THE SUPREME COURT OF SRI LANKA

JUDGMENTS

2023

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INDEX

1.	JANUARY	01
2.	FEBRUARY	
3.	MARCH	
4.	APRIL	
5.	MAY	
6.	JUNE	1313
7.	JULY	1453
8.	AUGUST	1776
9.	SEPTEMBER	1953
10.	OCTOBER	2399
11.	NOVEMBER	3337
12.	DECEMBER	4554

JANUARY

2023

JUDGMENTS

JANUARY INDEX

1.	SC/APPEAL/143/2015	2
2.	SC/TAB/1A and 1B/2020	19
3.	SC/APPEAL/11/2017	164
4.	SC/APPEAL/136/2011	302
5.	SC/APPEAL/104/2015	317
6.	SC/APPEAL/161/2016	329
7.	SC/APPEAL/182/2017	340
8.	SC/APPEAL/28/2014	357
9.	SC/APPEAL/46/2014	364
10.	SC/CHC APPEAL 22/2014	380
11.	SC/FR163/2019	408
12.	SC/FR329/2017	532
13.	SC /FR/85/2015	556
14.	SC/APPEAL/34/2014	581
15.	SC/CHC APPEAL/35/2012	597
16.	SC/APPEAL/52/2020	634
17.	SC/CHC APPEAL/04/2007	669
18.	SC/CONTEMPT/03/2020	686

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

In the matter of an application for Leave to Appeal under Section 31DD of the Industrial Disputes Act, No. 43 of 1950 as amended by Act, No. 24 of 2022.

K. A. Munidasa
Wattahena, Thalagaswala.

Applicant

SC Appeal No. 143/15
SC/HC/LA 76/14
SP/HC/LT/AP/907/2012
LT/Galle No. 4/G/513/2009

-Vs.-

Diya-kithulkanda Co-operative Thrift & Credit Society Ltd,
Diya-kithulkanda, Thalgaswala.

Respondent

AND

Diya-kithulkanda Co-operative Thrift & Credit Society Ltd,
Diyakithulkanda, Thalgaswala.

Respondent-Appellant

-Vs.-

K. A. Munidasa,Wattahena, Thalagaswala.

Applicant-Respondent

AND NOW BETWEEN

Diya-kithulkanda Co-operative Thrift & Credit Society Ltd,
Diyakithulkanda, Thalgaswala

Respondent-Appellant-Petitioner

-Vs.-

K. A. Munidasa
Wattahena, Thalagaswala.

Applicant-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J.
L.T.B. Dehideniya, J.
Yasantha Kodagoda, PC, J.

COUNSEL: Sanjaya Kodituwakku for the Respondent-Appellant-Petitioner
M. Wanniappa for the Applicant-Respondent-Respondent.

WRITTEN SUBMISSIONS: 28.02.2022

ARGUED ON: 30.08.2022

DECIDED ON: 10.01.2023

Judgement

Aluwihare PC. J.,

(1) The Applicant-Respondent-Respondent (hereinafter referred to as the (Applicant) filed an application against the Respondent-Appellant-Petitioner (hereinafter referred to as the Appellant) in the Labour Tribunal on the basis that his services were terminated wrongfully. The Applicant prayed for reinstatement and back-wages. The learned President of the Labour Tribunal upheld the application and ordered the reinstatement and payment of back-wages. Aggrieved by the said order, the Appellant appealed against the award to the High Court. The learned High Court Judge affirmed the award of the learned President of the Labour Tribunal and in addition ordered the payment of back-wages to cover the duration of the inquiry. The Appellant is now canvassing the said order of the High Court.

(2) When this matter was supported before this court for Special Leave to Appeal, Special Leave was granted on the following questions of law referred to in sub-paragraphs (b) (c) and (d) of paragraph 18 of the petition of the Appellant:

[I] Have both the President of the Labour Tribunal and the learned High Court Judge overlooked the nature of the employment of the Respondent?

[II] Have both the President of the Labour Tribunal and the learned High Court Judge misdirected themselves in ordering reinstatement of service of the Respondent?

[II] Have both the President of the Labour Tribunal and the learned High Court Judge erred in fact and law in computing the back wages of the Respondent?

(3) It would be apposite to refer to the facts of the case before examining the aforementioned questions of law. The Applicant had joined the Appellant, the Diya-Kithulkanda Co-operative Thrift & Credit society Ltd., as a "Cash Collector" on the 25th of August 2007 and continued in service till July 2009. The Applicant, however, asserts that he had not been paid his salary for the months of May, June, and July in 2009 and had alleged that when he made inquiries about the non- payment which was on the 31st July, the Appellant had stopped providing him with work. According to the Applicant, on the 3rd of August he had again made further inquiries and he was once again refused work. Thereafter, on 3rd September 2009 he had filed an application in the Labour Tribunal claiming relief in the form of reinstatement and back wages for wrongful termination. According to the Applicant he had been paid a monthly salary of Rs.10, 000/-. at the time of dismissal.

(4) The Appellant, in their response to the application filed by the Applicant, maintained that the Applicant, had been recruited on contract basis, initially, for a period of one year, beginning, 1st August 2007 to work in the delivery van as a "Cash Collector" for a Product Distribution Agreement the Appellant had entered into with Nestle Lanka PLC.in May 2007 [R6]. Initially this had been for a period of one year. At the expiry of the said contract period, however, the Applicant was offered an extended contract for the period of one more year beginning, 1st August 2008 and ending on 31st July 2009 [R16 A] for services related to the same project. At the expiry of that contract, the Appellant had decided to extend the contract as a Cash Collector for a further period of 3 months with effect from 1st August 2009. It is in evidence that the reason for obtaining services on a contract basis instead of permanent employment was due to the fact that the services were needed only for the duration of the subsistence of the 'distribution agency' with Nestle Ltd.

(5) It would also be relevant to mention that the Appellant Co-Operative Society at its General Meeting held, decided to offer employment opportunities regarding the Nestle project, only to the members of the Society or their relatives. The Applicant had admitted that, at a General Meeting it was announced that members can apply for the vacancies in the Nestle project and accordingly he had applied. The Applicant had also admitted that at the end the second year, a contract for three months was offered to all employees attached to the 'Nestle project.'

(6) According to the evidence led, by 2009 April, the project had become a failure and all persons employed by the project were put on notice that due to financial issues, the project would be terminated.

(7) The Appellant, in explaining the non-payment of the Applicant's salary for the months of May to August, states that they decided to hold it back till the Applicant signed the fresh contract extending his services by 3 months. The Appellant takes up the position that the Applicant's services were not terminated nor was he dismissed from service, but was treated as having vacated his post, since he did not report for duty after the 1st of August 2009.

(8) Having examined and assessed the evidence produced before the tribunal by both parties, the learned President of the Labour Tribunal had focused on the question whether the Appellant had unjustly terminated the services of the Applicant by refusing to employ him on 31st July and 3rd August 2009 or whether the Applicant had vacated his post by not reporting for work from 3rd August 2009. The learned President of the Labour Tribunal observed that the initial recruitment as a Cash Collectors had been on an application made by the Applicant and no evidence had been adduced to establish that a formal contract of employment was initially signed or exchanged to establish a master-servant relationship between the two parties, but the Applicant had continued in service till July 2009, receiving a monthly salary as

remuneration for his work as a Cash Collector. The learned President of the Labour Tribunal, by the award dated 31st May 2011, ordered the Appellant to pay, back-wages to the Applicant at the rate Rs.10, 000/- for the months of May, June and July of 2009, [the three months for which the Applicant complained that he was not paid] and to pay wages amounting to Rs. 240,000 (10,000 x 24) up to the date of the Tribunal's decision, and also to reinstate the Applicant with effect from 3rd May 2011.

(9) From the tenor e of the award of the Labour Tribunal, it appears that the learned President of the Labour tribunal had concluded that the Applicant's employment with the Appellant was on a permanent basis for the reason that the Appellant had neither adduced any material as evidence nor elicited in the cross examination, to establish that the form of employment offered to the Applicant was one of a contractual and not of a permanent nature . [Page 5 of the Award]. This observation in my view, however, does not seem to be accurate and later in the judgement I have given reasons for the said conclusion.

(10) Being aggrieved by the said order, the Appellant appealed to the High Court pleading that the orders referred to in the preceding paragraph were erroneous on two grounds. Firstly, that despite being employed on a contract basis for a fixed period of time, the learned President of the Labour Tribunal had declared the Applicant to be a permanent employee. Secondly, that despite the Applicant's voluntary termination of services by vacating the post, the learned President of the Labour Tribunal had declared that his services had been terminated by the Appellant.

(11) The learned High Court Judge, relying on the decision in the case of *Ceylon Cinema and Film Studio Employees Union v. Liberty Cinema Ltd* 1994 3 SLR 121 held that the assessment of evidence lies within the province of the

Labour Tribunal, and the appellate court cannot review the Labour Tribunal's findings unless the Labour Tribunal had no evidence on record to support its findings. Accordingly, the Appellant was required to satisfy the High Court that there was no cogent evidence to support the conclusion reached by the Tribunal or that the finding was not rationally possible and was perverse having regard to the material placed before the Tribunal. The learned High Court Judge, having observed that the Appellant failed to satisfy Court, upheld the order of the learned President of the Labour Tribunal and by its order dated 21st October 2014, ordered back wages amounting to 42 months beginning in May 2011 up to September 2014 amounting to a sum of Rs. 420,000 (10,000 x 42), in addition to the wages ordered by the Labour Tribunal. The learned High Court Judge also affirmed the order of the Labour Tribunal directing the Appellant to reinstate the Applicant with effect from 30th November 2014.

(12) Before addressing the questions of law on which Special Leave was granted, I wish to touch on the appellate jurisdiction of the High Court and this Court as regards appeals from Labour Tribunals. In the case of ***Kotagala Plantations Ltd and Lankem Tea and Rubber Plantations (Pvt) Ltd v. Ceylon Planters' Society*** **SC Appeal 144/2009 SCM 15.12.2010,** Chief Justice, De. Silva, observed that: "... It is not for an Appellate Court to review the evidence and come to a different conclusion regarding the facts of the case **unless the findings on the facts by the Tribunal was against the weight of the evidence…".** Emphasis is mine]

(13) Therefore, this court does not endeavour to re-assess or re-evaluate any facts unless and otherwise the Appellant has satisfied the court that the learned President of the Labour Tribunal overlooked or reached conclusions which were against the weight of the evidence, or the conclusions reached were rationally impossible or perverse. Therefore, I shall confine my review solely

to the order of the learned President of the Labour Tribunal, which the Appellant submits was bad in law having regard to the weight of specific evidence placed before the Labour Tribunal.

Nature of Employment [1st question of law]

(14) Learned Counsel for the Appellant submitted that the nature of the Appellant's business as a Co-operative 'thrift society' was such that they would, from time-to-time, engage in various ventures with a view to generating revenue for its membership, and the agreement entered into with Nestle Lanka PLC, [in 2007] to distribute their products in the region, was one such venture. The management of the Society had also taken a decision to offer any available employment in connection with the Nestle venture to its own members as it would be some benefit to them. The Applicant being a member of the Society, was therefore one among many who was contracted for the specific purpose of collecting cash from the retailers to whom the merchandise was supplied. Learned Counsel for the Appellant also noted that the nature of the Applicant's employment was such that it was exclusively confined to the specific venture and the Applicant's admissions before the Labour Tribunal indicate that he too was aware of this fact. The learned Counsel for the Appellant drew the attention of the court to the evidence at the inquiry which reveals that the distribution of products in relation to the Nestle venture was phased out from about April 2009. The learned Counsel's submissions on this matter concluded by noting how the Applicant was provided employment for two subsequent years, each for a fixed term, during which the Appellant was engaged in the venture with Nestle Lanka PLC, and therefore, the Applicant's employment could not have been that of a permanent employee and could only be one of a fixed term employee. It is the Appellant's submission that therefore both the learned President of the Labour Tribunal as well as the learned High Court Judge misdirected themselves in holding that the Applicant was not a fixed term employee. It is the Applicant's position, that he

was a permanent employee, that he not working on a contract of employment for a fixed period of time, nor had he entered into any such contract.

(15) As **S. R. de Silva** notes in **'The Contract of Employment' (1998)** para. 179, p. 138, 'permanent employee' refers to persons who serve under a monthly contract or agreement of employment whereby the agreement upon which the master-servant relationship operates is renewed at the end of each month unless it is terminated upon notice by either party.

(16) At the inquiry before the Labour Tribunal, it was revealed that at the stage of recruitment, although the Appellant had decided to employ Cash Collectors on a contract basis for a fixed period, no written contract for the year 2007 - 2008 had been executed. R16 is the written contact drawn in the name of the Applicant signed by the Chairman of the Appellant Co-operative Society for the period 2008 August to 2009, however, its acceptance had not been acknowledged by the Applicant. The Applicant nevertheless had admitted at the inquiry (referenced in pages 13, 28, 29, 31 and 42 in the brief marked 'X') that despite the absence of a written contract of employment for a fixed term, he was aware of the nature of his employment as being exclusively confined to the Nestle venture. When questioned as to whether the Applicant was aware that he was employed to work for a period of one year, the Applicant answered that he had not been provided with notice of such an arrangement. Furthermore, it is the Appellant's submission that the learned President of the Labour Tribunal had not adduced sufficient weight to the documentary evidence (R16) provided to the Tribunal indicating the existence of a fixed-term contract between the Appellant and the Respondent.

(17) As noted by the learned President of the Labour Tribunal, both R16 documents, which appear to be the Applicant's letter of appointment and contract of employment for the period 1st August 2008 to 31st July 2009 do

not bear the signature of the Applicant and the Appellant does appears to have not acted in a professional manner when it came to regularising employment. Both, witnesses Somalatha [Accountant] and Withanachchi [Store keeper] of the Co-operative Society had been emphatic that the nature of the employment that was offered to all the employees relating to the Nestle venture were of fixed time contracts. It was the evidence of witness Withanachchi, that they [all those were recruited] were informed that, as the Society would only be acting as agents for Nestle, they were not being recruited on a permanent but only on a contract basis.

(18) When one considers the totality of the evidence led, the explanation of the learned Counsel for the Appellant as to why the Appellant decided to employ persons, whose services were confined to the Nestle venture, on a Fixed Term Contract seems rational. Thus, the learned President of the Labour Tribunal fell into error when he held that *" the Respondent [present Appellant] had not placed any evidence either through the cross examination of the Applicant or by other evidence that the Applicant entered into an employment contract with the Appellant on an yearly basis"* Accordingly, I answer the first question of law in the affirmative and hold that the nature of employment offered to the applicant was one of a fixed term contract.

Termination of Services

(19) It is established that neither the Appellant nor the Respondent provided notice of termination of services. Any cessation of service, therefore must necessarily have been caused by vacation of post by the Applicant or constructive termination of the Applicant's employment by the Appellant.

(20) It would be pertinent to examine the distinct elements of vacation of post as a means by which an employment is terminated. In a series of cases decided by this court, it has been established that vacation of post refers to a situation in

which the employee terminates his employment by not reporting to work over a sustained period of time, with no *animus revertendi*. I wish to examine the principles enunciated in the cases of ***Building Materials Corporation*** **v.** ***Jathika Sevaka Sangamaya*** **(1993) 2 Sri LR 316** and ***Nelson De Silva*** **v.** ***Sri Lanka State Engineering Corporation*** **(1996) 2 Sri LR 342.**

(21) In ***Building Materials Corporation*** **v.** ***Jathika Sevaka Sangamaya,*** Justice Perera observed that vacation of post occurs as follows: "Where **an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonably long period of time** such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service." [At p. 322] (emphasis added). In ***Nelson De Silva*** **v.** ***Sri Lanka State Engineering Corporation*** Justice Jayasuriya held that "[the] concept of vacation of post **involves two aspects**; one is **the mental element**, that is **intention to desert and abandon the employment** and the more familiar element of the concept of vacation of post, which is the **failure to report at the workplace of the employee. To constitute the first element, it must be established that the Applicant is not reporting at the workplace, was actuated by an intention to voluntarily vacate his employment.**" [at p. 343] (emphasis added).

(22) It is therefore evident that to constitute vacation of post, the workman must not report to or seek work from the employer. It is in evidence that the Applicant sought work from the Appellant on 31st July and 3rd August 2009. It is also established that the Applicant worked for the Appellant for the months of May, June and July without receiving his salary. The Applicant's position is that he inquired about the salary, but the Appellant refused to offer work to the Applicant, informing him that he would not be provided with work nor be paid the salary for the months of May, June and July until he signed the contract extending his services by 3 months from August 2009.

From the evidence it is clear that there was a standoff between the two parties, the Applicant was not agreeable to the extension of the [employment] contract only for three months, whereas the Appellant was not in a position to offer a contract for a longer period due to the Nestle project coming to an end. The Applicant's repeated attempts to report for work, prior to his absence from work due to the Appellant's manifest refusal to pay his salary leads me to draw the conclusion that the Applicant had not vacated his post.

(23) I wish to now examine whether the Applicant's services were terminated by the Appellant. I find the observations of Gunasekara, J. in the case of ***Pfizer Limited*** **v.** ***Rasanayagam*** **(1991) 1 Sri LR 290** before the Court of Appeal *ad rem* in this aspect. The Applicant, in that case, had communicated that although he did not report for work, he was willing to work for the employer and that his absence was a form of protest against the employer's order to report to a colleague who was a junior officer. Gunasekara, J. stated that "The question as to whether a given set of circumstances constitutes a vacation of employment or a constructive termination is a question of fact to be determined by the Tribunal having regard to all the facts and circumstances which transpire in the evidence." [at p. 294].

(24) The case of ***Warnakulasooriya v. Hotel Developers (Lanka) Ltd*****, SC Appeal 101/2014 (Decided on 26-07-2018)** is helpful in making the aforementioned determination. The employee in that case had been served with a letter terminating her services for vacating her post due to prolonged and sustained absence from employment. It was revealed that the employee had been unable to report to work due to medical reasons and had reported for work at the earliest possible date and submitted a medical certificate confirming the reasons for her absence. This Court, exercising its appellate jurisdiction held that the mental element of abandonment of employment had not been established as the employee had returned to work on the earliest

possible day, and for that reason the learned President of the Labour Tribunal and the learned High Court Judge had erred in concluding that the employee had vacated her post. The Court arrived at the said decision having considered the weight of documentary evidence placed before the Tribunal which indicated that the employer had send multiple notices and letters requiring explanation from hr for her absence.

(25) In the present case, as observed by the learned President of the Labour Tribunal, not only did the Appellant fail to provide such notice to the Applicant, but the Appellant had on two occasions expressly denied him work after he had served without receiving a salary for three consecutive months. The Appellant has submitted to the Labour Tribunal that it sought to discuss the Applicant's employment after 3rd August 2009 by inviting the Applicant to attend a discussion by a letter dated 24th August 2009. As observed by the learned President of the Labour Tribunal, however, there is no proof that such a letter was communicated to the Applicant

(26) It is my view, therefore, that by not providing the Applicant his salary for three consecutive months, and thereafter refusing to employ him, the Appellant had unjustly terminated his employment on the 3rd August 2009.

Order of Reinstatement [2nd question of law]

(27) It is the Appellant's submission that the President of the Labour Tribunal and the learned High Court Judge misdirected themselves by ordering reinstatement of service of the Applicant whereas the venture in question had ceased to function. The Applicant maintained that the reinstatement of his service was just and equitable. The Appellant in its written submission before this court referred to the decisions in De *Silva v. Ceylon Estate Staff's Union,* SC 211/72 SCM 15.05.1974 and *United Industrial Local Government and General Workers' Union v. Independent News Papers Ltd* 75 NLR 531 to

convince the court that the learned President of the Labour Tribunal erred in ordering reinstatement of the Respondent when the Appellant Co-op Society had been compelled to terminate its venture with Nestle PLC due to its failure.

(28) In the case of, ***United Industrial Local Government and General Workers' Union v. Independent News Papers Ltd.*** [supra], It was held [at p. 531] that the finding of a workman's termination of service as being unjust does not entitle the workman to demand reinstatement as a right, nor does it confer upon the Labour Tribunal an obligation to order reinstatement, the tribunal is vested with the discretion to determine whether payment of compensation would be a just alternative to reinstatement. I also wish to note the observations of Rajaratnam, J. in ***De Silva v. Ceylon Estate Staff's Union*** SC 211/72 SCM 15.05.1974: "…***the Tribunal must be mindful of the nature of the applicant's employment,*** the impact a reinstatement can make on the industry and the employer/ employee relationship. It should also consider whether an order of reinstatement would disrupt and disorganize the management or administration of the business.". [Emphasis added]. Furthermore, it was observed by this court in the case of **Jayasuriya vs. Sri Lanka State Plantation Corporation** 1995 2 SLR 379, that even where the dismissal is unlawful, reinstatement will not invariably be ordered either where it is inexpedient or where there are unusual features. In such an event, an award of compensation instead of reinstatement would meet the ends of justice. The instant case, in my view, is not an instance where reinstatement of the Applicant is expedient given the nature of the employment the Applicant was engaged in.

(29) It is established that the Appellant's business venture with Nestle Lanka PLC had completely ceased by 2010. Due to the unique utility 'Cash Collectors' offered to the Appellant in its venture with Nestle Lanka PLC, the fact that the venture had ceased due to its financial failure as far as the Appellant was

concerned and in particular the nature of employment that was offered to the Applicant, it is my considered view that the learned President of the Labour Tribunal erred in ordering reinstatement of the Applicant's services with effect from 3rd May 2011, and the learned High Court Judge erred in ordering reinstatement of service with effect from 30th November 2014.

(30) Accordingly, I answer the 2nd question of law also in the affirmative.

Payment of Back Wages

(31) It is the Appellant's submission that in the event this court finds that the Respondent's employment was terminated unjustly, the duration for the computation of payment of back wages should not extend beyond the period of employment the Respondent would have enjoyed, had his employment not been terminated. I am mindful of the duty of a Labour Tribunal, and consequently this court, to make such award or order as may appear just and equitable. The Applicant, no doubt, is entitled to compensation for the sudden termination, as he would have had a reasonable expectation of continuing employment within the venture. When computing compensation on the basis of the Applicant's basic salary, the final date of his period of service should be reconciled with the final date of employment of other persons employed as Cash Collectors for the Appellant's venture with Nestle Lanka PLC. Having considered all the facts and circumstances of the case, it is my view that that the compensation ordered by the learned President of the Labour Tribunal is reasonable and cannot be considered as excessive

(32) Accordingly, the order of the learned President of the Labour Tribunal dated 31st May 2011 ordering back wages amounting to Rs. 240,000 is affirmed. In my view the order of learned High Court Judge enhancing the back wages to Rs. 420,000 cannot be justified as the High Court had arrived at the said figure without proper evaluation of the facts relevant to issue of back wages.

(33) In determining this matter the principle laid down in the case of **Jayasuriya**

vs. Sri Lanka State Plantation Corporation [supra] would be relevant. It was held that "*In determining compensation what is expected is that after weighing together of the evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving at an amount that a sensible person would not regard as means of extravagant but would rather consider to be just an equitable in all the circumstances of the case'.* The Court also observed [in the case of **Jayasuriya**] "*that the burden is on the employee to adduce sufficient evidence to enable the tribunal to assess the loss and ….if the employee had had obtained equally beneficial or financially better alternative employment, he should receive no compensation.*" In the instant case the Applicant had failed to adduce any evidence as to loss to him.

(34) Accordingly, the order made by the learned High Court Judge enhancing the compensation ordered by the President of the Labour Tribunal is set aside and the order of the Labour Tribunal regarding compensation is affirmed. It is in evidence that the Applicant was not paid by the Appellant for the months of June, July and August 2009. That had not been factored in by the Labour Tribunal when computing the compensation. As such the Appellant is directed to pay the Applicant a sum of Rs.30,000/- in addition to Rs.240,000/- ordered by the Labour Tribunal.

Considering the above the 3rd question of law, which has two parts, is answered in the following manner;

(a) The Labour Tribunal had not erred in fact and law in computing the back wages of the Applicant and that part of the question is answered in the negative

(b) The High Court had erred in fact and law in computing the back wages of the Applicant and that part of the question is answered in the affirmative.

The Court makes the following orders;

(1) The orders made by both the Labour Tribunal and the High Court to reinstate the Applicant [Respondent] are set aside.

(2) The Applicant would be entitled to compensation in a sum Rs 270,000/-and the Appellant is directed to make this payment within two months from today.

(3) The Applicant [Respondent] is also entitled for the cost of this case in a sum of Rs. 40,000/-

Appeal is partially allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE YASANTHA KODAGODA PC.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal under and in terms of S. 12B of the Judicature Act No.2 of 1978 as amended by the Judicature (Amendment) Act, No. 9 of 2018 read with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 as amended

Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha, Colombo 07.

Complainant

SC TAB 1A and 1B/2020

High Court Trial-at-Bar Case No.
HC/PTB/01/04/2019

Vs,

Indiketiya Hewage Kusumdasa Mahanama,
Chief of Staff to the President,
Presidential Secretariat,
(Private Address)
No. 328/2, Betans Road, Dalugama, Kelaniya.

1st Accused

Piyadasa Dissanayake,
Chairman, State Timber Corporation,
(Private Address)
No. 55/23, Gemunu Mawatha,
Udumulla, Battaramulla.

2nd Accused

And now between

Indiketiya Hewage Kusumdasa Mahanama,
Chief of Staff to the President,
Presidential Secretariat,
(Private Address)
No. 328/2, Betans Road, Dalugama, Kelaniya.

Presently at- Welikada Prison, Colombo 10
(Pr. No. 23336X)

1st Accused-Appellant

Piyadasa Dissanayake,
Chairman, State Timber Corporation,
(Private Address)
No. 55/23, Gemunu Mawatha,
Udumulla, Battaramulla.

2nd Accused-Appellant

Vs,

1. **Commission to Investigate Allegations of Bribery or Corruption**,
   No. 36, Malalasekara Mawatha, Colombo 07.

Complainant- Respondent

2. **Hon Attorney General,**
   Attorney General's Department,
   Colombo 12.

Respondent

Before: Justice Vijith K. Malalgoda PC,
Justice L.T.B. Dehideniya,
Justice P. Padman Surasena,
Justice S. Thurairaja, PC,
Justice Yasantha Kodagoda, PC,

Counsel:

Anil Silva PC with Chandika Pieris, Nandana Perera, Dhanaraj Samarakoon and Isumi Jayawardena for the 1st Accused Appellant.

Gamini Marapana PC with Navin Marapana PC, Kaushalya Molligoda, Uchitha Wickremasinghe, Gimhana Wickramasurendra, Thanuja Meegahawatta and Saumya Hettiarachchi instructed by Sanath Wijewardena for the 2nd Accused Appellant.

Janaka Bandara DSG with Udara Karunathilleke SC, Kasun Sarathchandra SC and Subhashini Siriwardhena ADG, Anusha Samandapperuma ADL of CIABOC.

Argued on:

16-03-2021, 19-03-2021, 24-03-2021, 30-03-2021, 01-04-2021,13-07-2021,15-07-2021, 19-07-2021, 26-07-2021, 30-07-2021, 22-11-2021, 25-11-2021, 16-03-2022, 05-04-2022, 07-04-

2022, 08-04-2022, 13-05-2022, 01-06-2022, 03-06-2022, 15-06-2022, 05-09-2022, 06-09-2022, 09-09-2022.

Decided on: 11-01-2023

JUDGMENT

The two appellants before this Court namely Indiketiya Hewage Kusumdasa Mahanama and Piyadasa Dissanayake were indicted by the Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as DG-CIABOC) before the High Court of the Western Province holden in Colombo on several charges under the Bribery Act No. 11 of 1954 (as amended- hereinafter referred to as the Act). Acting on the Directive made by the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as CIABOC) under section 12 A (4)a of the Judicature Act (as amended) reference was made by DG-CIABOC to His Lordship the Chief Justice, and His Lordship had nominated a bench of three Judges of the High Court to hear and determine this case before the Permanent High Court at Bar (hereinafter be referred to as High Court at Bar).

The First and Second Appellants stood indicted by the DG-CIABOC for conspiring to solicit a sum of USD Three Million in the first instance and later Rupees Hundred Million as gratification and acceptance of Rupees Twenty Million as a gratification as an inducement or a reward in order to facilitate the process of handing over the machinery of the sugar factory in Kanthale, from the Virtual Complainant, Kotagaralahalli Pedappiah Nagarajah, during the period between 11th August 2016 to 03rd May 2018.

The Indictment that was served on the two accused contained 24 charges and except for the 4th count all the other counts contained charges against either the 1st or the 2nd Accused-Appellant, 4th count was a count of conspiracy against both Accused-Appellants.

As revealed before us 1st, 2nd and 5th - 12 counts were solicitation counts under sections 19 (b) and 19 (c) of the Act, and counts 13 and 14 were counts of acceptance under sections 19 (b) and 19 (c) of the Act against the 1st Accused-Appellant. Count 3 was a count of solicitation under section 19 (c), counts 15-22 were abetment counts corresponding to counts 5-12, and counts 23 and 24 were abetment counts corresponding to counts 13 and 14 against the 2nd Accused-Appellant.

The said 24 counts against the two Accused are set out as follows:

1. That on or about 11th August of 2016, at Colombo, within the jurisdiction of this court, the 1st accused, being a Public Servant, had solicited US$ 03 million as a gratification (Rs. 450 million) from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward for his performing or abstaining from performing any official act, or expediting, delaying, hindering or preventing the performance of an official act namely to hand over a plot of land, buildings, and machinery for the functioning of the Sugar Factory in Kanthale without any obstacle, had thereby committed an offence punishable under Section 19(b) of Bribery Act No. 11 of 1954 as amended.

2. At the time, place, and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant had solicited US$ 03 million (Rs. 450 million) as gratification from Kotagaralahalli Pedappiah Nagarajah, had thereby committed an offence punishable under Section 19(c) of the Bribery Act No.11 of 1954 as amended.

3. On or about 05th September of 2017, at the same place and in the course of the same transaction referred to in the 1st count, the 2nd accused, being a Public Servant, had solicited a sum of Rs.450 million as gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of Bribery Act No. 11 of 1954 as amended.

4. During the time period between 05th September 2017 and 03rd May 2018 at the same place and in the course of the same transaction referred to in the 1st count, the 1st and the 2nd accused, being Public Servants, had conspired to commit or abet or to act together with a common purpose or in committing or abetting, with or without any previous concert or deliberation, to solicit a sum of Rs. 100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah and as a result of such conspiracy, had solicited a sum of Rs. 100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence under Section 113(A) of the Penal Code, read with Section 25(3) and 19(C) of Bribery Act No. 11 of 1954 as amended.

5. On or about 27th February of 2018, at the same place and in the course of the same transaction referred to in the 4th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward, for his performing or abstaining from performing any official act, or expediting, delaying, hindering or preventing the

performance of an official act that is, to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 19(b) of Bribery Act No.11 of 1954 as amended.

6. At the time, place, and in the course of the same transaction referred to in the 5th count, the 1st accused, being a Public Servant had solicited a sum of Rs.100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

7. At the time, place, and in the course of the same transaction referred to in the 5th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to expedite or to delay or to hinder performing an official act that is, to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 19(b) of Bribery Act No. 11 of 1954 as amended.

8. At the time, place, and in the course of the same transaction referred to in the 5th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, had thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

9. On or about 28th April 2018, at the same place and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 20 (b) read with Section 20 (a) of Bribery Act No.11 of 1954 as amended.

10. At the time, place, and in the course of the same transaction referred to in the 9th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

11. On or about 3rd May of 2018, at the same place and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 20(b) read with Section 20(a) of Bribery Act No. 11 of 1954 as amended.

12. At the time, place, and in the course of the same transaction referred to in the 11th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

13. On or about 3rd May of 2018, at the same place and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant, had accepted a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale committed an offence punishable under Section 20(b) read with Section 20(a) of Bribery Act by No. 11 of 1954 as amended.

14. At the time, place, and in the course of the same transaction referred to in the 13th count, the 1st accused, being a Public Servant, had accepted a sum of Rs.20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, had thereby committed an offence punishable under Section 19(c) of the Bribery Act No.11 of 1954 as amended.

15. At the time, place, and in the course of the same transaction referred to in the 5th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 5th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(b) of Bribery Act No.11 of 1954 as amended.

16. At the time, place, and in the course of the same transaction referred to in the 6th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 6th count and as a result of such abatement the 1st accused had committed the said

offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

17. At the time, place, and in the course of the same transaction referred to in the 7th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 7th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(b) of Bribery Act No.11 of 1954 as amended.

18. At the time, place, and in the course of the same transaction referred to in the 8th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 8th count and as a result of such abatement the 1st accused had committed the said offence, therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

19. At the time, place, and in the course of the same transaction referred to in the 9th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 9th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 20(b) of Bribery Act No.11 of 1954 as amended.

20. At the time, place, and in the course of the same transaction referred to in the 10th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 10th count and as a result of such abatement the 1st accused had committed the said offence, therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

21. At the time, place, and in the course of the same transaction referred to in the 11th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 11th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 20(b) of Bribery Act No.11 of 1954 as amended.

22. At the time, place, and in the course of the same transaction referred to in the 12th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 12th count and as a result of such abatement the 1st accused had committed the said offence, therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

23. At the time, place, and in the course of the same transaction referred to in the 13th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 13th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 20(b) of Bribery Act No.11 of 1954 as amended.

24. At the time, place, and in the course of the same transaction referred to in the 14th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 14th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

Before the commencement of the trial before the High Court at Bar, two preliminary objections were raised with regard to the maintainability of the Indictment before the High Court at Bar, and subsequent to the ruling and/or decision by the High Court at Bar on those objections, the trial was commenced before the High Court at Bar.

During the trial before the High Court at Bar, the prosecution led the evidence of 22 witnesses including the evidence of K.P. Nagarajah the virtual complainant, ASP Ruwan Kumara the Chief Investigating Officer, and Sgt/ Karunarathne who acted as the decoy in the raid and closed the case for the prosecution marking as productions P-1 to P-116 A(a)-A(d) 1-5. The 1st Accused-Appellant made a dock statement and the 2nd Accused-Appellant gave evidence on oath and called one witness when the High Court at Bar called for their defence. At the conclusion of the trial before the High Court at Bar, the learned Judges of the High Court at Bar whilst acquitting the 2nd Accused-Appellant from count No. 3, convicted the 1st Accused-Appellant of all the charges against him, namely charges 1-2, 4, 5-14 and the 2nd Accused-Appellant of charges 4, and 15-24, and imposed sentences on them as follows;

<u>Against the 1st Accused-Appellant</u>;

Count 1	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 2	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 4	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 5	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 6	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 7	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 8	4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 9 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 10 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 11 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 12 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 13 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 14 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Out of the sentences imposed on the 1st, Accused-Appellant as referred to above, the sentences imposed on counts 1,4, 5, 9, and 13 were ordered to run consecutive to each other, and the sentence imposed on count 2 was ordered to run concurrent with the sentence imposed on count 1, sentences imposed on counts 6, 7 and 8 were ordered to run concurrent to sentence imposed on count 5, sentences imposed on counts 10, 11 and 12 to run concurrent with the sentence imposed on count 9 and the sentence imposed on count 14 was ordered to run concurrent with the sentence imposed on court 13 of the indictment.

Against the 2nd Accused-Appellant;

Count 4 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 15 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 16 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 17 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 18 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 19 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 20 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 21 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 22 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 23 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 24 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Out of the sentences imposed on the 2nd Accused-Appellant the sentences imposed on counts 4, 15, and 19, were ordered to run consecutive to each other, and the sentences imposed on counts 16, 17 and 19 were ordered to run concurrent with the sentence imposed on count 15, and the sentences imposed on counts 20, 21, 22, 23 and 24 were ordered to run concurrent with the sentence imposed on count 19 of the indictment

The aggregate sentence imposed on the two Accused-Appellants are as follows:

Aggregate sentence imposed on the 1st Accused-Appellant,

20 years of Rigorous Imprisonment with a fine of Rs. 65000 and compensation of Rs. 20 million in terms of section 26 of the Bribery Act.

Aggregate sentence imposed on the 2nd Accused-Appellant

12 years Rigorous Imprisonment with a fine of Rs. 55000

Being aggrieved by the said conviction and the sentence imposed on them by the High Court at Bar, both Accused Appellants had preferred two appeals to the Supreme Court under and in terms of section 12 B of the Judicature Act (as amended) read with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 (as amended) His Lordship the Chief Justice had nominated the present bench in terms of section 12B of the Judicature Act (as amended) to hear and determine the said appeals and the two Accused-Appellants appeared through their counsel in the hearing of their appeals before this Court.

As already referred to above, the two Accused-Appellants were indicted before the High Court at Bar under the provisions of the Bribery Act for the solicitation and acceptance of bribes. As at the time of the offence, the 1st Accused-Appellant was the Chief of Staff at the Presidential Secretariat and the 2nd Accused-Appellant was the Chairman of State Timber Corporation. The Complainant K.P. Nagarajah an Indian National was involved in Sugar Industry and acted as a representative/ shareholder to a foreign investor who was interested in purchasing the state-owned Kanthale Sugar Factory. The evidence led before the High Court at Bar revealed (which I will consider when analyzing the evidence) that the Complainant had observed an inordinate delay in implementing the unsolicited proposal to purchase the Kanthale Sugar Factory when the matter had been approved by the Cabinet of Ministers. 1st Accused-Appellant being the Secretary to the Ministry of Lands, during the period in question was handling this matter by himself and the complainant had taken up the position that the 1st Accused-Appellant had solicited a bribe of US $ 3 million. Since the Complainant was not happy with the progress made, he brought it to the notice of an official in the Prime Minister's Officer and the matter had referred to the CIABOC by an Additional Secretary to the Prime Minister's Officer. The Complainant Nagarajah had appeared before the Investigation Unit of CIABOC on a telephone message received by the said division.

During the same period virtual complainant had a few meetings with the two accused and it was the position of the witness that the accused had solicited a sum of Rs. 20 million as an advance in order to finalize matters pending at that time and a successful raid had been carried out on the 3rd May

2018 at Hotel Taj Samudra – Colombo when the 1st Accused-Appellant accepted a bribe of Rs. 20 million from the complainant and the 2nd Accused-Appellant too was arrested on charges of abetment.

The indictment that was served on the two Accused-Appellant contained out charges into a series of events that took place in the process of the solicitation and acceptance of the bribe including the original solicitation of US $ 3 million and the subsequent events that took place at the office of the 2nd Accused-Appellant and at Bread Talk restaurant and finally the acceptance that took place at Taj Samudra Hotel Colombo.

During the arguments before us, the two Accused-Appellants raised several grounds of appeal, and the grounds that were raised before us can be summarized as follows,

***Was the investigation into the complaint received by the CIABOC against the Appellants, conducted by officers of the CIABOC in a lawful manner? (Was the investigation lawful?)**

***The Indictment was ex facia ultra vires the provisions of section 11 of the CIABOC ACT**

***Have the charges in the indictment (joinder of charges) been framed in a lawful manner? More particularly, is the amalgamation of charges 1 and 2 with the rest of the charges lawful, in that, has the prosecution established that the offences contained in charges 1 and 2 were committed in the course of the same transaction with the offences contained in the remaining charges?**

***Has the Prosecution proved "aliunde" that there were reasonable grounds to believe that two or more persons have conspired together to commit an offence? If not, was resorting to section 10 of the Evidence Ordinance lawful?**

***When the admissibility of voice recording was challenged at the time the prosecution sought to place such recordings before the Court as evidence, was it lawful for the trial judge to have differed taking a decision on the matter till the end of the trial? or in the alternative, Was it incumbent on the trial court to have conducted a voire dire inquiry into the matter and make a prompt ruling regarding the admissibility of the impugned voice recordings?**

***Was the procedure the trial judges had adopted by deferring the decision on the admissibility of the Voice recordings, Cause a miscarriage of Justice?**

***Did the Magistrate have power/Judicial Authority to give voice samples to the Government Analyst? Was the compulsion of the Appellants to give voice samples to the Government Analyst a breach of the rules against self-incrimination and did it cause a miscarriage of Justice?**

***Is "Voice Analysis" in the manner conducted by Witness Gunathilaka, Assistant Examiner of Questioned Documents of the Government Analyst Department a "Science"?**

***What amounts to "Safe Custody" as per Section 4 (1)(d) of the Evidence (Special provisions) Act? Were the Voice recordings in "Safe custody," when the recorded conversations were in a mobile phone, which was in the custody of the virtual Complainant? Has the fact that the voice recordings were in the custody of the Virtual Complainant, resulted in the recordings becoming inadmissible**

***Were the two Accused-Appellants entrapped to commit the offence they have been convicted of, and if so, have they been deprived of a fair trial?**

***In view of the alleged infirmities in the testimony given by the virtual Complainant, can credibility and testimonial trustworthiness be attached to his testimony?**

***Did the virtual Complainant have a motive to falsely implicate the Accused?**

*** Did the two Accused Appellants possess any motive to solicit and or accept a bribe as narrated by the virtual complainant?**

In considering the grounds that were raised on behalf of the Accused-Appellants before this Court, it is useful for this Court to first analyze the factual Matrix as revealed before Court during the arguments.

As already referred to above, the prosecution before the High Court at Bar, led the evidence of 22 witnesses including the evidence of witness Nagarajah, the virtual complainant in this case.

According to the testimony of witness Nagarajah, he has first come to Sri Lanka in 1994 seeking the prospects of investing in the apparel sector due to the GSP+ stimulus package that the Sri Lankan Government had been enjoying during that time. Thereafter, in 2011 he had decided to invest in the local sugar industry and had taken part in the international tender called for by the then Sri Lankan Government for Kanthale Sugar Factory. The tender process had been called off before its completion.

The second attempt of the witness to have the Kanthale Sugar Factory project comes to light in 2015, with the establishment of a new Government. According to the witness, he had submitted an unsolicited proposal to the then Minister in charge of Lands, under whose purview Kanthale Sugar

Factory project had been listed. The proposal came through Sri Prabhulingeshvar Sugars and Chemicals Company, which has its origins in India and is one of the largest in the global sugar industry. The project proposal is not only for manufacturing sugar but also to produce ethanol, electricity, and organic fertilizer on larger scales as by-products while empowering the farming community with financial assistance and improving their welfare. The proposal suggested a joint venture company to manage Kanthale Sugar Factory of which 51% of shares are owned by the Sri Lankan Government and 49% by the Investor Company. The total investment was estimated to be a Hundred million USD based on Build Operate and Transfer (BOT) as opposed to Build Operate and Owned (BOO). A cabinet memorandum dated 14.02.2015 had been submitted for approval in this regard by the then Minister of Lands the late Mr. M.K.D.S. Gunawardena.

A cabinet subcommittee comprised of three Cabinet Ministers who were appointed to evaluate the said proposal and to report back to the Cabinet of Ministers **(P20).** The said Cabinet Sub-Committee had referred the project proposal to the Board of Investment of Sri Lanka (hereinafter referred to as BOI) to evaluate the feasibility of the project. During this time, the BOI had been in receipt of another project proposal in respect of the same project from a company called Jupiter Sugars (PVT) Ltd., also from India. **(P23)**

Having considered the capability, capacity, and experience in the related area, the Cabinet of Ministers on 25.06.2015 approved the proposal submitted by the witness with the concurrence of the BOI. **(P24), (P25), (P26)**

Witness Nagarajah, on behalf of the Investor Company (at that point of time) MG Sugars Lanka (PVT) Ltd, had entered into an Agreement with BOI on 27th July 2015 as an initial step to commence with the Kanthale Sugar Factory project (**P5**).

The drafting and preparation of the Shareholders Agreement which was the next stage of this project had prolonged for 13 months. For the project to be carried out in Sri Lanka, a Sri Lankan Company named M.G. Sugars Private Limited was incorporated as a "Special purpose vehicle to undertake the business of revival/ restructuring of the sugar industry in Kanthale through the formation and set up a new sugar factory and associated enterprises and the involvement of the local farming community" The Sri Lankan Government was given shares in the aforesaid Sri Lankan Company as it was a party to this project in terms of the proposals. Further, the investment was channeled via a Company incorporated in Singapore named S.L.I. Development Private Limited which comprised Sri Prabhulingeshvar Sugars and Chemical Industries Ltd, Mendel Gluck, Nagarajah, and Moussa Salem **(P6)**. It was later observed that the said S.L.I. Development Private Limited had

also been brought into the Shareholders Agreement. As the initial proposal approved by the Cabinet of Ministers was for the project proposal by Sri Prabhu Lingeshwar Sugar and Chemical Company, it was decided to obtain the approval of the Cabinet of Ministers before signing the agreement by the Government of Sri Lanka and S.L.I. Development Private Limited. The Cabinet of Ministers granted the approval on 14th June 2016 and the Shareholders Agreement was signed on 11th November 2016.

After signing the Shareholders Agreement, in terms of Art. 7.9 of the said Agreement, the Government of Sri Lanka, which held 51% of the shares of MG Sugars Lanka (PVT) Ltd., was supposed to release the agreed existing infrastructure, machinery, and buildings of the existing Kanthale Sugar Factory along with surrounding 500 acres of land to the said MG Sugars Lanka (PVT) Ltd. in order to commence its operations. **(P6C)**

Witness Nagarajah claimed that a few days after the Shareholders Agreement was signed (11.08.2016), he had a meeting with the first Accused-Appellant in the capacity of the Secretary to the Ministry of Lands, under which the subject of the Kanthale Sugar Factory had been listed. It is at this meeting, according to the witness, the first Accused-Appellant solicited Three Million USD from him in order to facilitate the execution of the proposed project. The witness had neither refused, nor agreed to the said solicitation knowing the fact that the first Accused-Appellant, being the Secretary of the Ministry in charge of the Project can easily scuttle the whole process.

The witness had observed that even after several months of signing the Shareholders Agreement, the first Accused-Appellant failed to comply with the agreed requirements of the said Agreement, and that had gone to the extent of refraining from appointing his nominee.

A letter dated 25.10.2016 from the then Chairman of BOI to the first Accused-Appellant had solicited his assistance “to expedite the process to initially divest relevant lands for factory, nursery and staff residences as provided for in Article 7.1.1(a), 7.1.1 (b) and 7.1.1 (d) of the Shareholders Agreement to the said enterprise to facilitate preparation work of the project” to be implemented within the given timeline enabling “the investor to proceed with preliminary work on land clearance and clearance of old buildings as the implementation of the Agreement is time bound with the bank guarantee”

It is at that point the first Accused-Appellant wrote a letter dated 2.11.2016 addressed to the Secretary of the Ministry of Finance, with a copy to the Chairman of BOI seeking advice on the following matters in order to proceed with the Joint Venture

i. The conditions to be adopted on releasing lands as Article 09 of the Shareholders Agreement affirms that the Government has the authority of 51% of shares of the company.

ii. As part of the revival process, of the Kanthale Sugar Factory, the Ministry of Lands already obtained a sealed valuation from the Government Valuer for machinery and other available resources within the factory premise.

iii. As such, the procedures to be adopted on implementation of Article 7.9 of the Shareholders Agreement

It is in this process that the witness wrote a letter dated 5.12.2016 to the Secretary to the Treasury, with a copy to the first Accused-Appellant, requesting to make necessary arrangements for the leasing of land as per the Agreement in order to commence activities immediately, since 4 months have already passed after the signing of the Shareholders Agreements. (P67)

In the meantime, the Secretary to the then Prime minister, on behalf of the Cabinet Committee on Economic Management (hereinafter referred to as CCEM) had written to the first Accused-Appellant that "The Ministry of Lands has not yet handed over the Land of Kanthale Sugar Plant to the New Investor. The CCEM instructions were given to the Secretary, Ministry of Lands to hand over the land and report back at the Next CCEM Meeting." (P68).

The first Accused-Appellant had then written to the Hon Attorney General on 16/1/2017 with a copy of the Shareholders Agreement attached thereto, soliciting assistance to sort out two matters to proceed with the implementation of the said Agreement. **(P70)**

i. There is an issue in deciding the consideration of a Lease Agreement for the State Lands to be given to the company since the said Lands are to be given in lieu of the 51% shares of the Government.

ii. Even though the Shareholders Agreement affirms the investor to take possession of land, premises, infrastructure, and machinery, no instructions were given on transferring these resources, approximately valued at Rs.300Mn by the chief valuer.

Several letters had been exchanged thereafter between MG Sugar, CCEM, and the 1st Accused-Appellant about the lease of land as per the agreements already signed but once again the 1st Accused-Appellant wrote to the Hon. Attorney General on 16.03.2017 soliciting advice on:

i. the conditions to be adopted in releasing lands to the investor; and

ii. the procedures to be adopted in disposing the existing infrastructure, machinery, and other movable properties when implementing the Shareholders Agreement. **(P76)**

However, in a letter dated 20/3/2017 by the Hon. Attorney General to the 1st Accused-Appellant, in reply to P76, observed "……. that although the BOI Agreement was signed on 27/5/2015 and the Shareholders Agreement was executed on 11/8/2016, the said project has not commenced yet and there was inordinate delay". Accordingly, the first Appellant was advised by the Hon. Attorney General: (P77)

i. As regards the releasing of lands to the investor, the modalities are expressly provided in Article 7.1.1. of the Shareholders Agreement. There are no extraneous conditions to be complied with when releasing the said land, and it is incumbent upon the signatories to the said Agreement to strictly abide by the provisions of the said Article. In view of the concerns expressed at the CCEM about the long delay, this process should be completed expeditiously as possible.

ii. Regarding the disposal of existing infrastructure, machinery, and other movable properties, the open tender procedure should be followed within a stipulated time frame.

On or about 18th May 2017, the 1st Accused Appellant met the virtual complainant at the Royal Boat Restaurant in Wattala for a meeting over dinner (the 1st Accused Appellant denied such meeting). The 1st Accused-Appellant had then informed the virtual complainant that if he does not pay the solicited gratification, he would take steps to call for tenders to dispose of the existing machinery.

When the New paper advertisements were published inviting bids to demolish the buildings and sell the equipment as per the instructions of the Hon. Attorney General, the Legal consultants of MG Sugars (Pvt) Ltd wrote to the 1st Accused-Appellant that they have been instructed by their client to institute legal action against the 1st Accused-Appellant if the said invitation for bids is not publicly revoked with immediate effect. The said decision to sell the equipment was the subject matter in an arbitration proceeding commenced in Singapore by MG Sugars (Pvt) Ltd thereafter.

In reply to another letter sent by the 1st Accused-Appellant on 04.08.2017, Hon. Attorney General had observed the following (P83)

> "Upon consideration of the available documentation, it is quite clear that the Ministry of Lands and the BOI have not shared a common understanding or

> Agreement pertaining to a revival/restructuring of Kanthale Sugar Factory. As a result, there has been a plethora of letters forwarded to this Department seeking legal clarification on specific matters which are particularly relied upon or perceived by the respective institutions. This has led to five (05) opinions tendered by this Department."

Whilst the exchange of letters, discussions, and consultations take place amongst the stakeholders to the Shareholders Agreement from 11/8/2016 up until **P83** was issued by the Hon. Attorney General on 17/8/2017, witness Nagarajah says that he received a call on 05.09.2017 from the second Accused-Appellant, who was known to him previously, requesting him to come to Waters Edge Hotel at Battaramulla in the evening of the same day. Witness had gone to Waters Edge Hotel as agreed upon and during the conversation, the second Accused-Appellant had told the witness that the first Accused-Appellant is disappointed over the recent developments pertaining to the Kanthale Sugar Factory project, especially the adverse media publicity against him.

Witness had not specified whether he wished to pay the solicited amount of bribe indicated by the second Accused Appellant but has indicated that he will have to discuss this issue with the other directors of the company.

It was also claimed by the witness that he recorded this conversation with the second Accused-Appellant by using his mobile phone.

In the meantime, MG Sugars Lanka (PVT) Ltd., through its Attorneys, informed the first Accused-Appellant on 6/10/2017 as follows:

> "……Due to the failure and/or neglect of the Government of Sri Lanka to resolve the matter amicably, and despite the numerous *bonafide* efforts made by our client in this, the same was referred to the Singapore International Arbitration Centre (CIAC)
>
> As such, an Emergency Interim Relief Agreement (EIRA) was made in terms of Rule 30.2 and Schedule 1 of the CIAC Rules.
>
> Pursuant to the aforementioned application, a hearing was held via telephonic conference on the 29th of September 2017 at 11 a.m. Sri Lanka time. Subsequently, an award of Emergency Interim Relief was delivered in favour of our client……..
>
> Therefore, you are now compelled to maintain the status quo and are restrained from carrying out any demolition and/or removal exercise of any infrastructure, machinery, buildings and/or implements situated within the said lands." **(P84)**

Witness Nagarajah had testified before the High Court at Bar that he provided a Bank Guarantee of USD 10Mn in favour of the Government of Sri Lanka for several years by that time and has spent around USD 12Mn as consultancy fees and other expenditures in relation to the project. Considering the arbitration process, the Cabinet Sub Committee decision, and the huge amount that he had to spend during this time, he claims that he was frustrated and left with no option but to complain to the political hierarchy about what was going on in respect of the Kanthale Sugar Factory project.

It is against this backdrop that witness Nagarajah, had made a written complaint dated 7/2/2018 to the then Prime Minister. The witness was given an audience by a senior official of the Prime Minister's office on 9/2/2018 who had advised him that he should raise this issue with CIABOC if he claims that a bribe has been solicited by a Government Official.

ASP/Ruwan Kumara, PW 2, the then Deputy Director (Investigations) of CIABOC confirmed that he was advised by his Immediate Senior Officer, Director (Investigations) on 9/2/2018, that an Indian National is expecting to lodge a complaint with CIABOC and to take further steps in that regard. The mobile telephone number of the said Indian National had also been provided. Several attempts by ASP/Ruwan Kumara to contact the said complainant had not been successful, but he had returned a call to PW 2 on the same day. Thereafter Kotagarahalli Peddapaiya Nagarajah the said Indian National had gone to meet ASP/Ruwan Kumara, at his office at CIABOC around 3.30 p.m. on 9/2/2018 itself.

After listening to the narration of witness Nagarajah, PW 2 informed him that a written complaint should be submitted in order to commence the investigations over the allegations levelled.

In compliance with the directive of PW 2, the witness had handed over a written complaint to the CIABOC on 15/2/2018. Subsequently, witness Nagarajah's complaint had been reduced into writing on 22/2/2018 by IP/ Tennakoon (PW 5) of CIABOC.

After making the statement to CIABOC on 22.02.2018, the witness met the second Accused-Appellant at his office at Timber Corporation on 23/2/2018. During this meeting, the witness conveyed the message to the second Accused-Appellant, that he wants to proceed ahead with the Kanthale Sugar Factory project and therefore willing to pay a "bribe" as per the request of the first Accused-Appellant. It was the suggestion of the second Accused-Appellant at this meeting that the witness must pay Rs. 350Mn for the scrap metal in the factory premises and pay Rs. 100Mn to the first Accused-Appellant in addition. At the end of this meeting, it was agreed to have a further discussion with the first Appellant to iron out the issues that existed over the implementation of the

Shareholders Agreement. According to the witness, this conversation had been recorded with the use of his mobile phone.

The witness had met with the first and the second Accused Appellants once again at the office of the second Accused-Appellant at the Timber Corporation on 27/2/2018. According to the witness, the reactions of the first Accused-Appellant towards him at the very beginning was very rude. The first Accused-Appellant, according to the witness, had gone to the extent of saying that he will never trust the witness and does not know whether he is using any recording device even at that point.

The second Accused-Appellant had intervened at this point in time to mediate on the situation and the 1st Accused-Appellant had agreed to talk to the witness about the project. It was suggested by the first Accused-Appellant that the witness should in writing express his willingness to purchase the scrap metal as estimated and a bribe of Rs. 100Mn, out of which Rs. 20Mn is to be paid as an advance with immediate effect.

Witness has testified, before the High Court at Bar, that he tried to negotiate to bring down the bribe to Rs. 10Mn but failed. He says that the first Accused-Appellant was very specific that he would not allow the project to proceed as long as he occupies the office of the Secretary if the demanded amount of Rs. 100Mn is not paid. It was also stated by the witness that the second Accused-Appellant had actively participated throughout this discussion. This conversation on 27/2/2018 had also been recorded by the witness. After the said meeting the witness had to go to India for a short stay.

It was asserted by the witness that he contacted the second Accused-Appellant whilst he was in India and tried to negotiate the amount of bribe but the request was turned down by him saying that the first Accused-Appellant would not agree to such a move.

Upon arrival on 05.03.2018, the witness had met the 2nd Accused-Appellant on two occasions, once at Waters Edge and the other at the 2nd Accused-Appellant's office. Even though the witness had expected to arrange the transaction in early march, that did not materialize due to the retirement of the 1st Accused-Appellant as Secretary Ministry of Lands and his assumption of duties as the Chief of Staff to His Excellency the President.

However, witness Nagarajah had met the two Accused-Appellants at the Bread Talk Restaurant on 28/04/2018 around 11.30 a.m. after the 1st Accused-Appellant assumed duties as the Chief of staff to His Excellency the President. According to the witness, this meeting was arranged as promised by the 2nd Accused-Appellant. It is during this meeting the 1st Accused-Appellant had given his new visiting card (**P10**) as the chief of staff to His Excellency the President. Witness had stated that, upon

his agreement to pay the demanded gratification of Rs. 100 million and to pay Rs. 20 million in advance, the 1st Accused-Appellant agreed to provide his assistance to ensure the continuance of the proposed Kanthale Sugar Factory project. Further, according to the witness he had requested three days to organize things in order to meet the said advance of Rs. 20 million.

Two days after the above meeting, on 30/04/2018, the witness conveyed the message to the 2nd Accused-Appellant that he is ready with the agreed advance money of Rs. 20 million by the 02nd or 3rd of May. By this time the witness had close contact with the officers of the CIABOC and he had even provided a traveling bag to the investigators to bring the money. Sgt/ Karunarathne an officer from CIABOC was entrusted as the decoy and this officer was present at Bread Talk when the witness met the two Accused-Appellants on 28.04.2018. On the instructions of the investigators, it was decided to conduct the raid at the Residence of witness Nagarajah and to introduce the decoy as a domestic helper to the two Accused-Appellants when they visit his residence to accept the bribe.

On the 3rd around 10 o'clock witness received a call from the 2nd Accused-Appellant, that they should be able to meet him after 2 p.m. at Hotel Taj Samudra. Once again, the 2nd Accused-Appellant had called the witness around 11 o'clock and told that both should be able to meet him around 3.20 p.m. at Hotel Taj Samudra.

According to witness Nagarajah, he immediately contacted the officers from CIABOC and informed them of the change of venue and on the instructions, he received from the investigators, left for Hotel Taj Samudra accompanied by Sgt/ Karunarathne in his car driven by his Driver.

Whilst the witness had been waiting at the coffee shop in the lobby of Hotel Taj Samudra, it was the 2nd Accused-Appellant who joined him first. A few minutes later, the 1st Accused-Appellant had also come to the same place and had a conversation for about 50 minutes and had some beverages as well. According to him, the 1st Accused-Appellant had questioned about the money and it was informed to him that it is ready but kept with the personal assistant who is in the car at the car park. It was further told by the witness that the 1st Accused-Appellant wanted "another bag" and that was supplied with the assistance of a waiter at the coffee shop. Upon settling the bill, **(P16)** all three proceeded towards the car park through the rear passage of the Hotel. When they reached the driveway, the witness waved at his driver with the use of the bag collected from the coffee shop **(P17)** signaling him to come towards them. Sgt. Karunaratne having seen this signal got off from the car and walked towards the witness and the two Accused-Appellants carrying, the red colour

traveling bag which contained Rs. 20 million cash. By the time Sgt/Karunaratne reached the trio, the car also reached closer to them.

According to the virtual complainant, when he asked the 1st Accused-Appellant whether he can hand over the bag, he was told by the 1st Accused-Appellant that he wants to check the money and give the 2nd Accused-Appellant's portion. Thereafter the 1st Accused-Appellant got into the rear seat of the car from the driver's side.

The Prosecution claims that P12 was then handed over to the 1st Appellant who was seated in the back seat and told: "Doctor I did my part and I need your help to continue with the Kanthale Project". Since the 1st Accused-Appellant was struggling to open the bag, the witness had requested Sgt/ Karunarthne to assist the 1st Accused-Appellant to get it open. The decoy, Sgt/ Karunarathne had helped the 1st Accused-Appellant to check the cash bundles and thereafter put three bundles out of four, into the bag that was obtained from the coffee shop, by Sgt/ Karaunarathne on the request of the 1st Accused-Appellant. This paper bag which was produced marked P-17 was with the witness until the 1st Accused-Appellant wanted that bag to be given to Sgt/ Karunarathne to put the 3 cash bundles into the bag. The 2nd Accused-Appellant had been standing at the front passenger seat door during this time.

Witness saw the officers from the CIABOC approaching his car and arresting the two Accused-Appellants, whilst the money that was given to the 1st Accused-Appellant was in his custody.

According to witness Nagarajah, he made a statement to CIABOC on the following day regarding the raid which took place at Hotel Taj Samudra. The investigators had requested him to hand over the two mobile phones that he used to record the conversations with the 1st and 2nd Accused-Appellants, but he has declined to adhere to the said request on the basis that his personal mobile phone contained a lot of financial, personal and health details of him and his family.

The prosecution had relied on the evidence of several officers from CIABOC in establishing the case against the two Accused before the High Court at Bar and Sgt/ Karunarathne who acted as the decoy is one of the main witnesses the prosecution had relied upon.

According to the evidence of Sgt/ Karunarathne, he witnessed the meeting between Nagarajah and the two Accused-Appellants which took place at the Bread Talk Restaurant on 28.04.2018. Thereafter he was instructed to act as a domestic helper at the house of witness Nagarajah when it was arranged to hand over the bribe money to the Accused-Appellants. The said plan was suddenly changed and the witness was instructed to go to Hotel Taj Samudra with the bag containing Rs. 2000000/-. He went to Hotel Taj Samudra accompanied by witness Nagarajah in the car belonging to

the witness Nagarajah driven by Nagarajah's driver. He was instructed to be in the car park and to meet witness Nagarajah with the bag containing the money when the message was sent by witness Nagarajah who went inside the Hotel. According to the witness, both the witness and the Complainant Nagarajah were searched by CI/ Pushpakumara before they left the house of the complainant at Rosemond Place. After some time, the driver informed him that witness Nagarajah wanted him to come with the money. At that time, he saw Nagarajah coming towards the car park with two others and waving at them. He immediately got down from the car with the Red colour bag and walked towards them. The car too was moved towards them and stopped Infront of them. At that time, he heard the witness asking the others, whether he could give the money and the 1st Accused-Appellant saying that he wanted to get inside the car and check the money.

When the 1st Accused-Appellant got into the rear seat of the car, Nagarajah had given him the bag and the 1st Accused-Appellant tried to open the bag. At that stage he heard Complainant Nagarajah telling the 1st Accused-Appellant, "Dr. I have done my part, I wanted you to help me to start the sugar project" On the request of Nagarajah, the witness helped 1st Accused-Appellant to open the bag and on the request of the 1st Accused-Appellant witness put 3 bundles of money (out of four) into a bag which was given to him by Complainant Nagarajah (P-17)

After placing three bundles of cash in P17 upon the request of the 1st Accused-Appellant, Sgt/ Karunarathne signaled SI/ Weerathunge (PW06), who was close by, indicating the completion of the transaction.

With the said signal of Sgt/ Karunarathne, all the key members of the investigating team, CI/ Pushpakumara (PW03), IP/ Tennakoon (PW05), and SI/ Weerathunga (PW06), who were approaching the car, had rushed there. Witness then informed the Chief Investigating Officer and others that the person who is in the back seat is the 1st Accused-Appellant and the person who is standing near the front passenger seat is the 2nd Accused-Appellant. He had confirmed the completion of the transaction between the virtual complainant and the 1st Accused-Appellant. It is CI/ Pushpakumara's evidence that the 2nd Accused-Appellant at this point asked whether they are police Officers and the 1st Accused-Appellant had told he is the Chief of Staff to His Excellency the President. CI/ Pushpakumara, has informed him that he is aware of that and requested the 1st Accused Appellant to allow him to continue his duties.

Regarding the investigation carried out by the officers of CIABOC, witness Thushara Ruwan Kumara Superintendent of Police and IP Janaka Pushpakumara gave evidence before the High Court at Bar and witness Anura Tennakoon, Inspector of Police, S.K. Weerathunga, Sub-Inspector of Police and

IP/ Janaka Pushpakumara gave evidence about the raid conducted on 03.05.2013 at Hotel Taj Samudra.

As revealed from the evidence of the said witnesses, upon his return from India on 05.03.2018, the Virtual Complainant Nagarajah informed the investigators that there is a great possibility for the transaction to take place either on 8th or 9th March 2018.

Thereafter ASP/ Ruwan Kumara (PW 2) assigned the investigation to a team led by Chief Inspector Pushpakumara (PW 3). CI/ Pushpakumara had been instructed by ASP/ Ruwan Kumara to obtain Rs. 30Mn cash from the Central Bank with the assistance of the Accounts Division. ASP/Ruwan Kumara has stated in his evidence that he decided to obtain Rs. 30Mn, instead of the required amount of Rs. 20Mn simply to avoid any suspicion, had the request of CIABOC being leaked to the suspects.

The investigators had initially suspected that the transaction might take place at the office of the second Accused-Appellant in the Timber Corporation. They had in fact visited the said compound in order to get ready for the raid, in case it takes place in that compound. At the same time, the Investigating Officers had come to the residence of the virtual complainant at Rosemond Place and had been of the view that it is a better location to have the raid conducted, having been compared to the surroundings of the Timber Corporation.

The case for the Prosecution is that, even though the Investigators were ready to conduct the raid on 8th or 9th March 2018, it did not materialize due to Mr. Nagarajah being informed by the second Accused-Appellant that the first Accused-Appellant is to retire as Secretary, Ministry of Lands and to assume duties as the Chief of Staff to His Excellency the President. However, after the meeting with the two Accused-Appellants and the Complainant at Bread Talk Restaurant on 28.04.2018, Complainant Nagarajah informed the Investigators that the transaction might take place within two-three days.

The Investigating team comprised CI/Pushpakumara (PW03), IP/Tennakoon (PW05), SI/ Weerathunga (PW06), and Sgt/Karunaratne (PW07) had visited the residence of Nagarajah on 02/05/2018 and decided at that point that it would be practically convenient for them to conduct the raid if it takes place at his residence.

It was decided at this meeting to have Sgt/ Karunarathne as the decoy when the raid is conducted. The team of investigators had once again visited the residence on 03/05/2018, the following day, to conduct the raid according to the instructions and directions that they are going to receive from the 2nd Accused-Appellant simply because the via media between Complainant and the 1st Accused-Appellant was the 2nd Accused-Appellant. It was at this visit only CI/ Pushpakumara had brought Rs.

20 million out of the money obtained by the CIABOC in March in anticipation of this raid, to the residence of witness Nagarajah and showed the same to him, four bundles of Rs. 5000 notes (P14-a, b, c, d), a total sum of Rs. 20million.

It is also claimed both by the virtual complainant and the investigating officers that the virtual complainant was adequately cautioned that he should not at any point give the money to the suspects forcefully and must give it to the hand of the suspect only if he shows a willingness to accept the money, whilst stressing that the money is being given to him in order to facilitate the Kanthale Sugar Factory project. The decoy Sgt/ Karunarathne too was present when the said instructions were given to the Complainant.

On 03rd May a red colour traveling bag (**P 12)** had been obtained by the investigators from the Virtual Complainant in order to put the said four bundles of money. Before the bundles of money had been kept inside **P 12**, they were wrapped using a few pages of an English newspaper **(P 13).** The cash certificate in respect of the said amount of money had been submitted by the CIABOC at the time suspects were produced before the Magistrate upon arrest **(P 15).**

Once the venue had been informed by the 2nd Accused-Appellant, CI/ Pushpakumara had decided to send the supporting teams along with IP/Tennakoon (PW 05), SI/ Weerathunga and WSI/Weerasinghe to Hotel Taj Samudra for reconnaissance/or to gather useful information in the ground level to conduct the raid.

Upon receiving the 2nd call specifying the time and confirming the venue, the Investigators who remained at the Complainant's residence had advised him to leave for Hotel Taj Samudra and the Complainant had left for the Hotel, accompanied by Sgt/Karunarathne (PW 07) in his Chauffer driven car.

Complainant Nagarajah had once again been strictly advised not to coerce or not to forcefully get the money accepted. The presence of the decoy at the time of the transaction had also been stressed upon. The decoy and the complainant were both searched by CI/ Pushpakumara and got himself satisfied that there is nothing illegal in their possession.

CI/ Pushkumara had left Nagarajah's residence at the same time in his official car to Hotel Taj Samudra.

According to the evidence of CI/ Pushpakumara when he went to Hotel Taj Samudra, the other CIABOC officer including IP/ Tennakoon, SI/ Weerathunge and WSI/ Weerasinghe had already arrived at the Hotel. He had seen the car belonging to the Complaint parked at the car park and he

too has stayed in the car park area. After some time, he saw the Complainant coming towards the car park with two other persons and Sgt/ Karunarathne going towards them with the Red Bag. The car belonging to the Complainant had moved towards them. When he saw PS Karunarathne's signal, he rushed towards the car.

At that time CI/Pushpakumara had witnessed the red colour traveling bag (P12) on the back seat beside 1st Accused-Appellant, CI/ Pushpakumara had further noticed that the three sealed bundles of cash were inside the Taj Samudra paper bag, (P17) and the unsealed bundle of cash was inside the red colour traveling bag (P12). Thereafter CI/ Pushpakumara put three sealed bundles of cash and the Taj Samudra paper bag inside the red colour traveling bag and handed over the same to SI/Weerathunga (PW06).

The 1st Accused-Appellant had been arrested around 4.35 p.m. followed by the arrest of the 2nd Accused-Appellant and both were taken to CIABOC to record their statements.

During the investigation at Hotel Taj Samudra, it has also been revealed that the Toyota Allion car bearing number KF- 9502, which belongs to the presidential secretariat, which was used by the 1st Accused-Appellant on 03.05.2018 to come to Hotel Samudra had been parked at the car park in anticipation of the return of the 1st Accused-Appellant. PW 10, Pinsiri Dharmapriya Peiris, the driver of the said vehicle had been arrested soon after the arrest of the two Accused-Appellants whilst waiting at the hotel car park, but released soon afterward his statement was recorded. Peiris has testified before the High Court at Bar to the effect that he was advised by the 1st Accused-Appellant to wait at the car park of the hotel until his return.

In addition to the evidence of the virtual Complainant and the Police Witnesses, the evidence of the Government Analyst played an important role in the prosecution evidence before the High Court at Bar. The prosecution had placed a lot of reliance on the telephone conversations between the virtual Complainant and the Accused-Appellants. As already referred to above in this Judgment, the virtual Complainant in his evidence before the High Court at Bar referred to several instances where he has recorded the conversation he had with the two Accused-Appellants. In the said circumstances voice identification of the two Accused-Appellants and the recorded conversations between the virtual Complainant and the Accused-Appellants had a key role to play at the trial before the High Court at Bar, and in this regard, the prosecution heavily relied on the evidence of Ms. Dulani Lalithya Gunathilake, an Assistant Examiner of Questioned Documents attached to the Government Analyst Department (PW41)

Witness Gunathilake had been called by the prosecution in order to testify about 18 voice samples she had extracted from two telephones belonging to the virtual Complainant that was handed over to her on 17.05.2018. The two Accused-Appellants had been produced before the witness to obtain voice samples on 29.06.2018 by an order of the Chief Magistrate.

The two Accused-Appellants raised several objections regarding the admissibility of the said evidence during the trial before the High Court at Bar, and several legal issues were raised before us during their submissions. We will be separately analyzing the questions of law raised on behalf of the two Accused-Appellants and will be considering the evidence of witness Gunathilake when analyzing the above.

The contemporaneous recordings of CCTV footage at Bread Talk Restaurant and Hotel Taj Samudra were also another piece of evidence relied upon by the prosecution. The above footages were played before this Court as well as before the High Court at Bar by the prosecution.

Apart from the evidence of the above witnesses, the prosecution had relied on the evidence of a few formal witnesses in order to establish some legal requirements and their evidence was neither challenged nor discussed on behalf of the two Accused-Appellants before this Court. At the conclusion of the trial before the High Court at Bar, Court having considered the material placed before it had called upon the two Accused-Appellants to place their defence before Court.

The 1st Accused-Appellant had made a statement from the dock and the 2nd Accused-Appellant opted to give evidence from the witness box. Witness Neelakandan was called as a witness on behalf of the second Accused Appellant. In his dock statement, the 1st Accused-Appellant admitted that he was appointed the secretary to the Ministry of Lands in 2015 and continued to hold the office until 10.03.2018, since his retirement from the public service. He had then been appointed as the Chief of Staff to His Excellency the President with effect from 22.03.2018, though the letter of appointment received by him on 05.04.2018.

According to the 1st Accused-Appellant he had been in the public service for over 30 years at the time he was arrested in relation to this incident. He vehemently denied the allegation levelled against him and went on to say that he follows a very simple lifestyle that was never tainted with bribes or any improper/ immoral conduct. He claimed that he was trapped by the complainant and that the CIABOC offices may have simply resorted to their ordinary duties.

Nevertheless, the 1st Accused-Appellant admitted that he met the complainant somewhere in August 2016, soon after the Shareholders' Agreement was signed on 11.08.2016, at his office, on 27.02.2018 at the office of the 2nd Accused-Appellant in Timber Cooperation, on 28.04.2018 at

Bread Talk Restaurant and on 03.05.2018 at hotel Taj Samudra. He also admitted that the 2nd Accused-Appellant accompanied him during the last 3 meetings above mentioned, at Timber Cooperation, at Bread Talk Restaurant, and at hotel Taj Samudra.

The concern of the 1st Accused-Appellant regarding the project in issue seems to be his observation on the Complainant/ Investor that he is more interested in the scrap metal available in the compound of the factory than in commencing the substantive Sugar Cane project. The 1st Accused-Appellant has stated that he, during the meeting on 27.02.2018, advised the Complainant that he could pay Rs.350 million for the value of the infrastructure available in the premises and commence the Sugar Cane project.

The 1st Accused-Appellant admits the pending Arbitration process in Singapore and submitted to the court that he was supposed to be a witness on behalf of the Sri Lankan Government and the Attorney General's Department was getting ready by preparing his affidavit before he testified. The 1st Accused-Appellant had not been able to testify as scheduled due to the arrest of this case and he has revealed that the Sri Lankan Government had lost the said arbitration in November 2018.

Whilst claiming that the Complainant developed a rift with him during this period of the delays in implementing the Kanthale Sugar project, the 1st Accused-Appellant admits that he took part in the discussions and the meetings with the complainant because of the request by the 2nd Accused-Appellant, who is a long-standing friend of him.

Explaining the events which took place on 03.05.2018, the 1st Accused-Appellant says that he was thinking of getting a lift from the complainant to the Ministry of Postal Services, where his wife was the secretary, got into the complainant's car to the right-hand rear seat. He had then been thinking, according to the 1st Accused-Appellant, to call his driver who was waiting for him at the hotel car park, to go back to the office, but suddenly a few people claimed to be police officers from CIABOC, had approached him and arrested then and there.

He claims that he in fact was a victim of a very well-articulated and executed conspiracy to trap him due to the role he played as the secretary to the Ministry of Lands. He further claims that the voice recordings produced in court are fabricated.

As referred to above the 2nd Accused-Appellant had opted to give evidence from the witness box and he had been subjected to cross-examined by the prosecution.

The career of the 2nd Accused-Appellant in the public sector runs from 1978 to 2015. He himself had been the Chief of Staff to a former president when such a position was created for the first time.

Upon his retirement, in 2015, he had been appointed the Chairman of the State Timber Cooperation, which also falls within the ambit of a "public officer" in terms of the bribery act. He had been holding the said office until he was arrested on 03.05.2018 in relation to this matter. The 2nd Accused-Appellant claimed that he met the complainant at a public function well before the meeting at Waters Edge Restaurant on 09.05.2017. Whilst admitting the first meeting reflected in the indictment, at Waters Edge Restaurant on 09.05.2017, the 2nd Accused Appellant admits the next four meetings he was alleged to have taken part, on 23.02.2018 and 27.02.2018 at his office, 28.04.2018 at Bread Talk Restaurant and finally on 03.05.2018 at hotel Taj Samudra.

The assertion of the virtual Complainant that the first Accused-Appellant blamed him for trying to trap him is corroborated by the 2nd Accused-Appellant to a greater extent. He claims that after the initial exchange of words commenced by the 1st Accused Appellant, both of them had ironed out their differences and agreed to work together.

The 2nd Accused-Appellant speaks of a herbal toothpaste, requested to be brought from India when the complainant goes there. And also, he had stated that the complainant had indicated to him that he has brought a bottle of Brandy when returning from overseas and one of the expectations of the 2nd Accused-Appellant during the meeting at Bread Talk was to obtain the said two items. Apparently, he admits that he was given the said herbal toothpaste by the complainant when they met at the Bread Talk Restaurant, but not the bottle of Brandy.

Explaining the reasons for his presence at hotel Taj Samudra on 03.05.2018, the 2nd Accused-Appellant says that he had to participate in a meeting in the India-Sri Lanka summit in the same evening at the same venue and therefore he thought of accommodating the repeated requests of the Complainant to have a meeting with the presence of the 1st Accused-Appellant.

It is the version of the 2nd Accused-Appellant that after the three of them met at the lobby of Hotel Taj Samudra for a discussion for about 20 minutes, the virtual Complainant had informed them that the two bottles of Brandy brought for them are in the car. According to the 1st Accused Appellant, the reason for him and the 1st Accused-Appellant to proceed towards the car park of the hotel was to get the said bottles. He confirmed the virtual Complainant getting a bag from the waiter of the hotel restaurant and says that he thought it was meant for the bottles the virtual Complainant was to give them.

The 2nd Accused-Appellant confirmed that the car of the virtual Complainant approached three of them when they proceeded towards the car park and a person with a pink colored t-shirt put a red colored bag on the rear seat of the car after opening the back door. He has testified that either time

he realized that the said red bag did not contain the anticipated bottles of Brandy, the 1st Accused-Appellant had already got into the back seat of the car from the driver's side. He admits that he too had been leaning onto the car when the investigators surrounded the car.

The 2nd Accused-Appellant vehemently denied that he himself solicited or abetted the 1st Accused-Appellant to solicit and/or accept any bribe from the Complainant in relation to any of the official duties related to Kanthale Sugar Project. Further, at one point, he denied the presence of his voice in the produced audio recording in court and alleged that the said recordings are being tampered with by the Complainant.

It is on the strength of the above evidence placed before the High Court at Bar, Court proceeded to convict the two Accused-Appellants on charges levelled against them except for the 3rd Count framed against the 2nd Accused-Appellant. It is also important to note at this stage that the prosecution after leading evidence before the High Court at Bar had informed Court that the prosecution would not be proceeding against the 2nd Accused-Appellant with regard to the 3rd count framed against the 2nd Accused-Appellant.

In the light of the evidence placed before the High Court at Bar by the prosecution as well as by the two Accused-Appellants, this Court will now proceed to consider the questions of Law raised by the two Accused-Appellants before this Court.

Was the investigation into the complaint received by the CIABOC against the Appellants, conducted by officers of the CIABOC in a lawful manner? (Was the investigation lawful?)

The argument advanced by the Accused-Appellants is that the officers of the CIABOC had not carried out investigations into the complaint received by it against the two Accused-Appellants, in a lawful manner. It was the submission of the learned President's Counsel for the Accused Appellants that the first complaint regarding this incident was not lawfully recorded by the officers of the CIABOC. In order to evaluate this argument, let us first consider the process in which the virtual complainant Nagarajah, approached the CIABOC.

As already observed in this Judgment the virtual complainant had met ASP Ruwan Kumara of CIABOC following the phone call, he received in his office at CIABOC where ASP Ruwan Kumara had advised him to write a complaint regarding the matter. Thus, ASP Ruwan Kumara after listening to the oral account narrated by the virtual complaint, sent the virtual complainant back to submit a written complaint, without proceeding to record/reduce the statement into writing at that time

itself. It was the submission of the learned President's Counsel that this procedure is illegal as it is contrary to section 109 of the Code of Criminal Procedure Act No 15 of 1979.

Thereafter, the virtual complainant proceeded to lodge a complaint on 15th February 2018 acting upon which, CIABOC had proceeded to record a statement from him in the English language on 22 February 2018. The investigators then informed him that the available material is not sufficient to proceed with an arrest, to which the virtual complainant responded that he no longer had contact with either Appellant at that point in time. The Investigators had then instructed the virtual complainant to regenerate communication with the Appellants. It is this procedure that the learned Presidents' Counsel for the Accused Appellants complains as being unlawful.

Section 109 (1) of the Code of Criminal Procedure Act No 15 of 1979 on which the learned President's Counsel for the Accused Appellants have relied, states as follows;

> "*Every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer"*

Section 109 (2) states-

> *"If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant:*
>
> *Provided that if it is not possible for the officer or inquirer to record the information in the language in which it is given the officer or enquirer shall request that the information be given in writing. If the informant is unable to give it in writing, the officer or inquirer shall record the information in one of the national languages after recording the reasons for doing so and shall read over the record to the informant or interpret it in the language he understands."*

However, we observe that the procedure regarding the commencement of an investigation in relation to the offences under the Bribery Act by CIABOC is different. The Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (CIABOC Act) has specifically provided as to how CIABOC must commence an investigation. This can be clearly seen in sections 3, 4, and 5 of the Act. It is worthwhile reproducing the following parts from those sections.

CIABOC Act No. 19 of 1994

Section 3

The Commission shall subject to the other provisions of this Act, investigate allegations, contained in communications made to it under section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, direct the institution of proceedings against such person for such offence in the appropriate court.

Section 4

(1) An allegation of bribery or corruption may be made against a person (whether or not such person is holding on the date on which the communication is received by the Commission, the office, or employment by virtue of holding which he is alleged to have committed the act constituting bribery or corruption) by a communication to the Commission, or a person may by a communication on to the Commission, draw the attention of the Commission to any recent acquisitions of wealth or property or to any recent financial or business dealings or to any recent expenditures by a person (whether or not such person is holding any office or employment on the date on which such communication is received by the Commission) which acquisitions, dealings or expenditures are to the knowledge of the person making such communication not commensurate with the known sources of wealth or income of such person.

(2) Upon receipt of a communication under subsection (1) the Commission, if it is satisfied that such communication is genuine and that the communication discloses material upon which an investigation ought to be conducted, shall conduct such investigation as may be necessary for the purpose of deciding upon all or any of the following matters; -

(a) prosecution or other suitable action under the provisions of the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975; or

(b) prosecution under any other Law.

and where the Commission decides, whether before or after the conduct of an investigation, that a communication received by it should be dealt with by any other authority, it may forward such communication to such other authority.

(3) the Commission shall have the power to investigate any matters disclosed by a communication received by it under subsection (1) whether or not such matters relate

> *to a period prior to the appointed date and notwithstanding anything to the contrary in any other law.*

Thus, it is a legal obligation in the form of a prerequisite under the CIABOC Act that the Commission must be satisfied that any communication it receives, is genuine and that such communication discloses material upon which an investigation ought to be conducted. Therefore, it would not be lawful for the Commission to bypass this provision and straight away proceed to launch an investigation in respect of any communication it receives irrespective of its merits.

Let us also consider the applicability of the provisions of the Code of Criminal Procedure Act No 15 of 1979 to the investigations undertaken by CIABOC.

Section 2 (1) of the Bribery Act No. 11 of 1954 has clearly set out the scope of application of other written laws to the offences under the Bribery Act. It is as follows;

Section 2 (2) of the Bribery Act-

> *(2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail.*

Further, Section 6(1) of the Bribery Act also has clearly specified the application of the Code of Criminal Procedure Act, No. 15 of 1979 to the offences under the Bribery Act in the following manner.

Section 6 (1) of the Bribery Act-

> *(1) Such of the provisions of the Code of Criminal Procedure Act, No. 15 of 1979, as are not excluded by subsection (2) or are not inconsistent with the provisions of this Act shall apply to proceedings instituted in a court for offences under this Act.*

In addition, the Prosecution's 2nd witness ASP Ruwan Kumara has provided the reasoning behind what impelled him not to record the virtual Complainant's statement at the very first instance, but to advise him to provide a written statement as CIABOC could treat it as a communication upon which it could act. Alongside other reasons, ASP Ruwan Kumara has stated in his evidence that as there was a complexity in the complaint and uncertainty in the alleged solicitation of a gratification at that point in time, he had wanted to establish whether the virtual Complainant was consistent in his version and ascertain whether there was merit in the allegations put forward by the virtual complainant.

In the evidence given by the virtual Complainant (PW 1), the learned counsel of the 2nd Appellant highlights that there was no evidence of contact between 2nd Appellant and the virtual Complainant after 5th September 2017, until the 23rd of February 2018, the day after Ruwan Kumara initiated the instigation on 22nd February 2018. Further, the learned counsel for the 2nd Appellant submitted that the entire process by CIABOC was to instigate, induce and inveigle PW 1 to hand over a bribe by providing PW 1 with the money to do so and that was a plan formulated by PW 2 Ruwan Kumara to entrap the Accused Appellants.

Learned Counsel for the Accused-Appellants persistently submitted that the Investigators of the CIABOC had an ulterior motive to entrap the Accused-Appellants, claiming that ASP Ruwan Kumara had made an unjustified phone call to the virtual Complainant instructing him to come to the CIABOC, without waiting for the virtual Complainant to come on his own. However, the evidence given by ASP Ruwan Kumara has clarified that the Director/Investigations of the CIABOC has informed him about the virtual Complainant and asked him to contact the said foreign national. The witness has further explained how they ordinarily receive complaints and has explained the situations where third parties contact the CIABOC on behalf of the Complainants [p.953 Vol 4A of Appeal Brief].

It is the submission of the appellants that the virtual Complainant had no intention of making a complaint to CIABOC. It is on that footing that the appellants further submitted that there cannot be a valid conviction without a legal and fair investigation.

We need to be mindful that the offences of bribery and corruption is generally committed by public officers. Thus, for an instance, in a circumstance where an allegation of bribery has to be made against the officer in charge of a police station, the mechanism provided for in the Code of Criminal Procedure Act for a complainant to make a complaint against the very police officer in the relevant police station appears to cause practical difficulties.

On the other hand, as a person can easily make an allegation of Bribery against any public officer, the legislature has set up a threshold in section 4 (2) of the CIABOC Act in that it has required CIABOC to be satisfied that the information received by it, is genuine and warrants further investigation. That would explain why investigations for the offences under the Bribery Act must proceed on a somewhat different path.

Thus, the legislature in its wisdom has vested the CIABOC with the power of commencing an investigation against any public officer when it receives any such communication only when the

Commission is satisfied that such communication is genuine and discloses material upon which an investigation ought to be conducted.

It must also be noted that the 19th amendment to the Constitution which was certified by the Parliament on 15th May 2015 brought in Chapter XIX A introducing a new Article, i.e., Article 156 A. According to Article 156A (1) (b), the powers of CIABOC includes '*the power to direct the holding of a preliminary inquiry or the making of an investigation into an allegation of bribery or corruption, whether of its own motion or on a complaint made to it, and the power to institute prosecutions for offences under the law in force relating to bribery or corruption.* (Emphasize is ours)

Accordingly, it is clear that the 19th amendment to the Constitution by Article 156 A had empowered the CIABOC to hold preliminary inquiries or investigations into allegations of bribery or corruption on its own motion also. This is in addition to its power to act when a complaint is made by any person.

We may mention here further that, the aforementioned Chapter (Chapter XIX A) containing Article 156 A was repealed by the 20th Amendment to the Constitution which came into effect on 29th October 2020. Although the said provision was subsequently repealed, the incidents relating to the instant case had taken place while the 19th amendment to the Constitution was in force i.e., the alleged incidents of solicitation of gratification had occurred during the time period between 11th August 2016–3rd May 2018. Thus, steps taken by ASP/Ruwan Kumara of CIABOC towards the commencement of around 22nd February 2018 would fall under Article 156 A making it lawful under the said article only.

Thus, it can be clearly seen that CIABOC had all the power, at the time in question, to commence and proceed with any investigation even on its own motion i.e., without a complaint. In this regard, section 5 of the CIABOC Act would also be relevant and its reproduction would further resolve the above issues. It is as follows;

Section 5 of the CIABOC Act:

> *(1) For the purpose of discharging the functions assigned to it by this Act, the Commission shall have the power-*
>
> *(a) to procure and receive all such evidence, written or oral, and to examine all such persons as the Commission may think necessary or desirable to procure, receive or examine;*

(b) to require any person to attend before the Commission for the purposes of being examined by the Commission and to answer, orally on oath or affirmation, any question put to him by the Commission relevant, in the opinion of the Commission, to the matters under investigation or require such person to state any facts relevant to the matters under investigation in the form of an affidavit;

(c) to summon any person to produce any document or other thing in his possession or control;

(d) to direct by notice in writing the manager of any back produce, within such time as may be specified in the notice, any book, document or cheque of the back containing entries relating to the account of any person in respect of whom a communication has been received under section 4 or of the spouse or a son or daughter of such person, or of a company of which such person is a director, or of a trust in which such person has a beneficial interest or of a firm of which such person is a partner, or to furnish as so specified, certified copies of such book, document, cheque or of any entry therein;

(e) to direct by notice in writing the Commissioner-General of Inland Revenue to furnish, as specified in the notice, all information available to such Commissioner-General relating to the affairs of any person in respect of whom a communication has been received under section 4 or of the spouse or a son or daughter of such person and to produce or furnish, as specified in the notice, any document or a certified copy of any document relating to such person, spouse, son or daughter which is in the possession or under the control of such Commissioner-General;

(f) to direct by notice in writing the person in charge of any department, office or establishment of the Government or the Mayor, Chairman, Governor or chief executive, howsoever designated, of a local authority, Provincial Council, scheduled institution or a company in which the Government owns more than fifty per centum of the shares, to produce or furnish, as specified in the notice, any book, register, record or document which is in his possession or under his control or certified copies thereof or of any entry therein;

(g) to direct any person in respect of whom communication has been received under section 4 to furnish a sworn statement in writing-

(i) setting out all movable or immovable property owned or possessed at any time, or at such time as may be specified by the Commission, by such person and by the

spouse, son, or daughter of such person and specifying the date on which each of the properties so set out was acquired, whether by way of purchase, gift, bequest, inheritance or otherwise;

(ii) containing particulars of such other matters which in the opinion of the Commission are relevant to the investigation;

(h) to direct any other person to furnish a sworn statement in writing-

(i) setting out all movable or immovable property owned or possessed at any time or at such time as may be specified by the Commission, by a such person where the Commission has reasonable grounds to believe that such information can assist an investigation conducted by the Commission;

(ii) containing particulars of such other matters which in the opinion of the Commission are relevant to the investigation;

(i) to prohibit, by written order, any person in respect of whom a communication has been received under Section 4, the spouse, a son or daughter of such person, or any other person holding any property in trust for such first-mentioned person, or a company of which he is a director or firm in which he is a partner from transferring the ownership of, or any interest in, any movable or immovable property specified in such order, until such time as such order is revoked by the Commission; and to cause a copy of such written order to be served on any such authority as the Commission may think fit, including in the case of immovable property, the Registrar of Lands, in the case of a motor vehicle, the Commissioner of Motor Traffic and in the case of shares, stocks of debentures of any company, the Registrar of Companies and the Secretary of such company;

(j) to require, by written order, any authority on whom a copy of a written order made under paragraph (i) has been served, to cause such copy to be registered or filed in any register or record maintained by such authority.

(k) to require, by written order the Controller of Immigration and Emigration to impound the passport and other travel documents of any person in respect of whom a communication has been received under section 4, for such period not exceeding three months as may be specified in such written order; and

(l) to require by written order, any police officer as shall be specified in that order, whether by name or by office, to take all such steps as may be necessary to prevent the departure from Sri Lanka of any person in respect of whom a communication has been received under section 4 for such period not exceeding three months, as may be specified in such order.

(2) the Commission may exercise any power conferred on it under subsection (1) and any person to whom the Commission issues any direction in the exercise of such power shall comply with such direction, notwithstanding anything to the contrary in any law.

The above section also clearly shows that the procedure of investigating offences under the Bribery Act takes a different form, from that of a normal crime investigation under the Code of Criminal Procedure Act. That is the law of the country.

In the above circumstances, the submission made on behalf of the Appellants that the virtual complainant had no intention of initiating an investigation by the officers of CIABOC becomes irrelevant.

Hence, we hold that the investigators of the CIABOC inclusive of ASP Ruwan Kumara have acted within the parameters of the law and have not acted in any manner which brings their conduct into question.

We need to highlight one other matter regarding the complaint that in the instant case. That is the argument that this case has been fabricated by the CIABOC against the Appellants. The Accused-Appellants were very senior Public Officers with long experience. They had held posts in the top echelons of the Government at the time of their arrest. However, it is noteworthy that at no time had they hitherto ever taken any step to make any complaint to any authority against any investigator for fabricating false evidence to implicate them in this crime. They also had failed to make any complaint against anyone in relation to any coercive act committed or unfair treatment meted out to them at any time during the investigation. Thus, we can conclude safely that no such fabrication had happened in the course of the raid and thereafter.

Hence, we hold that the position of the learned President's Counsel for the Accused-Appellants that the Accused-Appellants were subjected to an unfair, vindictive, prejudicial, and partisan investigation is completely unfounded.

In view of the threshold provision in section 4(2) of the CIABOC Act and also in view of the fact that any authorized officer of CIABOC is duty-bound to follow the procedure set out in the CIABOC Act,

the submissions made on behalf of the Accused-Appellants that the failure to record a statement from the virtual complainant on the very first day has led to an unfair investigation, also does not have merit. This is because the law requires that the CIABOC officer commencing the investigation must be satisfied of the genuineness of the complaint/allegation.

The learned President's Counsel for the 2nd Accused-Appellant advanced another argument to the effect that the prosecution had failed to make available to the accused, a copy of the first complaint. According to the learned President's Counsel, the first complaint of this case is the letter written by Nagarajah to the Prime Minister. He urged that we must apply the principles of fair trial enumerated in the case of ***Wijepala vs Attorney General.*** *[(2001) 1 Sri L.R. 46]*

It would be relevant at this stage to reproduce here, Section 444 of the Code of Criminal Procedure Act which is as follows;

Section 444 of the Code of Criminal Procedure Act No. 15 of 179

444. **Accused person entitled to copy of first information**

(1) Every inquirer or officer in charge of a police station shall issue to every accused person or his attorney-at-law who applies for it a duly certified copy of the first information relating to the commission of the offence with which he is charged and of any statement made by the person against whom or in respect of whom the accused is alleged to have committed an offence.

(2) In every proceeding under this Code the production of a certified copy of any information or statement obtained under subsection (1) shall be prima facie evidence of the fact that such information was given or that such statement was made to the inquirer or police officer by whom it was recorded; and notwithstanding the provisions of any other law, it shall not be necessary to call such inquirer or officer as a witness solely for the purpose of producing such certified copy.

(3) In the course of a trial in a Magistrate's Court, the Magistrate may, in the interests of justice, make available to the accused or his attorney-at-law for perusal in open court the statement recorded under Section 110 of any witness whose evidence is relied on by the prosecution in support of the charge against the accused.

What the learned President's Counsel for the Accused-Appellants complain as being not made available for them, is not the first information relating to the commission of the offence which an inquirer or officer in charge of a police station has had in their custody (as per the above section). What the above section makes every accused entitled to receive, is a duly certified copy of the first

information relating to the commission of the offence with which any inquirer or officer in charge of a police station is charged. Any letter written by either Nagarajah or anybody else to the President or to the Prime Minister of the country cannot be considered as the first information relating to the commission of the offence given to any inquirer or officer in charge of a police station under section 444 of the Code of Criminal Procedure Act.

The information which is treated as the first information as per our law is the first information relating to the commission of the offence given to any inquirer or officer in charge of a police station. Even in ***Wijepala vs Attorney General (2001) 1 Sri LR 46*** - Mark Fernando J treated witness named Senaratne's statement around 9.30 pm to hospital Police Post, as the first information.

On the other hand, Nagarajah's evidence on what he informed the President by that letter is the fact that the 1st appellant had called for tenders by way of a Newspaper advertisement, regarding the disposal of the factory building, machinery, and other infrastructure in the premises.

Moreover, the learned Presidents Counsel for the accused-appellants has also failed to show that there is evidence adduced in the trial, establishing the fact that any information/complaint (be it the first information or otherwise) pertaining to a solicitation of a gratification by either the appellants or any other public officer has been made to the President or the Prime Minister of the country.

This means that the appellants have not established the actual availability/actually making of such a complaint although they claim entitlement for it on the basis that it is the first information of the instant case.

There is also no mention of the fact whether the Appellants had taken any step to move court or the prosecution to give them a copy of this document if there was any such document available.

Therefore, this submission made by the learned President's Counsel for the Appellants has no merit.

The Indictment was ex facie ultra vires the provisions of section 11 of the CIABOC ACT

The next question of law raised on behalf of the 2nd Accused-Appellant was that the Indictment was *ex-facia ultra vires* the provisions of Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (CIABOC Act) for the reason that the Indictment served on the Accused-Appellant was unaccompanied by the direction of the Commission to Investigate Allegations of Bribery or Corruption (the Commission) to institute proceedings against the Accused-Appellants. The above issue was first raised before the High Court at Bar as a preliminary objection by the Accused-Appellants and the High Court at Bar overruled the preliminary objection.

There is no doubt as to the nature of the indictment that was before the High Court at Bar. CIABOC had investigated a complaint of bribery and forwarded an Indictment against the two Accused under the provisions of the Bribery Act. The jurisdictional objection that was first raised before the High Court at Bar as well as before this Court on behalf of the 2nd Accused-Appellant was based on the provisions of Section 11 of the CIABOC ACT.

When raising the objection, it was contended;

a) Whether the CIABOC had considered the investigational findings and directed the Director General of CIABOC to institute Criminal proceedings against the Appellant before the High Court.
b) If such a directive had been issued, was it incumbent on the Director General of CIABOC to have attached to the indictment, the direction received by him by the Commissioners?

and the learned President's Counsel heavily relied on two Appellate Court decisions one by the Court of Appeal and the other by the Supreme Court.

Even though this Court is not bound by a decision of the Court of Appeal, their lordships of the Court of Appeal when deciding the case of ***Nandasena Gotabya Rajapakse V. Director General Commission to Investigate Allegations of Bribery and Corruption and Others CA (Rev) APN 29/2018*** *C.A. minute 12.09.2019* had considered a plethora of decisions both by the SC as well as Court of Appeal and therefore it appears to us that the said decision has a persuasive value before the Supreme Court.

The main complaint in the said case was the failure by CIABOC to act under Section 78(1) of the Bribery Act (as amended) by granting written sanction to institute the proceedings before the Magistrate's Court. The English Text of Section 78(1) of the Bribery Act (as amended) reads as follows;

> "No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Commission."

The Court of Appeal has referred to the Sinhala text of Section 78 (1) of the Bribery Act, (as amended) and also to the decision by the Supreme Court in ***Senanayake V. Attorney General (2010) 1 Sri LR 149*** and observed the following;

> "The prosecution 'by' the Commission is therefore clearly legislative residue from Section 78 (1) from the statutory provisions that existed before the amendment brought in by Act Nos. 19 and 20 of 1994, with no corresponding power conferred on the Commission to institute

proceedings. In the circumstances, the order of the Magistrate's Court and the Provincial High Court is tainted with illegality and thereby subjected to be interfered with this Court in exerting its power of revision"

The Court of Appeal has observed the above and had finally concluded that "If that Court is the Magistrate's Court, then the Commission must sanction the institution of such proceedings by written communication to that effect, addressed to that Court.

Even though section 78 (1) of the Bribery Act refers to a written sanction in order to entertain any prosecution before the Magistrate, neither Section 78 (1) nor any other provision in the Bribery Act had imposed a similar restriction when forwarding an indictment to the High Court. Since the decision by the Court of Appeal had only considered the question of sanction granted by the 'Commission' under Section 78 (1) of the Bribery Act (as amended) we see no relevance of the above judgment to the instant case.

The Petitioner in ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption and Others SC Writ 1/2011*** *SC minute dated 26.07.2018*, had challenged the decision to prosecute the Petitioner before the Magistrate's Court by way of a Writ Application.

In the said case Petitioner's main argument before the Supreme Court was the failure of the CIABOC to adhere to Section 11 of the CIABOC Act when forwarding charges before the Magistrate's Court.

Section 11 of the CIABOC Act which provides for a directive from CIABOC to the Director General, reads as follows;

Section 11 Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law No. 01 of 1975, the Commission shall direct the Director General to institute criminal proceedings against such person in the appropriate Court and the Director General shall institute proceedings accordingly.

When raising the said objection to the charges that were presented before the Magistrate's Court, the Petitioner had also relied on Section 2 (a) of the CIABOC Act which reads as follows;

Section 2 (a) The Commission shall consist of three members, two of whom shall be retired Judges of the Supreme Court or the Court of Appeal and one of whom shall be a person with wide experience relating to the Investigation of Crime and Law Enforcement.

In the said case it was submitted before the Supreme Court, that during the period of which the investigation with regard to the Petitioner was carried out, CIABOC was not properly constituted since there were some unfilled positions or vacancies in the Commission and therefore the Commission could not have given a directive to the Director General to institute proceedings against the Petitioner before the Magistrate's Court under Section 11 of the CIABOC Act. While responding to the above position taken up by the Petitioner in the said case, the Director General of CIABOC had submitted the journal entry of the relevant file which carried the directive received by him before the Supreme Court along with the affidavit he tendered before the Court. The Supreme Court has considered several provisions of the CIABOC Act and the 'journal entry' that was produced marked R-1, had finally concluded that there was no valid directive made under Section 11 of the CIABOC Act and quashed the charge sheet issued to the Petitioner in the said case.

When raising the question of law, on behalf of the 2nd Accused-Appellant, it was submitted that the said decision had imposed a duty cast upon the Director General to file the directive he received by the Commission under Section 11 of the CIABOC Act along with the indictment filed before the High Court.

As already referred to above, the Petitioner in the case of ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)* came before the Supreme Court seeking a Writ of *Certiorari* to quash the charges served on her since there was no valid directive given by the Commission under Section 11 of the CIABOC Act. The Petitioner in the said Case had not challenged the charges served on her under Section 78 (1) of the Bribery Act (as amended) even though the impugned charge sheet was filed before the Magistrate's Court under Section 78 (1) of the Bribery Act for the failure to submit the written sanction from the Commission, and the Supreme Court when deciding the said case had not considered the provision in Section 78 (1) of the Bribery Act (as amended). It is also important to note at this stage that the Supreme Court when deciding ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)* had not pronounced a requirement by the CIABOC to submit a written directive when chargers are filed before the Magistrate's Court.

The requirements that should be fulfilled by CIABOC when forwarding an indictment before the High Court is identified under Section 12 (1) and (2) of the CIABOC Act which reads as follows;

Section 12 (1) Where proceedings are instituted in a High Court, in pursuance of a direction made by the Commission under Section 11 by an indictment signed by the Director General, such High Court shall receive such indictment and shall have

jurisdiction to try the offence described in such indictment in all respects as if such indictment were an indictment presented by the Attorney General to such Court.

(2) There shall be annexed to every such indictment, in addition to the documents which are required by the Code of Criminal Procedure Act, No. 15 of 1979, to be annexed thereto, a copy of the statements, if any, before the Commission, by the accused and by every person intended to be called as a witness by the prosecution.

The said provisions, in Section 12 (1) and (2) are silent on any requirement to annex a copy of the directive made under Section 11 of the CIABOC Act even though there is a specific reference to the directive made by the Commission under Section 11 of the CIABOC Act in subsection (1) referred to above.

In these circumstances it is clear that, the Supreme Court when deciding ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)* had never intended to impose an additional requirement to submit a written directive when filing charges before Court, and therefore this Court is not inclined to impose an additional requirement other than the provisions already identified in Section 12 (I) and (II) of the CIABOC Act when forwarding an indictment before the High Court.

Whilst raising the above objection to the indictment before the Supreme Court, the learned President's Counsel who represented the 2nd Accused-Appellant drew the attention of this Court to the alleged 'fundamental errors' committed by the High Court at Bar when refusing the same jurisdictional objection at the commencement of the Trial at Bar proceeding.

In this regard it was submitted that the High Court at Bar erred;

a) In holding that this issue had to be 'canvassed in another forum by way of a separate judicial proceeding'
b) In deciding this issue by applying the presumption in Section 114, illustration (d) of the Evidence Ordinance, failing to apply the explicit provisions of the Evidence Ordinance, and totally disregarding the doctrine of 'stare Decisis', in not following the decision of the Supreme Court in the Polwatte case.
c) In its selective application of presumptions under the Evidence Ordinance to the detriment of the Accused,

When considering the submissions referred to above, it is clear that the said grounds of appeal raised on behalf of the 2nd Accused-Appellant were based on a misinterpretation given to the decision of this Court in the case of ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)*.

As already observed by us, when deciding the above case, this Court had never intended to impose an additional requirement of submitting a written directive given by the Commission when forwarding an indictment by the Director General CIABOC to High Court other than following the provisions already identified under Sections 12 (I) and (II) of the CIABOC Act. If the Director General is directed under Section 11 of the CIABOC Act by the CIABOC to forward an indictment, he is only bound to follow the provisions in Section 12 (I) and (II) of the CIABOC Act. In the absence of any complaint, that the Director General CIABOC had failed to comply with Sections 12(I) and (II) of the CIABOC Act when forwarding the indictment before the High Court at Bar it is correct in refusing the jurisdictional objection raised on behalf of the 2nd Accused before the High Court at Bar. The Trial Judge before whom the indictment is filed is therefore bound to accept the indictment and take up the trial unless there is material to establish that Director General CIABOC had failed to comply with the provisions of Sections 12 (1) and (2) of the CIABOC Act. Any party who intends to challenge an indictment forwarded by the Director General CIABOC on the basis that, the CIABOC had failed to comply with Section 11 of the CIABOC Act, the said challenge could only be raised in an appropriate action filed before an appropriate forum.

In the said circumstance, I see no merit in the argument placed before us.

Have the charges in the indictment (joinder of charges) been framed in a lawful manner? More particularly, is the amalgamation of charges 1 and 2 with the rest of the charges lawful, in that, has the prosecution established that the offences contained in charges 1 and 2 were committed in the course of the same transaction with the offences contained in the remaining charges?

The Accused-Appellants before the High Court at Bar had raised an objection to the amended indictment on the basis that the prosecution could not have lawfully joined the charges in counts 1, 2, and 3 with the rest of the charges as the incidents referred to in charges 1, 2 and 3 do not fall within the same course of the transaction as the rest of the charges.

When the objection was raised in the High Court at Bar, the learned judges had decided to address the said objection after the leading of evidence by the Prosecution. Accordingly, the learned judges in the judgment dated 19th December 2019 have reached the conclusion that the events relating to the charges are interconnected and do form part of the same transaction. The learned Judges of the High Court at Bar have rejected the aforesaid objection of the Appellants.

Let us now consider whether there is merit in this argument. The indictment against both Accused-Appellants contains 24 charges and we have already mentioned the charges and the sentence imposed by the High Court at Bar in this Judgment.

Out of the 24 counts in the indictment, counts 1, 2, 4, 5, 6, 7, 8 9, 10, 11, 12, 13, and 14 are against the 1st Accused Appellant; the counts 3, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 are against the 2nd Accused-Appellant. The charge in count 4 has been framed against both Accused-Appellants

Learned President's Counsel for the Accused-Appellants submitted that charges 1 and 2 are in respect of the alleged solicitation of a bribe of Rs. 450 million (USD 3 million) by the 1st Accused Appellant on or about 11th August 2016 whereas charges 4 - 24 are solicitation of Rs. 100 million as a bribe and acceptance of Rs. 20 million as an advance based on a conspiracy set out in charge 4 during the period between 05th September 2017 and 03rd May 2018 and the 3rd charge is for solicitation of a bribe of Rs 450 million by the 2nd Accused-Appellant on or about 05th September 2017. The learned President's Counsel therefore sought to argue that the purpose of soliciting Rs. 450 million in respect of charges 1 and 2 was to permit the virtual complainant to go ahead with the project whereas the purpose in relation to charge 4 which covers the charge of conspiracy between 1st and 2nd Accused-Appellants to solicit Rs. 100 million is different. It was on that footing that the learned President's Counsel for the Accused-Appellants submitted that while there is a common factor of soliciting a gratification, the element of community of purpose cannot be inferred by the same and the Prosecution lacks evidence to prove that there was continuity of action and community of purpose to enable them to lawfully join the charges on the basis that they had occurred in the course of the same transaction.

It is also to be noted that the learned President's Counsel for the 1st Accused-Appellant had submitted before the High Court at Bar that the test used to ascertain whether incidents fall within the same transaction is the test of Common Agreement (පොදු එකඟතාවය), which is not seen in the current instance. Accordingly, it was the position of the learned President's Counsel for the 1st Accused-Appellant that charges 1-2 and 3 cannot be joined with the rest of the charges. In other

words, the Accused-Appellants had claimed that charges 1 and 2, charges 3, and charges 4 - 24 do not fall within the course of the same transaction but fall under three separate transactions.

It is the contention of the 1st Accused-Appellant that although the objection was raised at the correct time in the Trial at Bar, the learned Judges had indicated that they would consider the same at the end of the trial, misdirecting themselves on the law. Thus, the learned President's Counsel complained that evidence which otherwise would have been inadmissible was permitted in by the trial Judges. It is therefore the contention of the 1st Accused-Appellant that the Accused-Appellants did not get a fair trial due to the above alleged lapse on the part of the learned Judges of the Permanent Trial at Bar.

Let us first reproduce below, the relevant sections from the Code of Criminal Procedure Act No. 15 of 1979.

Section 173 (Separate charge of separate offence)

> *For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 174, 175, 176 and 180 which said sections may be applied either severally or in combination.*

Section 175 (1) (Trial for more than one offence)

> *If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the High Court such charges may be included in one and the same indictment.*

Section 180 (All persons concerned in committing an offence may be charged together)

> *When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit; and the provisions contained in the former part of this Chapter shall apply to all such charges.*

The 1st count (under section 19(b) of the Bribery Act) alleges that on or about 11th August 2016 in Colombo, the 1st Accused-Appellant being a public servant, (Secretary to the Ministry of Land), solicited from K. P. Nagarajah (the virtual complainant) a gratification in a sum of USD 3 Million [SLR

450 Million], as an inducement or reward for - his expediting or delaying or hindering or preventing an official act - or for assisting or favouring or for hindering or delaying the transaction of any business with the Government - that is to say the act of giving unto him the machinery along with the entirety of the land and premises for the purpose of operating the Kanthale Sugar Factory. The 2nd count is for the same incident but framed under 19(c) of the Bribery Act and therefore the charge is silent about the purpose for which the alleged gratification was solicited.

The 3rd count (under s. 19(c) of the Bribery Act) alleges that on or about 5th September 2017 in Colombo, the 2nd Accused-Appellant being a public servant, (the Chairman of the State Timber Corporation), solicited from K. P. Nagarajah (the virtual Complainant), a gratification in a sum of USD 3 Mil [SLR 450 million].

According to the Respondent, the alleged solicitation has been made in respect of the same purpose, and the evidence led in the case too clearly shows that the alleged solicitation has been made in respect of the same purpose which is the act of giving the machinery along with the entirety of the land and premises for the purpose of operating the Kanthale Sugar Factory. This is evident from the fact that the 2nd Accused-Appellant had approached the virtual Complainant on 5th September 2017 to discuss at Water's Edge, the matter relating to the Kanthale Sugar Factory project and to inform the virtual complainant about the disappointment of the 1st Accused Appellant. They discussed the recent developments of the project. Although the only connection/standing that the 2nd Accused Appellant had in this event is his mere close friendship with the 1st Accused Appellant, evidence shows very clearly that it was the expectation of the 2nd Accused Appellant to persuade the virtual complainant that he should adhere to the solicitation of the gratification by the 1st Accused Appellant. The gratification solicited is for non-other than relating to affairs of the progress of operating the Kanthale Sugar Factory which falls within one and the same transaction.

The 4th count alleges between the 5th September 2017 and 3rd May 2018 in Colombo, the 1st Accused-Appellant being a public servant, (the Secretary to the Ministry of Land and the President's Chief of Staff) and the 2nd Accused Appellant, being a public servant, (the Chairman of the State Timber Corporation) agreed to act together with or without any previous concert or deliberation with the common intention for or in committing or abetting the offence of soliciting from K. P. Nagarajah, a gratification in a sum of SLR 100 million and the said offence was committed in consequence of the said conspiracy and they thereby committed the offence of 'Conspiracy'

punishable under section 25(3) of the Bribery Act read with section 19(c) of the Bribery Act. The incident in count 4 too was committed on the same day as charge 3 (5th of September 2017). Counts 4 - 24 are connected to the aforesaid conspiracy to solicit Rs. 100 million as a bribe and acceptance of Rs. 20 million as an advance based on the same. Indeed, according to the Prosecution, both the Accused-Appellants had been present when the advance of Rs. 20 million was handed over by the virtual Complainant at the car park of Taj Samudra Hotel.

While it is clear from the above facts that the charges in counts 4-24 can be joined along with the charges in counts 1-3 under section 175(1) and section 180 of the Criminal Procedure Code on the basis that they had occurred in the course of the same transaction, let us proceed to consider how our Courts have applied this principle in the past.

In ***Jonklaas vs Somadasa 43 NLR 284***, Wijeyewardene J took into consideration that the substantial test for determining whether several offences are committed in the course of the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. His Lordship then went on to hold as follows.

> *" …a community of purpose and a continuity of action which are regarded as essential elements necessary to link together different acts so as to form one and the same transaction."*

This was followed by Alles J in ***Don Wilbert vs Sub Inspector Chilaw 69 NLR 448*** where the accused was charged on two counts; the first count was for driving a vehicle in a negligent manner; the second count was for failure to report the said accident to the Officer-in-Charge of the nearest Police Station after driving the said vehicle on the said highway at the same time and place and after having met with an accident causing injury to another, an offence punishable under section 224 of the Motor Traffic Act.

In the case of ***The King V. Aman 21 NLR 375*** the Accused was prosecuted upon an indictment containing two counts, one for causing hurt to one Sena Abdul Cader, and the other for voluntarily causing hurt to one Cader Meera Saibo. The accused has had words with the man who is the subject of the second count (Cader Meera Saibo), pulled out a knife, and stabbed him. He then rushed along the street, which had several boutiques, and had seen Sena Abdul Cader at a place about thirty yards from the place where he committed the first offence. He had an altercation with him the previous day about some rice. The Accused reminded him of that occurrence and stabbed Sena Abdul Cader also. The two offences were committed in the same street, and the man who was

struck on the occasion of the second offence could see from where he was standing, the disturbance going on in which the first offence was committed. One of the two objections raised in the appeal was that these two offences could not be considered as a series of acts so connected together as to form the same transaction. In that case, Bertram C.J. holding that the acts were so connected together as to form the same transaction stated as follows;

> *"The real truth is that in all cases that question is a question of fact. The word " transaction," is defined in the Imperial Dictionary (which seems very closely to follow the definition in Webster) as " that which is done or takes place, an affair." Had the expression in our section been '' a series of acts so connected together as to form the same affair " there would have been no question as to the meaning. The word " transaction " does not necessarily mean something which takes place between parties. That is explained in the case of Drinecqbier v. Wood ([1899) 1Oh.Div.397.), where Byrne J., in interpreting a similar phrase under the English rules of procedure, instances the case of a traction engine proceeding along a highway and causing damage to a terrace of several houses. He says: " In the illustration suggested by the illegal use of a traction engine passing in front of them, each owner would have to prove his title to his house, but the other questions of fact and law would be common to all the owners, and I have no doubt that they could all sue in one action."*

In **Don Wilbert's** case the two offences that were joined, did not even take place between the same parties. The said incidents were joined on the premise that it was committed by the same person one after the other. The Court did not hesitate to treat them as a series of acts so connected together as part of the same transaction. In the instant case, not only are the incidents connected and interwoven together but have occurred in the same course of events following one other. Further, all those incidents had occurred between the same parties namely the Accused-Appellants and the virtual Complainant.

In regard to the instant matter, it is the view of this Court that there exists a common purpose that runs throughout the charges 1-2,3 up to 4-24 which purpose being the need to obtain a bribe and to scuttle and delay the process in order to apply pressure on the virtual complainant to pay the bribe. Further, it is evident that the 1st Accused Appellant has sought the assistance of the 2nd Accused Appellant to solicit the bribe from the virtual complainant. The Respondent has relied on the telephone records in establishing the same. The 1st Accused Appellant has made a call to the 2nd Accused Appellant even prior to the 2nd Accused Appellant contacting the complainant on 5th September 2017.

Following the incident on the 5th of September 2017, there had been three attempts to solicit a bribe i.e., on the 27th of February 2018, the 28th of April 2018, and the 03rd of May 2018. In all of the above three instances, the 2nd Accused-Appellant had been involved in facilitating the transactions. Further in all 5 attempts of solicitation (11/08/2016, 05/09/2017, 27/02/2018, 28/04/2018, and 03/05/2018) the purpose of the bribe was to expedite the process and/or grant clearance of handing over the land and machinery of Kanthale old Sugar Factory to the virtual Complainant and or to his company. Thus, the 2nd Accused-Appellant had throughout been involved in soliciting and aiding the 1st Accused-Appellant.

Further, it should be noted that although there was no telephone correspondence between the 1st Accused-Appellant and the virtual Complainant during the period August 2016 to September 2017, the subject file maintained at the 1st Accused-Appellant Ministry reveals the continuous correspondence between the 1st Accused-Appellant and the Complainant. The relevant correspondence has been submitted before court by Prosecution Witness No. 37.

Accordingly, by the letter dated 16th January 2017 produced marked P-70 it is evident that the 1st Accused-Appellant has sought the opinion of the Attorney General when the same was not required. According to the Prosecution, that was to delay the process. Further, letters produced marked P 67 dated 17th December 2016 and P 73 dated 10th February 2017 prove that the 1st Accused-Appellant had unduly delayed the handing over of the land. The letter produced marked P 75 dated 6th March 2017 further indicates that the 1st Accused-Appellant had once again sought instructions relating to the same issue; this too according to the Prosecution, was to willfully delay the progress of the process.

The Prosecution has also adduced the letters produced marked P-80A dated 8th June 2017, P 80 dated 9th June 2017, and P 83 dated 7th August 2017 to further indicate that the 1st Accused-Appellant had continued to delay the process.

On the other hand, the mere absence of telephone communications between the 1st Accused-Appellant and the virtual Complainant during the period August 2016 to September 2017 does not mean that the relevant parties terminated altogether, the solicitation process they had already started and commenced a fresh solicitation process. Such thinking is far-fetched. Moreover, even if it is so, it is by and large, for the same purpose. Therefore, the continuity of action and the community of purpose are remarkably present in the incidents described in the charges.

Accordingly, it is evident that while the process pertaining to soliciting the gratification had commenced on 11th August 2016 and ended only on 3rd May 2018 running through a time span little

over of 1 1/2 years, the 1st Accused Appellant has continued to pursue his aim of soliciting and accepting the gratification from the virtual Complainant throughout the said period with the involvement of the 2nd Accused Appellant also in the process, right through from 5th September 2017 onwards.

Therefore, there is lucid evidence to hold that the Accused-Appellants have acted with a community of purpose and continuity action linking counts 1-2 and count 3 with the rest of the counts (4-24), creating one series of acts so connected together as to form the same transaction. Therefore, we find the joinder of charges in the instant case to be lawful and there is no misjoinder as alleged by the Accused-Appellants.

Has the Prosecution proved "aliunde" that there were reasonable grounds to believe that two or more persons have conspired together to commit an offence? If not, was resorting to section 10 of the Evidence Ordinance lawful?

In count 04 of the indictment, the 1st and 2nd Accused-Appellants have been charged with the offence of conspiracy under section 25 (3) of the Bribery Act read with section 19 (c) of the Bribery Act as amended and section 113 A of the Penal Code. The said count is to the following effect,

> *"That on between the 5th September 2017 and 3rd May 2018 at Colombo, within the jurisdiction of this Court, in the course of the same transaction the* 1st Accused Appellant *being a public servant, i.e., the Secretary of the Ministry of Land and the President's Chief of Staff, and the 2nd* Accused Appellant *being a public servant, i.e., the Chairman of the State Timber Corporation agreed to act together with or without any previous concert or deliberation with the common intention for or in committing or abetting the offence of soliciting from K P Nagarajah, gratification in a sum of SLR 100 Million and the said offence was committed in consequence of the said conspiracy and they thereby committed the offence of "Conspiracy " punishable under s. 25(3) of the Bribery Act read with s.19(c) of the Bribery Act as amended by Acts No.2/1965, 38/1974, 9/1980 and s. 113A of the Penal Code".*

It is the contention of the 1st Accused-Appellant that the Prosecution has not placed before Court material *aliunde*, to prove that there were reasonable grounds to believe that the Accused-Appellants have conspired together to commit the offence described in count 4.

The 1st Accused-Appellant submits that the only evidence the Prosecution has submitted in this regard, are statements alleged to have been made by the 2nd Accused-Appellant to the investigating officers regarding discussions he is alleged to have had with the 1st Accused-Appellant. Accordingly,

the 1st Accused-Appellant submitted that these items of evidence are hearsay which would be made admissible only under section 10 of the Evidence Ordinance which is as follows.

Section 10 (Things said or done by conspirator in reference to common intention.)

> *Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.*
>
> *illustrations*
>
> *Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.*
>
> *The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Colombo for a like object, D persuaded persons to join the conspiracy in Kandy, E published writings advocating the object in view at Galle, and F transmitted from Kalutara to G at Negombo the money which C had collected at Colombo, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy and to prove A 's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.*

The 1st Accused-Appellant argues that prior to section 10 being applied, the Prosecution must prove *aliunde* that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence. It is the contention of the 1st Accused-Appellant that, in proving such reasonable grounds the statements to be relied on (under section 10 of the Evidence Ordinance) cannot themselves be taken as evidence for the existence of reasonable grounds; the said reasonable grounds should first be established in order to pave the way for the said statements to be admitted as evidence under section 10 of the Evidence Ordinance, and such evidence produced to establish the existence of reasonable grounds would also be considered as additional proof of conspiracy.

in this regard, the learned President's Counsel for the 1st Accused-Appellant has cited the case of ***Peiris V. Silva 17 NLR 139 at 141***. In that case, Perera J had observed as follows;

> *"It is manifest that these statements are no more than mere hearsay as against the first accused. They are by no means evidence against him. With reference to them the Solicitor-General cited section 10 of the Evidence Ordinance, but that section applies when it is first established aliunde that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence. The statements relied on cannot themselves be taken as evidence of the existence of such reasonable grounds. Such grounds must first be established in order to pave the way for the admission of the statements as evidence, and when so admitted they may be additional proof of the conspiracy."*

This question was further considered in the case of ***King V. Attanayake (1931) 34 NLR 19*** where His Lordship Lyall-Grant J observed thus:

> *"Taylor on Evidence (section 590) states that before any act or declaration of one of a company of conspirators in regard to the common design as affecting his fellows is led, a foundation should first be laid by proof, sufficient, in the opinion of the Judge, to establish prima facie the fact of the conspiracy between the parties, or, at least, proper to be laid before a jury, as tending to establish such fact. The connection of the individuals in the unlawful enterprise being shown, every act or declaration of each member of the confederacy in furtherance of the original concerted plan and with reference to the common* object is, in contemplation of law an act and declaration of all and this is evidence against each other.
>
> ……
>
> *This statement of the English law has, I think, exactly the same effect as section 10 of our Code. Taylor proceeds: -"Sometimes for the sake of convenience the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the case."*

In King vs. Attanayake, Lyall-Grant, J. emphasized the followings:

> *(a) the judge should decide in every case whether or not reasonable grounds exist to believe that two or more persons have conspired together to commit an offence or an actionable wrong;*
>
> *(b) in order to do so, the judge can be guided:*

(i) by the evidence already led which gives an indication that a conspiracy already exists; and

(ii) by assurance of the prosecuting counsel that he would at a later stage lead further evidence.

(c) the existence of a conspiracy need not be conclusively proved in order to render evidence admissible under Section 10.

In the instant case, the Prosecution has clearly established the existence of reasonable grounds to believe that the two Accused-Appellants have conspired together to commit this offence. It would suffice in this regard, to mention here that the Prosecution has produced three main independent evidence for the said purpose. Firstly, the telephone call records between the Accused-Appellants and the virtual Complainant; secondly, the video footage in which both Accused-Appellants are shown acting in concert; thirdly, the conversations that took place amongst the three as admitted by the two Accused-Appellants.

Moreover, the Prosecution has produced before this Court, a telephone call log showcasing how the two Appellants have been in continuous communication while the 2nd Accused-Appellant had been having independent conversations with the virtual Complainant. The telephone records submitted, show that the 2nd Accused-Appellant had contacted the virtual Complainant via telephone call in twelve instances (during the time period 24th February 2018 – 3rd May 2018)/ The telephone log reveals how the two Accused-Appellants have been in contact with each other either immediately prior to or subsequent to the 2nd Accused-Appellant's telephone conversation with the virtual complainant. The said records have been established in the High Court at Bar by Prosecution Witnesses No. 28 and 29 (witness from Sri Lanka Mobitel Co. and Dialog Axiata Co.). In addition to the above, the 2nd Accused-Appellant has in fact admitted the identity of the voices in the audio recordings to be of his, the 1st Accused-Appellant's and the virtual Complainants. This indicates the existence of communion and agreement between the two.

Further, the video footage submitted, and the evidence led by the Prosecution confirms the presence of both Accused-Appellants along with the virtual complainant during the meetings that had taken place in the run up to the solicitation of the bribe i.e., the meeting at Bread Talk and the meeting at Taj Samudra Hotel. The presence of both Accused-Appellants and the conduct of both Accused-Appellants during the said meetings have displayed them acting in concert to infer the existence of conspiracy. In addition to the above, there is evidence that the 1st Accused-Appellant requesting for a separate bag from the hotel waiter at Taj Samudra once he got to know that the

virtual Complainant had brought the money. This when taken together with the other events, leads to the inference that such request was made to separate the share of the 2nd Accused-Appellant.

Thus, taking all of the above factors into consideration and while keeping in mind the degree of proof required by the Prosecution is merely to establish a *prima facie* case of conspiracy, where a prudent man would feel reasonably convinced that a conspiracy exists, we are of the view that the Prosecution has satisfied the aforesaid threshold requirement.

For the above reasons, we hold that the Prosecution has proved *aliunde*, that there are reasonable grounds to believe that the two Accused-Appellants have conspired together to commit the offence of conspiracy permitting further evidence in terms of section 10 of the Evidence Ordinance. Therefore, we hold that the learned Judges of the High Court at Bar have correctly applied section 10 of the Evidence Ordinance in relation to the charge of conspiracy against each of the Accused-Appellants.

When the admissibility of voice recording was challenged at the time the prosecution sought to place such recordings before the Court as evidence, was it lawful for the trial judge to have differed taking a decision on the matter till the end of the trial? or in the alternative, Was it incumbent on the trial court to have conducted a voire dire inquiry into the matter and make a prompt ruling regarding the admissibility of the impugned voice recordings?

Was the procedure the trial judges adopted by deferring the decision on the admissibility of the Voice recordings, cause a miscarriage of justice?

On 13/11/2019 the Counsel for the Prosecution who appeared before the High Court at Bar sought to place the recordings (converted into a transcript) before the Court as evidence. The Counsel appearing for the second Accused-Appellant opposed the same stating that the person who prepared the transcript (in accordance with the voice recordings) was not called before Court as a witness and that he/she did not sign the transcript, alleging that the authenticity of the transcript is questionable. Further he submitted to Court that the impugned voice recordings are not clear and hence the transcript which was made based on such recordings cannot be used as evidence. On the same day, Court made a prompt order stating that, Court will make an order considering the objections raised by the Defence at the end of the trial and Court allowed to raise questions based on the transcript (which made in accordance with the voice recordings). In this order, Court observed that though some parts of the voice recordings were not clear, the Court cannot neglect

the entire voice recording. Further it was emphasized in this order that the Court will consider the objections raised by the Counsel for the Defence when it would analyze the evidence.

This question of law suggests that, in the alternative, it was incumbent on the trial court to have conducted a voire dire inquiry into the matter and to have made a prompt ruling regarding the admissibility of the impugned voice recordings.

In answering the same this Court need to consider voire-dire inquiries and their application. Despite a judge not being normally required to determine questions of fact before the final judgment, in certain selected occasions the judge is called upon to do the same, particularly when a disputed question of fact must be determined in order to decide whether an item of evidence should be admitted. On these occasions the judge alone determines questions of fact and may generally tend to hear witnesses in order to do so. This procedure is called a "trial-within-a-trail" or "voire-dire."

The procedure at a voire-dire inquiry usually involves various steps including objection being made when the evidence is to be called, and the judge then hearing the evidence before ruling on admissibility, unless the circumstances are exceptional. If the Accused has opted for a jury trial, the jury is normally sent out and the evidence is heard in its absence. Usually, evidence for both prosecution and defence is called. Witnesses are sworn on the voire-dire, not on the oath taken when giving evidence before the jury. Prosecution witnesses may be cross-examined without affecting the right to cross-examination in the substantive trial. The Accused may give evidence himself and may call witnesses on his behalf. When deciding the question of admissibility, the judge should then act on admissible evidence presented at the voire-dire inquiry.

As is evident, a voire-dire inquiry is a protracted procedure which may involve many steps to be followed and generally this procedure may be adopted in a preliminary examination to determine competency of a witness available in Court to give evidence. This is done merely to save time as the Court may decide the competency of a witness at the outset of the trial. However, in the present case though the learned Counsel for the Accused Appellants contended that the learned Trial Judges ought to have conducted voire-dire inquiry to decide the admissibility at the outset of the trial itself, it is our position that holding a voire-dire inquiry is not a sine qua non to decide the admissibility of evidence.

In the case of ***Halawa V. Federation Against Copyright Theft ([1995] 1 Cr App Rep 21, DC)*** of the Divisional Court of UK, it was held that,

> *"The duty of trial judge, on an application under voire-dire,* ***is either to deal with it when it arises or to leave the decision until the end of the hearing, with the primary objective***

being to secure is fair and just trial for both parties. *Thus, in certain cases there will be a trial within a trial in which the accused is given the opportunity to exclude the evidence before he is required to give evidence on the main issues but* ***in most cases the better course will be for the whole of the prosecution case to be heard, including the disputed evidence, before any trial-within-a-trial held."***

(Emphasis Added)

There are other occasions when a trial-within-a-trial is appropriate i.e., to determine the admissibility of tape recordings as held in ***R v Robson v. Harris, R v Harris (1972) 56 Cr.App.R. 450***. However, a trial within a trial may be appropriate if the issues are limited but not if it is likely to be protracted and to raise issues which will need to be re-examined in the trial itself. Hence, it is our considered view that the voire-dire inquiry is a trial within a trial and should be used in the appropriate circumstances. It is not to be used as a means of protracting proceedings, which would in such case defeat the very purpose of having a trial before a High Court-at-Bar. In the instant case, there was sufficient material in the form of submissions of both parties before the Learned Judges to decide the admissibility of the audio recordings at the time they allowed the prosecution to lead such evidence. Hence we hold that it was lawful for the learned Trial Judges to have differed taking a decision on the matter till the end of the trial.

Further, in the impugned order Court made the decision to allow/place such recordings before the Court as evidence due to the fact that the 2nd Accused Appellant on many occasions accepted the voice recordings and its content. The excerpt of the order of the Trial Court is as follows:

"එසේම චිත්තිය විසින් මෙම හඬපටය ලක් කරන කාරණය ඒ සඳහා පදනමක් පවතින්නේද යන්න සම්බන්ධයෙන් නඩුවේ අවසානයේදී තීන්දු කරනු ලබන අතර, එකී කරුණු වලට යටත්ව මෙම ප්‍රශ්න ඇසීමට ඉඩ ලබා නොදීමට පදනමක් අධිකරණය නොදකී. ඊට හේතුව වන්නේ මේ වනවිටද සාක්ශිකරු විසින්ම මෙම හඬවල් බොහෝ දුරට පිළිගෙන තිබීමයි."

The above can simply be translated to the effect that the trial court decided to determine whether the Voice Recordings are admissible evidence for the purpose for which they are led by the prosecution, at the end of the trial. In the meantime, the Court stated that they did not see any basis to disallow questioning based on matters pertaining to the Recordings for the reason that, at such time, the Accused had already admitted matters in the recordings to a large extent during the trial.

It must be noted that this decision was made after consideration of the fact that the evidence was already almost admitted by the accused during the trial. This court observes that the opinion and impression created in the mind of laymen in being faced with evidence is drastically different to that of Judges who consider and evaluate these matters with a judicially trained mind and ample experience. The Judges who were at the Trial-at-Bar have proceeded to hear evidence as they have been capable of distinguishing the difference between admissibility of the evidence as a whole, as opposed to leading evidence for the limited purpose of identity towards the end. The High Court Judgment has dissected the admissibility of this evidence based on identity, content, safe custody and the implication of the evidence and considered each segment on its own merit. As such, this court does not find that this evidence has tainted the decision detrimentally to the accused.

Based on the above, the decision made by the judges to answer the issue regarding the admissibility of voice recordings at the end of the trial is acceptable as doing otherwise would merely have protracted proceedings, which defeats the very purpose of the trial. Therefore, this Court observes that the learned Trial Judges have not erred in allowing the prosecution to lead the audio recordings in evidence in the course of the trial and that the procedure adopted by the trial judges in deferring the decision on the admissibility of the voice recordings has not caused any miscarriage of Justice.

Did the Magistrate have power/Judicial Authority to give voice samples to the Government Analyst? Was the compulsion of the Accused Appellants to give voice samples to the Government Analyst a breach of the rule against self-incrimination and did it cause a miscarriage of Justice?

A prerequisite to the steps of voice identification, particularly for the purpose of Spectrographic and Automatic Analysis is the taking of voice samples from a conversation conducted with the concerned party as well as samples from reading a transcript based on recurring words in the recordings. In furtherance of this aim, the learned Magistrate had made an order dated 5th June 2018 under Section 124 of the Code of Criminal Procedure Act in relation to obtaining voice samples from the 1st and 2nd Accused Appellants as well as the Complainant. The Counsel appearing for the Accused Appellant had objected to the order on the basis that the Magistrate did not have the power under Section 124 of the Code of Criminal Procedure Act to make such order. Having considered the objection, the Magistrate had rejected the same.

The High Court appears to have relied on the cases of **Ritesh Sinha v Uttar Pradesh, R v Suppiah** and **King v Francis Perera** in coming to the conclusion that the Magistrate was acting within their powers with the said order. This court is faced with two Questions in this regard; firstly,

whether the Magistrate had power/judicial authority to give voice samples to the Government Analyst, and secondly, whether the compulsion of the Accused Appellants to give voice samples to the Government Analyst amounts to a breach of the rule against self-incrimination and thereby caused a miscarriage of Justice.

Section 124 based on which the Magistrate's order has been issued is as follows:

> *"Every Magistrate to whom application is made in that behalf shall assist the conduct of an investigation by making and issuing appropriate orders and processes of court, and may, in particular hold, or authorize the holding of, an identification parade for the purpose of ascertaining the identity of the offender, and may for such purpose require a suspect or any other person to participate in such parade, allow a witness to make his identification from a concealed position and make or cause to be made a record of the proceedings of such parade."*

In terms of the above, the Accused Appellants argue that the scope of this provision is restricted to the purposes of empowering the Magistrate to hold identification parades, as supported by the fact that the only amendment made to this section pertains to the conduct of such identification parades. Further, it is the position of the Accused that this is supported by Section 123 and the amendments thereof.

Section 123 as amended states,

> *"(1) Where any officer in charge of a police station is of opinion that it is necessary to do so for the purpose of an investigation, he may cause any finger, palm or foot impression or impression of any part of the body of any person suspected of the offence under investigation or any specimen of blood, saliva, urine, hair or finger nail or any scraping from a finger nail of such person to be taken with his consent.*
>
> *(2) Where the person referred to in subsection (1) does not consent to such impression, specimen or scraping being taken, such police officer may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order authorizing a police officer to take such impression, specimen or scraping and such person shall comply with such order.*
>
> *(3) Any officer in charge of a police station may, where it is necessary for the purpose of the investigation to compare any handwriting, cause a specimen of the handwriting of any person to be taken with his consent.*

(4) Where such person refuses to give a specimen of his handwriting the officer in charge of the police station may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order requiring such person to give a specimen of his handwriting, and such person shall comply with such order."

The Accused Appellants claim that the entry of "blood" to sub section (1) above by Section 3 of the Code of Criminal Procedure (Amendment) Act No 14 of 2005 supports the position that should the Act empower the magistrate to order the taking of voice samples, the same would have been included in express terms as was done in 2005. As such, they argue that the lack of express authorization is an implication of intentional exclusion of this authority.

However, in interpreting the above provision it is rather apparent that all specimen, impression or scraping; finger, palm or foot impression, impression of any part of the body, specimen of blood, saliva, urine, hair, finger nail, any scraping from a finger nail, or handwriting of any suspect, all relate to identification of the suspect in the course of an investigation, by comparison of samples found in relation to the relevant offence at the scene. As such the purpose of the voice samples directly corresponds to such purpose.

Most importantly, Section 124 in essence provides for the Magistrate to "assist the conduct of an investigation by making and issuing appropriate orders and processes of court" while the portion allowing for the conduct of identification "...and may, in particular..." simply indicates that the Magistrate can also hold or authorize the holding of identification parades "for the purpose of ascertaining the identity of the offender."

Interpretation of this section at such face value does not provide any assistance to crime investigations . Firstly, it must be noted that the primary purpose is not only holding identification parades but rather to provide judicial assistance for the conduct of investigations using the powers vested in the Magistrate to issue processes of court, which is a power neither lightly granted, nor vested in the investigators themselves. As such, this provision allows providing such assistance not provided for under the preceding provisions, to assist identification of suspects. The provision for identification parades is therefore rather an extension of this same power rather than a restriction of it.

The High Court at bar has also considered Section 7 of the Act which states

As regards matters of criminal procedure for which special provisions may not have been made by this Code or by any other law for the time being in force such procedure

> *as the justice of the case may require and as is not inconsistent with this Code may be followed.*

Considering the above, the taking of voice samples is indeed a procedure which the Code nor any other law expressly provides for, however as discussed above, it is in no way inconsistent with the Code and is aimed at achieving justice as is required in the instant case.

However, the Accused Appellants raise a secondary question whether the above order to provide evidence would potentially incriminate them on positive identification would amount to a violation of the rule against self-incrimination. The Evidence Ordinance Section 120(6) on Competency of witnesses provide that the accused shall be a competent witness in his own behalf, accordingly, the accused cannot be compelled to provide evidence against himself.

In Sri Lanka, this has been tested previously in ***Rex v Suppiah (1931) Cey. Law Recorder 31***, where the accused was compelled by an order of the Magistrate to provide impressions of fingerprints, which cited an observation made in a case before a Full bench of the High Court of Burma, ***King Emperor v Tun Hlaing (1923) I.L.R. 1 Ran. 759, F.B.*** wherein it was remarked that:

> *"The Court was not in effect compelling him to provide evidence against himself, since what really constituted the evidence, viz, the ridges of his thumb, are not provided by him any more than the features of his countenance"*

Further the case of **King v. Francis Perera 9 NLR 122** was cited, wherein a sample of handwriting was taken on an order of the Magistrate. In this instance, Middleton J was of the following view,

> *"It seems to me that the writing of these words and letter was merely the creation of facts, which standing alone were of no probative value, but which, when coupled or compared with some other facts in the case, might suggest an inference one way or the other, and until that comparison or conjunction was made, no inference arose."*

The above view was concurred by Wendt J who stated thus:

> *"They are not, the embodiment in language of any facts or opinions. The mere fact that they suggest an inference of guilt is not enough"*

In considering the instant case in light of the above, it is apparent that providing samples of his voice in conversation and via reading a transcript does not by itself amount to a confession and is merely a matter of providing a sample of the characteristics inherent to a person's voice, as opposed to posing questions in regard to the contents of the conversations at such stage of investigation. The

evidence of the recordings is of relevance at the comparison of the samples and on arriving at a conclusion as to identity of the suspect. It is primarily of relevance that certain communications, of whatever content, were constantly recurring between the parties at hand. The providing of voice samples to arrive at conclusions on scientific basis is a discovery of relevant fact and does not amount to a confession in the sense of violating rule against self-incrimination. To interpret it in such manner negates the functionality of Sections 123 and 124 as has been utilized since the enactment of these provisions. In the instant case this evidence is solely of corroborative value.

As neither of the above circumstances pertain to Voice Samples, the case of ***Ritesh Sinha v State of Uttar Pradesh (2013) 2 SCC 357*** cited cases including that of ***State of Bombay v Kathi Kalu Oghad (1961) AIR 1808*** in which the following observations were made by the then Chief Justice B.P Sinha:

> *"…Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge.*
>
> *In order that a testimony by an accused person may be said to have been self- incriminatory, the compulsion of which comes within the prohibition, of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if riot also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable..."*

Applying the above to the instant case, the compelling of the accused to provide voice samples cannot be considered self-incriminatory as it does not make the case against the accused probable by itself, rather it is used upon positive identification only in conjunction with other reliable evidence against the accused. Accordingly, the provided voice samples do not amount to a confession and is not self-incriminatory in nature. It is simply the process whereby facts pertaining to the identity of the accused can be ascertained.

Additionally, the Accused Appellants in their submissions raised a question of the compulsion to provide voice samples being a violation of the rights of the Petitioner. However, as in the **Ritesh Singh** case, in the specific context of the instant case, the position in Sri Lanka is that the right to privacy cannot be construed as absolute. The suspect under investigation must bow down to compelling public interest and the Magistrate's power to order him to give a sample of his voice for the purpose of investigation of a crime. Such power has been conferred on a Magistrate in order to exercise his jurisdiction vested in him under the aforementioned provisions of the Code of Criminal Procedure Act.

Considering all above, it is the opinion of this court that the Magistrate had power to give voice samples to the Government Analyst and the compulsion of the Accused Appellants to give voice samples is not a breach of the rule against self-incrimination nor has it caused a miscarriage of Justice or violation of their rights.

Is "Voice Analysis" in the manner conducted by Witness Gunathilaka, Assistant Examiner of Questioned Documents of the Government Analyst Department a "Science"?

It must be noted that this question of law at hand is not solely whether Voice Identification itself is a science, but rather whether the Voice Identification in the manner conducted by Witness Gunathilaka qualifies it as a science.

Since the question whether witness Gunathilaka is an expert in Voice Identification has been dealt with, we may consider the circumstances under which the evidence of this witness becomes relevant to the instant matter. As per Section 45 of the Evidence Ordinance, opinions of experts are relevant in certain instances. It is as follows:

> *"When the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant.*
>
> *Such persons are called experts. "*

Accordingly, an expert is a "person specially skilled in such science." The Accused Appellants have stated in their Written submissions that by the exclusion of any reference to "voice" in the above provision, the legislature never intended to provide for matters of Voice Identification. As has

been observed in the Judgment of the High Court, it must be noted that this provision was enacted in 1895. It is rather apparent that the science of "Audio Forensics" was not developed at the time of enactment of the Evidence Ordinance. Despite a lack of substantial amendments, this provision is still operable on the basis that the provision does not restrict the interpretation of what may amount to a science or an art, thus leaving room for the evolution of the same based on available technology, modern developments with the passage of time. The approach of courts has been aptly demonstrated in ***Singho Appu v the King (1944) 46 NLR 49,*** which stated thus;

> *"… "Science" and "art" in section 45 of the Evidence Ordinance are to be construed widely"*

It must also be noted that all areas of expertise expressly provided for in this provision pertain to the ascertainment of identity through the use of science. This has been the basis for leading evidence on many other matters of which expert evidence is admissible in Sri Lankan Courts, that solely fall within the ambit of "science", despite lack of direct mention in Section 45.

Further, as per illustration c of Section 45,

> *"The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinion of experts on the question whether the two documents were written by the same person or by different persons, are relevant."*

In terms of the above illustration, it is apparent that Section 45 stands to provide for expert evidence on identification. In the instant case, the evidence of the Expert Witness has only been used by the High Court to establish that the speakers in the recorded conversations were in fact the Accused Appellants. It appears that the question whether the voices of the speakers in the recordings as stated by the Complainant were the same voices of the Accused Appellants as per the voice samples provided by them. It is rather similar to the question whether the handwriting is of the same or different persons as raised in the illustration above. Considering all, in the event Voice Identification is considered a science in the manner conducted by the Expert Witness, expert evidence of the same is admissible under Section 45 of the Evidence Ordinance.

In the matter of assessing whether Voice Identification in the manner conducted by the expert witness is a science, the factor of whether the procedure followed during analysis is 'scientific' is of relevance. The High Court considered the fact that Voice Identification has been a developing area of research in Forensic science which has been evolving since World War II. The understanding behind this area of research has drastically evolved since its early days leading to higher levels of accuracy and many more available reliable methods to achieve its objective. The Witness has

explained how technological advancements have brought format comparison on par with DNA and handwriting analysis.

As already discussed in this Judgment, prosecution in the instant case had heavily relied on the identification of the two Accused-Appellants through their voice, and as already referred to above, PW 41 Dulani Lalithya Gunathilake testified before the High Court at Bar regarding her expertise on the matter and her findings with regard to the examination conducted on the voice samples submitted before her.

The High court Judgment reproduces at length, the basis of such analysis as described by witness Gunathilake in her evidence and the process utilized to analyze the impugned recordings. Witness Gunathilake in her evidence states specific factors considered in Voice Identification.

The witness described the physiological process through which voice is produced and perceived by a human being. This has been done to explain how this field is being treated as a science. A voice is produced by a stream of air starting at the lungs and moving through the larynx vibrating the vocal cords in it. The vibrations are released as sound waves. The sound waves would differ on factors such as the thickness of the walls of the larynx, the length of the vocal cords, their shape, and the amount of air that flows through it. The sound waves that take different shapes on the above factors would be reflected as 'formants' in the analysis.

The witness also explained that there are four formants in the Human Voice (Named 1,2,3 and 4) Out of the above four formants, the human ear can only perceive the 1st and 2nd formants. The 3rd and 4th formants out of the above are unique to each individual just like handwriting and DNA and is not affected by imitation. The witness explained that the analysis of the above formants is therefore accepted as a science.

In terms of the steps involved in the scientific analysis as conducted by the witness, the steps as described were firstly that of "Critical Listening". Critical Listening is explained as a focused form of listening where small segments are listened to repeatedly. Qualities such as primary frequency, pitch, volume, duration of periods of silence of the speaker, speed of speech, dynamics, the stress put on words/ enunciation of words, accent, words frequently used by the speaker, geographical variations in speech, and stammering are perceived and analyzed at this stage. As explained a voice sample is listened to over one hundred times and Spectrogram Analysis is also conducted to identify the 'formants' in the voices at this stage.

The Second Step is the extraction of voice samples from the individuals in question. Having a normal conversation with the subjects is done first in this process. While basic aspects of the voice are

checked, the subjects are later given a transcript to read out. The transcripts are extractions from the recordings that are produced for analysis. The portions from the transcripts are compared with the same portions of the questioned recordings when doing the formant analysis.

The witness further opined that the next expected development in this field would be “automatic comparison.” Even though such a software is used nowadays during the course of analysis, it is said not to be accurate enough to express an opinion based on that alone, Therefore the comparison is not solely based on the automatic analysis giving a margin for errors. The final comparison results are also subjected to review. The witness also explained how her report, in this case, has been subjected to review and agreed upon.

In addition to the above, she has stated that she has taken care to observe any background noises that would affect the analysis. Other factors considered had included whether the voice provided for analysis is a computer-generated voice which is evaluated during the Critical listening stage and through observations done during this phase and she was satisfied that no editing has been done.

The witness has discussed the extraction process of the recordings and the obtaining of the voice samples from witness which will be considered in due course in the analysis of the relevant questions of law. In Cross examination, she was extensively questioned on the validity of the Spectrographic analysis, to which she provided substantial responses with an explanation to the effect that the Spectrographic approach is supplemented by Critical Listening, automatic analysis, and review.

In terms of Audio recorded Evidence and Identification of an accused by voice, such evidence has been admissible in Sri Lanka for well over half a century. The High Court cites and relies on the Case of ***Abu Bakr v The Queen (1953) 54 NLR 566***. In this case, the prosecution adduced evidence to the effect that the incriminating speech in question, which allegedly attempted to promote feelings of ill-will and hostility between different classes of the King's subjects, was electronically recorded, and subsequently reproduced, by means of an instrument and that when it was reproduced it was taken down in writing by an officer of the Criminal Investigation Department, named Wijesena, and that the document containing the text of the speech as taken down by him. The said Wijesena gave evidence, identified the document, and read it aloud to the jury. One of the grounds of appeal is that this document was inadmissible. In this case, an element of Voice Identification was discussed. Gunasekere J considered the evidence reproduced by electronic means to be admissible under S.11 of the evidence Ordinance under the below premise:

"There was evidence before the jury, about the working of the wire recorder, upon which it was open to them to hold that the instrument could accurately record a speech and reproduce it; ….

The police sergeant who had operated the instrument at the time of the speeches gave evidence to the effect that it was he who operated it later to reproduce the sounds recorded on P1 so that Wijesena might take down the appellant's speech as reproduced; ***and that he identified the appellant's voice on that occasion. Another police sergeant, too, gave evidence to the effect that he was present on both occasions and that he too identified the voice that was reproduced as the voice of the appellant.***

The speech that is alleged to have been reproduced in Wijesena's hearing by means of the wire recorder is a fact that, in connection with the other facts alleged by the prosecution witnesses regarding the making of a speech by the appellant and the recording and reproduction of it, makes it highly probable that the appellant made a speech in the same terms on the occasion in question. Therefore, if it is not a fact that is otherwise relevant, it is relevant under section 11 of the Evidence Ordinance; which provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence of any fact in issue or relevant fact highly probable. ….. Therefore, even if the document itself was inadmissible there was before the jury admissible oral evidence of what was heard by Wijesena, from which they could infer what was said by the appellant and was recorded on the spool of wire P1.

As such the use of voice recording for the purpose of identification of an individual is not entirely a foreign concept to Sri Lankan Courts. The above case was cited for further discussion of this matter in the case of ***Karunaratne V. The Queen (1966) 69 NLR 10*** concerning a wire recording of a telephone conversation in which the police accused a solicitation of a bribe as inducement for the performance of an official function. The evidence was to be led in the form of the transcript of this conversation, however, the original recording itself was played in court. Hon. Justice T. S. Fernando, J observed:

"It was next urged on behalf of the appellant that, before the tape- recorded evidence was acted upon, the trial judge should have considered the evidence of an expert the defence called at the trial to prove, inter alia, that (1) there are dangers in attempting to identify speakers by their voices as relayed through tape-recorders and (2) the dangers attendant upon such identification are greater in a case where what is relayed is a telephone

conversation, and that too a taped telephone conversation. I think the criticism made in this regard is just."

However, the omission of the same was not fatal in the above case owing to ample surrounding evidence to substantiate the charge, as the Judges believed the wire recorded evidence was relevant principally as corroborative evidence touching identity. As evidence was led extensively on the matter of the margin of error in voice identification as well as the actual risk of using the evidence, we find that the circumstances mentioned in **Karunaratne** case do not apply against the admissibility of the recorded evidence in the instant case.

However, both law and science have developed exponentially since the above decisions. The above cases referred to witnesses simply identifying a suspect by voice and did not delve into determining the admissibility of evidence as a science nor consider expert evidence based on the same. Accordingly, the evidence of Voice Identification has predominantly been used in the past where the witness is familiar with the voice of the perpetrator.

Thus, in discussing whether the methodology used in the instant case is recognized in courts of law as a "Science", we may turn to available research and determinations in other Jurisdictions.

In terms of available research, in delving into the development of this field of science visible speech as a quantitative and legible form of speech was propounded by Melville Bell, and continued by his son, Alexander Graham Bell, and was furthered by the efforts of Bell Telephone Laboratories. The development of this technology was initially for the benefit of the deaf community, but the use of the Spectrograph and related technology was later rated a war project given the military interests in this technology. The technology of "voiceprints", coined with obvious reference to fingerprints, for the purpose of Voice Identification was furthered during this time and was later controversially used in forensic applications by engineer Lawrence Kersta. Others soon discovered that context dependence is important to perform identification and an aural perspective was suggested to increase the accuracy of identification, which has been supported by research subsequently. Accordingly, the development of the methodology as it stands today predominantly focuses on the use of four general approaches including the Auditory Approach, the Spectrographic approach, the Acoustic-phonetic approach, and the Automatic Approach.

In determining whether the utilized procedure is scientific, the High Court has relied on that of ***Daubert v Merrell Dow Pharmaceuticals Inc. 509 U.S. 579***. This case was preceded by the case of ***Frye V. United States, 293 F. 1013 (D.C. Cir. 1923)***, which had set the standard of admissibility of

expert opinion based on a scientific technique. In determining the admissibility of novel scientific evidence, it was famously stated that:

> *"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery,* ***the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs"***
>
> *(Emphasis added)*

This above "general acceptance test" was applied in determining the admissibility of expert evidence on spectrographic voice identification in many instances, including that of ***US v Smith 869 F.2d 348 (7th Circuit 1989)***. In this instance, the court was faced with a unique situation of identical twins who had committed financial fraud. The women were indicted and tried together for posing as bank employees and having telephoned banks authorizing them to make wire transfers of non-existent funds. Given that identity was a core dispute at the trial the government had led evidence provided by a Voice Identification Expert who utilized the Spectrographic approach to determine which of the twins had made certain phone calls. It was argued on behalf of the defence that Voice Identification did not pass this test of general acceptance. However, based on sufficient evidence of the reliability of this technique being adduced at trial by a description of the principles behind and the technique used to make spectrographs, as well as the technique being unlikely to mislead the jury, The evidence was held to be admissible.

However, in the case of ***Daubert V. Merrell Dow Pharmaceuticals Inc. 509 U.S. 579*****,** as has been relied on by the High Court, it was held that, faced with expert scientific testimony, the trial judge, must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at hand. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable rules.

While it is specified that this is not an exhaustive list, the considerations therein mentioned are sound in assessing whether the scientific method is sound, beyond simply the "General Acceptance" test of Frye.

In the instant case, the Witness has provided information as to the above. She has expounded on the acceptance of this science within the relevant scientific community of Forensic Audio Analysis, and the methods utilized are supported by current scientific findings in this field of science. Additionally, the software and devices used and their acceptance as suitable for the purposes used, and she has provided a clear answer as to the margin of error and potential risks, including the methods used to mitigate errors as far as possible through using a combination of multiple standard methods. As has been aptly noted, the inquiry is a flexible one wherein the methodology used in each science must be considered for its own merit as opposed to a strict checklist to be satisfied. The expert witness has conducted this examination with careful attention on the process and has not hesitated in indicating instances where she could not give conclusive answers, giving her reasoning for such instances. Additionally, her findings are not merely her own, but have been reviewed and approved by competent individuals in her department.

In terms of the error rate, a hundred percent infallibility or unanimity is not a precondition for general acceptance of scientific evidence under our law. Allowing for substantial technological advancement since the decision in the case of ***U.S. Vs. Smith (Supra)*** in terms of the Spectrograph analysis alone as it was in that time, the error rates as admitted and discussed in that case, prove that there is a certain margin of error as has been elaborated by numerous studies. However, it is also mentioned that many difficulties encountered in Voice identification using tapes not recorded under laboratory conditions will increase the error rate of false eliminations. As such, instead of results in more false identifications, these variations would result in more false eliminations, doing away with prejudice that may be caused to the accused by the conditions of the recording.

In the instant case this is assisted by the element of the accent and speech style of the two accused, in speaking in English which is not in fact their first language. The 2nd Accused has admitted that he is not particularly comfortable or well versed in speaking English, which amounts to his individual speaking style and accent being much more so pronounced as opposed to comparing the samples of persons whose style and manner of speaking would be easier to replicate. As in **Archbold** on **Criminal Pleading Evidence and Practice 14-72**, on Expert Evidence of Voice Identification by personal characteristics, the advantage of expert evidence is that the expert can draw up an overall profile of an individual's speech patterns, in which the significance of each parameter is assessed individually, and which will be backed up with instrumental analysis and reference research.

Additionally, admission of evidence of novel sciences for the purposes of identification is not a foreign experience for Sri Lankan Courts. For instance, the leading of evidence as to identification through DNA typing and fingerprints in the ***Sajeewa Alias Ukkuwa and Others V. The Attorney-General (Hokandara Case) (2004) 2 SLR 263*** as early as 1999 made history as the first case to consider DNA evidence in Sri Lanka. Thereafter, the use of DNA evidence as corroborative evidence in the case of ***The Attorney-General V. Potta Naufer and Others (Ambepitiya Murder Case) (2007) 2 SLR 144,*** with extensive elaboration of the methodology and science supporting the use of DNA typing, are both instances of leading expert evidence for the purposes of identification. Given the technological advancement, especially with the use of personal devices as smartphones and personal computers, the outlook on technological evidence must be altered significantly, making room for modern realities which could not have been contemplated by legislators at the time of the enactment of certain legislation effecting such evidence. It is evident that the evolution of technology has outpaced the parallel development of law, and oft it has been demonstrated in cases as the above, that practical necessity being demonstrated in cases, leads to the opinions of courts preceding and influencing eventual legislative amendments encompassing such opinions.

The identification of individuals, earlier being a selected few methods has undeniably advanced during the current millennia. For instance, the development of biometric technology for identification, including methods as facial and retinal recognition, have drastically increased in accuracy.

However, in terms of legal admissibility of evidence based on novel sciences, it is entirely dependent on factors that include those considered above and is undeniably subjective to each individual circumstance, the science concerned, the specific methodology used, and the error margin involved. In the instant case, applying all the above tests and taking the expert evidence into account, with due regard to the methodology used in this specific circumstance, we find that “Voice Analysis” in the manner conducted by Witness Gunathilake, is in fact a “Science” which falls under Section 45 of the Evidence Ordinance.

Was it correct for the trial court to have concluded that Witness Gunathilake of the Government Analyst Department was an “Expert” on “Voice Identification” for the purposes of S.45 of the Evidence Ordinance?

In considering the question of whether Witness Gunathilake is an expert in the field of Voice Identification, her credentials which have been admitted during the examination of the witness before the High court are noteworthy.

She has performed over sixty voice analysis and issued Analyst Reports for similar purposes albeit never having testified before court prior to this occasion. She was functioning in the capacity of Assistant Government Examiner of Questioned Documents and had listed her basic qualifications. In respect of qualifications in the area of Forensic Audio Analysis, she has specialized in this area during the training she received through a project conducted by KOICA Institute (Korea International Cooperation Agency) through which she has participated in a training conducted by four senior scientists at the National Forensic Service (NFS) situated in Wongju, South Korea. Thereafter, a further training was provided on her return to Sri Lanka. The witness explains that the equipment required for this form of testing was donated by KOICA and that she is the most senior officer in regard to Audio Forensic Analysis in her Department and has provided reports since 2017.

In terms of who may qualify as an expert, the High Court has relied on the definition provided by **Black's Law Dictionary** as

> *"Someone who, through education or experience, has developed skill of knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder"*

And "expert evidence" as provided by the same source is as follows:

> *"Evidence about a scientific, technical, professional or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field"*

In the case of ***Charles Perera V. Motha 65 NLR 294*** Hon. Basnayake, C. J. expressed his opinion on the expert witnesses to the effect that:

> *The standing of the expert, his skill and experience, the amount and nature of the materials available for comparison, the care and discrimination with which he has approached the question on which he is expressing his opinion, the extent to which he has called in aid the advances of modern science to demonstrate to the Court the soundness of his opinion, are all matters which will assist the Court in assessing the weight to be attached to the fact of his opinion. The cross-examination of the " expert " by the opposing side, where it is properly directed, would also assist the Court in determining what weight it should attach to the fact declared relevant by section 45.*

Additionally, in cases such as ***Solicitor General V. Fernando 1965 67 NLR 159*** it was considered that the precise character of the question upon which expert evidence is required has to be taken into account when deciding whether the qualifications of a person entitles him to be

regarded as a competent expert. In the situation at hand given that the witness is the expert on Audio Analysis in Sri Lanka and the character of the question pertains to Voice Identification, which is an area she has received special training in, she qualifies as an expert in the instant case on the questions directed to her.

Her credibility is in no way affected by the lack of previous appearances before a court of law. As considered in ***Mitharadasa Fernando V. S.I of Police, Kalubowila 1961 63 NLR 422*.** The fact that a person has provided evidence as an expert 250 instances prior, does not qualify him as an expert in the subject matter. Further, as per ***Stork I.P Vs. Perera (1948) 38 C.L.W 80*,** once the necessary degree of skill is conceded it does not matter how seldom that skill has been displayed in the witness box. Accordingly, the real expertise, training and methodology utilized by the witness is of more important than the number of times a person may or may not have testified before court. This was considered in the field of Voice Identification in the US 7th Circuit Court in ***US V. Smith 869 F,2d 348 (7th Cir.1989)***, in leading evidence of an expert who had not previously testified as a voice identification expert in a court of law.

The expert evidence of novel sciences is a question posed to Courts even during cases as ***Singho Appu V. The King (Supra)*** in which expert evidence was led regarding footprints, Hon Howard, C.J, considered that;

> *"Here again the testimony against the accused did not rest solely on the evidence of foot-prints… it would appear that the learned Judge in the present case was entitled to construe the words "science" or "art" so widely as to include within its ambit the testimony of a person who had studied foot-prints. If he was satisfied that such person was capable of distinguishing and identifying foot-prints, he was also entitled to rely on his testimony"*

In such cases, it was made apparent that in addition to the wider construction of Section 45, evidence of such science or art can be admitted if the Court is satisfied that the person testifying regarding the same is a person capable of distinguishing and identifying matters of such nature,

Applying the same to the instant case, in perusing the material before this court I find that the Witness has received requisite training and is competent in the field in which she professes to be an expert and she has continually practiced the same in previous instances albeit never having testified before court on the same. The witness has provided extensive and clear answers to the questions posed to her in her area of expertise in addition to a clear report of her investigation. She has expressed the basis of her having formed opinions with direct reference to the methodologies utilized by her in the conduct of her investigation. Further, she has not hesitated in answering with

clarity of the instances she could not deduce any matter with certainty. The witness has maintained a professional demeanor, standing firmly in cross examination and has presented her opinion with great confidence in an unwavering manner. The cross examination has not revealed any matters fatal to her findings nor refuted her position through other expert evidence.

For the reasons stated hereinbefore we hold that it is correct for the trial court to have concluded that witness Gunathilake of the Government Analyst Department is an "Expert" on "Voice Identification" for the purposes of S.45 of the Evidence Ordinance.

What amounts to "Safe Custody" as per Section 4 (1)(d) of the Evidence (Special provisions) Act? Were the Voice recordings in "Safe custody," when the recorded conversations were in a mobile phone, which was in the custody of the virtual Complainant? Has the fact that the voice recordings were in the custody of the Virtual Complainant, resulted in the recordings becoming inadmissible?

Information stored on digital devices can pose a number of evidential issues for the courts. This is largely given that rules of evidence contained in the Evidence Ordinance evolved long before the advent of modern electronic equipment and computers, and those rules have not always proved adaptable to evidence emanating from such modern devices. This has necessitated the introduction of legislation with a view of facilitating the proper use of such evidence. The Evidence (Special Provisions) Act No. 14 of 1995 has been enacted in Sri Lanka to provide for the admissibility of audio-visual recordings, and of information contained in statements produced by computers in civil and criminal proceedings.

Section 3 of the Evidence Ordinance has confined its definition of "evidence" to oral and documentary evidence. However, despite the non-inclusion of real evidence within the definition of "evidence" in Section 3, our courts have admitted real evidence also. The introduction of the Evidence (Special Provisions) Act No. 14 of 1995, has now enabled a party to produce in any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording or reproduction thereof. (Section 4 (1) of the Act).

Section 4 (1)(d) of the Evidence (Special Provisions) Act reads as follows,

> *"In any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording reproduction thereof, tending to establish that fact shall be admissible as evidence of that fact. If it is shown that-*

a) .....

b) .....

c) .....

*d) the recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction, or that it was **kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which It was in such custody.**"*

(Emphasis added)

There was no dispute that the voice recordings relevant to the instant case is a contemporaneous recording in terms of Section 4(1) of the Act. This is presumably because the said voice recording was recorded using a mobile phone.

The main thrust of the arguments put forward by the Accused Appellants is whether the voice recordings were in safe custody while in the possession of the Virtual Complainant. Section 4(1)(d) of the Act (above mentioned) is relevant in this regard.

Safe Custody is the safekeeping of important documents and valuables, in the instant case, the voice recordings. It is important to maintain the chain of custody to preserve the integrity of the evidence and prevent it from contamination, which can alter the state of the evidence. If not preserved, the evidence presented in Court might be challenged and ruled inadmissible. The chain of custody in digital forensics can also be referred to as the forensic link, the paper trail, or the chronological documentation of electronic evidence. It indicates the collection, sequence of control, transfer, and analysis. It also documents each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer.

In order to preserve digital evidence, the chain of custody should span from the first point of data collection, through examination, analysis, reporting, and the time of presentation to the Courts. This is necessary to avoid the possibility of any suggestion that the evidence has been altered or tampered with, in any manner. While it may have been handled correctly during the forensic process, if the evidence is then handed to the Court in a way that then leaves it open to alteration, perhaps by altering the timestamps or metadata associated, it may then be damaged. Hence it is important to establish that the recordings were in safe custody at all material times and that sufficient precautions were taken to prevent even a mere possibility of tampering in order to ensure

the authenticity of the recordings. In the instant case, the chain of custody pertaining to the persons in whose possession the evidence was kept, it can be observed that the chain of custody has not been broken as the recordings were constantly in possession of the Complainant until it was handed over to the Government Analyst and there have been no third-party interferences.

The Virtual Complainant has recorded multiple telephone conversations which had taken place between the 1st and 2nd Accused-Appellant and himself during the years 2017-2018 on his two mobile phones (iPhone 6 and iPhone 7). The issue raised by the Accused Appellants is that the alleged mobile phones used to record the conversations had not been tendered to the investigators and that the Complainant traveled to Bangalore, India with the mobile phones in his possession. Therefore, the Accused Appellants argue that they were not in safe custody when they were in the possession of the Virtual Complainant.

As per the Complainant's explanation, this was because he was a businessman and needed the use of the said mobile phones for his day-to-day activities. The Complainant admits that he did not hand over the said mobile phones to the investigators but had directly handed them over to the Government Analyst much later. In the meantime, he had traveled to India several times while possessing mobile phones in his custody and had copied all the recordings onto his computer in Bangalore. He further admits that he had retained custody of the phones for 5 days before the recordings made on 23/02/2018 were copied to the computers of the investigators and for over 5 months before the recordings made on 05/09/2017 were copied to the computers of the investigators.

As per the evidence submitted, the Accused Appellant argue that the said mobile phones had been handed over temporarily to the Government Analyst much later on 17/05/2018 and the same was not sealed. It is the contention of the Accused Appellant that the Complainant had ample opportunity to tamper with them prior to handing them over to the Government Analyst.

However, in the Indian case of ***S. Pratap Singh V. State of Punjab, AIR 1964 SC 72*****,** it was held that, tape recorded talks are admissible in evidence and the simple fact that such type of evidence can be easily tampered with certainly could not be a ground to reject such evidence as inadmissible or refuse to consider it, because there are few documents and possibly no piece of evidence, which could not be tampered with.

The Accused relying on Indian Law further argues that the fact that the recordings were not sealed "naturally gives rise to the argument that the recording medium might have been tampered with before it was replayed."

In the Court of Appeal case ***Abeyagunawardane V. Samoon and Others [2007] 1 Sri L.R*** the video cassette lay for two years in a dark room, which was not padlocked, nor the envelope that contained the video cassette sealed, as in the case of other productions, and accessible to many others. Hon. Imam J stated that,

> *"The evidence of P.S. Karunathilaka in my view clearly establishes that the requirements as set out in section 4(1)(d) of the aforesaid Evidence (Special Provisions) Act No. 14 of 1995 were not complied with. Section 4(2) of the aforesaid Act makes it clear that the video cassette could be admissible in evidence only if the conditions set out in section 4(1) are satisfied."*

In the above case, it was decided that the video cassette was not admissible as it did not satisfy the requirements set out in Section 4(1)(d) as it was easily accessible to anyone for two whole years and thus could have been tampered with. However, in the instant case, although the devices were not sealed when it was handed over to the Government Analyst, the recordings were on the personal mobile phones of the Complainant. As such, the circumstances of the instant case differ from that of the aforementioned case as it was always on his person even when he traveled to India and was never left unattended unlike in the case of **Abeyagunawardane**.

Furthermore, the Complainant had established the fact that the two mobile phones were secured with Personal Identification Numbers (PIN) only known to him and it was only he who had access to the phones. In mobile devices, the PIN acts as a password preventing persons from gaining unauthorized access to a personal device. This is a numeric code that must be entered each time the device is started. Unlike a video cassette, a mobile phone is much more advanced in technology and has many security features such as PIN codes or biometric scanners which prevents unauthorized access.

Due to the development of security countermeasures in personal devices, such as smartphones are no longer easily accessible to outsiders. As per Paul Bischoff, who is privacy advocate at Comparitech, iPhones are considered to have a highly secure operating system. Disk encryption is enabled by default, apps from the App Store go through a stricter vetting process, and Apple does not gather users' personal details for advertising purposes. Hence, third party access through hacking or malware is minimal in the devices used by the Complainant.

In the instant case, it is vital to establish that the recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction, or that it was kept in safe custody at all material times, during or after the making of

such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which it was in such custody.

As per the testimony of the expert witness Gunathilake, they have subjected the recordings to an initial investigation. She further pointed out that they did not subject the recordings to an authenticity analysis as they were not requested to do so. However, upon the initial investigation they were able to identify that they were not computer-generated voices thus, there was no need to go for an authenticity analysis.

However, they did subject the said recordings to a process of Critical Listening. This involves a thorough breakdown of both foreground and background sounds through repetitive listening. They had scanned the recordings to identify any viruses, then made a duplicate copy of it to work with, in order not to harm the original file. During the initial investigation of the copy, they first identify whether the voices on the recording are computer generated voices. Next, they pay attention to the background noises to see if there have been any changes to the background or if the flow of the conversation has changed. During this process they had listened to recordings repeatedly in order to identify if there has been any editing done to the recording, during which they had not identified any discrepancies. It is submitted that on a preliminary basis there were no indications of alteration shedding doubt on the authenticity of the recordings that would have indicated the need for an Authentication Analysis.

Upon being questioned on whether any mimicry of voices can be identified during the initial investigation, witness Gunathilake explained that only the tone we hear will be different. No matter how hard a person tries to change their voice only the basic pitch can be changed, and the person can still be identified through the process utilized for identification and on the above basis it was observed that the recordings have not been altered or tampered with.

On a secondary level, the Accused-Appellants argue that the presence of a “modified date” on the properties of the said recordings show that they have been modified by the Complainant. As per witness Gunathilake, what appears as the date modified means the last date the file has been modified or the content of the file has been changed. This can be changed or edited by anyone and therefore cannot be considered during a forensic investigation. As she further explained, the date modified can change due to saving the file after any small changes done to it or if the file is copied as a VCD – then both the modified date and created date will change to the date it was created. This can even change if one copies the file to a laptop, in which event the date of the file may change to

the date and time of the operating system on the laptop. Therefore, as per witness Gunathilake, the date modified cannot be relied on in identifying whether the file has been tampered with.

Thirdly, the Accused Appellants relying on the testimony of witness Gunathilake, argued that the voice recordings may have been tampered with even before they were handed over to the Government Analyst Department.

As witness Gunathilake explained, a more accurate and scientific form of investigating any tampering or alteration of the voice recordings is by analyzing the Hash Value of the recordings. Hash value is an algorithm which is unique to each file and is used to identify the files. Hash values can be thought of as fingerprints for files. The contents of a file are processed through a cryptographic algorithm, and a unique numerical value (the hash value) is produced that identifies the contents of the file. If the contents are modified in any way, the hash value will also change significantly. Of the many varieties of hash values available, the varieties used in the immediate investigation are MD.05 (Message Digest 5) and SHA 01 (Secure Hash Algorithm 1).

As every file on a computer is, ultimately, just data that can be represented in binary form, a hashing algorithm can take that data and run a complex calculation on it and output a fixed-length string as the result of the calculation. The result is the file's hash value or message digest. Since hashes cannot be reversed, simply knowing the result of a file's hash from a hashing algorithm does not allow a person to reconstruct the file's contents. However, it does allow to determine whether two files are identical or not without knowing anything about their contents.

As witness Gunathilake explained, she cannot confirm that the hash value of the original recording and the hash value of the recording given to her are the same. In the event the recording had been altered with before she received it, she would not have the original hash value. However, what she can confirm is that the hash value of the recording given to her, and the hash value of the recording played in Court are the same. Thus, it can be proved that the recordings have not been tampered with during that specific period of time, however, it is not a fact that can serve to establish genuineness nor tampering of any form.

Due to the above reasons explained, this Court believes that the mobile phones were in safe custody while they were in the custody of the Virtual Complainant.

Additionally, the Accused Appellants had raised objections with regard to the application of Section 7(1) of the Act. Section 7(1) reads as follows;

> *The following provisions shall apply where any party to a proceeding proposes to tender any evidence under section 4 or 5, in such proceeding-*

(a) the party proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial file, or cause to be filed, in court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence;

(b) any party to whom a notice has been given under the preceding provision may, within fifteen days of the receipt or such notice apply to the party giving such notice, to be permitted access to

At the time of the commencement of the trial, the accused had requested access to the two iPhones, which were used by the Complainant to record the conversations. With the commencement of the prosecution the Court has allowed both Accused Appellants to inspect the two mobile phones of the Complainant. (Both Accused have challenged the voice recordings on the ground that they were not kept in safe custody and that the Prosecution has not excluded the possibility of tampering. Therefore, they contended that it was dangerous to rely on such recordings).

However, as observed by the High Court, the said request for access to the mobile phones were made only on 09/09/2019, which was not within the stipulated period of 15 days. Though the opportunity was granted, the Accused Appellants did not inspect the devices and informed that the given time was not sufficient to employ the services of an expert. The Court had granted further time to have access to the phones on 18/09/2019 and on 20/09/2019. However, the 1st Accused Appellant particularly had failed to lead the evidence of his expert who inspected the two phones and the 2nd Accused Appellant did not even utilize the opportunity given to him by the Court to inspect the two phones. Therefore, the Accused Appellants cannot rely on non-compliance with Section 7 to question the integrity of the recordings.

Finally, in the question of whether the fact of the recordings being in the custody of the Virtual Complainant has resulted in them becoming inadmissible. In the instant case, when dealing with the question of admissibility, the High Court has stated that it used the voice recordings found in the mobile phones only to the limited extent of identifying the voices of the parties involved. However, as discussed above, as the recordings have been in safe custody while in possession of the Complainant, the recordings can be used as evidence to prove that the conversations actually took place and the incidents discussed happened in reality (further proved by the CCTV recordings submitted). Additionally, during cross examination and through independent evidence led to this

effect, it became an admitted/proved fact that the relevant conversations and incidents had indeed taken place. This is simply, corroborated by the scientific and technical evidence discussed above. Finally, as per Section 167 of the Evidence Ordinance,

> *The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.*

It is the opinion of this court that the conviction of the accused is based on sufficient evidence beyond the voice recordings. Indeed, the recordings serve as corroborative evidence supporting the conviction, however, exclusion of the same would not have amounted to any substantial variation of the decision.

Therefore, after carefully observing all the evidence at hand, this Court believes that the voice recordings which were in the mobile phones of the Virtual Complainant were in safe custody as per Section 4(1)(d) and are therefore admissible.

Were the two Accused-Appellants entrapped to commit the offence they have been convicted of, and if so, have they been deprived of a fair trial?

As has already been mentioned above, the virtual complainant had met ASP Ruwan Kumara of CIABOC after he had received a telephone call. Upon the virtual complainant's arrival in his office at CIABOC, ASP Ruwan Kumara had advised him to submit a written complaint regarding the matter. Thus, ASP Ruwan Kumara after listening to the oral account narrated by the virtual complainant, sent the virtual complainant back to submit a written complaint, without proceeding to record/reduce the statement into writing. Thereafter, the virtual complainant had lodged a complaint on 15th February 2018 and CIABOC had proceeded to record a statement from him on 22 February 2018. As has been mentioned before, the investigators then informed him that the available material is not sufficient to warrant an arrest. As the virtual complainant informed CIABOC that he no longer had contact with either Accused Appellant at that point in time, the Investigators had instructed the virtual complainant to renew his communication line with the Accused Appellants. It is the submission of the Accused Appellants that this procedure amounts entrapment of the Accused Appellants at the instance of the officers of CIABOC.

Learned President's Counsel for the 2nd Accused-Appellant vehemently relied on ***Sorrells V. United States*** 287 US 435 (1932). In that case the term entrapment has been defined as follows: *"… the conception and planning of an offence by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer …".* It can be seen from the above definition that any defence of entrapment would pre-suppose that the accused person who takes up such defence admits commission of the offending act. It is then only such accused person can assert that he/she would not have committed it in the absence of any trickery, persuasion or fraud of the officer. Let us see whether there was trickery, persuasion or fraud on the part of the CIABOC officers.

When the virtual complainant had received a telephone call from ASP Ruwan Kumara of CIABOC he went on his own volition. It was not his position that he was coerced by any officer of CIABOC to make a complaint against the Accused Appellants. When ASP Ruwan Kumara requested the virtual complainant to submit a written complaint, the virtual complainant could have waited without submitting such statement in writing. Thereafter, the virtual complainant could well have waited without proceeding to CIABOC which led to his statement being recorded on 22 February 2018. When the virtual complainant was informed by CIABOC to renew his communication line with the Accused Appellants the virtual complainant could have waited without implementing that advise. It was not his position that he was lured by any officer of CIABOC to make a complaint against the Accused Appellants. It is also not the position of the Accused Appellants that they would not have perpetrated this crime if not for the trickery, persuasion or fraud of the CIABOC officers. The defence of the Accused Appellants is that they did not commit this crime. Then whose position is this? It is only an argument put forward by the learned counsel for the Accused Appellants in the course the hearing of this appeal inviting Court to hold in this case that the officers of CIABOC have entrapped the Accused Appellants. We are unable to see any merit in this argument.

Moreover, if it is the position of the Accused Appellants that they would not have perpetrated this crime if not for the trickery, persuasion or fraud of the CIABOC officers, that would necessarily be within their exclusive knowledge. Thus, in such circumstances, section 106 of the Evidence Ordinance to wit: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him' shall apply. Even if one is to argue that the above is a special circumstance (not provided by statutory law but as per some law), then too, section 105 of the Evidence Ordinance would apply and the burden of proving the existence of circumstances bringing the case within such special circumstance is upon the Accused Appellants. The Accused Appellants in the instant case have not even attempted to discharge such burden.

We need to be mindful that Police officers day in and day out, lay traps to detect criminals in action. This happens in cases involving possession and trafficking of dangerous drugs, bribery and corruption, gambling, prostitutions, raids carried out by authorized officers under Food Act and even price control cases. That is a long-standing practice happening from time immemorial not only in this country but in every part of the civilized world. While it is not an unlawful method of detecting crimes, the learned President's Counsel also did not seek to argue that those trap cases come under 'entrapment'. This can be clearly seen from the following quotation relied upon by the learned President's Counsel from the judgment of Justice Panchapakesa Ayyar in ***M.S. Mohiddin V. Unknown*** *[AIR 1952 Mad 561]:*

> *"… I have held in several cases already that there are two kinds of traps 'a legitimate trap', where the offence has already been born and is in its' course, and 'an illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not.* ***Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be 'a legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man.*** *But, where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes, and he is tempted with a bribe; just to see whether he would accept it or not and to trap him; if he accepts it, will be 'an illegitimate trap' and, unless authorized by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who -will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost to a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, like P.Ws 9 to 11, and the witnesses to the trap, like P.W. 8 would in no sense be "accomplices" and their evidence will not require under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinized carefully and accepted as true before a conviction can be had."* (Emphasize is ours).

In the instant case, what had happened is not anything more than the virtual complainant going out offering to bring the money after the Accused Appellants solicited the bribe from him but goes to the CIABOC and brings CIABOC officers to witness the payment. Thus, even in terms of the above case cited by the learned President's Counsel for the 2nd Accused Appellant, the trap in the instant

case would be 'a legitimate trap', which is 'wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man'. It is not an entrapment.

Moreover, Entrapment as a defence is not part of our criminal justice system. Even if one resorts to section 100 of the Evidence Ordinance, the position would be the same. Section 100 of the Evidence Ordinance is as follows:

> *"Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in Sri Lanka, such question shall be determined in accordance with the English Law of Evidence for the time being."*

In ***R. Vs. Sang****, [(1980) AC 402],* the House of Lords held that Entrapment is not a defence in English Law. Thus, it would further confirm the earlier position we have already taken that even through the window provided for in section 100, Entrapment is not a defence in our criminal justice system.

Furthermore, in Rajapakse V Fernando (52 NLR 361), Mr. Chitty's first submission was that while Courts have to look to the Evidence Ordinance in regard to questions of evidence, nevertheless, it is incorrect to say that the principles of '' Public Policy '' do not form part of our law. Mr. Chitty contended in that case that the power is inherent in the Courts of Justice when it is faced with, what he called, conduct which is contrary to public morality or fair dealing. In such a scenario, Mr. Chitty contended that the Courts, despite the strict rules of evidence, must apply such principles of public policy, and hold that the admission of such evidence would cause greater harm than its rejection, and refuse to receive such evidence. However, Dias SPJ's views stated in that case, could be discernible from following excerpts taken from that judgment. They are as follows:

> *"… With this submission I am unable to agree. It will be observed that Mr. Chitty has been unable to quote a single authority in support of his proposition. What authority there is appears to be against him". …*
>
> *"…What Mr. Chitty is inviting us to do now is precisely what Wood Renton C J. pointed out a Court of Justice could not and must not do, namely, to expand the law of evidence by importing into it certain grounds of public policy to control or modify the statutory rules of evidence laid down by the Evidence Ordinance. This we cannot do as we possess no legislative powers. An examination of the provisions of the Evidence Ordinance shows that the Legislature when drafting the Evidence Ordinance had ". public policy " in mind, and legislated in order to give effect to the principles of " public policy " of the kind Mr. Chitty*

refers to in certain cases. Thus the admission of confessions against persons accused of crimes was confined within very strict limits. The rules of evidence relating to privilege and the admission of privileged communications is another example of the Legislature giving effect to certain principles of public policy. The prohibition that the prisoner's spouse should be called as a witness for the prosecution save in very exceptional cases furnishes another example. I am, therefore, unable to agree with Mr. Chitty that, over and above this, there exists a nebulous and undefined residual power in the Courts to admit or reject admissible evidence brought before it by legally competent and compellable witnesses on grounds of "public policy". Section 100 of the Evidence Ordinance provides that in the case of any casus omissus we are to have recourse, not to Scottish or American law, but to the principles of the English law alone. As I have pointed out, under English Law, relevant evidence which has been obtained improperly is not rendered inadmissible on that ground alone". …..

"..Mr. Chitty next argued that altogether apart from the question of public policy, there is another principle of law that an accused person should not be compelled to give or furnish evidence against himself. I agree that it would be immoral and undesirable that agents provocateur and others should tempt or abet persons to commit offences ; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge ' to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict". …..

The above excerpts are self-explanatory and hence we would not delve on any further discussion on this matter. Therefore, we reject the argument advanced by the Accused Appellants that they have been deprived of a fair trial as the officers of CIABOC have entrapped the Accused Appellants in this case.

In view of the alleged infirmities in the testimony given by the virtual Complainant, can credibility and testimonial trustworthiness be attached to his testimony?

Did the virtual Complainant have a motive to falsely implicate the Accused?

Did the two Accused Appellants possess any motive to solicit and or accept a bribe as narrated by the virtual complainant?

As already referred to above in this judgment, the instant case is based on an investigation commenced by the officers of CIABOC upon a complaint of alleged solicitation of a bribe by two senior Public Servants. The said complaint was investigated by a team of officers from CIABOC and the two Accused-Appellants were arrested at the point of accepting a bribe of Rupees twenty million. The fact that the two Accused-Appellants came to the Coffee-shop of Hotel Taj Samudra and met with the virtual Complainant as pre-arranged by them and the fact that they had some refreshments at the expense of the virtual Complainant is undisputed. The video footages obtained from the Hotel CCTV system confirms this fact. Subsequent to the meeting at the Coffee-shop, all three persons, including the virtual Complainant, the two Accused-Appellants, walked towards the car park. When the car belonging to the virtual Complainant reached them, the 1st Accused-Appellant had got into the rear seat of the said car from the Drivers side, and was seated inside the car with two bags, containing Rs. 20 million when the officers of the CIABOC came to the place. The 2nd Accused-Appellant who accompanied the 1st Accused-Appellant to the car park was watching the transaction when he was arrested by the CIABOC officers.

It is also admitted by the 2nd Accused-Appellant that he met the virtual Complainant on 05.09 2017 at the Waters' Edge Restaurant. The meeting between the two Accused-Appellants and the virtual Complainant on 27.02.2018 at the office of the 2nd Accused-Appellant and on 28.04.2018 at Bread talk Restaurant was admitted by all parties including the two Accused-Appellants. Even though the 1st Accused-Appellant denies his meeting with the virtual Complainant on 17.05.2017 at Royal Boat Restaurant, he too had admitted meeting the virtual Complainant at his office somewhere in August 2016 after signing the shareholders' agreement. It is also an admitted fact before the High Court at Bar, that the virtual Complainant representing Sri Prabhulingeshvar Sugars had submitted the unsolicited proposal for a joint venture between the Government of Sri Lanka and the said company to manage Kanthale Sugar Factory in early 2015 and in fact a cabinet paper was submitted by the late Minister of Lands seeking approval for the above proposal.

The virtual complainant complains of a long delay in giving effect to the unsolicited proposal he made and alleges that the 1st Accused-Appellant being the key person who is responsible for giving effect to the cabinet approval, had purposely delayed the implementation since the virtual complainant did not agree to pay him US $ 300000 as a bribe.

Since the case for the prosecution was solely dependent on the evidence of Nagarajah (the virtual complainant), it was submitted on behalf of the Accused-Appellants that it is unsafe to act on the

evidence of the sole witness who cannot be considered as an innocent person but was a dubious investor. In his evidence before the High Court at Bar, the virtual complainant took up the position that he recorded several conversations between him and the two Accused-Appellants and that he did not modify the recordings until the two phones were handed over to the Government Analyst for examination.

However, it was argued on behalf of the Accused-Appellants that the presence of a modified date on the properties that were examined by the Government Analyst creates a doubt on the evidence of the virtual Complainant and therefore his evidence cannot be acted upon or in other words, the virtual Complainant had lied before the High Court at Bar when he said that he did not interfere with the recorded evidence.

In those circumstances, on behalf of the 1st Accused-Appellant, it was submitted that the Court should advert to the principle of "indivisibility of credibility"

In this regard, the 1st Accused-Appellant relied on several appellate Court decisions including the case of ***Queen V. Vellasamy 63 NLR 265 at 270***.

As already referred to by us in this judgment, witness Gunathilake had explained her position with regard to "Modified data" as "the date modified can change due to saving the file after any small change done to it or if the file is copied as a VCD- then both the modified date and created date will change to the date it was created. This can even change if one copies the file to a laptop, in which event the date of the file may change to the date and time of the operating system on the laptop."

Based on the above, witness Gunathilake took the view that the date modified cannot be relied on, in identifying whether the file has been tampered with or not but she took the view that, the recordings before her were subject to Critical Listening which involves a thorough breakdown of both foreground and background sounds through repetitive listing and she could not identify any editing done to the voice samples. Furthermore, we have already held that the voice recordings which were in the mobile phones of the Virtual Complainant were in safe custody as per Section 4(1)(d) and are therefore admissible. we have already given extensive reasons in that regard.

In the light of the above conclusion and on the evidence of witness Gunathilake, it is not possible for this Court to conclude that witness Nagarajah had lied before the High Court at Bar when he denied making any modification to the recordings that were available in his two mobile phones.

When advancing the above argument, the Accused-Appellants further contended that the same principle of indivisibility of credibility applies when the prosecution decided to drop the 3rd charge in the Indictment against the 2nd Accused-Appellant.

As already referred to in this judgment, the 3rd count in the Indictment referred to a solicitation of a gratification of Rs. 540 million from the virtual complainant on or about 05.09.2017 by the 2nd Accused-Appellant. When establishing charges against an accused person, it is the duty of the prosecution to submit evidence to prove each and every charge. As submitted by the learned counsel for the Respondents, even though witness Nagarajah had referred to a meeting with the 2nd Accused-Appellant at Waters Edge Restaurant on 05.09.2017, he had not referred to a solicitation of Rs. 540 million from him on that day.

In the absence of any other evidence to that effect, the prosecution had decided to drop the said count but it cannot affect the credibility of the evidence of the virtual complainant.

As observed by this Court the above decision of the prosecution was solely on the non-availability of evidence to establish the said count, but there is no material before court to conclude that the virtual complainant had either lied or took up a different stand when giving evidence before the High Court at Bar.

Even though the learned Counsel for the Accused-Appellants relied heavily on the principle of indivisibility of credibility and submitted that “witness cannot be both not credible and credible with regard to the very same evidence” and submitted that it is unsafe to act on the evidence of the virtual Complainant, we see no reason to uphold such position for two reasons.

Firstly, the material already referred to above does not reveal that the evidence given by the virtual complainant with regard to the said matters are contradictory in nature compelling the Court to reject his evidence.

Secondly, our Courts have now adopted a more moderate view in following the principle of indivisibility of credibility which is evident from several cases decided in the recent past including the case of ***Sudu Aiya and Others V. The Attorney General 2005 1 Sri LR 358 at 377*** where the position of our Courts was discussed as follows;

> “Further, counsel’s submission that Ratnayake has given false evidence and by the application of the maxim “Falsus in uno, falsus in omnibus” his evidence should be rejected, is also without merit. Other than a few contradictions and omissions which were not very

material, defence did not succeed in showing that witness Ratnayake had given false evidence. In relation to this matter, errors of memory, faulty observations, and even exaggerations must be distinguished from deliberate falsehood. Besides, this maxim has not been applied as an absolute rule. It was observed in the case of ***Samaraweera vs. The Attorney General*** that divisibility of evidence test is preferred under certain conditions. In the case of ***Francis Appuhamy vs. The Queen*** T. S. Fernando J, in the course of his judgment stated as follows: "Certainly in this Country, it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

The virtual complainant is an Indian National who was engaged in business activities in Sri Lanka since 2003. In 2011 when the Government of Sri Lanka called for international bids to recommence the work in Kanthale Sugar Factory, he submitted a tender but he was not awarded the tender at that time. However, the said process was subsequently cancelled by the Government and in the year 2015 the virtual complainant had submitted an unsolicited offer for the same purpose through Prabhulingeshvar Sugar and Chemicals Company, a leading Sugar Manufacturer in India.

Subsequent to the signing of the shareholder's agreement in August 2016, the virtual complainant had met the 1st Accused-Appellant at his office and during the said meeting the 1st Accused-Appellant had solicited a gratification of 3 million USD to execute the project.

During this period 1st Accused-Appellant was directly involved in the implementation of the project as the Secretary to the Ministry of Lands. As revealed from the evidence of the virtual complainant, the 1st Accused-Appellant on another occasion had informed the virtual complainant that if he does not pay him the solicited gratification, steps would be taken to dispose of the existing machinery without giving it to the virtual complainant as per Article 7.9 of the Agreement. While the process for disposing of the machinery was in progress, the 2nd Accused-Appellant had met the virtual complainant and influenced him to resolve the dispute between the virtual complainant and the 1st Accused-Appellant with regard to the machinery lying in the Sugar Factory premises.

Even though the virtual complainant had ignored various steps taken by the 1st Accused-Appellant that delayed the implementation of the cabinet decision and the agreements signed between the parties, the seriousness of the conduct of the 1st Accused-Appellant was realized by the virtual

complainant when the 1st Accused-Appellant advertised the sale of machinery at Kanthale Sugar Factory.

As already revealed from the evidence of the virtual complainant, the investors had spent more than 20 million USD by this time and therefore, he had decided to bring it to the notice of the Prime Minister and met an officer of the Prime Minister's office and informed his grievance to the said officer. Since there was a reference to a solicitation of a bribe, he was advised by the said officer to lodge a complaint at the CIABOC.

However, the virtual complainant had not gone to CIABOC until he was requested to come by the CIABOC. When he was asked to lodge a complaint by ASP Ruwan Kumara, his first reaction was that he is not interested in taking legal action since he had come here to do business, but finally agreed to submit a written complaint.

The above is the path in a nutshell which ended up with a complaint by witness Nagarajah with CIABOC against the two Accused-Appellants. If he had the intention to falsely implicate the two Accused-Appellants, he would not have waited so long to lodge a complaint against them. As already referred to in this judgment, the Hon. Attorney General too had observed a long delay in implementing certain decisions by the 1st Accused-Appellant but still, the virtual complainant was following the routine procedure by making an appeal after appeal, until he realized that the things have been moving away from the interest of the investor.

Learned President's Counsel on behalf of the two Accused-Appellants argued that the two Accused-Appellants did not possess any motive to solicit and/or accept a bribe as narrated by the virtual complainant.

In support of the above argument the followings were submitted on behalf of the 2nd Accused-Appellant:

a) A copy of the shareholders agreement was not provided to him and he had to request for a copy from the Finance Ministry in order to implement the provisions in the said agreement.
b) Later he had observed that certain provisions in the agreement were contradictory to the advice given by the Hon. Attorney General.
c) In the said circumstances he had faced difficulties in implementing the provisions in the agreement and therefore he had to obtain advice from the Hon. Attorney General on several

> occasion, but he never delayed the process to scuttle the implementation of the shareholders agreement.

At this point, I would like to look at Black's Law Dictionary to ascertain the meaning of the term "motive". Black defines motive as, "something esp. willful desire that lead one to Act (Black's Law Dictionary 8th edition) In the above context the motive entertained by the virtual complainant should be for a wrongful purpose or in other words should have had malicious motive to falsely implicate the Accused-Appellant.

It is observed by this Court that the Cabinet Committee on Economic Management (CCEM) and the Hon. Attorney General, both had observed the long delay in implementing the shareholders agreement and the 1st Accused-Appellant had been repeatedly reminded by the said Cabinet Committee to handover the land and report back to the Committee.

Similarly, the Hon. Attorney General too had observed in his letter addressed to the 1st Accused-Appellant which was produced mark P-77 as follows:

> "As regards the releasing of lands to the investor, the modalities are expressly provided in Article 17.1.1. of the Shareholders Agreement. There are no extraneous conditions to be completed with when releasing the said land, and it is incumbent upon the signatories to the said agreement to strictly abide by the provisions of the said Articles. In view of the concerns expressed at the CCEM about the long delay, this process should be completed expeditiously as possible."

When the Hon. Attorney General had reached a specific and conclusive opinion about the issues raised by the 1st Accused-Appellant, as submitted by the learned Deputy Solicitor General before us, the 1st Accused-Appellant had without any justification, turned again towards the secretary to His Excellency the President writing the letter dated 07.08.2017 (P-82) seeking his intervention in the process.

The next notable incident after writing P-82 was the intervention by the 2nd Accused-Appellant, and the meeting the 2nd Accused-Appellant and Nagarajah had at Waters Edge Restaurant on 05.09.2017.

From the call record details produced before the High Court at Bar, it was the 2nd Accused-Appellant who had given the first call to Nagarajah on 05.09.2017 around 11.42.52.a.m.

Since then, the involvement of the 2nd Accused-Appellant is visible from the two CCTV footages produced before Court with regard to the meetings at Bread Talk Restaurant and Taj Samundra Hotel and the call records which show a similar pattern of calls taken between the virtual complainant and the two Accused-Appellants.

When evaluating the above evidence, the High Court at Bar had correctly observed that the 1st Accused-Appellant once retired from the office of the Secretary to the Ministry of Lands and assumed duties as the Chief of Staff of the Presidential Secretariat, where he has no role to play in Kanthale Sugar Factory Project, had still opted to continue the dealings with the virtual complainant and admittedly met with him at Bread Talk Restaurant and Hotel Taj Samudra in order to "discuss" and "assist" him in proceeding ahead with the project. If the 1st Accused-Appellant accompanied by the 2nd Accused-Appellant, wanted to assist the virtual complainant in the said project, being senior officers of the Government, they would obviously know that it is not the acceptable, prudent or transparent way in dealing with the matters of this nature.

When considering the totality of the above material we have no hesitation in concluding that both Accused-Appellants did possess the requisite motive for the solicitation and acceptance referred to in the Indictment filed before the High Court at Bar.

As already observed by this court the virtual complainant being a foreigner who had come to Sri Lanka to engage in business, and gone a considerable distance in the relevant investment by spending and/or investing over 20 million USD. He had not been left with any other option, but to seek some assistance from the higher authorities as he did. It was the version of the virtual complainant that he never wanted/planned to get entangled with anybody in this manner but simply wanted to focus on his business, but the circumstances had led for the final outcome of him becoming the virtual complainant in this case.

In the light of this backdrop, this court concludes that the virtual complainant had simply acted as an ordinary reasonable man who was confronted with a situation to which the solutions were beyond his reach.

We have carefully considered all the arguments put forward before us by both parties. For the foregoing reasons, we are unable to agree with the submissions of the learned Presidents' Counsel for the Accused Appellants that the High Court at Bar has wrongly/unlawfully/unfairly conducted the trial against their clients and wrongly convicted them. We hold that the High Court at Bar has lawfully convicted both the Accused Appellants for the respective charges. We see no necessity for

our intervention in this conviction. Therefore, we proceed to affirm the conviction of both the Accused Appellants for the respective charges as entered into by the High Court at Bar.

The learned Presidents' Counsel for the Accused Appellants also made submissions regarding the sentences imposed on them by the High Court at Bar.

We have already mentioned before that both the Accused Appellants at the time they solicited and accepted the bribes relevant to the instant case were holding very high posts in the highest echelons of the Public Service of this country. The magnitude of the bribes they have solicited are unimaginable. The purpose for which they were solicited no doubt shows that the Accused Appellants while holding high positions of the Government had only worked for their unlawful and immoral purposes while only helping the destruction of the country's economy. We are of the view that it would be difficult for this country to revive itself as long as high officers like the Accused Appellants would hold such high offices in the Government. We therefore think that it would be important to take into account the need to deter such public officers from being inclined to embark on such unlawful endeavours.

In the case of **The Attorney-General Vs. H. N. De Silva 57 NLR 121**, Basnayake, A.C.J. (as he then was) stated as follows:

"In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

Sri Skanda Rajah J while citing with approval, the above passage from Basnayake, A.C.J.'s judgment, went ahead in the case of M**. Gomes (S. I. Police, Crimes) Vs. W. V. D. Leelaratna 66 NLR 233**, to add three more grounds which a trial judge should consider in the assessment of the sentence to be imposed on a convicted accused. Three of those additional grounds are firstly, the nature of the loss to the victim and secondly, the profit that may accrue to the culprit in the event of non-detection and thirdly, the use to which a stolen article could be put.

Perusal of the judgment of the High Court at Bar shows clearly, that it has been mindful of all the relevant matters before passing the sentence imposed by it on the Accused Appellants. The sentences imposed by the High Court at Bar are within the sentences the law has prescribed for the relevant offences. We have no basis to disagree with the said sentences. We affirm the sentences imposed on both the Accused Appellants by the High Court at Bar.

We proceed to dismiss the appeals of both the Accused Appellants.

Justice Vijith K. Malalgoda PC,
JUDGE OF THE SUPREME COURT

Justice L.T.B. Dehideniya,
JUDGE OF THE SUPREME COURT

Justice P. Padman Surasena,
JUDGE OF THE SUPREME COURT

Justice S. Thurairaja, PC,
JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J

I have considered the draft judgment of my brother Judges Honourable Justice Vijith K. Malalgoda, PC, Honourable Justice L.T.B. Dehideniya, Hon. Justice P. Padman Surasena and Hon. Justice S. Thurairaja, PC. I am **in agreement** with their judgment, including their findings in respect of the several questions of law raised during the hearing of this Appeal, and the conclusion reached that this **Appeal should be dismissed** for the reasons contained in the said judgment. However, it is my considered opinion that the following question of law raised by the Appellants is unique, extremely important and therefore requires a detailed and an in-depth consideration. Therefore, I present this judgment which contains reasons, conclusions and findings of my own regarding the following question of law:

Were the two Appellants entrapped to commit the offences they have been convicted of, and if so, have they been denied a 'fair trial'?

Introduction

During the hearing of this Appeal, learned President's Counsel for both Appellants jointly raised a novel and innovative question of law. Albeit brief, their position was that (i) both Appellants (more particularly the 1st Appellant) had been 'entrapped' to commit the offences which they had been found *'guilty'* of having committed and convicted, (ii) the investigative technique referred to as 'entrapment' is obnoxious to law and hence illegal, (iii) presentation of evidence by the prosecution at the trial arising out of such entrapment was contrary to law, and thus, (iv) the two Appellants had been denied a 'fair trial'. Therefore, learned counsel for the Appellants submitted that convictions of both Appellants should be quashed and the Appeal should be allowed, as their Fundamental Right guaranteed under Article 13(3) of the Constitution (which guarantees an accused a *'fair trial'*) had been infringed. It was submitted on behalf of the 1st Appellant that the *'defence of entrapment'* was raised on his behalf at the end of the trial in the Permanent High Court at Bar, which rejected the said defence. They submitted that the rejection of the *'defence of entrapment'* was unlawful and hence this Court should set-aside the finding of guilt pronounced by the Permanent High Court at Bar. They urged that this ground of appeal was of such fundamental and critical importance, that should this Court were to hold with the Appellants on this point, the conviction of the Accused - Appellants should be set-aside and the Appellants should be acquitted while allowing this Appeal.

Both learned President's Counsel emphasized that their arguments pertaining to this question of law were being presented without prejudice to their other submissions which were based on the footing that (i) the institution of criminal proceedings by the Director General of the Commission to Investigate Allegations of Bribery or Corruption was unlawful, (ii) the joinder of charges was unlawful, in that there was a misjoinder, (iii) the testimony given by virtual complainant Nagarajah was false and untrustworthy, (iv) the deferment of the decision pertaining to the admissibility of the mobile telephone call recordings, till the end of the trial, was unlawful, (v) the Magistrate (during the investigation stage) having directed the Appellants to give voice samples to the Government Analyst was in violation of the rule against self-incrimination and was thus unlawful, and (vi) the prosecution had failed to prove the charges beyond reasonable doubt.

Both learned President's Counsel for the Appellants as well as the learned Deputy Solicitor General who appeared for the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) submitted that this was the first instance where the *'defence of entrapment'* had been raised in a criminal appeal in Sri Lanka. Therefore, in my opinion, there exists a compelling need to consider this matter very carefully and at considerable length.

Submissions of learned Counsel

Submissions on behalf of the 1st Appellant

Citing the judgment of Justice Rehnquist in ***United States v. Russell*** *(411 US 423)*, learned President's Counsel for the 1st Appellant drew the attention of this Court to the following quotation:

> *"… that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offence does not defeat the prosecution. … Nor will the mere fact of deceit defeat the prosecution. … For there are circumstances when the use of deceit is the only practicable law enforcement technique available.* ***It is only when the Government's deception actually implants the criminal design in the mind of the Defendant that the defence of entrapment come into play****."* [Emphasis added]

Citing certain principles contained in the judgment of the House of Lords in ***R v. Looseley,*** learned President's Counsel submitted that in English law, while entrapment is not a substantive defence to criminal liability, it has been held that nevertheless, it is unacceptable for the State, through its agents to lure and entrap its citizens into committing crimes and then prosecute them for their criminal conduct. To allow such prosecutions to take place would be to condone the abuse of its power by the Executive and compromise the integrity of the criminal justice system. Permitting

entrapment would result in an abuse of the process of court and possibly lead to a violation of Article 6 of the European Convention on Human Rights (ECHR). (Learned President's Counsel drew parallels between Article 6 of the ECHR and Article 13(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka, which guarantee *inter-alia* the right to a *'fair trial'*.) Therefore, prosecutions based on entrapment should be stayed as it would amount to an abuse of process. It is necessary to balance the competing requirements that those who commit crimes should be convicted and punished, and that there should not be an abuse of process which would constitute an affront to public conscience.

Learned counsel submitted that even though an accused receives a forensically fair trial, if it would be unfair to present certain evidence or subject the accused to a particular type of trial, he should not be tried in that manner. In appropriate circumstances, the doctrine of entrapment could be availed of by an accused to obtain relief against oppressive actions by the Police.

Turning towards Sri Lanka's law, learned President's Counsel submitted that in terms of Article 13(3) of the Constitution, every accused was entitled to receive a fair trial. He submitted that it was a very important Fundamental Right. A prosecution which is founded upon entrapment deprives an accused of a fair trial. Therefore, principles of law pertaining to entrapment should be applied when deciding Sri Lankan cases of the instant nature. Learned counsel submitted that if the investigation that resulted in the indictment of the accused was based on entrapment, following trial, the accused should not be convicted. In view of these principles of law, as the accused have been unlawfully convicted by the Permanent High Court at Bar, in Appeal, the conviction should be quashed and the Appeal should be allowed.

It is necessary to place on record, that though learned President's Counsel for the 1st Appellant initially attempted to portray that 'entrapment' was an exculpatory defence even under Sri Lankan law, he later abandoned that position, and sought to convince this Court (and I would think, advisedly) that entrapment is an unlawful investigative technique, and thus, the presentation of evidence emanating from an entrapment is unlawful. He submitted that in the instant case, the prosecution had presented evidence emanating from such an entrapment (which amounted to unlawfully gathered evidence), and hence the 1st Appellant (together with the 2nd Appellant) had been denied a fair trial.

Learned President's Counsel for the 1st Appellant further submitted that it was at the instance of CIABOC officers, that the virtual complainant had got in touch with the 2nd Appellant and accordingly on 05.09.2017 both of them had met at the *Waters Edge* restaurant. On the advice of CIABOC officers, through the 2nd Appellant, a meeting with the 1st Appellant had been arranged. That meeting took place on 27.02.2018 at the office of the 2nd Appellant. At this meeting, learned Counsel alleged that due to persistence by the virtual complainant the 1st Appellant solicited a bribe of Rs. 100 million, out of which the virtual complainant was asked by the 1st Appellant to pay a sum of Rs. 20 million, as an advance. It was submitted that the said solicitation of a bribe took place due to 'trickery' practiced on the 1st Appellant by officers of the CIABOC and the virtual complainant. After this meeting, CIABOC officers attempted to get down the 1st Appellant to the residence of the virtual complainant. Notwithstanding entreaties made by the virtual complainant, the 1st Appellant did not fall prey to that trap. Once again on 28.04.2018, at the instance of the virtual complainant, the 2nd Appellant persuaded the 1st Appellant to come to *Bread Talk* to meet the virtual complainant. This meeting took place on the same day at *Bread Talk* outlet, and it is alleged that the 1st Appellant repeated the solicitation of the bribe of Rs. 20 million. Thereafter, the virtual complainant proceeded to India and was there for a week, and returned. After he returned, the 1st Appellant was inveigled by the virtual complainant to come to the Taj Samudra Hotel, and that final meeting took place on 03.05.2018, where the learned President's Counsel submitted that a 'trap' had been laid. Learned counsel submitted that this sequence of events and the associated circumstances, clearly point towards 'entrapment' perpetrated by officers of the CIABOC together with the virtual complainant, to which the 1st Appellant fell victim to.

In view of the foregoing facts and circumstances, learned President's Counsel for the 1st Appellant submitted that this was 'a case of entrapment', and thus, the 1st Appellant has been denied a fair trial and hence the conviction of the 1st Appellant should be quashed in appeal.

Submissions on behalf of the 2nd Appellant

Augmenting the submissions made in this regard by learned President's Counsel for the 1st Appellant and successfully creating a synergy between the two submissions, the learned President's Counsel for the 2nd Appellant submitted that the Constitution ensures and guarantees unto the Accused in this case, as well as to all other accused, the fundamental right to a fair trial. However, the Accused – Appellants in this matter were deprived of a fair trial due to several reasons; the investigation carried out by CIABOC officers amounted to an entrapment was one, and the main ground. The other grounds urged by learned President's Counsel for the 2nd Appellant which he

alleged resulted in the Appellants being denied a fair trial have been dealt with by my brother judges as separate and substantive questions of law on their own standing. As I agree with the reasons, findings and conclusions reached in respect of those other grounds of Appeal, I do not propose to deal with those grounds raised by learned President's Counsel.

Learned President's Counsel for the 2nd Appellant submitted that investigation officers of CIABOC have not been vested with power to engage in an 'entrapment' in the nature of what they did in this case. He said that officers of CIABOC have induced and inveigled the virtual complainant who complained only of an instance of solicitation of a bribe, to participate in a scheme which had been designed to entrap the Appellants, so that they may be prosecuted. The entrapment perpetrated by officers of the CIABOC with the cooperation and assistance provided by the virtual complainant resulted in the Appellants committing offences, which they would not have otherwise committed. Entrapment was caused when the virtual complainant offered a bribe to the Appellants, afresh. Such offering was done with the view to luring the Appellants to commit the offence of accepting a bribe, and apprehending the Appellants in the act of acceptance.

Quoting certain observations of Justice Saleem Marsoof, PC in ***Namunukula Plantations Limited v. Minister of Lands and 6 Others***, *[(2012) 1 Sri L.R. 365]*, learned President's Counsel submitted that the conduct of officers of CIABOC was contrary to public policy and hence a prosecution launched based on such a scheme ought not be entertained by any Court, as it would be a pollution of the 'pure stream of justice'.

Citing the judgment of Justice Roberts in ***Sorrells v. United States****, [287 US 435 (1932]*, learned President's Counsel submitted that this Court should adopt the definition of 'entrapment' found in the said judgment. It defines entrapment as *"… the conception and planning of an offence by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer".* Learned President's Counsel submitted that in the same case, Justice Roberts has held that, *"… Proof of entrapment at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. …".*

Referring to the powers and functions of the CIABOC in terms of the Commission to Investigate Allegations of Bribery or Corruption Act, No.19 of 1994 (CIABOC Act), learned President's Counsel submitted that the CIABOC and its officers did not have the power to 'trap' a person or 'to find out

whether he will commit an offence'. Citing Lord Goddard in ***Brannan v. Peek*** *[(1947) 2 All ER 572]*, he submitted that unless authorized by an Act of Parliament, no trap can be laid by the police to find out whether a man will commit an offence, and that persons trapping him like that would be accomplices, who are themselves liable for punishment. He submitted that the doctrine pertaining to the prohibition on entrapment contained in ***Brannan v. Peek*** should be adopted by Sri Lankan Courts under section 100 of the Evidence Ordinance and incorporated into Sri Lanka's Law of Evidence.

The position advanced by learned President's Counsel was that upon recording the complaint of the virtual complainant Nagarajah relating to the alleged solicitation of a bribe by the 1st Appellant, CIABOC officials should have proceeded to investigate that complaint. If the complaint revealed the commission of an offence or offences, the Commission should have directly taken action against those who have committed such offence(s). He submitted that without doing that, the investigators had engaged in a 'process of entrapment' which is unlawful. Officers of the CIABOC did so by directing Nagarajah to re-establish contact with the Appellants, record all communications he had with them, and luring the suspects to commit further offences. He submitted that doing so was in excess of the powers conferred on CIABOC by the CIABOC Act and was thus, illegal. Therefore, learned President's Counsel submitted that the trial Court (Permanent High Court at Bar) should have rejected the testimony presented by the prosecution relating to the series of events which are said to have occurred after Nagarajah's complaint was recorded by officers of the CIABOC.

Learned President's Counsel in his post-argument written submissions brought to the attention of this Court the following quotation from the judgment of Justice Panchapakesa Ayyar in ***M.S. Mohiddin v. Unknown*** *[AIR 1952 Mad 561]*:

> *"… I have held in several cases already that there are two kinds of traps 'a legitimate trap', where the offence has already been born and is in its' course, and 'an illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be 'a legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man. But, where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes, and he is tempted with a bribe just to see whether he would accept it or not and to trap him if he accepts it, will be 'an illegitimate trap'*

and, unless authorized by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost into a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, like P.Ws 9 to 11, and the witnesses to the trap, like P.W. 8 would in no sense be "accomplices" and their evidence will not require under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinized carefully and accepted as true before a conviction can be had."

Learned President's Counsel for the 2nd Appellant also drew the attention of this Court to the following quote from the judgment in ***Ramjanam Singh v. The State of Bihar*** *[AIR 1956 SC 643]*:

"Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agents provocateurs may be (and we realize to the full that this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done."

Summing up his submissions on this point, learned President's Counsel for the 2nd Appellant submitted that there cannot be a valid conviction in the absence of a legal and fair investigation. He alleged that the evidence in this case in its entirety is the result of an *'entrapment'* which was illegal and conducted by officers of the CIABOC. Learned counsel alleged that the evidence in this case had not been procured by the investigators during a legally valid and fair investigation. Quoting from the judgment of Justice Mark Fernando in ***Victor Ivon v. Sarath N. Silva, Attorney General and Another*** *[(1998) 1 Sri L.R. 340]*, learned President's Counsel concluded his submission by stating that *"… a citizen is entitled to a proper investigation – one which is fair, competent, timely and appropriate …"*.

Submissions on behalf of the Respondent

Responding to the submissions made by learned President's Counsel for the Appellants, learned Deputy Solicitor General for the Respondent (CIABOC) made two key submissions. They were that (i)

'entrapment' is not a 'substantive defence in Sri Lankan jurisprudence', and (ii) assuming without conceding that the defence of entrapment can be taken by an accused in a criminal case in Sri Lanka either as an exculpatory defence or as a ground on which it could be alleged that the accused had been denied a fair trial, the facts of the instant case do not fall within the scope of 'entrapment' as recognized by other jurisdictions, and thus the question of legality of the evidence presented by the prosecution does not arise. He emphasized that the two Appellants had not been denied a fair trial.

For the purpose of determining whether a particular set of facts pertaining to an investigation reveal the existence of an 'entrapment' or not, learned Deputy Solicitor General presented the following quotation from the House of Lords judgment in ***R v. Loosely**, [(2001) UKHL 53]*:

> *"On this a useful guide is to consider whether the police did no more than present the defendant with **an unexceptional opportunity to commit a crime**. I emphasize the word "unexceptional". The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially. McHugh J had this approach in mind in Ridgeway v. The Queen (1995) 184 CLR 19, 92, when he said:*
>
> > *'The State can justify the use of entrapment techniques to induce the commission of an offence only when the inducement is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity. That may mean that some degree of deception, importunity and even threats on the part of authorities may be acceptable. But once the State goes beyond the ordinary, it is likely to increase the incidence of crime by artificial means.'"*

Learned Deputy Solicitor General submitted that though the 'defence of entrapment' was recognized in certain overseas jurisdictions, English Courts do not treat entrapment as a substantive defence. Citing ***R v. Sang**, [(1980) AC 402],* he submitted that the Court had held that the physical and mental elements of an offence are both constituted even when there is entrapment, and that in the circumstances, the value if any of the defence of entrapment is limited to mitigation of culpability. In support of his submission as regards the position in English law, learned DSG cited the following excerpt from the judgment of Lord Nicholls in ***R. v. Loosely**, [(2001) UKHL 53]:*

"In R v Sang [1980] AC 402 Your Lordships' House affirmed the Court of Appeal decisions of R v McEvilly (1973) 60 Cr App R 150 and R v Mealey (1974) 60 Cr App R 59. The House treated it as axiomatic that entrapment does not exist as a substantive defence in English law. Lord Diplock, at p 432, noted that many crimes are committed by one person at the instigation of others. The fact that the counsellor or procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender: 'both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in his case'. Likewise, Lord Fraser of Tullybelton observed, at p 446, that all the elements, factual and mental, of guilt are present and no finding other than guilty would be logically possible. The degree of guilt may be modified by the inducement and that can appropriately be reflected in the sentence. Lord Fraser famously added that when Eve, taxed with having eaten forbidden fruit, replied 'the serpent beguiled me', her excuse was at most a plea in mitigation and not a complete defence."

In view of the foregoing, learned DSG urged this Court to follow English law regarding this matter, and to not recognize entrapment as a substantive defence. He stressed that, if at all, 'entrapment' should be treated only as a mitigatory ground for reduction of the severity of the punishment.

Referring to ***R v. Loosely*** learned DSG conceded that, following the enactment of the Police and Criminal Evidence Act (1984) by the Parliament of the United Kingdom (the enactment of which pre-dates the decision in *R v. Loosely*), the concept of excluding from criminal trials evidence emanating from 'entrapment' has been recognized by English law, if such entrapment amounted to an abuse of power or if the conduct of the Police was illegal. He submitted that trial judges were permitted to exclude such evidence on the premise that permitting such evidence would affect fairness of the proceedings. He submitted that in the circumstances, exclusion of evidence emanating from entrapment in English law is an evidential principle as opposed to an exculpatory defence.

Learned DSG submitted further that in Sri Lankan law, trial judges were not empowered to exclude evidence that is relevant and admissible (in terms of the provisions of the Evidence Ordinance), on the premise that such evidence would affect fairness. Citing ***Rajapakse v. Fernando*** *[52 NLR 361],* he submitted that even evidence emanating from a search which was in the circumstances of the situation 'illegal' was admissible provided such evidence was relevant. In this regard, learned DSG cited the following excerpt from the judgment of Justice Dias:

"I agree that it would be immoral and undesirable that agents provocateur and others should tempt or abet persons to commit offences; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict."

It is a point of considerable significance that learned DSG while emphasizing that admission of evidence during a trial should be screened only from the perspective of 'relevancy' and 'admissibility' (as per provisions of the Evidence Ordinance), did not venture to comment on whether the views of Justice Dias should be reconsidered in the present era, in view of the possible causal relationship between *'evidence gathered through unlawful means'* and depriving an accused of the fundamental right to a *'fair trial'*.

Based on an analysis of the judgment of the House of Lords in ***R v. Loosely***, learned Deputy Solicitor General pointed out that when determining whether a particular *modus operandi* adopted by law enforcement authorities in the conduct of an investigation amounts to 'entrapment' (which method he admitted should not be condoned), there are several features the Courts should consider. They are (a) the nature of the offence that was being investigated into, (b) reason for the investigators having adopted the particular investigative procedure, (c) the nature and extent of participation by the investigators, (d) intrusiveness of the investigative method adopted, (e) whether the investigators acted in *good-faith,* and (f) the antecedents of the suspect.

Turning towards the evidence, learned Deputy Solicitor General submitted that the following evidential aspects pertaining to the case, should be taken into consideration:

(i) The involvement of officers of the CIABOC commenced only after the 1st Appellant had in August 2016 made the initial solicitation of a bribe of USD 3 million from the virtual complainant.

(ii) Following the first instance when the solicitation was made, the 1st Appellant had on several other occasions solicited from the virtual complainant a bribe, and such events reveal a predisposition on the part of the 1st Appellant to accept a bribe from the virtual complainant.

(iii) On 5th September 2017 (well before the virtual complainant complained to the CIABOC), when the virtual complainant met the 2nd Appellant at the *Waters Edge*, the 2nd

Appellant had on his own motion solicited a bribe on behalf of the 1st Appellant. That was without the virtual complainant having induced the 2nd Appellant.

(iv) From that point onwards, it was the 2nd Appellant who had arranged meetings between the 1st Appellant and the virtual complainant. The virtual complainant did not initiate any of those meetings.

(v) At no stage did the officers of the CIABOC instigate or induce or lure either of the Appellants to solicit or accept a bribe. Nor did the virtual complainant do so.

(vi) The role of the decoy who was an officer of the CIABOC was passive, non-intrusive and was a mere 'pedestrian' like presence.

(vii) The decoy did not actively guide the virtual complainant, or manipulate the processes of the raid.

(viii) The virtual complainant on the strict advice of officers of the CIABOC refrained from enticing, luring or otherwise encouraging the 1st and the 2nd Appellants to commit any offence.

Learned DSG submitted that these items of evidence and circumstances support his contention that the instant case was not a case of 'entrapment'. Learned DSG using terminology found in ***R v. Loosely*** stressed that the role of CIABOC officers was limited to *'providing an unexceptional opportunity to commit a long-standing pre-planned crime which was already in the move'*. He submitted that in the circumstances, the evidence emanating from the prosecution's narrative from the time the virtual complainant complained to the CIABOC up to the arrest of the Appellants, should not be rejected and should be taken into consideration for the purpose of determining this Appeal. He concluded his submissions by stating that in view of the foregoing, the Appellants had not been denied a *'fair trial'*.

Finding of the Trial Court

An examination of the impugned judgment of the Permanent High Court at Bar reveals that learned Counsel who defended the two Appellants at the trial had raised 'the defence of entrapment' on the footing that the virtual complainant Nagarajah had acted as an *agent provocateur*, and that he had lured the accused to commit the offences in the indictment. In the circumstances, learned Counsel had pleaded that the evidence of the virtual complainant relating to events that are said to have occurred from the moment the complaint was made to the CIABOC, be excluded from the trial. Following a consideration of ***R. v. Sang,*** the trial Court had rejected the submission that English law recognizes the 'defence of entrapment'. Drawing a parallel, the view formed by the trial Court is

that Sri Lanka's law too does not recognize the 'defence of entrapment'. Thus, the Court has concluded that the evidence presented by the prosecution against the accused cannot be rejected. Such refusal to reject evidence presented by the prosecution has also been on the footing that virtual complainant's conduct cannot be treated as that of an *agent provocateur.*

Consideration, conclusions and findings

The fundamental right to a *'fair trial'*

The right of a person accused of committing an offence, to a *'fair trial'* against him, which is a fundamental right recognized by Article 13(3) of the Constitution, is of unparalleled importance. It is an important and crucial safeguard to ensure that only a person *'guilty'* of having committed an offence is *'convicted'* by a Court. Such conviction should be conditioned upon the prosecution having proved the charge against the accused beyond reasonable doubt. It is a *'fair trial'* that ultimately ensures that not a single innocent person is convicted of committing an offence for which he is not culpable of. Rightfully, the concept of a *'fair trial'* finds itself a foremost place even in the main objective of criminal justice, that in my opinion being, *'the prevention, detection and investigation of crime, and the prosecution and punishment of offenders founded upon a lawful and* ***fair trial****'.*

Particularly due to the prospect of a criminal trial resulting in the imposition of serious penal sanctions which have the potential of depriving the convict of his personal liberty, as well as affecting his financial and proprietary interests culminating in serious and far-reaching consequences, the conduct of criminal trials and related prosecutions must not only be procedurally lawful, they must be conducted in a fair manner as well.

It is primarily a *'fair trial'* that reflects the civility of any criminal justice system and ensures that the dignity of all persons who may be prosecuted by the state is protected and that criminal justice is administered according to law, equitably, and in a fair manner. It is the rule of law and a *'fair trial'* that separates a *'prosecution'* from a *'persecution'*. Persecution is a major afront to the rule of law and is unfair. Persecution is a sign of incivility. In the long-term, systematic and widespread persecution has the distinct potential of causing social unrest, resulting in the breakdown of an otherwise cohesive and law-abiding society and culminating in the destruction of the state. The insistence upon the conduct of criminal trials in a fair manner is a safeguard against such dangerous evils.

It is a *'fair trial'* that distinguishes a competent criminal trial court discharging justice according to law which is very much in national and public interest, from what is colloquially referred to as a *'kangaroo court'* of which the hallmarks are (i) illegitimacy, (ii) absence of independence, impartiality and neutrality, (iii) lack or absence of professionalism and fairness on the part of the judge and the prosecutor, and (iv) the existence of subjectivity, arbitrariness, unreasonableness, prejudice and unjustifiable haste.

'Fair trial' is consonant with the administration of justice, and serves as a protection against harassment and oppressive intrusion into the liberty of not only innocent persons, but even persons who may be culpable of committing offences.

Therefore, *'fair trial'* is necessarily a core feature to be expected from Sri Lanka's criminal justice system, which should permeate throughout the multiple phases of the criminal justice system, without being technically restricted to the trial stage. It is an imperative legal requirement that should prevail during pre-trial, trial and post-trail stages of criminal justice. It is of such importance that an accused deprived of a *'fair trial'* thereby gains the entitlement to have his conviction challenged in Appeal on that ground alone, particularly if grave and irreparable prejudice to the accused had resulted from such absence or lack of a *'fair trial'* culminating in a miscarriage of justice.

Article 13(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka provides as follows:

> *Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law,* ***at a fair trial*** *by a competent court.* [Emphasis added]

The importance the Constitution has placed on the fundamental right to a fair trial is manifest in the fact that Article 15 of the Constitution does not recognize any restrictions that may be lawfully imposed on the enjoyment of the right to a fair trial, save as to certain very limited restrictions that may be prescribed by law. The only restriction permitted by the Constitution are those that may be prescribed by law and made applicable only to trials against members of the armed forces, the police and other forces who may be charged with the maintenance of public order. Thus, there can be no derogation from the right to a fair trial even with regard to persons who may be indicted of having committed the most heinous type of offences such as those that may cause serious harm to national security or to the society as a whole.

In ***The Attorney-General v. Segulebbe Latheef and Another****, [(2008) 1 Sri L.R. 225]* and ***Attorney-General v. Aponso,*** *[(2008) B.L.R. 145]*, Justice J.A.N. De Silva (as His Lordship was then) has highlighted the importance of recognizing the right to a fair trial in the following words:

> *"The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a "fair trial" by a competent court. This right is recognised obviously for the reason that a criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another, if found guilty. The right of an accused persons to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice has been denied."*

Justice J.A.N. De Silva has observed that the right of an accused person to a fair trial is recognized in all criminal justice systems in the civilized world. Its denial is generally proof enough that justice has been denied. Justice De Silva has further observed that like the concept of fairness, a fair trial is also not capable of a clear definition. However, there are certain aspects or qualities of a fair trial amongst other things which could be identified.

From a holistic perspective, it is in public interest that the following are ensured:

(i) That a person who has committed an offence and is therefore indicted, must be found *'guilty'* and **convicted** of committing the offence he has been charged with, and is appropriately punished in terms of the law. However, such outcome must be achieved by prosecuting the alleged offender before a competent court, through a procedurally lawful and fair trial at which evidence that is legally relevant is presented in terms of legally admissible means, through credible witnesses, whose testimonies are trustworthy.

(ii) That a person who has not committed an offence, who nevertheless may have been indicted, must be found *'not guilty'* and **acquitted** of the charges in terms of the law, following a procedurally lawful and fair trial.

Trial outcomes that are contrary to these two principles are inconsistent with the objectives of criminal justice and are not in public interest.

As pointed out by learned President's Counsel for the 1st Appellant, a trial should not only be forensically fair (which means compatibility with procedural and evidential rules), it must be fair in the true sense of the word.

In ***Zahira Habibullah Sheik and Another v. State of Gujarat and Others****, [Criminal Appeal No. 446-449 of 2004, decided in March 2006 by the Supreme Court of India],* Justice Arijith Pasayat has held the following:

> *"The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation – peculiar at times and related to the nature of crime, persons involved – directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of the criminal justice system. … Denial of a fair trial is as much injustice to the accused as it is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm."*

In view of the foregoing, it is my view that judges of trial Courts of this country have an enormous and extraordinary legal responsibility of ensuring that criminal trials are conducted not only in a forensically accurate manner (in accordance with procedure prescribed by law and in compliance with the rules of evidence) but also in a fair manner as well. Similarly, there is an associated professional duty cast on the prosecutor (who in the conduct of criminal prosecutions has a quasi-judicial responsibility to perform, solely in public interest) to conduct the prosecution not only as provided for in the Code of Criminal Procedure Act and to present evidence in accordance with the law of Evidence, but also to discharge that pivotal professional responsibility towards the administration of justice in a fair manner as well. I cannot see a fair trial taking place, unless both the trial judge and the prosecutor discharge their responsibilities in a fair manner. That of course does not mean that all judicial orders and prosecutorial decisions should be favourable to the accused. What it means is that, while the trial judge should make lawful, judicious and fair decisions, the prosecutor must act in a quasi-judicial and fair manner, necessarily in public interest. The master and the guiding force of both the judge and the prosecutor should be the law and the law alone, and no individual or organization or self-interest.

There is one more point that requires, what I wish to refer to as a 'passing comment' . It is necessary to note that the concept of fairness at a criminal trial has been so far recognized as a fundamental

right only from the perspective of the accused. However, in my view, it is of paramount importance to recognize that victims of crime are also entitled to receive a fair trial. The right to a fair trial is one of the underlying legal concepts based upon which the Parliament has enacted numerous rights of victims of crime and made them justiciable in terms of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015. Thus, victims of crime are also entitled by law to receive a fair trial. Witnesses too, have an entitlement to testify at a fair trial. What is even more important to note is that when an offence has been committed, the public at large and the state also have the entitlement to have a lawful, fair and expeditious trial against the perpetrator of the offence. Such trial should be aimed at the conviction of the *guilty* or the acquittal of the *innocent*.

Relationship between the fundamental right to a *'fair trial'* and adjudication of a criminal appeal

It is natural for one to wonder why in the judicial adjudication of a criminal appeal, judicial consideration need be given to the examination and determination of whether in the impugned trial proceedings the accused – appellant had been deprived of the 'fundamental right' to a 'fair trial'. In this regard, it is pertinent to observe that in terms of the Constitution of the Democratic Socialist Republic of Sri Lanka, it is the duty of all organs of the state (the Executive, Legislature and the Judiciary) to respect, protect and promote the fundamental rights of all persons and not to act in a manner that would infringe fundamental rights. In fact, in my view, the spirit of Sri Lanka's Constitution demands that the three organs of the state undertake and carryout an 'activist role' towards the promotion and protection of fundamental rights. That is an overarching Constitutional duty cast on the state towards the public at large.

While Articles 17 read with 126 provide for a specific mechanism to impugn executive or administrative action on the footing that such action infringed one or more fundamental rights or that there exists an imminent likelihood of a fundamental right being infringed and to therefor obtain declarations from the Supreme Court to that effect and just and equitable relief, it remains the responsibility of all Courts to ensure that judicial proceedings (notwithstanding the nature of the jurisdiction invoked) are conducted in a manner in which fundamental rights are not infringed. It is important to note that as the mechanism contained in Articles 17 and 126 does not confer jurisdiction on the Supreme Court to adjudicate upon allegations that a particular judicial conduct or a judicial decision resulted in an infringement of a fundamental right, it is through appellate proceedings of this nature that the Supreme Court could examine such allegations. Thus, in appellate proceedings (such as in the instant appeal), when an allegation is made that the impugned criminal trial proceedings were conducted in a manner that infringed the fundamental rights of the

accused, the Supreme Court must give its anxious consideration to such allegation and arrive at a finding thereon. If it is found that a fundamental right the accused – appellant was entitled to enjoy had been infringed during trial proceedings and such infringement had resulted in a miscarriage of justice, the conviction of the accused – appellant must be set aside.

In this regard it would be pertinent to note that Justice Buwaneka Aluwihare in ***Hattuwan Pedige Sugath Karunarathne v. Attorney-General*** *[SC Appeal 32/2020, Supreme Court Minutes of 20th October 2020]* has observed that Courts must respect and give effect to Constitutional provisions in the conduct of Court proceedings, such as the fundamental rights contained in Chapter III of the Constitution. Justice Aluwihare has proceeded to observe that Article 13(3) recognizes the entitlement of a person charged with an offence to a *'fair trial'*, a right which the state has an obligation to accord to an accused through the Courts. It is important to note that these observations were made by Justice Aluwihare in the course of adjudicating upon a criminal Appeal.

Basis for the allegation that the Appellants had been denied a *'fair trial'*

Learned President's Counsel for the Appellants presented their arguments on the footing that the entire investigation conducted by the CIABOC was founded upon a process of investigation which they referred to as 'entrapment'. They submitted that the investigative process of entrapment is illegal (or to say the least unlawful), and that such illegality in the investigation resulted in the Appellants being deprived of a fair trial, since a lawful and fair investigation was a prerequisite for a fair trial. They submitted that the Appellants had been denied a fair trial, as the Prosecution's evidence was founded upon an entrapment which was illegal. Thus, from a generic perspective, the position advanced on behalf of the Appellants was that as the prosecution was founded upon an entrapment, the accused were deprived of a fair trial, and hence the convictions must be quashed.

Therefore, it is necessary to first consider and conclude whether a 'lawful investigation' is a prerequisite for a 'fair trial' or whether a lawful investigation is a component of a fair trial.

Nature and ingredients of the right to a *'fair trial'*

Though the Constitution recognizes the right to a fair trial as a Fundamental Right, the black letters of the Constitution remain conspicuous by their silence as to the exact meaning and the constituent ingredients of a fair trial.

The conceptual origins of a fair hearing (used synonymously with the term 'fair trial') being afforded to a person accused of committing a crime are found in the Magna Carta of 1215 AD. ["… *No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers or by the law of the land … To no one will we sell, to no one will we deny or delay, right or justice*."]

The specific rules which regulate a fair trial have evolved from the rules of natural justice. It is widely accepted that the concept of a 'fair hearing' was developed by the judges of Courts of Equity in England and thereby entered the English common law. In contemporary English law, the concept of a fair hearing has found its way into both administrative law and the law relating to criminal justice. A 'fair hearing' as a Human Right was initially recognized by the Universal Declaration of Human Rights (UDHR) in 1948. Article 10 of the Declaration provides that, *"Everyone is entitled **in full equality to a fair and public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* [Emphasis added] Articles 11, 14 and 15 of the Declaration refer to certain ensuing rights of persons accused of committing offences, which seek to guarantee a fair trial.

The significance of Articles 10, 11, 14 and 15 of the UDHR fell outside the spotlight in 1966 by the right to a 'fair trial' being recognized as a Human Right under the International Covenant on Civil and Political Rights (ICCPR). With almost universal ratification of the Covenant, the ICCPR serves as the bedrock for contemporary International Human Rights Law.

Article 14 of the ICCPR reads as follows:

> *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing** by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

> *7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

Supplementing the ICCPR, several regional Human Rights treaties have come into being, among which is the European Convention on Human Rights (ECHR) of 1950. Article 6 of the ECHR seeks to guarantee the human right to a fair trial. Article 6(1) provides as follows:

> ***In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing*** *within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.* [Emphasis added]

Judgments of the European Court of Human Rights which contain very important pronouncements on the right to a fair trial embodied in the ECHR (such as *Teixeira de Castro v. Portugal* cited by the House of Lords in *R. v. Looseley*, the case which was referred to frequently by learned Counsel during the hearing of this Appeal) have contributed immensely to the development of jurisprudence regarding the human right to a fair trial.

It is to be noted that Article 14 of the ICCPR while recognizing the right to a 'fair hearing' as a Human Right, contains both substantive and procedural safeguards to ensure that accused receive a fair trial. They are recognized under international human rights law only as minimum legal guarantees to be accorded to a person accused of committing an offence. A careful consideration of the schemes and provisions of the Code of Criminal Procedure Act (CCPA) and the Evidence Ordinance (EO) reveal that these two laws which are the two primary cornerstones of the criminal justice system of Sri Lanka, have been designed and structured to recognize many of the features contained in Article 14 of the ICCPR and generally the concept of a fair trial. Nevertheless, it is important to note that the CCPA and the EO do not contain ingredients of a fair trial, exhaustively. Those two laws, provide only the minimum features of a fair trial.

In 2007, the Parliament enacted the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, as its preamble reads, to give effect to certain Articles of the ICCPR relating to Human Rights which have not been given domestic recognition through legislative measures. Section 4 of the Act confers on 'alleged offenders' the following 'entitlements':

> *(1) A person charged of a criminal offence under any written law, shall be entitled —*
>
> *(a) to be afforded an opportunity of being tried in his presence;*
>
> *(b) to defend himself in person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;*
>
> *(c) to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance:*
>
> *(d) to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;*
>
> *(e) to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted; and*
>
> *(f) not to be compelled to testify against himself or to confess guilt.*
>
> *(2) Every person convicted of a criminal offence under any written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed.*
>
> *(3) No person shall be tried or punished for any criminal offence for which such person has already been convicted or acquitted according to law.*

Whether these 'entitlements' have the force of law and unconditional justiciability (particularly as they have not been, surprisingly though, classified as 'rights') is a matter to be decided in an appropriate case. However, it is pertinent to note that substantial judicial recognition of these 'entitlements' is found in ***Attorney-General v. Aponso*** (cited above).

It is noteworthy that both Article 14 of the ICCPR and section 4 of the ICCPR Act make no mention regarding the need for a lawful investigation based upon which a criminal prosecution could be founded upon and for a lawful investigation to be a condition precedent for a fair trial.

Nevertheless, it is necessary to consider whether this lacuna in international treaty and domestic statutory law, needs to be filled by judicial pronouncements resulting in the development of the common law.

In ***Wijepala v. Attorney General*** *[(2001) 1 Sri L.R. 46]* Mark Fernando, J. observed that Article 13(3) *"not only entitles an accused to a right to legal representation at a trial before a competent court, but also to a fair trial, and that* ***includes anything and everything necessary for a fair trial****."* (Emphasis added.) Thus, it is seen that Justice Mark Fernando has by the use of the term *'anything and everything'* indicated the impossibility of defining the concept of a fair trial and exhaustively describing the constituent ingredients of a fair trial. He has observed the expansive nature of the concept of a fair trial. Indeed, what amounts to a fair trial would be extremely difficult to define. It is only a series of judgments on this matter that would give rise to a comprehensive description of the concept of a fair trial and illustrate a definitive list of the constituent ingredients of the concept. Whether or not an accused has been denied a fair trial must be determined upon a consideration of the attendant facts and circumstances of the case in comparison with the requirements of a fair trial.

Link between the right to a fair trial, a lawful investigation and the institution of criminal proceedings

It is noteworthy that both the institution of criminal proceedings and the conduct of criminal prosecutions are founded upon the conduct of criminal and forensic investigations. A criminal investigation can be described as **a legally regulated process**, which is required to be conducted by officials who possess the legal authority to conduct such a process. The primary objectives for which a criminal investigation is conducted, are as follows:

(a) To ascertain the truth pertaining to the information, complaint or allegation that an offence has been committed (i.e. whether in fact an offence has been committed).

(b) If the investigation reveals that in fact an offence has been committed, ascertaining the identity of the perpetrator.

(c) Apprehending the perpetrator.

(d) Collecting 'investigative material' that would have the potential of being admissible against such perpetrator in a court of law, by converting such material into 'judicial evidence' (oral, documentary and technical), so that criminal proceedings could be instituted against the perpetrator, and upon successful prosecution of the perpetrator, he could be convicted for committing the offence and be appropriately punished.

It must be noted that the function of the Attorney General with regard to the institution of criminal proceedings (following a consideration of investigative material) has been conferred on him by

statute (the written law). A decision on the institution of criminal proceedings has a direct bearing on the legal rights and interests of both the suspect / accused (alleged offender) and the relevant victim of crime. Therefore, this function of the Attorney General should be viewed from the perspectives of principles of public law. Subject to the exception provided by section 24 of the Commissions of Inquiry Act (as amended by Act No. 16 of 2008), the statutory function of instituting criminal proceedings against alleged offenders is regulated by section 393 of the Code of Criminal Procedure Act (CCPA). With regard to offences that are required to be investigated into by the police, the CCPA requires the decision of the Attorney General on the institution of criminal proceedings to be founded upon an investigation conducted by the police in terms of the law. Thus, with regard to an offence investigated into by the police, a decision on the institution of criminal proceedings by the Attorney General must be founded upon an *intra-vires*, independent, impartial, neutral, *good faith* and objective consideration of investigative material relating to an investigation conducted by the police **in a lawful manner**. The same principle applies to the function of the CIABOC pertaining to the institution of criminal proceedings by it. It needs hardly be mentioned that the institution of criminal proceedings by either the Attorney-General or the CIABOC for whatever collateral purposes of itself or any other person, would be unlawful and amount to an infringement of Article 12 of the Constitution.

If investigators are permitted to conduct investigations in a manner contrary to law, it would amount to a serious afront to the rule of law and will affect the legality of the institution of criminal proceedings. Similarly, it will affect the integrity of the criminal justice system and frustrate the achievement of objectives of criminal justice. It can result in persons suspected of committing offences being deprived of their fundamental rights, the truth being suppressed, and accused persons being unfairly prosecuted. It can give rise to innocent persons being investigated into and actual perpetrators of crime being shielded from criminal justice. In addition to the underlying rationale behind outlawing unlawful investigations, from a public law perspective, **using investigative material gathered through such an unlawfully conducted investigation to found a decision on the institution of criminal proceedings would be manifestly unlawful.**

In ***R.P. Wijesiri v. The Attorney General*** *[(1980) 2 Sri L.R. 317],* Justice Parinda Ranasinghe (as His Lordship was then) as a Judge of the Court of Appeal, considered the vexed question of (in the circumstances of the case examined by that Court), the legality of an indictment preferred by the Attorney General to the High Court. His Lordship considered whether, even if the Attorney General had the statutory power to prefer an indictment to the High Court, such indictment should have

been preceded by a 'lawful investigation'. While answering this question in the affirmative, Justice Ranasinghe observed the necessity for and the importance of a legally valid investigation being conducted by the Police into an offence, before criminal proceedings are instituted by the Attorney General. He observed that the importance of commencing proceedings before a Court in a lawful manner cannot be overstated (at page 339). In the circumstances of that case where the Attorney General had directly instituted criminal proceedings against the Petitioner for having committed an offence under section 480 of the Penal Code, Justice Ranasinghe observed (at pages 346-7) that the indictment should have been preceded by a lawful investigation, and that the absence of such a lawful investigation preceding the indictment rendered the indictment also unlawful. Justice Abdul Cader pronouncing a separate judgment, while expressing agreement with the views expressed by Justice Ranasinghe, held that in the circumstances of that case, the High Court was not empowered to try the case, as the Police had not conducted an investigation in a lawful manner in accordance with the provisions of the Code of Criminal Procedure Act. He therefore ruled that the indictment itself was unlawful.

Thus, the law is clear. The institution of criminal proceedings in the High Court by the Attorney-General and by the Director General of the CIAOBC (who is also conferred with the statutory power of instituting criminal proceedings before the High Court by forwarding indictment, on a direction to do so by the Commission) should be founded upon a consideration of investigative material collected in the course of a **lawful investigation** (which means an investigation conducted in terms of the applicable law) and should be preceded by the conduct of such a lawful investigation by competent law enforcement personnel. All criminal investigations must necessarily be conducted in terms of the law. As observed by the Court of Appeal in ***R. P. Wijesiri v. The Attorney General***, it is only investigative material emanating from a 'lawfully conducted investigation' that a prosecutorial authority such as the Attorney General should consider for the purpose of deciding on the institution of criminal proceedings. The same principle of law would apply to the CIABOC.

In terms of section 11 of the CIABOC Act, where the material received by the Commission in the course of an investigation conducted under the Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, the Commission shall direct the Director General to institute criminal proceedings in the appropriate Court. It is implicit in section 11, that such investigation should be lawful. Thus, this principle applies equally to both the Attorney-General and the Commission to Investigate Allegations of Bribery or Corruption. It logically flows from this principle of law, that, if upon a consideration of investigative material, an affirmative

decision is taken by either of these two prosecutorial authorities to institute criminal proceedings against an alleged offender, the corresponding prosecution can be conducted only based on material collected in the course of a lawful investigation, and not otherwise.

It is necessary to observe that basing prosecutorial decisions such as a decision on the institution of criminal proceedings and framing of charges, and the conduct of prosecutions relying upon material gathered in the course of an unlawful investigation, would be a violation of the doctrine of the rule of law, and be both unreliable and unfair. The resultant effect of an unlawful investigation may be grave prejudice being caused to the accused and depriving him of this fundamental right to a *'fair trial'*. Such a process would also amount to an infringement of Article 12(1) of the Constitution (which may be identified as the Constitutional guardian of the rule of law).

Fair investigations

Not only should a criminal investigation be lawful, it must be fair as well; fair from the perspective of both the victim of crime and the suspected perpetrator of the offence. From the perspective of the suspect, a fair investigation will include the investigator adhering to the following:

(i) Explaining to the suspect the allegation against him.

(ii) Affording the suspect, a full opportunity of presenting his position with regard to the allegation against him and regarding persons who have made incriminatory statements and items of incriminatory material gathered by investigators.

(iii) Conducting investigations based on exculpatory positions (if any) taken up by the suspect.

(iv) Treating the suspect in a humane manner, and in a manner that would not infringe his fundamental rights.

The investigator must always maintain an objective mind and not view or treat the suspect with any prejudice. Ascertainment of the truth in terms of the law should be the prime motive of the investigator, and not to 'develop a case against the suspect so that he could be somehow prosecuted'.

In ***Nirmal Singh Kahlon v. State of Punjab and Others****, [(2009) AIR SC 984]* the Supreme Court of India has held that *"… an accused is entitled to a fair investigation.* ***Fair investigation and fair trial are concomitant to the preservation of fundamental right*** *of an accused under Article 21 of the Constitution of India".* [Emphasis added] In ***Sidhartha Vashisht alias Manu Sharma v State (NCT of***

***Delhi)**, [(2010) 6 SCC 1]* the Supreme Court of India has observed that, *"… the alleged accused is entitled to fairness and true investigation and fair trial, and the prosecution is expected to play a balanced role in the trial of a crime... The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law".*

If an investigation is conducted in an unfair manner, the accused (when indicted) may be able to claim that he had been deprived of his fundamental right to a fair trial. Further, by the conduct of an unfair investigation, there is every reason to believe that the truth will not surface, and in the circumstances, the public will lose confidence in criminal law enforcement and in the criminal justice system.

Unlawful investigations

There can be a strong causal nexus between on the one hand an unlawfully conducted investigation and on the other hand the conviction of the accused following a trial at which investigative material collected in the course of such unlawful investigation had been presented (as judicial evidence). Presentation of evidence founded upon investigative material (material which has the potential of being converted into judicial evidence at the trial) collected in the course of an unlawfully conducted investigation can pollute the findings of the trial court and its verdict, and thereby render such finding unlawful. That is primarily due to the possibility of highly prejudicial evidence emanating from an unlawfully conducted investigation. Therefore, if the prosecution had relied primarily on evidence collected in the course of an unlawfully conducted investigation, it is possible that such evidence resulted in causing substantial prejudice to the accused and therefore resulted in a miscarriage of justice. If in fact a miscarriage of justice had occurred, the conviction of the accused should be set aside on the premise that the accused has been denied a fair trial. That is a situation where the outcome of the case (conviction of the accused) has been inextricably interwoven with the evidence presented by the prosecution which had emanated from an unlawfully conducted investigation. Therefore, there has been a causal nexus between the unlawfully conducted investigation and the conviction of the accused.

However, there may be situations where the investigation as a whole had been conducted in a lawful manner, and only certain segments of it had been unlawfully conducted. An example would be a lawful investigation into an incident of murder, where a particular search had been conducted in an unlawful manner, and a highly incriminatory item of real (physical) evidence having been found during such unlawful search. In such instances, the Court would have to carefully examine

and rule on the impact of such unlawfully conducted portion(s) of the investigation. What was the impact of the search having been conducted in an unlawful manner, on the recovery of the relevant incriminatory item of real evidence? Was evidence presented against the accused based on such unlawfully conducted segments of the investigation? Was the testimonial narrative of the prosecution pertaining to the recovery of such item, credible and trustworthy? Has the presentation of material emanating from such unlawfully conducted segments of the investigation, cause grave and irreparable prejudice to the accused resulting in a miscarriage of justice? It is the answers to these questions, that will enable the Court to determine whether in such instances (where only a part of the investigation had been conducted unlawfully), the accused had been denied a fair trial, and if so, whether the conviction should be set-aside.

Conduct of the investigation by officers of the CIABOC

It is now necessary to consider whether the investigation into the complaint made to the CIABOC by the virtual complainant Nagarajah, had been conducted in a lawful manner. In this regard, consideration of section 5 of the Code of Criminal Procedure Act, No. 15 of 1979 would provide a useful starting point.

> *All **offences** –*
> *(a) under the Penal Code,*
> *(b) **under any other law unless otherwise specifically provided for in that law or any other law**,*
> *shall be **investigated**, inquired into, tried and otherwise dealt with **according to the provisions of this Code**.* [Emphasis added]

The offences for which the Appellants have been found *'guilty'* of committing, are offences under the Bribery Act. The Bribery Act presently does not contain specific provisions pertaining to the conduct of investigations into offences under the Act. [Prior to 1994, there were certain provisions, which were repealed by Act No. 20 of 1994.]

However, the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, which established the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), has vide section 3 of the Act, entrusted such Commission the statutory functions of –

(i) investigating allegations contained in communications made to the Commission under section 4, and

(ii) where such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, directing the Director General for the Prevention of Bribery or Corruption to institute criminal proceedings against such person in the appropriate court.

It would be seen that by section 5 of the CIABOC Act, the CIABOC has been vested with certain powers of investigation. Therefore, the Commission in the exercise of its statutory function of investigating the alleged commission of certain offences (such as the offences the Appellants were subsequently indicted of having committed) is entitled to exercise such powers of investigation contained in section 5 of the CIABOC Act. However, vide section 5 of the Code of Criminal Procedure Act, unless specifically provided in a particular law, an investigation at large should be conducted in the manner provided for in such Code. To enable officers appointed to assist the Commission to exercise powers of investigation contained in the Code of Criminal Procedure Act, section 18(2) of the CIABOC Act provides that the Director General for the Prevention of Bribery or Corruption (referred to as the 'Director General of the Commission' during the hearing of this Appeal) and every officer appointed to assist the Commission shall be deemed to be 'peace officers' within the meaning of the Code of Criminal Procedure Act.

A careful consideration of the Code of Criminal Procedure Act reveals that the statutory regulation of the conduct of an investigation is primarily found in Chapter XI of the Act. As observed by Justice Parinda Ranasinghe in ***R.P. Wijesiri v. The Attorney-General,*** Chapter XI contains vital powers of investigation, provisions that are sacrosanct and are invaluable safeguards against oppressive and unlawful forms of investigations. However, it is important to note that there are several very important provisions pertaining to the conduct of criminal investigations outside Chapter XI of the Code as well. They are, the (i) power to conduct search operations (sections 24 to 31), (ii) powers of arrest of suspects (sections 23, 32, 33, 34, and 42), and (iii) power to hold an arrested person in custody (sections 37 and 43A). Additionally, when police officers conduct investigations, they are empowered under the provisions of the Police Ordinance as well. Therefore, restricting the powers of investigation to Chapter XI of the Code would not be correct.

A further examination of the provisions of the CIABOC Act and the Code of Criminal Procedure Act reveals that though the said laws suitably empower any Peace Officer or an Officer-in-Charge of Police Station (in the context of investigations into offences under the Penal Code and various other laws containing offences which may be investigated into by the Police) and the Commission (in the

context of offences under the Bribery Act and the Declaration of Assets and Liabilities Law), the two laws in conjunction do not exhaustively contain provisions of law that would regulate the conduct of investigations. Neither of these two laws stipulate the exact *modus operandi* that may be adopted when conducting an investigation. For valid reasons, determining the exact manner in which an investigation should be conducted has been left to the ingenuity of the relevant investigators based on circumstances relating to each investigation. The manner of conducting an investigation is to be determined keeping in mind a host of factors such as the nature of the offence, the circumstances pertaining to the commission of the offence that is required to be investigated into, and the need to collect sufficient investigative material that would enable the launching of a successful prosecution. Subject to the provisions of the afore-stated laws and circumscribed by such laws, investigation officers have been vested with considerable discretionary authority to determine the exact manner in which the investigation ought to be conducted and implement the conceptualized investigation strategy in a lawful manner. Particularly with regard to complex crimes such as premeditated murder, bribery and corruption, money laundering, and drug trafficking, law enforcement officers would need to adopt complex investigative methodology to detect crime and to gather evidence. Of course, when designing such investigation strategy and implementing it, investigation officers would have to abide specifically by the applicable provisions of the afore-stated two laws and generally by the rule of law, which would include recognizing and respecting the Fundamental Rights of suspects and the rights and entitlements of victims of crime and witnesses. Indeed, every investigation must be conducted in a lawful, impartial, fair, prompt and comprehensive manner, with the view to ascertaining the truth.

Laying of a 'trap' and 'entrapment' as investigative techniques and their legality

Throughout the hearing of this Appeal, there was considerable debate about the investigative technique adopted by CIABOC officials which resulted in the arrest of the appellants. While learned President's Counsel for the Appellants submitted that what took place at the instance of officers of the CIABOC was an 'entrapment', learned Deputy Solicitor General for the Respondents submitted that the investigative technique adopted by officers of the CIABOC did not amount to 'entrapment' and was not unlawful. Learned counsel also debated whether the *modus operandi* adopted by CIABOC officers was merely 'laying of a trap' or 'an entrapment'. Therefore, it is now necessary to consider (i) what a 'trap' is as opposed to an 'entrapment', (ii) whether the *modus operandi* of 'entrapment' as alleged to have been adopted by the investigation officers of the Commission in the instant case, amounted to an 'entrapment' (iii) whether such 'entrapment' is 'unlawful' or 'illegal',

and (iv) whether in the instant case, officers of the CIABOC engaged in an entrapment and thereby deprived the Appellants of a *'fair trial'*.

A search for answers to these questions should be viewed against the backdrop of a core submission made by learned President's Counsel for the Appellants, that when the virtual complainant Nagarajah lodged his complaint at the CIABOC, all what CIABOC officers were entitled to do in terms of the law, was to investigate that complaint containing multiple instances of solicitation of a bribe, and if such investigation revealed sufficient evidence against the perpetrators, take action against them. Learned counsel submitted that instead of doing that (which is the investigative procedure provided by law), the investigators engaged in entrapping the Appellants, which was illegal.

In my view, what was urged by learned President's Counsel for the Appellants as being the lawful entitlement of investigators, was a very conventional and routine investigation: What may be described as a 'simple, conventional and reactive investigation', as opposed to a 'proactive form of investigation aimed at detecting the commission of an offence and gathering cogent evidence relating to the commission of such offence'.

It would be seen that not only in complex crimes such as bribery, corruption, money laundering, terrorism, drug trafficking and online / cyber environment based criminal activities, even in somewhat simple offences such as offences under the Food Act and the Consumer Protection Authority Act, unless law enforcement authorities were to engage in the adoption of proactive and innovative measures of investigation, detecting the commission of the offences, promptly arresting the perpetrator and procuring credible and cogent evidence relating to commission of those offences, would be extremely difficult. Further, by the adoption of simple, conventional and reactive methods of investigation (in the nature of what was submitted by learned counsel for the Appellants as being what was permitted by law), it is highly unlikely that the investigators would be successful in securing sufficient investigative material that would enable the prosecutor to successfully prosecute the offender. Therefore, in my view, what was suggested by the learned President's Counsel for the Appellants as being the only method that is permissible by law, would not be in public interest or in the furtherance of objectives of law enforcement and criminal justice. In my opinion, what was suggested by learned Counsel for the Appellants would be a panacea for perpetrators of crime to avoid criminal justice sanctions, and certainly not in public interest.

Particularly in what may be referred to as 'consent crimes' where there is no direct and immediate victim and both parties had acted surreptitiously in a consensual manner, it is unlikely that law enforcement officers will receive complaints or information pertaining to the commission of such offences. Examples would be (i) a lay person voluntarily giving a bribe to a public officer to secure a benefit for himself and the corresponding acceptance of that bribe by the official for his personal gain, which results in the requested official act being successfully performed and a benefit accruing to both the giver and the receiver of the bribe, and (ii) the sale of narcotics by a large scale drug-trafficker to secure financial gain for himself and the corresponding purchase of such narcotics also by a drug-trafficker or by an addict for re-sale or personal use. Unless law enforcement authorities based on available information and crime intelligence, engage the suspected perpetrator in a proactive manner and devise a method of apprehending the perpetrator at the very moment the offence is committed while they themselves witness the commission of the offence, detection of such offences, arrest of suspects and successful prosecution of offenders would not be feasible. Contemporary law enforcement practices which include covert policing operations in the name and style of sting operations using decoys, other forms of crime detection using decoys, test purchases, controlled deliveries, automated detection of offences using advanced technology, and virtue testing of fidelity to legal values using online communication channels and other methods are adopted throughout the world. Particularly with the increase in the sophistication of commission of crime and the use of advanced technology by criminals, law enforcement authorities have been able to keep society relatively safe from unscrupulous criminals, mainly due to such proactive forms of crime detection and criminal investigation.

Particularly in the field of bribery and corruption, which has most dangerously invaded the officialdom of our country and caused (possibly continues to cause) significant damage to the integrity of governance and devastating economic consequences, the adoption of proactive forms of investigation (to the exclusion of what is illegal) is very much in public interest, and must be encouraged.

Trap

According to the Oxford Advanced Learns' Dictionary (10th Edition - 2020) to the extent it is contextually relevant, a 'trap' is a clever plan designed to trick somebody, either by capturing them or by making them to do or say something that they did not mean to do or say. (e.g. She had set up a trap for him and he had walked straight into it.) A trap is also a trick to get somebody into doing something. According to the Black's Law Dictionary (11th Edition) a trap is a devise for capturing

living creatures and that shuts suddenly. A trap has also be described as any devise or contrivance by which one may be caught unawares.

From a crime detection perspective, a 'trap' may be described as an innovative crime detection method which law enforcement authorities use to nab perpetrators at the very instant the offence is committed. It is an undercover method of criminal investigation by which 'a trap is laid' enabling the perpetrator to be apprehended in the 'act of committing the crime' while ensuring that the perpetrator has no room to extricate himself. Where investigators adopt the 'trap' technique, the suspected perpetrator is not apprehended (arrested) immediately following the receipt of information or the complaint that he has committed an offence. A crime detection method referred to as a 'trap' is laid providing the perpetrator an opportunity to commit the substantive offence or a further offence (if he decides to commit the substantive offence or such further offence, on his own volition). It is the commission of the substantive or further offence that is detected by law enforcement officers by the laying of a trap. Thus, what law enforcement officers do is to design and create circumstances that confer on the perpetrator the opportunity to commit an offence on his own free will. This investigative method is designed in such a manner that the suspect receives a free opportunity to commit an offence in the immediate presence of an undercover law enforcement officer, who is generally referred to as a 'decoy'. The decoy is a passive observer of the conduct of the offender and either does not engage with the offenders or engages only minimally. The decoy offers no inducement to the suspect to commit an offence, nor does he lure him to commit the offence. If the offender does commit an offence, the decoy either directly apprehends the offender or signals the rest of the law enforcement personnel, and they rush to apprehend the offender.

The laying of a trap is carried out for multiple reasons. They are, (i) to check the veracity of the complaint / information received, (ii) to directly take cognizance of the offence being committed (as the decoy witnesses the offence being committed), and (iii) to facilitate the perpetrator being arrested 'in the act of committing the offence' or immediately thereafter. This method has the advantage of securing cogent evidence against the perpetrator, obtain corroboration of the complainant's position, preventing the offender from destroying evidence which incriminates him, and also prevents the offender from evading arrest. Therefore, 'laying of traps' is a well-accepted method. Thus, it would be seen that, it will certainly not be in public interest to proscribe all forms and manifestations of 'laying of traps', which do not take the manifestation and aggravated form of 'entrapment' (defined below). I take judicial note of the fact that, the CIABOC presently adopts the

'laying of traps' as a routine method of detection of accepting bribes and its legality has not been challenged in judicial proceedings. During the hearing of this Appeal, learned Counsel for the Appellants were non-committal regarding their views on legality of 'laying of a trap using a decoy'.

In ***M.S. Mohiddin v. Unknown*** *[AIR 1952 Mad 561]* (cited by learned President's Counsel for the 2nd Appellant) Justice Panchapakesa Ayyar has referred to two kinds of traps, namely *'legitimate traps'* and *'illegitimate traps'*. The challenge in my view would be to draw the dividing line between traps simpliciter that are permissible as they are lawful, as opposed to what are impermissible and thus unlawful. However, it is important to note that basing the argument on what is lawful verses what is unlawful based on nomenclature alone to be assigned to the impugned investigative technique can be troublesome.

Entrapment

'Entrapment' as an investigative technique, which was at the epicenter of the argument in this Appeal, is a term which does not find a statutory definition in Sri Lankan law (both written and unwritten law). Learned Counsel did not bring to the attention of this Court a statutory definition of the term found in a statute of a comparable jurisdiction.

In the foregoing circumstances, it would be logical to commence the search for a definition of the term by ascertaining the literal meaning of the term 'entrapment'. According to the Oxford Advanced Learner's Dictionary (10th Edition - 2020) 'entrapment' means *the illegal act of tricking somebody into committing a crime so that he can be arrested for it*. Other language dictionaries offer similar literal meanings.

The logical next step would be to refer legal dictionaries. According to the Merriam–Webster's Dictionary of Law, entrapment is *the action or process of entrapping and the state or condition of being entrapped*. The term has also been defined as *the affirmative defence of having been entrapped by an agent of the government*. According to the Black's Law Dictionary (11th Edition), entrapment is *a law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion in an attempt to cause a criminal prosecution against that person*.

All counsel were unanimous in their position that judicial pronouncements of this country do not contain a definition of the term 'entrapment'. In the circumstances, it is necessary to consider

judicial interpretations found in judgments of comparable jurisdictions. As referred to above, learned President's Counsel for the 2nd Appellant brought to the attention of this Court a possible definition of the term, found in ***Sorrells v. United States*** *287 US 435 (1932),* which provides that entrapment is *"… the conception and planning of an offence by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer …".* Learned Deputy Solicitor General did not oppose this definition.

In the English case of ***R. v. Frank Alexander Birtles*** *[(1969) 53 Cr.A.R. 469]*, Lord Parker, CJ has, in an instance where the informer had created the commission of an offence by inciting the accused to commit an offence which he would not have otherwise committed, held that *"it is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed."* These words reflect Lord Chief Justice Parker's views on what entrapment means. In the South African case of ***S. v Malinga*** *[(1963) 1 S.A.L.R.692]* Justice Holmes has defined that a person may be referred to as a "trap" which such *"person who with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence."* In the Canadian case of ***R. v. Haukness,*** *[(1976) 5 W.W.R. 420],* entrapment has been defined as *"… the act of an officer who induces a person to commit a crime, not contemplated by such person, for the purpose of prosecuting him …".*

Upon a consideration of the literal meaning of the English term 'entrapment', definitions found in legal dictionaries, and judicial pronouncements of comparable jurisdictions, without intending to provide an exhaustive definition, it is my view that ***'entrapment' is a process which is associated with the conduct of certain forms of criminal investigations, where one or more law enforcement officers in collaboration with or without the participation of a lay person, engages in the conduct of one or more activities not associated with routine and conventional criminal investigations, for the purpose of inducing or enticing another person to commit a crime. Such stratagem may take the form of instigation, enticement, inveigling, applying duress or luring. As a result of such stratagem, the offender commits an offence, which he did not originally intend to commit. The result of causing the offender to commit an offence is achieved by deception or fraud. As a result of such stratagem and upon being deceived, the offender commits the offence he was instigated, enticed, inveigled or lured into committing. Consequent to the commission of the offence, the offender is arrested forthwith.***

Thus, it would also be seen that 'entrapment' is an aggravated manifestation of 'laying of a trap'. In an entrapment, in addition to the routine features of 'laying a trap', investigators engage in certain measures by the application of stratagem, so as to induce or lure the offender to commit an offence which he would not have otherwise committed. In other words, investigators not only set in place circumstances that confer on the offender an opportunity to commit and offence, they 'create' the commission of the offence, as well.

Generally, entrapment is carried out by an *agent provocateur.* An *agent provocateur* is a person who entices another to commit an express breach of the law, which that person would not have otherwise committed, and then proceed to inform against him in respect of such offence to a law enforcement agency or to a Court. An *agent provocateur* could be a law enforcement officer or a lay person who acts in terms of advice or instructions given by a law enforcement officer. It is noteworthy that in entrapment, certain forms of interventions by law enforcement officers, are *per-se* criminal activities. Examples would be abetting the commission of an offence or conspiracy to commit an offence. Those are instances where the law enforcement officer concerned and or the *agent provocateur's* conduct forms the *actus reus* of an offence. However, in certain other entrapments, interventions by the *agent provocateur* do not constitute the *actus reus* of any offence. Notwithstanding the possible blameworthiness of the conduct of the *agent provocateur,* it is necessary to note that in entrapment, the motive of law enforcement officers is to detect and apprehend a person whom they believe has engaged in criminal activity. They do not entertain any criminal intent on their part.

It is thus seen that, in a case of entrapment, what led to the perpetrator to commit the ingredients of the offence, was a form of intervention necessarily associated with deception practiced upon him by law enforcement officers or by a lay person acting at the behest of law enforcement officers. As a result of the intervention, the perpetrator commits an offence which he would not have committed if not for such intervention. These features of 'entrapment' distinguish itself from a 'trap' simpliciter.

In ***Nottingham City Council v. Amin*** *[(2000) 1 WLR 1071],* it was held that the nature of the offence, the reason for the particular police operation, the nature and extent of police participation in the crime, and the character of the accused, are factors among others that may be taken into consideration in determining whether a particular conduct of the law enforcement officers is

acceptable or not. It was further held that this was not an exhaustive list of factors and that their relative weight and importance depends on the facts of each case.

Though in order to justify a particular *modus operandi* adopted by them to investigate a crime, law enforcement officers may advance the proposition that recourse was had to the impugned procedure for the purpose of detecting a person in the act of committing an offence and that they acted in *good faith,* the legality of such *modus operandi* needs to be carefully considered.

Legal implications arising out of entrapment

The legal implications arising out of entrapment has been discussed in the English case of ***R v Sang*** *[(1980) AC 402]*, which was referred to by all Counsel and by the trial court**.** In this case, while Sang had been a prisoner detained at the Brixton prison, he met a fellow prisoner called Scippo who unknown to Sang, was a police informant and served in this instance as an *agent provocateur*. Shortly before Sang was about to be released from prison, Scippo who seemed to think that Sang's business or part of it was to deal in forged banknotes, told Sang that he knew of a safe buyer of forged banknotes and that he would arrange for this buyer to get in touch with Sang by telephone. Soon after Sang left the prison, he was telephoned by a man who posed as a keen buyer of forged banknotes and enquired whether Sang would sell him some. Sang responded that he would, and at a subsequent meeting between the two, the deal was to be completed. Sang had no idea that the man with whom he had been speaking, was, in fact a sergeant of the police. Sang and some of his associates went to the meeting carrying with them a large number of forged USD banknotes and walked straight into a police trap. The forged notes were confiscated and Sang and his comrades in crime were arrested. Subsequently, Sang and another were charged with conspiracy to utter counterfeit banknotes and with unlawful possession of the same.

At the trial, the trial judge ruled that he had no discretion to exclude evidence obtained through an *agent provocateur* and after trial, convicted Sang. The Court of Appeal dismissed Sang's Appeal. However, the following question was certified as being fit for consideration by the House of Lords: *"Does a trial judge have a discretion to refuse to allow evidence-being other than evidence of admission-to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?"*

The House of Lords affirmed the view of the Court of Appeal (Criminal Division). It was held that there was no justification for the exercise of the judge's discretion to exclude evidence, whether or not it had been obtained as a result of the activities of an *agent provocateur*. Accordingly, the appeal was dismissed. In the course of the judgment, the Court enunciated the following principles:

- There is no defence called 'entrapment' known to English Law. The fact that the procurer of the offence (*agent provocateur*) is a policeman or a police informer cannot affect the guilt of the principal offender, although it may be of relevance in mitigation of penalty for the offence. Both the physical element (*actus reus*) and the mental element (*mens rea*) of the offence with which the accused has been charged are present in this case.
- Incitement is no defence in law for the person incited to crime, even though the inciter is himself guilty of crime and may be far the more culpable. There are other more direct, less anomalous ways of controlling police and official activity than by introducing so dubious a defence into the law. The true relevance of official entrapment is upon the question of sentence where its mitigating value may be high.
- A trial judge in a criminal trial has always a discretion to refuse to admit evidence pertaining to entrapment, if in his opinion its prejudicial effect outweighs its probative value.
- Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, the trial judge has no discretion to refuse to admit relevant and admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an *agent provocateur*.
- 'Fair' in this context relates to process of trial. No man is to be compelled to incriminate himself; No man is to be convicted save upon the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless such admission or confession was made voluntarily. If legally admissible evidence be tendered which endangers these principles, the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in the law to secure him a fair trial.

Lord Diplock answered the afore-stated question of law, in the following manner:

> A <u>trial judge may, at his discretion, exclude such evidence pertaining to an entrapment only where its prejudicial effect outweighs its probative value or where the evidence has been obtained from the accused after the commission of the offence</u>, as in cases of admissions and confessions.

Thus, it is evident that ***R v. Sang*** has been decided on the premise that procuring evidence through entrapment does not *per-se* make such evidence inadmissible against the accused. Nor is entrapment an exculpatory defence. If at all, it will have the effect of mitigating the sentence. The view of the Court was that admissibility of evidence procured through entrapment should be determined based on relevancy, admissibility and the probative value of such evidence, and should not be necessarily excluded.

In ***Regina v. Loosely*** and ***The Attorney General's Reference, No. 3 of 2000*** *[(2001) UKHL 53]* (which were two conjoined appeals), the House of Lords revisited the law regarding this matter. Much of the very interesting and argumentative debate during the hearing of the instant Appeal centered around the *ratio decidendi* of the judgment of the House of Lords and its applicability to the facts and circumstances of the instant case.

In ***R v Looseley****,* during the course of an authorized police operation relating to the trade in class-A controlled drugs, an undercover police officer who was at a public house, was given the defendant's (Looseley's) name and telephone number as a potential source of drugs. The officer telephoned Looseley who confirmed that he could obtain drugs. After they had agreed on a price for the supply of heroin, the defendant took the officer to an address where the defendant obtained a quantity of heroin and gave it to the officer in exchange for the agreed sum. On two further occasions, the officer contacted the defendant and bought two more quantities of heroin from him. The defendant was charged with supplying or being concerned in the supplying to another of a class-A controlled drug, contrary to section 4 of the Misuse of Drugs Act 1971. The trial judge declined to stay proceedings as an abuse of process of court or to exclude the evidence under section 78 of the Police and Criminal Evidence Act. The Court of Appeal upheld the judge's ruling and dismissed the defendant's appeal against conviction. The House of Lords held that there was no objection to the police posing as drug users to trap an active drug dealer.

In ***Attorney General's Reference (No. 3 of 2000)****,* two undercover police officers offered contraband cigarettes to a youth. The youth took the officers to the accused (who was introduced as a potential buyer), who paid for the cigarettes. The officers then asked the accused if he could supply them with some heroin. At first the accused said he could not get heroin at such short notice and that he was "not into heroin". But eventually he agreed to try and get them some. A few days later, he took the officers to meet the supplier, collected the heroin and gave it to the officers in exchange of 475

pounds. When he was subsequently arrested and interviewed, he said that because the officers were getting him cheap cigarettes, he thought that supplying heroin amounted to a 'favour for a favour'. He did not suggest that the officers exerted pressure of any kind. The accused was charged with supplying to another, a class-A controlled drug contrary to section 4 of the 971 Act. The trial judge stayed proceedings on the ground that the police officers had incited the commission of the offence and that based on jurisprudence of the European Court of Human Rights, held that permitting the evidence to be admitted would deprive the accused of the right to a fair hearing as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. When the stay was lifted and the prosecution offered no evidence, the accused was acquitted. On reference by the Attorney-General, the Court of Appeal ruled that the trial Judge had erred in staying proceedings. In the House of Lords, it was held that there was an abuse of process where the defendant, who had never dealt in drugs was induced to procure heroin for an undercover officer by the prospect of a profitable trade in smuggled cigarettes – the police had caused him to commit an offence which he would not otherwise have committed.

It is important to note that during the intervening period between the judgments in ***Sang*** and ***Loosely and AG's Reference 3 of 2000***, several significant developments occurred in the United Kingdom, which seems to have had an influence on the outcome of the two conjoined Appeals. They were, (i) the enactment of the Police and Criminal Evidence (PACE) Act of 1984, in which section 74 provides for the exclusion of otherwise admissible evidence on the footing that it would be unfair to adduce it, (ii) the pronouncements of the judgments of the European Court of Human Rights in ***Ludi v. Switzerland*** *[(1992) 15 E.H.R.R. 201]* and ***Texeira de Castro v. Portugal*** *[(1998) 28 E.H.R.R. 101]* where investigations conducted by the police amounting to entrapment were viewed from the context of Article 6 of the European Convention on Human Rights and determined by that Court as having deprived the accused of a fair trial, (iii) the decision of the House of Lords in ***R v. Latif and Shahzad*** *[(1996) 2 Cr.App.R. 92],* and (iv) the enactment of the Human Rights Act of 1998 of the United Kingdom, of which Article 6 guarantees the right to a fair trial.

In ***R v. Loosely*** and ***AG's Reference 3 of 2000***, the primary questions before the House of Lords were, (i) whether entrapment was illegal and thus whether evidence pertaining to an entrapment is inadmissible, and (ii) when an attempt is made by the prosecution to present evidence procured through entrapment, whether proceedings should be stayed or the impugned item of evidence should be excluded.

Particularly in view of the divergence of views expressed by learned Counsel during the hearing of this Appeal regarding the *ratio decidendi* to be deducted from the opinions of the several Lords who heard these two conjoined appeals, in my view, the following detailed reproduction of the principles of law (as contained below) found in the composite judgment of the House of Lords ***Loosely*** and ***AG's Reference 3 of 2000*** along with the corresponding observations and comments contained in the several opinions of their Lordships, is quite justified.

(1) It is not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. Such conduct would amount to entrapment, which would be a misuse of state power and an abuse of process of court.

(2) By recourse to the principle that every court has an inherent power and duty to prevent abuse of its process, the courts can ensure that agents of the Executive of the state do not so misuse the coercive law enforcement functions of the courts and thereby oppress citizens.

(3) As to where the boundary lies in respect of acceptable police behaviour and what is unacceptable, each case must depend on its own facts. A useful guide to identifying the limits of the type of police conduct that is acceptable is to consider whether, in the particular circumstances, the police did no more than present the defendant with an unexceptional opportunity to commit a crime. The yardstick is, in general, whether the conduct of the police preceding the commission of the offence was no more than might have been expected from others in the circumstances; if not, then the police were not to be regarded as having instigated or incited the crime; if they did no more than others might be expected to do, they were not creating crime artificially. However, the investigatory technique of providing an opportunity to commit the crime should not be applied at random fashion or be used for wholesale virtue testing without good reason. The greater the degree of intrusiveness, the closer will the court scrutinize the reason for using it. The ultimate consideration is whether the conduct of the law enforcement agency is so seriously improper as to bring the administration of justice into disrepute. The use of proactive techniques is needed more, and is hence more appropriate, in some circumstances than others; the secrecy and difficulty of detection and the manner in which the particular criminal activity is carried on being relevant considerations.

(4) The difficulty lies in identifying conduct which is caught by such imprecise words as 'lure' or 'incite' or 'entice' or 'instigate'. If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible

and impermissible police conduct. But that would not be a satisfactory place for the boundary line.

(5) Moreover, and importantly, in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable. Test purchases fall easily into this category.

(6) Thus, there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime. Sometimes, the particular technique adopted is acceptable. Sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable.

(7) The fact that the evidence was obtained by entrapment does not of itself require the judge to exclude it. But, in deciding whether to admit the evidence of an undercover police officer, the judge may take into account matters such as whether the officer was enticing the defendant to commit an offence he would not otherwise have committed, the nature of any entrapment, and how active or passive was the officer's role in obtaining the evidence.

(8) The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that 'threatens either basic human rights or the rule of law'.

(9) Entrapment, and the use of evidence obtained by entrapment ('as a result of police incitement'), may deprive an accused of the right to a fair trial. Although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence.

(10) Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.

(11) Expressions such as ‘state-created crime’ and ‘lure’ and ‘incite’ focus attention on the role played by the police in the formation of the defendant’s intent to commit the crime in question. If the defendant already had the intent to commit a crime of the same or a similar kind, then the police did no more than give him the opportunity to fulfil his existing intent. This is unobjectionable. If the defendant was already presently disposed to commit such a crime, should opportunity arise, that is not entrapment. That is not state-created crime. The matter stands differently if the defendant lacked such a predisposition, and the police were responsible for implanting the necessary intent.

(12) The overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute.

(13) The use of pro-active techniques is more needed and, hence, more appropriate, in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.

(14) It is necessary to consider the reason for the particular police operation. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one-way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centered on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.

(15) The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the accused's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.

(16) The fact that the accused was entrapped is not inconsistent with his having broken the law. The entrapment will usually have achieved its object in causing him to do the prohibited act with the necessary guilty intent.

(17) Many cases place emphasis upon the question of whether the policeman can be said to have caused the commission of the offence, rather than merely providing an opportunity for the accused to commit it with a policeman rather than in secrecy with someone else. There is no doubt that this will usually be a most important factor in deciding whether or not the police have overstepped the line between legitimate crime detection and unacceptable crime creation.

(18) The only proper purpose of police participation is to obtain evidence of criminal acts which they suspect someone is about to commit or in which he is already engaged. It is not to tempt people to commit crimes in order to expose their bad characters and punish them.

(19) Closely linked with the question of whether the police were creating or detecting crime is the supervision of their activities. To allow policemen or controlled informers to undertake entrapment activities unsupervised carries great danger, not merely that they will try to improve their performances in court, but of oppression, extortion and corruption.

(20) The remedy where entrapment has occurred is not a substantive defence. It had also been held that entrapment gives rise to a mitigatory plea in so far as the sentence is concerned. However, in view of section 78 of the PACE Act of 1984 and the Human Rights Act of 1998, this approach must be modified. The phrase 'fairness of proceedings' in section 78 of the PACE Act is directed primarily at matters going into the fairness of the actual conduct of proceedings. However, the scope of the wide and comprehensive discretion conferred on trial judges should not be strictly to procedural unfairness and can justify the exclusion of evidence pertaining to entrapment.

Present status of the English law on entrapment

In view of the foregoing, it is evident that the law relating to entrapment as laid down in ***R v. Sang*** has been reversed by the House of Lords by their judgment in the conjoined Appeals of ***R v. Loosely*** and ***AG's Reference (No. 3 of 2000)***. The House of Lords has held that entrapment amounts to an abuse of power conferred on law enforcement and investigation officers. Permitting entrapment to take place is an afront to the integrity of criminal justice and is contrary to public policy. It is inimical to the rule of law, and hence cannot be condoned. Entrapment causes the creation of an offence, that is, in entrapment the offender commits an offence which he would not have otherwise committed. (It should be noted that, 'creating crime' is different from 'creating circumstances that provides a mere opportunity to commit crime'.) In the circumstances, entrapment (the parameters of which have been laid down in the several opinions of the Lords, as being distinguishable from lawful proactive forms of investigation which would include the 'laying of traps' simpliciter) as a form of investigative technique is not lawful under English common law. Nevertheless, entrapment is not a substantive defence in English law. Evidence emanating from an entrapment would impinge on the right of an accused to a fair trial. Therefore, such evidence should not be permitted to be led in evidence.

During the hearing of this Appeal, learned counsel did not bring to the attention of this Court any subsequent judgment of the House of Lords or the Supreme Court of the United Kingdom which reflects that the English common law on this matter has changed since the judgment in ***R v. Loosely***. Nor did a scrutiny of the English law by me reveal such a development. I have considered the judgment of the Court of Appeal (UK) in ***Haroon Ali Syed v. Regina****, [(2018) EWCA Crim 2809],* and it is my view that English common law on this matter remains that which is contained in ***R v. Loosely*** and ***AG's Reference 3 of 2000****.*

Position of Sri Lanka's law regarding entrapment

I find myself in agreement with the afore-stated principles of law contained in ***R v. Loosely*** and ***AG's Reference (No. 3 of 2000)***. Adoption of these principles into Sri Lanka's law is wholly consistent with the law and procedure pertaining to criminal justice of this country and is in perfect consonance with the fundamental right to a *'fair trial'*. Thus, without any hesitation, I apply those principles in the adjudication of the instant Appeal.

In the present Appeal, the determination of the question of law referred to at the commencement of this judgment is not based only on the unlawfulness of the investigative method of entrapment. The related and more important issue in my opinion is whether permitting a prosecution to present evidence emanating from entrapment would be 'fair' and therefore, permissible.

In a situation where the offender had been entrapped, the intention on the part of the offender to commit the offence is not based on his free will and own volition and independent decision-making. The intention to commit the offence is the result of the stratagem applied on the offender by the *agent provocateur.* The offender did not on his own free will intend to commit the offence. He was influenced to commit an offence which if left alone to himself, he would not have committed. The offence is committed by the offender influenced by or due to the inducement, incitement or duress provided or as a result of being lured into committing the offence by the *agent provocateur*. The formation of the *mens rea* of the offence arises out of the intervention by the *agent provocateur*. Thus, though the requisite *mens rea* is entertained by the offender and the *actus reus* of the offence is completed by him, the *modus operandi* adopted by the *agent provocateur* and the investigators cannot be endorsed. In a case of entrapment, law enforcement personnel and or the *agent provocateur* are responsible for the 'creation' of the offence perpetrated by the offender. If not for their design and intervention aimed at the commission of the offence, the offender would not have committed the offence he has been subsequently charged with. Thus, in situations where

entrapment has taken place and such entrapment had resulted in the accused committing the offence, it would be manifestly unfair to prosecute him founded upon evidence arising out of the entrapment. That is because, presenting such evidence would be grossly unfair. In my view, that is the justification for the policy and rationale in outlawing evidence emanating from entrapment.

In view of the foregoing, **I hold that the investigative technique of 'entrapment' as defined in this judgment, is unlawful to the extent that, it is an abuse of the powers of investigation conferred on law enforcement officials, is an affront to the rule of law as it amounts to conspiracy or abetment to commit an offence or luring another to commit an offence. Doing so which results in 'creating the commission of an offence' which the offender would not have if not for being entrapped committed, is not in public interest, is against public conscience, has the potential of bringing the system of criminal justice into disrepute, and carries the distinct possibility of depriving an accused of a *'fair trial'*.**

However, following English law, I hold that **entrapment is not an exculpatory defence, as entrapment does not negative criminal responsibility**.

It is unlawful for investigators to engage in entrapment, and is thus an unlawful investigative technique. Therefore, adoption of entrapment as an investigative technique is a violation of the rule of law. An investigation which predominantly takes the form of an entrapment is an unlawful investigation. As a lawful investigation is a prerequisite for a fair trial, an entrapment gives rise to the distinct possibility of the accused being deprived of a 'fair trial'. If detected during the trial stage, the duty of the trial judge is to exclude evidence emanating from an entrapment. If alleged and proven during the appellate stage that evidence emanating from an entrapment had been led by the prosecution during the corresponding trial, the responsibility of the appellate judge is to consider the impact of the evidence that had emanated from such entrapment, and quash the conviction and acquit the accused, <u>if</u> the reception of such evidence at the trial had deprived the accused – appellant of a *'fair trial'* resulting in a miscarriage of justice.

Did the manner in which the investigation was carried out by officers of the CIABOC, amount to entrapment?

What is now left to be determined is whether, the conduct of CIABOC officials and the virtual complainant (at the instance of CIABOC officials) amounted to 'entrapment' which by its very nature and impact, in the circumstances of this case, would have deprived the Appellants of a fair trial.

In this regard, it is necessary to note that, the Accused – Appellants in their testimonies did not plead that they were entrapped to commit the offences they were accused of committing. Such a suggestion was not even made by the defence to prosecution witnesses. Nor did learned Counsel for the Appellants submit to this Court that the Appellants had committed the offences they were indicted of having committed, because they were entrapped. What was submitted on behalf of the Appellants was that CIABOC officers and the virtual complainant had engaged in entrapment which resulted in the Appellants being arrested and subsequently prosecuted. Thus, the Court is left with only the testimonial narrative of the prosecution to determine whether the Appellants had been entrapped and thereby deprived of a fair trial. In this regard, the following items of evidence, related circumstances and necessary inferences are of particular relevance:

(i) Well before the virtual complainant complained to the Prime Minister's office and thereafter met with and made a statement to the CIABOC, the 1st Appellant had on or about 11th August 2016, solicited a bribe of USD 3 million from the virtual complainant Nagarajah. The solicitation related to a matter that the virtual complainant was legitimately interested in getting attended to, namely facilitating the process of handing over to MG Sugars Lanka (Pvt.) Ltd (a company he was interested in) the plant and machinery of the Kantale Sugar Factory, which was a condition specified in the Shareholders' Agreement which the investor company entered into with the Government of Sri Lanka.

(ii) Thereafter, the 1st Appellant had on 27th February 2017 and 5th September 2017, repeatedly solicited bribes from the virtual complainant. On those occasions too, there was no enticement on the part of the virtual complainant which can be alleged by the Appellants as having resulted in the 1st Appellant soliciting such bribes.

(iii) The virtual complainant did not give the 1st Appellant the solicited bribe. In response thereof, the 1st Appellant did not concede to the legitimate entitlement of MG Sugars Lanka (Pvt.) Ltd to receive the ownership of the old plant and machinery of the Kantale Sugar factory. Thus, in February 2018, as at the time the virtual complainant got in touch with CIABOC officials, the matter the virtual complainant was interested in remained unresolved and pending. At no time between the solicitation and the virtual complainant having come into contact with CIABOC officials did the 1st Appellant withdraw the solicitation or state that he was no longer interested in receiving a bribe for the work the virtual complainant requested him to attend to. Thus, it is important to take note of the

fact that the 1st Appellant's predisposition to commit the offence of acceptance of a bribe remained active, notwithstanding the lapse of time between the last solicitation prior to the complaint being made to CIABOC and the time the virtual complainant got in touch with CIABOC officials in February 2018, when the virtual complainant lodged the complaint.

(iv) The 2nd Appellant's involvement in facilitating the 1st Appellant to receive the bribe commenced in September 2017, prior to the virtual complainant coming into contact with CIABOC officials. That was founded upon an initiative by the 2nd Appellant.

(v) The involvement of CIABOC officials commenced in February, 2018.

(vi) The virtual complainant was not under instructions by officers of the CIABOC to incite or lure the Appellants to commit any offence. Nor did he do so. However, on the advice of CIABOC officials, the virtual complainant contacted the 2nd Appellant by telephoning him. At the ensuing meeting, the virtual complainant told the 2nd Appellant that he was willing to pay a bribe to the 1st Appellant. In that regard, all what Nagaraja did was to inform the 2nd Appellant that he was willing to accede to the demand of the 1st Appellant. In response, the 2nd Appellant proposed that a bribe of Rs. 450 million be given to the 1st Appellant. At no stage did the 2nd Appellant indicate directly or otherwise that neither he nor the 1st Appellant were interested in receiving a bribe from the virtual complainant. Thus, the virtual complainant did not lure in the Appellants to accept a bribe. All what the virtual complainant did was to provide an opportunity to the Appellants to commit further offences. Further, these circumstances clearly point towards the continuation of the intent and pre-existing predisposition of the Appellants to commit the offence of acceptance of a bribe.

(vii) The initial use of a 'decoy' (an under-cover CIABOC officer) was limited to ascertaining the veracity of the complaint made by the virtual complainant to the CIABOC. Throughout the series of events that followed culminating in the acceptance of the bribe at the car park of the Taj Samudra Hotel, the decoy was a passive observer and did not instigate or lure either of the Appellants to commit an offence.

(viii) At meetings between the virtual complainant and the two Appellants, the bribe had been reduced to Rs. 100 million, and Rs. 20 million was to be initially paid as an advance. These changes took place at the instance of the Appellants.

(ix) On 3rd May 2018 when the Appellants met with the virtual complainant in the lobby of the Taj Samudra Hotel, neither by word nor deed, did the virtual complainant or the

decoy lure, encourage, entice or apply duress on either of the Appellants to accept a bribe.

(x) The acceptance of the bribe of Rs. 20 million by the 1st Appellant was a purely voluntary act on the part of the 1st Appellant. Such acceptance was the culmination of a series of events which commenced from the original solicitation of a bribe of USD 3 million.

(xi) When the Appellants were arrested the same day soon after they accepted the bribe from the virtual complainant (at the time when they were inside the car of the virtual complainant which was in the car park of the Taj Samudra Hotel), the role of CIABOC officers was purely law enforcement in nature. The CIABOC officers or the virtual complainant did not thrust the money upon either of the Appellants. The role of the decoy was passive, and to use terminology of the learned Deputy Solicitor General, 'pedestrian like'.

(xii) As at the time the virtual complainant complained to CIABOC, the only reason as to why the 1st Appellant had not committed the offence of accepting a bribe, was due to the fact that the virtual complainant was not willing to give the 1st Appellant the solicited bribe.

It is also seen from the above-mentioned sequence of events that at no time during the afore-stated events did any CIABOC officer entice, incite or lure either of the Appellants to solicit or accept a bribe. CIABOC officers did not advice the virtual complainant to do so either. Nor did the virtual complainant conduct himself in such a manner. What was done by CIABOC officers and the virtual complainant was to provide an opportunity to the Appellants to fulfil their intent. They did nothing to takeaway or limit the exercise of free will or discretion by the Appellants. The Appellants immediately took advantage of the opportunity that was given.

At the time the virtual complainant got in touch with the 2nd Appellant (sequel to the virtual complainant having met CIABOC officers following the complaint,), his utterance to the 2nd Appellant was limited to informing him that he (the virtual complainant) was willing to pay the bribe which the 1st Appellant had solicited from him. The 2nd Appellant immediately responded by suggesting that the virtual complainant pays a bribe of Rs. 450 million. If by that time, the 1st Appellant had given up his original intention of receiving a bribe from the virtual complainant and the 2nd Appellant was not interested in facilitating the 1st Appellant receiving a bribe from the virtual complainant, there was no reason for the 2nd Appellant to have made the afore-stated suggestion and for the 2nd Appellant to have arranged a meeting between the virtual complainant and the 1st Appellant. Further, unless the 1st Appellant remained interested in receiving a bribe from the virtual

complainant, the 1st Appellant would not have participated in the meeting arranged by the 2nd Appellant held on 27th February 2018. Furthermore, the conversation at that meeting had commenced seamlessly from where the parties concluded the last meeting before the virtual complainant complained to CIABOC. At that meeting, the virtual complainant did not have to persuade or encourage the 1st Appellant to accept a bribe. The 1st Appellant solicited a bribe of Rs. 100 million with Rs. 20 million to be paid as an advance.

Prosecution evidence relating to events that took place between 27th February and 3rd May 2018, clearly points towards the interest and keenness on the part of the 1st and 2nd Appellants to receive a bribe from the virtual complainant. The events of 3rd May 2018 show clearly the initiative taken by the 1st and 2nd Appellants to receive the bribe of Rs. 20 million from the virtual complainant. On that final occasion too, there was no inducement on the part of the virtual complainant. His conduct was limited to handing over to the 1st Appellant the solicited bribe of Rs. 20 million. The role of the 'decoy' was observatory in nature. He did not by any utterance or action on his part lure the Appellants to accept the bribe. The role of the other officers of the CIABOC was non-intrusive in nature. During the covert operation they took part in, their role was limited to observing the occurrences keenly and apprehending the Appellants no sooner the bribe was accepted.

Thus, it is beyond doubt that, the events which resulted in the 1st Appellant with the assistance of the 2nd Appellant having accepted a bribe of Rs. 20 million, was purely due to voluntary conduct on the part of the two Appellants, and CIABOC officers along with the virtual complainant had not participated in an entrapment as alleged on behalf of the Appellants. There had been neither illegality nor abuse of power in the manner the officers of the CIABOC conducted the investigation.

In view of the foregoing factual circumstances, neither the officers of the CIABOC who conducted the investigation nor the virtual complainant Nagarajah can be classified as *agents provocateurs*, as they did not create an offence by enticing or luring the Appellants to commit an offence. They merely provided an unexceptional opportunity to the Appellants to commit a further ensuing offence.

The *modus operandi* adopted by the officers of the CIABOC does not violate the scheme and provisions of the CIABOC Act and the applicable provisions of the Code of Criminal Procedure Act. As observed by me previously, provisions of those two laws do not lay down investigative techniques to be adopted when conducting an investigation. Apart from laying down certain vital provisions of law

pertaining to the conduct of investigations (which investigators are obliged to comply with) and powers of investigations, the law does not specify the practical manner in which an investigation ought to be conducted (*modus operandi* to be adopted when conducting an investigation). Based on the nature of the complaint received, the offence, the investigative material that can be gathered at that point of time, nature and degree of corroboration or the absence thereof of the complainant's narrative, and the propensity of the alleged perpetrator committing further offences, it is up to the investigator to determine whether the suspect should be interviewed and arrested forthwith or to delay the arrest pending further investigative steps being taken in *good-faith* and in a manner that would not infringe the law, while keeping in mind the ultimate objective of conducting a successful investigation in terms of the law. In the circumstances, the arrest of the alleged offender can be delayed up to a strategic moment when the suspect making use of an unexceptional opportunity provided by the investigator commits an ensuing further offence, enabling the commission of such offence being spontaneously detected and the suspect being arrested in the immediate aftermath of such subsequent offence being committed.

In this instance, the investigators of the CIABOC had decided to conduct further investigations with the view to ascertaining the veracity of the complaint, and should the occasion arise, to arrest the suspects at the time they commit the offence of acceptance of the solicited bribe. Their conduct was unexceptional, and was limited to providing an opportunity to the Appellants to commit an ensuing offence which they in any event intended to commit. The motive of the investigators was achieved, as subsequent investigative steps taken by them enabled them to conclude that the complainant's version of events was credible. Further, they were successful in apprehending the Appellants in the act of committing the ensuing offence, which in this instance was the acceptance of a bribe. Therefore, I am of the view that the investigative technique adopted by officers of the CIABOC was not in violation of the applicable statutory framework, did not amount to an entrapment and therefore was lawful. Further, I do not see CIABOC officers having abused their authority or by themselves having committed an offence or acted with a personal or malicious vendetta against the Appellants. There is nothing in the conduct of CIABOC officers or the virtual complainant Nagarajah that would shock the conscience of the public or bring the criminal justice system into disrepute. Their conduct is not contrary to the notions of fairness, particularly as the commission of an offence was not created by them. Nor were the Appellants deprived of their own free will.

In view of the foregoing, while expressing agreement with the submissions made by the learned Deputy Solicitor General, I conclude that the investigative technique adopted by the CIABOC does

not amount to an entrapment and that the Appellants have not been deprived of a fair trial. Therefore, I hold that the Appellants' fundamental right guaranteed under Article 13(3) of the Constitution has not been infringed, and hence there exists no basis in fact or in law to set aside the conviction of the Appellants.

I wish to acknowledge with appreciation the invaluable submissions made by learned President's Counsel for the Appellants and the learned Deputy Solicitor General, which significantly contributed towards the development of this judgment.

Justice Yasantha Kodagoda, PC

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal to the Supreme Court in terms of the article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka, from the judgement dated 30.07.2015 of the Court of Appeal in CA Writ Application No. 404/2009.

SC Appeal 11/2017
SC SPL LA No. 177/2015
CA Writ No.404/2009

Dinga Thanthirige Jayalath Perere,
No. 1/64, Kalalgoda Road,
Pannipitiya.
Petitioner-Appellant

Vs.

1. Vice Admiral W.K.J. Karannagoda
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.

1A. T.S.G. Samarasinghe
Vice Admiral
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.

1B. S.A.M.J. Perera
Vice Admiral
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.

1C. Vice Admiral Ravindra C. Wijegunaratne
Commander of the Sri Lanka Navy
Sri Lanka Navy Headquarters,
Colombo 01.
(Added)

2. M.R.U. Siriwardene,
   Rear Admiral, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

3. M. Prematillake
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

4. M.A.J. De Costa
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

5. N.W.W.G.W.M.G.M. Gunasekera
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

6. D.S. Udawathha,
   Commodore, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

7. A.K.M. Jinadasa
   Captain, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

8. A.S.M.P. Alahakoon
   Captain, Sri Lanka Navy
   Sri Lanka Navy Headquarters,
   Colombo 01.

Respondent-Respondent

Before : Jayantha Jayasuriya, PC, CJ

L.T.B. Dehideniya, J

Yasantha Kodagoda, PC, J.

Counsel	:	Faisz Musthapha, PC with Faiza Markar and Keerthi Tillekaratne for the Petitioner -Appellant.
		Rajive Goonetillake, Senior State Counsel for the Respondent-Respondent.
Argued on	:	24.07.2020, 22.09.2020 and 21.10.2020
Written submissions		
filed on	:	23.02.2017 and 30.11.2020 by the Petitioner. -Appellant.
		06.02.2018 and 05.01.2021 by the Respondent-Respondent.
Decided on	:	11.01.2023

Jayantha Jayasuriya, PC, CJ

The Petitioner-Appellant (hereinafter referred to as the "appellant") sought special leave to appeal from this court, aggrieved by the judgement of the Court of Appeal where he invoked the writ jurisdiction of that Court and prayed for Writs of Certiorari. The Court of Appeal by its judgment dated 30th July 2015, while refusing the relief prayed, dismissed the appellant's application.

This Court granted special leave to appeal on the following questions of law:

a) Did the Court of Appeal err in holding that the Appeal, against the sentence passed by the Court Martial under section 122 of the Navy Act, to His Excellency the President is an alternative remedy which ousted the writ jurisdiction of Court in respect of the subject matter of Petitioner's application before the said Court?

b) Did the Court of Appeal err in holding that there was no need for the Court Martial to have given reasons for its verdict on the sole basis that the Code of Criminal Procedure Act does not require the jury to give reasons for its verdict nor does the Navy Act require of Court Martial to give reasons for its findings?

c) Did the Court of Appeal err in its failure to consider whether judge advocate's directions did not justify the determination of the Court Martial?

d) Is the sentence imposed on the Petitioner violative of Section 104 of the Navy Act?

e) Can this Court grant the Petitioner any relief in view of Section 122 of the Navy Act read with Section 10 of the Navy Act as the Petitioner's decommissioning has been approved by His Excellency the President?

I have had the advantage of reading the draft judgment of Justice Yasantha Kodagoda PC and I agree with the views expressed by his Lordship on the question of law (a) referred to above and hold that that the Court of Appeal erred by holding that the appeal against the sentence passed by the Court Martial under section 122 of the Navy Act, to the President is an alternative remedy which ousted the writ jurisdiction of Court. However, in my view the decision of the Court of Appeal to refuse issuing writs of certiorari and mandamus should not be interfered with, due to my conclusions on the questions of law (b), (c) and (d) on which Special Leave to Appeal was granted by this Court, as more fully described herein below.

The appellant was a Commissioned Officer of the Sri Lanka Navy – a Captain – at the time material to the incidents relating to these proceedings. On 24th July 2008 the appellant who was serving as Commanding Officer at Port of Colombo had been issued with a transfer order requiring him to take up duties as Naval Officer in Charge of Mullikulam, Silavathura and Vankalai with effect from 03rd August 2008. However, this transfer order had been cancelled and by a subsequent transfer order, dated 21st August 2008, the appellant had been transferred to newly established naval deployments in Vankalai and Nanaddan, in Mannar, effective from 04th September 2008 as Contingent Commander. At this point of time, the administration and logistics support for these two naval deployments had been channelled through one of the closest commissioned bases, namely SLNS Gajaba, as the two newly established navy deployments to which the appellant was attached were not commissioned yet. With this appointment the appellant was placed under the Commander of North Central Naval Area. The abovementioned two newly established naval deployments were placed under the aforesaid Commander, for operational purposes in accordance with the administrative structure of the said area.

On 28th October 2008, around 10.30 pm army camp namely Thalladi army camp, adjacent to the two navy deployments that were under the command of the appellant was subjected to an air attack. At the time of this attack the appellant had been at the commissioned base SLNS Gajaba. At no point did the appellant return to the two navy deployments under his command namely Vankalai and Nanaddan between the commencement of the said attack on the army camp and the time at which the threat of any further attacks ceased.

Following these events, a Navy Board of Inquiry had been appointed and the said board of inquiry had recommended suitable disciplinary action against the appellant. Thereafter, a summary of evidence had been recorded and a Court Martial had been convened as provided for, under the Navy Act. The appellant who was represented by counsel before the Court Martial was found guilty of both charges framed against him, on 13th May 2009. After the findings of the Court Martial on the two charges were pronounced, the counsel for the appellant had pleaded in mitigation and the prosecution had made available the personal file of the appellant and other confidential reports to the Court Martial. Thereafter, the Court Martial had pronounced its sentence after an adjournment of thirty-five minutes. Sentences imposed on the appellant were severe reprimand for the first charge and dismissal without disgrace for the second charge. The appellant on the following day namely 14th May 2009 had made an application for revision of the sentence to the President, in terms of section 122 of the Navy Act. While the decision of the said appeal to the President was pending, the appellant invoked the jurisdiction of the Court of Appeal on 25th June 2009. The appellant in the said application prayed for writs of certiorari to quash the report of the board of inquiry, the charge sheet, summary of evidence recommending a court martial and the findings and sentence of the Court Martial.

Two charges on which the appellant was found guilty and sentenced were; first, that the appellant, between the period 15th September 2008 and 10th November 2008 (other than on days that he was on leave or absent for health reasons) stayed away or left the place of deployment namely Vankalai and Nanaddan naval deployments at night without permission of a proper authority and thereby committed an offence under section 60(2) of the Navy Act as amended; second, that in the night of 28th October 2008, the appellant failed to return to his tactical area of command after receiving information on the air attack on Thalladi Army camp while being the Contingent Commander of the two navy deployments – Vankalai and Nanndan, and thereby

committed an offence under section 104(1) of the Navy Act, as amended. Evidence of several witnesses had been presented before the Court Martial. On behalf of the prosecution the Area Commander of the North Central Command, the secretary to the area commander, Deputy Area Commander and the Commanding Officer of Vankalai had testified. On behalf of the appellant, the appellant himself, Commanding Officer of SLNS Gajaba, Contingent Commander Mannar, Commanding Officer Naval Deployment Silavathura and Logistics Officer, SLNS Gajaba had testified before the Court Martial.

The Court of Appeal having considered the material presented before it and the submissions of counsel for all the parties had dismissed the application of the appellant where he sought writs of certiorari to quash *inter alia* findings and sentence of the Court Martial. The Court of Appeal in dismissing the application had held that there is no legal duty on the Court Martial to give reasons for its verdict and that the appellant had sought an alternative remedy, namely that the appellant had submitted an appeal to the President in terms of section 122 of the Navy Act. Furthermore, in refusing to grant relief to the appellant, the Court of Appeal had observed that the appellant holds office at the pleasure of the President in terms of section 10 of the Navy Act and the President had refused the application made by the appellant in terms of section 122 of the Navy Act.

The learned President's Counsel for the appellant submitted that the Court of Appeal erred when it reached the aforementioned decision. One of the main contentions of the learned President's Counsel was that the Court of Appeal erred when it held that there is no legal duty on the Court Martial to give reasons for its verdict. I would first proceed to consider this issue.

'Duty to give reasons'

Question of law (b), on which this Court granted leave, was raised by the appellant in this regard. The learned President's Counsel strenuously argued that the developments that had taken place in relation to rules of natural justice and / or in relation to fairness in administrative and or judicial decision making process as recognised by our courts should be applicable in determining this issue. In this regard much reliance was placed by the learned President's Counsel on the following judgments of this court: **Karunadasa v Unique Gem Stones Ltd; and Others** [1997] 1 SLR 256, **Jayaratne v Fernando & Others** [2000] 3 SLR 69 and **Bandara and another v**

Premachandra [1994] 1 SLR 301. Our attention was also drawn to the Court of Appeal Judgment in **Abeysinghage Chandana Kumara v Kolitha Gunathilaka Air Vice Marshal *et. al.***, CA Writ 333/2011, CA minutes of 01.06.2020.

In **Karunadasa** (supra) the subject matter for determination before the Supreme Court was a judgment of the Court of Appeal where a Writ of Certiorari was issued quashing a decision of the Commissioner of Labour made under the provisions of Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, as amended, on the basis that the Commissioner's failure to give reasons for his decision amounted to a violation of the rules of Natural Justice. The Supreme Court having examined the impugned judgment of the Court of Appeal observed;

> *"Senanayake, J., in the Court of Appeal did not attempt to lay down an inflexible general principle that Natural Justice always requires an administrative authority to give reasons, although he did perceive a trend in that direction. It seems to me that his observations - that giving reasons for a decision is one of the fundamentals of good administration, and is implicit in the requirement of a fair hearing - were made, and must be understood, in the context of the position of the Commissioner of Labour under the Termination Act'* (at p 262-263)

The Supreme Court having made the observation mentioned above held;

> *"To say that Natural Justice entitles a party to a hearing, does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision "may be condemned as arbitrary and unreasonable"; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent's failure to produce the 3rd respondent's recommendation thus justified the conclusion that there were no valid reasons, and that Natural Justice had not been observed".* (at p 263)

The Supreme Court having reached this conclusion, referred the case back to the Court of Appeal to re-hear the matter, after calling for the record of proceedings and the relevant recommendations based on which the Commissioner of Labour made his decision.

In **Jayaratna** (supra) the Supreme Court considered an impugned decision of the allocating authority of the railways department to cancel a decision through which one of the government quarters was to be allocated to the petitioner who was a clerk attached to the railways department. The petitioner invoked the jurisdiction of the Supreme Court alleging a violation of Article 12 of the Constitution. The Supreme Court in its judgment considered a series of illegalities and inappropriateness of conduct of relevant officials. Such illegalities and inappropriate conduct included the failure to have proper documentary evidence of ministerial orders by public officers and the absence of any power under the Establishment Code for a Minister to order the allocation or cancellation of government quarters. The Supreme Court in the above decision did not proceed to consider any issue on "failure to give reasons" even though one of the key phrases recorded in the head note of the law report reads "cancellation of an allocation of government quarters without reasons".

Bandara (supra) is an instance where petitioners who invoked the jurisdiction of the Supreme Court on an alleged violations of rights guaranteed under Articles 12(1), 14(1)(c) and 14(1)(d) of the Constitution, challenged the impugned decision to place them on vacation of post. In the examination of relevant Constitutional provisions and the provisions of the Establishment Code, the Court observed that,

> *"The power to make rules under Article 55(4) is subject to the provisions of the Constitution, including Article 12; and the Constitution rests on the Rule of Law. Rules made under Article 55(4) must be interpreted so as to avoid inconsistency with Article 12 and the Rule of Law, even if dismissal "without any reason being assigned" might, at other times or in other contexts, have been equated to "dismissal without any reason". I hold that the conditions on which powers have been delegated are contained in Chapter II, Section 11. Sections 11:2 and 11:5 confer an entitlement to confirmation, upon fulfillment of certain conditions; Section 11:2 makes the public officer liable to termination for misconduct and other "defects"; all this is inconsistent with any*

discretion to authorise dismissal "at pleasure". It is in that context that Section 11:4 must be interpreted.

I am of the view that in the Establishments Code "without assigning any reason" only means no reason need be stated to the officer, but that a reason, which in terms of the Code justifies dismissal, must exist; and ***when the law requires disclosure of such reason, it will have to be disclosed*** *- and, if not disclosed, legal presumptions will be drawn. I hold that the Cabinet has only delegated a power to dismiss for cause, and according to a procedure prescribed (e.g. Chapter II, Section 11:2:1)." (emphasis added)*

Examination of theses judgments reflect that primarily the administrative authorities are bound to take decisions based on reasons and no capricious or arbitrary decisions can be allowed to stand. Therefore, even if the reasons are not disclosed at the time the decision is communicated, disclosure of such reasons at a time of judicial review satisfies this requirement. It is important to note that the Court has imposed such obligation of disclosure in situations *"When the law requires disclosure of such reason, ……"* as laid down by this court in **Bandara** (supra). In my view one important factor that has to be taken into account in giving effect to this requirement is the scope of the statutory scheme within which such authorities are exercising their discretion. In **Karunadasa** (supra) Justice Fernando explicitly observed that the requirement to give reasons should be understood *"... in the context of the position of the Commissioner of Labour under the Termination Act".*

Justice Fernando with Justice Edussuriya agreeing, in **Lanka Multi Moulds (pvt) Limited v Wimalasena, Commissioner of Labour and others** [2003] 1 SLR 143 (at 152-153), a case where a decision of the Commissioner of Labour was quashed by the Court of Appeal, examined several decisions including decisions that had expressed a contrary view, and while further elaborating his decision in **Karunadasa** (supra) observed that:

"Although the Commissioner has a discretion in respect of both limbs of section 6, that is not an unfettered or unreviewable discretion. As the Court of Appeal observed, he must give reasons for his decision. Although in Samalanka Ltd v Weerakoon ([199] 1 SLR 405) , it was held by Kulatunga, J, (with G.P.S. de Silva, CJ. and Ramanathan, J. agreeing) that

the Commissioner was not under a duty to give reasons, I took the contrary view in Karunadasa v Unique Gemstones Ltd ([1997] 1 SLR 256), (with Wadugodapitiya, J. and Anandacoomaraswamy, J. agreeing). That decision was considered and followed by Gunasekera J. in Ceylon Printers v Commissioner of Labour ([1998] 2 SLR 29). Since G.P.S.de Silva, CJ. agreed with Gunasekera, J. on that occasion it is clear that he no longer agreed with Samalanka. In Mendis v Perera ([1999]2 SLR 110 at 148) I observed that the audi alteram partem rule does not merely entitle a party to a purely formal opportunity of placing his case before a tribunal, and that natural justice would be devalued if the tribunal does not consider the evidence and the submissions, evaluate it properly and not in haste, and give reasons for its conclusions. However, in Yaseen Omar v Pakistan International Airlines, ([1999] 2 Sri LR 375), Samalanda was followed, apparently without the attention of the Court being drawn to the subsequent decisions to the contrary and the relevant citations.

It is therefore necessary to reiterate what has long been recognized: that the statutory conferment of a right of appeal against the decision of a tribunal has the effect of imposing a duty on that tribunal to give reasons for its decisions (Brook Bond Ceylon Ltd v Tea, Rubber (etc) Workers Union [77 NLR 6] Ratnayake v Fernando [SC 52/86 SCM 20.5.91]). The conferment of a right to seek revision or review necessarily has the same effect. As the decisions cited show, if the citizen is not made aware of the reason for a decision he cannot tell whether it is reviewable, and he will thereby be deprived of one of the protections of the common law - which Article 12(1) now guarantees. Today, therefore, the conjoint effect of the machinery for appeals, revision, and judicial review, and the fundamental rights jurisdiction, is that as a general rule tribunals must give reasons for their decisions".

In **Central Bank of Sri Lanka and others v Lankem Tea and Rubber Plantations (PVT) Ltd:** [2009] 2 SLR 75 the Supreme Court while determining an appeal from the Court of Appeal where the Court of Appeal quashed a decision of the Controller of Exchange made under the Exchange Control Act, considered the following observation of the Court of Appeal:

"Failure to give reasons therefore amounts to a denial of justice and is itself an error of law. In R v. Mental Health Review Tribunal, ex parte Clatworthy ([1985] 2 All ER 699) it was held that reasons should be sufficiently detailed as to make quite clear to the parties and specially the losing party as to why the tribunal decided as it did, and to avoid the impression that the decision was based upon extraneous consideration rather than the matter raised at the hearing." (at p 101)

Justice Marsoof having considered submissions of all parties in this regard, observed:

"It is important to note that the changes taking place in other jurisdictions have also had their influence on our Courts, and a strong trend of insistence on a statement of reasons is discernible in Sri Lankan judicial decisions. The Sri Lankan authorities were examined recently by the Supreme Court in M. Deepthi Kumara Guneratne and Two Others v Dayananda Dissanayaka and Another [SC (FR) Application No. 56/2008 (S.C. Minutes dated 19th March 2009)] in which the Supreme Court has moved towards recognizing a general duty to give reasons". (at p 105)

Having made this observation Justice Marsoof further proceeded to consider whether there was a duty to give reasons in the matter under consideration and held:

"In view of the fact that Section 52(7) of the Act expressly confers a right of appeal against the decision of the Central Bank to impose a penalty, and even the decision of the Minister on appeal, is reviewable in writ proceedings, I am inclined to follow the reasoning adopted by the Privy Council in Minister of National Revenue v. Wrights Canadian Ropes Ltd. [(1947) AC 109] wherein it was observed that –

"Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action. . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal. . . The Court is . . .. always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are. . . . insufficient in law to support it, the determination cannot stand. . . ."

As observed by Sedley, J., in R v. Higher Education Funding Council [(1994) 1 AER 651]

". . . . . each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not."

I am of the opinion that in the circumstances of this case, the decisions contained in P10 and P14 cry out for reasons, and the failure to give any, render them devoid of any legal validity. I hold that the failure to give reasons rendered the decisions contained in P10 and P14 nugatory, and answer question (f) on which leave has been granted, in the negative and against the Appellant." (at p 105-106)

Jurisprudence of our courts that considered developments in English common law as set out above had therefore recognised, that the "duty to give reasons" by administrative authorities when taking decisions on various matters need to be examined in the context of the given situation. The statutory scheme within which such authorities are empowered to take decisions and the specific circumstances of each case needs to be examined despite such duty is recognised as a "general duty".

It is also pertinent to note that Lord Carnwath in **R (CPRE Kent) v Dover DC** [2017] UKSC 79, [2018] 2 All ER 121 at 137-138, in examining 'what common law duty there may be on a local planning authority to give reasons for grant of planning permission' observed:

"[51] Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see Doody v Secretary of State for the Home Dept, [1993] 3 All ER 92, [1994]1 AC 531; R v Higher Education Funding Council, Ex p Institute of Dental Surgery [1994] 1 All ER 651 at 671-672, [1994] 1 WLR 242 at 263; De Smith's Judicial Review (7th edn, 2013) para 7-099). Doody concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a

decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:

"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view …" (See [1993] 3 All ER 92 at 109-110, [1994] 1 AC 531 at 565 per Lord Mustill.)

It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.

[52]. Similarly, in the planning context, the Court of Appeal has held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (R v Aylesbury Vale District Council, Ex p Chaplin (1998) 76 P & CR 207, 211-212 per Pill LJ). Although this general principle was reaffirmed recently in R (on the application of Oakley) v South Cambridgeshire DC [2017] EWCA Civ 71, [2017] 1 WLR 3765, the court held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Of the last point, Elias LJ (giving the leading judgment, with which Patten LJ agreed) said (at [61]):

"The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential

significance to very many people suggests that some explanation is required … the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty."

His conclusion was reinforced by reference to the United Kingdom's obligations under the Aarhus Convention (para [62]; see to similar effect my own comments on the relevance of the Convention, in Walton v Scottish Ministers [2012] UKSC 44; [2013] 1 CMLR 858 at [100]). Sales LJ agreed with the result, but expressed concern that the imposition of such duties "might deter otherwise public-spirited volunteers" from council duties, and might also introduce "an unwelcome element of delay into the planning system" (para [76])."

It is also pertinent to observe that in the United Kingdom, the duty to give reasons by non-judicial administrative tribunals had been statutorily mandated by Tribunals and Inquiries Act, of 1958. The same Act recognises limitations such as refusal to give reasons on grounds of national security. Furthermore, the Act had made provision to recognise further restrictions on future occasions after necessary consultations, on grounds such as "reasons are unnecessary" or on impracticability to give such reasons.

In the context of introducing such requirement through the provisions of the Inquiries Act of 1958, it is said:

"In response to the widespread feeling that Act ought to say something about giving reasons for decisions, the Government introduced a new clause in the House of Commons which now stands in the Act as section 12. This requires reasons to be given for decisions both by tribunals and by Ministers after statutory inquiries. The statement of reasons may be either written or oral, and it need be made only if requested." (Case Comment, Tribunals and Inquiries Act, 1958, H.W.R. Wade, The Cambridge Law Journal, November, 1958, p.129 at 133).

This statutory requirement had continued in the English legal system and section 10 of the Tribunals and Inquiries Act, 1992 provides:

"Reasons to be given for decisions of tribunals and Ministers.

(1)Subject to the provisions of this section and of section 14, where—

(a)any tribunal specified in Schedule 1 gives any decision, or

(b)any Minister notifies any decision taken by him—

(i)after a statutory inquiry has been held by him or on his behalf, or

(ii)in a case in which a person concerned could (whether by objecting or otherwise) have required a statutory inquiry to be so held,

it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested*, on or before the giving or notification of the decision, to state the reasons."*

Schedule I of the said Act makes reference to more than sixty five statutory bodies / tribunals that attend to sixty five different areas such as Agriculture, Banking, Building Societies, Child support maintenance etc. Therefore, jurisprudence under the English legal system needs to be considered in the context of such statutory scheme too. Provisions in such statutory schemes would influence decisions on common law. In my view, when examining the question whether a duty to give reasons on an administrative authority at a given situation exists or not, the primary issue before court is whether the statutory scheme under which such authorities exercise their powers had imposed such a duty or not. If no such statutory duty exists, then the court needs to consider whether the manner in which authorities had exercised their statutory duties had adversely impacted on the legality and reasonableness of the decision and if so to further consider whether the common law imposes such a duty in the context of the statutory scheme within which the authorities have exercised their powers, in the given situation. In my view, examining the desirability of placing such duty to give reasons on the basis that availability of reasons would enhance the acceptability of such decisions falls outside the scope of judicial review when examining the legality and the reasonableness of a decision of an administrative body, in a given situation.

Therefore, I am of the view, in considering the legality and reasonableness of the verdict of the Court Martial in the instant appeal it is imperative to consider the relevant legal provisions applicable to the Court Martial and the manner in which proceedings had been conducted in the given situation and thereafter to consider whether the impugned verdict of the Court Martial should be quashed or not by a writ of certiorari on the basis that no reasons had been given by

the members for their verdict. The appellant's application to the Court of Appeal is to quash the verdict of the specific Court Martial and is not a challenge to the legal framework relating to Courts Martial in abstract. Therefore, it is necessary to consider whether the judgement of the Court of Appeal which refused any relief to the appellant should be interfered with or not, in its proper context. I would further elaborate on this aspect when considering the legality of the Court Martial proceedings that are impugned by the appellant.

In the outset it is pertinent to observe that appellant's right to challenge the proceedings of the Court Martial in the Court of Appeal is arising from section 132 of the Navy Act. Section 132(1) of the Navy Act reads:

> *"Such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of mandamus, certiorari and prohibition shall be deemed to apply in respect of any court martial or any naval officer exercising judicial powers under this Act".*

Hence, it is through this deeming provision that the proceedings of a Court Martial constituted under the Navy Act, is subjected to judicial review by the Court of Appeal. It is further pertinent to observe that through this legislative scheme a civilian court has been empowered to examine the proceedings of a tribunal established under the naval law, within the statutory framework that is specifically provided for under the above-mentioned section of the Navy Act.

The 'Manual of Military Law' published by War Office, printed under the authority of His Majesty's stationary office, London, a manual that had been compiled initially in the year 1884, to "assist officers in acquiring information in respect of those branches of law with which they have occasion to deal in the exercise of their military duties", states that *"Military law is the law which governs the soldier in peace and in war, at home and abroad. At all times and in all places the conduct of officers and soldiers as such is regulated by military law"* ['Manual of Military Law' supra, sixth edition (1914), page 1].

Objects of Military Law is described as,

> *"..to maintain discipline among the troops and other persons forming part of or following an army,. To effect this object, acts and omissions which are mere breaches of contract in civil life – e.g, desertion or disobedience to orders – must, if committed by*

> *soldiers, even in time of peace, be made offences, with penalties attached to them; while, on active service, any act or omission which impairs the efficiency of a man in his character of a soldier must be punished with severity"* ["Manual of Military Law", supra page 6].

In early periods, in England, military law had existed only in times of actual war. In such times military law had been initiated through Articles of War issued under the prerogative power of the Crown. This position had changed with the enactment of Mutiny Act, in the year 1689. At early stages military law was administered by Court of Chivalry and later through Court or Council of War. Thereafter, such Council of War had transformed to Court Martial. In 1879, Army Discipline and Regulation Act was enacted to consolidate provisions of Mutiny Act and statutory Articles and thereafter two years later in 1881, the Army Act was enacted. Thereafter, Army Act (44 & 45 Vict., c. 58) and Army Annual Act had comprised a part of Military Law of Great Britain.

It is recognised that these Acts *".[.is] part of Statute Law of England, and, with the considerable difference that it is administered by military courts and not by civil judges, is construed in the same manner and carried into effect under the same conditions as to evidence and otherwise, as the ordinary criminal law of England"* ["Manual of Military Law" supra page 1]

Trying persons who are subjected to Military Law by Courts Martial had been accepted and recognised over a long period of time, under these legislative schemes. All matters relating to such Courts Martial, including their jurisdiction, composition and procedure were governed by those statutes as well as rules made under them. According to section 52 of the Army Act (44&45 Vict. Ch 58) members of a Court Martial have to subscribe to an oath and confirm that at no stage the opinion or a vote of a fellow member will be disclosed. Furthermore, section 53 of the same act provides that in the event of an equality of votes on the finding, the accused is deemed to be acquitted. In the event of equality of vote on sentence or any other matter, the president has a second or casting vote. Under Rule 44A of Rules of Procedure (1907) findings of the Court Martial are recorded simply as a finding of "guilty" or of "not guilty" or "Not guilty and honourably acquit him of the same". Therefore, from the inception of trials before a Court Martial the practice of finding of guilt or innocence of the accused was on the basis of a "vote"

and the members were not obliged to further explain, elaborate or provide reasons for their "vote".

It is also pertinent to note that the role played by the "Judge Advocate" remains one of the main features of Courts Martial. One of the most important duties discharged by the Judge Advocate in the adjudication process in a Court Martial had been the 'summing up' he makes at the end of evidence presented by parties. Rule 103 (E) of the Rules of Procedure (1907) provides that *"At the conclusion of the case he will, unless both he and the court considers it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court proceed to deliberate upon their finding".* Therefore, it is a statutory requirement that the Judge Advocate has to sum up the case unless he and the court think a summing up is unnecessary. Furthermore, the Judge Advocate *inter alia* has a responsibility to address the Court Martial of any irregularities in the proceedings, and any defects in the charge. He also has a duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such or of his ignorance or incapacity. The Judge Advocate has to full fill his duties while maintaining impartiality.

In a nutshell, conveying the opinion of the members of a Court Martial on the guilt or innocence of an accused by way of a vote and the Judge Advocate who maintains impartiality providing advise on legal matters as well as providing a non-binding summing up to the Court Martial had been features that did exist from the inception of the Court Martial process established under the military law, in the British legal system.

The statutory framework relating to military law in the United Kingdom had evolved since its inception and Armed Forces Acts of 2006, 2011 and 2016 are the main statutes in this regard at present.

This Court, in **Gunaseela v Udugama *et al*** 69 NLR 193, when considering the constitutionality of the Court Martial process as provided under Army Act of 1949 as amended, made the following observations on the direct applicability of the provisions in the Army Act (1881) of the United Kingdom in Ceylon until the enactment of Army Act in 1949. The court recognised that *"The Army Act, 1881, of the United Kingdom was, like many other British enactments, part of the law of Ceylon long before the Independence of Ceylon."* (at p 194).

The Court further observed:

> *"For a long period therefore the law of Ceylon provided for the trial by Courts Martial of certain offences committed by "persons subject to military law" of the above and other categories"*. (supra at p 195)

In **Jayanetti v Martinus** 71 NLR 49, the Supreme Court examined the legality of Court Martial proceedings conducted under the Navy Act, No 34 of 1950 as amended. The court focused on the summing-up of the Judge Advocate and recognised the important role played by a Judge Advocate in a court martial convened under the Navy Act. In this regard the court observed:

> *"Section 39 of the Navy Act prescribes the powers and duties of the Judge-Advocate in court martial proceedings. They are inter alia, to give advice on questions of law or procedure during the proceedings of a court martial, to give advice on any matter before the court, to ensure that the accused does not suffer any disadvantage at his trial, and at the conclusion of the case to sum up the evidence and advise the court upon the law relating to the case.*
>
> *The reason why such powers and duties are vested and imposed on the Judge Advocate is almost obvious. A court martial, although it has the power to try and punish offences, which if committed by civilians would be tried by the ordinary courts, is not ordinarily composed of officers with legal knowledge or judicial experience. In fact the court in the present case was composed of two supply officers and one surgeon officer. It is because of this lack of legal or judicial training and experience that the function of advising courts martial is committed by law to the Judge Advocate. Indeed, his functions are comparable to those of a Judge of Assize in cases tried by Jury. Although it is the function of the Jury to decide all questions of fact, the law requires that before the Jury deliberates on the facts, the Judge must sum up to them the evidence. Section 39 (d) imposes a similar requirement in the case of a trial by court martial"* (supra at p 49-50)

Section 39 of the Navy Act sets out the Duties of Judge Advocate and subsection (d) of section 39 provides that:

"At the conclusion of the case he shall, unless both he and the court martial consider it unnecessary, sum up the evidence and advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding."

The importance of a summing-up of the judge advocate in the context of legality of the entire Court Martial proceedings was described in **Jayanetti** (supra) in following terms:

"Had it been necessary for me to decide that the failure of a Judge-Advocate to sum up on evidence and on the law will be a ground for quashing the finding of a court martial only if that failure resulted in a miscarriage of justice, the matters discussed in the two preceding paragraphs of this judgment would compel me to hold that there did result in this case a miscarriage of justice.

I prefer, however, to rely on the ground that the failure of a Judge Advocate to perform the statutory duty, explicitly imposed by s. 39 (d) of the Navy Act to sum up on evidence before the court deliberates on its finding, is a fatal illegality. I hold that a finding reached without such a summing-up is one reached without jurisdiction, just as would be a verdict of a jury reached at the conclusion of a trial without there having been the charge of the trial Judge which is required by s. 243 of the Criminal Procedure Code. It is true that s. 39 (d) of the Navy Act allows the summing-up to be dispensed with, if both the Judge Advocate and the court consider it unnecessary. But the Legislature surely assumed that such a dispensation would be permitted only if the facts of a particular case are unusually simple, or perhaps if both parties consent to the dispensation. The Legislature could not have contemplated that a Judge-Advocate, the very title of whose office denotes its quasi-judicial character, might through caprice or inadvertence deny to an accused person his right to a summing-up on the evidence and on the law" (at p. 51)

The importance of the summing up of a Judge Advocate in Court Martial proceedings as well as the similarity between the roles played by the Judge Advocate in such proceedings and a judge who presides over a jury trial, is aptly demonstrated in the above findings of the court. Whilst the summing up by the judge in a jury trial guides and assist the members of the jury in a jury trial, the summing up of a Judge Advocate in a Court Martial assists and guides members of the Court Martial. The responsibility and the duty to find the guilt or innocence of the accused is placed on

the members of the jury at a jury trial in a court of law and similarly, such duty is cast on the members of the Court Martial in proceedings before a Court Martial. There is no statutory duty imposed either on members of a Court Martial or the members of a jury to give reasons for their finding.

It is pertinent to observe that absence of reasons for the verdict of a Court Martial had not impeded civilian courts exercising powers of judicial review over such verdicts, as provided by law. The Court of Appeal in **Kumaresan v Pannanwela *et al*** [1990] 2 SLR 181, considered a summing up of a Judge Advocate of a Court Martial convened under the Air Force Act No 41 of 1949 as amended and quashed the proceedings and the order of the Court Martial by issuing a writ of certiorari. Main reasons for the court to issue the writ were the defects in the summing up of the Judge Advocate. Similarly in **Chandra Kumar and Another v Captain Samarawickrema *et al*** [2002] 2 SLR 153, also the Court of Appeal granted a writ of certiorari to quash the conviction of a Court Martial convened under the Navy Act, due to the fact that the Judge Advocate erred in law in giving a particular direction to the members of the court.

Starting with the statutory framework established in the United Kingdom from the nineteenth century and thereafter through the framework established by three statutes, Army Act (1949), Air Force Act (1949) and Navy Act (1950), regulate the Court Martial proceedings in Sri Lanka. Rules made under the Army Act and Air Force Act had further complemented the statutory framework. As a practice, proceedings of Courts Martial appointed under the Navy Act had continued to take place similar to the proceedings of Courts Martial under the other two statutes, even though no rules had been promulgated relating to proceedings of Courts Martial under the Navy Act. Two main features of the Court Martial proceedings namely the important role played by the Judge Advocate in such proceedings including delivering the summing up by him and the members of court arriving at the verdict by the process of "vote" without giving reasons for such verdict had remained intact, in Courts Martial appointed under all three statutes.

In England, Armed Forces Acts of 2006, 2011 and 2016 had brought in numerous changes to the Court Martial process. These changes had been introduced *inter alia* to address adverse concerns raised by the European Court of Human Rights. It is also pertinent to note that these statutory developments in relation to military law had been introduced while developments in common law relating to "duty to give reasons" were taking place.

However, it is further pertinent to note that no changes had taken place either statutorily or on the basis of developments in common law in relation to the manner in which the final decision of members of a Court Martial is pronounced, under the English Law. It remains that the decision of the Court Martial to be reached by the vote of the members and there is no legal obligation placed on them to give reasons for their decision or to explain the reasons for their vote. Therefore salient features of Courts Martial in the context of pronouncing their findings on the guilt or innocence of the accused continued static through out the evolution of military law and had not changed despite the developments in the common law and statutory law in relation to administrative bodies in the context of a duty to give reasons for their decisions. Furthermore, the role played by the Judge Advocate also had been preserved to ensure that the Court Martial proceedings would not breach the fair hearing guarantee.

"The Court Martial and The Summary Appeal Court Guidance" Volume 2 at p 10 version 7 (2015) (Issued by Judge Advocate General and The Director of Military Court Service) in relation to "Deliberations on Findings" (chapter 3.17) elaborates that;

"*The law permits a board in the Court Martial to reach a finding of guilt or innocence by a simple majority, but it is preferable and desirable for any finding to be unanimous if possible. If there is equality of votes, the court must acquit the defendant. There is no casting vote at this stage. Before the board retires to deliberate on its findings, the judge gives directions on this point and on other matters. Until after a finding of guilt has been announced in open court, no discussions whatsoever of sentencing options or implications, no matter how general or hypothetical, are to take place before or during any trial proceedings or in the absence of the judge."*

Contrasting Roles of the Judge Advocate and Board Members is described in "The Court Martial and The Summary Appeal Court Guidance" Volume 1 at p 5 version 7, (2015) – (Issued by Judge Advocate General and The Director of Military Court Service) in the following terms:

"*The roles and functions of the judge and the members are entirely different, but taken together they contribute directly to a just outcome of each trial. As such they are complementary and both functions are indispensable. Where there is a plea of Not Guilty in the Court Martial, the members exclusively decide the guilt or otherwise of the defendant, based on the evidence*

presented to them. The judge takes no part in this decision (except where he decides that there is no case to answer at the close of the prosecution case and directs the board to find the defendant not guilty). The members hear, assess, deliberate on, and (if applicable) arrive at a finding on the facts of the case. During the trial proceedings they are acting in a similar way to a jury, and all members of the board have an equal vote and voice; there is no casting vote at this stage. The President of the Board chairs the discussion and reports the outcome to the court. If there is equality of votes, the court must acquit the defendant" (3.7)

"*The judge, in addition to being aware of the evidence before the court, will have seen the trial papers and may have heard legal arguments in the absence of the board. The function of the judge is to ensure the trial is conducted fairly, decide what evidence the members hear and see, and ensure the correct interpretation and application of the law and procedures. The judge's role is exactly the same as the role of the judge presiding over a jury trial in the Crown Court until it comes to the sentencing stages"* (3.8)

It is also pertinent to observe that 'trial by jury' or 'jury trials' had been in existence in England and other common law countries for centuries. One static feature in jury trials had been that the duty to find guilt or innocence of an accused remains with the jurors. There had been no change in this unique feature in jury trials that continued despite changes in many other areas under the common law. The 'duty to give reasons' as developed by the common law in relation to decisions of administrative authorities had not been extended to the verdicts of jury trials. Therefore, neither the common law nor the statute law casts an obligation on the jurors to give reasons, for their verdict.

Jury trials in criminal proceedings had been a feature in our legal system also for centuries. Learned President's Counsel for the appellant submitted that, *"trial by jury is traceable to the Magna Carta (Vide chapter 39 of the Magna Carta whereby the people extracted the right to be tried by one's equals. Trial by jury is an institution of great historical antiquity and by usage, has acquired the force of law. It is a legacy which the law in Sri Lanka adopted and is a part of the practice of our courts. Under our law the practice of the courts constitutes LAW – cursus curiae est lex curiae as applied in Jeyaraj Fernandopulle's Case 1996 1 SLR 70 at page 83".*

At present, proceedings of jury trials are governed by the provisions in the Code of Criminal Procedure Act, No 15 of 1979 as amended. Sections 229, 230 and 231 sets out the duties of the Judge in a jury trial and section 232 sets out the duties of the jury. Sections 233, 234, 235 and 236 sets out matters relating to the verdict of the jury.

Duties of the jury as provided under the statute include "to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned, to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not to decide all questions which according to law are to be deemed questions of fact to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning".

The manner in which the verdict should be pronounced as provided under section 234 is firstly the registrar to inquire "Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged?" and the foreman to state the verdict of the jury.

Thereafter section 236 provides to record the verdict in the following manner:

"the Registrar shall make an entry of the verdict on the' indictment and shall then say to the jury the words following or words to the like effect : " Gentlemen of the jury: attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner A.B. is guilty" (or "not guilty").

The statutory scheme through which a jury trial is conducted does not require the jury to give reasons for their verdict. In this regard it is also pertinent to observe that no specific statutory provision exits absolving the jury from such duty. Yet, even the trial judge has no right to inquire into the reasons for their verdict, despite a judge is empowered to ask questions from the jury to 'ascertain' what the verdict is, under section 235. It is such practice that had been continuing since the inception of trials by jury in England. Neither the common law nor the statute law had intervened in this practice. It is also pertinent to observe that even an appellate court that considers an appeal against a conviction by a jury has no right to seek for reasons from the jurors

to their verdict and absence of reasons is not a ground on which a conviction by a jury could be set aside. Law does not permit drawing an inference that reasons were not pronounced due to the absence of valid reasons for the jury to have arrived at the verdict of guilt. No duty to give reasons for the decision is imposed on a jury despite the fact that a statutory appeal lies against a conviction based on the verdict of a jury. One of the grounds on which the duty to give reasons was developed under the common law is *"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it is important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed*" (per Lord Mustill in **Doody v Secretary of State for the Home Dept,** ([1993] 3 All ER 92 at 109-110, [1994] 1 AC 531 at 565). Nevertheless, the common law principles at no stage imposed a duty on a jury to give reasons for its verdict.

Similarly, neither the common law principles as developed in England, nor the statutory schemes had extended the 'duty to give reasons' to a Court Martial in relation to its verdict. As discussed hereinbefore both jury trials and trials in Courts Martial had been in existence over centuries. Roles of the Judge Advocate and members of Courts Martial vis-à-vis roles of the presiding judge and members of a jury had been recognised, as similar. The Supreme Court in **Jayanetti** (supra) and **"The Court Martial and The Summary Appeal Court Guidance"** issued by Judge Advocate General and The Director of Military Court Service (supra) have recognised such similarity. There is no reason for me to deviate from these views even though the statutory provisions governing proceedings of Courts Martial and jury trials are not identical. Existing practices relating to Courts Martial and jury trials and the jurisprudence as discussed hereinbefore reflect, that they are similar in context. Furthermore, in my view the unique nature of the 'Court Martial' in the context of the court structure in the legal system and the responsibility on the Court Martial to act 'judicially' had not altered this position. Even a court, which falls within the traditional structure of courts in a legal system, is bound to act judicially. Yet, the developments in common law principle 'duty to give reasons', had not been extended to the verdict of a jury.

In the backdrop of these legal principles, I will now turn to the impugned Court Martial proceedings. The entire record of proceedings including the charge sheet, evidence, summing up of the Judge Advocate and the verdict is available for perusal by this court and it was available for the Court of Appeal too. A team of counsel, presumably of his choice, had represented the appellant before the Court Martial. At the commencement of the proceedings an objection had been raised in relation to one of the members of the tribunal. The Judge Advocate thereafter had addressed the remaining two members and had explained the grounds for such objection and had invited the two members to reach a decision. Accordingly, the composition of the Court Martial had been changed as they decided in favour of the objection raised on behalf of the appellant. The Judge Advocate had addressed the members on the legal position regarding the admissibility of the summary report on the prosecution case presented by the prosecuting officer. The Judge Advocate at the end of evidence had addressed the members for one hour and forty five minutes. In his address, he had drawn the attention of the members to the relevant legal principles including the burden and standard of proof, the manner in which the prosecution evidence and defence evidence should be considered as well as the different aspects of the testimonies of prosecution and defence witnesses. It is pertinent at this stage to observer, that Learned President's Counsel for the appellant in the course of his submissions before this Court did not impugn the summing up of the Judge Advocate but acknowledged the comprehensiveness and impartiality reflected therein.

Members of the Court Martial had retired for deliberations at the conclusion of the aforementioned summing up of the Judge Advocate and had pronounced its verdict after fifty-five minutes. The appellant was pronounced guilty on both counts. The Court Martial had not deviated from its practice and had not violated any statutory provision in the Navy Act.

All this material including the evidence and the summing up of the Judge Advocate was made available to the appellant as well as the Court of Appeal at the hearing of appellant's application for Writ of Certiorari. Therefore, the absence of reasons from members of Court Martial for their verdict had not adversely impacted the Court of Appeal in the exercise of its jurisdiction under Article 140 of the Constitution read with section 132(1) of the Navy Act.

Therefore, in my view the Court of Appeal did not err when it refused to quash the verdict of the Court Martial on the ground that it failed to give reasons. It is my considered view that, imposing a duty to give reasons on the members of a Court Martial on the basis that such general duty exists under the 'common law principles' brings in a complete change to the military justice system contrary to the statutory scheme and the practice prevalent over centuries.

In reaching my findings on this matter I have also considered two decisions of the Court of Appeal namely, judgment of a Divisional Bench in **Fonseka v Lt. General Jagath Jayasuriya *et al***, [2011] 2 SLR 372 and the judgment of a single judge in **Abeysinghage Chandana Kumara v Kolitha Gunathilaka *et al***, CA/Writ/333/2011, CA minutes dated 01.06.2020. In **Fonseka** (supra) on behalf of the petitioner it was contended that a Court Martial is bound to give reasons as Court Martial had been recognised as a 'court' and also has a duty 'to act judicially'. Having reiterated this submission the Court had not proceed to make a specific finding in favour of this submission but dismissed the application *in limine* on the basis that the petitioner was guilty of non-disclosure. In **Abeysinghage Chandana Kumara** (supra), the learned judge held that in the matter under consideration the Court Martial had failed to comply with regulations 98 and 175 of 'The Court Martial (General and District) Regulations which requires "The opinion of every member of the court martial as to the findings shall be given by word of mouth on each charge separately" and every member of court martial *"must give his opinion by word of mouth on every matter which the court has to decide, including sentence, notwithstanding that he may have given his opinion in favour of acquittal"* and had held that *"it is incurable and fatal to the conviction"*. Thereafter the learned judge had proceeded to hold that *"giving of reasons for decision of the court martial has not been excluded expressly or by necessary implication in the Air Force Act or Regulations made thereunder. Hence, the failure to give reasons is fatal to the conviction of murder and punishment of life imprisonment"*.

However, due to the reasons enumerated hereinbefore, I am not inclined to consider learned judge's view in **Abeysinghage Chandana Kumara** (supra) favourably. Absence of an appeal by the Honourable Attorney-General to the Supreme Court from the said decision of the Court of Appeal, in my view, is not a factor that can have any influence on my view in this regard. The learned President's Counsel for the appellant submitted that the right to judicial review of the decision of a Court Martial would be rendered an 'empty shell' if the Supreme Court departs

from the decision in **Abeysinghage Chandana Kumara's** case (supra). In this regard it is pertinent to observe that in numerous occasions, the Court of Appeal has quashed Court Martial proceedings by exercising writ jurisdiction vested by the Constitution read with the provisions in the Army, Air force and Navy Acts. Supreme Court had affirmed such decisions, unless in situations where the Court of Appeal had erred.

In **Kumaresan v Pannanwela and others** [1990] 2 SLR 181 a writ was issued to quash findings of a Court Martial under the Air Force act due to defects in Judge Advocate's summing up and the defects in the charges. In **Indrananda De Silva v Lt. Gen. Waidyaratne and others,** [1998] 1 SLR 175 a writ was issued to quash conviction entered by a Court Martial under the Army Act due to admission of illegal evidence and insufficiency of evidence. A conviction of a Navy Court Martial had been quashed in **Chandra Kumar and another v. Capt. Samarawickrama and others, [**2002] 2 SLR 153, due to defects in the summing up of the Judge Advocate and for the reason that the Court Martial erred in admitting certain items of evidence. In **Koralagamage v Commander of the Army,** [2003] 3 SLR 169, a writ was issued to quash the conviction of an Army Court Martial on the basis that the opportunity to cross examine witnesses was denied to the accused. A conviction of a Court Martial had been quashed on the basis that the offence was prescribed, in **Chandrasena v Commander of the Sri Lanka Army and others,** [2004] 1 SLR 404. In **Jayanetti** (supra), failure of the Judge Advocate to perform the statutory duty to sum up the evidence, led to the conviction being quashed.

In **Wimalasiri v Daluwatte and others,** [2002] 2 SLR 192, court in refusing to issue a writ observed that;

> *"when the evidence placed before the Court Martial is considered, it does not appear that, on the evidence available, the decision of the Court is unsupportable or perverse. There is also no serious procedural error resulting in a miscarriage of justice".* (at p 196)

In the light of the jurisprudence discussed hereinbefore, I am not inclined to consider favourably, the above-mentioned submission of the Learned President's Counsel, that the failure to follow the decision in **Abeysinghage Chandana Kumara** (supra) would make writ jurisdiction over a Court Martial an 'empty shell'.

In view of my findings enumerated hereinbefore, I answer question (b), on which this Court had granted Special Leave, in the negative.

Did the Court of Appeal err in its failure to consider whether judge advocate's directions did not justify the determination of the Court Martial?

It is the contention of the learned President's Counsel for the appellant that this question should be considered in the context of 'no evidence' rule. Furthermore, it was submitted that the same issue was in the forefront of the arguments before the Court of Appeal as the appellant argued that the Court Martial ought to have found the appellant not guilty for both counts.

On behalf of the respondents, learned Deputy Solicitor General submitted that the examination of the record of the Court Martial proceedings aptly demonstrate that the "no evidence" rule does not arise in the given situation. It was further contended that sufficient evidence was presented before the Court Martial and the verdict of the Court Martial on either count is neither perverse nor unreasonable despite conflicting evidence existed in relation to the first charge. The learned Deputy Solicitor General contended that the summing up of the Judge Advocate quite correctly had drawn the attention of the members of the Court Martial to the fact that such inconsistencies exist and had addressed comprehensively on the legal position relating to the standard and burden of proof. Furthermore, on behalf of the respondents it is submitted that no inconsistencies exist in the evidence pertaining to the second charge and hence, there is no legal basis to interfere with the verdict in relation to the said charge. On this basis the learned Deputy Solicitor General submitted that no legal basis exists to issue a writ of certiorari to quash the impugned verdict on either of the two charges.

On behalf of the appellant it was submitted that our courts have adopted and applied 'no evidence' rule in **Hasseen v Gunasekera and others**, CA application 128/86 CA minutes 02.10.1995, **Kiriwanthe v Nawarathne** [1990] 2 SLR 393 at 409, **Nalini Ellagala v Poddalgoda** [1999] 1 SLR 46 at 52 and **Nicholas v Macan Markar Limited;** [1985] 1 SLR 130 at 140-141.

In **Nalini Ellegala** (supra) the Supreme Court considered whether the Rent Board of Review erred in exercising its appellate jurisdiction in relation to a decision of the Rent Board.

Section 40(4) of the Rent Act provides that "Any Person who is aggrieved by any order made by any Rent Board under this Act may …….. appeal against the Order to the Board of Review: provided however, that no appeal shall lie except upon a matter of law".

In considering this issue, the Supreme Court considered the Court of Appeal decision in **Hassen v Gunasekera and Others** (supra), and recognised that the Court of Appeal had "dealt with an order of the Board of Review, affirming an order of the Rent Board which had been *"arrived at without an adequate evaluation of the evidence and by failing to take into consideration relevant items of evidence which could have influenced the finding"* and held the Rent Board as well as the Board of Review had "erred in law by failing to take into account relevant items of evidence in arriving at the finding" and therefore quashed the orders of the Rent Board as well as of the Board of Review".

Furthermore, the Supreme Court in **Nalini Ellagala** (supra) observed that

> *"Wade & Forsyth, Administrative Law, 7th edition at page 312 dealing with the 'no evidence' rule states that 'no evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding, or where, in other words, no tribunal could reasonably reach that conclusion on that evidence". It goes on to state at page 316 that "It seems clear that this ground of judicial review ought now to be regarded as established on a general basis", and forecasts that 'no evidence' seems destined to take its place as yet a further branch of the principle of ultra vires, so that Acts giving powers of determination will be taken to imply that the determination must be based on some acceptable evidence. If it is not, it will be treated as 'arbitrary, capricious and obviously unauthorised'."*

Applying the principles enumerated hereinbefore, the Supreme Court held that

> "*the Rent Board had failed to properly evaluate the evidence and such failure was a question of law upon which the Board of Review was entitled to exercise its powers under section 40 of the Act".* (at p52).

Nicholas (supra) is a case where the jurisdiction of the Court of Appeal was invoked to quash a decision of the Rent Board of Review. The basis on which the application for the writ of certiorari was made includes that *"the decision of the said Board of Review bears on record an error of law, in that the Board of Review has made order without jurisdiction and / or in excess of the jurisdiction and in contravention of the statutory provisions in the law"* (at p 134).

In the said matter the court was confronted with the issue, whether the Board of Review having considered the facts including contents of documents produced before the Rent Board had taken a view different to the view taken by the Rent Board, which led to the setting aside of the order of the Rent Board when the Board of Review had the jurisdiction to consider an appeal from the Rent Board solely on matters of law, as provided under section 40 of the Rent Act? In this regard the learned counsel for the petitioner had submitted that the Board of Review could have set aside the findings on questions of fact if there was no evidence before the Rent Board to come to the conclusion it had arrived at, or on the evidence available before the Rent Board, no reasonable person could have come to that conclusion.

The court before embarking on the analysis of relevant legal principles in this regard had quite correctly identified the scope of examination the Court of Appeal has to engage, in exercising its jurisdiction of judicial review in relating to the decision of the Rent Board of Review. The court held;

> *"There is a fine distinction between, "appeal" and "judicial review". When hearing an appeal the court is concerned with the merits of the decision in appeal. The question before court is whether the decision subject matter of the appeal is right or wrong. In the case of judicial review the question before the court is whether the decision or order is lawful, that is, according to law. As such in this application for a writ, it is not the function of this court to decide whether the order of the Rent Board is right or wrong, or whether the order of the Rent Board of Review is right or wrong. The function of this court in this instance is to decide whether on the principles applicable to judicial review, the order of the Rent Board of Review should be allowed to stand or should be set aside". (at p 139)*

Clearly identifying the parameters within which a court exercising its jurisdiction in an application for "judicial review" should act, the court proceeded to observe that:

> *"A close study of the principles set down in these English and Ceylon cases referred to above show that the principles adopted by a superior court in considering a writ against an order of an inferior tribunal or court or an appeal on questions of law from an inferior court or tribunal are almost the same or have come closer. However De Smith Judicial Review of Administrative Action (4th Ed.) - page 129 states as follows:*
>
> *"The criteria adopted by the courts for distinguishing between question of law and questions of fact have not been uniform……. Moreover, criteria applied in one branch of the law may be largely irrelevant in another: it may be unwise to, rely upon the fine distinctions drawn in income tax appeals or workmen's compensation appeals as authoritative guidance in appeals from other inferior tribunals or applications for certiorari to quash determinations of the national insurance commissioners or medical appeal tribunals for error of law on the face of the record. (In respect of this opinion) the relevant note 9 to this passage states as follows - Nevertheless, the important decision of the House of Lords in Edwards v. Bairstow (supra) a tax case in which the concept of a question of law was given a broad interpretation, has been influential in other contexts. It has been applied, e.g. in R. v. Medical Appeal Tribunal, ex p. Gilmore (supra) a case of certiorari to quash for patent error of law, and in rating..... and arbitration cases, and in a case involving the scope of the obligation to pay social security contributions (Global Plant Ltd. v. Secretary of State for Social Services (supra) and in a case concerning the registration of common land..... and in unfair dismissal cases). Subject to these qualifications, it is possible to make some meaningful generalisations about the tests applied by the courts to discriminate between law and fact in administrative law. But we must first enter another linguistic maze".''* (supra at p 142-143).

Having examined all the material available, the court observed that:

> *"The Rent Board of Review ……. has not shown that there was no evidence for the finding of the Rent Board and that the finding was inconsistent with the evidence" and*

contradictory of it. In my view what the Rent Board of Review has done is that it has on the same material substituted the finding of` facts' and the opinion of the Rent Board, with its own finding of facts and its opinion. What the Rent Board of Review has done is to 'come to a different conclusion on the facts of the case, from that of the Rent Board and to give that finding a legal decoration or embellishment by reference to three cases" (supra at p 144)

In **"Administrative Law"** by H.W.R. Wade and C.F. Forsyth (10th Edition at 229-230) sets out 'no evidence" rule in following terms:

"It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly – R v Criminal Injuries Compensation Board 1997 SLT 291. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.

'No evidence does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding – Allison v General Medical Council [1894] 1 QB 750 at 760, 763; Lee v Showmen's Guild of Great Britain [1952] 2 QB 329 at 345 - ; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence – R v Roberts [1908] 1 KB 407 at 423 - . This 'no evidence' principle clearly has something in common with principle that perverse or unreasonable action is unauthorised and ultra vires. It also has some affinity with the substantial evidence rule of American Law, which requires that findings be supported by substantial evidence recorded as a whole – Administrative Procedure Act (USA 1946, s 10(e); Universal Camera Corporation v National Labour Relations Board 340 US 474 (1951); Schwartz and Wade, Legal Control of Government, 228 - ."

When *curses curie* and legal literature relating 'no evidence' rule is considered in the context of the factual position relating to the impugned Court Martial proceedings, it is pertinent to note that the prosecution had led evidence of four witnesses and a similar number of witnesses had testified on behalf of the appellant. Furthermore the appellant himself also had testified before the Court Martial.

Two charges that were framed against the appellant had been,

(a) Absence from Vankalai and Nanaddan, which was his "place of deployment" without obtaining permission from an authorised officer, in violation of section 60(2) of the Navy Act.

(b) The failure to return to his place of deployment namely Naval depot at Vankalai, upon becoming aware that the LTTE had bombed Thalladi army camp, and thereby committing an offence punishable under section 104(1) of the Navy Act.

First, I will consider the submission of the learned Deputy Solicitor General, that the 'no evidence rule' cannot be invoked in relation to the second charge, framed against the appellant. In this context it is pertinent to note that the appellant had pleaded not guilty to both charges. However, one of the admissions recorded before the Court Martial is that the appellant was away from Vankalai at the time the air raid was launched on Thalladi Army camp in the night of 28th October 2008. Accordingly, the Judge Advocate had correctly directed that the facts both parties had agreed need not be further proved. Therefore, there is no conflict on the fact that one of the core issues in relation to the second charge, namely that the appellant failed to return to his place of deployment upon becoming aware of the air raid on Thalladi camp stands proved. The appellant's position relating to the second charge is that he took the decision to remain at SLNS Gajaba without proceeding to his Area of Command on the basis that his presence at SLNS Gajaba would be more beneficial than his presence at the camp situated within his Area of Command. However, the prosecution counters this position. Prosecution contends that no member of the Navy who is acting under the command of a senior officer has the authority to deviate from the duties and responsibilities assigned to him until his superior commands to that effect. There is no dispute between the parties that at no stage during the relevant time the appellant either sought or made any attempt to seek permission of his superiors to remain at SLNS Gajaba without proceeding to his area of command, Vankalai. Hence, I am of the view

that 'no evidence rule' cannot be invoked in relation to the second charge. The issue is whether there is merit in the defence pleaded by the appellant or not.

The Judge Advocate in his summing up had drawn the attention of the Court Martial to the fact that the appellant on his own volition remained at SLNS Gajaba. Furthermore, he had placed the submissions made by both parties before the members to consider whether the appellant should be held guilty for the second charge. The members were left to decide whether the conduct of the appellant prejudices good order and naval discipline.

Section 104 of the Navy Act reads:

"Every person subject to naval law who, by any act, conduct, disorder, or neglect which does not constitute offence for which special provision is made in any other section of this Act, prejudices good order and naval discipline, shall be guilty of a naval offence and shall be punished with dismissal with disgrace from the Navy or with any less severe punishment in the scale of punishments".

The appellant having admitted that he did not proceed to Vankali after coming to know about the air raid on the nearby army camp, explained various steps he took by remaining at the operations room at SLNS Gajaba, in the absence of its Commander, that night. However, he admitted that he knew that his duty was to report to Vankali no sooner he came to know about the air raid and that he did not receive instructions from any senior officer to remain at SLNS Gajaba without proceeding to his area of command. It is also pertinent to note that the emergency situation that arose with the air raid approximately around 10.30 pm was fully lifted only in the early morning the following day. Judge Advocate, in his address invited the members to consider whether the appellant's failure to report to the pre- determined area of command to which he should report at a time of an emergency prejudices good order and naval discipline as submitted by the prosecution. In this context, he further invited the Court Martial to consider whether any person should be allowed to act arbitrarily. In this regard, the Judge Advocate further directed the Court Martial to consider the appellant's position that he took all possible measures to coordinate with other relevant personnel using the facilities available at SLNS Gajaba.

When all these facts are taken together, I am of the view that there was sufficient evidence before the Court Martial to consider all relevant matters and reach a decision on the second charge. Hence there is no rationale to interfere with the verdict of guilt pronounced by the Court Martial against the appellant on the second charge, on the basis of the 'no evidence rule'.

The learned President's Counsel for the appellant submitted that the second charge is '*ultra vires'*. His submission is that when an officer or a sailor commits a misconduct in battle, he is guilty of offence set out in section 54 of the Navy Act and does not become liable to be prosecuted under section 104 of the Act. It is his submission that section 104 could be invoked only relating to general conduct.

However, I observe firstly, that section 104 does not make a distinction between conduct while engaged in action and general conduct. To the contrary, section 54 deals with specific conduct in situations where there is signal of battle or on sight of a ship of an enemy. Furthermore, Section 54 (1) deals with three specific types of conduct that attracts penal consequences. They are, failure to use utmost exertions to bring his ship into action, failure to encourage his inferior officers and men to fight courageously and surrendering his ship to the enemy or withdrawing from fight. If the conduct of any flag officer, captain, commander or commanding officers falls within the ambit of any of the aforementioned circumstances, then such a person who had acted traitorously is liable to be punished with death or with any less severe punishment if such person had acted from cowardice. To the contrary, such person is liable to be punished with dismissal with or without disgrace or any less severe punishment, if had acted from negligence or through other default.

However, section 104 deals with conduct, act, disorder or neglect that does not constitute an offence under any other provision of the Act, including section 54. In the course of the submissions no attempt was made to demonstrate how the alleged conduct of the appellant in the given situation would fall within the ambit of section 54. Furthermore, that the appellant had raised no objection in relation to the second charge framed against him under section 104 of the Act but had pleaded to the charge and had taken part in the proceedings. In my view the second charge framed against the appellant is neither *ultra vires* nor illegal.

In the context of the first charge framed against the appellant, the learned President's Counsel for the Appellant drew the attention of this Court to the record of proceedings before the Court Martial with a view of demonstrating that this is a fit case to quash the verdict of the Court Martial based on 'no evidence' rule. It was his submission that evidence of several witnesses contradicted the evidence of Area Commander, on the fact that the appellant stayed outside his area of duty – place of deployment – without permission. The learned President's Counsel further submitted that the evidence of those witnesses corroborated the position taken up by the appellant in his testimony before the Court Martial.

The prosecution had led the evidence of the Area Commander, Secretary to the Area Commander, Deputy Area Commander and Commanding Officer of Vankalai. The appellant himself and four other witnesses namely Commanding Officer of SLNS Gajaba, Contingent Commander of Mannar, Commanding Officer of Naval Deployment Silavathura and Logistics Officer of SLNS Gajaba, had testified for the defence.

It is pertinent to note that the main issue to be determined in deciding the appellant's innocence or guilt in relation to the first charge is whether he stayed outside his place of deployment without permission from an authorised officer. There is no dispute that SLNS Gajaba is situated outside the place of deployment relating to the appellant and that the appellant on several occasions spent the night at SLNS Gajaba, including the day on which an air raid was launched on Thalladi army camp situated approximately 6-7 kilometers away from Vankalai. Therefore, the only issue that that had to be decided is whether the appellant had permission to stay at SLNS Gajaba, a place from where it takes about 30-45 minutes to reach Vankalai. There is also no dispute as to who should have granted such permission. It is the Area Commander under whose command the appellant was placed within the command structure and therefore it is no person other than the Area Commander could have granted such permission.

The Area Commander who testified before the Court Martial said that he did not grant permission for the appellant to stay outside his place of deployment but wanted the appellant to examine the area and inform the best location where he should stay when he reported for duty. It was his concern whether the appellant would stay at the same place where the Commanding Officer is located or whether the appellant, tactically would wish to stay at a different location.

This witness had been cross-examined extensively and it was suggested that he granted permission for the appellant to stay at SLNS Gajaba until suitable arrangements are made at Vankalai. Furthermore, it was suggested that the inadequacies in residential facilities for officers at Vankalai was discussed at official meetings and necessary instructions had been given to remedy this situation at the earliest. The witness had said that permission should have been given in writing to stay at facility situated outside the area of command. Furthermore, he said that the appellant would have attended to his initial matters within about two days of reporting to SLNS Gajaba and thereafter would inform his decision as to the best place to stay after examining the area under his command. It was his position that the appellant confirmed that the best place to stay is the place where the Commanding Officer is located – Basthipuram situated within Vankalai.

According to the appellant, he was appointed Contingent Commander of Vankalai and Nanaddan with effect from 04 September 2008. At that stage the Commanding Officer of Vankalai had been overseas and the appellant had communicated with the Commanding Officer at SLNS Gajaba to obtain necessary information to reach there. The appellant had been informed that, arrangements had been made for him to stay at SLNS Gajaba. Accordingly, the appellant had directly proceeded to SLNS Gajaba and reached there around 5.00 pm. The appellant on the following day had reported to the Area Commander who was at Thalaimannar. He had remained at VIP chalet at SLNS Gajaba till 7th of September 2008, the day on which he proceeded to Vankali situated within his area of deployment as Contingent Commander of "Vankalai and Nandaal". The appellant claims that he came to know from the Commanding Officer of Vankalai that permission had been granted for the appellant to stay at SLNS Gajaba until suitable arrangements are made to stay within the area of Vankalai and Nandaal. The Appellant further claims that he decided that the best place for him to stay is Vankali, after inspecting the area. He had accordingly informed the Area Commander and suggested that he would stay at Vankalai when the Commanding Officer is absent but would stay at SLNS Gajaba on the days that Commanding Officer is present at Vankalai. It is appellant's position that the Area Commander granted permission for him to stay at SLNS Gajaba on the days that Commanding Officer is present at Vankalai.

Deputy Area Commander who testified before the Court Martial had said that the appellant at one point told him that the Area Commander granted permission for him to stay at SLNS Gajaba on the nights Commanding Officer is availabe at Vankalai. The witness had said that he would have discussed with the Area Commander and sought permission if the appellant sought permission from him. However, as the appellant sought no permission from him the witness had not taken any steps in this regard any further or to make any inquiries from the Area Commander.

Commanding Officer of Vankalai in his testimony had said that the appellant arrived at Vankalai on the 7th of September. The appellant spent about a week at Vankalai. Therefater, on 14th September he proceeded to SLNS Gajaba after informing the witness that he received instructions from SLNS Gajaba regarding his accommodation. During the initial period the appellant had spent the night at the facility the witness was staying. However, thereafter the appellant had spent the night at SLNS Gajaba on the days the witness was present at Vankalai. This witness had further said that at a meeting held about a week prior to the arrival of the appellant, the Area Commander said that appellant would be provided with accommodation at SLNS Gajaba until suitable arrangements are made at Vankalai.

Commanding Officer of Gajaba in his testimony said that when he received the signal about appellant's arrival he obtained permission to make necessary temporary arrangements for appellant's accommodation at the initial stage as the appellant would directly arrive at SLNS Gajaba, before proceeding to his area of responsibility.

It is also pertinent to note evidence of other witnesses who testified at the Court Martial confirm that discussions took place at several meetings attended by the Area Commander on the inadequacy of residential facilities at Vankalai and the need to expedite the completion of construction work to ensure that such issues are resolved early. Furthermore, on behalf of prosecution as well as on behalf of the appellant, minutes and agenda items of said meetings had been produced as evidence before the Court Martial.

Examination of the oral evidence of the witnesses, including the evidence of the appellant, demonstrate that there had been inconsistencies on the issue whether the appellant had

permission from the Area Commander to stay the night at SLNS Gajaba - outside the area of command - on the days the Commanding Officer was present at Vankali. However, there is no inconsistency on the fact that none of the records of the meetings confirm that the Area Commander had granted permission to the appellant to stay at SLNS Gajaba. Furthermore, there is no inconsistency on the fact that at no stage the appellant obtained written permission from the Area Commander, to stay at SLNS Gajaba.

At the conclusion of the testimonies, the Judge Advocate had addressed the members and had extensively dealt with the evidence of all relevant witnesses. He had drawn the attention of the members to the inconsistencies among the evidence of witnesses, and different positions taken up by the prosecution and defence in their submissions. Furthermore, he had given instructions to the members on the standard and burden of proof placed on the prosecution. The Judge Advocate quite correctly had said that the issue whether the appellant had permission to stay at SLNS Gajaba is a question of fact that should be decided by the members. One other pertinent fact that had been placed before the members by the Judge Advocate is the absence of written permission for the appellant to stay at SLNS Gajaba and the issue whether this is a matter where such written permission is required or not.

When the totality of the oral and documentary evidence is considered in the context of the summing up of the Judge Advocate, it is clear that the members had been allowed to discharge their duty by arriving at a decision on the guilt or innocence of the appellant by forming their own view on the core issue, based on the evidence presented.

In my view, inconsistences in the oral evidence when considered together with all documentary evidence, on no reasonable hypothesis the verdict of the Court Martial could be classified as irrational, illegal, arbitrary or perverse. It is also not possible to hold that the evidence presented before the Court Martial, *is not reasonably capable of supporting the finding*. Therefore, 'no evidence rule' cannot be invoked against the verdict of the Court Martial in relation to its verdict on the first charge too. Furthermore, a court exercising writ jurisdiction has no authority to substitute the findings of facts arrived by the Court Martial with the findings of the court based on its opinion and reach a different conclusion. Therefore, I am of the view that there is no legal basis to interfere with the verdict of the Court Martial.

Is the sentence imposed on the petitioner violative of Section 104 of the Navy Act?

Section 104 of the Act prescribes 'dismissal with disgrace from the Navy or with any less severe punishment in the scale of punishment' as the sentence to be imposed for an offence under said section. Section 120 of the Act sets out the scale of punishments, in the descending order. While the highest punishment as per the said scale is death, dismissal with disgrace from the Navy and dismissal without disgrace remains the third and sixth in the scale of thirteen different types of punishment. For an offence under section 104, dismissal with disgrace remain the highest punishment and dismissal without disgrace remains the fourth highest punishment.

The main contention of the learned President's Counsel for the appellant regarding the sentence is that the sentence of dismissal without disgrace imposed on count 2 fails to pass the 'proportionality test'.

The alleged misconduct of the appellant and surrounding circumstances relating to the second count had already been discussed when considering the legality of the verdict of the Court Martial. Therefore, repetition of such facts is unwarranted and unnecessary at this stage. The Judge Advocate in his directions had explained the nature of the allegation and the respective positions taken up by the appellant and the prosecution. It is also pertinent to observe that the appellant was provided an opportunity to plead in mitigation and the prosecution had presented the appellant's personal file to the Court Martial for consideration. Court martial having considered all such material including the letter of displeasure issued by the Navy Commander at a prior occasion had imposed severe reprimand and dismissal without disgrace as sentence for count 1 and 2, respectively.

Learned Deputy Solicitor General defending the aforesaid sentence imposed by the Court Martial on both counts, submitted that the appellant as a senior officer of the Navy failed to provide leadership to subordinates who were under his command at a time his presence at his area of command remained his core duty. Appellant's failure to be present in his area of command without permission from his superior is a serious breach that caused prejudice to good order and naval discipline. In contrast, the learned President's Counsel for the appellant contended that the sentence of 'dismissal without disgrace' is disproportionate in view of the appellant's good record in the Navy and steps he took while remaining at SLNS Gajaba at the time of emergency.

Court Martial in imposing the sentence on count two was possessed with all this material and has imposed the fourth severe punishment that is prescribed by law. Discipline is a major factor that needs to be preserved and respected in armed forces to ensure that all members would contribute to maintain an effective and efficient defense mechanism. The sentence imposed by the Court Martial on second count is neither disproportionately drastic nor it is altogether excessive and out of proportion to the occasion. Therefore, in my view there is no basis to interfere with the sentence imposed by the Court Martial.

The Court of Appeal despite erred by holding, that the appeal against the sentence passed by the Court Martial under section 122 of the Navy Act, to the President is an alternative remedy which ousted the writ jurisdiction of Court, proceeded to examine rest of the issues and had refused to grant relief to the appellant on merits of the application.

In view of my findings on issues that are discussed hereinbefore, there is no legal basis to grant writs of certiorari and mandamus as pleaded by the appellant. Therefore, the appeal of the appellant against the judgement of the Court of Appeal fails. In view of these findings, examining the remaining issue - whether this Court could grant the petitioner any relief in view of Section 122 of the Navy Act read with Section 10 of the Navy Act as the Petitioner's decommissioning has been approved by His Excellency the President? - is of an academic exercise only. Therefore, I will refrain from examining the said question.

The appeal of the appellant is dismissed. In the circumstances of this case, I refrain from making any order on costs.

Chief Justice

L.T.B. Dehideniya. J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, PC, J

This judgment relates to an Appeal submitted to this Court against a Judgment of the Court of Appeal dated 30th July 2015.

On 16th January 2017, following a consideration of a Petition of Appeal to this Court dated 9th September 2015 against the afore-stated judgment of the Court of Appeal and submissions made by learned Counsel for the Petitioner and the Respondents, this Court granted *Special Leave to Appeal* in respect of the following questions of law:

(i) Did the Court of Appeal err in holding that the Appeal against the sentences passed by the Court Marshal under section 122 of the Navy Act to His Excellency the President, is an 'alternative remedy' which ousted the writ jurisdiction of Court in respect of the subject matter of the Petitioner's Application before the said Court?

(ii) Did the Court of Appeal err in holding that there was no need for the Court Marshal to have given reasons for its verdict on the sole basis that the Code of Criminal Procedure Act does not require a jury to give reasons for its verdict, nor does the Navy Act require a Court Marshal to give reasons for its findings?

(iii) Did the Court of Appeal err in its failure to consider whether the Judge Advocate's summing up did not justify the determination of the Court Marshal?

(iv) Are the sentences imposed on the Petitioner violative of section 104 of the Navy Act?

(v) Can this Court grant the Petitioner any relief in view of section 122 of the Navy Act read with section 10 of the Navy Act, as the Petitioner's decommissioning has been approved by His Excellency the President?

[The fifth question of law was raised by learned counsel for the Respondents. The term 'Petitioner' referred to above, is a reference to the 'Appellant' in the present Appeal.]

On 24th July 2020 at the commencement of the argument of this Appeal, learned President's Counsel for the Appellant with the leave of this Court, raised two further grounds of Appeal, which may be couched in the following terms:

(vi) Is the verdict of the Court Martial bad in law, in that, there was no evidence placed before the Court Martial which could be used to substantiate the verdict of *'guilty'*?

(vii) Are the sentences imposed by the Court Martial bad in law, in that the said sentences are not in conformity with the principle of proportionality?

Learned Senior State Counsel did not raise serious objection to this Court entertaining and considering those two additional questions of law. In any event, it is trite law that once the Supreme Court grants *'special leave to appeal',* it thereafter gains inherent jurisdiction to consider any further pertinent questions of law arising out of the judgment appealed against.

Background

The incident which led to the pronouncement of the impugned finding (verdict) of the Court Martial proceedings referred to in the judgment of the Court of Appeal, occurred in the backdrop of the pendency of terrorism perpetrated by a terrorist organization called the "Liberation Tigers of Tamil Eelam" (LTTE) and an armed conflict between the LTTE and the Armed Forces of Sri Lanka. The LTTE entertained the goal of establishing a separate sovereign State primarily in the Northern and Eastern Provinces of Sri Lanka to be named "Tamil Eelam". The conduct of the LTTE which was unconstitutional, was associated with the unleashing of terrorist acts, posed a serious threat to national security, caused an interruption of the territorial integrity of the country, prevented the State from exercising its writ of governance in certain parts of the country, and disrupted the exercise of sovereignty by the citizens of the Republic. In response, the Armed Forces of Sri Lanka conducted a series of military operations aimed at suppressing and terminating terrorism. At the time of the incident under reference, *"Humanitarian Operation"* - the last of a series of military operations was afoot. It ended in May 2009 with the successful termination of LTTE terrorism and its organized presence in Sri Lanka.

As part of its terrorist operations, with the aid of small rudimentary aircrafts, from time to time, the LTTE launched several aerial attacks on different parts of the country, which included Colombo. One such attack launched by the LTTE, took place on the night of 28th October 2008. That was the day on which the Appellant's conduct which became the subject matter of a trial before a Court Marshal established in terms of the Navy Act took place. It is the finding (verdict) of that Court Martial and the orders of sentence which were impugned before the Court of Appeal.

The Appellant

Having joined the Sri Lanka Navy on 28th February 1986 as a trainee Cadet, following continuous service to the nation and having incrementally obtained a series of promotions to higher ranks, on 1st January 2008 the Appellant had been elevated to the rank of Captain. In addition to routine training, the Appellant has obtained a Masters' Degree in Defence Studies Management. During 23 years of service, the Appellant has undergone specialized education and training in several areas. He held several important appointments which included positions which required him to command Sri Lanka Navy vessels, such as long patrol boats, fast attack crafts, a surveillance and logistics vessel, Submarine Chaser *"SLN Parakramabahu"*, and the largest standing craft of the Navy at the time, *"SLN Shakthi"*. He also served as Commanding Officer of several Navy camps and detachments. The Appellant has placed before the Court of Appeal material which reflect that he had contributed in a significant manner towards multiple naval operations against the LTTE, and towards research and development. In recognition of his services to the Sri Lanka Navy and to the motherland, the Appellant has been decorated by the award of several gallantry medals including the *"Rana Soora Padakkama"* (first awarded in 2001 and re-awarded twice in 2002), *"Purna Bhumi Padakkama"*, the *"Riviresa Campaign Service Medal"*, and had received multiple commendations. It is noteworthy that in his summing up, the Judge Advocate has observed that the Appellant had served the Navy, 'exceptionally'.

The incident

With the progression of the *"Humanitarian Operation"*, the Army had captured certain territorial areas from the control of the LTTE. During the period immediately preceding

September 2008, the Army had handed over two such areas, namely Vankalai and Nanaddan (situated in the District of Mannar) to the Navy. As at the time of the incident in issue, the Navy was in the process of establishing its presence in Vankalai and Nanaddan, and constructing logistics associated with the setting up of Navy camps in those areas. As Vankalai and Nanaddan were newly established camps, they had not been commissioned, and for administrative and logistics purposes, attached to *SLNS Gajaba*, which was at that time, the main Navy camp in Mannar.

On 24th July 2008, at a time when the Appellant was serving as the Commanding Officer of the Navy camp *SLNS Rangala* situated within the Colombo Port, the Appellant received a transfer order from the Commander of the Sri Lanka Navy, Vice Admiral W.K.J. Karannagoda – the 1st Respondent. He was required with effect from 4th September 2009, to assume duties as the *"Contingent Commander – Vankalai and Nanaddan"*. This appointment came within the overall administrative command of the North Central Naval Area (which is a territorial administrative area demarcated by the Navy), commanded by the Area Commander of the North Central Naval Area, who was at that time, Rear Admiral Tikiri Bandara Illangakoon.

On 4th September 2008, the Appellant proceeded to Mannar and arrived at *SLNS Gajaba* to assume duties as the Contingent Commander of Vankalai and Nanaddan. He proceeded to Vankalai on the 7th, and stayed there for two weeks. On 5th September, the day after his arrival at *SLNS Gajaba,* when the Appellant met with the Area Commander, the latter had instructed the Appellant to identify a suitable location in Vankalai where the Contingent Headquarters for Vankalai could be established. Accommodation for the Contingent Commander was to be constructed within the Vankalai Navy camp. The Appellant's position is that the temporary arrangement for him to stay during night-time at *SLNS Gajaba* was put in place with the knowledge, concurrence, verbal approval and acquiescence of the Area Commander Rear Admiral Illangakoon. This position has been refuted by Rear Admiral Illangakoon.

Following the initial 14 days at Vankalai, the Appellant started staying overnight at the 'VIP Chalet' in *SLNS Gajaba,* while during day-time, performing his duties in Vankalai and Nanaddan.

The position of the Respondents is that the Appellant had not received any authorization from the Area Commander, to, even as an interim arrangement, stay at *SLNS Gajaba* during night-time. Thus, the Respondents claim that by staying overnight at *SLNS Gajaba,* the Appellant had acted contrary to Naval law and thereby committed an offence.

On 28th October 2008, at approximately 10.20 pm, the LTTE launched an aerial attack on the Thalladi Army camp, by dropping two bombs. (Thalladi is also situated in the District of Mannar, North of the town of Mannar, adjacent the A14 road. This had been the main Army camp in Mannar.) The Vankalai Navy detachment was located approximately 7 km from the Thalladi Army camp. In preparedness to respond to possible further attacks by the LTTE, Navy personnel at the Talaimannar, Gajaba and Vankalai camps had assumed 'action station' positions.

When this attack took place, the Appellant had been at the VIP Chalet of *SLNS Gajaba,* in his temporary accommodation. The Commanding Officer of the Vankalai Navy detachment was at Vankalai. When the 'action stations' siren was sounded, the Appellant rushed out of the VIP Chalet. Outside, he met Supplies Officer Lt. Commander T.N.S. Perera, who was the Acting Commanding Officer of *SLNS Gajaba* on that day. He informed the Appellant of the attack. Thereafter, the Appellant telephoned the Commanding Officer Vankalai Lt. Commander Rohana Dissanayake and inquired about the situation at Vankalai. The Appellant ascertained what action he had taken up to that point of time, and had informed him that he was about to leave *SLNS Gajaba* to arrive at Vankalai. Lt. Commander Dissanayake had informed the Appellant that he had taken all necessary steps, sequel to his having heard of the dropping of two bombs. He had added that there was no necessity for the Appellant to come to Vankalai. In the meantime, the Appellant rushed to the Operations Room at *SLNS Gajaba.* Thereafter, the Appellant had on his own initiative, taken control of the Operations Room of *SLNS Gajaba* and taken several steps in response to the LTTE attack and to counter any further attacks. His justification for taking over command at the Operations Room of *SLNS Gajaba* is that Lt. Commander T.N.S. Perera being a 'logistics officer' of the Navy, was inexperienced in handling combat related emergency matters. Thus, it was necessary to step into his shoes and take command of *SLNS Gajaba*.

The difference of positions between the Appellant and the Area Commander Rear Admiral Illangakoon as to whether or not the latter gave permission to the Appellant to temporarily reside at *SLNS Gajaba* was the main issue which was at the very epicentre of the trial conducted against the Appellant before the Court Martial. Further, the Respondents claim that notwithstanding all the measures which the Appellant claims to have taken from the Operations Room of *SLNS Gajaba*, it remains clear that at the time of the LTTE attack, the Appellant who was the *Contingent Commander - Vankalai and Nanaddan* was not within the 'area of duty' assigned to him (referred to as the 'Tactical Area of Responsibility' - TAOR) namely, Vankalai and Nanaddan, and that during the attack and its immediate aftermath, he did not rush to his TAOR. The position of the Respondents is that, independent of the situation that prevailed at *SLNS Gajaba* at the time of the attack, the Appellant was duty bound to rush to his TAOR and perform his duties. The Respondents assert that, in the circumstances, the Appellant has acted contrary to Naval law and discipline, and thus committed an offence.

Action against the Appellant

On 17th November 2008, the Appellant was served with a letter calling upon him to provide explanation for *"living at SLNS Gajaba which is outside the area of responsibility"* ("P7a"). On 18th November 2008, the Appellant responded and provided explanation ("P7b"). Subsequently, a Board of Inquiry comprising of the 6th to 8th Respondents had been constituted by the 1st Respondent to conduct a preliminary investigation into the allegation that the Appellant had 'vacated the tactical area of responsibility without permission'. Consequently, the Board of Inquiry interviewed the Appellant and several other officers. Afterwards, the Board of Inquiry submitted a Report ("R3") to the 1st Respondent together with findings that the Appellant had 'stayed away from his TAOR without prior approval, denying operational leadership to men under his command'. However, the Board noted that the Appellant remaining outside the TAOR had been with the complete knowledge, concurrence, verbal approval and acquiescence of the Area Commander, a fact which such Commander himself had denied. The Board recommended that suitable disciplinary action be taken against the Appellant.

Thereafter, a 'Charge Sheet' containing the afore-stated allegation was served on the Appellant. Commencing on 12th January 2009, the 5th Respondent recorded a 'Summary of Evidence'. Following the recording of the 'Summary of Evidence', the 5th Respondent presented a report to the 1st Respondent, containing a finding that there was sufficient *prima facie* evidence to substantiate the charges against the Appellant, and recommending that the Appellant be tried before a Court Martial.

In the Court of Appeal, the Appellant sought to impugn the lawfulness of the proceedings of the aforesaid Board of Inquiry and its report, as well as the report which was prepared following the recording of the Summary of Evidence. However, he did not seek to challenge the lawfulness of those proceedings and corresponding findings contained in the said Report in the Supreme Court.

Institution of Court Martial proceedings against the Appellant

According to the Respondents, following a consideration of the Report of the 6th to 8th Respondents and the Report of the 5th Respondent, the 1st Respondent had decided to convene a Court Martial to try the Appellant. Accordingly, on 4th March 2009, a 'charge sheet' signed by the 1st Respondent had been served on the Appellant. The 1st Respondent also constituted a Court Martial comprising of the 2nd Respondent - Rear Admiral M.R.U. Siriwardena (Chairman), 3rd Respondent - Commodore M. Prematileka, and 4th Respondent - Commodore M.A.J. De Costa as members of the Court Martial. Rear Admiral S. Palitha Fernando, PC was appointed by the 1st Respondent to function as the Judge Advocate of the Court Martial.

Charges against the Appellant

During the course of the Court Martial proceedings, the original 'Charge Sheet' issued under the hand of the 1st Respondent was amended with regard to the first charge. Learned President's Counsel for the Appellant made no complaint regarding that amendment introduced to the 'Charge Sheet'. The charges (as amended) levelled against the Appellant were as follows:

(i) *That during the days and time period specified in the charge (which included the day on which the LTTE aerial attack took place), excluding certain days on which the Appellant was on leave and including certain days the Commanding Officer of Vankalai was on leave or was otherwise not at the Vankalai detachment,* ***without***

having obtained the formal approval from a competent authority, during night time, left or remained out of the place of duty (tactical area of responsibility), namely the Naval detachment at Vankalai and Nanaddan*, and thereby committed an offence in terms of section 60(2) of the Navy Act.*

(ii) That during the afore-stated time period, being an officer coming within the North Central Naval Area and appointed to function as the Contingent Commander for Vankalai and Nanaddan, on 28th October 2008, during night-time when the Thalladi Army Camp came under a terrorist aerial attack, and ***having got to know that the enemy aerial attack plan had been activated for the Vankalai and Nanaddan naval areas to counter the said aerial attacks, did not proceed to the tactical area of responsibility and give leadership to men under his command****, and thereby acted in violation of naval discipline and good order, and thus committed an offence in terms of section 104(1) of the Navy Act.* [Emphasis added]

[An examination of the evidence presented before the Court Martial reveals that the main contentious issues between the prosecution and the defence, have been the portions underlined by me in the two counts.]

It is not in dispute that both the institution of Court Martial proceedings and the framing of charges against the Appellant were founded upon the exercise of authority by the 1st Respondent, and per-se not unlawful.

Trial before the Court Martial

Commencing on 2nd May 2009, a trial before the Court Martial constituted for the specific purpose was held. Area Commander, North Central Naval Area - Rear Admiral Tikiri Bandara Illangakoon, Secretary to the Area Commander Lt. Commander - K.W.B.M.P. Wijesundera, Deputy Area Commander Commodore - V.E.C. Jayakody, and the Commanding Officer Vankalai - Lt. Commander Rohana Dissanayake testified for the prosecution. The Appellant himself, Commanding Officer of *SLNS Gajaba* - Lt. Commander Ranaweera, Contingent Commander Mannar - Commander Baanagoda, Second in Command of the Silawatura Navy

camp - Lt. Commander Deegala, and Supplies Officer *SLNS Gajaba* - Lt. Commander T.N.S. Perera testified on behalf of the defence.

Consideration of the testimonies given by witnesses before the Court Martial and the respective positions of counsel with regard to the evidence

At this point, it would be necessary to refer to the evidence led by the prosecution and the defence before the Court Martial and to the submissions made in that regard by learned Counsel for the Appellant and the Respondents.

Indeed, as has been pointed out by Justice Sisira De Abrew in ***Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene and Others*** *[2007] 1 Sri L.R. 24*, the scope of judicial review in an application for a writ of certiorari in respect of a conviction or sentence pronounced by a Court Martial, is different to and narrower than the scope of judicial scrutiny in a conventional appeal from a conviction and sentence pronounced by a Court of law which has exercised criminal jurisdiction and conducted a trial into the alleged commission of an offence by an accused. Notwithstanding a Court Martial exercising **a hybrid of disciplinary and criminal jurisdiction**, judicial review in a writ application in respect of the findings of a Court Martial, is exercised for the **limited purpose of determining the legality** (lawfulness) of the impugned decisions of the Court Martial as opposed to the merits of the decisions. However, as I intend to point out at a subsequent point in this judgment, a consideration of the evidence led before the Court Martial would be necessary, particularly for the purpose of determining the legality of the findings of the Court Martial. Thus, the following consideration of the evidence.

1st count –

Learned President's Counsel for the Appellant submitted that, to prove the first charge, the prosecution relied purely on the testimony of the Area Commander - Rear Admiral Illangakoon, that he had not given permission to the Appellant to stay at *SLNS Gajaba* located outside the Appellant's TAOR, permission which he was entitled to give either in writing or orally. He submitted that Rear Admiral Illangakoon's oral evidence was to the effect that he did not give the Appellant permission to stay at *SLNS Gajaba*. However, this position was contradicted by other witnesses including another witness summoned by the prosecution itself to give evidence.

The position of the Appellant was that the Area Commander had given him permission to stay at *SLNS Gajaba* until a suitable accommodation facility was constructed at the Vankalai camp. Learned President's Counsel quoted the evidence of Commanding Officer Vankalai - Lt. Commander Dissanayake. His position had been that prior to the arrival of the Appellant in Mannar, at a meeting of Heads of departments held on 28th August, he had brought to the attention of Rear Admiral Illangakoon that there was no suitable accommodation facility at Vankalai for an officer of the rank of the Appellant. In response, Rear Admiral Illangakoon had instructed the Commanding Officer *SLNS Gajaba* to provide temporary accommodation for the Appellant at *SLNS Gajaba*. That was to be an interim measure, until a suitable accommodation facility was arranged in Vankalai. When the Appellant arrived in Mannar, Lt. Commander Dissanayake had informed the Appellant of this temporary arrangement. Learned President's Counsel submitted that Commanding Officer *SLNS Gajaba* - Lt. Commander Ranaweera had in his testimony corroborated this position. Lt. Commander Ranaweera testified that he had received instructions from the Area Commander to permit the Appellant to stay at *SLNS Gajaba* and had informed the Appellant of that arrangement. It was submitted that when this position was put to Rear Admiral Illangakoon, he had indicated that the Commanding Officer *SLNS Gajaba* "*may have*" sought his permission. At the next meeting of the Heads of departments held on 20th October 2008, the same issue had been brought to the attention of the Area Commander and he had issued further instructions to expedite the process of constructing new contingent headquarters and an accommodation facility at the Vankalai camp. Deputy Area Commander Jayakodi's evidence had been that he himself was aware that the Appellant was staying at *SLNS Gajaba* and that he believed that this fact was within the knowledge of the Area Commander.

The evidence of the Appellant was that, following his having reported for duty in Mannar, he received instructions from the Area Commander himself to identify a suitable location within Vankalai to establish his Contingent Headquarters and quarters. He had received permission (verbally) from the Area Commander to stay at *SLNS Gajaba,* until proper accommodation arrangements were constructed at Vankalai. Accordingly, he stayed overnight at the 'VIP chalet' at *SLNS Gajaba.* One day, the Area Commander arrived at *SLNS Gajaba* and he too stayed at the same chalet, along with him. At a Heads of departments meeting held on 24th September 2008

chaired by the Area Commander, particularly as it was dangerous for the Appellant to travel between *SLNS Gajaba* and Vankalai, he had raised this issue regarding the construction of his Contingent Headquarters and accommodation facility in Vankalai, and certain decisions had been taken by the Area Commander with the view to expediting the process.

In response, learned Senior State Counsel submitted that the Area Commander - Rear Admiral Illangakoon had given clear and specific evidence that the Appellant did not ask for permission and that he had not given permission to the Appellant to remain outside his TAOR. The Area Commander had not been aware that the Appellant had been staying at *SLNS Gajaba* during nighttime. Learned Senior State Counsel relied heavily on the admission made by the Appellant during cross-examination, that his TAOR was Vankalai and Nanaddan, and that he stayed at *SLNS Gajaba* which was outside his TAOR. He had also admitted that he was aware that according to his job functions, he was required to stay within his TAOR. Further, the Appellant had admitted that he did not get 'written permission' from the Area Commander to stay outside his TAOR, at *SLNS Gajaba*.

2nd count –

Learned President's Counsel for the Appellant submitted that on the night of the 28th October 2008, when the 'action station' siren was raised at *SLNS Gajaba*, the Appellant who was at the 'VIP chalet', had rushed out. He had been informed by Lt. Commander T.N.S. Perera (who was acting for the Commanding Officer of *SLNS Gajaba* as the Commanding Officer was on leave), of the LTTE aerial attack. The Appellant had initially decided to rush to Vankalai on his motor cycle. He instructed his personal security officer to get ready to proceed with him to Vankalai. Before leaving to Vankalai, he rushed to the 'operations room' of *SLNS Gajaba.* He contacted Commanding Officer Vankalai - Lt. Commander Dissanayake, who had informed the Appellant that he had taken all necessary measures to secure the Vankalai camp and that there was no necessity for the Appellant to come there. Given the size of the Vankalai Navy camp, the Appellant thought that the chances of the LTTE dropping a bomb at the Vankalai camp was quite remote. On the other hand, that night, both the Commanding Officer and the Executive Officer of *SLNS Gajaba* (the first and the second officers in-charge of the camp) had been on leave. The next senior most officer of *SLNS Gajaba* - Lt. Commander T.N.S. Perera was a 'logistics officer'

who had minimal combat experience. In the circumstances, the Appellant had decided that he should remain at *SLNS Gajaba*, take necessary decisions and provide leadership to its personnel. Learned President's Counsel submitted that the conduct of the Appellant on that occasion was a 'tacit two-way arrangement' based on exigencies of the situation.

Learned President's Counsel emphasized that the Appellant had satisfied himself that under the leadership of Lt. Commander Rohana Dissanayake, the Vankalai camp was in safe hands. Further, he had himself taken all necessary measures to ensure the safety of that camp. Lt. Commander Dissanayake had also explained to the Appellant that it was not necessary for him to rush to Vankalai. In those circumstances, the Appellant had decided that his presence in Vankalai was not essential. He was conscious of the fact that having dropped two bombs on the Thalladi Army camp, on its return journey, the LTTE aircrafts were unlikely to drop another bomb in the same general area of Mannar. Particularly as the Appellant was the third senior most officer in the entire North Central Naval Area, and as he had considerable combat experience, he thought that his primary duty was to provide leadership to *SLNS Gajaba* and defend that naval base. Counsel submitted that it would have been irresponsible on the part of the Appellant had he left *SLNS Gajaba* keeping it in the hands of Lt. Commander T.N.S. Perera who did not have necessary military leadership skills and combat experience. Having assumed de-facto command of *SLNS Gajaba*, the Appellant had taken all necessary measures that were required. In his testimony, the Appellant has explained in detail, the nature of the action he took from the operations room of *SLNS Gajaba.* He had contacted the Air Force base in Mannar and spoken with the Commanding Officer of the Thalladi Army camp. He had also alerted the officer in-charge of the Rangala naval base and informed him of the approaching LTTE aircrafts. Throughout that night, the Appellant had contacted the Commanding Officer of the Vankalai Navy camp - Lt. Commander Dissanayake, ascertained the situation at that end, and given necessary instructions to him.

Learned President's Counsel also submitted that witnesses for the prosecution had not given evidence regarding an essential ingredient of the second charge, namely, that the conduct of the Appellant on the night of the 28th of October 2008 was 'prejudicial to good order and naval

discipline'. Thus, he submitted that, on that ground alone, the 2nd count on the charge sheet should have failed.

With regard to the 2nd count, the submission of the learned Senior State Counsel was that the Appellant had admitted that it would have been possible for him to travel to the Vankalai Navy camp within 10 to 15 minutes, and that he had originally got ready to go there. He had subsequently changed his mind. The Appellant had admitted that it was his duty to have gone to the Vankalai camp. He had also admitted that, on the night of the 28th of October 2008, he had not obtained permission from a senior officer to remain at *SLNS Gajaba* and function in-charge of its operations room. He had remained at *SLNS Gajaba* based on his own discretion. Learned Senior State Counsel submitted that the Appellant did not have a valid excuse for staying back at *SLNS Gajaba* and for not having rushed to his TAOR. He submitted that returning a verdict of *'guilty'* in respect of the 2nd count was not only reasonable, it was the only finding the Court Martial could have arrived at.

Summing up of the Judge-Advocate

At the conclusion of the trial, the Judge Advocate summed up the evidence presented by the prosecution and the defence, and addressed the Court Martial on the applicable law. During the hearing of the Writ Application in the Court of Appeal and during the hearing of this Appeal, learned President's Counsel for the Appellant did not impugn the summing up. In fact, learned counsel asserted that the summing up contained several components which were supportive of the Appellant's contention that he was not guilty of committing the two offences contained in the charge sheet. Due to its comprehensive and balanced nature, learned President's Counsel for the Appellant appreciated the summing up. His submissions in that regard were only short of rating the summing up as a truly impartial, comprehensive and a model address.

The Judge Advocate has drawn the attention of the Court Martial to the following salient aspects of the case:

(i) Commanding Officer Vankalai - Lt. Commander Dissanayake who was called to testify for the prosecution had contradicted the testimony of the Area Commander

Rear Admiral Illangakoon, and corroborated the position of the accused. Nevertheless, he had not been treated as an 'adverse witness' by the prosecution.

(ii) Commanding Officer *SLNS Gajaba* - Lt. Commander Ranaweera who was called to testify for the defence, in his evidence had also contradicted the evidence of the Area Commander and corroborated the position of the accused. Consideration should be given by the Court Martial as to whether a junior officer would contradict the testimony of a senior officer such as that of the Area Commander, unless the latter's evidence was untrue.

(iii) Defence witnesses corroborated the evidence given by the accused.

(iv) The accused should be convicted only if the Court Martial was satisfied that the entirety of the defence evidence should be rejected in its totality.

(v) Should the Court Martial entertain any doubt regarding the testimony of the Area Commander, the benefit of such doubt should be given to the accused and he should be 'acquitted'.

The Judge Advocate has also addressed the Court Martial on the fact that the prosecution does not dispute that on the night of the LTTE attack, while the Appellant was at *SLNS Gajaba,* he had taken all necessary steps and given suitable instructions. What was in issue was whether in the circumstances that prevailed on the night of the 28th October 2008, the accused not having proceeded to his TAOR amounted to a violation of 'good order and naval discipline'.

Finding (verdict) of the Court Martial and sentencing orders

It is not in dispute that on 13th May 2009, following the conclusion of the proceedings of the Court Martial, it found the Appellant *"guilty"* of committing both offences in the amended charge sheet (vide "P17a"). It is evident from the proceedings of the Court Martial that prior to the determination of the sentences, the Court Martial had afforded an opportunity to the Appellant to make representations on his behalf in mitigation of the sentences. Learned Counsel who represented the Appellant before the Court Martial had made use of that opportunity and addressed the Court Martial regarding the unblemished record of the Appellant and his having been decorated for his yeoman service to the nation. Following a consideration of that plea in

mitigation of the sentences, the Appellant was sentenced by the Court Martial (vide "P17b") in the following manner:

1st Charge – Severe Reprimand

2nd Charge – Dismissal without disgrace from the Navy.

The record of the proceedings also reflects that prior to the conclusion of proceedings of the Court Martial, the learned counsel for the Appellant had notified the tribunal that the Appellant intends to present an Appeal to His Excellency the President in terms of section 122 of the Navy Act. That was for the purpose of seeking a revision of the sentences.

Appeal to the President in terms of section 122 of the Navy Act

On 14th May 2009, acting in terms of section 122 of the Navy Act, the Appellant presented an Appeal to His Excellency the President, seeking a revision of the sentences imposed on him. A copy of that Appeal was produced to the Court of Appeal, marked "P18". In the circumstances, the operation of the sentences was stayed. Nevertheless, the Appellant was directed not to report for work, pending a decision by the President. By his letter dated 28th May 2009, the 1st Respondent forwarded the Appeal to His Excellency the President through the Secretary to the Ministry of Defence. Following a consideration of the Appeal, His Excellency the President turned down the request of the Appellant for a revision of the sentences. By letter dated 14th July 2009, the Secretary to the Ministry of Defence conveyed the decision of the President to the 1st Respondent. In the circumstances, the punishment imposed by the Court Martial was operationalized and executed. Accordingly, with effect from 16th August 2009, the Appellant was discharged from the Navy.

Application filed by the Appellant in the Court of Appeal seeking the issuance of a Writ of Certiorari

By Application dated 25th June 2009, the Appellant petitioned the Court of Appeal impugning the afore-stated finding (verdict) and orders of sentence of the Court Martial. He sought the following reliefs:

(a) A mandate in the nature of a Writ of Certiorari quashing the **findings** of the Court Martial dated 13th May 2009.

(b) A mandate in the nature of a Writ of Certiorari quashing the **sentences** imposed by the Court Martial dated 13th May 2009.

Primary positions of the Appellant and the Respondents before the Court of Appeal

The Appellant's position was that since the prosecution had failed to prove the two charges against him beyond reasonable doubt, the Court Martial should have returned a verdict of *'not guilty'* and acquitted him. The Appellant also asserted that the findings (verdict and sentences) of the Court Martial did not contain reasons therefor. In the circumstances, it was argued before the Court of Appeal that the findings of the Court Martial were illegal, *ultra vires*, arbitrary, capricious, and unreasonable.

The Respondents' position was that the proceedings of the Court Martial were lawful and fair, and following a proper consideration of the evidence, the Court Martial had rightly arrived at a finding that the Appellant was *'guilty'* of both charges. Thus, their position was that both the conviction and the sentences imposed on the Appellant were lawful and appropriate. The Respondents asserted that a Court Martial is not obliged by law to give reasons for its findings.

Judgment of the Court of Appeal

Following the hearing of the Application, by judgment dated 30th July 2015, the Court of Appeal dismissed the Application of the Appellant.

The judgment of the Court of Appeal contains *inter-alia* the following findings:

(i) On the day of the LTTE aerial attack, the Petitioner (which is a reference to the Appellant before the Supreme Court) had remained at *SLNS Gajaba* without proceeding to Vankalai.

(ii) The Code of Criminal Procedure Act does not require a jury to give reasons for its verdict. Similarly, the Navy Act does not require a Court Martial to give reasons for its findings. In *G.S.C. Fonseka vs. Lt. General J. Jayasuriya and five others*, it has been held that a Court Martial need not give reasons for its finding (verdict).

(iii) By presenting an Appeal to the President in terms of section 122 of the Navy Act, the Petitioner has sought an 'alternative remedy'. Where there is an alternative remedy, a writ of certiorari will not lie.

(iv) The Petitioner's application under section 122 was refused by His Excellency the President. Under section 10 of the Navy Act, the Petitioner holds office at the pleasure of the President. The Petitioner's dismissal had been approved by the President.

In view of the afore-stated findings, the Court of Appeal dismissed the Application. The Appeal to the Supreme Court is against the afore-stated judgment of the Court of Appeal.

Consideration of the questions of law, findings and conclusions

(i) Does the 'appeal' which was submitted by the Appellant to the President amount to an 'alternative remedy' which ousts the jurisdiction of the Court of Appeal?

The issue to be determined is whether the Application (what has been referred to as an 'Appeal') presented by the Appellant in terms of section 122 of the Navy Act to His Excellency the President amounts to an 'alternative remedy' which 'ousts the jurisdiction of the Court of Appeal' in considering and awarding relief as prayed for by the Petitioner (Appellant) in respect of the Application filed by him seeking writs of certiorari quashing certain decisions including the verdict pronounced, and the sentences imposed by the Court Martial.

"P18" is a copy of the Application dated 14th May 2009, titled "An **Application for revision of sentence** in terms of section 122 of the Navy Act", presented by the Appellant to His Excellency the President through the Commander of the Sri Lanka Navy. This Application contains *inter-alia* a narration of the factual sequence which culminated in the pronouncement of the impugned finding (verdict) and the sentences imposed on the Appellant by the Court Martial. Further, it contains the following prayer:

> *"Being aggrieved by the aforesaid sentence passed on me, I humbly request Your Excellency to **revise the sentence** imposed on me by the President and the members of the*

Court Martial considering the mitigatory circumstances stated above and the following:" [Emphasis added]

In addition to the reiteration of the grounds for mitigation of the sentences advanced before the Court Martial by counsel for the Appellant, four more mitigatory grounds have also been cited by the Appellant. The Appellant has concluded his Application to the President, with the following sentence:

"I humbly request Your Excellency as the Commander in Chief of the Armed Forces to consider all this (sic) aforesaid circumstances and ***revise the sentences*** *imposed on me which will enable me to serve the Sri Lanka Navy and my motherland further."* [Emphasis added]

By letter dated 28th May 2009, the 1st Respondent had, through the Secretary to the Ministry of Defence, forwarded this 'Appeal' to His Excellency the President. When forwarding the 'Appeal', the 1st Respondent had attached his observations and the proceedings of the Court Martial. Following a consideration of the Application and the views of the 1st Respondent, His Excellency the President had decided to 'ratify the recommendation made by the Commander of the Navy'. Though inconsequential, it is necessary to note that the 1st Respondent had not made any 'recommendation'. He had expressed the view that the conduct of the Appellant was inexcusable. Be that as it may, in effect, the President had decided not to grant any relief to the Appellant. The decision of the President was conveyed to the 1st Respondent by Additional Secretary to the Ministry of Defence by his letter dated 14th July 2009. Accordingly, the Appellant was informed of the outcome of his Application. In view of the decision of the President, the 1st Respondent had given effect to the sentences imposed on the Appellant, and accordingly, with effect from 16th August 2009, the Appellant had been discharged from the Sri Lanka Navy. The formal announcement that the Appellant has been discharged from the Sri Lanka Navy had been produced before the Court of Appeal. ("R7")

The view expressed by the Court of Appeal (in the impugned judgment), is as follows:

> *"Petitioner has sought an alternative remedy under section 122 of the Navy Act; he has made an appeal to the President. Where there is an alternative remedy a writ of certiorari will not lie".*

Submissions of Counsel

President's Counsel for the Appellant - Learned President's Counsel critiqued the Court of Appeal's view regarding this matter. He submitted that a verdict and sentence of a naval Court Martial are specifically made amenable to the writ jurisdiction of the Court of Appeal. He cited section 132 of the Navy Act in support of this contention. Learned counsel also submitted that, the principle that when there is an alternate remedy the writ will not lie is not an inflexible rule. Citing Chief Justice Neville Samarakoon's views in *Kanagaratna v. Rajasunderam [(1981) 1 Sri L.R. 492]*, learned President's Counsel submitted that the availability of an alternative remedy does not prevent a court from issuing a writ in cases of excess or absence of jurisdiction. Further, citing the judgment of the Supreme Court in *Somasunderam Vanniasingham v. Forbes and Another [(1993) 2 Sri L.R. 362]*, it was submitted that before a Court refuses to review a decision of an inferior tribunal, it should satisfy itself that the administrative relief provided by a statute, should be a satisfactory substitute to the impugned decision being reviewed by Court.

Senior State Counsel for the Respondents - In response, learned Senior State Counsel, possibly having understood the soundness of the argument presented in this regard by the learned President's Counsel for the Appellant, did not seek to justify the conclusion reached in this regard by the Court of Appeal. In his post-argument written submissions, learned Senior State Counsel submitted that *"... the decision of the Court of Appeal on this aspect of an alternate remedy, even if erroneous, ..."*, indicating his inability to defend this particular pronouncement contained in the judgment of the Court of Appeal. This, truly reflects, as all counsel representing the Honourable Attorney General ought to, the learned Senior State Counsel having taken an objective view regarding this question of law, which is in consonance with the applicable law.

Analysis and the findings

At this stage, it is pertinent to note that by the presentation of the Application ("P18") to His Excellency the President, the Appellant had sought only the mitigation of the sentences imposed on him by the Court Martial, and had not sought the quashing of the finding of guilt (conviction) or any of the decisions which led to the institution of Court Martial proceedings against him.

Section 122 of the Navy Act

Section 122 of the Navy Act reads as follows:

> *"The President may* ***annul, suspend, or modify any sentence*** *(including a sentence of death) passed by a court martial or by a naval officer exercising judicial power under this Act, or substitute a punishment inferior in degree for the punishment involved in any such sentence, or remit the whole or any portion of the punishment involved in any such sentence, or remit the whole or any portion of the punishment into which the punishment involved in any such sentence has been commuted; and any sentence so modified shall, subject to the provisions of this Act, be valid, and shall be carried into execution, as if it had been originally passed, with such modifications, by such court martial or officer.*
>
> *Provided that neither the degree nor the duration of the punishment involved in any sentence shall be increased by any such modification."* [Emphasis added]

It is thus seen that the Appellant has acted advisedly in having sought only a revision of the sentences imposed on him, because section 122 of the Navy Act, empowers the President to **only consider and alter a sentence imposed by a Court Martial, and does not empower him to quash or vacate the findings of the Court Martial referred to as its 'finding' (verdict)**.

Section 122 of the Navy Act can be classified as a 'statutory remedy' which enables a person convicted by a Court Martial or by a naval officer who has purportedly exercised judicial power in terms of the Navy Act, to seek 'administrative relief' with regard to the sentence imposed. This statutory remedy enables an aggrieved party to seek a revision or mitigation of the sentence imposed. It does not enable an aggrieved party to seek a review and quashing of the finding of guilt, which in this case was the conviction of the Appellant in respect of the two counts in the

charge sheet. In ***Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene and Others***, Justice Sisira De Abrew has held as follows:

> *"... In fact, section 122 of the Navy Act deals with* ***revision of sentences*** *imposed by a Court Martial or by a Naval officer exercising judicial power under the Navy Act and* ***it does not deal with quashing of convictions imposed by a Court Martial*** *or by a Naval officer exercising judicial power under the Navy Act. ..."*
> [Emphasis added]

Therefore, it is evident that the relief which the Appellant has sought in terms of section 122 of the Navy Act is **limited to a review of the sentences** imposed on him. As referred to above, the relief sought by the Appellant from the Court of Appeal is much wider, in that he has sought mandates in the nature of Writs of Certiorari to quash not only the sentences imposed on him by the Court Martial, but also the finding (verdict), the decision to institute Court Martial proceedings against him, the report of the Board of Inquiry and report of the recording of the Summary of Evidence.

Writ of certiorari as a discretionary remedy

Particularly since the jurisdiction conferred on the Court of Appeal to issue a mandate in the nature of a writ of certiorari is an extraordinary remedy, it is often submitted on behalf of the decision-maker of the impugned decision that the writ is not available 'as of right' or as a 'matter of course', and is issued only at the discretion of the Court. In ***Biso Menika v. Cyril de Alwis and Others [(1982) 1 Sri LR 368]*** Justice Sharvananda as he was then, held as follows:

> "*A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well-accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver..."*

It is also submitted that the Court is vested with discretion to determine whether or not the writ should be issued.

Indeed, the issuance of a mandate in the nature of a writ of certiorari is a discretionary remedy. Thus, Courts are entitled by law to exercise a considerable amount of discretion in determining whether or not a writ should be issued. Notwithstanding the Court determining that the impugned order is in fact unlawful, the Court may in certain situations refrain from issuing the writ to quash the unlawful order, if it deems withholding the issuance of the writ is justifiable and appropriate in the circumstances of the case. Thus, a writ of certiorari is not a remedy that may be claimed by a petitioner as of right. The issuance of the writ is at the instance of the Court exercising discretion.

However, it needs to be highlighted that permitting the issuance of the writ to be finally governed by the exercise of judicial discretion is troublesome, particularly from the perspective of the rule of law. Inappropriate exercise of judicial discretion resulting in the refusal to issue a writ of certiorari in the backdrop of the petitioner having successfully established that the impugned order is unlawful, would undermine the rule of law. Therefore, after the Court is satisfied that the impugned order is unlawful, if the Court is to exercise discretion in deciding as to whether or not the writ should be issued, it must be done with considerable circumspect, judiciously and with great caution.

The exercise of discretion by Court is not unfettered. For the purpose of guiding the exercise of such discretion, the common law has developed certain well-established grounds which are recognized by contemporary Administrative Law and by the *cursus curiae* of this Court and the Court of Appeal. Nevertheless, once grounds for the issuance of the writ have been satisfied by the party seeking relief, refusal to grant the writ must be founded upon compelling reasons, which would provide justification for allowing an 'unlawful order' to remain without being quashed.

However, the situation would be different when there is a statutorily recognized 'right of appeal', which would enable the aggrieved party to challenge the legality of the impugned order based on both the law and the facts. In such instances, Court will rightly question as to why the petitioner sought judicial review without exercising the statutorily available right of appeal, and unless

there is a satisfactory explanation for not having exercised the right of appeal, the Court will decline to exercise the jurisdiction of judicial review. Nevertheless, if the impugned order is a nullity due to the decision-maker having exercised power in flagrant excess of power conferred on him or due to any other reason which renders the decision void, Court would not hesitate to quash it, notwithstanding the aggrieved party not having exercised the statutorily available right of appeal.

One possible ground that would militate against the issuance of the writ, is the availability of an **adequate alternate remedy** as opposed to a mere alternate remedy. As explained above, the right to present an Application to His Excellency the President in terms of section 122 of the Navy Act cannot be recognized as an adequate alternate remedy, in that, even if the President wishes, he may only revise the sentence, and would not have any power to quash the conviction pronounced by the Court Martial. Furthermore, in my view, it would not be correct to hold that the existence of even an adequate alternate remedy would 'oust the jurisdiction' of the Court of Appeal. The existence of an adequate alternate remedy and the Application being presented to the Court of Appeal seeking a writ of certiorari without having exhausted such available remedy would only be a ground on which the Court may in the exercise of its discretion refuse to grant relief. Furthermore, after having sought an alternate administrative remedy and having been unsuccessful in securing relief, there is no bar for the aggrieved party to seek judicial relief, provided he can satisfy Court of the existence of grounds for the grant of relief.

Additionally, it is also necessary to be mindful that the Navy Act specifically empowers a person aggrieved by the finding of a Court Martial to seek from the Court of Appeal, *inter-alia*, a mandate in the nature of a Writ of Certiorari. Section 132(1) of the Navy Act provides as follows:

> *"Such provisions of Article 140 of the Constitution as relate to the grant and issue of writs of mandamus, certiorari and prohibition shall be deemed to apply in respect of any court martial or any naval officer exercising judicial powers under the Act."*

Thus, it is seen that the Navy Act, while on the one hand providing an administrative remedy to seek a revision of the sentence by applying to His Excellency the President, has afforded another remedy in the nature of judicial relief by conferring the right to invoke the jurisdiction of the Court of Appeal to issue a mandate in the nature of *inter-alia,* a Writ of Certiorari. It is however necessary to point out that, even if section 132(1) of the Navy Act did not confer such a legal right on an aggrieved party to seek judicial relief, the Constitutional provision of Article 140 by itself would entitle an aggrieved party to seek judicial review of the finding (verdict) and sentence pronounced by a Court Martial, because it is a statutory body conferred with legal authority to take decisions which have a bearing on the rights of persons.

Conclusion reached by me in respect of the 1st question of law

Section 122 of the Navy Act does not provide an 'adequate and efficacious alternative remedy' to a person aggrieved by a finding of guilt and the sentence imposed by a Court Martial. Furthermore, the availability of an 'adequate and efficacious alternate remedy' does not by itself 'oust the jurisdiction of the Court of Appeal' with regard to an Application seeking a writ of certiorari. It only serves as a ground on which the Court may exercise discretion and consider whether in the circumstances of the case, the writ should be refused, notwithstanding the petitioner having satisfied the Court that the impugned decision is 'unlawful'.

Therefore, I hold that it was not lawful for the Court of Appeal to have held that the Court's jurisdiction had been 'ousted' due to the Petitioner (Appellant) having sought relief from the President in terms of section 122 of the Navy Act. It was incorrect for the Court of Appeal to have held that the Application presented by the Appellant to the President amounted to an 'alternate remedy' and therefore the jurisdiction of the Court of Appeal had been 'ousted'. Thus, the first question of law in respect of which *special leave to appeal* has been granted, is answered in favour of the Appellant.

(ii) Was it erroneous for the Court of Appeal to have held that there was no need in law for the Court Martial to give reasons for its verdict and that the absence of such reasons does not render the verdict void?

Before the Court of Appeal as well as in the Supreme Court, the Appellant challenged the lawfulness of the finding (verdict) of *'guilty'* and the orders of sentence pronounced on him, on the footing that the Court Martial was required in terms of the law to give reasons for its finding (verdict), and that the Court Martial had failed to give such reasons. Therefore, it was argued on behalf of the Appellant that the finding of the Court Martial is bad in law and void, and hence should be quashed by a mandate in the nature of a writ of certiorari. On behalf of the Respondents, it was argued that a Court Martial was not obliged by law to reveal reasons for its finding. The Court of Appeal held in favour of the Respondents.

During their submissions before this Court, both the learned President's Counsel for the Appellant and the Senior State Counsel for the Respondents agreed with each other that as evident from the record of the proceedings of the Court Martial, the Court Martial had not given any reasons for finding the Appellant *'guilty'* in respect of the two charges contained in the charge sheet.

As regards the sentences, the learned Senior State Counsel pointed out to the proceedings of the Court Martial, where he submitted that 'reasons' for the sentences had been stated. Learned President's Counsel for the Appellant insisted that the proceedings do not reflect reasons for the sentences.

I have carefully considered the proceedings of the Court Martial. The proceedings of 13th May 2009 reflect that the members of the Court Martial have, after finding the Appellant *'guilty'* of both counts in the charge sheet, permitted counsel for the prosecution to tender to the Court Martial the 'personal file' of the Appellant and certain 'confidential documents'. The record does not reveal as to whether such documentary material was made available to either the accused or to his counsel for the purpose of examining them and commenting upon them. One would expect such fairness to have been adhered to in proceedings before a Court Martial. Be that as it may, counsel for the accused had addressed the Court Martial in mitigation of the sentences, and subsequently, the Court Martial has recorded the following:

> *"The Court has taken into consideration the submissions made on behalf of the accused, for the purpose of mitigating the sentence of the accused. Consideration has also been given to the letter of displeasure issued by the Commander of the Navy regarding the accused. Therefore, the following punishment is imposed: 1st count – Severe reprimand, 2nd count – Dismissal from the Navy without disgrace."*

It is thus seen that the Court Martial has only specified the material considered by it when arriving at a decision regarding the punishment to be imposed, and **has not given reasons for the imposition of the stipulated punishment**.

Thus, this judgment will proceed on the footing that the Court Martial has not given any reasons for both the finding of guilt (verdict) and the orders of punishment imposed on the Appellant.

Both counsel submitted that neither the provisions of the Navy Act nor any other applicable statute impose a statutory obligation on a Court Martial to give reasons for its finding (verdict). Thus, the question to be determined by this Court is, notwithstanding the absence of a statutory requirement to give reasons, whether a Court Martial has a legal duty to give reasons for its finding (verdict) and order of sentence (punishment), and whether the absence of such reasons renders the verdict and the order of sentence pronounced by a Court Martial unlawful and hence void.

Learned counsel for the Appellant and the Respondents agreed with each other that revealing reasons for the verdict and for the order of punishment has never been the practice of Courts Martial in this country. Thus, the absence of reasons for the impugned decisions is not peculiar to the instance being examined in this Appeal.

The relevant portion of the impugned judgment of the Court of Appeal regarding this particular question of law, is as follows:

> *"The next issue is the Court Martial. The petitioner argued that no reasons were given by the Court Martial for its findings. The Code of Criminal Procedure does not require the jury to give reasons for its verdict, nor does the Navy Act require a Court Martial to give reasons*

for its findings. In the case of G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya and five others, it was held by three judges of the Court of Appeal that a Court Martial need not give reasons."

Submissions of Counsel

President's Counsel for the Appellant - Citing the judgment of this Court in *Karunadasa v. Unique Gem Stones Limited and Others [(1997) 1 Sri L.R. 256]*, learned President's Counsel for the Appellant submitted that although there is no general duty in English law for statutory authorities to give reasons for their decisions, English judges have recognized exceptions to the rule and imposed such a duty on the basis of 'natural justice' and 'fairness'. It was submitted that this Court has observed in judgments relating to fundamental rights Applications, that Article 12(1) of the Constitution confers a right to know the reasons for a decision, which is a manifestation of the guarantee of the equal protection of the law. He submitted that in the context of the machinery for appeals, revision, judicial review and the enforcement of fundamental rights, giving reasons for decisions is increasingly becoming an important protection of the law. If a party is not told the reasons for a decision that affects his interests, his ability to seek judicial review will be impaired.

While rightfully conceding that the recent judgment of the Court of Appeal in *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Marshal and Others [CA Writ No. 333/2011, CA Minutes of 1st June 2020]* is not binding on this Court, learned President's Counsel submitted that the Court of Appeal had in that matter, having gone into this very issue of whether there is a legal obligation cast on a Court Martial to give reasons for its finding and whether the failure to do so would render such verdict void, has held that in terms of the law of Sri Lanka, the duty to give reasons is a mandatory constitutional duty, and consequently, a decision in breach of this requirement was flawed and hence void.

Responding to the 'parallel' drawn by the Court of Appeal in the impugned judgment between a 'trial before a jury' and 'proceedings before a Court Martial', and provisions of the Code of Criminal Procedure Act which regulate such trials in the High Court heard before a Judge of the High Court together with a jury, and such provisions not requiring juries to give reasons for its verdict, learned President's Counsel for the Appellant submitted that a trial before a jury is not

comparable with proceedings before a Court Martial. He submitted that the two types of proceedings were distinguishable. Citing the views expressed by Justice Saleem Marsoof in the judgment of the Supreme Court in *Fonseka v. Attorney General [(2011) BLR 169],* learned President's Counsel submitted that though it has been held that a Court Martial is a 'court', it was not part of the 'regular judicial hierarchy'. He submitted that a Court Martial is a *sui generis* tribunal, and hence proceedings before a Court Martial cannot be equated to proceedings before a jury. Learned President's Counsel also submitted that though there is a similarity between a High Court Judge and a Judge Advocate, proceedings in the High Court in a trial before a jury is materially different to proceedings before a Court Martial. That is due to the following reasons:
(i) Section 39(a) of the Navy Act limits the role of the Judge Advocate to giving 'advice', and that too with the prior permission of the Court Martial, whereas, in a trial before a jury, the law imposes a mandatory requirement on the presiding High Court judge to sum up the evidence, which function he exercises as of right. Furthermore, jurors are bound to follow directions given by the presiding High Court judge on the law.
(ii) There exists a provision in the Navy Act which enables the delivery of the 'summing up' to be dispensed with, provided agreement in that regard is reached between the Court Martial and the Judge Advocate, whereas, in a trial before a jury, the summing up by the High Court judge cannot be dispensed with.

Learned President's Counsel for the Appellant relied heavily on the pronouncement made by Justice Sarath N. Silva (as he then was) in *Kusumawathie and Others v. Aitken Spence & Co. Ltd. and Another [(1996) 2 Sri L.R. 18]* that the norm that there is no requirement in law to give reasons for a decision should not be construed as a 'gateway to arbitrary decisions and orders'. If a decision that is challenged is not a speaking order, when Notice is issued by a Court exercising judicial review, reasons to support the decision must be disclosed at least to Court. If a statutory body fails to disclose to Court reasons for its decision, an inference may be drawn that the impugned decision is *ultra vires* and relief may be granted on that basis. If no reasons are adduced, the Court would presume that in fact, no reasons exist.

Learned President's Counsel in his usual exuberant style of rhetorical advocacy concluded his submissions by stating that if this Court were to depart from the ratio of the judgement of Court

of Appeal in *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Marshal and Others*, it would render the right to judicial review of decisions of Courts Martial an 'empty shell'.

Senior State Counsel for the Respondents - In response, learned Senior State Counsel for the Respondents prefaced his submissions regarding this question of law, by submitting that the duty to give reasons is not yet 'settled' in Administrative Law. Upholding his customary frankness and the professional standard which is expected particularly from counsel representing the Honourable Attorney General, he conceded that in the contemporary era, there is an increasing trend in academic authority supporting the view that it is desirable to give reasons for administrative decisions. Citing internationally recognized authors such as De Smith, Wade and Craig, learned Counsel submitted that treatises on Administrative Law authored by these academics of high eminence refer to English Courts not yet having recognized the existence of a 'mandatory general legal duty to give reasons'. He submitted that Professor William Wade citing the case of *R. v. Home Secretary, ex parte Doody,* has advanced the view that, principles of natural justice have not yet embraced into its fold a general rule that reasons should be given for decisions of public authorities. He submitted that in the case of *S.N. Mukherjee v. Union of India [AIR (1990) SC 1984]*, the Supreme Court of India had held that while there is in India a general duty to give reasons, if a statute expressly or by implication indicates that reasons do not have to be given, then it is not mandatory to give reasons. Learned counsel for the Respondents submitted that the Indian Supreme Court had held that the scheme of the Act and the Rules are such, that reasons are not required to be recorded by a Court Martial. He submitted that the Supreme Court of India has specifically held that a Court Martial is not required to give reasons for its findings.

Turning towards Sri Lankan case law, he submitted that in *Yaseen Omar v. Pakistan International Airlines Corporation and Others [(1999) 2 Sri L.R. 375]*, the Supreme Court having examined the applicable law contained in the judgment in *Samalanka Ltd. v. Weerakoon, Commissioner of Labour and Others [(1994) 1 Sri L.R. 405]* has held that in the absence of a specific statutory requirement, there is no general principle in administrative law that requires the authority making the decision to adduce reasons, provided the decision is made after holding a

fair hearing. Learned Senior State Counsel submitted that the Supreme Court had found error in the view that, giving reason is a *sine qua non* for a fair hearing.

Learned counsel also submitted that the judgment in *Karunadasa v. Unique Gemstones Ltd.* should not be viewed as authority for the proposition that reasons must necessarily be given for all administrative and quasi-judicial decisions.

Learned Senior State Counsel conceded that the Supreme Court in the determination of Fundamental Rights Applications such as *Choolanie v. Peoples Bank and Others [(2008) 2 Sri L.R. 93]* and *Hapuarachchi and Others v. Commissioner of Elections and Another [(2009) 1 Sri L.R. 1]* has observed that the failure to give reasons for a decision may make such decision liable to be struck down for arbitrariness, on the footing that arbitrary decisions are violative of Article 12(1) of the Constitution. His position however is that Article 15(8) of the Constitution provides for the imposition of 'restrictions' on Fundamental Rights as may be prescribed by law, on members of the armed forces and the police, which may be imposed in the interest of the proper discharge of their duties and the maintenance of discipline among them. Learned counsel submitted that the provisions of the Army, Navy and Air Force Acts which require pronouncements of Courts Martial to be arrived at by 'vote' and thus do not require reasons for the decision to be given, would tantamount to a restriction which comes within the purview of Article 15(8).

Citing section 43 of the Navy Act, learned Senior State Counsel submitted that decisions pertaining to the finding (verdict) of the Court Martial and the sentence to be imposed on a person found to be *'guilty'* should be decided by 'vote'. Thus, he submitted that in any event, it would not be possible to give reasons for the verdict.

In response to the query from Court as to how a higher court exercising the function of judicially reviewing the findings of a Court Martial may perform that function if reasons are not attached to the finding, learned Senior State Counsel submitted that the higher Court may examine the record which contains the evidence recorded by the Court Martial, submissions of counsel and the summing up of the Judge Advocate, and thereby determine whether the finding is reasonable.

He submitted that it would be the same material an appellate Court exercising appellate jurisdiction in respect of a verdict returned by a jury at a 'jury trial' would have access to.

In view of the foregoing, learned Senior State Counsel submitted that a Court Martial is not required by law to give reasons for its finding.

Views, findings and conclusions

Reasons for a decision

'Reasons for a decision' are the internal cognitive thought processes which result in the decision-maker arriving at his decision. Reasons would reflect the internal step-by-step process which culminates in the final decision. It amounts to the 'logic' which links the 'material considered' with the 'decision' arrived at. In the context of a pronouncement by a Court of Law or a Court Martial, 'reasons' would amount to the (a) determination of relevant facts based on testimony or other material considered by the decision-maker, (b) appreciation and application of the law, and (c) conclusions reached which propelled the decision-maker to arrive at the final decision. Thus, 'reasons for the decision' is nothing additional. It is a mere external announcement of the internal decision-making process.

The issue to be determined is, in instances where the statute which empowered the decision-maker to arrive at a decision and other applicable laws are silent on whether or not reasons for the decision should be announced, and where such written law does not explicitly or impliedly exempt the decision-maker from giving reasons, whether the unwritten law or the common law would impose a legal duty on the decision-maker to disclose reasons for his decision.

Fair Hearing

A ***'fair hearing'*** is a standard of fairness which is sought to be guaranteed by the rules of ***natural justice.*** In terms of Article 13(3) of the Constitution, the right to a *'fair trial'* is a fundamental right conferred on all accused. For over a century, fundamentals of justice have required that *'no one should be condemned without being given an opportunity of explaining his conduct',* and that unless there are compelling reasons for refraining from doing so, *'a decision affecting the legally protected interests of a person should not be arrived at without affording that person an*

opportunity of being heard in support of the protection of such interests'. In addition to determining whether the purported exercise of power was within the limits of such power, a preponderance of Applications seeking judicial review of decisions arrived at by statutory and public bodies which have purportedly exercised statutorily conferred power, are decided by Courts primarily on a consideration of whether the decision-maker had complied with the rules of *natural justice* and given a *fair hearing* to the party that claims to have been affected by the decision arrived at. It can be said that **giving a *'fair hearing'* is very much a *sine qua non* for a lawful decision which has the potential of affecting rights of persons**. Rules of natural justice have been developed in order to ensure that a *fair hearing* is afforded and to regulate such hearings. Thus, a Court of law called upon to judicially review a decision arrived at by a statutory body would be anxious to ascertain whether this fundamental requirement has been complied with. While the record of the statutory body and evidence relating to the process of decision-making would generally reflect whether a *fair hearing* had been afforded, in most instances, it would be the reasons for the decision that would actually enlighten judges performing the function of judicial review, whether the hearing was in fact fair; whether an impartial and adequate hearing had been given; and whether the decision was arrived at objectively. Furthermore, a reasoned decision would give life to the principle that *"justice should not only be done, but should also manifestly be seen to be done"*.

Objective decisions

The decision being **objectively arrived at and being reasonable** are other necessary conditions to be satisfied for a decision to be lawful. A lawful decision is a decision taken in *good-faith* upon a diligent and unbiased consideration of all relevant facts, while rejecting irrelevant facts, and having correctly appreciated and applied the applicable law. Such a decision is recognized as an **objective decision**. A **reasonable decision** is a decision that is founded upon an objective consideration of legally relevant facts and the correct application of the law to such relevant facts. It is the **reasons for the decision** that would reflect whether the decision-maker had in fact arrived at the decision in an objective manner, and whether the decision is reasonable. Thus, a decision which has attached to it reasons therefor, attracts accountability and transparency. It enables a proper judicial assessment to be made whether the decision had been arrived at upon a proper and unbiased appreciation of the relevant facts, is founded upon a correct appreciation

and application of the law, and is therefore a **lawful decision**. Further, the availability of reasons for the decision would reveal whether the decision-maker had (a) acted in excess of the law, (b) not afforded a fair hearing, (c) decided in a biased manner, (d) founded his decision upon a consideration of irrelevant facts or an erroneous application of the law, or (e) due to other reasons, the decision is arbitrary, unreasonable, subjective, capricious or aberrant and, hence the decision is **unlawful**. Thus, a decision to which reasons have not been contemporaneously given by the decision-maker, on the one hand, impairs and hinders proper judicial review and assessment, and on the other hand runs the risk of being classified and quashed as an unlawful decision which suffers from one of the above-mentioned legal defects.

Obligation to give reasons for the decision

No person concerned in justice and in the correctness, fairness, quality and legality of administrative, quasi-judicial and judicial decisions, would suggest that a decision-maker need not have any reasons for his decision. The absence of reasons for decisions, as well as inability on the part of a decision-maker to publicly declare the reasons for his decision could easily be due to the adoption of an unreasonable approach or due to sheer arbitrariness. The panacea for reasonable and lawful decisions would primarily be the adoption of an unbiased, objective and reasoned approach. Thus, reasons for a decision is an absolute necessity.

In this backdrop, the issue to be determined is not whether there should be reasons for a decision, but whether a decision-maker should be required by law to disclose the reasons for his decision, which he ought to, in any event be having with him at the time he arrived at the decision.

Factors for and against the imposition of a legal duty to give reasons

The law and in particular the common law is primarily founded upon the rule of law, public policy and public interest, logical reasoning, fairness, justice and equity. Thus, the question of law whether public authorities who function as decision-makers should be required by law to give reasons for their decisions, should be founded upon the merits of the purposes for which such a duty should be imposed viz. possible consequences arising out of the imposition of such a duty.

The main factors in favour of administrative, quasi-judicial and judicial bodies being required to give reasons for their decisions, can be described in the following manner:

(i) The requirement to give reasons encourages the public authority concerned to give a proper *fair hearing* to the party whose rights may be affected by the decision it takes, as opposed to merely and perfunctorily going through the notions of a *fair hearing*.

(ii) The duty to articulate reasons for the decision, is a self-disciplining exercise, which encourages decision-makers to act independently, impartially and neutrally, and adopt in *good-faith*, a disciplined and focused approach. It encourages conscientious consideration of pertinent issues. It dissuades decisions being arrived at in a biased or an arbitrary manner, and decisions being taken for collateral purposes. Decision-makers are compelled to act diligently and give objective consideration to the relevant material placed before them, while applying the law correctly, and rejecting irrelevant material and considerations. When there is a legal duty to give reasons, there is a reasonable expectation of the decision-making process not going astray. The existence of a legal duty to give reasons, would encourage decision-makers to participate in the hearing and in the decision-making process with a purposive approach, so that Parliament would be able to realize its objectives in having conferred statutory power on the relevant decision-making body.

(iii) The compulsion on reasons for the decision being announced facilitates correct, lawful and higher quality administrative, quasi-judicial and judicial decision-making. Reasons for the decision would reflect the rationale for the decision.

(iv) The duty to give reasons encourages statutory bodies to adopt a reason based, logical and rational approach to decision-making. It facilitates cognitive structuring of the decision-making process founded upon valid reasons. Thus, the final decision is likely to be reasonable as opposed to being unreasonable. As the decision is to be founded upon reasons that have to be declared, it is unlikely that the decision would be arbitrary.

(v) Reasons for the decision provide a justification for the decision. Thereby, the decision becomes more transparent. When a wrong decision has been taken, the decision-maker can be held accountable.

(vi) The imposition of a duty to give reasons is the main protection against a miscarriage of justice.

(vii) A reasoned decision would demonstrate that parties have been properly heard. When reasons for the decision are known by the person affected by such decision and other concerned parties, they would be able to comprehend the decision and appreciate the justification for it. Thus, the decision is likely to become acceptable. Revealing reasons would satisfy the legitimate expectations of the person affected by the decision, to get to know reasons for the decision. Thus, reasons for the decision serve the interests of those affected by the decision and the community at large. In any event, giving reasons for the decision appeals to the normal man's sense of justice. Thus, it enhances public confidence in the particular decision-making process and in individual decisions.

(viii) Existence of reasons for the decision enables and facilitates proper and meaningful exercise of judicial review and makes such review efficacious. The existence of reasons for the decision facilitates detection of errors; particularly if justiciable flaws exist. Thus, giving reasons serves the interests of the Court performing the function of judicial review.

(ix) During judicial review, decisions containing reasons therefor, are less likely to be classified as being arbitrary or unreasonable and therefore unlikely to be quashed on such grounds. When reasons for the decision are not available, a Court performing the function of judicial review may conclude that reasons have not been given, as there were no good reasons to be given. In such situations, it is likely that the impugned decision would be denounced as being arbitrary.

(x) It is when reasons for the decision are known by the Court exercising the function of judicial review, that such Court could conclude whether the impugned decision is reasonable.

These factors serve as virtues of giving reasons, and provide incentives for decision-makers to give reasons for their decisions. These factors are in conformity with general principles of justice, and provide great logical relevance and sufficient justification for the law to confer a duty on statutory authorities to give reasons for their decisions.

The dissenting judgment of Justice Subba Rao in ***Madya Pradesh Industries Ltd. v. Union of India and Others***, *Supreme Court of India, [(1966) 1 S.C.R. 466]*, contains the very essence of the strong arguments in favour of imposing a legal duty on statutory bodies and tribunals to disclose reasons for their decisions, in the following well-articulated sentences:

> *"In the context of a welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory court to keep the tribunal within bounds. A reasoned order is a desirable condition of judicial disposal. ... If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard."*

However, it is necessary to be mindful that there are certain valid reasons as to why purely administrative bodies conferred with statutory power (as opposed to tribunals and judicial bodies), should not be mandated by law to give reasons for their decisions. These factors also cannot be overlooked or trivialized. These factors may be summed up in the following manner:

(i) Having to state reasons would almost always impede efficiency associated with the delivery of the decision, would result in inevitable delays and require enhanced resources. It may in certain circumstances, attract an intolerable burden on administrative bodies and higher costs.

(ii) There can be many situations where statutory and public bodies are required to take into consideration certain material factors that cannot be disclosed to the person who may be affected by the decision and to the public at large. Matters pertaining to (a) national security and the defence of the country, (b) sensitive matters pertaining to international relations and foreign policy, (c) certain trade and commercial interests of the country, and (d) matters pertaining to ongoing criminal investigations, are some examples.

(iii) In situations where value-based judgments have to be arrived at, articulation of reasons may be quite challenging. Decisions based purely on academic assessments is an example where reasons for the decision are virtually inexpressible, though not impossible to state.

(iv) Reasons for the decision that are stated may not necessarily be the true and complete reasons that resulted in the particular decision being arrived at. Reasons that are declared by the decision-maker may be strategy based, as opposed to candor. Thus, the compulsion to give reasons may not necessarily give rise to transparency.

(v) Stating reasons may result in the proliferation of legal challenges.

The afore-stated factors both 'for' and 'against' the imposition of a legal duty to give reasons for decisions attract considerable merit, are significant, and are of high logical relevance. However, in my view, the merits in the factors that support the imposition of a legal duty to give reasons, certainly outweigh the factors that militate against the imposition of such a legal duty. The view that reasons for a decision are not necessary or important, is not appealing to an objective and reasonable mind. However, it must be emphasized that (i) the nature and the precise content of the written law which conferred legal authority to the decision-maker, (ii) nature of the decision, (iii) the impact of the decision on the rights and interests of persons, and (iv) possible consequences that may arise by revealing reasons for the decision, would be critical factors that would determine whether or not the imposition of a legal duty to give reasons was intended by Parliament and is desirable, necessary, appropriate and justifiable. The law in this regard, both statutory and common law, can be recognized and applied in such a manner so as to prevent (a) an insurmountable burden being imposed on decision-makers by the enforcement of a legal duty to give reasons, and (b) adverse consequences flowing. These objectives can be achieved by

recognizing exceptions to the rule. Those exceptions would recognize situations where the law does not require reasons for the decision to be declared.

As seen in the views of Lord Denning MR in ***R v. Secretary of State for the Home Department, ex parte Hosenball*** *[(1977) 3 All ER 452]* the existence of the need to protect national and public security may be one such exception that provides justification for the tribunal to refrain from revealing reasons for the decision.

Whether a statutory body should be required by law and therefore would have a duty to give reasons for its decisions would depend on a host of factors, and would have to be determined on a case-by-case basis. Those factors in my view are as follows:

(i) Whether the applicable statutory framework including the law that has empowered the body to take the decision and any other applicable law, has imposed a specific or implied requirement to give reasons for the decision;

(ii) The character of the decision-making body;

(iii) The nature of the decisions it has been empowered to take and possible legal implications arising out of such decision;

(iv) Whether in the attendant circumstances, there can be a guarantee that a *fair hearing* had been given by the statutory body, unless reasons for the decision are revealed;

(v) Whether judicial review of the decision would be rendered nugatory by the statutory body not having revealed reasons for its decision;

(vi) Whether a higher Court performing judicial review of the impugned decision would not be able to perform such function in the interests of justice, unless reasons for the decision are known;

(vii) Reasons if any, that would provide a valid justification for the refusal or failure on the part of the decision-maker to give reasons for the decision.

Views of respected academicians and reputed authors

At this stage, it would in my opinion be desirable to consider views of several respected academicians and reputed authors contained in treatises, regarding the duty if any, to give reasons.

Professor P.P. Craig in *"**Administrative Law**"* (Sweet & Maxwell, 1999, 4th Edition, page 432 - 436) is of the view that there is no general common law duty to give reasons. He however asserts that there are nonetheless, a number of ways in which the common law has in particular instances, imposed such a duty. He has explained that in addition to the written law explicitly imposing a legal duty to give reasons, there are five indirect ways of imposing such a duty. They are as follows:

(i) By contending that the absence of reasons renders any right of appeal or review nugatory, or that it makes the exercise of that right more difficult, and therefore recognizing the existence of a duty to give reasons;

(ii) By labelling the decision reached in the absence of declared reasons as being arbitrary;

(iii) By considering the evidence or the material placed before the decision-maker and determining that in the absence of reasons, the decision arrived at is unreasonable;

(iv) By recognizing the existence of a legitimate expectation founded upon the public body concerned, had in previous instances been disclosing reasons for its decisions, and in the impugned occasion has refrained from giving reasons, thereby depriving the person affected by the decision reasons for the decision which would contravene his legitimate expectation that reasons would be given;

(v) By considering the nature of the decision-maker, the context in which he operates, the impact of the decision, and accordingly determining whether the giving of reasons is required for the attainment of justice.

These five methods could be invoked to require decision-making public authorities to give reasons for their decisions.

Professor Craig concludes in the following manner:

> *"**The general rule should be that reasons should be given, subject to exceptions where really warranted. The jurisprudence of our courts is coming close to this proposition. It would do much to simplify and clarify matters if the legal rule could be expressed in this way.**"*

De Smith's Judicial Review (2007, 6th Edition, edited by former Chief Justice of England and Wales **Lord Woolf, Professor Jeffrey Jowell** and **Professor Andrew Le Sueur**, page 410 - 422) highlights the essence of the matter, by expressing the view that the failure by a public authority to give reasons or even adequate reasons for a decision, may be unlawful in two ways. First, it may be said that such a failure is procedurally flawed and unfair. Secondly, the failure to give reasons may indicate that the decision is irrational. The author points out that as a general proposition, it is still accurate to say that 'the law does not at present recognize a general legal duty to give reasons for an administrative decision'. But, the increasing number of so-called 'exceptional' circumstances in which substantive and procedural fairness now require that reasons be afforded to an affected individual, means that the general proposition is becoming meaningless. Apart from demonstrating the mere fact that a decision-making process is held to be subject to the requirements of fairness, it does not automatically lead to the further conclusion that reasons must be given. However, it is certainly now the case, that a decision-maker subject to the requirements of fairness, should consider carefully whether in the particular circumstances of the case, reasons should be given. Indeed, so rapidly is the case law on the duty to give reasons developing, that it can now be added that fairness or procedural fairness will usually require a decision-maker to give reasons for his decisions. Overall, *'the trend of the law has been towards an increased recognition of the duty to give reasons'.* There has been a strong momentum since of late, in favour of greater openness in decision-making. What were once seen as exceptions to the rule which stipulated instances where reasons for the decision were required, are now becoming examples of the norm; while the cases where reasons are not required may be taking on the appearance of exceptions.

The concluding paragraph of this topic in De Smith's Judicial Review is of considerable significance:

> *"**Since the duty to give reasons may now be seen simply as yet another aspect of the requirements of procedural fairness**, it would be wrong to imagine that the duty may be artificially confined to situations in which the decision-maker is acting in a 'judicial' or 'quasi-judicial' capacity. Although in Cunningham, some reliance was placed upon the fact that the Civil Service Appeal Board is a fully 'judicialized' tribunal, and one that is*

almost unique among tribunals in not falling under a statutory duty to give reasons, subsequent decisions have made it clear that ***reasons may be required of a body exercising 'quasi-judicial' functions****, such as that of the Home Secretary in relation to the tariff period to be served by life sentence prisoners,* ***and 'administrative' functions, such as a local authority making decisions regarding an individual's housing application****. Fairness may also require that a body explain why it is rejecting or preferring particular evidence or why it is failing to give effect to a legitimate expectation.* ***The distinction between judicial, quasi-judicial and administrative functions may be consigned to history in this context, as well as more generally****. As Sedley J. has put it, in rejecting such a submission in the context of the duty to give reasons, in the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge v. Baldwin been alive to that fact."* [Emphasis added]

*"**Administrative Law**"* by **Professor H.W.R. Wade** edited by **Christopher Forsyth** (Oxford, 2014, 11th Edition, page 440) contains the following views:

*"... **Nevertheless, there is a strong case to be made for the giving of reasons as an essential element of administrative justice**. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law.* ***A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others****."* [Emphasis added]

Referring to contemporary trends, Professor Wade has proceeded to observe the following:

*"**The House of Lords has recognized 'a perceptible trend towards an insistence on greater openness … or transparency in the making of administrative decisions', and***

> ***consequently has held that where, in the context of the case, it is unfair not to give reasons, they must be given****."* [Emphasis added]

Professor Wade has cited several recent judgements where the House of Lords has held that reasons for the decision of the tribunal should have been given: *R. v. Home Secretary ex parte Duggan [(1994) 3 All ER 277]* and *R. v. Home Secretary ex parte Follen [(1996) COD 169]* where it has been held that a mandatory life prisoner was entitled to know the reasons why he continued to be classified as a 'category A' prisoner, and hence not entitled to parole, *R v. Home Secretary ex parte Murphy [(1997) COD 478]* where it had been held that a mandatory life prisoner was entitled to know the reasons why the Parole Board's recommendation that he be transferred to an open prison, was not accepted, and the judgment in *R. v. Director of Public Prosecutions ex parte Manning [(2001) QB 330]* where notwithstanding a jury before which an Inquest into a custodial death, had ruled that the death was an unlawful killing and the Director of Public Prosecutions had decided not to prosecute the alleged perpetrators of the crime, that the reasons for the decision not to prosecute should be disclosed.

The commentary on this important aspect of public law by Professor Wade concludes with the following words:

> *"**The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise**. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but **the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them**."* [Emphasis added]

Dr. Sunil Coorey in ***Principles of Administrative Law in Sri Lanka*** (2020, 4th Edition, Volume I, page 576) having surveyed a series of local judgments on this matter, including ***International Cosmetic Applicators (Pvt.) Ltd. v. Arialatha and Others***, ***[****(1995) 2 Sri L.R. 61]*, ***Unique Gemstones Ltd. v. W. Karunadasa and Others, [****(1995) 2 Sri L.R. 357]*, ***Wickremasinghe v. Chandrananda de Silva, Secretary, Ministry of Defence and Others,*** *[(2001) 2 Sri L.R. 333]*,

Benedict and Others v. Monetary Board of the Central Bank of Sri Lanka and Others *[(2003) 3 Sri L.R. 68]*, ***Hapuarachchi and Others v. Commissioner of Elections and Another****, [(2009) 1 Sri L.R. 1]*, states as follows:

> *"... **But the tide seems to be turning. The view seems to be again gaining acceptance that natural justice or procedural fairness requires reasons to be given for the decision and be communicated to the parties affected**. In a recent judgment which reviewed numerous Sri Lankan and foreign decisions, views of textwriters, and other relevant material, the Supreme Court said that, "an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. ... **Considering the present process in procedural fairness vis-à-vis rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement**" – Hapuarachchi v. Commissioner of Elections [(2009) 1 Sri L.R. 1]."*

Similarly, **Dr. Mario Gomez**, in '***Emerging Trends in Public Law'*** (1998), has, following an exhaustive examination of judicial trends in Sri Lanka and elsewhere in the common law world supplemented by recent academic thinking, expressed the following view:

> "*In Sri Lanka courts previously required reasons where there was a right of appeal. This position has altered radically over the past three years. Sri Lankan courts are now insisting that public law decision making should be reasoned. Barring one case, judicial decisions over the past three years have developed a right to reasons. The Sri Lankan courts will also ask for reasons at the stage of review and in the absence of reasons may infer a finding of ultra vires or irrationality. Recent cases show that a general duty to provide reasons is likely to emerge as part of the Sri Lankan law in the near future."*

In the concluding paragraph, Dr. Gomez emphasizes the importance of giving reasons in the following manner:

> "*Reasons enhance the participatory flavour of a decision. There is an inkling of a dialogue involved when a person is told why his or her point of view was not followed.*

Reasons for a decision also flow inevitably as a consequence from the right to be heard. If a person has been heard and a decision is taken which adversely affects him or her, then such a person is entitled to be told why the decision was made in that way. Reasons will go some way towards ensuring that public decision making is not ad hoc and arbitrary, but closely thought out and transparent. As Craig observes the 'very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so'. Reasons will ensure higher levels of public accountability and contribute to increasing the integrity of the administrative process. Secrecy, with regard to any decision, raises suspicion and speculation."

Dr. Shivaji Felix, in the article titled ***'An Appraisal of the duty to give reasons in Administrative Law',*** (Bar Association Law Journal, 1997, Volume VII, Part I, page 48) has expressed the following view:

"The duty to give reasons, whether imposed by statute or as a common law requirement, is a fundamental of good administration. It results in decision-makers behaving in a more responsible manner. It is a fetter upon the exercise of arbitrary power and enhances the quality of decision-making. Openness and candour in the process of decision-making is facilitated when reasons are communicated for a decision. The duty to give reasons is an aspect of due process and is an important right that warrants protection… ***Thus, the recognition of a duty to give reasons is an important right which requires protection. The protection of such a right, augurs well for good administration and the preservation of the rule of law.*** *It is an important fetter upon the exercise of arbitrary power and is a singular recognition of the need for openness and transparency in the process of decision-making."*

Position in the English common law

The historical origin in English common law of the 'duty to give reasons' on the part of public and statutory functionaries who have been vested with statutory power to arrive at decisions which have the potential of impacting on the rights of persons, dates back to the latter part of the 20th century. Over the years, the position of the common law seems to have evolved progressively towards the recognition of the existence of such a legal duty.

In the early case of ***Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others*** [(1968) AC 997], the House of Lords without recognizing that the Minister of Agriculture had a legal duty to give reasons for the impugned decision in that case, highlighted possible consequences arising out of not giving reasons for the decision. It has been held by Lord Hodson that ***where the circumstances indicate a genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation.*** Lord Upjohn has held that *"a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."* It is thus seen that the judgment of the House of Lords serves the purpose of providing a compelling encouragement on public functionaries to give reasons for their decisions.

In ***R. v. Civil Service Appeal Board, ex parte Cunningham****, [(1991) 4 All ER 310],* where Lord Justice Leggatt who considered the lawfulness of a decision arrived at by a tribunal empowered to take appellate level decisions on employment related disciplinary matters in the public sector, observed that the duty to act fairly in the attendant circumstances of that case extended to an obligation being cast on the tribunal to give reasons for its decision. The court observed that, in the circumstances, the failure to give reasons amounted to a breach of procedural fairness. The judgment reflects the view of the court, that the Civil Service Appeal Board is a 'judicialized' tribunal. Another important feature contained in this judgment is the view that, **once the court decides to exercise jurisdiction to cause judicial review, the public body whose decision is being reviewed owes a duty towards the Court to disclose reasons for its decision**. Justice Donaldson drew a distinction between the legal duty on a public authority to provide an individual with reasons for its decisions and the duty to provide to Court reasons for the authority's impugned decision. Breach of the former duty can lead to the quashing of the decision without more. Failure to follow the latter, he observed, may lead to the Court drawing inferences adverse to the public authority, but it will not necessarily do so.

A further strengthening of this view is seen in the judgment of the House of Lords in ***Regina v. Secretary of State for the Home Department, Ex parte Doody****, [(1994) 1 AC 531]*, where it was held by Lord Mustill, that while *"the law does not at present recognize a general duty to give reasons for an administrative decision",* to mount an effective attack on the impugned decision, the person affected by such decision has, in the absence of reasons for the decision, virtually no means of ascertaining whether the decision-making process had gone astray. **Giving reasons though not specifically stated in the statute, may in certain circumstances be implied**. He has proceeded to opine that he observes in recent judgments, a perceptible trend towards an insistence on greater openness in the making of administrative decisions. In this case, the House of Lords expressed the view that a convicted prisoner serving a term of life imprisonment was entitled to be told by the Home Secretary reasons for his having rejected the advice of the trial judge regarding the minimum duration of the term of imprisonment which the prisoner should serve. Lord Mustill observed that **giving reasons may be inconvenient, but giving reasons would not be against public interest**.

Shortly after the delivery of that judgment, in ***Regina v. Higher Education Funding Council, ex parte Institute of Dental Surgery****, [(1994) 1 All ER 651]*, reflecting what I see as a dampening or retardation of the progressive development of the law in this regard, it has been held by Justice Sedley of a Divisional Court of the Queen's Bench, that the imposition of a duty to give reasons may place an undue burden on decision-makers. It would demand an appearance of unanimity where there is diversity of views. It would call for articulation of sometimes inexpressible value judgments and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. Nevertheless, leaving room for the common law to, in the future, impose a legal duty to give reasons in appropriate instances, Justice Sedley recognized that while there was no general and overall duty cast on administrative bodies to give reasons for their decisions either on general grounds of fairness or simply to enable grounds for judicial review of a decision to be explored, there were two classes of cases where such duty would exist in law. **Those two classes are, where, (i) the subject matter is an interest so highly regarded by law, such as for example personal liberty, that fairness requires that reasons, at least for particular decisions be given as of right, and where (ii) the decision appears to be aberrant**. In this case, the decision of the Higher Education Council regarding the quantum of the annual

research grant to be awarded to the Institute of Dental Surgery, which was founded on an academic assessment of research standards of the Institute, was deemed not to be aberrant as warranting reasons to have been given for the decision of the Council.

In view of the financial and reputational importance of the decision of the Higher Education Council to the Institute of Dental Surgery, proponents have argued, and I am inclined to agree, that if this case was decided today, the Court would not have decided the case in the same manner. It is more than likely that the Court would impose a duty to give reasons, particularly since the Court felt that it was not suitably equipped to decide on the appropriateness of the ranking given by the Council to the Institute. Thus, there is the need for reasons for the decision, enabling Court to determine whether the decision is unreasonable or arbitrary. This view is strengthened by Justice Sedley's own subsequent view expressed in ***Regina (Wooder) v. Feggetter and Another***, *[(2003) Q.B. 219]*, that had the case relating to the *Institute of Dental Surgery* been decided by him when he was called upon to decide this case (*R. v. Feggetter*), it would not have necessarily been decided the same way. That is an indication that due to the progressive development of the common law with regard to the duty to give reasons, **Courts may now, even with regard to instances of decision-making involving 'academic or other value-based judgments' insist on the decision-maker giving reasons, particularly if the impugned decision attracts implications as regards legally recognized rights or interests of persons**.

Regina v. Ministry of Defence, Ex parte Colin James Murray, *[(1998) COD 134]*, is a case quite similar to the case which this Court has been called upon to decide. The Divisional Court of the Queen's Bench had been called upon to judicially review a decision of a Court Martial which had imposed a punishment of 6-month imprisonment, reduction in rank and dismissal from service, on an Army Sergeant. Evidence revealed that the Sergeant was of good character and had served the Army for 20 years. He pleaded *'guilty'* to a charge of wounding another non-commissioned officer by biting his nose, and was accordingly convicted. During the sentencing hearing, evidence was led by the prosecution and the defence. The evidence included conflicting expert medical evidence. The position taken up on behalf of the accused Sergeant was that the impugned behaviour was attributable wholly or partially to intoxication arising out of medication

(Mefloquine) he had taken to treat malaria. That position was rejected by the Court Martial, which did not give reasons. The convicted and sentenced Sergeant appealed against the sentencing order to the Confirming Officer, who confirmed the sentence. He subsequently sought judicial review. It was observed by Chief Justice Bingham that there was no over-riding general principle that reasons must be given, and that would include decisions pertaining to disciplinary matters. Nevertheless, the Court observed that **where the liberty of a person was involved, Courts would have to supply additional procedural standards to ensure fairness**. **The absence of legislative provisions that reasons should be given, is no firm indicator that reasons need not be given**. Where there is no statutory requirement to give reasons, the person arguing that reasons should have been given, must show that the procedure of not giving reasons was unfair. **The Court observed that the carrying out of a judicial function by a tribunal, additionally favoured reasons for the decision to be disclosed, particularly as personal liberty was involved**. Court also observed that fairness required that reasons should have been given both as to why the Court Martial had reached the conclusion that there was no causal connection between the applicant's actions and Mefloquine which he had taken, and why it decided that a sentence of imprisonment was required rather than some lesser sentence which would not have had the same dire consequences for the Sergeant. However, Court observed that it should not be thought that failure to give reasons would normally result in the quashing of a post-conviction determination of fact and the determination of the sentence. **Judicial review was unlikely to succeed, for example, where the reasons were easily discernible albeit not expressed, or where no other conclusion than the one reached was realistically possible**. In the circumstances, the sentence imposed by the Court Martial was quashed by the Queen's Bench Division, for non-disclosure of reasons. Following careful consideration, I have concluded that the ratio of this judgment has high persuasive impact on the determination of the instant Appeal.

The position of the English common law on the duty to give reasons during the final years of the last millennium is seen in the observations of Lord Clyde in ***Marta Stefan v. General Medical Council***, *[(1999) 1 WLR 1293]*, wherein he observed that, *"**there is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples***

of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions*".*

In ***Karen Louise Oakley v. South Cambridgeshire District Council****, [(2017) EWCA Civil 71] decided by the Court of Appeal (Civil Division) of the United Kingdom,* the issue that came up for consideration was whether the Planning Committee of the South Cambridgeshire District Council ought to have given reasons for granting planning permission to the Cambridge City Football Club for the construction of a 3000-seater football stadium, training and parking facilities and a recreational ground in Cambridgeshire. An Application for planning approval had been presented to the Council by the football club. The Council's senior planning officer who processed the Application, presented to the planning committee a report containing her findings, a recommendation that the Application be rejected and permission refused together with reasons therefor. The planning committee of the Council met to consider the Application, and decided not to act per the recommendation of the senior planning officer. It decided in principle to approve the proposed developmental activity. During the consultation phase, a party claiming to be aggrieved by this decision, made representations to the Council urging that planning permission be refused for the project. However, the Council granted planning approval. The party that made such representations, challenged the decision of the Council, on the footing that the planning committee had failed to give reasons for its decision, notwithstanding the existence of a duty to give reasons. According to the applicable statute, reasons were required to be given only in instances where planning approval was refused and when approval was granted subject to conditions. The statute did not specifically require reasons to be given for a decision when granting approval without imposing conditions. Deciding the matter in appeal, Lord Justice Elias observed that the common law would be failing in its duty if it were to deny to parties who have such a close and substantial interest in the decision, the right to know why the impugned decision was taken. That is partly, but by no means only, for the instrumental reason that it might enable them to be satisfied that the decision was lawfully made, and to challenge the decision if they believe that the decision is unlawful. It is also because, as citizens, they have a legitimate interest in knowing how important decisions affecting the quality of their lives have been reached. This is particularly so, where they have made representations in the course of the decision-making process. In a general sense, this may be considered as an aspect of the duty of fairness, which in

this context requires that decisions be transparent. **The Court observed that where reasons for the decision can be readily inferred, the need may not arise to give reasons**. It was not possible in the circumstances of the case to arrive at such an inference, particularly as the committee had deviated from the planning officer's recommendations. In the circumstances of this case, the Court observed that reasons for the decision were opaque. Thus, **the Court recognized the duty to give reasons, as a requirement for good administration and transparency, and reinforced the justification for the imposition of a legal duty to give reasons**.

In the judgment of the Court of Appeal (Civil Division) of England, in ***Horada (On behalf of the Shepherd's Bush Market Tenants' Association) and Others v Secretary of State for Communities and Local Government and Others [(2017) 2 All ER 86]***, Lord Justice Lewison with whom Lord Justice Longmore and then Chief Justice Lord Thomas of Cwmgiedd agreed, held as follows:

> "*One of the purposes of requiring a decision-maker to give reasons for his decision is so that those who are affected by the decision may themselves decide whether the decision is susceptible to legal challenge…In short, although it is clear that the Secretary of State disagreed with the inspector's view that the guarantees and safeguards were inadequate he does not explain why he came to that conclusion. I do not consider that requiring a fuller explanation of his reasoning either amounts to requiring reasons for reasons, or that it requires a paragraph by paragraph rebuttal of the inspector's views. But it does require the Secretary of State to explain why he disagreed with the inspector, beyond merely stating his conclusion that he did. The two critical sentences in the decision letter are, in my judgment, little more than 'bald assertions'. The Secretary of State may have had perfectly good reasons for concluding that the guarantees and safeguards were adequate. The problem is that we do not know what they were. In those circumstances I consider that the traders have been substantially prejudiced by a failure to comply with a relevant requirement."*

In ***R (On the application of CPRE Kent) v Dover District Council and another [(2018) 2 All ER 121]***, Lord Carnwath with all other Lords agreeing, held as follows:

"*Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed. … It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review. … In my view, Oakley was rightly decided, and consistent with the general law as established by the House of Lords in Doody. Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. Doody itself involved such an application of the common law principle of 'fairness' in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by courts.* ***Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.***" [Emphasis added]

It appears that Lord Carnwath's views reproduced above, reflect the present position of the English law on the duty to give reasons.

Position of the law in India

The judgment of the Indian Supreme Court in ***Siemens Engineering & Manufacturing Company of India Limited v. Union of India and Another****, [(1976) Supplementary S.C.R. 489]*, has while highlighting the importance and recognizing the existence of a legal duty on statutory administrative bodies to give reasons for their decisions, introduced a pioneering linkage between the *'duty to give reasons'* and a well-established principle in Administrative Law, namely, *'the rules of natural justice'.* Justice Bhagwati has expressed the following views:

*"****It is now settled law that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons****. … If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that*

> *administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process.* ***The rule requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretense of compliance with it would not satisfy the requirement of law.****"* [Emphasis added]

Learned President's Counsel for the Appellant emphasized the importance of this Court being persuaded to follow the *ratio decidendi* in the Indian Supreme Court's decision in ***S.N. Mukherjee v. Union of India****, [(1990) AIR 1984]*, which he said marks a high watermark in India's Administrative Law. This judgment contains the views of India's Supreme Court on whether (a) a *confirming authority* (exercising authority in terms of the Army Act in respect of a finding and sentence imposed by a Court Martial) is required by law to record reasons for confirming the finding and sentence imposed by a Court Martial, and (b) the *Central Government* or its *competent authority* (which is empowered to deal with a post-confirmation petition) is required to record reasons for its order in respect of a petition presented to it. In the process of considering these two issues, the Supreme Court also considered the answer to the fundamental question, as to whether a Court Martial is required to record reasons for the finding (verdict) and sentence imposed.

Having surveyed in detail the position of the law of England, United States of America, Canada, Australia and India, as regards the legal duty to give reasons by administrative bodies, Justice Agrawal has held that ***"… it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record reasons for its decisions****"*. The judgment contains the view that the requirement that reasons be recorded should govern decisions of administrative authorities exercising quasi-judicial functions, irrespective of whether the decision is subject to appeal, revision or judicial review. However, the Court observed that

the reasons for the decision which are to be declared need not be elaborate, as in the case of a Court of law. The nature and the extent of the reasons would depend on the facts and circumstances of the matter. However, it is necessary that the reasons are clear and explicit, so as to indicate that the decision-making body had given due consideration to the points in controversy.

Nevertheless, the Court noted that provisions of **India's Army Act and Rules made thereunder negatived the requirement to give reasons for the findings of the Court Martial and the order of sentence, and for that reason alone held that there was no legal duty on a Court Martial established in terms of India's Army Act, to give reasons for its decision**. Under these circumstances, India's Supreme Court dismissed the Appeal by the convicted and sentenced Army officer.

However, what is important is that, this judgment, recognizes the general principle that there exists a duty to give reasons for decisions by statutory bodies. That duty can be dispensed with, only when the empowering statute negatives that duty, either explicitly or impliedly.

Views of the Supreme Court and the Court of Appeal

At this stage, it would be appropriate to consider the views of our Supreme Court and the Court of Appeal, regarding this issue.

In ***Samalanka Limited v. Weerakoon, Commissioner of Labour and Others***, *[(1994) 1 Sri L.R. 405]*, Justice K.M.M.B. Kulatunga has commented on whether the Commissioner of Labour acting in terms of section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, was required to give reasons for his decision to grant permission to an employer (Appellant) to terminate the employment of workmen of the company, subject to terms specified relating to the payment of compensation and gratuity. His Lordship has observed that the impugned judgment of the Court of Appeal could not be faulted, in that, **while it is desirable to give reasons for a decision**, for example where a right of appeal is provided against such decision, **in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to**

adduce reasons, provided that **the decision is made after holding a fair inquiry**. It appears that in that matter, though reasons for the decision had not been given by the Commissioner, the Supreme Court had, in view of the attendant circumstances of the case, been satisfied that a fair inquiry had been conducted by the Commissioner and that in the circumstances his decision was not arbitrary, and therefore not unlawful.

Therefore, in my view, the judgment of Justice Kulatunga which reflects a generic proposition of the law, that 'reasons for a decision need not be given by the decision-maker', is linked necessarily to the satisfaction by Court that in the circumstances of the case, a *fair hearing* had been given by the Commissioner and his decision does not appear to be arbitrary.

In ***Kusumawathie and Others v. Aitken Spence & Company Limited and Another***, *[(1996) 2 Sri L.R. 18]*, Justice Sarath N. Silva (as His Lordship was then), has examined this issue in a judgment of the Court of Appeal. In this matter too, whether there exists a legal duty to give reasons has been considered in the backdrop of the powers and functions of the Commissioner of Labour in terms of section 2 of the Termination of Employment of Workmen Act, No. 45 of 1971. The Petitioners had challenged a decision of the Commissioner on the sole ground that the impugned decision violated the principles of natural justice, by the Commissioner having failed to give reasons for his decision. However, it is to be noted that the Commissioner had, through an affidavit that was filed in the Court of Appeal, explained the reasons for his decision. Justice Silva has considered the question of law which was before the Court of Appeal, that being, whether in the absence of a specific statutory requirement to give reasons, the Commissioner was required by law to communicate reasons for his decision along with the decision, and whether doing so is a requirement of the rules of natural justice. His Lordship has observed that neither the common law nor the principles of natural justice require as a general rule, that administrative tribunals or authorities should give reasons for their decisions that are subject to judicial review. His Lordship has also observed the following:

> *"**Thus, it is seen that the common law of this country has evolved so as to require every tribunal or administrative authority whose decision is subject to a statutory right of appeal to give its reasons for such decision**. Reasons have to contain findings on the*

disputed matters that are relevant to the decision. It is also seen that in the absence of a statutory requirement to give reasons for decision or a statutory appeal from a decision, as aforesaid, there is no requirement of common law or the principles of natural justice, that a tribunal or an administrative authority should give reasons for its decision, even if such decision has been made in the exercise of a statutory discretion and may adversely affect the interests or the legitimate or reasonable expectations of other persons. ... There being no statutory requirement to give reasons and no provision for an appeal from the Commissioner's decision, the only ground of challenge advanced by the Petitioner has to fail.

However, I have to reiterate the observation made by Tambiah, J. ten years ago in the case of Samarasinghe v. De Mel that it is indeed desirable that reasons be given by the Commissioner for a decision or an order made under the Termination of Employment of Workmen (Special Provisions) Act. ...

... The finding in the preceding section of this judgment that there is no requirement in law to give reasons should not be construed as a gate-way to arbitrary decisions and orders. If a decision that is challenged is not a "speaking order", (carrying its reasons on its face), when notice is issued by a Court exercising judicial review, reasons to support it have to be disclosed with notice to the Petitioner." [Emphasis added]

It would thus be seen that Justice Silva has highlighted the legal duty to give reasons for the decision when there is a statutory right of appeal against the impugned decision. His Lordship's view seems to be that where there is no statutory right of appeal, there is no legal obligation to reveal the reasons for the decision simultaneously with the decision. His Lordship does not explain why reasons for a decision should be given when there is a statutory right of appeal and why reasons need not be contemporaneously declared together with the decision, in other instances, where though there is no right of appeal, judicial review may be available to challenge decisions of statutory bodies. The need for reasons for a decision in instances where there is a statutory right of appeal, is because, in the exercise of appellate jurisdiction the court should visit the merits of the decision as well as the lawfulness of the application of the law. Thus, it is

necessary to be apprised of and consider reasons for the decision. Similarly, in the exercise of judicial review, the Court has to consider whether there are errors of law embedded in the decision and also whether the decision is reasonable. In the absence of reasons for the decision, how can those matters be gone into? Thus, I must respectfully record disagreement with the limitations His Lordship has imposed regarding the instances where there exists a legal duty to disclose reasons for the decision.

However, it is pertinent to note that His Lordship has insisted on the need to disclose reasons for the decision, if and when, the decision is impugned before a Court. In the matter presently before this Court, the 2nd to 4th Respondents who were members of the Court Martial, have not placed reasons for the impugned finding of guilt before the Court of Appeal. Thus, according to the principle enunciated by Justice Sarath Silva, the impugned finding of the Court Martial is liable to be quashed on that ground alone. In this regard, it is to be noted that learned Senior State Counsel did not offer any explanation as to why reasons for the verdict pronounced by the Court Martial were not placed before the Court of Appeal.

With the view to considering the judgment of the Supreme Court in ***Karunadasa v. Unique Gem Stones Ltd. and Others***, *[(1997) 1 Sri L.R. 256]*, cited by both the learned President's Counsel for the Appellant and learned Senior State Counsel for the Respondents, it is necessary to initially consider the prelude to that case, namely ***Unique Gemstones Ltd. v. W. Karunadasa and Others,*** *[(1995) 2 Sri L.R. 357]*. This matter has also originated from a decision given by the Commissioner of Labour in terms of section 2 of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, in the backdrop of the 1st Respondent (employee) having complained to the 2nd Respondent – Commissioner of Labour that the Petitioner (employer) had terminated his services. The employer denied that allegation and counter-claimed that the 1st Respondent vacated services following frequent instances of absenteeism. Following the conduct of an inquiry by the 3rd Respondent - Assistant Commissioner, the 2nd Respondent - Commissioner of Labour determined that the employment of the 1st Respondent had been terminated by the Petitioner and thus directed that the workman be reinstated. He further directed that a specified amount of back wages be paid to the 1st Respondent. The Petitioner asked the Commissioner to provide him reasons for his decision, to

which the latter did not respond favourably. Thereafter, the Petitioner moved the Court of Appeal for the issuance of a writ of certiorari to quash the decision of the 2nd Respondent Commissioner, on the footing that the impugned decision was not accompanied with reasons for the decision, and thus it was alleged that the inquiry contravened the principles of natural justice. Even after his decision was challenged in Court, the 2nd Respondent did not tender to the Court of Appeal reasons for his decision. Nor was the record of the inquiry conducted by the Assistant Commissioner or his recommendation to the Commissioner presented to Court. In fact, both of them had not even been represented before the Court of Appeal. In this setting, having examined a series of judgments reflecting both English and Sri Lankan law, Justice H.W. Senanayake while issuing a writ of certiorari quashing the decision of the Commissioner, observed the following:

> *"**There is a continuing momentum in administrative law towards transparency in decision making. It is my considered view that public officers who wield power on others should give reasons for their decisions**. The failure to give reasons is a breach of section 17 of the T.E. Act because it is inconsistent with the principles of natural justice. It is my view the 2nd Respondent's failure to give reasons is a negation of natural justice."* [Emphasis added]

Aggrieved by the judgment of the Court of Appeal which resulted in the quashing of the decision of the Commissioner of Labour, the employee (Karunadasa) appealed to the Supreme Court. The ensuing judgment of the Supreme Court is ***Karunadasa v. Unique Gem Stones Limited and Others***. Delivering the judgment of the Supreme Court, Justice Mark Fernando observed as follows:

> *"... Article 12(1) of the Constitution now guarantees the equal protection of the law. **In the context of the machinery for appeals, revision, judicial review, and the enforcement of the fundamental rights, giving reasons is becoming, increasingly, an important 'protection of the law'** (see for instance Bandara v. Premachandra) for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired. ... To say that natural justice entitles a party to a hearing, does not mean merely that his evidence and submissions must be heard and recorded; **it necessarily means that he is entitled to a reasoned consideration of the case which he presents**. And whether or not*

> *the parties are also entitled to be told the reasons for the decision, if they are withheld,* ***once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable****'; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent's failure to produce the 3rd respondent's recommendations thus justified the conclusion that there were no valid reasons, and that natural justice had not been observed. ...* ***The fact that the 3rd respondent held a fair inquiry and otherwise acted within jurisdiction does not excuse the failure to give reasons.*** *... While the mere fact that the 3rd respondent held the inquiry does not vitiate the 2nd respondent's order, the 2nd respondent's failure to give reasons is all the more serious because it was not he who held the inquiry.* ***The judgment of the Court of Appeal that natural justice required that reasons be given, must therefore be affirmed****."* [Emphasis added]

It is thus seen that the Supreme Court has in this judgment recognized that the conduct of what appears to be a *fair hearing* does not absolve the statutory body from the duty to give reasons. Further, the Court has recognized that the duty to give reasons is interwoven with the rules of natural justice. The Supreme Court has observed that the absence of reasons for the decision, renders the decision open to the criticism that it is violative of Article 12(1) of the Constitution. Furthermore, the absence of reasons for the decision would deprive the person affected by the decision of the equal protection of the law.

The next judgment which along with the judgment in the *Samalanka Limited* case that was heavily relied upon by learned Senior State Counsel was ***Yaseen Omar v. Pakistan International Airlines Corporation and Others****, [(1999) 2 Sri L.R. 375]*. That matter also related to an inquiry conducted by the Commissioner of Labour in terms of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. The Court of Appeal had set aside the impugned decision of the Commissioner of Labour on the ground that giving reasons for the decision is a *sine qua non* for a *fair hearing*, and that the Commissioner had not given reasons for the impugned decision. In appeal to the Supreme Court, Justice Dr. Shirani Bandaranayake, as she was then, citing with approval the judgment of Justice Kulatunga in *Samalanka Limited v. Weerakoon, Commissioner of Labour and Others* has observed that there is no general principle

of administrative law that natural justice requires the authority making the decision to adduce reasons, provided the decision is made after holding a *fair inquiry*. Justice Bandaranayake has also considered the judgment of the Queen's Bench Division in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery,* and cited with approval its *ratio decidendi* being, ***'while there is no general duty to give reasons for a decision, there are classes of cases where there is such a duty, namely (a) situations where the subject matter is an interest so highly regarded by the law, such as for example personal liberty that fairness requires that reasons, at least for particular decisions, be given as of right, and (b) where the decision appears to be aberrant****'*.

Justice Bandaranayake has extensively dealt with the material that had been placed before Court by the Commissioner of Labour including the Report of the relevant Assistant Commissioner of Labour. The only logical conclusion that can be arrived at is that Her Ladyship was satisfied that the Commissioner of Labour had conducted a *fair inquiry* in compliance with section 17 of the Act, which requires the Commissioner to conduct an inquiry in a manner not inconsistent with the principles of natural justice. By the detailed reference to the material considered by the Commissioner, it is evident that Her Ladyship was convinced of the correctness of the decision the Commissioner had arrived at. It also appears that Her Ladyship was convinced that the decision of the Commissioner could not be invalidated merely due to the absence of reasons, particularly as there was no statutory requirement for the Commissioner to give reasons for his decision. Thus, it would not be possible for me to agree with the submission of learned Senior State Counsel, that Justice Bandaranayake's views serve to propound a 'general principle of administrative law, that in the absence of a statutory requirement, there is no general principle that requires the authority making the decision to adduce reasons, provided the decision is made after holding a *fair hearing*'. In my view, Justice Bandaranayake by recognizing the principle contained in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery,* has left it open for a Court exercising the function of judicial review to quash a decision of a statutory body to which reasons have not been attached, if the inquiry and the decision come within one of the two situations referred to in that judgment.

In the subsequent case of ***Lanka Multi Moulds (Pvt) Ltd v Wimalasena, Commissioner of Labour and others***, *[(2003) 1 Sri L.R. 143]*, Justice Mark Fernando has reiterated his views regarding the duty to give reasons, in the following manner:

> "*Although the Commissioner has a discretion in respect of both limbs of section 6, that is not an unfettered or unreviewable discretion. As the Court of Appeal observed, he must give reasons for his decision. Although in Samalanka Ltd. v Weerakoon, it was held by Kulatunga, J (with G.P.S. de Silva, CJ and Ramanathan, J agreeing), that the Commissioner was not under a duty to give reasons, I took the contrary view in Karunadasa v Unique Gemstones Ltd. (with Wadugodapitiya, J and Anandacoomaraswamy, J agreeing). That decision was considered and followed by Gunasekera, J in Ceylon Printers v Commissioner of Labour. Since G.P.S. Silva, CJ agreed with Gunasekera, J on that occasion it is clear that he no longer agreed with Samalanka. In Mendis v Perera, I observed that* ***the audi alteram partem rule does not merely entitle a party to a purely formal opportunity of placing his case before a tribunal, and that natural justice would be devalued if the tribunal does not consider the evidence and the submissions, evaluate it properly and not in haste, and give reasons for its conclusions***. *However, in Yaseen Omar v Pakistan International Airlines, Samalanka was followed, apparently without the attention of the Court being drawn to the subsequent decisions to the contrary and relevant citations. …*
>
> ***It is therefore necessary to reiterate what has been long recognized: that the statutory conferment of a right of appeal against the decision of a tribunal has the effect of imposing a duty on that tribunal to give reasons for its decisions. …*** *The conferment of a right to seek revision or review necessarily has the same effect. As the decisions cited show, if the citizen is not made aware of the reason for a decision he cannot tell whether it is reviewable, and he will thereby be deprived of one of the protections of the common law – which Article 12(1) now guarantees. Today, therefore, the conjoint effect of the machinery for appeals, revision, and judicial review and the fundamental rights jurisdiction, is that* ***as a general rule tribunals must give reasons for their decisions****."*
> [Emphasis added]

Another aspect of this issue arises out of the contemporary view that wholly unreasonable or arbitrary decisions are violative of Article 12(1) of the Constitution. When reasons for a decision are not disclosed, the Court is deprived of the opportunity of considering reasons for the decision, for the purpose of determining whether the decision is reasonable. Particularly when reasons are not revealed even after the decision is impugned before a Court, there is a justification to conclude that, (a) reasons were not revealed as the statutory body had no reasons to be given, or (b) the reasons which the statutory body had taken into account were subjective or otherwise indefensible before a Court of law, and hence would not withstand an objective scrutiny. In these situations, there is every likelihood that the Court would conclude that the decision is either unreasonable, arbitrary or unlawful due to other reasons. Thus, there is a strong argument in favour of the proposition, with which I find myself in agreement, that **decisions which are pronounced without reasons being revealed, and no legally tenable excuse being presented to Court for not having revealed reasons, are decisions which are violative of Article 12(1) of the Constitution, and thus unlawful. The situation gets compounded when reasons for the decision are not revealed even to Court, once the decision is impugned**.

In this regard, the following views of Dr. Mario Gomez contained in his article titled **'*Blending Rights with Writs: Sri Lankan Public Law's New Brew*'** published in 2006, in *Acta Juridica, University of Cape Town's Law Journal,* is of particular importance:

> "*There are two ways of challenging the discretionary power of public authorities: writs and fundamental rights. In recent years, there has been a cross-fertilization of ideas and concepts between these two areas. In applications for a writ, Sri Lankan courts are beginning to assert that the exercise of discretionary power by the public authority must conform with the requirements of Article 12 (the right to equality and equal protection) as well as with the other traditional grounds of review. At the same time the courts have asserted that* ***the constitutional right to equality and equal protection includes the right to natural justice, to reasons,*** *a recognition of legitimate expectations and the right against arbitrary and unfair treatment. This cross-fertilization of ideas and concepts has considerably enriched Sri Lankan public law."* [Emphasis added]

Justice Sripavan as His Lordship was then, in ***Benedict and others v Monetary Board of the Central Bank of Sri Lanka and others,*** *[(2003) 3 Sri L.R. 68]* has held that failure to give adequate reasons amounts to a denial of justice and therefore is itself an error of law. His Lordship held as follows:

> "*The reasons must not only be intelligible but should deal with the substantial points which have been raised. The Courts have treated inadequacy of reasons as an error on the face of record so that inadequately reasoned decision could be quashed, even if the duty to give reasons was not mandatory… In the absence of reasons, the person affected may be unable to see whether there has been a justiciable flaw in the decision making process…Giving reasons introduces clarity and minimizes arbitrariness; it gives satisfaction to the party against whom the order is made and also enables the supervisory court to keep any tribunal within bounds. If the reasons are not given, the court can only draw an inference that the first respondent had no rational reason for its decision and has failed to act with procedural fairness towards depositors and creditors."*

His Lordship has expressed a similar view *in* ***Lankem Tea and Rubber Plantations (Pvt) Ltd. v Central Bank of Sri Lanka and Others****, [(2004) 2 Sri L.R. 133]* wherein His Lordship held as follows:

> *"In the absence of reasons, it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law. In R v Mental Health Review Tribunal, ex parte Clatworthy, it was held that reasons should be sufficiently detailed as to make quite clear to the parties and specially the losing party as to why the tribunal decided as it did and to avoid the impression that the decision was based upon extraneous consideration rather than the matter raised at the hearing."*

In ***Shell Gas Lanka Ltd. v Consumer Affairs Authority and Another****, [(2005) 3 Sri L.R. 262]*, the Petitioner had sought prior approval in writing from the Respondent to revise the retail price of liquid petroleum (gas, for home consumption). That application and a subsequent appeal had been rejected by the Respondent. In this backdrop, the Petitioner contended before the Supreme Court, inter-alia that the Respondent failed to give reasons for his decision (refusal to permit a

revision of the price) and therefore, the decision was unreasonable. Justice Sisira de Abrew held that, in His Lordship's view, failure to give reasons can be construed as 'no reasons'. Citing a long line of local and foreign judicial decisions, His Lordship held that natural justice demands that administrative tribunals should give reasons for their decisions. Further, His Lordship was of the view that unreasonable decisions of administrative tribunals could be quashed by the Court of Appeal in the exercise of its writ jurisdiction. Accordingly, a writ of certiorari was issued to quash the decisions of the Respondent and a writ of mandamus was issued to compel the Respondent to determine the Petitioner's application.

That Justice Dr. Shirani Bandaranayake (as she was then) has subsequent to the delivery of the Judgment in *Yaseen Omar v. Pakistan International Airlines Corporation and Others* reconsidered her view on this matter, is evident when one considers that Her Ladyship has expressed the following views in ***Choolanie v. People's Bank and Others*** *[(2008) 2 Sri L.R. 93]*:

> *"On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Furthermore, in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily in coming to their conclusion. …"*

Her Ladyship in ***Hapuarachchi and Others v. Commissioner of Elections and Another*** *[(2009) 1 Sri L.R. 1]* has reiterated her views regarding this important question of law, in the following manner:

> *"Accordingly, an analysis of the attitude of the Courts since the beginning of the 20th (sic) century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness.* ***Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try***

> ***to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement****."* [Emphasis added]

In ***Central Bank of Sri Lanka and Others v Lankem Tea and Rubber Plantations (Pvt) Ltd*** *[(2009) 2 Sri L.R. 75]*, a writ of certiorari from the Court of Appeal was sought to quash a penalty imposed on the Petitioner by the Respondents for an alleged contravention of a provision of the Exchange Control Act. The Petitioner alleged that reasons were not given for the imposition of the penalty. The Petitioner also alleged that the President in her capacity as the Minister of Finance had refused to mitigate the penalty and had also refused to give reasons for the refusal. The Court of Appeal issued the writ and quashed the impugned decisions. The Respondents appealed against that judgment to the Supreme Court. Justice Marsoof with whom Chief Justice Sarath N. Silva and Justice Shiranee Tilakawardane agreed, while affirming the judgment of the Court of Appeal and dismissing the Appeal, held as follows:

> "*It is important to note that the changes taking place in other jurisdictions have also had their influence on our courts, and a strong trend of insistence on a statement of reasons is discernible in Sri Lankan judicial decisions. The Sri Lankan authorities were examined recently by the Supreme Court in M. Deepthi Kumara Guneratne and Two others v Dayananda Dissanayake and Another SC (FR) Application No. 56/2008 (SC Minutes dated 19th March 2009) in which the Supreme Court has moved towards recognizing a general duty to give reasons. … I am of the opinion that in the circumstances of this case, the decisions contained in P10 and P14 cry out for reasons, and the failure to give any, render them devoid of any legal validity. I hold that the failure to give reasons rendered the decisions contained in P10 and P14 nugatory..."*

I wish to also consider the judgment of the Court of Appeal in ***Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Martial and Others*** *(CA Writ 333/2011, CA Minutes 1st June 2020)* decided by Justice Mahinda Samayawardhena. In this matter, the Petitioner, an aircraftman of the volunteer force of the Sri Lanka Air Force had been found '*guilty'* by a General Court Martial for committing murder and sentenced to rigorous imprisonment for life.

One out of the three grounds on which the Petitioner sought the quashing of the finding of guilt and the sentence imposed on him, was that reasons were not given for the finding of the General Court Martial. It was common ground that the General Court Martial was obliged to act in terms with the Sri Lanka Air Force Act read together with Court Martial (General and District) Regulations promulgated in terms of the Act, and that neither legislation specifically required the General Court Martial to give reasons for its findings. Justice Samayawardhena has observed the following:

> *"... **If a country is governed by the rule of law, reasons for decisions must be given, no less when a man is convicted for murder and the death sentence or life imprisonment is passed as the punishment**. ... **The giving of reasons for decisions is inherent in the justice system of any civilized society**. It is embedded in it and inseparable from it. It is a basic requirement of natural justice. Such a fundamental requirement which goes to the root of the matter cannot be taken away by conjecture. ... **I would go one step further to say that not only can it not be assumed that a requirement to give reasons is excluded by implication, even if that requirement is excluded in express terms, such (purported) exclusions shall be subject to strict interpretation in order to promote the essence of natural justice**. ... In my judgment, giving reasons for a decision of the Court Martial has not been dispensed with expressly or by necessary implication in the Air Force Act or Regulations made thereunder. Hence, **failure to give reasons is fatal to the conviction** of murder in the instant case**... If natural justice does not require giving reasons for decisions, fairness, at least does**. **... Failure to give reasons is a denial of justice**. ... **Failure to give reasons suggests arbitrariness**. ... Giving reasons for decisions minimizes abuse of power. ... When shall the decision-maker give reasons? **The decision-maker shall give reasons at the time of making the decision, unless there is an agreement to the contrary**. Can failure to give reasons be remedied by giving reasons later? The answer shall be in the negative. If reasons have been given but not communicated to the party concerned, the situation is different. ... If the decision is an empty decision devoid of reasons, there is no decision in the eyes of the law. It is a nullity – nullity ab initio; bad – incurably bad. There is no necessity to quash such a purported decision for there is nothing to quash in the first place. Nevertheless, to avoid any*

confusion and for clarity, the decision can be formally quashed by way of certiorari." [Emphasis added]

I must record my agreement with the views expressed by Justice Mahinda Samayawardhena.

As regards the judgment of Justice Samayawardhena in *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka, Air Vice Marshal and Others*, we inquired from learned Senior State Counsel as to whether the Attorney General who represented the Respondents in that matter agrees with the views of the Court of Appeal, and learned Senior State Counsel responded in the negative. We then inquired whether the Attorney General had on behalf of the Respondents preferred an Appeal to this Court against the judgment of the Court of Appeal, to which learned Senior State Counsel also responded in the negative. However, he did not venture to explain as to why an Appeal was not presented.

Impugned judgment of the Court of Appeal

I must now turn towards the two reasons cited by the Court of Appeal (contained in the impugned judgment) for its conclusion that a Court Martial is not required by law to give reasons for its findings.

First ground – Reasons need not be given since juries in jury trials in the High Court are not required to give reasons

The first reason identified by the Court of Appeal is that the Code of Criminal Procedure Act does not require a jury to give reasons for its verdict, nor does the Navy Act require a Court Martial to give reasons for its findings. Thus, the impugned judgment of the Court of Appeal seems to suggest the following:

(a) Proceedings before a Court Martial is similar, if not identical to jury trials in the High Court. A jury is not required by the provisions of the Code of Criminal Procedure Act to give reasons for its verdict. Thus, a Court Martial is also not required by law to give reasons for its decisions.

(b) The Navy Act does not contain a legal requirement for a Court Martial to give reasons for its finding (verdict). Thus, there is no legal duty on a Court Martial to give reasons for its finding.

Court Martial proceedings and jury trials in the High Court

The Code of Criminal Procedure Act recognizes and provides three formats for the conduct of criminal trials by the High Court. They are, (i) trial before a judge of the High Court sitting without a jury, (ii) trial before a judge of the High Court sitting with a jury, (commonly referred to as a 'jury trial'), and (iii) trial by three judges of the High Court, (commonly referred to as a 'trial at bar'). Chapter XVIII of the Code of Criminal Procedure Act, No. 15 of 1979 regulates the conduct of such a 'jury trial'. The basis for the first part of the first reason cited by the Court of Appeal, is that, in several respects a trial before a 'Court Martial' is parallel to a 'jury trial' in the High Court, and as the law (as it stands at present) does not require a jury to give reasons for its verdict, a Court Martial is also not required by law to give reasons for its finding (verdict). As I can see, there are two fallacies in this approach, arising out of the supposed parallel between the two trial forms. First, whether the equation of a 'jury trial' in the High Court to a trial before a Court Martial is a legally tenable proposition. Secondly, whether independently of a determination on whether a jury is required to give reasons for its verdict, the question whether a Court Martial is required by law to give reasons for its finding should be determined.

The attempt at drawing a parallel between a jury trial and a trial before a Court Martial arises out of the external manifestation that a judge of the High Court who presides at a trial in the High Court before a jury performs functions which are performed by the Judge Advocate in a trial before a Court Martial, and that members of the Court Martial are like jurors who decide on facts based upon which they arrive at the finding (verdict). There is indeed a rational basis for this parallel. Thus, I respectfully agree with the proposition of Chief Justice H.N.G. Fernando in ***Jayanetti v. Martinus and Others****, (71 NLR 49),* that the functions of a Judge Advocate are **comparable** to that of a Judge of a High Court in a jury trial. However, a thorough consideration of the powers and functions of a judge of the High Court in comparison with those of a Judge Advocate of a Court Martial, reveals that the two positions and their powers and functions are **not identical**. Learned President's Counsel for the Appellant has pointed towards three critical

factors (referred to earlier) with which I find myself in agreement. These factors distinguish the two roles. The distinctions in the two roles arise out of section 39 of the Navy Act, when compared with provisions of sections 239 and 240 of the Code of Criminal Procedure Act. What appears to be a distinction of fundamental importance, is that, while a Judge of the High Court is empowered to preside over proceedings in the High Court and **give directions to the jury** on matters of law which **the jury is obliged by law to comply with**, as regards questions of law, in terms of the Navy Act, members of a Court Martial are not relegated to perform the subordinate role a jury is required to perform. Members of a Court Martial are not only the decision-makers with regard to questions of fact, they are equally placed with regard to determination of questions of law. The role and functions of the Judge-Advocate in a trial before a Court Martial as provided in section 39 of the Navy Act is **'advisory'** in nature, and he is subordinate to the legal standing of members of the Court Martial.

Sections 229 and 230 of the Code of Criminal Procedure Act, provide that, the judge of the High Court shall (i) when the trial is concluded, charge the jury summing up the evidence and laying down the law by which the jury is to be guided, (ii) decide all questions of law arising in the course of the trial, (iii) decide upon the meaning and construction of all documents given in evidence at the trial, (iv) decide upon all matters of fact which may be necessary to prove in order to enable evidence of particular matters to be given, and (v) decide whether any question which arises is for himself or the jury. Further, section 231 provides that the judge may in the course of his summing up, if he thinks proper, express to the jury, his opinion upon any question of fact or upon any question of mixed law and fact relevant to the case at hand. It would thus be seen that, the legal scheme and provisions relating to the powers and functions of a judge of the High Court in a 'jury trial' differ significantly from those relating to a Judge Advocate in a trial before a Court Martial. This in my view creates a significant difference between a jury trial and a trial before a Court Martial.

The other difference stems from the distinction between the High Court before which jury trials take place and Court Martials. As detailed out in a different part of this judgment, due to several significant reasons, a Court Martial cannot be equated to a Court of law. As pointed in that part of this judgment, a Court Martial lacks the features of a Court of law, and is a **tribunal** (and not

a 'court') which has been conferred with *inter-alia*, judicial powers to impose penal and disciplinary sanctions.

Therefore, I find myself in agreement with the submission made in this regard by learned President's Counsel for the Appellant, that a trial before a jury in the High Court is not identical to a trial before a Court Martial. His submission that in the eyes of the law the two types of trial proceedings are distinguishable, in my view, is well-founded.

In the circumstances, I find myself unable to agree with the reasoning contained in the impugned judgment of the Court of Appeal, that, since a jury in a jury trial in the High Court is not required by the Code of Criminal Procedure Act to give reasons for its verdict, a Court Martial too is not required to give reasons for its decisions.

Be that as it may, I would not be surprised, if in view of recent developments in Public Law aimed at ensuring adherence to the rule of law, fairness, reasonableness, transparency and accountability, in the near future the common law would demand that trial juries be also required by law to give reasons for their verdicts. Such a revolutionary change in the 'trial by jury' system would *unlock the veil of secrecy surrounding the jury room,* which has so far been guarded. That of course is not a matter to be determined in this appeal. However, that is another reason as to why the issue before this Court should not be determined founded upon the prevailing written law relating to jury trials in the High Court being the Code of Criminal Procedure Act, which does not specify that a jury should give reasons for its verdict.

No explicit statutory duty conferred by written law on a Court Martial to give reasons for its findings

Section 43 of the Navy Act provides for the manner of deciding questions before a Court Martial. Section 43 reads as follows:

> *"Every question before a court martial shall be decided by the majority vote of the members of the court martial. Where there is an equality of votes of the members of a court martial on the question of the finding in any case, the accused in that case shall be*

deemed to be acquitted. Where there is an equality of votes of the members of a court martial on the sentence in any case or on any question arising after the commencement of the hearing of any case other than the question of the finding, the president shall have a casting vote."

It is thus seen that the Navy Act does not explicitly impose a statutory legal duty requiring a Court Martial to give reasons for its finding.

This Court inquired from learned Senior State Counsel for the Respondents whether there existed Rules made by the Minister in terms of section 161 of the Navy Act, which contained further legal requirements pertaining to the conduct of Court Martial proceedings and regarding the making of orders, the finding and sentence. Learned counsel responded in the negative.

The written law mainly provides the basic legal framework, and it is the duty of common law judges to fill in the rest with applicable legal principles existing in the domain of the unwritten law. On many occasions, the common law has filled lacuna existing in the written law and has thereby facilitated the enforcement of the law and the administration of justice in a just and fair manner. For example, it is very rarely that a legal mechanism which confers statutory power to a public or statutory functionary specifically provides that such body should adhere to the rules of 'natural justice', grant a 'fair hearing' and decide 'objectively'. Omissions by the legislature have been and continues to be filled by judges, by incorporating doctrines found in the common law into legislative provisions. Thus, merely because a particular legal requirement is not explicitly found in written law, it cannot be hurriedly and safely assumed that such a legal requirement does not exist in law. In this regard, it is important to note that the Navy Act also does not contain any provision of law or feature which negatives the existence of a legal duty on a Court Martial to give reasons for its findings. Furthermore, section 132 of the Navy Act provides that such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of *mandamus, certiorari,* and *prohibition* shall be deemed to apply in respect of any Court Martial. Thus, it is seen that the legislature in its own wisdom has provided by written law for judicial review of decisions of Courts Martial to be carried out from the perspective of Public Law, which governs the issuance of such writs. That is another reason as to why the legal

scheme contained in the Navy Act should be viewed from the perspective of Public and Administrative Law.

A careful examination of the provisions of the Navy Act reveals that there does not exist any legal provision in that Navy Act which negatives the common law duty for a Court Martial to give reasons for its finding and order of sentence. In this regard, it is to be noted that, the Indian Supreme Court refrained from granting any relief to the Petitioner in *S.N. Mukherjee v. Union of India,* since the court observed that the provisions of the Army Act of India and in particular Rules 62 and 66(1) of the Rules made in terms of the Army Act in the opinion of the Indian Supreme Court, negatived the duty to give reasons for the finding and sentence imposed by a Court Martial. It is on that footing that the Indian Supreme Court having emphatically recognized a common law requirement for statutory bodies to give reasons for their decisions, held that a Court Martial established in terms of India's Army Act is not required to give reasons for its finding and sentence.

Second ground contained in the impugned judgment: Judicial precedent contained in *G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya*

The second reason which appears to have influenced the Court of Appeal to arrive at the finding that a Court Martial is not required by law to give reasons for its finding, is a pronouncement contained in a judgment of the Court of Appeal decided by three judges of that Court in ***G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya and five others***, *[CA Writ 679/2010, CA Minutes of 16th December 2011]*. Learned Deputy Solicitor General who appeared in the Court of Appeal for the Respondents had invited the Court of Appeal to treat that judgment (decided by three judges of the Court of Appeal) as judicial precedent to the proposition that a Court Martial is not required by law to give reasons for its finding. That case relates to a onetime Commander of the Sri Lanka Army (the Petitioner) who was found *'guilty'* by a Court Martial and sentenced to serve a term of imprisonment. He sought to have the finding and the sentence imposed on him by the Court Martial quashed by a writ of certiorari. In that matter, one out of the several grounds based upon which the Petitioner sought to challenge the lawfulness of the impugned finding of the Court Martial and the sentence imposed on him, was that no reasons were given by the Court Martial for its finding. The Court of Appeal dismissed the application *in-limine* on the premise that the

Petitioner was *'guilty'* of non-disclosure and suppression of certain material to the Court of Appeal which in the view of the Court, the Petitioner was obliged to reveal. Therefore, the Court held that the Petitioner was not entitled to the writ of certiorari, as it is a discretionary remedy. On the afore-stated question of law, whether a Court Martial is obliged by law to give reasons for its findings, the Court of Appeal has held as follows:

> *"The learned counsel submitted that the Court Martial had been declared a court of law in G.S.C. Fonseka v. Dhammika Kithulegoda and seven others (SC No. 1/2010 CA Writ Application 676/2010 – SC Minutes of 10th January 2011) wherein the Supreme Court has held that the Court Martial should act judicially. Therefore, the Court Martial should give reasons for its decision. However, the Supreme Court's interpretation of the Court Martial is for the purpose of Article 89(d) of the Constitution."*

It thus appears that the Court of Appeal in the afore-stated judgment had merely referred to the submission made to it by counsel for the Petitioner, that as a Court Martial is to be recognized as a 'court', it should give reasons for its decision, and has responded to that submission by reiterating the determination of the Supreme Court, that a Court Martial should be considered to be a 'court' only for the purposes Article 89(d) of the Constitution. There is no specific finding by the Court of Appeal, that a Court Martial need not give reasons for its decisions. Nor is there such a finding in the Determination of the Supreme Court. I must observe that the Court of Appeal has given an extremely narrow construction to the Determination of the Supreme Court. It has not considered the broader and critical issue of whether a Court Martial is obliged by the common law to give reasons for its findings. This becomes a critical issue, because the Supreme Court had observed that a Court Martial should act 'judicially'. The judgment of the Court of Appeal in my view **does not** contain a finding that the common law on the matter does not impose a legal obligation on a Court Martial to give reasons for its findings.

In the Reference referred to above by the Court of Appeal to the Supreme Court in ***Gardihewa Sarath C. Fonseka v. Dhammika Kithulegoda, Secretary General of Parliament and Others****, [SC Reference No. 1/2010, SC Minutes of 10th January 2011, reported in 2011 BLR 169]*, the question of law which the Supreme Court had to determine was whether the words 'any court' referred to in Article 89(d) of the Constitution refer to the Supreme Court, Court of Appeal and

the other Courts of First Instance, to the exclusion of tribunals and institutions or whether the words 'any court' include a Court Martial. Chief Justice J.A.N. De Silva has in response to that question of law, observed that the concept of Courts Martial is valid under the Constitution, and that considering Article 4(c) of the Constitution in relation with Articles 16, 105(2) and 142, **a Court Martial is an entity required to function judicially, and exercising judicial power and is recognized as such by the Constitution in terms of the second limb of Article 4(c), has the power to hear and try cases, and impose valid sentences including sentences of death and imprisonment**. Chief Justice De Silva with whom three other judges agreed, held that **a Court Martial is a "court" for the purposes of Article 89(d) of the Constitution**. Justice Saleem Marsoof, in his separate opinion, while agreeing with the conclusion reached by the Chief Justice, expressed the view that the institution of Court Martial, being an emanation of executive power, is not a court, tribunal or institution set up for the administration of justice which protect, vindicate, and enforce the rights of the people as described in Article 105 of the Constitution, and has no place in Chapter XV of the Constitution. However, Justice Marsoof held that **a Court Martial is a competent court within the meaning of the phrase in Article 13(4) of the Constitution**. **The term 'competent court' includes not only a regular court, but even an 'extraordinary court' such as a Court Martial**. In the circumstances, Justice Marsoof held that the words 'any court' in Article 89(d) should be construed in a manner so as to include all courts which are created and established or otherwise recognized by the Constitution as being competent to impose punishments envisaged in that Article, including a Court Martial.

For the purpose of determining this Appeal, what is pertinent to note is that both views of the Supreme Court recognize the fact that a Court Martial is a 'court' and is thus required by law to act 'judicially', in the hearing of cases and in the imposition of punishments. This is notwithstanding the unresolved issue whether a Court Martial that is required to function 'judicially' and is empowered with 'judicial power' can be appointed by the Executive, which would in this instance include the President and the Commander of the Sri Lanka Navy. Be that as it may, Article 13(4) of the Constitution provides that, any person charged with the commission of an 'offence' shall be entitled to be heard, in person or by an attorney-at-law, at a ***'fair trial'*** by a competent court. It is thus seen that in addition to the common law requirement that a ***'fair hearing'*** should be given by a statutory authority (which would include a Court

Martial) conferred with power to arrive at a decision which has the potential of affecting the rights of a person, there is an additional duty conferred on a Court Martial in view of its standing as a 'Court', to afford a ***'fair trial'*** to the accused. In terms of Article 13(4) of the Constitution, the right to a *'fair trial'* is a fundamental right conferred on any person charged with the commission of an offence. Thus, an accused before a Court Martial such as the Appellant, should be able to enjoy the fundamental right to a *'fair trial'.* In my view, a ***'fair trial'*** is a process that is a refined and specialized form of a ***'fair hearing'***. A *'fair trial'* is the standard which a court of law is required to adhere to. Thus, in my view, a Court Martial is constitutionally required to adhere to **a higher standard of fairness** than a normal statutory body which is empowered to take a decision that has a bearing on the rights of a person. It must be observed that a Court Martial is no ordinary statutory body or tribunal. It is required to adhere to the standards of *fairness* required from a Court of law. That higher standard of fairness is an additional factor which imposes a duty on a Court Martial to give reasons for its finding, as in the case of a Court of law being required to give reasons for its verdict. Such reasons for the verdict form a major portion of the 'judgment' of a Court of law that has exercised criminal jurisdiction.

Thus, I am compelled to point out that the reliance by the Court of Appeal in the impugned judgment on ***G.S.C. Fonseka v. Lt. Gen. J. Jayasuriya and five others***, is not defensible in the eyes of the law.

Courts of law and Courts Martial

Though in the afore-stated Determination of the Supreme Court, a Court Martial has been recognized to be a 'Court of law' for the purposes of Article 89(d) of the Constitution, there are significant differences between a 'Court of law' and a 'Court Martial'. As regards a trial before a Court Martial established in terms of the Navy Act is concerned, the principal differences between the two become significant when consideration is given to the following features pertaining to a Court Martial:

(i) When there is information that an offence recognized by the Navy Act has been committed by a person who is subject to naval law, the Commander of the Navy is empowered to direct the initiation of an investigative process, referred to as the

holding of a 'Board of Inquiry' and is empowered to appoint members to that Board. [Regulations 2 and 4, Navy (Board of Inquiry) Regulations, 1975]

(ii) Following the conduct of the investigative process by the Board of Inquiry, the Commander of the Navy may use the information gathered by the Board of Inquiry to determine whether the alleged offender should be subjected to a Court Martial. [Regulation 5, Navy (Board of Inquiry) Regulations] Thus, it can be said that the Commander of the Navy is empowered to decide on the institution of Court Martial proceedings against the alleged offender.

(iii) Thereafter, the Commander of the Navy is empowered to issue a 'charge sheet' against the alleged offender and thereby institute proceedings against the alleged offender. [Document marked "P13" in the Court of Appeal which is the 'charge sheet' issued to the Appellant containing offences alleged to have been committed by him, reveals that.]

(iv) Unlike a Court of law, a Court Martial lacks permanency, in that it is convened on a case-by-case basis. Thus, it may be termed as an 'ad-hoc tribunal' as opposed to a 'standing or permanent court'.

(v) A Court Martial is convened based on an order by the President of the Republic who is also the Commander-in-Chief of the Armed Forces or by an officer not below the rank of Captain authorized in that regard by the President of the Republic. [section 34(1), Navy Act] (Section 34 provides two exceptions to this, wherein due to exigencies of the situation, certain other Navy officers have been empowered to constitute a Court Martial.) Thus, a Court Martial is constituted at the discretion of the President or an officer of the Navy authorized by the President.

(vi) Members of a Court Martial are necessarily officers of the Navy, Army or the Air Force and appointed by the same authority who has ordered the convening of such Court Martial [section 35, Navy Act] or in certain situations by the President of the Court Martial. (The President of a Court Martial is also appointed by the President or other officer who convened the Court Martial.) Thus, the appointment of members of a Court Martial is case specific.

(vii) Neither the President of the Court Martial nor other members of a Court Martial are 'judicial officers'. Their primary function is not to hear cases, they do not receive any

judicial training in judicial adjudication of disputes, and are not required to adhere to judicial ethics. Thus, they cannot be categorized as professional judges. It is apt to refer to them as 'military professionals', who are called upon on a case-by-case basis to administer 'military justice'.

(viii) The Judge Advocate who plays a pivotal role in the functioning of a Court Martial, is also appointed by the President of the Republic or by such officer who convened the particular Court Martial. [section 38, Navy Act] Thus, the post of Judge Advocate is also case specific.

(ix) As pointed out above, the Judge Advocate's role in Court Martial proceedings is 'advisory' in nature. [section 39, Navy Act] Even on questions of law, he cannot 'direct' members of the Court Martial regarding the manner in which the relevant question should be determined.

(x) A Court Martial is both a 'disciplinary body' as well as a 'tribunal' vested with jurisdiction and powers akin to a Court of law vested with criminal jurisdiction.

(xi) The President of the Republic is entitled to revise a punishment imposed by a Court Martial. [section 122, Navy Act]

It would thus be seen that the investigation into an offence, institution of criminal proceedings, convening of the Court Martial and its composition, and the appointment of the Judge-Advocate is vested in the Executive branch of the State (primarily the President of the Republic, Commander of the Navy and by officers subordinate to the Commander). It is seen that the entire military justice system provided for in the Navy Act is centered on the Executive. Whereas, the functioning of a Court of law exercising criminal jurisdiction and hearing of cases by such Court happens within a wholly different legal framework, wherein there are structural and efficacious arrangements to guarantee independence and professionalism in the administration of criminal justice. Delivery of criminal justice does not occur at the discretion of the Executive. In view of the afore-stated features pertaining to proceedings of a Court Martial, it is my view that a Court Martial can in no way be recognized as an independent, impartial and neutral judicial tribunal, notwithstanding it being conferred with the exercise of functions which are akin to judicial functions and possessing the power to impose severe penal punishments.

It is necessary to appreciate that senior military officers, unlike civilian judges, would be well-placed to appreciate incidents which occur in a military setting and would be ideally suited to arrive at qualitative value judgments on military matters. However, the competency of members of a Court Martial to appreciate complex questions of law such as satisfaction of ingredients of an offence, and other important matters such as the assessment of credibility and testimonial trustworthiness of witnesses, which are issues that would invariably arise in the course of a trial before a Court Martial, can give rise to well-founded concerns.

Thus, a Court Martial can in my view be categorized as an ***'extraordinary judicialized military tribunal possessing a fusion of disciplinary and criminal adjudicatory jurisdiction'.*** A Court Martial lacks certain fundamental and key features of a Court of law. Whether the system of military justice administered by Courts Martial is in conformity with constitutionally recognized norms pertaining to administration of justice, can be called into question in many respects. Whether in view of the prevailing law relating to the composition and conduct of Court Martial proceedings, an accused before such tribunals can reasonably be expected to enjoy the fundamental right to a *fair trial* is an important question of law, which may have to be determined in the future. It is not necessary for me to express a view on that matter in this judgment. It is possible that the system of Courts Martial as contained in the Navy Act continues to survive in the contemporary era, purely due to Article 16 of the Constitution, which provides that, all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the fundamental rights guaranteed by Chapter III of the Constitution, and as the Navy Act had been enacted and brought into operation prior to the promulgation of the 1978 Constitution.

In concluding this part of my judgment, I need to touch on one more point. It may be argued that the law and procedure relating to the functioning of Courts Martial in Sri Lanka are similar to that of the United Kingdom, and as Courts Martial in the United Kingdom are not required by either statute or common law to give reasons for their verdicts, in Sri Lanka too, Courts Martials need not give reasons for their verdicts. I would with the greatest respect to those who may wish to advance that proposition, state that I disagree with that view. That is due to the following reasons. The Armed Forces Acts of 2006, 2011, 2016 of the UK, augmented by the Armed

Forces Act of 2021 (which are quinquennial Acts of Parliament of the UK) have greatly enhanced the integrity of the military justice system in the United Kingdom. It is now a system of justice integrated into the core system of Administration of Justice of the United Kingdom. So much so, that the Lord Chief Justice of England and Wales now devotes a chapter of his Annual Report to the Service Justice System (as the military justice system is now called). In view of procedural changes introduced to the Court Martial system by the aforementioned laws and the inbuilt safeguards to ensure that the accused has a right to a fair trial, it can now be safely said that the Court Martial proceedings in the United Kingdom are parallel to jury trials conducted by conventional courts (the Crown Court) exercising criminal jurisdiction of that country, and therefore, the necessity of insisting on a Court Martial to give reasons for its decisions is possibly not necessary. Regrettably though, that cannot be said about the military justice system of Sri Lanka. Some of the key features of the contemporary service justice system of the United Kingdom which contrasts itself from Sri Lanka's military justice system are as follows:

(i) Courts Martial in the United Kingdom are standing permanent courts.

(ii) Members of the Court Martial (Board) who invariably are military personnel are not directly appointed by the respective Commander of the relevant armed force. Nor are they appointed by the relevant Commander at his discretion to hear a particular case.

(iii) Judge Advocates (who come under the Judge Advocate General) are members of the independent judiciary, and are appointed on merit by the independent Judicial Appointments Commission. The Judge Advocate General is appointed by His Majesty the King on the recommendation of the Lord Chancellor. They are not appointed on a case by case basis by the respective Commander.

(iv) During the early stages of trial proceedings before a Court Martial, the Judge Advocate gives on record in open court, a specific direction to members of the Court Martial (the 'Board') referred to as the *'morris direction'.* This direction is aimed at ensuring that members of the Board understand their duties in respect of the trial. These directions are styled to ensure that members of the Board act in an independent manner and need not be influenced by their chain of command directives from senior military officers.

(v) The proceedings of Court Martial are open to the public unless specifically an order is made for proceedings to be held *in camera* for certain limited reasons.

(vi) The directions and rulings which the Judge Advocate may give the Board (members of the Court Martial) on questions of law, procedure and practice are binding on the court.

(vii) The summing up by the Judge Advocate cannot be dispensed with.

(viii) At the end of proceedings, if the Judge Advocate is satisfied that the findings announced by members of the Court Martial are acceptable in law, the Judge Advocate and the President of the Board shall sign a record of the findings. If the Judge Advocate is not satisfied, he shall direct the members of the Board to withdraw and reconsider their findings.

(ix) A person convicted and sentenced by a Court Martial may with the leave of Court appeal to the Court Martial Appeal Court against both the conviction and the sentence. The Court Martial Appeal Court comprises of regular judges of the Court of Appeal.

[While some of these features are found in provisions of the 2006, 2011, 2016 and 2021 Acts, others are found in the Armed Forces (Court Martial) Rules 2009 promulgated by the Secretary of State under the Armed Forces Act of 2006.]

It would be seen that these features provide systemic and procedural safeguards to ensure a fair trial to accused and the delivery of justice. These features are also aimed at ensuring the independence of members of the Court Martial, in that, they are protected from possible influences that may otherwise come their way from the military hierarchy. Further, these features guarantee procedural fairness, integrity of the system of service (military) justice. The Judge Advocate as a person and through his role in a Court Martial, is required to perform judicial functions. There exists a guarantee of professionalism and high integrity in the role and functions of the Judge Advocate. These features also confer on Court Martial a parity of status with jury trials conducted in Crown Courts of the United Kingdom. Regrettably though, none of these features are found in the military justice system of Sri Lanka. Therefore, a comparison between the service justice system of the United Kingdom and the military justice system of Sri Lanka, is

not possible. In the circumstances, I am inclined to hold that in view of the vast differences between the two systems, it is not logical to conclude that because the statutory and English common law do not require a Court Martial to give reasons for its verdict, the same principle should apply to a Court Martial of Sri Lanka governed by the respective Acts, and hence there is no legal duty to give reasons for the verdict. No comparison can be made between the military justice system of Sri Lanka and the service justice system of the United Kingdom.

From the perspectives of compatibility with norms of justice and public policy, and in conformity with human rights, findings (verdicts) of Courts Martial in Sri Lanka should necessarily be viewed with a degree of circumspect. Under such circumstances, the availability of 'reasons' for the finding of a Court Martial, is perhaps the most important source by which a Court of law exercising the function of judicial review could determine whether an accused who has been convicted of committing an offence had received a *fair trial,* and whether the finding (verdict) of the Court Martial had been arrived at independently, impartially, neutrally, necessarily in accordance with the merits of the case, founded upon a correct appreciation and application of the law, and is reasonable. In the circumstances, for the purpose of ensuring justice, fairness and transparency, and the protection of fundamental rights, it is necessary that a legal duty be cast on a Court Martial to declare reasons for its findings (verdict). Perhaps, requiring a Court Martial to give reasons for the verdict, is possibly the only effective guarantee of a *fair trial* to accused who are arraigned before a Court Martial and to ensure that justice is duly administered.

Section 43 of the Navy Act and Article 15(8) of the Constitution

The next issue that requires consideration is whether the legal duty imposed on members of a Court Martial by section 43 of the Navy Act to (following the conclusion of recording evidence, submissions of counsel for the prosecution and the defence and the summing up by the Judge Advocate), cast their vote and thereby indicate their individual finding, tantamount to a restriction imposed in terms of Article 15(8) of the Constitution, which restricts an accused before a Court Martial from receiving reasons for the finding arrived at by the Court Martial. This issue arises out of an indirect admission by learned Senior State Counsel that an accused before a Court Martial would in view of his Fundamental Rights to equality and equal protection

of the law recognized by Article 12(1) of the Constitution have the right to know the reasons for the finding of the Court Martial, if not for the provisions of section 43 of the Navy Act. Learned Senior State Counsel submitted that the imposition of a restriction of that nature is permissible in terms of Article 15(8) of the Constitution.

Article 15(8) of the Constitution provides the following restriction on the enjoyment of certain Fundamental Rights recognized by Chapter III of the Constitution.

> *"The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions* ***as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them****."* [Emphasis added]

Dr. Jayampathy Wickramaratne, **PC** in ***Fundamental Rights in Sri Lanka*** (2021, 3rd Edition, p. 159) has stated the following:

> *"A Constitution that declares fundamental rights and freedoms lays down permissible restrictions in order to maintain a balance between individual rights and freedoms on the one hand and the interests of the society on the other. While the rights and freedoms represent the claims of the individual, the permissible restrictions represent the claims of society. Yet, as Bhat J stated in Sushila Aggarwal v State (NCT of India), it would be useful to remind oneself that the rights which the citizens cherish deeply are fundamental – it is not the restrictions that are fundamental."*

The submission made by learned Senior State Counsel necessitates this Court to consider whether section 43 of the Navy Act imposes a restriction in terms of Article 15(8) of the Constitution, disentitling an accused before a Court Martial from enjoying the right to know reasons for its finding (final decision).

It is seen that section 43 of the Navy Act imposes a requirement that every matter that requires a decision by a Court Martial including its finding (verdict) be determined by a vote. Implicit in the section is the norm that where there is a difference in the number of votes cast in favour and against a particular proposition, the decision of the majority would prevail. The section also provides for the ensuing situation where there is an equality of votes. Section 43 in my view does not directly or indirectly indicate that it serves as a restriction on a Fundamental Right (in this instance the Fundamental Right enshrined in Article 12(1) of the Constitution) in so far as persons to whom the Navy Act applies. This provision of the law does not prohibit the giving of reasons for the finding or provide a legal entitlement on members of a Court Martial to refrain from giving reasons for their finding. Section 43 provides a mechanism that must necessarily be adopted, as a Court Martial comprises of multiple members who are required to arrive at decisions both during and at the end of the trial proceedings. It is seen that, while adhering to the requirement contained in section 43 of the Navy Act, it is possible for members of the Court Martial to first cast their respective votes declaring their individual decision on whether the accused is *'guilty'* or not, and thereafter give reasons for their respective finding. Consequently, there is nothing stated in section 43 that would prevent either the unanimous views of the Court Martial or the divergent views of members of the Court Martial from being declared as reasons for the finding. Furthermore, if section 43 is to serve as a permissible restriction coming within the ambit of Article 15(8) of the Constitution, there should be an intimate, real and rational connection with the object of the restriction and what is sought to be protected by Article 15(8), namely 'the interests of the proper discharge of their (members of the Armed Forces) duties and the maintenance of discipline among them'. As to how the disclosure of reasons for the finding of the Court Martial in the instant case would have a detrimental impact on the proper discharge of the functions of members of the Armed Forces and the maintenance of discipline among them, is a matter that beats even my imagination. For these multiple reasons, I conclude that section 43 of the Navy Act does not serve as a constitutionally recognized and permissible restriction on the enjoyment of the right to equality and equal protection of the law, which would entitle the accused before a Court Martial to receive reasons for the finding (verdict).

Reasons for the finding of the Court Martial not revealed to the Court of Appeal

Learned Senior State Counsel took pains to attempt justifying the conviction of the Appellant by the Court Martial. Based on his interpretation of the evidence placed before the Court Martial, he advanced reasons, which in his view supported the Appellant having been convicted by the Court Martial. However, the purported reasons were not revealed by the Court Martial to the Appellant at the stage the finding was announced. Nor have reasons for the finding been recorded in the official record of the proceedings of the Court Martial. Furthermore, reasons for the finding were not revealed to the Court of Appeal by the 2nd to 4th Respondents, who were members of the Court Martial.

Further, as quoted by me previously, in ***Kusumawathie and Others v. Aitken Spence and Company Limited and Another****, [(1996) 2 Sri L.R. 18]*, Justice Sarath N. Silva has held that, if a decision that is challenged is not a 'speaking order' carrying its reasons on its face (as in the finding of the Court Martial), when Notice is issued by a Court exercising judicial review, reasons to support the decision have to be disclosed to Court with notice to the Petitioner.

Learned Senior State Counsel did not explain as to why even the Court of Appeal was not apprised of reasons for the verdict pronounced by the Court Martial. Therefore, in the circumstances of this Appeal, it is not possible to consider whether the conviction of the Appellant by the Court Martial is justifiable or not. Further, the absence of providing reasons for the verdict to the Court of Appeal, is another factor which vitiates the finding of the Court Martial.

Need for reasons for the finding of the Court Martial due to the evidence

Quite independent of the legal duty cast on a Court Martial by the common law to give reasons for its finding (verdict), in this case, the following analysis of the evidence presented by the prosecution and the defence, would also in my opinion warrant reasons for the finding of guilt to have been given. In the circumstances, the absence of reasons would indicate the unreasonableness and arbitrary character of the finding.

1st Count

As regards the 1st count in the charge sheet, which contained an allegation that the Appellant had committed an offence under section 60(2) of the Navy Act, the key ingredient the prosecution was required to prove beyond reasonable doubt was that during the period relevant to that count, the Appellant had, *'without the approval from the competent authority, remained out of his tactical area of responsibility'*, and that such conduct amounted to *'improperly leaving the place of duty'*. That is the applicable prohibition contained in the afore-stated section. It is common ground that for this purpose, the 'competent authority' was the Area Commander of the North Central Naval Area, Rear Admiral Illangakoon. His testimony was that he did not give authorization to the Appellant to stay at *SLNS Gajaba* at night-time instead of staying at the Vanlakai naval detachment. The position of the Appellant was that the Area Commander had given him authorization, as an interim measure (until suitable accommodation for him was arranged at the Vankalai naval deployment), to remain overnight at *SLNS Gajaba.* In the circumstances, to find the Appellant *'guilty'* of the first count, the Court Martial should have, as pointed out by the Judge-Advocate (a) fully believed and accepted the testimony given by Rear Admiral Illangakoon, and (b) rejected the testimony of the Appellant, Lt. Commander Dissanayake and all the defence witnesses. The question arises on what basis the Court Martial decided to do so, particularly in view of the testimony given by the prosecution's own witness Commanding Officer Vankalai - Lt. Commander Dissanayake, whose evidence in this regard cut-across the testimony of Rear Admiral Illangakoon and fully supported the evidence of the Appellant. The impact of Lt. Commander Dissanayake's evidence must be viewed in the backdrop of the prosecution not having treated him as an 'adverse witness'. Had the prosecution done so, it would have been possible for the prosecution to have discredited him and invited the Court Martial to disbelieve his testimony. Furthermore, it is seen that the testimony given by Lt. Commander Ranaweera also serves to corroborate the evidence of both the Appellant and that of Lt. Commander Dissanayake. In the circumstances, only the Court Martial would have known the reasons based upon which it decided to fully accept the testimony of one prosecution witness - Rear Admiral Illangakoon, while not accepting the testimony of another prosecution witness - Lt. Commander Dissanayake. Furthermore, even if the evidence of Rear Admiral Illangakoon is fully believed while rejecting the testimonies of all other witnesses, the question remains as to the reasons based upon which the Court Martial decided that in the circumstances of this case,

the conduct of the Appellant which was impugned by the prosecution, amounted to an offence in terms of section 60(2) of the Navy Act, in that the Appellant's conduct amounted to improperly leaving the place of duty.

2nd Count

As regards the 2nd count in the charge sheet, the key factual ingredient which the prosecution was required to prove beyond reasonable doubt was that on the night of the LTTE aerial attack, the Appellant *'did not proceed to his tactical area of responsibility being Vankalai and Nanaddan'*, and thereby failed to *'provide leadership to men under his command',* an offence in terms of section 104(1) of the Navy Act. That in fact, pursuant to getting to know that the LTTE had launched an aerial attack, the Appellant who was at *SLNS Gajaba* did not rush to the Vankalai naval detachment, is not denied by the Appellant. His position is that he initially attempted to rush to the Vankalai naval detachment from *SLNS Gajaba.* However, having ascertained the position that prevailed at Vankalai and Nanaddan from the Commanding Officer Vanlakai - Lt. Commander Dissanayake and having satisfied himself that the situation there was 'under control' and that all necessary measures were in place in Vankalai to counter a possible further LTTE aerial attack, in view of the situation which prevailed at *SLNS Gajaba,* he took a considered decision not to leave *SLNS Gajaba,* to take charge of its operations room and to provide leadership to the naval personnel at that camp. This was due to the fact that the acting officer-in-charge of the camp on that occasion - Lt. Commander T.N.S. Perera was not a combat-experienced naval officer and was only a 'logistics officer'. The Appellant thus felt that his presence at *SLNS Gajaba* was necessary and in the best interests of the Navy and national security. As pointed out by the Judge Advocate, even the prosecution had conceded that the accused had taken all necessary measures and given necessary instructions from *SLNS Gajaba.* Thus, whether in the circumstances, the conduct of the Appellant amounted to causing *'prejudice to the good order and naval discipline'* which is the 'resultant ingredient' of the offence contained in section 104(1) of the Navy Act, is the matter in respect of which the Court Martial had to take a decision on. As the Court Martial decided to find the Appellant *'guilty'* of the second count as well, it is evident that it had answered this question in the affirmative. Thus, the ensuing question which looms large, is the basis on which the Court Martial decided to find the Appellant *'guilty'* in respect of count 2, given the fact that he had taken a considered decision to

remain at *SLNS Gajaba*, a decision which the prosecution does not necessarily impugn, and his having taken all such measures which he claims were in the best interests of the Navy and national security.

In my view, the afore-stated analysis exemplifies the need for the Court Martial to have given reasons for its finding (verdict). The absence of such reasons gives rise to an irrefutable inference that the finding of the Court Martial is unreasonable and arbitrary or to say the least, begs of justification.

Position of the law pertaining to the duty to give reasons for the finding and the punishment imposed by a Court Martial

Since the dawn of the new millennium and the 21st century, it appears that Courts in the common law world have refrained from holding that 'there is no general rule that statutory bodies have a legal duty to give reasons for their decisions'. Judgments of superior Courts and views of academicians and respected authors which I have considered earlier in this judgment, reflect a general and overall, well founded progressive trend towards the imposition of a legal duty on statutory authorities who are empowered to take decisions which have a bearing on the rights of persons, to give reasons for their decisions. This change in judicial policy which is founded upon the underlying evolving policies of public law, appear to be due to the keenness on the part of Court to ensure objectivity, fairness, reasonableness, transparency and accountability in decision-making by public and statutory bodies, including administrative bodies, tribunals and Courts of law. The overwhelming merits in imposing a legal duty on such bodies to give reasons for their decisions, amply justify this shift in the policy of Public and Administrative Law and in judicial policy.

The imposition of a legal duty to give reasons for decisions, is not only desirable, but necessary. The duty to give reasons arises out of the overarching duty on statutory bodies to give a *fair hearing*, which is regulated primarily by ensuring compliance with the *principles of natural justice*. The first two pillars being *'audi alteram partem'* and *'nemo judex in causa sua'*, there is considerable merit in the proposition that the duty to give reasons is the third pillar of the doctrine of natural justice. The imposition of a legal duty to give reasons is the most efficacious

way of determining whether a *fair hearing* had in fact been given in accordance with the *principles of natural justice.* That is the fundamental basis for holding that, subject to certain justifiable exceptions, there exists a legal duty on statutory bodies to give reasons for their decisions which have a bearing on the rights of persons.

Thus, particularly in view of more recent judgments reflecting the present position of the law in this regard in the common law world, there is a compelling need to reformulate the principle pertaining to the duty to give reasons for decisions, in the following terms:

> ***Unless specifically precluded or exempted by statutory provision, or the duty to give reasons has been impliedly yet unambiguously negatived, a statutorily created body empowered by law to take a decision which may have a bearing on the rights of a person, is required by law, to, following the applicable procedure provided by law, declare and forthwith record reasons for its decision. Provided however, a statutory body may be excused from the fulfilment of such legal duty, if the duty to disclose reasons for the decision has been dispensed with by the party affected by such decision, or there existed a legally justifiable reason for having in the circumstances of the situation, refrained from giving reasons for the decision. In such event, the grounds for not revealing reasons for the decision shall be declared and recorded along with the decision.***

Exceptions to this generic legal duty, in most instances have been specifically laid down in statutes, or is to be necessarily inferred from the nature and the structure of the applicable written law, and the attendant circumstances.

In view of the foregoing detailed consideration of the law, I hold that **a Court Martial is required by the common law to give reasons for its decisions, including reasons for the finding of guilt or otherwise of the accused and the punishment imposed**.

An accused before a Court Martial, is entitled to the Fundamental Right to the equal protection of the law, as recognized by Article 12(1) of the Constitution, the concomitants of which are

equality, rule of law, equal protection of the law including non-discrimination. The right to equality imposes an additional duty on the statutory bodies to give reasons for their decisions. Furthermore, an accused before a Court Martial has in terms of Article 13(4) of the Constitution, the right to a *fair trial.* The legal duty cast on a Court Martial to afford a *fair trial* to an accused, imposes a higher threshold for the maintenance of fairness. In this regard, it is important to note that, a consideration of the reasons for the finding (verdict) and the sentence is a significant way of determining whether an accused before a Court Martial had in fact received a *fair trial.* This is an additional factor which necessitates the imposition of a legal duty on a Court Martial to declare reasons for the finding (verdict). Thus, an accused before a Court Martial has in addition to the public and administrative law entitlement of receiving the reasons for the finding, a Fundamental Right to that effect as well.

The position of the law as regards a Court Martial convened in terms of the Navy Act, may be stated in the following terms:

> ***A Court Martial convened in terms of the Navy Act is required by law to give reasons for its finding (verdict) and the order of punishment (sentence) it imposes on a convicted accused. Such reasons shall be forthwith announced to the accused and contemporaneously recorded. This legal duty cast on a Court Martial by the common law, may be negatived by explicit or implied statutory provision. However, the Navy Act does not contain any such provision which negatives the common law duty cast on a Court Martial.***

In view of the evidence led before the Court Martial in the instant case, the absence of reasons for the finding (verdict) gives rise to the irrefutable inference that the finding of the Court Martial is both unreasonable and arbitrary. That the members of the Court Martial opted not to provide reasons for their finding even to the Court of Appeal, strengthens that inference.

While it is not possible to provide a generic description of the nature, extent and degree of details to be included in the 'reasons for the decision', it would suffice to say that, reasons for a decision are the factors that gave rise to the decision. Reasons being declared should be accurate,

sufficient in detail and embedded with clarity, enabling the applicable legal framework, factual basis and rationale for the decision to be understood correctly by a discerning and objective-minded reader.

In the backdrop of the existence of a legal duty to give reasons for the finding (verdict) and for the determination of punishment (sentence), the absence of such reasons renders the finding of guilt and the sentence imposed by the Court Martial to be declared unlawful, and thus void.

Conclusions reached by me in respect of the 2nd question of law

In view of my findings regarding the position of the law with regard to the existence of a legal duty on a Court Martial to give reasons for its finding (verdict) and the orders of punishment (sentence), I hold that it was erroneous for the Court of Appeal to have held that there was no need in law for the Court Martial to have given reasons for its finding (verdict) and that the absence of such reasons does not render the verdict void. Thus, I hold that the finding of guilt pronounced by the Court Martial dated 13th May 2009 and the associated sentences pronounced on the same day, are, due to the absence of reasons therefor, ***ab initio void***.

3rd, 4th, 6th and 7th questions of law

The need to provide answers to the 3rd question of law – *"whether the Court of Appeal had erred in its failure to consider whether the Judge Advocate's directions did not justify the determination arrived at by the Court Martial?"*, 4th question of law – *"Whether the sentences imposed by the Court Martial on the Appellant is violative of section 104 of the Navy Act?"*, 6th question of law – *"Whether the verdict of the Court Martial is bad in law, in that there was no evidence placed before the Court Martial which could be used to substantiate the verdict of 'guilty'?"*, and the 7th question of law – *"Whether the sentences imposed by the Court Martial are bad in law, in that the said sentences are not in conformity with the principle of proportionality?"*, arises in my view for consideration, only if the 2nd question of law was answered in favour of the Respondents. The 3rd, 4th, and 6th questions of law are premised upon the questioning of the legality of the finding (verdict) of the Court Martial, independent of the ground that a legal duty exists on a Court Martial to give reasons for its finding, which the Court Martial had in this instance violated. As I have already held that the non-disclosure of reasons for

the findings of the Court Martial renders such findings void on that ground alone, it would not be necessary for me to provide answers to these three questions of law. Further, the 7th question of law which relates to the sentences imposed by the Court Martial, arises for consideration only if I had held that the finding of guilt pronounced by the Court Martial was lawful. As the conviction of the Appellant has been held by me to have been unlawful and therefore void, the need to consider the legality and the appropriateness of the sentences passed on the Appellant does not arise. Therefore, this judgment will not contain my views regarding the afore-stated four questions of law.

(v) Can this Court grant the Petitioner any relief in view of section 122 of the Navy Act read with section 10 of the Navy Act, as the Petitioner's (sic) decommissioning has been approved by His Excellency the President?

As observed previously, on 13th May 2009 the Appellant was found *'guilty'* by the Court Martial and on the same day, sentenced. ("P17a" and "P17b") By letter dated 14th May 2009, the Appellant presented an Application to His Excellency the President seeking revision of the sentences imposed on him. That was in terms of section 122 of the Navy Act. ("P18") Consequently, the implementation of the sentences imposed on him by the Court Martial had been stayed, pending a determination of the Application presented by the Appellant to His Excellency the President. ("P19") It appears from documents "R6" and "R8", that His Excellency the President had on a date between 9th June and 14th July 2009, decided not to grant any relief to the Appellant and thereby had ratified the sentences pronounced by the Court Martial, backed by the observations presented by the 1st Respondent. It is the position of the Respondents that, in view of the foregoing, the punishment awarded by the Court Martial was executed on 16th August 2009, by issuing a 'dismissal' signal (announcement). ("R 7") This has resulted in the Appellant's tenure at the Navy coming to an end.

It is to be noted that, having on 14th May 2009 submitted the afore-stated Application to His Excellency the President seeking a revision of the sentences, on 25th June 2009, the Appellant filed an Application in the Court of Appeal invoking the writ jurisdiction of that Court in terms of Article 140 of the Constitution, seeking *inter alia* mandates in the nature of writs of certiorari

quashing the finding (verdict) and the sentences imposed on him by the Court Martial. On 4th August 2009 the Court of Appeal had issued Notice on the Respondents. Following the hearing of the Application, on 30th July 2015, the Court of Appeal pronounced its judgment dismissing the Application, which was impugned in this Appeal.

It is thus seen that the punishment imposed by the Court Martial was executed by promulgating a 'dismissal' signal on 16th August 2009, while proceedings were pending in the Court of Appeal. That 'dismissal' is directly linked to His Excellency the President having decided not to revise the sentences imposed on the Appellant by the Court Martial. It can also be seen that His Excellency's decision arises directly out of the impugned finding of guilt by the Court Martial and the impugned sentences of 'severe reprimand' and 'dismissal without disgrace from the Navy' also imposed by the Court Martial, and for no other reason.

Section 10 of the Navy Act provides that *'every commissioned officer shall hold his appointment during the President's pleasure'.* The afore-stated question of law which had been proposed by learned Counsel for the Respondents has been founded upon a particular factual position, namely, that His Excellency the President has, acting in terms of section 10 of the Navy Act, withdrawn the commission of the Appellant resulting in the Appellant being decommissioned. However, no material has been placed either before the Court of Appeal or this Court in support of that factual position. Thus, it is not possible to consider this question of law on the footing that His Excellency the President has exercised discretion in terms of section 10 of the Navy Act and 'withdrawn' the commission of the Appellant. There is evidence of only His Excellency the President having acted in terms of section 122 of the Navy Act.

The view of the Court of Appeal in this regard, is to the following effect:

> *"Petitioner's application under section 122 was refused by His Excellency the President. Under section 10 of the Navy Act, he holds office at the pleasure of the President and his dismissal has been approved by His Excellency the President."*

It appears that the Court of Appeal had proceeded on the footing that the present status of the Appellant, of being 'dismissed' from the Sri Lanka Navy arises out of His Excellency the President having exercised power in terms of both sections 10 and 122 of the Navy Act. However, there is no material in support of that view. The 'dismissal' of the Appellant from the Sri Lanka Navy can be attributed to two developments. First, the conviction and sentence imposed by the Court Martial in respect of the second count on the charge sheet, viz. that the Appellant being dismissed from the Navy without disgrace, and secondly, His Excellency the President acting in terms of section 122 of the Navy Act and determining not to review that sentence. Thus, it would not be correct to view the present status of the Appellant from the perspective of the President having exercised power in terms of section 10 of the Navy Act.

Be that as it may, assuming for the purpose of determining the afore-stated question of law raised by learned Counsel for the Respondents, that His Excellency the President has made an order in terms of section 10 of the Navy Act, it is necessary to consider what effect the issue of a mandate in the nature of a writ of certiorari quashing the findings of the Court Martial would have on such order made by the President.

Section 10 of the Navy Act by no means empower His Excellency the President to exercise power in the nature of a *carte blanche.* I recognize that His Excellency the President being the Commander-in-Chief of the Armed Forces and the Head of State of the Democratic Socialist Republic of Sri Lanka, has in terms of section 10 of the Navy Act, been vested with a considerable degree of discretionary authority to determine the tenure of service of commissioned officers of the Sri Lanka Navy. Our Courts would not easily interfere with the exercise of that power by the Head of State. However, the *'pleasure principle'* which the learned Senior State Counsel submitted is embedded in section 10 of the Navy Act, has to be viewed from the perspective of doctrines relating to the exercise of Constitutional and statutory powers as recognized by the Constitution itself and by Public Law. *'Unfettered and unreviewable absolute discretion'* finds no place in the present era of *Constitutionalism* and the *rule of law* on which the sovereignty of the people of the Democratic Socialist Republic of Sri Lanka has been founded. The *cursus curiae* of this Court, clearly prescribes that the application of the 'pleasure principle' is circumscribed by the Constitution, which includes the Fundamental Rights

recognized by the Constitution. Subject to restrictions that may be prescribed by law in terms of Article 15(8) of the Constitution, Article 12 of the Constitution which guarantees equal protection of the law including equality and non-discrimination, would demand that the exercise of power by the President in terms of section 10 of the Navy Act be in accordance with the rule of law, be reasonable, and not be arbitrary. These same principles of law would apply to situations where His Excellency the President has exercised power of revision of sentence in terms of section 122 of the Navy Act.

As explained earlier, when His Excellency the President acting in terms of section 122 of the Navy Act decided not to review the sentences imposed on the Appellant by the Court Martial, he had acted based on material placed before him. Such material included the proceedings of the Court Martial, the finding of guilt, the orders of sentence, and the observations of the 1st Respondent. It is thus evident that the 'basis' which prompted His Excellency to decide not to grant any relief to the Appellant were the afore-stated material, which included the impugned decision of the Court Martial. I have already held that the said decisions of the Court Martial are bad in law, and hence void, *ab initio*. Nothing flows out of a void decision. Thus, the orders of the Court Martial considered by His Excellency are not cognizable in the eyes of the law. Similarly, there is no foundation recognizable in the eyes of the law for the observations of the 1st Respondent submitted to His Excellency the President, as such observations have also been founded upon primarily the impugned findings of the Court Martial. It is thus seen that in the circumstances of this matter, the material considered by His Excellency the President has no legal validity. Thus, no legal consequences would flow from the afore-stated decision of His Excellency the President not to revise the sentences imposed on the Appellant by the Court Martial.

In view of the foregoing, I hold that the ensuing **'dismissal' of the Appellant from the Sri Lanka Navy has no effect in law**.

Would the issuance of the writ be futile?

The common law recognizes multiple grounds on which the refusal to issue the writ would be justified under certain circumstances. **Futility** in issuing the writ is one such ground. Court will

not issue the writ in favour of a petitioner, if it is evident that the issuance of the writ would be futile, as the writ issued by Court would remain only as an order of Court, and would not yield any relief to the party who sought the writ. **Dr. Sunil Coorey** in **Principles of Administrative Law in Sri Lanka** (4th Edition, Volume 2, page 1172) has lucidly captured this principle in the following manner:

> *"Certiorari will not be issued to quash a particular exercise of power* ***if it be futile to do so*** *because* ***it is no more operational or it has had its effect****. However,* ***if there be any practical benefit*** *(in the form of a clarification of the legal position) for the future, either to the Petitioner or to the public at large, by quashing an exercise of power which is no more operational or has had its effect, certiorari will nevertheless issue to quash such exercise of power."* [Emphasis added]

As pointed out by learned Senior State Counsel for the Respondents, in ***Siddeek v. Jacolyn Seneviratne and three others****, [(1984) 1 Sri L.R. 83],* it has been held that Court will not issue a writ of certiorari where the end result will be futility, frustration, injustice and illegality.

In this matter, as to whether the issuance of a writ of certiorari would be futile, has to be considered in view of (a) the Appellant having been 'dismissed' from the Sri Lanka Navy, and (b) the Appellant having by now passed the age of retirement. (By Motion dated 19th February 2020, Attorney-at-Law for the Appellant has notified this Court that the Appellant would be reaching his retirement age on 17th August 2020.)

In this regard, it is important to note that if the consequences arising out of an impugned order is continuing to flow, it would not be futile to quash the impugned order. The issuance of the writ would thereby terminate the continuation of the flow of consequences which are detrimental to the interests of the person affected by the impugned order.

Indeed, it would now be too late to reverse the direct impact which has arisen out of the finding (verdict) and the sentences pronounced by the Court Martial, as consequent to the said orders, the sentences have been executed and the Appellant has been dismissed from the Navy. His situation has got compounded as he has by now passed the retirement age. However, the

quashing of the finding of the Court Martial and the related orders of punishment would not be completely futile and hence this Court will not be acting in vain, as the issuance of writ quashing the finding of guilt and the orders of sentence pronounced by the Court Martial would serve the interests of the Appellant, as, (i) it would erase the blemish ensuing from the said orders of the Court Martial, and would accordingly restore the image and professional reputation of the Appellant, and (ii) it would entitle him to terminal and other benefits which in terms of the applicable laws and regulations, the Appellant would have been entitled to receive, had he not been convicted and sentenced by a Court Martial and dismissed from the Sri Lanka Navy. It is also possible that during the time period commencing from the date of the finding (verdict) and sentences pronounced by the Court Martial and the date of retirement, he would have become entitled to a promotion in rank, which he was deprived of, due to his dismissal from the Navy. Thus, quashing of the impugned finding (verdict) and sentences imposed by the Court Martial may entitle him to be considered for such a promotion with retrospective effect. Thus, it is my view that the issuance of a mandate in the nature of a writ of certiorari would not in the circumstances of this case, be futile, and will not be a useless formality.

Conclusion reached by me in respect of the 5th question of law

As stated above, there is no evidence before this Court that His Excellency the President has exercised power in terms of section 10 of the Navy Act. In view of the foregoing analysis, I hold that, notwithstanding His Excellency the President having exercised power in terms of section 122 of the Navy Act and the Appellant having been dismissed from the Sri Lanka Navy, this Court can grant relief to the Appellant. In the circumstances of this case, the grant of a mandate in the nature of a writ of certiorari will not be futile.

Conclusion

In view of the answers to the 1st, 2nd and 5th questions of law, I am of the view that this Appeal should be allowed and the impugned judgment of the Court of Appeal dated 30th July 2015 should be set-aside.

In view of the foregoing, I hold that mandates in the nature of writs of certiorari quashing the findings of guilt imposed by the Court Martial dated 13th May 2009 and the associated sentencing orders imposed on the Appellant should be issued by this Court.

Thus, it is my view that the incumbent Commander of the Sri Lanka Navy should be directed by this Court to cause the erasure of the afore-stated decisions of the Court Martial which in my opinion should be quashed, and to treat the Appellant in a manner as if he had not been convicted and sentenced by the Court Martial. In the circumstances, it is my view that it should be deemed that the Appellant was never dismissed from the Sri Lanka Navy. Therefore, it is my further view that the Appellant should be entitled to terminal benefits or other employment-related emoluments, he should have been entitled to receive had he not been convicted by the Court Martial and dismissed by the Sri Lanka Navy.

I wish to record my deep appreciation to both learned President's Counsel for the Appellant and the learned Senior State Counsel for the Respondents, for their submissions and invaluable assistance to Court, which significantly contributed towards the formulation of this minority judgment.

Judge of the Supreme Court

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

Case No. SC Appeal No. 136/11

HC (Civil) 06/2006(3)

Stassen Exports Ltd.

No. 833, Sirimavo Bandaranaike Mawatha,

Colombo 14

Appellant-Petitioner- Plaintiff

-Vs-

1. Kithsiri Jayasinghe
   Registrar of patents & Trademark
   267, Union Place
   Colombo 02
2. M.S. Hebtulabhoy & Co Ltd.
   257,
   Grandpass Road
   Colombo 14

Respondent- Respondent- Defendant

And

Stassen Exports Ltd.

No. 833,

Sirimavo Bandaranaike Mawatha

Colombo 14

Appellant/Petitioner/ Plaintiff

Vs

1. Director General of Intellectual Property of Sri Lanka
   National Intellectual Property Office in Sri Lanka
   400, D.R. Wijewardene Mawatha
   Colombo 10.

1st Respondent-Respondent-Defendant

2. Suad Ahamed Mohamed Saleh Baeshan
3. Khalid Ahmed Abu Baker Abdullah Baeshan
4. Osama Ahmad Abu Baker Abdulla Baeshen
5. Sumaya Ahmad Abu Baker Abdullah Baeshen
6. Sahar Ahmad Abu Baker Abdullah Baeshen
7. Mohamed Abdul Kader Baeshen
8. Ahmed Abdul Kader Baeshen

All partners of Ahamed Saleh Baeshen and company, a limited liability Partnership, existing under the law of the Kingdom of Saudi Arabia of
P.O. Box 18
Al Dahab Street
Jeddha 21411
Saudi Arabia

Substituted 2 to 8- Respondents-Respondents-Defendants

AND NOW

Stassen Exports Ltd.

No. 833,

Sirimavo Bandaranaike Mawatha,

Colombo 14

Appellant-Petitioner-Plaintiff-Appellant

1.Director General of Intellectual Property

of Sri Lanka National Intellectual Property

Office in Sri Lanka

400, D. R. Wijewardene Mawatha

Colombo 10.

1ST Respondent-Respondent-Defendant-Respondent

2. Suad Ahamed Mohamed Saleh Baeshan
3. Khalid Ahmed Abu Baker Abdullah Baeshan
4. Osama Ahmad Abu Baker Abdulla Baeshen
5. Sumaya Ahmad Abu Baker Abdullah Baeshen
6. Sahar Ahmad Abu Baker Abdullah Baeshen
7. Mohamed Abdul Kader Baeshen
8. Ahmed Abdul Kader Baeshen

All partners of Ahamed Mohamed Saleh

Baeshen and Company, a limited liability
Partnership existing under the law of the
Kingdom of Saudi Arabia of
P.O. Box 18
Al Dahab Street,
Jeddah 21411,
Saudi Arabia.

Substituted-2 to 8- Respondents-Respondent-Defendants

Before: L. T. B. Dehideniya, J
P. Padman Surasena. J
E. A. G. R. Amarasekara, J

Counsel: Faiz Musthapha, PC for Appellant-Petitioner-Plaintiff- Appellant
Hiran de Alwis with C. Jayamaha and Ms. Medani Naroda for 2nd to 8th Substituted- Respondents-Respondents-Defendants- Respondents.
Ms. Viveka Siriwardena, D S G with Navodi de Zoysa, S C for 1st Respondent-Respondent-Defendant-Respondent.

Argued on: 22.07.2020

Decided on: 11.01.2023

E. A. G. R. Amarasekara, J

This appeal arises from the judgment of the Commercial High Court of Colombo, dated 10.06.2010. By the said judgment, the learned Commercial High Court Judge rejected the

application filed by the Appellant-Petitioner-Plaintiff-Appellant (hereinafter referred to as the Appellant or Petitioner) challenging the decision of the original 1st Respondent-Respondent-Defendant, the predecessor of the present 1st Respondent-Respondent-Defendant, namely the Registrar of Patent and Trademarks (hereinafter sometimes referred to as the Registrar) to register the trademarks bearing no. 47711, 47712, 47713, 47714, 47715, 47716, 47717 and 49305 in the name of the 2nd Respondent-Respondent-Defendant, M. S. Hebtulabhoy & Co. Ltd.(hereinafter referred to as the 2nd Respondent). Originally the action was filed in the District Court of Colombo on 01.03.1991 under and in terms of the Code of Intellectual Property Act No.52 of 1979 and was given the case No. 3263/Spl. Pending the determination in the District Court of Colombo, said Code of Intellectual Property Act was repealed and replaced by the Intellectual Property Act No.36 of 2003 and in terms of the provisions of the said Act, the action filed by the Appellant in the District Court was deemed to be instituted and continued under the said new Act and was transferred to the Commercial High Court of Colombo established under the High Court of the Provinces (Special Provisions) Act No.10 of 1996 and was assigned the No.06/2006(3). The learned High Court Judge delivered the impugned judgment after hearing the parties. The Appellant being aggrieved by the Judgment of the Commercial High Court, instituted a special leave to appeal application in this Court and leave was granted only on the following questions of law referred to in paragraph 17 a, b and d of the petition dated 20.07.2010.

"a) Did the Commercial High Court of Colombo err by failing to consider and/or appreciate that the Registrar of Patents and Trademarks had failed to provide a fair hearing to the Petitioner (Appellant) and had thereby violated the principles of natural justice?

b) Did the Commercial High Court of Colombo err by failing to consider and/or appreciate that the Registrar of patents and Trademarks had, even after the Petitioner (Appellant)

had brought it to his notice that he had failed to communicate the grant of extensions of time to file the Petitioner's (Appellant's) Notices of Opposition, wrongfully, arbitrarily, unfairly, and unreasonably refused to afford the Petitioner (Appellant) the due opportunity to its said Notices of Opposition?

d) Did the Commercial High Court of Colombo err by failing to appreciate that the Registrar of Patents and Trademarks had acted in contravention of the provisions contained in Subsections (10), (11) and (14) of Section 107 of the Code of Intellectual Property Act No. 52 of 1979, in not permitting the Petitioner (Appellant) extensions of time to file its Notices of Opposition, and had thereby abused the powers and discretion vested in him by law and/or contrary to the scope and ambit of the said provisions?"

It is pertinent to note that when the Appellant filed the original action in the District Court, it has named itself as the Appellant/Petitioner/Plaintiff and termed its application as Petition of appeal/Petition/Plaint. Further, in the caption it has invoked the jurisdiction of the court in terms of the provisions of the Code of Intellectual Property Act No.52 of 1979 without referring to any specific section or sections. This indicates that the Appellant was not definite about under which provision of the Code of Intellectual Property Act No.52 of 1979, it wanted to invoke the jurisdiction of the District Court and whether its application was an appeal, plaint or an application by way of a petition. The main allegation in the petition/plaint filed in the District Court appears to be based on the fact that the extension of time to file Notice of Opposition was not communicated to the Appellant by the Registrar and thus, the decision to register the said marks were taken without giving an opportunity to place its objections which amounts to breach of the rules of natural justice. Anyway, the said Petition/Plaint filed in the District Court cannot be considered as an application to declare the nullity of registration or for the removal of the mark in terms of section 130 and 132 of the said Code, since there is;

- No prayer for a declaration for nullity of registration and there is no specific or clear reference to section 99 or 100 or grounds mentioned in those sections to indicate that the registration was a nullity on those grounds,
- No allegation based on failure to use the registered marks or on transformation of the mark into generic name.

Further, one may question whether the petition filed before the District Court was an appeal filed in terms of section 182 of the said Code since the power given to the District Court in appeal was to have and exercise the same discretionary powers conferred upon the Registrar and as such, whether the District Court has powers to inquire into the conduct of the Registrar in extending the time given to file Notice of Opposition or communicating the dates as alleged in the petition/plaint in an appeal filed in terms of section 182 is arguable, since one cannot expect the Registrar himself has such discretionary powers to supervise his own conduct. However, as per the averments in paragraph 28 and the prayers of the petition/plaint filed in the District Court, it appears that the application falls under the scope of section 172 (2) of the said Code which gives the power to review any decision of the Registrar and rectify the register.

Whatever the nature of the application is, as per the questions of law allowed by this court, now the matter depends on whether the Registrar violated the rules of natural justice by not permitting a fair hearing by acting in contravention of the provisions contained in Subsections (10), (11) and (14) of Section 107 of the Code of Intellectual Property Act No. 52 of 1979, in not permitting the Appellant extensions of time to file its Notices of Opposition, and had thereby abused the powers and discretion vested in him by law and/or contrary to the scope and ambit of the said provisions or by failing to communicate the grant of extensions of time to file the Appellant's Notices of Opposition, wrongfully, arbitrarily, unfairly, and unreasonably refused to afford the Appellant the due opportunity to its said Notices of Opposition.

However, as per the paragraph 13 of the petition/plaint dated 1st march 1991, tendered to the District Court, the Appellant itself has admitted that there were minutes made giving extension of time but the allegation is that the Registrar failed to reply to its letters and communicate such extension of time to the Appellant. Even in the paragraph 6 of the petition of appeal dated 20.07.2010 tendered to this court, the Appellant has admitted that some of the files that were in the custody of the Registrar contained minutes to the effect that the said extensions were granted. The Appellant has further stated in the same paragraph that it was of the bona fide belief and conviction that the said extensions of time had been duly granted without revealing the time such belief or conviction occurred. If such belief or conviction occurred prior to the expiry of time requested, it should have filed the Notice of Opposition within that time. The allegation in the said paragraph also refers to the failure of the Registrar to communicate the extension of time to the Appellant. As per the affidavit dated 29.10.2008, filed by the present 1st Respondent-Respondent-Defendant (hereinafter referred to as the 1st Respondent) before the Commercial High Court, the 1st Respondent also admits that he granted extensions of time but denies that he has a statutory duty or responsibility to communicate such extensions of time to the Appellant- (vide paragraph 14 and 08 of the said Affidavit). The 3rd question of law [question of law in paragraph 17(d) of the Petition} allowed by this court is based on the premise that the extensions of time were not granted. As it appears that there is no dispute as to the granting of extensions of time now, the matter has to be decided on whether the registrar was duty-bound to communicate the extensions of time and if so, failure to do so had affected the rights of the Appellant denying him a fair hearing.

In this regard, it is important to examine some applicable provisions in the Code of Intellectual Property Act no 52 of 1979 which was in force during the relevant time the application for registration of the impugned marks were made and original plaint/petition was filed in the District Court.

Chapter XXI of the said Code of Intellectual Property Act contains provisions relating to the requirements of applications and the procedure for registration of marks. Section 102 to 105 in that chapter relate to requirements of an application to register marks, temporary protection of marks exhibited at an international exhibition and application fees. Section 106 of the Code provides for examination of application as to the form by the Registrar and in terms of the said section once an application for registration is tendered, the Registrar is duty-bound to examine whether the application complies with the provisions of sections 102 and 105 and where applicable with the provisions of sections 103 and 104. Since the matter at hand as set forth by the questions of law mentioned above does not contemplate Section 103 and 104, it is not necessary to examine provisions relating to those sections at this moment. However, if the application tendered does not comply with sections 102 and 105, the registrar shall refuse to register the mark but prior to such refusal he shall notify the applicant of any defect in the application affording the applicant an opportunity to cure such defects- vide proviso to section 106(2). This provision, though not directly related to the matter in issue it shows that there are certain occasions in the registration procedure of a mark where the Registrar is statutorily bound to give notice to a party involved in the process. However, section 107 of the said Code is more relevant to the matter at hand. As per section 107(1), if the application complies with section 102 and 105, the Registrar shall examine the mark in relation to the provisions of section 99 and 100 as to the admissibility of the mark. Section 107(2) states that if the mark is inadmissible under sections 99 or 100 the Registrar shall notify the applicant of the grounds for refusal. Section 107(2) is another instance where the Registrar is statutorily required to notify the relevant person. Sub Sections 107(3) to (6) provides for the applicant to make submissions to Registrar, after such a refusal to register and for hearing and inquiry in that regard and also provides for the acceptance, refusal or conditional acceptance of the application after such inquiry. It

should be noted that even in section 107(4), Registrar is statutorily directed to inform the date and time of hearing to the applicant once the applicant made such submissions.

After examining the application as aforesaid, if the Registrar is of the opinion that the mark is admissible, he has to request the applicant to pay the fee for publication within the prescribed period and if the applicant fails to file the fee within the prescribed period, the Registrar may refuse to register the mark – vide section 107(7) and (8). In this occasion the Code does not require the Registrar to notify the applicant of his refusal. It is understood as the applicant is given a time period by the statute itself to do a certain act and if he fails to do it within the given time, it appears that the intention of the legislature is not to burden the Registrar with the notifying of the outcome of such failure. The Registrar has a discretion to grant reasonable extension of time periods referred to in section 107 including the time period referred to in section 107(7). However, though in certain circumstances the Code requires the Registrar to notify certain decisions made by him to the relevant person, the Code does not statutorily require the Registrar to notify if he grants any reasonable extension of time. It must be understood that a reasonable extension may not be granted arbitrarily but only on an application made requesting such an extension. If such an application is made, it is expected on the part of the applicant who asked for an extension to be vigilant and keep an eye on the progress of his application for the extension. It must be the reason for not requiring the registrar to notify of any extensions made under section 107(14). On the other hand, when an extension of time or date is given whether to notify the relevant party who requested for extension may depend on the practice adopted by relevant institution. For example, if a court grants a date or an extension of time on a request made by a motion it may not notify the relevant party always since the party concerned has access to the registry on his own or through his agent. Thus, when the Appellant challenges the conduct of the Registrar in relation to communication of the extension of time, it must reveal the practice adopted by the Registrar's office in that regard, which it fails to do.

Once the fee for publication is made, the Registrar shall proceed to publish the application setting out the details elaborated in section 107(9) of the Code. It is not among the disputed facts that such publications were done regarding the applications relating to the impugned registrations. This also indicates that the Registrar examined the marks in terms of sections 106 (1) and 107(1) and was of the opinion that marks were admissible under section 99 and 100. As per section 107(10) of the Code, if any person considers that the mark is inadmissible on one or more of the grounds referred to in section 99 or 100, he within three months from the date of publication of the application, using the prescribed form along with the prescribed fees, is required to give the Registrar his Notice of Opposition stating his grounds for opposition. If no Notice of Opposition has been received by the Registrar within the said three months period, Registrar shall register the mark. The Registrar is required to ask for observation from the applicant who tender the application to register, only if he receives a Notice of Opposition in prescribed form along with the fee within the prescribed time- vide section 107(12). Once he receives the observation, the Registrar can consider whether or not the mark may be registered. If he thinks it is necessary, he may hear the parties before making such decision. Once the Registrar decides to register the mark, he must register it in the register maintained in terms of section 109 and issue a certificate to the registered owner of the mark. The Registrar is further requested to publish the registered mark in the Gazette using the prescribed form – vide section 109 and 110 of the Code. It is clear that the Appellant did not file the Notice of Opposition within the three months period given by statute itself in section 107(10). Appellant's position is that it asked for extension of time in relation to each application. The 1st Respondent also admits as explained above that he had granted the extension of time in terms of section 107(14). The Appellant takes up the position that the extension of time in relation to the relevant applications were not communicated to the Appellant by the Registrar and as such it did not have the opportunity to file Notice of Opposition and the Registrar, in breach of the rules of natural justice, has registered

the impugned marks. The Appellant further states that once it came to know about the registration, though requested to allow it to file notice of opposition, it was not allowed. The 1st Respondent states that he acted in terms of the provisions of the Code and he is not required to communicate the extensions of time and therefore the registrations of the marks were done according to law. What I observed above in relation to paying the fee for publication within a prescribed time period and the Registrar's ability to extend time under section 107(14) where need to notify the extension is not statutorily made is also relevant to the prescribed time period given to file Notice of Opposition and extension of time by the Registrar.

As mentioned before, even though on certain occasions the Registrar is obliged to notify the relevant person by the Code itself, no such obligation is made by the Code with regard to extension of time in terms of section 104(14). Any reasonable person, who has asked for extension of time after failing to file the Notice of Opposition within the 3 months period granted by section 107(10) of the Code must be vigilant of his application for extension of time. The Appellant has not shown that there was an impossibility to get to know the outcome of his applications for the extensions of time in relation to several applications relating to the impugned marks from the office of the Registrar. Appellant and/or its agents handling matters relating to Intellectual property matters at the office of the Registrar must have been aware of the practices adopted there in relation to application for extension of time but the Appellant does not reveal the practice adopted in the office of Registrar in relation to requests for extension of time. Further, the Appellant does not say that on the other occasions the Registrar used to communicate the grant of extensions of time. As per the document marked A5 by the Appellant, it appears when an application for extension of time is made, registration is stayed for the time requested for expecting the filing of Notice of Opposition. The said document reveals that on an application made by Messrs. Akbar Brothers Limited in relation to the TM 49305, registration was stayed twice for a total period of 6 months. This indicates that

there appears to be a practice staying the registration of marks once an extension of time is asked for by an intended opponent. Whatever it is, the Appellant has only asked for extensions for three months period in relation to each application and it appears that it has not asked for further extensions. Any reasonable, vigilant person who has asked for extension of time for 3 months and who has not received any communication from the Registrar, would come to one of the following inferences and acts accordingly to save his rights by the expiration of the requested 3 months period;

- That his application for extension is rejected by not giving the extension. If he thinks it is arbitrary and contrary to law, he would have naturally taken steps to challenge such constructive refusal before the proper forum to get such extension.
- That his application for extension of time is not yet considered. Therefore, he would have tendered the Notices of Opposition within the time period he had asked for as an extension, to be consider by the Registrar once his application for extension of time is granted.
- That since the requested extension has not thus far granted, and as a result he cannot file the Notice of Opposition till it is granted, ask for further extension on that ground.

The Appellant has not acted in such a manner but has waited till the Registrar registered the marks which took place after sometime from the final date of the extension it had asked for. As per its Petition dated 20.07.2010 filed in this court, marks bearing No. 47711,47712,47713,47714,47715,47716,47717 and 49305 were gazetted on 18.12.1987, 01.01.1988, 14.01.1988 and 24.06.1988. The three months periods allowed by section 107(10) had to be over by 18.03.1988, 01.04.1988, 14.04.1988 and 24.09.1988. The extensions asked for by the appellant had to be over by 18.06.1988, 01.07.1988, 14.07.1988 and 24.12.1988. There was no valid application to extend time furthermore. A valid application has to be made prior to the expiry of three months contemplated in section 107(10) or before the expiry of any extended time granted by the Registrar under

section 107(14) as the Registrar has no option other than registering the marks unless he receives Notice of Opposition within the prescribed period- vide 107(11). The Appellant should not be allowed to say that it should have been given further time as per the letter marked A4 written on 28.03.1990 which has been written after many months from the expiry of the 3 months extensions it had asked for. The letter marked A5 clearly shows that the marks were registered many months after the expiry of 3 months extensions asked for by the Appellant. As mentioned before, there were no valid applications to extend time that will cover the dates on which the marks were registered. If the Appellant was reasonable and vigilant it would have asked for further extensions prior to the expiry of the 3 months extensions it had asked for or tender the Notices of Opposition prior to the expiry of the said requested 3 months periods. As per section 107(11) of the Code, the Registrar has no other option than registering the mark if there is no Notice of Opposition filed within the prescribed time or within any extended time.

I observe that the Appellant has brought this court's attention to the fact that the 2nd Defendant had agreed to enter the judgment in favour of the Appellant before the Commercial High Court Judge. However, it has not revealed the order dated 17.09.2007 made by the learned Commercial High Court Judge in that regard. In that order, learned High Court Judge has stated that the 2nd Defendant had no status to do so as the 2nd Defendant had assigned all its rights by that time.

Even though, the Appellant attempts to blame the Registrar for not affording a fair hearing, it must be noted the Registrar is not bound to hold an inquiry even if a party files its Notice of Opposition- vide section 107(13). He has to hold an inquiry only if he thinks it is necessary to hold an inquiry after calling for observations from the applicant after serving the Notice of Opposition on the applicant. To give a fair hearing there must be a Notice of Opposition first. As explained above, if there were no Notices of Opposition on time, it was the fault of the Appellant as the Appellant did not act vigilantly to assert his

rights, if any. Therefore, the questions of law mentioned above, in respect of which this court has granted leave, have to be answered in the negative and against the Appellant. Thus, this appeal is dismissed with costs.

……..

Judge Of the Supreme Court

L. T. B. Dehideniya, J.

I agree.

……..

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

……

Judge of the Supreme Court

IN THER SUPRERME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Inoka Sulari Nissanka
121/C,
Kaluwairippuwa west,
Katana.
Plaintiff

SC Appeal No. 104/2015
NWP/HCCA/KUR/93/2008F
DC/Kuliyapitiya Case no.12857/P

Vs.

1. Stela Karmon Nissanka,
   121/C,
   Kaluwairippuwa West,
   Katana.
2. Nissanka Appuhamilage Kema Senehelatha Nissanka,
   No.382, Kandurugashena,
   Kuliyapitiya.
3. G. G. Krishantha Sisira Pathirana,
   No.382, Kandurugashena,
   Kuliyapitiya.

Defendants

AND

Nissanka Appuhamilage Kema Senehelatha Nissanka,
No.382, Kandurugashena,
Kuliyapitiya.
2nd Defendant-Appellant

G. G. Krishantha Sisira Pathirana,

No.382, Kandurugashena,

Kuliyapitiya.

3rd Defendant-Appellant

Vs

Inoka Sulari Nissanka

121/C,

Kaluwairippuwa west,

Katana.

Plaintiff-Respondent

Stela Karmon Nissanka,

121/C,

Kaluwairippuwa West,

Katana.

1st Defendant-Respondent

AND NOW BETWEEN

G. G. Krishantha Sisira Pathirana,

No.382, Kandurugashena,

Kuliyapitiya.

Substituted 2nd Defendant-Appellant-Appellant

G. G. Krishantha Sisira Pathirana,

No.382, Kandurugashena,

Kuliyapitiya**.**

3rd Defendant-Appellant-Appellant

Vs

Inoka Sulari Nissanka
121/C,
Kaluwairippuwa west,
Katana.
Plaintiff-Respondent-Respondent

Stela Karmon Nissanka,
121/C,
Kaluwairippuwa West,
Katana.
1st Defendant-Respondent-Respondent

BEFORE: L. T. B. Dehideniya, J.
S. Thurairaja, PC, J.
E. A. G. R. Amarasekara, J.

COUNSEL: C. J. Ladduwahetty for the Substituted 2nd and 3rd Defendants-Appellants-Appellants.
Lionel K. Patabendi with Asela Patabendi for the Plaintiff-Respondent-Respondent.

ARGUED ON: 11.02.2020

DECIDED ON: 11.01.2023

E A G R Amarasekara, J.

The partition action relevant to this appeal was filed by the Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the Plaintiff) in the District Court of Kuliyapitiya to partition the land called "Ambagahamulawatte" of A: 0 R: 1 P: 30 in extent which was more fully described in the scheduled to the plaint dated 12.03.2001. Admittedly, the original owner of the said land was one Nissanka Appuhamilage Don Daniel Nissanka who died leaving as his heirs, his daughter the 2nd Defendant-Respondent-Respondent, Khema Senehelatha Nissanka (hereinafter referred to as the 2nd Defendant) and his son, Sisira Siriwimal Nissanka. The original owner was the grandfather of the Plaintiff and the 3rd Defendant-Respondent-

Respondent (hereinafter referred to as the 3rd Defendant). He was also the father-in-law of the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant). The Plaintiff is the daughter of the 1st Defendant and 1st Defendant was married to Sisira Siriwimal Nissanka, the son of the original owner who died leaving the 1st Defendant (his wife) and the Plaintiff (his daughter) as his heirs. The 3rd Defendant is the son of the 2nd Defendant. Upon the demise of the original owner a testamentary case was filed in the District Court of Kuliyapitiya and the 2nd Defendant has been appointed as the administrator. The above facts were not disputed. No dispute has arisen as to the identity of the corpus. Thus, under the normal course of events, with demise of the original owner, the property which belonged to the original owner should devolve on his daughter (2nd Defendant) and his son, Sisira Siriwimal Nissanka in equal shares, namely undivided ½ of the property to each of them, and with the demise of Sisira Siriwimal Nissanka his ½ share should devolve equally on the Plaintiff and the 1st Defendant giving each of them ¼ share of the property. Since the 2nd Defendant has executed the deed of gift no.3085 dated 05.11.1999, 2nd Defendant's share should go to the 3rd Defendant subject to the life interest of the 2nd Defendant.

As against the position taken up by the Plaintiff which is compatible with the devolution of title described above, the 2nd and 3rd Defendants have claimed prescriptive title to the entire property described in the schedule to the plaint. The position taken up by the 2nd and 3rd Defendants is that there was an agreement between the children of the original owner, namely the 2nd Defendant and Sisira Siriwimal Nissanka. As per the agreement they say that the 2nd Defendant and her brother agreed;

a) to sell the property called "Mahamaligashena" which was at Puttalam to settle the debts of the original owner, especially the debts to the Agricultural and Industrial Credit Corporation of Ceylon and
b) after such sale, to give the rest of the property at Puttalam to Sisira Sriwimal Nissanka and to give the property in dispute to the 2nd Defendant to retain as her own.
c) the balance to be shared by the 2nd Defendant and her brother Sisira Siriwimal Nissanka.

The evidence led at the trial shows that other than the subject matter of the partition action related to this appeal and the land at Puttalam mentioned above, there had been another

property called Veehena that belonged to the original owner which has been partitioned through an action filed in the district court of Marawila.

The decisions of the courts below indicate that the learned judges of those courts, namely the judge of the District Court of Kuliyapitiya and the learned High Court Judges of the Provincial High Court of Kurunegala hearing Civil Appeals, have come to the conclusion that exchange of property as described above has not been proved by the 2nd and 3rd Defendants. Thus, the District Court has decided to partition the land in dispute by refusing to accept the stance taken by the 2nd and 3rd Defendants and the said decision of the District Court has not been interfered with by the learned High Court Judges sitting in appeal over the said decision of the District Court.

Being aggrieved by the decision of the Provincial High Court of Kurunegala, the 2nd and 3rd Defendants have come before this court and leave has been granted on the questions of law mentioned in paragraph 26(a) and (f) of the petition dated 07.11.2014. The said questions of law are mentioned below;

"a) Did the learned District Judge disregarded or ignore his own findings of facts in coming to his conclusion of law on the question of prescription of the 2nd and 3rd Defendants?

f) Did the learned High Court make a serious error regarding the law of ouster when they held that the presumption of prescription would not arise in this case?"

It is true that the evidence led at the trial indicates that the 2nd and 3rd Defendants were in possession of the land in dispute after the death of the original owner for about 27 years. As per the pedigree which is not in dispute, the 2nd Defendant became a co-owner. In law the possession of a co-owner is the possession of the other co-owners. It is not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster is needed to prove the commencement of an adverse possession against the other co-owners- Vide **Corea V Appuhamy 15 NLR 65**. Thus, it is necessary for a co-owner who comes to possess a land as a co-owner to prove how his possession became adverse to the possession of the other co-owners. In this regard, the co-owner who claims prescription must place evidence to prove the commencement of adverse possession by proving ouster or something equivalent to ouster or place evidence sufficient

to presume that ouster has taken place 10 years prior to filing the action. If it is a very long possession that has commenced prior to the time that is within the knowledge of the available witnesses, and if the nature of the possession indicates that the relevant party has been in possession as sole owner, it is reasonable for a court to presume the existence of an adverse possession. However, in the case at hand, the 2nd Defendant became a co-owner after the death of her father, the original owner. Then if anything similar to ouster took place it has to be within her knowledge and, if she intends to claim prescriptive title to the co-owned land, she should prove ouster or circumstances similar to ouster. This is especially so, when one considers the family relationship between the parties and the fact that one party resided at Puttalam considerably away from the disputed land. Unless ouster or something similar to that is proved, such facts may encourage a court to presume that the possession is permissive or that the possession of the 2nd and 3rd Defendant is also the possession of the other co-owners who resided at Puttalam. As held in **Sideris V Simon 46 NLR 273**, in an action between co-owners the question whether a presumption of ouster may be made from long and undisturbed and uninterrupted possession is one of fact, which depends on the circumstances of each case. As per **Abdul Majeed V Ummu Zaneera 61 NLR 361**, among other things, the relationship of the co-owners and where they reside in relation to the situation of the property are relevant matters that should be considered in whether a presumption of ouster should be drawn or not. It is natural in our culture if co-owners reside in different places, one co-owner or few of them to enjoy the co-owned property till the co-ownership is terminated.

As mentioned above, the 2nd Defendant, after the death of her father, started possession as a co-owner and it should be within her knowledge if she started to possess adversely. Thus, she should be able to prove ouster or something similar to ouster if such an event took place. Coupled with that, the relationship between the parties and the distance of residence of the Plaintiff and the 1st Defendant to the situation of the property in issue make it difficult to presume ouster or a commencement of an adverse possession merely because of the 2nd and 3rd Defendants are in possession for a period of 27 years or so.

Hence, I now consider whether the 2nd and 3rd Defendants were able to establish ouster or the commencement of adverse possession against the Plaintiff and the 1st Defendant through the other evidence led before the trial judge. In this regard the 2nd Defendant and the 3rd

Defendant rely on the purported agreement mentioned above between Sisira Siriwimal Nissanka who was the father of the Plaintiff and the husband of the 1st Defendant. If such an agreement to exchange the balance of the Puttalam land with the land in issue was in existence, 2nd Defendant should have started adverse possession prior to the death of the said Sisira Siriwimal Nissanka. However, the evidence given by the 2nd Defendant on 26.02.2008 at pages 3 and 4 of the District Court proceedings (pages 159 and 160 of the brief) stands against the stance taken up by the 2nd Defendant. There she admits that after the death of her brother the ½ share of the land in question devolved upon his daughter and wife, namely the Plaintiff and the 1st Defendant. If, she and her brother terminated the co-ownership by an agreement with her brother to exchange the properties after settling the loans of her father, the property in question cannot be a co-owned property to be inherited by the Plaintiff and the 1st Defendant. She further admits in her evidence that there was no written agreement (See page 160 of the brief which is page 4 of the District Court proceedings of 26.02.2008). If there was no agreement attested by a Notary relating to exchange of land, it cannot be a valid agreement. On the other hand, if her position is that she commenced adverse possession after an oral agreement with her brother that cannot stand as she admits the title of the wife and the child of the brother after his death. While admitting title of another at a given time one cannot maintain that her/his possession was adverse to them at that time. Thus, her own evidence is contrary to the position that she commenced adverse possession following the agreement with her deceased brother to exchange lands of Puttalam and Kuliyapitiya.

The 2nd Defendant in her evidence has also stated that she and the heirs of Sisira Sriwimal Nissanka, namely the Plaintiff and the 1st Defendant became the co-owners of the entirety of the land in Puttalam which was 100 acres in extent excluding the 2 acres acquired by the State (see pages 122 and 135 of the brief). Though, there was an agreement entered between heirs of the original owner and one Joseph M Perera to sell some land and settle the loans of their father, they could not sell property as agreed by the said agreement- vide pages 126, 135 to138 of the brief. Thereafter, she states that 50 acres were sold to settle the loans due from the estate of the deceased father and she and her brother became the heirs to the balance 50 acres - vide pages 138 and 139. She has further stated that after the death of her brother, his wife the 1st Defendant possessed the balance 50 acres at Puttalam and 1st Defendant has

sold those 50 acres by two deeds and she did not take any steps against that even though she had lawful right to 25 acres since she had completely handed over the said property to her brother vide pages 138 to 144 of the brief. It must be noted that if she says that she had a lawful right to 25 acres of land in Puttalam after the death of her brother it is contrary to her original stand which was to indicate that her adverse possession commenced following an agreement with her deceased brother by exchanging properties at Puttalam and Kuliyapitiya. As mentioned earlier, such an agreement is not valid unless executed in writing before a notary. The above position taken up while giving evidence by the 2nd Defendant indicates that her purported adverse possession did not commence even based on an oral agreement when her brother was among the living by giving him balance 50 acres in Puttalam and she taking the possession of Kuliyapitiya land as her own. Her version indicated through evidence states that she became an owner of 25 acres of the land in Puttalam after the death of her brother but relinquished her rights to that property to own the property in Kuliyapituya as her own, owing to the agreement with her brother which is invalid before law in terms of section 2 of the Prevention of Frauds Ordinance. If she had commenced adverse possession after the heirs of her brother became co-owners based on an agreement that adverse possession has to be based on an agreement between her and the heirs of her brother. Otherwise, she has to prove some other overt act from which she commenced her adverse possession. There is no such agreement between her and the heirs of her brother produced before court. A party cannot commence adverse possession with a secret intention. Other than the purported agreement between the 2nd Defendant and her brother, no other overt act has been referred as the commencement of adverse possession.

On the other hand, the deed no.169 dated 18.08.77 executed by her to sell 50 acres of the land in Puttalam does not indicate that she sold it as the administrator of the estate of the father to settle the loans due from the estate of the deceased father. She has sold her rights as the owner of a divided 50 acres of the Puttalam land for a consideration of Rs.33000.00.

In the schedule of the said deed, boundary to the east has been described as the land belonging to the heirs of Sisira Siriwimal Nissanka which means the Plaintiff and the 1st Defendant. As per the attestation, out of said consideration, Rs.24000.00 has been paid to her and only Rs.9000.00 has been retained by the vendee to pay the installment due to

Agricultural and Industrial Credit Corporation loan. As per the evidence led at the trial, the estate of the deceased father of the 2nd Defendant had cash worth of Rs.12798.00 while there were liabilities of Rs 68,048/- as payment due to the State and Rs. 26250/- as payment due to Agricultural and industrial development Corporation- vide page 172 of the brief. Further, as per the evidence at pages 173 and 176 of the brief, on 10.06.1982, the 2nd Defendant had stated before the judge in the testamentary proceedings that she had already paid Rs.23126/- of the above mentioned Rs.26250/-. She has further undertaken to pay the balance without burdening the Plaintiff and the 1st Defendant of the present action. As per the evidence at pages 174 and 175, it appears that the testamentary case is not yet concluded and devolution properties of the estate has not been yet tendered to the said court. Even the Attorney-at-Law and Notary public who attested the said deed has stated in evidence that he was not aware about any testamentary case pending- vide page 116 of the brief. Thus, it is clear, the 2nd Defendant sold the 50 acres not as the administrator but as the owner of a divided 50 acres of the land in Puttalam and paid only a portion of the loan by selling it.

Similarly, as per the evidence led at the trial, balance 50 acres of the land in Puttalam has been sold by the heirs of the said Sisira Sriwimal Nissanka- vide evidence at pages 104,105, 140,141,142,143 and 144 of the brief. Deed no.175 dated 26.04.1978 is the deed by which the 1st Defendant sold her rights in 25 acres in the land in Puttalam. As per the attestation, out of the consideration of Rs.18000/-, Rs.13153/- has been paid to the Agricultural and Industrial Corporation. Thus, it is clear that even the heirs of the brother of the 2nd Defendant took part in paying the loan of the estate of the deceased father of the 2nd Defendant. Further it appears that, when the 2nd Defendant stated to the District Court hearing the testamentary action that she has paid Rs.23126/- of the loan to the Agricultural and Industrial Corporation, the sum paid by the 1st Defendant is also included in that sum.

However, the evidence referred to above indicates that the 2nd Defendant and the heirs of her brother dealt with their entitlement in the Property in Puttalam separately and the 2nd Defendant treated her portion of land as a divided portion even when executing the deed of sale for her portion and she executed the said deed as the owner of the 50 acres and not as the administrator to sell part of the estate to settle a loan. It is also evinced that both parties have contributed to settle the loan to Agricultural and Industrial Corporation. The said

evidence is not compatible with the position that the 2nd Defendant sold 50 acres to settle the loans of the deceased father and she gave her 25 acres that should come to her from the land in Puttalam in lieu of the land in Kuliyapitiya, the subject matter of the partition action related to this appeal. Thus, the 2nd Defendant's stance regarding such exchange of lands and selling of 50 acres from the estate to settle the loan is not reliable. The 3rd Defendant was not a party to such agreement if there was any, and he cannot speak to the truth of it and he in his evidence-in-chief itself has said that he knows nothing about the testamentary case.

On the other hand, as per the evidence referred to above, it appears still the testamentary action is not concluded. The 2nd Defendant is the administrator who holds responsibilities as a fiduciary towards all the heirs. As far as she remains the administrator of the estate of the deceased father, she has to manage the properties belonging to the estate of the deceased for the benefit of the heirs subject to her duties as the administrator. Thus, not only as a co-owner but also as a fiduciary she must prove ouster or something similar to that to claim prescriptive rights against other heirs to a property belonging to the estate of the deceased. As explained above she has failed in proving such ouster or commencement of adverse possession from some event similar to ouster.

The 2nd and 3rd Defendants in their written submissions have referred to certain answers given by the Plaintiff while giving evidence. At page 103 of the proceedings, when it was suggested to the Plaintiff that 2 acres of the land in Puttalam was acquired by the State and 50 acres of it were sold to settle the loans of her grandfather, she has answered admitting that, and learned District Judge has referred to that admission in his judgment-vide page 192 of the brief. At page 105 of the brief the Plaintiff has stated that after the death of her father the land was possessed by them after a division caused through the intervention of court. The learned District Judge has referred to this statement of the Plaintiff at page193 of the brief. For the following reasons, this court or a court below cannot rely on those answers.

- Even the father of the Plaintiff was a minor when the testamentary case was filed and the Plaintiff was only 2 years when her father died. Thus, she cannot give evidence with first-hand knowledge of such facts relating to any agreement to sell 50 acres to settle loans of her grandfather. She must have come to know about that from another source and such source is not before court to test the truth of it. On the other hand,

as explained above the deeds executed by the 2nd Defendant and the 1st Defendant and the other evidence before this court do not support that there was such settlement but indicate that the parties have dealt separately with regard to their rights in the land in Puttalam. Moreover, both parties had paid the loan and it appears that it was the mother of the Plaintiff (1st Defendant) who contributed more towards paying the loan.

- If there was any decision to divide the properties among the parties through a court, it has to be in writing and no such decision, permission or direction is placed as evidence at the trial. No oral evidence of the Plaintiff who seems to have no personal knowledge can be accepted for what should have been in writing unless it is proved that primary evidence is destroyed or not available and the Plaintiff has first-hand knowledge of such decision, permission or direction.
- It is not uncommon in Sri Lanka that co-owners amicably possess different parts of the co-owned property for convenience without terminating their co-ownership. The Plaintiff through whatever the admissions or statements made as above has not admitted such division was with the intention of terminating the co-ownership to give exclusive ownership to separated parts of the estate of the deceased grandfather.

The 2nd and 3rd Defendants try to fault the Plaintiff and the 1st Defendant for not calling the 1st Defendant to give evidence. There is no evidence to say that she was a party to or she witnessed the purported oral agreement between the 2nd Defendant and her brother. On the other hand, as elaborated above the evidence including the documentary evidence make the version of the 2nd and 3rd Defendants unacceptable. Moreover, the burden of proving prescriptive title is on the 2nd and 3rd Defendants who claim prescriptive title. Besides, the presumptions such as;

- A co-owner's possession is the possession of other co-owners,
- When a possession of a person may be referable to a lawful title, that person is presumed to possess by virtue of his/her lawful title,
- A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity,

stands for the benefit of the Plaintiff and the 1st Defendant. As such, the 2nd and 3rd Defendants should have proved ouster or something equivalent to ouster to prove the change of their status in relation to the subject matter of the partition action related to this appeal and to prove their adverse possession. As explained above, the 2nd and 3rd Defendants have not placed reliable and sufficient evidence to prove or presume ouster. Evidence led at the trial indicates that it is more probable that there had been an amicable partition of the land at Puttalam but not an exchange of lands between parties. Thus, I cannot find fault with the conclusions reached by the learned High Court Judges or the learned District Judge.

Hence, the questions of law quoted above have to be answered in the negative and in favour of the Plaintiff and the 1st Defendant.

Therefore, this appeal is dismissed with costs.

……

Judge of the Supreme Court

L.T.B. DEHIDENIYA, J.

I agree

……

Judge of the Supreme Court

S. THURAIRAJA, J.

I agree

……

Judge of the Supreme Court.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal against the judgment delivered by the Civil Appellate High Court of Kegalle.

Kehelwattage Podi Singho Sunil
Premawardane,
Peramadulla,
Udumulla via Kadugannawa.

Plaintiff

Vs

SC Appeal 161/2016
SC/HCCA/LA 03/2016
SP/HCCA/KAG/81/2013 (F)
D.C. Kegalle 26203/P

1. Bibile Manage Chandrawathy,
   Peramadulla, Udumulla via
   Kadugannawa.

2. Kamal Gamini Premawardane,
   Peramadulla, Udumulla via
   Kadugannawa.

3. Agampodige Jinadasa,
   Waliwatura, Udumulla via
   Kadugannawa.

3(a) J. P Gnawathy,
   Pathahamula Hena,
   Udumulla via Kadugannawa.

4. Kehelwatte Gedara Gunadasa,
   Peramadulla, Udumulla.

5. Kehelwatta Gedara Wijepala,
   Peramadulla, Udumulla.

6. Kehelwattalage Jemis,
   Peramadulla, Udumulla.

6(a) Kehelwattalage Somasiri,
Peramadulla, Udumulla.

7. Suduhakuralage Podi Amma,
Peremadulla, Udumulla,

7(a) Kehelwatte Gedara Gunadasa,
Peremadulla, Udumulla.

8. Hondamuni Arachilage Podimenike,
Udumulla via Kadugannawa.

Defendants

AND BETWEEN

Kehelwattege Podi Singho Sunil
Premawardane,
Peramadulla,
Udumulla via Kadugannawa.

Plaintiff- Appellant

Vs

1. Bibile Manage Chandrawathy,
Peramadulla, Udumulla via
Kadugannawa.

2. Kamal Gamini Premawardane,
Premadulla, Udumulla via
Kadugannawa.

3. Agampodige Jinadasa,
Waliwatura, Udumulla via
Kadugannawa.

3(a) J. P Gnawathy,
Pathahamula Hena,
Udumulla via Kadugannawa.

4. Kehelwatte Gedara Gunadasa,
Peramadulla, Udumulla.

5. Kehelwatte Gedara Wijepala,
Peramadulla, Udumulla.

6. Kehelwattalage Jemis,
Peramadulla, Udumulla.

6(a) Kehelwattalage Somasiri,
Peramadulla, Udumulla.

7. Suduhakuralage Podi Amma,
Peramadulla, Udumulla,

7(a) Kehelwatte Gedara Gunadasa,
Peremadulla, Udumulla.

8. Hondamuni Arachilage Podimenike,
Udumulla via Kadugannawa.

Defendant- Respondents

AND NOW BETWEEN

4. Kehelwatte Gedara Gunadasa,
Peremadulla, Udumulla.

5. Kehelwatte Gedara Wijepala,
Peramadulla, Udumulla.

6. Kehelwattalage Jemis,
Peramadulla, Udumulla

6(a) Kehelwattalage Somasiri,
Peramadulla, Udumulla.

7. Suduhakurulage Podi Amma,
Peramadulla, Udumulla.

7(a) Kehelwatte Gedara Gunadasa,
Peramadulla, Udumulla.

4,5,6(a) and 7(a) Defendant-Respondent-Petitioners/Appellants

Vs

Kehelwattege Podi Singho Sunil Permawardane,
Peramadulla, Udumulla via Kadugannawa

Plaintiff- Appellant- Respondent

1. Bibile Manage Chandrawathy,
   Peramadulla, Udumulla via Kadugannawa.

2. Kamal Gamini Premawardane,
   Peramadulla, Udumulla via Kadugannawa.

3. Agampodige Jinadasa,
   Waliwatura, Udumulla via Kadugannawa.

3(a) J. P Gnawathy,
   Pathahamulla Hena,
   Udumulla via, Kadugannawa.

8. Hondamuni Arachilage Podimenike,
   Udumulla via Kadugannawa.

1, 2, 3(a), 8 Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, PC. J.,
L.T.B. Dehideniya, J and
Murdu N.B.Fernando, PC.J.

Counsel: D. Jayasinghe for the 4th to 7th Defendant- Respondent- Appellants.
P. Senanayake for the Plaintiff-Appellant-Respondent.

Argued on: 01.02.2021

Decided on: 12.01.2023

Murdu N.B. Fernando, PC. J.,

By this appeal, the 4th to 7th defendant-respondent-appellants ("the 4th to 7th defendants / appellants") impugned the judgement dated 01st December, 2015 pronounced by the Civil Appellate High Court of Kegalle. ("the High Court")

This Court on 29th August, 2016 granted leave to appeal to the 4th to 7th defendants, on the following two questions of law.

1. Did the High Court err in holding that the plaintiff has established the identity of the land shown to be partitioned?
2. Did the High Court err in failing to consider the prescriptive title of lots 2,3, and 4 claimed by the 4th to 7th defendants?

The matter in issue in this appeal pertains to a partitioning of a land called 'Getagoyawe Hena' situated at Weliwathura in the Kegalle District.

The plaintiff-appellant-respondent ("the plaintiff / respondent") initiated an action in the District Court of Kegalle in May 1994 citing five defendants, the 1st and 2nd defendants being his wife and son and praying, that the land more fully described in the plaint be partitioned among the plaintiff and the 1st and 2nd defendants in accordance with the Partition Law.

The plaintiff pleaded that the 3rd to 5th defendants were trespassers of the land to be partitioned. The plaintiff further moved for an enjoining order and an interim injunction against the 3rd defendant, restraining him from building on the land in issue and interfering with the plaintiff's proprietary rights. The District Court upon hearing all parties, granted the interim relief as prayed for by the plaintiff against the 3rd defendant.

Thereafter, commissions were issued and the 6th, 7th and 8th defendants (being the parents of the 4th and 5th defendants) intervened to this action and the matter proceeded to trial, based upon 34 points of contention.

The corpus in issue was described in the schedule to the plaint as *'2 palas of paddy sowing extent'* and the commission issued by court referred to the land as 'Getagoyawe Hena' in extent 1A 1R and 16.4P comprising of 4 lots bearing numbers **1, 2, 3** and **4**.

The plaintiff and the 1st and 2nd defendants claimed all 4 lots of 'Getagoyawe Hena' and moved that it be partitioned upon the share allotment of 14/16, 1/16 and 1/16.

The 3rd defendant claimed proprietory rights exclusively to lot **1** and the 4th to 7th defendants claimed lots **2,3,4** and specifically the buildings and plantations standing thereon. The claims of the 3rd and the 4th to 7th defendants were based upon title deeds, which referred to a land called and named as 'Deekiriyawatte Kumbukke Hena'. It is observed that the land depicted in the plaint is not 'Deekiriyawatte Kumbukke Hena' but 'Getagoyawe Hena'.

On 29th January, 2013 the District Court dismissed the plaintiff's action primarily upon the ground that the corpus sought to be partitioned had not been properly identified.

Being aggrieved by the said judgement, the plaintiff appealed to the High Court and the High Court set aside the District Court judgement and entered decree in favour of the plaintiff and permitted the partitioning of the corpus as prayed for by the plaintiff.

The 3rd defendant (i.e., the principal defendant) did not appeal against the judgement of the High Court to this Court. Thus, the 3rd defendant did not challenge the aforesaid High Court judgement which permitted the partitioning of the corpus among the plaintiff and the 1st and 2nd defendants.

Only the 4th to 7th defendants came before this Court and obtained leave of court and that is the instant appeal that this Court is now called upon to adjudicate. The appellants are challenging the judgement of the High Court on two grounds, namely the identity of the corpus and the appellants right and title to lots **2, 3** and **4** of the corpus based upon deeds and prescription.

Regarding the identity of the corpus, the submissions of the appellants were twofold. *Firstly*, the extent and boundaries of the corpus are not accurate and the surveyed land is called Deekiriyawatte Kumbukke Hena (based on the title deeds 6V1 and 6V2 produced by the appellants) and not Getagoyawe Hena as claimed by the plaintiff. *Secondly*, that the burden of proving the identity of the corpus lies with the plaintiff.

Whilst there is no doubt that the burden of proving the identity of the corpus is with the plaintiff, as succinctly observed by Sansoni, J. in **Jayasuriya v. Ubaid (1957) 61 NLR 352**, there is a duty cast on the trial judge to satisfy himself as to the identity of the land sought to be partitioned in a partition action.

In the instant matter, the finding of the District Judge was that the plaintiff has failed to prove to the satisfaction of court the identity of the corpus.

However, in appeal the High Court reversed the said finding. Whilst the High Court categorically remarked that an appellate court generally does not interfere with the findings of the trial court and does so only on very rare occasions and for reasons stated, that in the instant case, the appellate court had to examine the factual matrix, since the trial judge had failed to investigate the title of the plaintiff and moreover the identity of the corpus.

It is observed that the learned judges of the High Court have been mindful of the statutory duty of a trial judge with regard to evaluating and assessing evidence, when it embarked on a journey to investigate the title and identity of the corpus.

Thus, this Court cannot falter the conduct of the learned judges of the High Court with regard to evaluation of evidence led at the trial and be satisfied of the title and identity of the corpus.

This Court further observes that the appellants did not challenge the judgement of the High Court *per se* before us. The appellants did not attack or found fault with the findings of the learned judges of the High Court in evaluating the evidence led at the trial, specifically regarding the identity, the name, the metes and bounds i.e., the four corners of the corpus. In the submissions before this Court, the appellants merely re-iterated the position taken up at the trial and did not even refer to the findings of the District Court, which too the appellants now move to set aside.

The High Court considered the identity of the corpus, specifically regarding its metes and bounds, extent and given name, in much detail and in comparison with title deeds and all other plans and documents produced and marked at the trial by all the parties, including the 4th to 7th defendants. I do not wish to refer to or appraise and or evaluate the said details, especially the findings with regard to the corpus and its four boundaries in this appeal, except to state that the High Court has considered and analysed the title deeds of the appellants, *viz* 6V1 and 6V2 and held that out of the 4 boundaries, 3 boundaries namely, the east, the south and the west referred to in the said title deeds do not correspond with the corpus.

It is further significant that the High Court upheld the findings of the trial court regarding lot **3** of the court commissioner's plan and held that it is not Deekiriyawe Watta as contended by the 4th to 7th defendants *i.e.,* the present appellants. The said finding was based upon the evidence given, deeds, plans and other documents marked and produced at the instant trial.

In coming to its finding, it is observed that the learned Judges of the High Court heavily relied upon a plan produced at the trial, which relates to another partition case where final decree had already been entered. In the said case, where the plaintiff and the 3rd to 7th defendants were also parties, the 3rd to 7th defendants have categorically asserted that Deekiriyawe Watta, lies to the '*east of the present corpus*', which the plaintiff pleaded as Getagoyawe Hena. Based on the contention of the said defendants, Deekiriyawe Watta lies to the east of Getagoyawe Hena and the High Court had come to a finding for reasons elicited, that the 3rd to 7th defendants cannot take a different position and or challenge or contend in the appeal before it, that Deekiriyawe Watta comprise of Getagoyawe Hena or a part of Getagoyawe Hena, the named corpus.

The instant corpus Getagoyawe Hena, consists of four lots, bearing numbers **1, 2, 3** and **4** based on the court commissioner's plan. Lots **1** and **3** are larger in extent of land compared to

lots **2** and **4**. There is no dispute between the appellants and the respondent regarding lot **1**. In fact, lot **1** comprising in extent 29.6P is not claimed by the appellants. It was only claimed by the 3rd defendant who did not come before this Court. The trial court and the High Court as discussed above, have categorically held that lot **3** [comprising in extent 15.7P] is not Deekiriyawe Watta, the land claimed by the appellants based upon its title deeds 6V1 and 6V2.This finding of the High Court is also not challenged by the appellants.

Thus, the dispute narrows down to lots **2** and **4**, the smaller portions of lands which are not contiguous lots but depicted in the two corners of the corpus, comprising of 3.3P and 7.8P of land. The High Court has categorically held that the boundaries in lots **2** and **4** do not fall within the metes and bounds referred to in the appellant's title deeds 6V1 and 6V2 and therefore had come to the finding, based upon the said title deeds the 4th to 7th defendants cannot claim title to lots **2** and **4** of the corpus. This finding too, was not challenged by the appellants before this Court.

In the aforesaid circumstances, this Court sees no merit in the contention of the appellants regarding the failure of the High Court to identify the corpus, based upon the given name and the specified boundaries. We observe that the identification of the property to be partitioned had been properly done by the High Court adhering to principles laid down in judicial precedent. We therefore see no reason to interfere with the judgement of the High Court on the said ground.

The appellants also challenged the identity of the land based upon the varying extent depicted in the plaint and the court commissioner's plan. Regarding the difference of the extent, the High Court held that the extent of land could vary between the schedule to the plaint and the court commissioner's plan, since the plaint gives the extent as *"2 palas of paddy sowing extent"* and the court commissioner's plan gives the extent as 1A 1R 16.4P. i.e., two different modes of measurement.

In coming to the said finding the learned judges of the High Court, relied upon the case of **Ratnayake and others v. Kumarihamy and others** reported in **2002 (1) Sri LR 65.**

In the said case, Weerasuriya, J. (President, Court of Appeal as he was then), referred to the ancient traditional method of measurement of land and exhaustively quoted from **Ceylon Law Recorder, Vol XXII page** xlvi and observed;

> *"The system of land measure computed according to the extent of land required to sow with paddy or kurakkan varies due to the interaction of several factors. The amount of seed required could vary according to the varying degrees of the soil, the size and quality of the grain and the peculiar qualities of the sower. In the circumstances it is difficult to correlate sowing extent accurately by reference to surface areas."* (page 68)

The aforesaid judgement of the Court of Appeal was upheld by the Supreme Court. **See: Ratnayake and others v. Kumarihamy and others** reported at **2005 (1) Sri LR 303.**

In the Supreme Court judgement Udalagama J., whilst reiterating the above observations of the President of the Court of Appeal went onto hold,

> *"that land measures computed on the basis of land required to be sown with kurakkan vary from district to district depending on the fertility of soil and quality of grain and in the said circumstances difficult to correlate the sowing extent with accuracy. Thus, there cannot be a definite basis for the contention that 1 laha sowing extent, be it kurakkan or paddy would be equivalent to 1 acre."* (page 307)

Thus, based upon the above dicta, this Court sees no merit in the submission of the appellants regarding the variation of extent given in the schedule to the plaint and the extent depicted in the court commissioner's plan. We are of the view, that the ancient and traditional sowing extent of grain and the modern measurement of actual extent of land cannot be compared *per se* since numerous other factors (*i.e.,* the terrain, the fertility of the soil, size and quality of the grain and various modes and methods of cultivation) have a bearing on the sowing extent. Thus, ancient sowing extent cannot be considered in its strict form and a leverage ought to be given for variation when corelated to present-day measurements. Further, we are of the view, that even if the trial court came to a finding that extents vary, that factor alone will not vitiate rejection of the plaint and judgement be given in favour of the appellants, as there are many other items of evidence that should be considered in deciding on the identity of a land to be partitioned.

This Court also observers, that the learned judges of the High Court have in detail investigated the title of the plaintiff based on deeds running back to the year 1901,*.i.e.,* more than a century.The High Court has evaluated the corpus, its identity, its metes and bounds and the extent (given in accordance with ancient measurements) and had come to the finding that the plaintiff has established the identity of the land to be partitioned and the title to lots 1, **2, 3** and **4** of Getagoyawe Hena. This finding of the High Court, regarding the plaintiffs right and title was not challenged by the appellants before us. Hence, this Court sees no basis or reason to interfere with the said finding and or the judgement of the High Court.

In the aforesaid circumstances, the **1st question of law** raised before this Court is answered in the negative. The High Court we hold, was not in error when it held that the plaintiff has established the identity of the land sought to be partitioned.

Let me now move onto consider the **2nd question of law** raised before this Court. It is in respect of the prescriptive title of the appellants to the corpus or the land to be partitioned.

It is observed, except for a bald statement in the submissions of the appellants, *'that the appellants have possessed the plantations and the buildings for a long duration, uninterruptedly and without accepting the plaintiff and the 1st and 2nd defendants as co-owners and thus acquiring prescriptive title to the land called Deekiriyawe Watta,* there is not an iota of acceptable evidence led before the trial court with regard to prescription and or to appellants prescriptive title to the corpus in issue and or to the *plantations and buildings* standing thereon as emphatically pleaded by the appellants. The appellants have also failed to establish adverse possession against the respondent and or an overt act said to have been committed by the appellants against the respondent. Moreover, the submission of the appellants is regarding acquiring a prescriptive title or a prescriptive claim to a land called Deekiriyawe Watta. As categorically held by the High Court, Deekiriyawe Watta lies to the east of the corpus and hence does not form or comprise the land sought to be partitioned by the plaintiff nor a part thereof. Hence, I see no merit in the contention put forward by the appellants that they have established prescriptive title to the land in dispute.

In a long line of judicial decisions, this Court has categorically held that an overt act and or an ouster i.e., a starting point of possession has to be established to prove prescription and the burden of proof clearly lies with the party who asserts prescriptive title. [**Ref. Chelliah v. Wijenathan 54 NLR 337; Corea v. Iseris Appuhamy 15 NLR 65; Thilakeratne v. Bastian. 21 NLR 12; Sirajudeen v. Abbas 1994 (2) Sri LR 365]**

In the instant appeal, the appellants have failed to establish before us, an overt act and or that they have prescriptive title to the land to be partitioned, namely Getagoyawe Hena and or specifically to the plantations and the buildings standing on lots **2** and **4** of the corpus. The High Court has emphatically held that the 3rd to 7th defendants cannot claim any right to the corpus, based upon prescriptive title. The appellants have failed to challenge such position before this Court and we see no reason to interfere with the findings of the High Court regarding its finding on prescription.

In the aforesaid circumstances, the **2nd question of law** raised before this Court is answered in the negative. The High Court has not erred in failing to consider the prescriptive title claimed by the appellants to lots **2,3** and **4** of the land to be partitioned.

In summarizing, the two questions of law raised before this Court are answered in favour of the respondent. The appellants have failed to establish that the learned judges of the High Court have erred whatsoever in coming to its conclusion.

Thus, for reasons adumbrated in this judgement, the appeal of the **4**,**5,6a and 7a defendant- respondent-appellants is dismissed**.

The judgement of the Civil Appellate High Court of Sabaragamuwa, holden in Kegalle dated 01st December, 2015 is upheld.

The plaintiff-appellant-respondent is entitled to a sum of Rs 25,000/= payable by the 4, 5, 6a and 7a defendant- respondent- appellants as costs of this appeal.

The appeal is dismissed.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J

I agree

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal under and in terms of section 9(a) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge,
Criminal Investigation Division,
Colombo

Complainant

SC Appeal No. 182/2017

SC SPL LA No. 201/16

High Court Case No. HCMCA 136/2014

Magistrate Court (Fort) Case No.

~Vs.~

Sangili Ramalingam
No. 19,
Wilferd Place,
Colombo 3.

Accused

AND BETWEEN

Mohhamed Hajji Anwar
No 50/19,
Sir James Pieris Mw,
Colombo 02

First Complainant-Appellant

~Vs.~

Sangili Ramalingam
No. 19,
Wilferd Place,
Colombo 3.

Accused~Respondent

AND

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

Respondent

AND NOW BETWEEN

Sangili Ramalingam
No. 19,
Wilferd Place,
Colombo 3.

Accused~Respondent~Appellant

~Vs.~

Mohhamed Hajji Anwar
No 50/19,
Sir James Pieris Mw,
Colombo 02

Virtual Complainant~
Appellant~Respondent

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

Respondent-Respondent

BEFORE : Buwaneka Aluwihare, PC, J
L. T. B. Dehideniya, J. &
P. Padman Surasena, J.

COUNSEL : Asthika Devendra with Kaneel Maddumage for the Accused-Respondent-Appellant.

Shanaka Ranasinghe, PC. With Yasas Wijesinghe and Nisith Abeysooriya for the Virtual Complainant-Appellant-Respondent.

Madhawa Tennakoon, SSC. With Thivanka Attygalle, SC. For the Respondent-Respondent.

ARGUED ON : 08.06.2020

DECIDED ON : 12.01.2023

JUDGEMENT

Aluwihare, PC, J.

(1) Accused Respondent Appellant (hereinafter referred to as the Accused) was charged before the magistrate's court on three counts punishable under section 25[1] of the Debt Recovery (Special Provisions) Act number 2 of 1990 and one count of Criminal Misappropriation punishable in terms of section 386 of the Penal Code.

(2) At the conclusion of the trial, the learned magistrate having concluded that the prosecution had failed to prove any of the charges preferred against the Accused, found him not guilty as charged and proceeded to acquit him.

(3) Aggrieved by the order of acquittal, the Virtual Complainant Respondent [hereinafter referred to as the Complainant] appealed against the said judgement of the learned magistrate, sanction having first obtained from the Honourable Attorney General, to the High Court.

(4) After hearing the appeal, the learned High Court judge in delivering the judgment, holding that the learned magistrate had erred in finding the Accused not guilty and acquitting him, set aside the said orders, and proceeded to convict the Accused on all four counts.

(5) Further, the learned High Court judge also held that the prosecution had proved the charges preferred against the Accused and that there was no impediment to convict the Accused for the charges preferred against him.

(6) The present appeal arises from the said judgement of the High Court, and when the matter was supported for special leave, the court granted special leave on the questions of law referred to in in sub- paragraphs (a) to (g) of paragraph 12 of the petition of the petitioner which are reproduced verbatim below.

(a) Did the learned High Court judge, err in holding that the Petitioner had failed to establish that he has repaid the money relating to the loan for which as guarantee the cheques in issue were given, whereas it was not the contention of the Petitioner that he has already repaid the said sums and/or which is not required to cast a doubt on the prosecution case?

(b) Did the learned High Court judge err in holding that the petitioner had failed to reveal specific details of the transaction relating to documents V1 to V6,

whereas there is no burden in law for the accused to prove the same other than to cast doubt on the prosecution case.

(c) Has the learned High Court judge failed to evaluate the evidence relating to each charge individually, which is prior to the petitioner's conviction for all four counts as required by law?

(d) Did the learned High Court judge fail to consider that the version of the prosecution would not satisfy the test of probability, whereas evidence of PW-1 in respect of selling apparels to the petitioner was not proved before the court and/or has not been corroborated?

(e) Did the learned High Court judge err in law by failing to consider that the petitioner could not be found guilty for count 2 and count 3 as the same were framed under section 25 (1) (a) of the Debt Recovery (special provisions) Act and/or the petitioner has stopped the payments of the two cheques relating the set counts?

(f) Did the learned High Court judge, in law by failing to consider that the petitioner could not be found guilty for Count 4 as the prosecution has failed to prove beyond reasonable doubt that the readymade garments had been taken/obtained by the petitioner?

(g) Did the learned High Court judge fail to consider that the contention of the petitioner is more probable than the version of the respondent.

The factual background

(7) According to the Virtual Complainant, he being a trader in textiles and finished garments, sold a stock of garments to the Accused in December 2011 to the value of Rs.2.5 million and had received cheques from the Accused as payment. An

invoice for the said amount [P5] and a 'Gate Pass' [P1] signed by the accused in proof of delivery, were produced in evidence.

(8) The invoice clearly indicates that the goods had been supplied to the Accused whom the Complainant knew of, having had business dealings with him previously and the Accused had signed at the foot of the invoice acknowledging the acceptance of the stock of garments.

(9) It appears that, what had been given by the Accused were post-dated cheques and the details are as follows;

[1] A cash Cheque no 196169 dated 30.03. 2012 drawn for Rs 850,000/-[P2]

[2] A cash Cheque no 196170 dated 30.04. 2012 drawn for Rs 850,000/-[P3]

[3] A cash Cheque no 196171 dated 15.05. 2012 drawn for Rs 800,000/-[P5]

(9) All three cheques were dishonoured in the following manner.

[i] The cheque No.196169, when presented to the bank, had bounced with the endorsement "refer to the drawer (01)". The code '(01)' is the standardised bank code used to denote that there were insufficient funds in the account of the drawer to meet the payment.

[ii] When cheque No. 169170 was presented it also had returned with the endorsement "payment stopped by the drawer (52)". The code "(52)" is the standardised bank code used to denote a directive from the drawer/ account holder countermanding the payment.

[iii] When the cheque No. 169171 was presented for payment, that too has bounced with the endorsement "Account closed (51)".

(10) A junior executive officer of the Commercial Bank, Lakshita Hewawasam in his testimony produced the details of the bank account maintained by the Accused

with the Kotahena branch of the Commercial Bank. According to the witness, of the three cheques in question, the cheque number 196169 drawn for Rs.850, 000/- was dishonoured due to insufficient funds in the accused's account to meet the payment. Cheque No. 169170 drawn for rupees 850000/- was dishonoured as the account holder [the Accused] countermanded the payment, while the third cheque for Rs. 800,000/- when presented for payment on 15.8.2012, the account had been closed by the accused Rasalingam on 8. 5. 2022.

(11) The accused giving evidence under oath stated that he borrowed Rs.2.4 million as a lump sum on interest from the virtual complainant and issued 3 cheques. His position was that he paid the Complainant Rs.125000/- a month, as interest. The Accused, however, conceded that there is no documentary proof of the monies that he alleged to have borrowed from the Complainant or any proof of interest payments made by him as alleged. The Accused, however, denied that he ever engaged in any transaction relating to garments and denied the signature on the 'Gate Pass' P1 as his.

(12) It appears from the evidence led at the trial, that prior to the impugned transaction relevant to these proceedings, there had been business dealings between the two parties which the Complainant admitted in his evidence. The documents V1 and V2 were produced in that regard, but both those documents are dated in 2011 whereas the impugned cheques had been dated in 2012. The virtual Complainant had said that documents V1 and V2 have no connection with the sale of garments. As such there does not appear to be a nexus between those two sets of documents and the impugned transaction.

Legal issues

(13) Having considered the evidence led at the trial, this court is of the view that the prosecution had failed to establish the offence of Criminal Misappropriation. Although the learned High Court Judge had concluded that all elements of the

said charge had been established, with due respect to the learned judge, I beg to disagree with the said conclusion.

(14) As far as the charge of Criminal Misappropriation is concerned, the allegation is that the accused dishonestly 'misappropriated' the garments he obtained from the virtual complainant. It is clear from the evidence that this was a pure and simple sale of goods and once the virtual complainant parted with the consignment of garments, the Accused was free to appropriate it in any manner he wished. Simply, there was no arrangement between the Virtual-Complainant and the Accused as to the manner in which the garments should be dealt with. Hence, one cannot say that the accused 'misappropriated' the garments.

(15) For the reasons set out above, I am of the opinion that the charge of Criminal Misappropriation is not made out and the conviction of the Accused for the said offence cannot be sustained. Accordingly, the conviction of the accused for the charge of Criminal Misappropriation [the 4th count] is hereby set aside and accordingly I make order acquitting the Accused on that count.

(16) For the reasons set out above I answer the question of law referred to in sub-paragraph (f) of paragraph 12 of the Petition in the affirmative.

(17) The remaining questions of law (a) to (e) and (g) relate to the conviction for the offences under the Debt Recovery (Special Provisions) Act.

(18) Before I deal with the liability of the Accused in terms of provision of the Act under which he was charged, I wish to consider the argument of the learned Counsel for the Accused where he argued that the learned High Court Judge had failed to evaluate the evidence led at the trial and in particular, to evaluate evidence relating to each charge before convicting the Accused. In this regard,

I wish to rely on the principle laid down in the case of **Mannar Mannan Vs. The Republic of Sri Lanka** 1990 1 SLR 280.

(19) It would be pertinent at this point to address our minds to the Constitutional provision embodied in Article 138 which sets down the criteria in granting relief in exercising Appellate jurisdiction. The proviso to the Article reads;

> *Provided that no judgement, decree, or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties* ***or occasioned a failure of justice***. [emphasis added]

Although the Article referred to above occurs in the Constitution under the heading "The Court of Appeal", the proviso referred to should be considered a guiding principle when a forum is exercising *'appellate jurisdiction'*

It is also to be noted that the proviso to Article 138 referred to above, is mirrored in Section; 334(1) of the Code of Criminal Procedure Act No.15 of1979 [hereinafter the CPC] the application of which was considered by a bench of five judges of this court in the case of **Mannar Mannan** *[supra].*

(20) The proviso to Section 334(1) of the CPC reads thus;

"Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred ".

In the case of **R v.Nicholas Webb Edwards** [1983] EWCA Crim J0228-2, the court considered some of the earlier English cases touching on the applicability of a proviso which is similar to that of our Constitution. This was a case where the appellant was convicted of rape and the sole ground of appeal was that there was a failure to direct the jury on the standard of proof. Goff L. J., in the course of his

judgment stated: "*It is plain that the failure of the Judge to direct the jury on the standard of proof was a serious defect in the summing up..... That being so, we have to consider whether we should exercise our powers under the proviso to section 2 (1) of the Criminal Appeal Act of 1968 to dismiss the appeal if we consider that no miscarriage of justice has actually occurred. From those cases it appears that in such a case, as in any other case, **the court must consider the operation of the proviso in the light of the particular facts of the case.*** [emphasis is mine].

(21) In answering the questions of law referred to above, all what this court has to consider is whether the prosecution has established, beyond reasonable doubt, the charges preferred against the accused under section 25 (1) of the Debt Recovery (special provisions) Act [Hereinafter the Act].

(22) Section 25(1) of the Act states thus;

(1) Any person who-

(a) knowingly draws a cheque which is dishonoured by a bank for want of funds;

(b) gives an order to a banker to pay a sum of money, which payment is not made by reason of there being no obligation on such banker to make payment or the order given being subsequently countermanded with a dishonest intention, or; and

(c) gives an authority to an institution to pay a sum of money to itself, in payment of a debt or loan or any part thereof owed to such institution, from, and out of an account maintained or funds deposited, by such person with such institution and such institution is unable to take such payment to itself by reason of such person not placing adequate funds in such account or by

reason of the funds deposited having been withdrawn by reason of such person countermanding the authority given or by reason of any one or more of such reasons ; or

(d) having accepted an inland bill refuses payment dishonestly;

5.

shall be guilty of an offence under this Act and shall on conviction by a Magistrate after summary trial be liable to punishment with imprisonment of either description for a term which may extend to one year or with fine of ten thousand rupees or ten per centum of the full value of the cheque, order, authority or inland bill in respect of which the offence is committed, whichever is higher, or with both such fine and imprisonment.

(23) At this juncture it would be pertinent to consider the liability under the penal provision referred to above. It is clear that the provision is not a strict liability provision and a mental element is part of the offence.
In an instance where a cheque is dishonoured due to lack of sufficient funds, the requisite mental element is *knowledge* on the part of the Accused, whereas when the reason for a cheque to be dishonoured is either the same being countermanded or closure of the account after the cheque was issued, then the mental element that has to be established is one of *dishonesty*.

(24) It is my view, that in a prosecution under Section 25 of the Act, the reason or the reasons as to the issuance of the cheque is not relevant, as the nature of the transaction is immaterial as far as the offence is concerned. In the instant case the liability of the Accused has to be considered in the following manner;
Regarding the cheque No. No 196169 dated 30.03. 2012, the liability has to be considered under paragraph (a) of Section 25 (1) of the Act whilst in relation to cheques bearing Nos. 196170 and 196171, what would be applicable is paragraph (b) of that Section.

(25) In relation to count No.1, which is based on the Cheque 196169 what the prosecution was required to prove, in order to satisfy the ingredients of the

offence was that the cheque that was drawn by the Accused was dishonoured due to insufficient funds and that the Accused had knowledge that the funds were insufficient to meet the cheque. It is common ground that the cheque was drawn by the Accused and the fact that it was dishonoured was not disputed by him either. It has also been established that the cause for dishonouring was due to lack of funds.

(26) The monthly bank statements of the Accused's business establishment for the months of January to May 2012 were marked and produced at the trial [P7]. In the normal course of events the account holder [Accused] ought to have received them at the end of each month. None of these statements reflect a sufficient credit balance to meet any of the cheques that the Accused issued to the Complainant.

(27) In any event there was no material placed before the court to show that the Accused did not have the knowledge that the credit balance was insufficient to meet the cheque. Regard being had to common course of natural events and human conduct plus the attended circumstances, it would be reasonable for the court to presume that the Accused was aware that the amount of money lying to his credit in the bank account in question was insufficient[to meet the cheques] at the time relevant to the impugned transaction.

(28) On the other hand, if any facts were especially within the knowledge of the Accused which was indicative of 'lack of knowledge' on his part as to the funds lying to the credit of the bank account, then it was incumbent on the Accused to prove that fact within the meaning of Section 106 of the Evidence Ordinance. The illustration to Section 106 reads thus;

> *"A person is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket on him"*

(29) Considering the above, I hold that the learned High Court Judge was correct in coming to the conclusion that the prosecution has established count No.1 beyond reasonable doubt.

(30) As far as count 3 is concerned, the conduct of the Accused in closing the bank account before the due date on which the cheque No. 196171 could have been presented for payment, appears to be a deliberate act on his part to deprive the Complainant of encashing the cheque in question. When the cheque was presented for payment by the Complainant, there was no obligation on the banker to make the payment, thus fulfilling the requisite elements of paragraph (b) of Section 25(1) of the Act.

(31) Here, again the attendant circumstances are indicative of dishonesty on the part of the Accused in the absence of any material to infer otherwise. As such the conviction of the Accused on count 3 also cannot be faulted.

The questions of law

(32) The question (a) raises the issue as to whether the learned High Court judge, erred in holding that the Petitioner [the Accused] had failed to establish that he has repaid the money relating to the loan for which as guarantee the checks in issue were given. Firstly, it must be said that what the learned High Court Judge had said was, that the Accused had argued that the cheques were given in respect of a loan obtained by the Accused but the Accused had failed to establish that the loan had been repaid. As referred to earlier, these matters are irrelevant as far as the requisite elements of the offence and as such the manner in which the learned High Court Judge dealt with this aspect has no bearing on the charges. As such I answer the question of law (a) above in the negative.

(33) The question of law referred to in paragraph (b) raises the issue as to whether the learned High Court judge erred in holding that the Accused had failed to reveal specific details of the transaction relating to documents V1 to V6, whereas

there is no burden in law for the accused to prove the same other than to cast doubt on the prosecution case. As referred to earlier, there does not appear to be any nexus between V1 to V6 and the impugned transactions relevant to this case. V1 refers to a cheque drawn on the Bank of Ceylon for Rs. 400,000/- V5 also refers to a cheque issued from the account the Accused maintained at the Bank of Ceylon, however, all the cheques relating to this case had been drawn on the Commercial Bank. It also refers to a cheque drawn for Rs.400, 000/-. None of the cheques relevant to the instant case had been drawn for Rs. 400,000/-. As such I am of the view that even if the learned High Court Judge had considered the documents V1 to V 6, he could not have arrived at a different decision. In the circumstances, I answer the question (b) referred to above also in the negative.

(34) The question of law referred to in paragraph (c) raises the issue as to whether the learned High Court judge failed to evaluate the evidence relating to each charge individually as required by law. As regard to the question of law raised, it is true that a court is required to consider each charge separately and decide as to whether the requisite *actus reus* and the *mens rea* have been established by the prosecution beyond reasonable doubt, before entering a conviction. The complaint in the instant case appears to be that the learned Judge had not done so. Upon perusal of the judgement, it appears that the contention on behalf of the Accused is correct in this regard. The question is whether the accused must be given the benefit of every non-direction or misdirection on the part of the learned judge. I do not think so. Even if there was a non-direction, if that non-direction had not caused any prejudice to the Accused or had not resulted in any failure of justice there is no reason then, to vary the judgement. Upon considering the entirety of the evidence led at the trial, I am of the view that if the learned High Court Judge had directed himself properly, he could not have come to a different conclusion other than finding the accused guilty. As such I answer the question of law referred to in paragraph (c) referred to above also in the negative.

(35) Question of law referred to in paragraph (d) raises the issue as to whether the learned High Court judge failed to consider that the version of the prosecution would not satisfy the test of probability whereas evidence of the Complainant in respect of selling apparels to the petitioner was not proved before the court and or has not been corroborated. This aspect again is not relevant in deciding the issues in this case as all what the learned High Court Judge was required to consider as to whether the requisite elements of the offence had been established or not and the probability of the version given by the Accused has no bearing on the charges as the Accused had not denied issuing the cheques. As such the question of law (d) too is answered in the negative.

(36) The question of law referred to in paragraph (e) raises the question as to whether the learned High Court judge erred in law by failing to consider that the petitioner could not be found guilty for count 2 and count 3 as the same were framed under section 25 (1) (a) of the Debt Recovery (special provisions) Act. In relation to count 2 and 3, the violations come under paragraph (b) of Section 25(1) and not under paragraph (a) of that section. The penal provision, however, is common to both limbs. Furthermore, in the body of the charges the specific reason as to the dishonouring of the cheques are referred to. In count 2 the actual reason for dishonouring of the cheque was due to the Accused countermanding the payment and not due to insufficient funds. However, the body of the charge states; '*knowing that the cheque would be dishonoured due to lack of funds to meet the cheque you issued it.*' As far as the said count was concerned what the prosecution had established through the bank official was that they did not honour the cheque as the Accused instructed the bank to stop payment and the issue of insufficiency funds was not raised. Hence, to my mind the finding of guilt on count No. 2 was erroneous. As such, as far as count 2 is concerned, I answer the question of law referred to in paragraph (e) in the affirmative and set aside the finding of guilt and the conviction of the Accused on the said count. The situation, however, is different in respect of count 3 which specifically says after issuing a cheque dated 15. 05.2012 the Accused closed the bank Account. It is a

known fact that in banking practices a cheque is valid for a period of six months from the date of its issuance. If a purposive construction is to be given to Section 25 of the Act, it would be reasonable to expect a reasonable man to make certain that all the cheques that had been issued by him had been presented for payment before taking the step of closing the bank Account. If a person acts with honesty, it would be reasonable to expect that person to inform any party to whom such person has issued cheques, his intention to close the bank account giving them a window to present any cheques for payment. In the instant case the Accused had not taken any such step which goes to indicate the dishonest intention on the part of the Accused. In the circumstance I hold that the finding of the Accused guilty on Count 3 is in accordance with the law and I answer the question of law referred to in paragraph (e) in the negative in respect of count 3.

(37) I have already dealt with the question of law referred to in paragraph (f) in paragraphs (13) to (16) of this judgement and answered the issue, as such I do not wish to repeat it here.

(38) The question of law referred to in paragraph (f) raises the question as to whether the learned High Court judge failed to consider that the contention of the petitioner [Accused] is more probable than the version of the respondent. I have expressed the view that the nature of the transaction is not material to decide the liability under Section 25(1) of the Act, unless it is relevant to establish or negate the requisite *mens rea*. The position taken up by the Accused was that the cheques were given as he borrowed money from the Complainant whereas the prosecution case is that it was given as payment for the stock of garments. When one considers the facts peculiar to the instant case in considering the culpability of the Accused, the non-consideration of probability of the Accused version has no bearing on the charge. As such I answer the question of law raised in paragraph (f) also in the negative.

Orders of the Court

The conviction of the Accused on counts 1 and 3 of the charge sheet dated 20th February 2013 are affirmed.

The conviction of the Accused on counts 2 and 4 of the said charge sheet are set aside and the accused is acquitted on the said counts.

As directed by the learned High Court judge, the magistrate is required to impose an appropriate sentence upon considering the aggravating and mitigatory factors.

The Registrar of this court is directed to return the original magistrate's court case record forthwith and to communicate the judgement of this court to the learned magistrate.

Appeal is partially allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE P. PADAMN SURASENA

I agree

JUDGE OF THE SUPREME COURT

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

1. Mandis de Silva Jayasingha,
   Walpola, Matara
   (Deceased)

1A. Hemalatha de Silva Jayasingha,
   Walpola, Matara
   Plaintiff

SC APPEAL NO: SC/APPEAL/28/2014
SC LA NO: SC/HCCA/LA/540/2011
HCCA MATARA NO: SP/HCCA/MA/526/2006(F)
DC MATARA NO: P/14642

Vs.

1. Somadasa Galle Liyanaga,
   Welegoda
2. Chandrika Kumudini Samaraweera,
   2nd Cross Road, Walpola, Matara
3. Olga Ranjani Wijeweera alias
   Samaraweera, Welewatte
   Defendants

AND BETWEEN

1. Mandis de Silva Jayasingha
   Walpola, Matara
   (Deceased)

1A. Hemalatha de Silva Jayasingha,
Walpola, Matara
Plaintiff-Appellant

Vs.

1. Somadasa Galle Liyanaga,
Welegoda.
2. Chandrika Kumudini Samaraweera,
2nd Cross Road, Walpola, Matara
3. Olga Ranjani Wijeweera alias
Samaraweera,
Welewatta
Defendant-Respondents

AND NOW BETWEEN

1. Mandis de Silva Jayasingha,
Walpola, Matara
(Deceased)

1A. Hemalatha de Silva Jayasingha
Walpola, Matara
Plaintiff-Appellant-Appellant

Vs.

1. Somadasa Galle Liyanaga,
Welegoda
2. Chandrika Kumudini Samaraweera,
2nd Cross Road, Walpola, Matara

3. Olga Ranjani Wijeweera alias
Samaraweera, Welewatta
(Deceased)

3A. Dayananda Wejeweera,
Welewatta, Matara

3B. Devi Tharanga Wejeweera,
Welewatta, Matara

Defendant-Respondent-Respondents

Before: Vijith K. Malalgoda, P.C., J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: P. Peramunugama for the substituted Plaintiff-Appellant-Appellant.
Rohan Sahabandu, P.C., with Chathurika Elvitigala for the substituted 3rd Defendant-Respondent-Respondents.

Argued on: 02.08.2022

Written submissions:
by the substituted Plaintiff-Appellant-Appellant on 04.04.2014
by the substituted 3rd Defendant-Respondent-Respondents 10.6.2014

Decided on: 12.01.2023

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Matara to partition the land known as "*Excluded portion of Punchipathagewatta bearing assessment number 11*" described in the second paragraph of the plaint

between the plaintiff and the 1st defendant. The 2nd and 3rd defendants, two siblings, have been made parties to the action as they dispute the plaintiff's rights to the land. After trial, the District Court dismissed the plaintiff's action on the basis that the 3rd defendant has prescribed to the land. On appeal, the High Court of Civil Appeal affirmed the judgment of the District Court and dismissed the appeal. The plaintiff has filed this appeal against the judgment of the High Court. This Court granted leave to appeal against the judgment of the High Court on the following questions of law as formulated by learned counsel for the plaintiff:

a) *Did the Honourable Judges of the Provincial High Court of Civil Appeals of the Southern Province (Holden in Matara) err in not considering an all important item of evidence, the complaint marked IV2 and the existence of the Western boundary shown in Plan No. 1318A marked X, which nullifies the finding of the Learned trial Judge as to the possession of the subject matter of this action as part of the adjoining land pertaining to lot A of land called Punchipathagewatta?*
b) *Did the Honourable Judges of the Provincial High Court of Civil Appeals of the Southern Province (Holden in Matara) err in holding that the learned District Judge is correct in holding that the 3rd Defendant has prescribed to the subject matter of this action by being in possession of the subject matter of this action as part of the adjoining land pertaining to lot A of land called Punchipathagewatta?*
c) *Did the Honourable Judges of the Provincial High Court of Civil Appeals of the Southern Province (Holden in Matara) err in not considering that once the paper title to the subject matter of this action is proved to be with the Plaintiff and the 1st Defendant the burden of proving the prescriptive right to the subject matter of this action as a distinct and separate land within the meaning of*

section 3 of the Prescription Ordinance is with the 3rd Defendant which the 3rd Defendant has failed to do even on the finding of the Learned trial Judge as to the possession of the subject matter of this action?

There is no corpus dispute in this case but the District Court has confined the corpus to lot 1 in the preliminary plan marked X. Learned counsel for the plaintiff does not contest this finding. There had been a dispute on the pedigree but the District Court has resolved it in favour of the plaintiff. However the District Court has dismissed the plaintiff's action on the basis that the 3rd defendant possessed the corpus (i.e. lot 1 in plan X) together with lots 3 and 4 in the same plan as part of "*lot A of Punchipathagewatta bearing assessment number 11*" which lies adjoining the land to be partitioned. It is common ground that "*lot A of Punchipathagewatta bearing assessment number 11*" is possessed by the contesting defendants or their people, not by the plaintiff or the 1st defendant.

The plaintiff describes the disputed land as a burial ground but admits in evidence that no one has been buried there in her lifetime. She was 46 years old at the time of giving evidence. She has not witnessed any burials there although she says her deceased father had told her that some of her forefathers were buried there. There are no tombs. There is nothing to look after or possess. It is a bare land. The plaintiff in her evidence says when her father, the original plaintiff, was alive, he used to clean the land. The District Court has not believed this evidence. If what the plaintiff says in relation to possession is correct, they could have at least put up a fence separating that portion from "*lot A of Punchipathagewatta bearing assessment number 11*". This has not been done.

According to the complaint made by the original plaintiff to the Gramasewa Officer marked 1V2, which the plaintiff strongly relies on

(*vide* the first question of law reproduced above), the 2nd defendant is in possession of the land on the northern boundary of the disputed land and the 2nd defendant put up a fence joining the disputed portion of the land to her land on or around 24.05.1989. That is the complaint. The plaintiff does not ask the Gramasewa Officer to hold an inquiry into his complaint. He did not make a police complaint either. After this alleged incident, he filed this partition action on 18.08.1989. If the original plaintiff had been in possession of the disputed portion of the land for a long time and if the 2nd defendant forcibly evicted him by erecting a fence around that portion and joining that portion to her land, a reasonable person in my view would have acted differently. Be that as it may, if what the plaintiff says in 1V2 is correct, until such time, the disputed portion did not have a fence separating it from "*lot A of Punchipathagewatta bearing assessment number 11*". This supports the assertion of the 2nd and 3rd defendants, which was accepted by the District Court, that they possessed the disputed portion of the land as part of "*lot A of Punchipathagewatta bearing assessment number 11*" as one allotment. According to the preliminary plan, there is no fence on the northern boundary of the land although the other three boundaries have fences. There is a "foundation" on the northern boundary. This seems to be a construction by the 2nd and 3rd defendants.

Neither the plaintiff nor her father has ever paid assessment rates to the Municipal Council in relation to the corpus but the 3rd defendant and her father have. Learned counsel for the plaintiff contends that although the 3rd defendant may have paid rates on assessment number 11, the land for the partition of which the action was filed is not assessment number 11. This is contrary to the evidence of the plaintiff. She has accepted in evidence that assessment number 11 is the land in dispute. It is in that context that the District Court has made the finding that the 3rd defendant and her father have paid taxes on assessment number 11

including the disputed portion. Learned counsel also contends that rates are not levied on burial grounds. Although the plaintiff identifies this as a burial ground, it is no longer used for that purpose.

Learned counsel for the plaintiff, either in the written submissions or oral submissions, does not give any acceptable cogent reason for this Court to reverse the judgment of the District Court. The judgment of the District Court is a well-considered one. On the facts and circumstances of this case, the finding of the District Court which was affirmed by the High Court that, on a balance of probability, the 3rd defendant has acquired prescriptive title to lots 1, 3 and 4 in plan X, is justifiable. I answer the questions of law upon which leave has been granted against the plaintiff and dismiss the appeal but without costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal to the Supreme Court against Judgment of the Court of Appeal dated 23/10/2013 delivered in C.A. Appeal No.948/2000(F) D.C.Negombo Case No.3552/L.

IN THE DISTRICT COURT

SC/APPEAL NO.46/2014
SC/SPL/LA No.296/2013
C.A. APPEAL 948/2000
D.C. Negombo Case No. 3552/L

1. Nanayakkara Senarath Appuhamillage Karunarathne Nanayakkara, of Banduragoda.
[Deceased]
2. Karunarathne Senarath Appuhamillage Indra Beatrice Nanayakkara, of Banduragoda.

Plaintiffs

Vs.

Jayasinghe Aratchige Somaratne, of Banduragoda.

Defendant

IN THE COURT OF APPEAL

Jayasinghe Aratchige Somaratne, of Banduragoda.

Defendant Appellant

Vs.

2. Karunarathne Senarath Appuhamillage Indra Beatrice Nanayakkara, of Banduragoda.

Plaintiff Respondent

NOW, IN THE SUPREME COURT

2. Karunarathne Senarath Appuhamillage Indra Beatrice Nanayakkara, of Banduragoda.

Plaintiff- Respondent -Petitioner-Appellant

Vs.

Jayasinghe Aratchige Somaratne, of Banduragoda

Defendant- Appellant- Respondent

Before: Buwaneka Aluwihare, PC, J
L. T. B. Dehideniya, J
S. Thurairaja, PC, J

Counsel: Dr Sunil Cooray with Sudarshani Cooray for the Plaintiff-Respondent-Petitioner- Appellant.
Ranjan Suwandarathne, PC with Ineka Hendawitharana and Lahiru Abeyratne for the Defendant-Appellant-Respondent.

Argued on: 04. 03.2021

Decided on: 12.01.2023

Judgement

Aluwihare, PC, J,

(1) This matter which was argued before the Court of Appeal was decided on a preliminary issue and as such the facts referred to here are confined, to the extent necessary to the issue in question.

Factual Background

(2) The Plaintiff-Respondent-Petitioner-Appellant, [hereinafter the Plaintiff] jointly with his now deceased father who was the 1st Plaintiff, filed action against the Defendant-Appellant-Respondent [hereinafter referred to as the Defendant] seeking a declaration of title to the land described in the Schedule "B" to the plaint upon the deeds pleaded in the plaint, for an order permitting the erection of a boundary fence separating the lands occupied by the plaintiffs and the defendant and to have the defendant ejected from the land described in Schedule "B" to the plaint, and for damages and Costs.

(3) The Defendant by his amended answer dated 28th January 1992 took up the position that his father J.A.Stephen Appuhamy and he were entitled the entire land described in the Schedule to the said amended answer and depicted in Plan No. 5026 dated 3.9.1986 marked "P7" by uninterrupted and undisturbed possession for well over the prescriptive period and in addition, the Defendant also took up the position that there was a misjoinder of parties and causes of action and that the plaint was contrary to Section 35 (1) of the Civil Procedure Code and moved to have the plaintiffs' action dismissed.

(4) By the judgment dated 4th July 2000 the learned Additional District Judge entered judgment for the plaintiffs as prayed for in the plaint with the exception that the damages in prayer (d) to the plaint were restricted to Rs.2500/-.

(5) The land described in Schedule "B" of the plaint is lot 1 of Koangahawatte depicted in plan no. 159 dated 2nd March, 1968 made by K.A.G. Amarasinghe

Licensed Surveyor, which is in extent of 1 acre 1 rood and 9 perch. The Plaintiff and the deceased Plaintiff in the plaint alleged that the property described in the Schedule "A" to the plaint was owned by the Deceased Plaintiff and his brothers and thereafter the deceased Plaintiff and his brothers, divided the said property by an amicable partition and in terms of the said division the Deceased Plaintiff claimed that he became the absolute owner of the property described in Schedule "B" to the plaint.

(6) The Deceased Plaintiff and the Plaintiff further stated that the Deceased Plaintiff by deed no. 8015 dated 1.3.1970 gifted the said property to the Plaintiff subject to the life interest of the Deceased Plaintiff.

(7) The plaintiff averred that a portion to the north west of the property described in Schedule "A" of the plaint at the time of the said division of the property was reserved for one J. A. Stephen Appuhamy and both the Deceased Plaintiff and the Plaintiff alleged that the Defendant around September 1985, removed a fence and caused damage to certain trees situated in the Plaintiffs' land and the said action of the Defended led to the institution of this action before the District Court.

(8) The Defendant in his amended answer stated that his father and he, possessed a portion of the land depicted in plan no. 5026. The Defendant described the land as a property of 1 rood and 1.2 perches in extent, depicted in plan no. 2635 dated 29th December 1988 made by R. I. Fernando Licensed Surveyor. The Defendant claimed ownership by prescriptive title to this portion of land, whilst raising an objection that the Deceased Plaintiff and the Plaintiff had wrongfully joined causes of action in violation of Section 35(1) of the Civil Procedure Code.

(9) At the trial, 2 admissions, 10 issues on behalf of the Plaintiff and 4 issues on behalf of the Defendant were recorded. The Plaintiff closed his case by calling the brother of the Appellant, Ariyaratne Nanayakkara as a witness and reading

in evidence documents marked P1 to P7a. On behalf of the Respondent, one Samarasena Senarath and one Wijerathna Arachchige Nimalsena were called in to give evidence.

(10) The District Court on 4th July 2000 entered judgment for the Plaintiff, granting reliefs prayed for, subject to the restriction of damages to Rs. 2,500/- in prayer (d) of the Plaint. Being aggrieved by the said judgement, the Defendant appealed therefrom to the Court of Appeal.

(11) The Defendant in his petition of appeal dated 17th August 2000 has set out ten grounds of appeal numbered (a) to (j). By judgement dated 23.10.2013, the Court of Appeal held that the Plaintiff's action did not comply with Section 35(1) of the Civil Procedure Code and proceeded to set aside the judgment of the District Court without addressing any of the other issues raised by the Defendant.

(12) Being aggrieved by the said Judgement of the Court of Appeal, the Plaintiff appealed to the Supreme Court. On 17.03.2014, this Court granted Special Leave to Appeal on the question of law set out in Sub-paragraph (a) of paragraph 17 of the Petition of the Appellant [Plaintiff] dated 02.12.2013. The court, however, was of the opinion that the issue on which the Court of Appeal decided the appeal and the question of law on which special leave was granted could not be reconciled. In the circumstances with the consent of the learned counsel who represented the parties it was agreed that, instead of the question of law on which special leave was granted on 02. 12. 2013, the appropriate questions that should be considered by this court are the questions of law that are referred to in sub-paragraphs (g) and (h) of paragraph 17 of the Petition. Accordingly, by order dated 30.03.2021, this Court resolved to consider the questions of law referred to in the sub-paragraph (g) and (h) of paragraph 17, instead of paragraph (a).

The said questions of law referred to in the said sub -paragraphs are reproduced below,

(g) Did the Court of Appeal err by failing to appreciate that this action of the Plaintiff was for the recovery of land within the meaning of section 35(1) of the Civil Procedure Code, and that the prayers (a), (b) and (c) in the plaint were prayers only for the recovery of land and that therefore, so far as the said three prayers are concerned, there was no necessity to obtain leave under the said provisions of law;

(h) So far as prayers (d) and (e) in the plaint are concerned, was there no necessity to obtain leave of court as the said two prayers came within section 35(1)(b), and accordingly there was no necessity to obtain leave of court to include them in the prayer to the plaint, as held by the District Court [p.160].

(13) The learned counsel for the Plaintiff contended that in deciding the cause of action on which a Plaintiff came to court, it is necessary to examine the plaint as a whole, including all its averments and reliefs prayed for. He further contended that on a plain reading of the plaint, the action instituted by the Plaintiff cannot be understood as an action for the definition of boundaries. He maintained that the court of appeal gravely erred in holding that the present action is an action for the definition of boundaries, even though several ingredients needed to be pleaded in an action for the definition of boundaries are not found in the plaint. He submitted that all the prayers set out in the Plaint are based on the title of the Plaintiff, and thus the action constitutes a *rei vindicatio* action. His position was that the relief prayed for, namely permission to erect a fence on the common boundary is part of and in furtherance of the "recovery of immovable property" within the meaning of section 35 of the Code. It was also submitted that if the relief for the erection of a fence on the common boundary was wrongly included in the prayer of the plaint because leave of the court under Section 35(1) of the Code was not obtained by the Plaintiff, only that particular relief should have been refused, without a dismissal of the action in its entirety.

(14) The learned Presidents' Counsel for the Respondent argued that paragraph [12] of the Plaint as well as prayer (b) taken together with prayers (a) and (c) of the Plaint make it clear that the Appellant is attempting to combine an action for declaration of title and ejectment, with an action for the definition of boundaries. He submitted that this is contrary to Section 35(1) of the Code since the Plaintiff has not first obtained leave from the Court to combine such actions. He noted that the Defendant by their answer dated 24th April 1987 has raised this objection. The learned Presidents' Counsel also referred to several decided judgements in support of the contention that an action for the definition of boundaries cannot be combined for an action for declaration of title. These judgements will be analysed later in this judgment. Accordingly, it was the Defendant's submission that the judgement of the Court of Appeal be upheld and that this appeal be dismissed.

(15) The observation made by the Court of appeal [page 3 of the judgement] was that; the *Plaintiff has sought to combine a rei vindicatio action with an action for definition of boundaries and proceeded to hold that "It clearly appears from prayer (a) of the plaint that the Respondent [the Plaintiff] has sought a judgement declaring him as the owner of the land described in the schedule "B" to the Plaint. In contrary to the said relief the Respondent, in prayer 'b' of the plaint, has sought to erect the boundary fence between the Appellant's [the Defendant] and the Respondent's lands.* ***It seems from paragraph 12 and prayer 'b' and 'c' of the plaint that the Respondent's action is for Definition of boundaries."***

(16) The Court of Appeal further observed that "It was apparent from the evidence of the Respondent [the Plaintiff] that there was a fence between the two lands and the Appellant [the Defendant] has destroyed the said fence and has encroached the Respondent's [Plaintiff's] land. Hence it was clear that there had been an ascertainable common boundary between the two lands and such boundary had been obliterated subsequently. Apart from that the Appellant has encroached the Respondent's land. **But in an action for definition of boundaries**

a plaintiff cannot seek to eject a person from a land or from a portion of land which has been encroached by a Defendant." [Emphasis added]

(17) It is evident from the above observation, that the Court of Appeal has proceeded on the basis that Plaintiff's action was one for definition of boundaries. Therefore, the first issue to be ascertained by this court is whether the Plaintiffs, by their Plaint sought an action for the definition of boundaries in addition to an action for declaration of title.

(18) The Court of Appeal has concluded that the action is one for definition of boundaries by referring to paragraph 12 and prayers (a), (b), (c) of the Plaint. Paragraph 12 merely sets out that a cause of action has accrued to the Plaintiff to sue for the reliefs claimed by the Plaint. By prayer (a) of the Plaint, the Plaintiffs had sought a declaration of title to the land described in the Schedule "B" to the plaint. By prayer (b) they had sought [for permission] to erect a boundary fence separating the lands occupied by the Plaintiffs and the Defendant. By prayer (c) she has sought the ejectment of the defendant from the land described in the Schedule "B" to the plaint, after the erection of the said boundary fence.

(19) Prayers (a) and (c) of the Plaint, namely, for declaration of title to the land in question, and ejectment of defendants from the same land, are standard relieves prayed in a *re vindicatio* action. In reality it is only prayer (c) of the Plaintiff's plaint that may not strictly fall within the standard reliefs one would pray for in such an action. Considering the totality of the evidence led and the attended circumstances, however, I am unable to agree that prayer (c) along with averments in paragraph 12 of the Plaint one could conclude that the Plaintiff's action was one for definition of boundaries.

(20) On behalf of the Defendant, several decisions were cited in support of their preposition that an action for definition of boundaries cannot be joined with

an action for declaration of title. However, in all those cases cited, the plaintiffs have sought **a definition or demarcation** of a boundary through the prayer.

In ***Somawathie and Others v Illangakoon*** **[2013] 1 Sri L.R. 94**, at page 96 it is stated that,

"In the prayer of the plaint, the plaintiffs have prayed for an order ***demarcating the boundaries of their land***, ejectment of the defendant from that land and for damages as quantified in prayer 'C' of the plaint." [Emphasis added]

In ***Leelawathie hamine and another v Gnanasiri*** **[1989] 1 Sri L.R. 322**, it is stated at page 322,

"The plaintiffs in the prayer to the plaint have asked that their western **boundary be defined** according to title plan No. 290399."

In the case of ***M. Jacolis Apphu v W.A. David Perera*** **(1967) 69 NLR 548**, at page 549 it is stated,

"The plaintiff-respondent to this appeal, claiming to be the owner of the allotment of land depicted as lot 4B of Plan No. 1194 (P8) dated 8.2.1962 made by A. R. C. Kiel, Licensed Surveyor, instituted this action for a **definition of the western boundary of that allotment,** namely the boundary separating that allotment from the allotment marked Lot 4A on the said plan." Emphasis added]

(21) These cases are quite distinct from the present action, as the Plaint in the present action does not contain a prayer for the definition or demarcation of a particular boundary to a land. Prayer (b) is for an erection of a boundary fence separating the Plaintiff's land from the Defendant's. The said prayer in my view does not denote that the Plaintiff's action is one for the definition of boundaries.

(22) A complete picture of the nature of the Plaintiff's action may be gleaned by referring to the issues and admissions of the parties. The following issues have been raised by the Plaintiff and the Defendant at the commencement of the trial,

Issues by the Plaintiff:

1. Were the 1st Plaintiff and his brothers the owners of the land described in Schedule "A" to the Plaint by virtue of Deed No. 699 dated 05.02.1951 attested by B.B.P. Wijewardena Notary Public and Deed No. 6454 dated 30.11.1925 attested by S.J.V. Wickremasuriya Notary Public?

2. Did the 1st Plaintiff and his brothers, by the deed of partition No. 40 dated 29.08.1968 attested by D.A.F.D. Jayawardena Notary Public, partition the land described in Schedule "A" to the Plaint?

3. In terms of the said partition, did the 1st Plaintiff become the owner of the land described in Schedule "B" of the Plaint?

4. Did the 1st Plaintiff by Deed No. 8015 dated 01.03.1970 attested by D.R.S. Gunawardena Notary Public gift the land described in Schedule "B" of the Plaint to the 2nd Plaintiff, subject to the life interest of the 1st Plaintiff?

5. Is the 2nd Plaintiff entitled to the said land described in Schedule "B" to the Plaint on deeds as well as prescriptive possession?

6. At the time the land described in Schedule "B" to the plaint was partitioned, was a portion from its northwestern side separated off to be possessed by J. A. Stephen Appuhamy?

7. After the death of the said J. A. Stephen Appuhamy, has the Defendant been in occupation?

8. On or about 01.09.1985 did the Defendant wrongfully and unlawfully break down the boundary fence separating the land occupied by the Defendant and the land described in Schedule "B" of the Plaint, cut down three Jak trees, cut down branches of a Mango tree and cause damage to the other trees?

9. If so, what is the quantum of damages?

10. If the above issues be answered in favour of the 2nd Plaintiff, is she entitled to the reliefs prayed for, in the Plaint?

The only issue relating to the boundaries of the land in question is issue no. 8. Referred to above. It is significant to note [from the issue no. 8] that the Plaintiffs were never in doubt as to what the northern boundary to the impugned property was. They are only alleging that the Defendant caused damage to the fence that was already in place, along the said boundary.

(23) As stated, none of the issues referred to above relate specifically to the issue of boundaries between the Plaintiff's and Defendant's lands. Issue No. 8, appears to have been raised in order to quantify damages that the Plaintiff has claimed as a result of the damage caused to the fence by the Defendant's alleged acts. The issues raised do not indicate in any manner that the Plaintiffs had endeavoured to maintain an action for the definition of boundaries.

(24) To my mind, there was only one cause of action and that is for declaration of title to the land referred to in schedule 'B' of the plaint. The claim for the damages caused to the fence is merely consequential in that the Plaintiffs alleged that the Defendant trespassed on to their property and in the process of cutting down some trees, caused damage to the fence as well.

(25) **Fernando vs. Lakshman Perera** 2000 (2) S.L.R 413 was a case where the Plaintiff not only sought a declaration that he was entitled to the land in question, but also a further declaration, *inter alia*, to invalidate two deeds. It was argued that the joinder violated the provisions of section 35[1] of the Civil Procedure Code, as in an action instituted in terms of Section 35, no other claim or cause of action shall be made unless with leave of court, except in cases enumerated therein.

Justice Jayawickrema delivering judgement held;

"In paragraph 17 of the plaint he states that a cause of action has arisen to evict the Defendant and place the Plaintiff in possession of the land. On a perusal of this plaint, I find that there is only one cause of action as per Paragraph 17 of the plaint. ***The prayer for invalidation of two deeds referred to above is consequential to the main cause of action to obtain a declaration of title to this land.*** *For this purpose, it is necessary to prevent the 1st and the 2nd Respondents from alienating the land by way of transferring, selling, agreeing to sell and mortgaging the said land.* ***Under Section 35(1)(b) of the Civil Procedure Code the Plaintiff*** *in an action for declaration of title to immovable property* ***is entitled to make a claim for damages*** *for breach of any contract under which the property or any part thereof is held; or* ***consequential on the trespass which constitute the cause of action.*** *In the instant case the claim to invalidate the deed and agreement itself is consequential to the main cause of action to obtain a declaration of title. It is necessary to prevent the alleged actions of the Defendant and to invalidate any illegal transfers or alienations. It is abundantly clear on a reading of the plaint which states in minute detail the alleged conduct of the Defendant to alienate the property which is the subject matter of this action, that the only cause of action is to obtain a declaration of title and possession of the subject matter."* [Emphasis added]

(26) In **Peiris and Another v Siripala [2009] 1 Sri L.R. 75**, His Lordship De Silva J observed; [at page 78]

"One of the main legal arguments of the Appellants, put forward in their submissions was based on section 35 (1) of the Civil Procedure Code. The relevant issue is issue number 6. The Appellants argued that a cause of action to have the deed P2 declared null and void cannot be joined with a cause of action for a declaration of title to immovable property without leave of the court first had and obtained. Appellants argued that the Respondent should have dropped one of the causes that is, the Respondent should have either maintained the cause of action for a declaration of title or should have

abandoned that cause of action and maintained a cause of action for a declaration that the aforementioned deed P2 was a fraudulent deed and therefore was void."

His lordship went on to hold that; [at page 79] "*On the other hand, assuming without conceding that the Respondent had formulated issues on both causes of action, namely the declaration of title and for a declaration that deed P2 is void, I find such procedure to be perfectly in order. The law permits one to adopt such a cause and is not repugnant to section 35 (1). There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed (in this case P2) is consequential to a prayer for declaration of title."*

(27) In the instant case too, the Plaintiffs, in their issues raised have confined themselves to an action for declaration of title, and to recover damages resulting from the wrongful trespass into their land by the Respondent. Accordingly, I find that the Court of Appeal has erred in deciding that the Appellant has instituted and action for the definition of boundaries.

(28) Considering the aforestated, I hold that the action of the Plaintiff was for the recovery of the land in question and as such there was no need to obtain leave of the court in terms of Section 35(1) of the Civil Procedure Code. Accordingly, the question of law referred to in sub-paragraph (g) of Paragraph 17 of the Petition is answered in the affirmative. [The 1st question of law on which special leave was granted]

(29) The next issue to be determined is whether the inclusion of prayers (d) and (e) in the Plaint, makes the action contrary to Section 35(1) of the Civil Procedure Code as no leave of the court was obtained. [Question of law referred to in sub-paragraph (h) of Paragraph 17 of the Petition].

In paragraph (d) of the prayer to the plaint, the plaintiffs have claimed Rs. 5000/- as damages whereas in paragraph (e) they have sought an order for

ejection of the Defendant and peaceful possession of the land *after erecting the fence.*

(30) Section 35(1) of the Civil Procedure Code states,

"In an action for the recovery of immovable property, or to obtain a declaration of title to immovable property, no other claim, or any cause of action, shall be made unless with the leave of the court, except

(a) claims in respect of mesne profits or arrears of rent in respect of the property claimed;

(b) damages for breach of any contract under which the property or any part thereof is held; or consequential on the trespass which constitutes the cause of action; and

(c) claims by a mortgagee to enforce any of his remedies under the mortgage"

(31) As referred to earlier the several cases have held that Section 35(1) does not bar a Plaintiff instituting an action for declaration of title, from including in the prayer, other consequential reliefs flowing from the same cause of action. In ***Fernando v Lakshman Perera*** **[2000] 2 Sri L.R. 413** the Plaintiff in his Plaint had prayed for a declaration of title to the land in suit as well as for invalidation of two deeds relating to the said land. Jayawickrema, J, at page 416 held,

"On a perusal of this plaint I find that there is only one cause of action as per Paragraph 17 of the plaint. ***The prayer for invalidation of two deeds referred to above is consequential to the main cause of action to obtain declaration of title to this land.***

In ***Peiris and Another v Siripala*** [supra] referred to earlier, Ranjith Silva, J, states [at page 78],

"On the other hand, assuming without conceding that the Respondent had formulated issues on both causes of action, namely the declaration of title and for a declaration that deed P2 is void, I find such procedure to be perfectly in order. The law permits one to adopt such a cause and is not repugnant to section 35 (1). **There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed (in this case P2) is consequential to a prayer for declaration of title.** It is to prevent the Respondents from alienating the land or in order to prove that he still retains title and that he has not alienated his rights.

(32) On a perusal of the Plaint of the Appellant in the present action, it is quite clear that there is only one cause of action. The cause of action alleged by the Appellant is that on or about 01.09.1985 the Defendant wrongfully and unlawfully broke down the boundary fence separating the land occupied by the Defendant and the land described in Schedule "B" of the Plaint, cut down, three Jak trees and branches of a Mango tree and caused damage to the other trees. All reliefs prayed for in the Plaint, namely, for a declaration of title to the land, for the erection of a boundary fence, for ejectment of defendants from the said land, and for damages, flow from this single cause of action. Accordingly, the relief prayed in paragraph (e) of the Plaint, which is for an erection of a boundary fence separating the lands occupied by the plaintiffs and the defendant, flows from the same cause of action and is consequential to the main relief prayed which is for the declaration of title to the said land. Therefore, the said prayer is not repugnant to Section 35(1) of the Civil Procedure Code.

(33) Accordingly, I find that the Court of Appeal has erred in finding that the action by the Appellant is contrary to Section 35(1) of the Civil Procedure Code. I answer the second question of law upon which Special Leave was granted, being on the questions of law referred to in paragraph 17(h) of the Petition of Appeal, also in the affirmative.

Accordingly, the judgement of the Court of Appeal is set aside and the appeal is allowed. We observe, however, that the Court of Appeal had not dealt with any of the other issues raised by the Defendant before it. As such this matter is referred back to the Court of Appeal for consideration of the appeal of the Defendant on its merits.

However, the Court of Appeal would not be required to re- visit the issue raised under Section 35(1) of the CPC as this court had already made a pronouncement.

The Court of Appeal is further directed to consider the appeal and to dispose of the matter as early as possible considering the delay that has already resulted in the process of litigation.

The appeal is allowed subject to cost of Rs. 50,000/-

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 read with Article 154H of the Constitution of the Democratic Socialist Republic of Sri Lanka and Chapter L VIII of the Code of Civil Procedure

Mohamed Lebbe Mohamed Zarook,
No. 41, Kandy Road,
Gampola.

SC (CHC) Appeal No. 22/2014
Case No. HC (Civil) 121/2005/MR

PLAINTIFF

~Vs.~

Tokyo Cement Company (Lanka) Ltd.,
No. 469/1/1, Galle Road,
Colombo 3.

DEFENDANT

AND NOW BETWEEN

Mohamed Lebbe Mohamed Zarook,
No. 41, Kandy Road,
Gampola

PLAINTIFF~APPELLANT

~Vs.~

Tokyo Cement Company (Lanka) PLC.,
No. 469/1/1, Galle Road,
Colombo 03.

DEFENDANT-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J,
L. T. B. Dehideniya, J &
P. Padman Surasena, J

COUNSEL: Kamran Aziz with Ms. Fahama Latheef instructed by Earnest Law Chambers for the Plaintiff-Appellant.

Nihal Fernando, PC with Rajindra Jayasinghe instructed by Sudath Perera Associates for the Defendant-Respondent.

ARGUED ON: 01.02.2022

WRITTEN SUBMISSIONS: 14.03.2022

DECIDED ON: 12.01.2023

JUDGEMENT

Aluwihare, PC, J.

Introduction

(1) The Plaintiff-Appellant (hereinafter referred to as the "Plaintiff") instituted action against the Defendant-Respondent (hereinafter referred to as the "Defendant") in the Provincial High Court of the Western Province (Exercising Original Civil Jurisdiction) (hereinafter referred to as the "Commercial High Court") seeking relief as prayed for in the plaint dated 01.07.2005. The Defendant by their Answer, sought the dismissal of the Plaintiff's action. After the conclusion of the Trial, the learned Judge of the High Court, by Judgement dated 2013.09.20 dismissed the action.

Facts of the Case

(2) The Plaintiff filed this action against the Defendant on the following five causes of action,

(a) The Defendant had wrongfully seized a lorry owned by the Plaintiff and obtained Rs. 800,000/- from the Plaintiff for its release, but had refused to release the same thereafter. Therefore, the Defendant has been unjustly enriched by their unlawful conduct.

(b) The Defendant failed to pay certain incentive allowances amounting to Rs. 619,360/- owing to the Plaintiff.

(c) The Defendant failed to pay certain transport allowances amounting to Rs. 240,200/- due to the Plaintiff.

(d) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, prevented the Plaintiff from earning an income of Rs. 12 million thus causing damages to the Plaintiff.

(e) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, caused injury to the Plaintiff's goodwill and reputation causing a loss of Rs. 10 million to the Plaintiff.

(3) For the purpose of this appeal, the Plaintiff limited their arguments to *the first cause of action*, which is that the Defendant has been unjustly enriched, owing to the alleged wrongful seizure of the lorry owned by the Plaintiff.

(4) The facts material to the present appeal are as follows. The Plaintiff carries on a business called "Jinnah Hardware" as the proprietor. The Defendant is a Company that produces Cement under the name "Tokyo Cement" for the local market. On or about 1994, the Defendant appointed the Plaintiff as a distributor of "Tokyo Cement" in the Central Province.

The facts alleged by the Plaintiff

(5) The facts alleged by the Plaintiff by their Plaint dated 01.07.2005 are as follows,

(a) On or about 11.09.2003, the Plaintiff dispatched his lorry bearing No. 68-3654 together with a cheque for Rs. 112,100/- to the Defendant's Depot in Trincomalee to take delivery of an ordered consignment of Cement.

(b) The Defendant thereafter seized the lorry, retained the cheque of Rs. 112,100/- and refused to supply the said order of cement until the Plaintiff deposited a sum of Rs. 1,000,000 to the Defendant's account.

(c) The Plaintiff, upon notice of the seizure of the lorry, stopped the payment of the cheque amounting to Rs. 112,100/-.

(d) Thereafter the Plaintiff, delivered three cheques to the Defendant amounting to Rs. 500,000/-, Rs. 200,000/- and Rs. 100,000 respectively.

(e) After the said cheques were realized, the Defendant continued to refuse to release the said lorry or to supply cement to the Plaintiff.

(f) Thereafter, the Plaintiff, sent two letters dated 17.11.2003 and 30.01.2004 demanding the release of the said lorry and supply of cement.

(g) The Defendant by their letter dated 22.03.2004 refused to comply with the Plaintiff's demand.

The facts alleged by the Defendant.

(6) The facts alleged by the Defendant are as follows,

(a) The Plaintiff, prior to instituting the present action, had instituted action before the District Court of Colombo by Case No. 7275/Spl against the Defendant based on the same facts and the same letter of demand dated 30.01.2004. In the said case, the Plaintiff had not reserved its right to

institute a separate action. Accordingly, the Defendants raised a preliminary objection that the present case is contrary to Section 34 of the Civil Procedure Code and/or is *res judicata* and therefore the Plaintiff's case should be dismissed *in limine*.

(b) It was the Defendant who facilitated the purchase of the lorry bearing No. 68-3654, by advancing a sum of Rs.1, 292,000/- in order for the Plaintiff to distribute cement to the Defendant, and that the Defendant was the registered owner of the said lorry (V8 produced along with the affidavit of the Finance Manager of the Defendant). As such the Defendant had a lien over the said lorry till any outstanding sums owing to the Defendant were paid by the Plaintiff. The Defendant admitted to having seized the lorry on or about 11.09.2003, and having kept the lorry in their possession till certain sums owed to the Defendant were settled by the Plaintiff.

(c) The payment practice that was followed for the purchase of cement by the Plaintiff was for the Plaintiff to deposit the monies directly to the Defendant's Bank Account and 'fax' the customer's copy of the credit slip to the Defendant as proof of depositing the monies. The Defendant alleged that the Plaintiff had forged credit slips (V1 to V 6) and faxed such forged slips to the Defendant in order to purchase cement.

(d) The Commercial Bank had informed that the 'Credit slip' copies faxed by the Plaintiff, did not relate to any of the vouchers in their records and as such the Bank is unable to reconcile the purported deposits (V1 to V6) with the vouchers held by the Bank(letter V3) and the copies of credit slips submitted for verification do not tally with any of the original credit slips in the possession of the Bank (letter V5) .

(e) Accordingly, the Defendant alleged that there was an outstanding sum of Rs. 1,539,900 which was due and owing from the Plaintiff to the Defendant for Cement supplied at the time the said lorry was seized by the Defendant.

(f) The payment of Rs. 800,000 by three cheques, after the seizure of the lorry is an admission by the Plaintiff that a sum of Rs. 1,539,900 is due and owing by them to the Defendant.

The Issue

(7) The learned Judge of the High Court, by Judgement dated 2013.09.20, upheld the preliminary objection raised by the Defendant and dismissed the action. The main ground of appeal raised by the Petitioner is that said dismissal of the action by the learned Judge is erroneous.

(8) At the outset, it would be apposite to determine the legality of the findings of the learned Judge of the High Court with respect to the preliminary objection raised by the Defendant. The learned Judge in his judgement finds that the action of the Plaintiff was contrary to sections 33 and 34 of the Civil Procedure Code.

(9) It must be noted that the Plaintiff in his Plaint in the Commercial High Court has alleged five distinct causes of action against the Defendant. The first cause of action distinctly relates to the alleged unlawful seizure of the lorry by the Defendant, which was also in issue in the previous case, the District Court case No. 7275/Spl filed by the Plaintiff against the Defendant. The remaining four causes of action, that is the second to fifth causes of action, are not directly related to the said seizure. These causes of action mainly arise from the termination of the services of the Plaintiff as a cement distributor and appear to mainly concern the commercial transactions that have taken place between the Plaintiff and the

Defendant. Accordingly, it is my view that each cause of action must be considered to assess any inconsistency with Sections 33 and 34 of the Civil Procedure Code in light of the District Court action filed by the Plaintiff.

(10) The second to fifth causes of action are as follows,

(a) The Defendant failed to pay certain incentive allowances amounting to Rs. 619,360/- owing to the Plaintiff.

(b) The Defendant failed to pay certain transport allowances amounting to Rs. 240,200/- due to the Plaintiff.

(c) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, prevented the Plaintiff from earning an income of Rs. 12 million thus causing damages to the Plaintiff.

(d) The Defendant through their conduct of terminating the services of the Plaintiff as a cement distributor, caused injury to the Plaintiff's goodwill and reputation causing a loss of Rs. 10 million to the Plaintiff.

(11) It is quite evident on the face of the Plaint that the second to fifth causes of action relate to commercial transactions between the Plaintiff and the Defendant. The second and third causes of action relate to recovering certain incentive allowances and transport allowances allegedly due and owing from the Defendant to the Plaintiff. The fourth cause of action pertains to deprivation of the Plaintiff's ability to earn income by the conduct of the Defendant. The fifth cause of action relates to an alleged harm to the Plaintiff's goodwill and reputation. These causes of

action, *prima facie* does not appear to be related to the unlawful seizure of the lorry. The Plaintiff's contention that the present action is distinct from the previous action filed by the Plaintiff, in District Court Case No. 7275/Spl, *prima facie*, appears to have some merit **only with regards to the second to fifth causes of action.**

(12) The learned High Court Judge, while dismissing the Plaintiff's action on the preliminary objection raised, has proceeded to assess the merits of all the causes of action alleged by the Plaintiff, without prejudice to the preliminary objection raised. Accordingly, the learned High Court judge has found that the Plaintiff has not sufficiently proven their case with respect to the second to fifth causes of action. Although the Plaintiff has preferred this appeal against the said judgement, in the present appeal, the Plaintiff has restricted their submissions to the first cause of action. Accordingly, the Plaintiff has not canvassed before this court any of the findings of the learned High Court Judge with respect to the second to fifth causes of action.

(13) Even though the Plaintiff did not challenge the findings of the learned High Court Judge in respect of the merits of the second to fifth causes of action this Court has given its mind to the findings of the learned High Court judge and we find no material error regarding the conclusions reached by the learned High Court Judge with regards to the merits of the said causes of action. Therefore, for the purposes of this appeal, it is immaterial whether the second to fifth cause of action are in fact barred by Sections 33 and 34 of the Civil Procedure Code. Accordingly, the same need not be determined by this Court.

(14) The material issue at hand is whether the first cause of action of the Plaintiff, the unjust enrichment of the Defendant as a result of their alleged unlawful seizure

of the lorry of the Plaintiff, is contrary to Sections 33 and 34 of the Civil Procedure Code, in light of the District Court case No 7275/Spl filed by the Plaintiff.

(15) The Plaintiff in their submissions before this Court stated that the unlawful seizure of the lorry is a transaction that resulted in two distinct causes of action, first for the recovery of the possession of the lorry and secondly for the recovery of the money given by the Plaintiff to the Defendant in order to get the said lorry released. The Contention by the learned Counsel for the Plaintiff was that, although flowing from the same transaction, these two actions related to two distinct causes of action.

(16) The learned President's Counsel for the Defendant submitted that the claim in the present action arises from the same transaction as in the District Court Case No. 7275/Spl. He further submitted that the payment of Rs. 800,000/- which is sought to be recovered by the Plaintiff, is intrinsically interwoven to the cause of action in the District Court case. Accordingly, the learned President's Counsel argued that the present action is contrary to Section 34 of the Civil Procedure Code and that the Learned High Court Judge was correct in dismissing the Plaintiff's action.

(17) It must be noted that neither the Counsel for the Plaintiff, nor the Defendant, focused on Section 33 of the Civil Procedure Code in their submissions before this Court. The main focus of the submissions was with regards to Section 34 of the Code and whether the previous action filed by the Plaintiff in the District Court and the present action flow from the same cause of action.

(18) I am of the view that Section 33 of the Civil Procedure Code [Hereinafter the CPC] is key in determining this appeal. In fact, the learned High Court Judge in his judgement dated 2013.09.20 at page 12 has referred to Section 33 of the CPC and stated,

"ඉහත කරුණු අනුව දිසා අධිකරණයේ නඩුවට පාදක වූ ලොරිය රඳවා ගැනීම, එහි ලියාපදිංචි අයිතිය නොපැවරීම පිළිබඳ ආරවුල පාශ්වයන් අතර වූ සිමෙන්ති බෙදාහැරීමේ ගණුදෙනු වලින් ස්වාධීනව නොපිහිටන බව පෙනී යන නිසා **මේ සියලු කාරණා සිවිල් නඩු විධාන සංග්‍රහයේ 33 වගන්තියට ප්‍රකාරව වැඩිදුර නඩුකීම් ඇති නොවන ලෙස එක නඩුවෙන්ම මතු කල යුතු කරුණු බවට වැඩි බරින් තීරණය කරමි.**"

(19) It would be pertinent at this stage to refer to Section 33 of the Civil Procedure Code which reads thus;

> "Every regular action shall, **as far as practicable**, be so framed as to afford ground for a final decision upon the subjects in dispute, and **so to prevent further litigation concerning them**."[Emphasis added]

(20) Although most judgements refer to Section 33 of the CPC solely as a means to interpret Section 34 of the Civil Procedure Code, I am of the view that Section 33, imposes certain limitations on the types of actions that could be filed by a Plaintiff, quite independent of Section 34.

(21) It must be noted that Section 33 does not refer to the term "cause of action". The term used in the section is "subjects in dispute". The term "subjects in dispute" is much wider than the term "cause of action". Many distinct causes of action may arise from the same subjects in dispute. Therefore, quite independent of whether the two actions flow from the same cause of action, if two actions relate to the same "subjects in dispute", Section 33 requires that these matters be tried together as far as practicable so as to prevent further litigation concerning them.

(22) It must be noted that Section 33 of the CPC does not strictly require that all distinct causes of actions arising out of the same subjects in dispute always be tried in the same action. They must only be tried together so far as the same is ***practicable***. Distinct causes of action, although arising out of the same "subjects in dispute"

may be far apart in time, or involve completely different parties so as to not enable the same to be tried conveniently in one action. However, when different causes of action arise out of a sequence of events which are so proximate, involving the same parties, and relating to the same subjects in dispute, Section 33 of the CPC requires that the same be tried in a single action so far as practicable. In such an instance, if parties decide to file distinct actions, relating to the same "subjects in dispute," it would be incumbent upon them to satisfy the court that such matters could not have been conveniently tried in a single action. If the Parties fail to satisfy the court in that regard, it would be open for the court to dismiss such action for non-compliance with Section 33.

(23) The purpose of this section is explained in the section itself. If Parties were allowed to file distinct actions pertaining to the same subjects in dispute without any restriction, this could definitely lead to multiplicity of litigation concerning the same dispute and might cause inconvenience as far as the administration of Justice is concerned. As Chief Justice Sharvananda observed in the case of **Mackinons vs. Grindlays Bank 1986(2) SLR 272** *" All rules of court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and subordinate to that purpose."*

(24) The need for a finality in litigation is echoed in several decided judgements. In ***Pedris v. Mohideen*** **(1923) 25 N.L.R. 105**, at Page 111 it was held by Schneider J.,

> *"The policy of the Civil Procedure Code is to prevent a multiplicity of actions. It is, therefore, enacted in section 33: 'Every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.'"*

(25) In ***Miguel Appuhamy v Appuhamy*** **(1938) 40 N.L.R. 200** the issue was whether a Plaintiff, who has sued one of several joint-tort-feasors for the recovery of a share of the damage caused to him and has obtained judgment against him, could maintain a subsequent action against any of the other tort-feasors upon the same cause of action., Kretser J. Stated, [at pg. 204];

> *"This view [that the Plaintiff cannot maintain a subsequent action], accords with the maxim of the law Reipublicae interest ut sit finis litium, which we find embodied in section 33 of our Civil Procedure Code. That section says, "Every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so as to prevent further litigation concerning them ".*

After referring to Sections 33 and 34 of the Civil Procedure Code, Kretser J. went on to state; *"This section is very wide in its scope and emphatic in its language. It embodies the policy of our law. It clearly refuses to recognize division of a claim."*

At page 205, Kretser J. goes on to state that, "*On grounds of convenience too a multiplicity of actions is to be deplored. Take the present plaintiff's conduct. He claimed Rs. 300 from one wrongdoer and now claims Rs. 300 from another. There is no statement in the plaint as to what his total damages were but it was later taken to be Rs. 900. Had he been free to sue he might have gone on suing each of the five for Rs. 300. Had his damages to be estimated in the first case it would mean that the trial would be concerned with a claim for Rs. 900. Even if Rs. 300 were clearly due in that case it would not be so clearly due in the following cases. Besides the quantum of damages might be differently estimated by different Judges."*

(26) In ***Mammoo v. Menon*** **(1964) 66 N.L.R. 289** the issue was whether a landlord who, before the notice to quit sent by him to his monthly tenant has taken effect,

sues the tenant for recovery of arrears of rent but not for ejectment, is entitled to bring a separate action in ejectment after the same notice to quit has taken effect. At Page 292 Basnayake CJ. Observed;

> *"The basic principles of the law of Res Judicata have been written into our Civil Procedure Code. Its provisions are designed as far as may be to prevent a multiplicity of actions."*

(27) In several decided judgements, actions have been dismissed on the basis that they relate to claims that ought to have been raised on a previous action which had been instituted between the same parties.

(28) In ***Ponniah v. Payhamy*** **(1905) 8 N.L.R. 375**, the question of res judicata with regards to an action for land was considered. At page 376 Layard C.J. held,

> *"Now, the subject in dispute in both these actions was the right of the defendants to retain possession of the land in dispute as against the superior title of the plaintiff. Section 33 of our Civil Procedure Code provides that "every regular action shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them." The original action ought then to have been so framed as to set out every title that the plaintiff might have claimed to the land in dispute. It cannot be said in this case that the plaintiff was unaware of his title by conveyance, because it is admitted that he was aware of it at the time the original action was brought."*

(29) In the case of ***Vanderpoorten v. Peiris*** **(1937) 39 N.L.R. 5**, the Plaintiff had sued the Defendant to recover arrears of rent due on an indenture of lease and for a cancellation of the lease on the ground that the defendant sublet the premises contrary to the terms of the lease. The Plaintiff thereafter instituted another action to recover damages for the failure of the Defendant to keep the premises leased in

proper order and condition. The issue was whether the subsequent action was maintainable. The finding that the Plaintiffs could have brought the claims made at the subsequent action at the previous action was a material fact which influenced the Court in finding that the subsequent judgement was barred by the previous action. Poyser J. in allowing the appeal, declared;

"As previously pointed out, however, the plaintiffs could easily have ascertained, if they did not already know, the damage caused to the premises by the defendant and particularly so the construction of the concrete floors and could have without difficulty included in the previous action a claim in respect of these matters."

(30) The principle outlined in Section 33, which is that quite independent of whether the two actions flow from the same cause of action, if two actions relate to the same "subjects in dispute", these matters be tried together as far as practicable so as to prevent further litigation concerning them, is very similar to the principle of "constructive res judicata" recognized in India. The case of ***State of Uttar Pradesh v. Nawab Hussain*** [1977] AIR 1680, is the landmark judgement in this regard. In the Judgement delivered by Shinghaal J. it was held that;

> *"But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell L.J., has answered it as follows in* ***Greenhalgh v. Mallard;***
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> "*I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly*

could; have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata, which, in reality, is an aspect or amplification of the general principle."

(31) Considering the foregoing, I entertain the view that Section 33 of our Civil Procedure Code recognises a principle very similar to the aforementioned principle of "constructive res judicata" recognised in India.

(32) Applying the provisions embodied in Section 33 of the CPC to the facts of the instant case, I take the view that the first cause of action in the present action is a matter that the Plaintiff ought to have raised in the action filed by him in the District Court Case, in case No. 7275/Spl.

(33) Even if the Plaintiff's argument is accepted, that is, the action filed in the District Court and the first cause of action in the present action relate to two separate causes of action stemming from the same transaction, it is quite evident to the Court that both actions relate to the same "subjects in dispute", which is the lorry bearing No. 68-3654, which was alleged to have been unlawfully seized by the Defendant. It does not appear to Court that the Plaintiff has substantiated as to why the relief sought in the District Court action, and the first cause of action in the present case, could not be tried together in the same action. In my opinion the claim to obtain ownership and possession of the lorry as well as the claim to

recover the money given to the Defendant in order to get the lorry released, could have been conveniently tried in the same action. The two wrongs alleged to have been committed by the Defendant, namely the unlawful seizure of the lorry followed by the request to pay for its release and the subsequent refusal to release the lorry even upon the payment of a sum are so proximate, and arising between the same parties that it appears to be convenient to try the same in a single action.

(34) In this regard the following facts may be highlighted.

(a) There are many similarities between the Plaint filed by the Plaintiff in the present case and of that was filed in the District Court Case No. 7275/Spl. Paragraphs [1] – [8] are identical in both Plaints. Paragraphs [9] – [11] in the Plaint in the present case is identical to paragraphs [14] – [16] of the Plaint in the District Court action. Paragraphs [12] – [19] of the Plaint in the present case is identical to [18] – [25] of the District Court action with a few minor changes. Accordingly, almost all paragraphs setting out the facts of the case are identical.

(b) The documents annexed to the Plaint in the present case marked 'P1' to 'P36(28)' are identical to the documents annexed to the Plaint in the District Court Case marked 'P1' to 'P36(28)'.

(c) Both actions have been filed on the same letter of demand marked 'P11' with the Plaint in both actions. Page 3 of the said Letter of Demand states as follows,

"The irresponsible and unreasonable acts of your Officers have caused substantial and irreparable losses and damages to our client. We have

been instructed to specify the said losses and damages together with the amounts payable to our client as follows:

a) The earned incentive allowance of Rs. 619,360/-

b) The entitled transport allowance of Rs. 240,200/-

c) The aggregate sum of Rs. 800,000/- tendered as a deposit/-

d) The lorry bearing No: 68-3654 valued at Rs. 1.5 million.

e) Prospective income of Rs. 50,000/- per month from the said lorry.

f) Prospective income of Rs. 100,000/- per month from the business.

g) Loss of Good Will and Reputation estimated at Rs. 10 million."

(35) These facts make it evident that the Plaintiff knew of all relevant facts necessary to bring the present action, at the time of filing the action in the District Court. These facts also indicate that the claims made by the Plaintiff, in the present action and the District Court action arise from incidents that are so closely connected that the Plaintiff ought to have tried all claims in a single action. There is no explanation as to why the Plaintiff failed to do so. The Plaintiff has not reserved his right to institute a separate action in respect of these claims either.

(36) Even if the present claim and the District Court action arise out of two causes of action, there is no bar against the Plaintiff combining the two causes of action. The Civil Procedure Code does not prevent a Plaintiff from combining different causes of action. Most Plaints entertained by Courts disclose multiple causes of action. In fact, the Plaint of the Plaintiff in the current action discloses five causes of action and prays relief for all five. Accordingly, the Plaintiff ought to have tried the first cause of action in the present action, in the previous action filed by the Plaintiff in the District Court.

(37) The learned High Court Judge has approached this issue in a different perspective. The learned Judge has held that the unlawful seizure of the lorry and the subsequent demand of money for its release was intricately connected with the underlying commercial transactions between the Plaintiff and the Defendant. He reasons his deduction on the following facts,

(a) The lorry in question had initially been purchased by the Defendant and the Defendant had 'resold' the same to the Plaintiff on the basis that the Plaintiff would pay the purchase price in 36 installments, for the purpose of distributing Defendant's Cement.

(b) The Plaintiff was obliged to make payment for the lorry in 36 monthly installments. The Plaintiff had alleged that on or about 29.04.2002 they had completely settled all 36 monthly installments and had become the lawful owner and possessor of the lorry. However, according to Plaintiff's own document 'පැ 35' the Defendant had continued to be the registered owner of the said lorry despite the fact.

(c) Subsequent to the alleged unlawful seizure of the lorry, the highly unusual payment of Rs. 800,000/- made to the Defendant by the Plaintiff, solely on the request made by the Defendant.

(d) The failure of the Plaintiff to lodge a complaint regarding the alleged unlawful seizure of its lorry.

(38) The learned High Court Judge, based on the above observations has deduced that the Defendant may in fact have a lien over the lorry for any unpaid sums by the Plaintiff, as claimed by the Defendant. Accordingly, the learned Judge has held

that the unlawful seizure of the lorry, as being a part of the larger commercial arrangements between the Parties. The learned Judge observes that the Plaintiff is also aware of this fact based on the fact that the letter of demand, marked 'P11' has been annexed in the present action and the District Court action. Therefore, the judge finds that the issue pertaining to the ownership and possession of the lorry could not be decided independently of the underlying commercial transactions between parties. The learned Judge concludes that all these matters should have been determined in one action, so as to prevent a multiplicity of litigation, as per Section 33 of the Civil Procedure Code.

(39) Whether or not the unlawful seizure of the lorry was directly connected with the underlying commercial transactions between the Parties is a question of fact that ought to be determined at Trial. The learned High Court Judge has found that there is sufficient evidence to establish that such a connection exists. I find no defects in the reasoning of the learned Judge. The history of the ownership of the lorry as well as the Plaintiff's behaviour immediately subsequent to the seizure of the lorry is evidence that such a connection exists. Accordingly, the learned Judge has held that all these issues ought to have been tried in one action to prevent further litigation on the same issues as required by Section 33 of the Civil Procedure Code.

(40) I find the reasoning of the judge, with respect to the first cause of action of the Plaintiff in the present case to be sound. If the alleged unlawful seizure of the lorry was in fact connected with the underlying commercial transactions between the parties, then the underlying commercial transactions between the Parties would be directly connected with the issue of ownership and possession of the lorry bearing No. 68-3654, which is the "subjects in dispute" in the District Court case No 7275/Spl. Accordingly, it was incumbent upon the Plaintiff to show reasons as to why the two claims, the first for ownership and possession of the lorry, and

the latter for recovery of sums of money, were not filed in a single action. In the absence of the same, the learned Judge was entitled to hold that the present action was contrary to Section 33 of the Civil Procedure Code as it leads to a multiplicity of litigation.

(41) The Sections of the Civil Procedure Code which relate to Amendment of Pleadings and Claims in Reconvention are all aimed at preventing multiplicity of litigation. It is in the interest of Justice that all claims that can conveniently be disposed of in a single action be tried in a single action. Otherwise, the same facts would have to be established, the same documents would have to be proven, and the same witnesses would have to be led, as has happened in the present instance, in two different courts. Such methods of litigation are undoubtedly an abuse of the process of court and contrary to Section 33 of the Civil Procedure Code.

(42) I therefore hold that the present action is contrary to Section 33 of the Civil Procedure Code and an abuse of the process of Court. I find that the Plaintiff's first cause of action in the present action is contrary to S. 33 of the Civil Procedure Code as it relates to the same subjects in dispute as in the District Court Case No 7275/Spl, and the two claims could have been conveniently been tried in the same action. I also affirm the Judgement of the learned High Court Judge that the Plaintiff's first cause of action, although concerning certain commercial transactions between the Parties, is directly connected with the subjects in dispute in the District Court Case No7275 and therefore should have been raised in the said action, to prevent a multiplicity of litigation.

(43) The submissions of both parties at the appeal mainly focused on whether the present action filed by the Plaintiff and the District Court action, relates to the

same cause of action or distinct causes of action. The same may be analysed at this stage.

(44) It would be pertinent, at this point to refer to S. 34 of the Civil Procedure Code which reads as follows;

> "(1) Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.
>
> (2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.
>
> (3) For the purpose of this Section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

(45) The purpose of both Section 33 and 34 of the Civil Procedure Code is to prevent multiplicity of litigation as specified in Section 33.

(46) In contrast to Section 33 which Parties are required to follow as far as practicable, Section 34 is to be strictly followed by the Parties. The term "cause of action" is narrower in scope than the term "subjects in dispute". Parties are strictly required

to present all claims which they wish to bring before the court, arising out of the same cause of action in a single action.

(47) The definition for the term "cause of action" is set out in Section 5 of the Code. The section states,

> "Cause of action" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury.

(48) "Cause of action" was defined as follows by Lascelles J. in ***Samichi v Peiris*** **(1913) 16 N.L.R. 257** at 261,

> "*The true 'cause of action,' it seems to me, is the right in virtue of which this claim is made; the foundation of the claim which, in this case, is the right claimed under the assignment. This was the true cause on which the action was founded.*"

(49) The submission of the Plaintiff, as stated earlier was that the unlawful seizure of the lorry and the demand of payment for its release was a transaction which resulted in two causes of action, the first, for the recovery of the possession of the lorry and the second for the recovery of money given in order to get the lorry released.

(50) The cause of action refers to, the underlying wrong committed by a Party, which gives another party the right or entitlement to seek relief. This construction supports the definition of "cause of action" set out in Section 5 of the Code. Section 5 describes a "cause of action" as the wrong for the prevention or redress of which an action may be brought. This construction is also supported by the words of Section 34. Section 34 speaks of a **claim** that a plaintiff is entitled to make in

respect of a **cause of action**. Accordingly, it flows that the Plaintiff is entitled to make claims or pray for reliefs upon a cause of action.

(51) In the District Court case, the basis of the action appears to be the unlawful seizure of the lorry owned by the Plaintiff by the Defendant. In the present case, the basis of the first cause of action appears to be the Defendant's demand of money for the release of the lorry, and the subsequent refusal by the Defendant to release the lorry, which followed in sequence to the unlawful seizure of the lorry. The question to be determined is whether these two actions constitute two separate causes of action or constitute a series of steps of one continuing act.

(52) The better view, in my opinion is that these two actions relate to two separate, but closely linked, causes of action. The cause of action in the District Court or the wrong sought to be redressed in the District Court was the unlawful seizure of the lorry by the Defendant on or about 11.09.2003. The cause of action for the present action, or the wrong alleged by the Plaintiff in the present case is the money demanded by the Defendant for the release of the lorry and the subsequent refusal to release the same. It is clear that the second cause of action inevitably flows from the first cause of action. Accordingly, the two causes of action are linked. However, they are two distinct wrongs or two distinct causes of actions that the Plaintiff alleges that the Defendant has committed.

(53) Had the Defendant not demanded payment for the release of the lorry, subsequent to which the Plaintiff paid Rs. 800,000/- to the Defendant, the District Court action to recover the ownership and possession of the lorry would still be maintainable. However, in such circumstances there would be no ground for the present action to arise since no payment of money would have been made to the Defendant by the Plaintiff and thereby no unjust enrichment would have

occurred. This in my view indicates that the two claims in question concern two causes of action.

(54) I am of the view that the objective of Section 34 of the Code is to prevent parties from filing separate actions to claim **different reliefs in respect of the same cause of action**. This has been held in ***Palaniappa v Saminathan*** **(1913) 17 N.L.R 56** where at page 60, Lord Moulton describing Section 34 declared,

> *"It is directed to securing the exhaustion of the relief in respect of a Cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions."*

(55) For example, when a wrong is committed by a Party, the other party could sue for the rectification of such wrong and also for the party injured to be paid compensation for the loss suffered. If the injured Party files an action, praying for rectification of the wrong, but fails to pray for compensation as a relief, then such party cannot bring a separate action alleging the same wrong and praying for compensation for the loss suffered. In this example, since both reliefs are claimed from the same cause of action, or the same wrong that is alleged, Section 34 would be a fetter, in maintaining the subsequent action.

(56) Applying this principle to the facts of the present case, if the Plaintiff in District Court Case No 7275/Spl failed to pray for damages for the loss caused by the unlawful seizure of their lorry, such claim for damages cannot be prayed in the present action. However, the present claim concerns a cause of action closely connected but technically separate to that alleged in the District Court case.

(57) Nonetheless, such technical arguments should not function as an excuse for a Party to divide claims that ought to have been tried together. The mere fact that the two claims relate to two distinct causes of action does not explain the need to institute two separate actions.

(58) The Plaintiff has relied on several decisions to support their contention that, two distinct actions can be maintained from two separate causes of action that flow from the same transaction.

(59) In the case of ***Allagasamy v. The Kalutara Co., Limited*** **(1911) 14 N.L.R. 262** cited on behalf of the Plaintiff A kangany, sued the second defendant (the superintendent of an estate) in the Court of Requests for " pence money " due to him in respect of a gang of coolies. The defendant pleaded that the coolies had been transferred from plaintiff's gang to another gang, and that therefore no "pence money" was due to the plaintiff. Ultimately a portion of his claim was admitted and paid, and it was recorded that the Plaintiff Kangany was allowed to withdraw his action. The Kangany then brought the subsequent action, against the first defendant company and the second defendant to recover a sum of Rs. 10,000 as damages for the wrongful transfer of the coolies. The defendants took a plea of res judicata but the court held that the action was maintainable.

(60) The position taken up in **Allagasamy** [supra] could be distinguished from the present case. Middleton, J stated that; [at page 267]

> *"There is nothing to show that at the time of the institution of the Court of requests case, the plaintiff was aware, that he could have claimed any other relief than that sought for in that case, and I think, therefore, that under section 207 of the Civil Procedure Code he is not now estopped from claiming the relief demanded in the present action."*

In the said case, the Plaintiff could not have maintained both claims concurrently in the same action as he was unaware that he could have claimed any other relief. The position is clearly distinct in the present case since the Plaintiff was aware of all the relevant information to bring the present action, at the time of instituting the first action.

(61) The Plaintiff also relied on the decision in ***Kandiah v Kandasamy*** **(1967) 73 N.L.R. 105** in support of their contention. In the said case, the first action by the Plaintiff against the Defendant had been to recover his share of profits for the first half-year. The second action filed by the Plaintiff was to recover his share of profits for the second half-year. The final action was filed by the Plaintiff to recover his share of capital of the partnership business. At page 107 T. S. Fernando J. states,

> *"The present case was founded on an entirely different cause of action, viz, the refusal or failure to pay back to the plaintiff his share of the capital contributed by him, and section 34 provides no bar to that claim."*

The facts of the said case are quite distinct to the present as the causes of action were entirely distinct, and not connected as in the present action.

(62) The Plaintiff has also cited certain judgements, namely, ***Palaniappa v Saminathan*** **(1913) 17 N.L.R 56** and ***Fernando v The Village Council of Andiambalama Palatha*** **(1975) 78 N.L.R. 4** which have held that Section 34 of the Code does not require a Plaintiff to include all causes of action arising from the same transaction. I am in agreement with this position. The court, however, had not considered the impact of Section 33 of the Code in any of these cases. In contrast, the learned High Court Judge has specifically relied on Sections 33 and 34 in arriving at his conclusions.

(63) As mentioned earlier, although being two distinct causes of action, the claims are so proximate and closely connected that it is in the interest of Justice that they are tried in the same action. The filing of two separate actions by the Plaintiff is contrary to Section 33 as both those issues could have been framed in a single action, and conveniently been disposed of. If this court were to allow the present action, which appears extremely similar to the previous action instituted by the Plaintiff in the District Court, to proceed the court would be paving the way for abuse of court process.

(64) I find that the Plaintiff's action, although not contrary to Section 34 of the Civil Procedure Code, offends Section 33 of the Code. There is no reason to adjudicate on the arguments put forward by the Parties with regards to the merits of the matter, since the preliminary objection against the present action stands. Accordingly, the Judgement of the learned High Court Judge with regards to the preliminary objection under Sections 33 and 34 of the Civil Procedure Code is affirmed, accordingly the appeal is dismissed.

The Defendant is entitled to the costs of this appeal.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA
I agree

JUDGE OF THE SUPREME COURT

JUSTICE PADAMN SURASENA
I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 126 of the Constitution.

SC FR 163/2019

Janath S. Vidanage
No. 37, W.A.D.Ramanayake Mawatha,
Colombo 02.

Petitioner

Vs.

1. Pujith Jayasundara
   Inspector General of Police
   Police Headquarters
   Colombo 01.

2. Hemasiri Fernando
   Secretary,
   Ministry of Defence
   No. 15/5, Baladaksha Mawatha
   Colombo 03.

   New Address:

   No. 11A, Sri Saranankara Road
   Pamankada East, Dehiwala.

3. Priyalal Dasanayake
   Deputy Inspector General of Police
   Special Security Division
   440A, Dr. Colvin R.de Silva Mawatha
   Colombo 02.

4. Hon. Attorney General
   Attorney Generals' Department,
   Colombo 12.

Respondents

SC FR 165/2019

Nagananda Kodithuwakku
Public Interest Litigation Activist
No. 99 Subhadrarama Road
Nugegoda.

Petitioner

Vs

1. Hon. Maithripala Sirisena
   The Minister of Defence
   Ministry of Defence
   15/5, Baladaksha Mawatha
   Colombo 03.

2. Hon. Ranil Wickremesinghe
   The Prime Minister of Sri Lanka
   The Prime Minister's Office
   58, Sir Earnest de Silva Mawatha
   Colombo 07.

3. Hon. Mahinda Rajapakshe
   The Leader of the Opposition
   Opposition Leader's Office
   117, Wijerama Mawatha
   Colombo 07.

4 Hemasiri Fernando
   Former Secretary of Defence
   Saranankara Mawatha
   Pamankada, Kirulapana.

5. The Secretary of Defence
   Ministry of Defence
   15/5, Baladaksha Mawatha
   Colombo 03.

6. Pujith Jayasundara
   Former Inspector General of Police
   Police Headquarters
   Colombo 01

6a. C.D. Wickremeratne
   Acting Inspector General of Police
   Police Headquarters
   Colombo 01

7. Hon. Attorney General
   Hon.Attorney Generals' Department,
   Colombo 12.

7a. Hon. Maithripala Sirisena
Hon. Former President and the former
Minister of Defence of Sri Lanka
No. 61, Malalasekera Mawatha,
Colombo 7

Respondents

SC FR 166/2019

Saman Nandana Sirimanne
No.37/1C, Ranasura Mawatha
Wennawatte, Wellampitiya.

Petitioner

Vs.

1. Pujith Jayasundara
   Inspector General of Police
   Police Headquarters
   Colombo 01.

2. Hemasiri Fernando
   Secretary,
   Ministry of Defence
   No. 15/5, Baladaksha Mawatha
   Colombo 03.

3. Priyalal Dasanayake
   Deputy Inspector General of Police
   Special Security Division
   440A, Dr. Colvin R.de Silva Mawatha
   Colombo 02.

4. Hon. Attorney General
   Attorney Generals' Department,
   Colombo 12.

Respondents

SCFR 184/2019

1. Jude Dinuke Laknath Perera
   Unit No. 5C, No. 03, De Alwis Avenue
   (Off De Seram Road), Mount Lavinia.

2. Christine Bianca Shivanthi Perera
27/1, Andarawatte Road
Polhengoda, Colombo 05

3. Mathes Hewage Nimal Karunasiri
130/15A, Samanala Place,
Nawinna, Maharagama.

4. Lincolon Ramkumar Ramiah
32B, Central Gardens, Ekala.

Petitioners

Vs.

1. Maithreepala Sirisena
His Excellency the President/Hon. Minister of Defence, Ministry of Defence
No. 15/5, Baladaksha Mawatha
Colombo 03.

1(a) Gotabaya Rajapakse
His Excellency the President
Presidential Secretariat
Galle Face, Colombo 01.

2. Ranil Wickremesinghe
Hon. Prime Minister and Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation, Northern Province Development and Youth Affairs.

2(a) Mahinda Rajapakse
Hon. Prime Minister and Minister of Economy & Policy Development and Buddhasasana, Cultural and Religious Affairs and Urban Development and Water Supplies & Housing Facilities.

3. Rishad Bathiudeen, M.P.
Hon. Minister of Industry and Commerce, Resettlement of Protracted Displaced Persons, Co-operative Development and Vocational Training and Skills Development.

4. Rauff Hakeem
Hon. Minister of City Planning , Water Supply and Higher Education.

5. M.H.A. Haleem M.P.
Hon. Minister of Postal Services and Muslim Religious Affairs.

6. Kabeer Hasheem M.P.
Hon. Minister of Highways and Road Development and Petroleum Resources Development.

7. Harin Fernando, M.P.
Hon. Minister of Telecommunication, Foreign Employment and Sports.

8. John Amarathunga M.P.
Hon. Minister of Tourism Development, Wildlife and Christian Religious Affairs.

9. Gamini Jayawickrema Perera, M.P.
Hon. Minister of Buddhasasana & Wayamba Development.

10. Mangala Samaraweera, M.P.
Hon. Minister of Finance.

11. Lakshman Kiriella, M.P.
Hon. Minister of Public Enterprises, Kandyan Heritage and Development.

12. Thilak Marapana, M.P.
Hon. Minister of Foreign Affairs.

13. (Dr) Rajitha Senaratne, M.P.
Hon. Minister of Health, Nutrition and indigenous medicine.

14. Ravi Karunanayake, M.P.
Hon. Minister of Power, Energy and Business Development.

15. Vajira Abeywardane, M.P.
Hon. Minister of Internal and Home Affairs and Provincial Councils and Local Government.

16. Patali Champika Ranawaka M.P.
Hon. Minister of Mega Police and Western Development.

17. Navin Dissanayake M.P.
Hon. Minister of Plantation Industries.

18. P. Harison M.P.
Hon. Minister of Agriculture, Rural Economic Affair, Livestock Development, Irrigation & Fisheries & Aquatic Resources Development.

19. Ranjith Madduma Bandara M.P.
Hon. Minister of Public Administration and Disaster Management.

20. Gayantha Karunathileke, M.P.
Hon. Minister of Lands and Parliamentary Reforms.

21. Sajith Premedasa, M.P.
Hon. Minister of Housing, Construction and Cultural Affairs.

22. Arjuna Ranathunga M.P.
Hon. Minister of Transport and Aviation.

23. U. Palani Digambaram. M.P.
Hon. Minister of Hill Country New Villages, Infrastructure and Community Development.

24. (Mrs) Chandrani Bandara, M.P.
Hon. Minister of Women and Child Affairs and Dry Zone Development.

25. (Mrs) Thalatha Athukorala M.P.
Hon. Minister of Justice and Prison Reforms.

26. Akila Viraj Kariyawasam, M.P.
Hon. Minister of Education.

27. Sagala Ratnayake, M.P.
Hon. Minister of Ports & Shipping & Southern Development.

28. Mano Ganeshan, M.P.
Official Languages, Social Progress and Hindu Religious Affairs.

29. Daya Gamage, M.P.
Hon. Minister of Primary Industries and Social Empowerment.

30. Malik Samarawickrema, M.P.
Hon. Minister of Development Strategies and International Trade.

2nd to 30th above , All c/o
Secretary to the Cabinet of Ministers
Houses of Parliament
Sri Jayewardenepura Kotte.

31. Ruwan Wijewardene
Hon. State Minister of Defence
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

31(a) Chamal Rajapakse
Hon. State Minister of Defence
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

32. Hemasiri Fernando
Former Secretary of the Ministry of Defence.
No. 11/3, Saranankara Road, Dehiwala.

32(a) Major General (Ret.d) G.D.H. Kamal Gunaratne
Secretary of the Ministry of Defence.
15/5, Baladaksha Mawatha
Colombo 03.

33. Pujith Jayasundara
Inspector General of Police
Department of Sri Lanka
Head Office, Colombo 01.

34. Hon. Attorney General
Attorney Generals' Department,
Colombo 12.

35. Nimal Siripala de Silva
Hon. Minister of Justice Human Rights and Legal Reforms.

36. Arumugam Thondaman
Hon. Minister of Community Empowerment & Estate Infrastructure Development.

37. Dinesh Gunawardana
Hon. Minister of Foreign Relations and Skills Development, Employment and Labour Relations.

38. Douglas Devananda
Hon. Minister of Fisheries and Aquatic Resources.

39. Pavithra Devi Wanniarachchi
Hon. Minister of Women & Child Affairs & Social Security and Healthcare & Indigenous Medical Services.

40. Bandula Gunawardene
Hon. Minister of Information & Communication Technology and Higher Education , Technology & Innovation.

41. Janaka Bandara Tennakoon.
Hon. Minister of Public Administration Home Affairs, Provincial Councils and Local Government.

42. Chamal Rajapakse
Hon. Minister of Mahaweli, Agriculture, Irrigation and Rural Development and Internal Trade, Food Security and Consumer Welfare.

43. Dullus Alahapperuma
Hon. Minister of Education and Sports and Youth Affairs.

44. Johnston Fernando
Hon. Minister of Roads & Highways and Ports & Shipping.

45. Wimal Weerawansa
Hon. Minister Small and Medium Business and Enterprise Development and Industries and Supply Chain Management.

46. Mahinda Amaraweera
Hon. Minister of Passenger Transport
Management and Power and Energy.

47. S.M. Chandrasena
Hon. Minister of Environment and Wildlife
Resources and Lands &Land Development.

48. Ramesh Pathirana
Hon. Minister of Plantation Industries and
Export Agriculture.

49. Prasanna Ranathunga
Hon. Minister of Industrial Export &
Investment Promotion and Tourism & Civil
Aviation.

35th to 49th above , All C/0.
Secretary to the Cabinet of Ministers
Houses of Parliament
Sri Jayewardenepura Kotte.

Respondents

SCFR 188/2019

P.K.A.D. Sunil Perera
No. 9 B, Iddamal Place
Sirimal Uyana, Ratmalana.

Petitioner

Vs.

1. Attorney General
Attorney Generals' Department,
Colombo 12.
(On behalf of)
Maithripala Sirisena
President and Minister of Defence
No. 15/5, Baladaksha Mawatha
Colombo 03.
(as per the 19th Amendment)

2. Ranil Wickremesinghe
   Prime Minister
   Prime Minister's Office
   58, Sir Earnest de Silva Mawatha
   Colombo 07.

3. Hemasiri Fernando
   Former Defence Secretary
   Saranankara Mawatha
   Pamankada, Kirulapana.

4. General Shantha Kottegoda
   Secretary of Defence
   15/5, Baladaksha Mawatha
   Colombo 03.

5. Pujith Jayasundara
   Inspector General of Police
   Police Headquarters
   York Street, Colombo 01.

6. C.D. Wickremeratne
   Acting Inspector General of Police
   Police Headquarters
   York Street, Colombo 01.

7. Thilak Marapana, M.P.
   Minister of Foreign Affairs.
   National Security Council
   Ministry of Defence
   15/5, Baladaksha Mawatha
   Colombo 03.

8. Mangala Samaraweera, M.P.
   Minister of Finance.
   National Security Council
   Ministry of Defence
   15/5, Baladaksha Mawatha
   Colombo 03.

9. Ravinath Ariyasinghe
   Secretary for the Ministry of Foreign Affairs.
   National Security Council
   Ministry of Defence
   15/5, Baladaksha Mawatha
   Colombo 03.

10.R.H.S. Samaratunga
Secretary for the Ministry of Finance
National Security Council
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

11. Ravindra Wijegunaratne
Chief of the Defence Staff
National Security Council
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

12. Mahesh Senanayake
Commander of the Army
National Security Council
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

13. Piyal de Silva
Commander of the Navy
National Security Council
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

14. Kapila Jayampathi
Commander of the Air Force
National Security Council
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

15. Nilantha Jayawardane
Head of Intelligence Services
SIS Director
National Security Council
Ministry of Defence
15/5, Baladaksha Mawatha
Colombo 03.

16. Hon. Attorney General
Attorney Generals' Department,
Colombo 12.

Respondents

SCFR 191/2019

1. Rev. Fr. Galgana Mestrige Don Henry Marian Ashok Stephen
   281, Deans Road, Colombo.

2. Rev. Fr. Benedict Tennison
   Sarath Iddamalgoda, 'Tulana', Kohalwila Road, Gonawala, Kelaniya.

3.Rev. Fr. W.B.Paul Eventius Sherard Fernando Jayawardana
   Samata Sarana, Aluthmawatha Road,
   Modera, Mattakkuliya.

Petitioners

Vs.

1. Hemasiri Fernando
   Former Secretary to the Ministry of Defence
   C/o the Ministry of Defence
   Baladaksha Mawatha
   Colombo 03.

2. Lt. General Shantha Kottegoda
   Secretary, Ministry of Defence
   C/o the Ministry of Defence
   Baladaksha Mawatha
   Colombo 03.

3. Mr. Pujith Jayasundara
   Inspector General of Police
   Police Headquarters
   Colombo 01.

4. C.D. Wickremeratne
   Acting Inspector General of Police
   Police Headquarters
   Colombo 01.

5. Mr. Udaya Seneviratne
   Secretary to His Excellency the President
   Presidential Secretariat
   Colombo 1.

6. Hon. Ranil Wickremesinghe
   Prime Minister, Temple Trees., Colombo 3.

7. Admiral Ravindra Wijegunaratne
   Chief of Defence Staff
   Office of the CDS, Navy Headquarters
   SLNS, Parakrama , Flagstaff Street, Colombo 1.

8. Lt. General Mahesh Senanayake
   Commander of the Sri Lanka Army
   Army Headquarters, Colombo 1.

9. Vice Admiral Piyal de Silva
   Commander of the Sri Lanka Navy
   Naval Headquarters
   SLNS Parakrama , Flagstaff Street, Colombo 1.

10. Air Marshal Kapila Jayampathi
    Commander of the Sri Lanka Air Force
    Air Force Headquarters, Kumararatnam Road,
    Colombo 2.

11. Nilantha Jayawardane
    Senior Inspector General of Police and the
    Head of State Intelligence Service (SIS) No. 32,
    Malalasekera Mawatha, Colombo 08.

12. Priyalal Dasanayake
    Senior Deputy Inspector General of Police
    (Ministerial Security Division)
    440A, Dr. Colvin R.de Silva Mawatha
    Colombo 02.

13. Hon. Attorney General
    Attorney Generals' Department,
    Colombo 12.

Respondents

SCFR 193/2019

Hilmy Ahamed
716/2, D.P. Wijesinghe Mawatha,
Pelawatte, Battaramulla.

Petitioner

Vs.

1. Hon. Attorney General
   Attorney Generals' Department,
   Colombo 12.

1A. Mithripala Sirisena
(Former President of Sri Lanka)
No. 61, Malalasekera Mawatha, Colombo 7.

2. Hon. Ranil Wickremesinghe
Prime Minister's office, Sir Earnest De Silva Mawatha, Colombo 7.

3. Thilak Marapana,
Minister of Foreign Affairs.
Ministry of Foreign Affairs,
Republic Building, Sir Baron Jayathilleke Mawatha, Colombo 1.

4. Mangala Samaraweera, M.P.
Minister of Finance.
Ministry of Finance
The Secretariat, Lotus Road, Colombo 01.

5. Hemasiri Fernando
Former Secretary of Defence

6. Ravinatha Aryasinha
Permanent Secretary for the Ministry of Foreign Affairs, Ministry of Foreign Affairs, Republic Building, Sir Baron Jayathilleke Mawatha, Colombo 1.

7. R.H.S. Samaratunga
Permanent Secretary for the Ministry of Finance, Ministry of Finance
The Secretariat, Lotus Road, Colombo 01.

8. Ravindra Wijegunaratne
Chief of Defence Staff,
Block No. 5, BMICH
Bauddaloka Mawatha, Colombo 07.

9. Mahesh Senanayake
Commander of the Army
Army Headquarters, Directorate of Media, 4th Floor, Premier Pacific Building, 28. R.A. De Mel Mawatha, Colombo 4.

10. Piyal de Silva
Commander of the Navy, P.O. Box 593
Navy Headquarters Colombo 1.

11. Kapila Jayampathi
Commander of the Air Force
Sri Lanka Air Force Headquarters,
Kumararatnam Road, Colombo 2.

12. Pujith Jayasundara
Inspector General of Police
Sri Lanka Police Headquarters
Church Street, Colombo 13.

13. Nilantha Jayawardane
Sri Lanka Police State Intelligence Service
Director, Sri Lanka Police Headquarters
Church Street, Colombo 13.

Respondents

SC.FR 195/2019

1. Mr. Kalinga N. Indatissa,
President's Counsel,
The President,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 20, 1st Lane,
Epitamulle Road,
Pitakotte.

Mr. Saliya Pieris,
President's Counsel,
The President,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of
No. 79/3, Kuruppu Road,
Colombo 8.

SUBSTITUTED 1ST PETITIONER

2. Mr. W.J. Shavindra Fernando,
President's Counsel,
Deputy President,
Bar Association of Sri Lanka,

No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 4/3, Sri Sumangala Mawatha,
Ratmalana.

Mr. Anura Meddegoda
President's Counsel,
Deputy President,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 195/21, Royal Court,
Koswatte Road, Nawala.
SUBSTITUTED 2ND PETITIONER

3. Mr. Kaushalya Nawaratne,
Attorney-at-Law and Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 8B, 1st Lane,
Pagoda Road,
Nugegoda.

Mr. Rajeev Amarasuriya,
The Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 8/2, Coniston Place,
Colombo 7.

SUBSTITUTED 3RD PETITIONER

4. Mr. A.W. Nalin Chandika De Silva,
Attorney-at-Law,

The Treasurer,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 321/15a, Rankethyaya Road,
Makola South,
Makola.
Mr. Rajindh Perera,
Attorney-at-Law,
The Treasurer,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 457/14A, Nawala Road,
Rajagiriya.

SUBSTITUTED 4TH PETITIONER

5. Mr. V. De Livera Tennekoon,
Attorney-at-Law,
The Assistant Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 74/5, Jaya Road,
Udahamulla,
Nugegoda.

Mr. T.M.S. Pasindu Silva
Attorney-at-Law,
The Assistant Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

And also of

No. 6/1, Watarappola Road,
Mt. Lavinia.
SUBSTITUTED 5TH PETITIONER

PETITIONERS

Vs.

1. Gen. S.H.S. Kottegoda (Retd.)
   Secretary,
   Ministry of Defense,
   No. 15/5, Baladaksha Mawatha,
   Colombo 03.

2. Hemasiri Fernando,
   Former Secretary,
   Ministry of Defense,
   No. 15/5, Baladaksha Mawatha,
   Colombo 03.

3. Pujitha Jayasundera,
   Inspector General of Police,
   (Presently on compulsory leave),
   Police Headquarters,
   Church Street,
   Colombo 01.

4. C.D. Wickramaratne,
   Acting Inspector General of Police,
   Senior Deputy Inspector General of Police,
   Police Headquarters,
   Church Street,
   Colombo 01.

5. Hon. Ruwan Wijewardana,
   State Minister of Defense,
   Ministry of Defense,
   No. 15/5,
   Baladaksha Mawatha,
   Colombo 03.

6. N.K.G.K. Nemmawatta,
   Secretary,
   State Minister of Defense,
   Ministry of Defense,
   No. 15/5, Baladaksha Mawatha,
   Colombo 03.

7. A.N. Sisira Mendis,
   Chief of National Intelligence,
   Office of the Chief of National Intelligence,
   Ministry of Defense,
   No. 15/5,
   Baladaksha Mawatha,
   Colombo 03.

8. Hon. Ranil Wickramasinghe,
   Prime Minister of the Democratic Socialist Republic of Sri Lanka,
   Prime Minister's Office,
   No. 58,
   Sir Ernest de Silva Mawatha,
   Colombo 07.

   And also

   Minister of National Policies, Economic Affairs, Resettlement & Rehabilitation, Northern Province Development and Youth Affairs,
   Ministry of National Policies, Economic Affairs, Resettlement & Rehabilitation, Northern Province Development and Youth Affairs,
   Miloda (Old Times Building),
   1st Floor, Bristol Street,
   Colombo 01.

9. Hon. Mangala Samaraweera,
   Minister of Finance and Mass Media,
   Ministry of Finance and Mass Media,
   Administration Building, 2nd Floor, New Building, The Secretariat,
   Colombo 01.

10. Hon. Tilak Marapana,
    Minister of Foreign Affairs,
    Ministry of Foreign Affairs,
    Republic Building,
    Colombo 01.

11. Hon. John Amarathunga,
    Minister of Tourism Development, Wildlife and Christian Affairs,
    Ministry of Tourism Development, Wildlife and Christian Affairs, Office of the Minister,
    7th Floor, No. 78, Galle Road, Colombo 03.

12. Hon. Gamini Jayawickrama Perera,
Minister of Buddhasasana and Wayamba Development,
Ministry of Buddhasasana and Wayamba Development,
No. 35, Sreemath Anagarika Dharmapala Mawatha, Colombo 07.

13. Hon. Lakshman Kiriella,
Minister of Public Enterprise, Kandyan Heritage and Kandy Development,
Ministry of Public Enterprise, Kandyan Heritage and Kandy Development,
Level 36, East Tower, World Trade Center,
Echelon Square, Colombo 01.

14.Hon Rauff Hakeem,
Minister of City Planning, Water Supply and Higher Education,
Ministry of City Planning, Water Supply and Higher Education,
Lakdiya Medura, No. 35, New Parliament Road,
Pelawatta, Battaramulla.

15.Hon. Dr. Rajitha Seneratne,
Minister of Health, Nutrition and Indigenous Medicine,
Ministry of Health, Nutrition and Indigenous Medicine,
No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

16. Hon Vajira Abeywardena,
Minister of Internal and Home Affairs, and Provincial Councils, and Local Government,
Ministry of Internal and Home Affairs, and Provincial Councils, and Local Government,
Independence Square, Colombo 07.

17.Hon Rishad Bathiudeen,
Minister of Industry and Commerce, Resettlement of Protracted Displaced Persons and Co-operative Development,
Ministry of Industry and Commerce, Resettlement of Protracted Displaced Persons and Co-operative Development,
P.O. Box 570, No. 73/1, Galle Road,
Colombo 03.

18.Hon. Patali Champika Ranawaka,
Minister of Megapolis and Western Development,
Ministry of Megapolis and Western Development,
17th and 18th Floor, "SUHURUPAYA",
Subhuthipura Road, Battaramulla.

19. Hon Ravi Karunanayake,
Minister of Power and Renewable Energy,
Ministry of Power and Renewable Energy,
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.

20. Hon. Thalatha Athukorala,
Minister of Justice and Prison Reforms,
Ministry of Justice and Prison Reforms,
Superior Court Complex, Colombo 12.

21. Hon. P. Harrison,
Minister of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries and Aquatic Resource Development,
Ministry of Agriculture, Rural Economic Affairs, Livestock Development, Irrigation and Fisheries and Aquatic Resource Development,
No. 288, Sri Jayawardenapura Mawatha,
Sri Jayawardenapura Kotte.

22. Hon. Kabir Hashim,
Minister of Highways and Road Development and Petroleum Resources Development,
Ministry of Highways and Road Development and Petroleum Resources Development,
Maganeguma Mahagedara,
No. 126, Denzil Kobbekaduwa Mawatha,
Koswatta, Battaramulla.

23. Hon. Gayantha Karunathilaka,
Minister of Lands and Parliamentary Reforms,
Ministry of Lands and Parliamentary Reforms,
"Mihikatha Medura", Land Secretariat,
No. 1200/6, Rajamalwatta, Avenue,
Battaramulla.

24. Hon. Sajith Premadasa,
Minister of Housing, Construction, and Cultural Affairs,
Ministry of Housing, Construction, and Cultural Affairs,
2nd Floor, Sethsiripaya, Battaramulla.

25. Hon. Arjuna Ranatunga,
Minister of Transport and Civil Aviation,
Ministry of Transport and Civil Aviation,
No. 01, Wijewardena Mawatha,
Colombo 10.

26. Hon. U. Palani Digambaram,
Minister of Hill Country, New Villages, Infrastructure and Community Development, Ministry of Hill Country, New Villages, Infrastructure and Community Development,
No. 45, St. Michael's Street, Colombo 03.

27. Hon. Chandrani Bandara,
Minister of Women and Child Affairs, and Dry Zone Development,
Ministry of Women and Child Affairs, and Dry Zone Development, Sethsiripaya,
(Stage II) 5th Floor, Battaramulla.

28. Hon. Akila Viraj Kariyawasam,
Minister of Education,
Ministry of Education,
Isurupaya, Pelawatta, Battaramulla.

29. Hon. H.A. Haleem,
Minister of Posts, Postal Services, and Muslim Affairs,
Ministry of Posts, Postal Services, and Muslim Affairs,
6th and 8th Floor,
Postal Headquarters Building,
No. 310, D.R. Wijewardana Road,
Colombo 10.

30. Hon. Sagala Ratnayake,
Minister of Ports and Shipping and Southern Development,
Ministry of Ports and Shipping and Southern Development,
No. 19, Chaithya Road, Colombo 01.

31. Hon Harin Fernando,
    Minister of Telecommunication, Foreign Employment and Sports,
    Ministry of Telecommunication, Foreign Employment and Sports,
    No. 79/1, 5th Lane, Colombo 03.

32. Hon. Mano Ganesan,
    Minister of National Integration, Official Languages, Social Progress, and Hindu Religious Affairs,
    Ministry of National Integration, Official Languages, Social Progress, and Hindu Religious Affairs,
    No. 40, Buthgamuwa Road, Rajagiriya,
    P.O. Box 1566, Colombo.

33. Hon. Daya Gamage,
    Minister of Labour, Trade Unions Relations, and Social Empowerment,
    Ministry of Labour, Trade Unions Relations, and Social Empowerment,
    2nd Floor, Land Secretariat, Colombo 05.

34. Hon. Ranjith Maddumabandara,
    Minister of Public Administration and Disaster Management,
    Ministry of Public Administration and Disaster Management,
    Independence Square, Colombo 07.

35. Hon. Navin Dissanayake,
    Minister of Plantation Industries,
    Ministry of Plantation Industries,
    11th Floor, Sethsiripaya (Stage II),
    Battaramulla.

36. Hon. Malik Samarawickrama,
    Minister of Development Strategies and Internal Trade,
    Ministry of Development Strategies and Internal Trade,
    6th Floor, West Tower, World Trade Centre,
    Echelon Square, Colombo 01.

37. Sumith Abeysinghe,
    Secretary to the Cabinet of Ministers,
    Office of the Cabinet of Ministers,
    Republic Building,

Sir Baron Jayathilaka Mawatha, Colombo 01.

38. Udaya Seneviratne,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo 01.

39. Saman Ekanayake,
Secretary to the Prime Minister,
Prime Minister's Office,
No. 58, Sir Ernest de Silva Mawatha,
Colombo 07.

40. Admiral Ravindra Wijegunaratne,
Chief of Defense Staff,
Office of Chief of Defense Staff,
Block No. 5, BMICH,
Bauddhaloka Mawatha, Colombo 07.

41. Lieutenant General Shavendra Silva,
Commander of the Army,
4th Floor, Premier Pacific Building,
No. 28, R.A. De Mel Mawatha,
Colombo 04.

42. Vice Admiral K.K.V.P.H. De Silva,
Commander of the Navy,
Naval Head Quarters, Colombo.

43. Air Marshal Kapila Jayampathy,
Commander of the Air Force,
Sri Lanka Air Force Headquarters,
No. 594, Colombo 02.

44. Ravinatha Aryasinha,
Secretary,
Ministry of Foreign Affairs,
Republic Building,
Sir Baron Jayathilake Mawatha,
Colombo 01.

45. Dr. R.H.S. Samarathunga,
Secretary, Ministry of Finance,
The Secretariat,
Lotus Road, Colombo 01.

46. D.W.R.D. Seneviratne,
Senior Deputy Inspector General of Police –
Crimes Investigation Division and Terrorism
Investigation Division,
P.O. Box 537, New Secretariat Complex,
Colombo 01.

47. M.R. Latif,
Senior Deputy Inspector General of Police,
The Commandant of the Special Task Force,

Headquarters of the Special Task Force,
Bauddhaloka Mawatha, Colombo 07.

48. D.G.N. Jayawardana,
Senior Deputy General of Police – State
Intelligence Service,
No. 10, Cambridge Place, Colombo 07.

49. Nandana Munasinghe,
Senior Deputy Inspector General of Police –
Western Province,
Police Headquarters, Church Street,
Colombo 01.

50. H.D.K.S. Jayasekara,
Senior Deputy Inspector General of Police –
Eastern Province,
Office of the Senior Deputy Inspector
General of Police,
Lady Manning Road, Batticaloa.

51. Jagath Abeysiriwardana,
Senior Deputy Inspector General of Police –
North Central Province and North Western
Province,
Senior DIG's Office of North Central
Province,
Meththa Mawatha, Air Force Camp Road,
Anuradhapura.

And also of
Senior DIG Office of North Western
Province, Kurunegala.

52. K.E.R.L. Fernando,
Senior Deputy Inspector General of Police –
Sabaragamuwa Province,
Senior DIG's Office of Sabaragamuwa
Province,

Pothgulvihara Mawatha,
Muvagama, Rathnapura.

53.S.M. Wickramasinghe,
Senior Deputy Inspector General of Police
of the Central Province and Uva Province,
Senior DIG's Office of Central Province,
No. 2, Pushpadana Mawatha, Kandy.

And also of
Senior DIG's Office of Uva Province,
No. 161/1, Mahiyangana Road,
Badulla.

54. K.E.R.L. Fernando,
Senior Deputy Inspector General of Police –
Southern Province,
Senior DIG's Office of Southern Province,
Nuper, Matara.

55.Y.W.R. Wijegunawardana,
Senior Deputy Inspector General of Police –
Northern Province,
Senior DIG's Office of Northern Province,
Palali Road, Kankasanthurai.

56. Priyalal Dissanayake,
Senior Deputy Inspector General of Police –
Special Security Division,
Police Headquarters, Church Street,
Colombo 01.

57. The Archbishop of Colombo,
Archdiocese of Colombo,
Archbishop's House,
Borella, Colombo 08.

58. The Incorporated Trustees of Church of
Ceylon,
No. 368/3a, Bauddhaloka Mawatha,
Colombo 07.

59. Bishop of Colombo,
Diocese of Colombo,
Church of Ceylon,
No. 368/3a,
Bauddhaloka Mawatha, Colombo 07.

60. Bishop of Kurunegala,
Diocese of Kurunegala,

Church of Ceylon,
Bishop's Office, Kandy Road,
Kurunegala.

61. M.L.A.M. Hizbulla,
Governor's Secretariat,
Lower Road, Orr's Hill,
Trincomalee.

62. Venerable Athuraliye Rathana Thero,
Sadaham Sewana,
Gothami Uyana,
Obesekarapura, Rajagiriya.

63. N.P. Illangakoon,
Advisor to the Ministry of Defence,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

64. Hon. Attorney General,
Attorney General's Office,
Colombo 12.

65. Ven. Mawarale Bhaddiya Thero,
Arya Nekethanaya,
No. 16B,
Sri Seelalankara Mawatha,
Habarakada, Athurugiriya.

66A. Hon. Maithripala Sirisena
Former President of the Democratic
Socialist Republic of Sri Lanka,
No. 02, Mahagama Sekara Mawatha,
Colombo 05.

ADDED 66A RESPONDENT

67A. Maj. Gen. Jagath Alwis,
Chief of National Intelligence
Office of the Chief of National Intelligence
Ministry of Defense,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

ADDED 67A RESPONDENT

68A. S. Amarasekara,
Secretary to the Cabinet of Ministers,
Officer of the Cabinet of Ministers,

Republic Building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

ADDED 68A RESPONDENT

69A. Dr. P.B. Jayasundara,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo 01.

ADDED 69A RESPONDENT

70A. Gamini Senarath,
Secretary to the Prime Minister,
Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha,
Colombo 07.

ADDED 70A RESPONDENT

71A. Maj. Gen. (Retd) Kamal Gunaratne,
Secretary,
Ministry of Defense,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

ADDED 71A RESPONDENT

72A. S.R. Attygalle,
Secretary,
Ministry of Finance,
The Secretariat,
Lotus Road, Colombo 01.

ADDED 72A RESPONDENT

73A. Brigadier Suresh Sallay,
Senior Deputy General of Police – State Intelligence Service,
No. 10, Cambridge Place,
Colombo 07.

ADDED 73A RESPONDENT

74A. Hon. Mahinda Rajapaksa,
Prime Minister of the Democratic Socialist Republic of Sri Lanka,

Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha,
Colombo 07.

And also of

Minister of Finance, Economy and Policy Development, Buddhasasana, Cultural and Religious Affairs, Urban Development, Water Supply and Housing Facilities,
Ministry of Finance, The Secretariat,
Lotus Road, Colombo 01.

ADDED 74A RESPONDENT

75A. Hon. Nimal Siripala De Silva,
Minister of Justice, Human Rights, and Legal Reforms,
Ministry of Justice, Human Resources, and Legal Reforms,
Superior Courts Complex, Colombo 12.

ADDED 75A RESPONDENT

76A. Hon. Arumugam Thondaman,
Minister of Community Empowerment & Estate Infrastructure Development,
Ministry of Community Empowerment & Estate Infrastructure,
No. 53, St. Michaels Road,
Colombo 03.

ADDED 76A RESPONDENT

77A. Hon. Dinesh Gunawardana,
Minister of Foreign Affairs, Skills Development, Employment, Labour Relations,
Ministry of Foreign Affairs, Skills Development, Employment, Labour Relations,
Republic Building,
Sir Barron Jayathilake Mawatha,
Colombo 01.

ADDED 77A RESPONDENT

78A. Hon. Douglas Theevanantha,
Minister of Fisheries and Aquatic Resources,
Ministry of Fisheries and Aquatic Resources,
Maligawatte Road, Colombo 01.

ADDED 78A RESPONDENT

79A. Hon. Pavithra Wanniarachchi,
Minister of Women and Child Affairs and Social Security, Healthcare and Indigenous Medical Services,
Ministry of Women and Child Affairs and Social Security, Healthcare and Indigenous Medical Services,
No. 115/2, Kotte – Bope Road,
Battaramulla.

ADDED 79A RESPONDENT

80A. Hon. Bandula Gunawardana,
Minister of Information and Communication Technology, Higher Education, Technology & Innovation,
Ministry of Information Technology, Higher Education, Technology & Innovation, Miloda Building, Bristol Street, Colombo 01.

ADDED 80A RESPONDENT

81A. Hon. Janaka Bandara Tennakoon,
Minister of Public Administration, Home Affairs, Provincial Councils and Local Government,
Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

ADDED 81A RESPONDENT

82A. Hon. Chamal Rajapaksa,
State Minister of Defense,
Ministry of Defense,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

And also

Minister of Mahaweli, Agriculture,
Irrigation and Rural Development,
Internal Trade, Food Security and
Consumer Welfare,
Ministry of Mahaweli, Agriculture,
Irrigation and Rural Development,
Internal Trade, Food Security and
Consumer Welfare, Sobadam Piyasa,
No. 416/C/1, Robert Gunawardana
Mawatha, Battaramulla.

ADDED 82A RESPONDENT

83A. Hon. Dulas Alahapperuma,
Minister of Education, Sports and Youth,
Ministry of Education, Sports, and Youth,
Isurupaya, Battaramulla – Pannipitiya
Road,
Battaramulla.

ADDED 83A RESPONDENT

84A. Hon. Johnston Fernando,
Minister of Roads & Highways, Ports &
Shipping,
Ministry of Roads & Highways, Ports &
Shipping,
No. 27, Bristol Street, Colombo 01.

ADDED 84A RESPONDENT

85A. Hon. Wimal Weerawansa,
Minister of Small and Medium Business
and Enterprise Development, Industries
and Supply Chain Management,
Ministry of Small and Medium Business
and Enterprise Development, Industries
and Supply Chain Management,
07th Floor, West Tower and, 36th Floor,
East Tower, World Trade Centre,
Echelon Square, Colombo 01.

ADDED 85A RESPONDENT

86A. Hon. Mahinda Amaraweera,
Minister of Passenger Transport Management,
Power & Energy,

Ministry of Passenger Transport Management,
Power & Energy,
7th Floor, Sethsiripaya, Stage II,
Battaramulla.

ADDED 86A RESPONDENT

87A. Hon. S.M. Chandrasena,
Minister of Environment, Wildlife
Resources, Land & Land Development,
Ministry of Environment, Wildlife
Resources, Land & Land Development,
Sobadam Piyasa, No. 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.

ADDED 87A RESPONDENT

88A. Hon. Ramesh Pathirana,
Minister of Plantation Industries, &
Export Agriculture,
Ministry of Plantations Industries, &
Export Agriculture,
11th Floor, Sethsiripaya, 2nd Stage,
Battaramulla.

ADDED 88A RESPONDENT

89A. Hon. Prasanna Ranatunga,
Minister of Industrial Exports and Investment
Promotions, Tourism, & Aviation,
Ministry of Industrial Exports and Investment
Promotions, Tourism, & Aviation,
3, 73/1, Galle Road, Colombo 3.

ADDED 89A RESPONDENT

90A. Ven. Bengamuwe Nalaka Thero,
Sri Pagnanda Dharmayathanaya,
Gamunu Mawatha, Station Road, Kelaniya.

ADDED 90A RESPONDENT

91A. Ven. Angulugalle Siri Jinananda Thero,
Sri Vimalaramaya, Isurupura, Malabe

ADDED 91A RESPONDENT

92A. Ven. Ratnapure Seevali Thero,
Samadi Viharaya,
Edirisinghe Road, Gangodawila,
Nugegoda.

ADDED 92A RESPONDENT

93A. Ven. Madille Pangyaloka Thero,
Samadi Viharaya, Edirisinghe Road,
Gangodawila, Nugegoda.

ADDED 93A RESPONDENT

94A. Alhaj Abdul Jawaaldhalim Walliyyullah
Trust, Baduriya Jumma Mosque Road,
Kattankudi.

ADDED 94A RESPONDENT

RESPONDENTS

SCFR 196/2019

Seerangan Sumithra
No.120/107, Sangamitta Mawatha,
Kotahena,
Colombo 13.
Petitioner

Vs.

1. Mr. Ranil Wickremesinghe
Hon. Prime Minister of the Republic
Minister of National Policies, Economic
Affairs, Resettlement and Rehabilitation
Northern Province Development and
Youth Affairs,
Prime Minister's Office,
No. 58, Sir Ernest de Silva Mawatha,
Colombo 07.

2. Mr. Thilak Marapana,
Minister of Foreign Affairs
Ministry of Foreign Affairs,
Republic Building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

3. Mr. Mangala Samaraweera
   Minister of Finance and Mass Media
   Ministry of Finance & Mass Media,
   The Secretariat, Lotus Road,
   Colombo 01.

4. Mr. Ravinatha Aryasinha
   Secretary to Ministry of Foreign Affairs
   Ministry of Foreign Affairs,
   Republic Building,
   Sir Baron Jayathilaka Mawatha,
   Colombo 01.

5. Dr. R.H.S.Samaratunga
   Secretary to the treasury and Ministry of Finance,
   Ministry of Finance,
   The Secretariat, Lotus Road,
   Colombo 01.

6. Mr. Hemasiri Fernando
   Former Secretary to Ministry of Defence
   C/O of Secretary to Ministry of Defence,
   Ministry of Defence,
   No. 15/5, Baladaksha Mawatha,
   Colombo 03.

7. Mr. Pujith Jayasundara
   Inspector General of Police
   C/O Acting Inspector General of Police
   Police Headquarters,
   Colombo 01.

8. Mr. Nilantha Jayawardena
   Senior Deputy Inspector General of Police-State Intelligence Service
   Police Headquarters,
   Colombo 01.

9. Admiral Ravindra C. Wijegunaratne
   Chief of Defence Staff,
   Office of Chief of Defence Staff,
   Block No. 05, BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

10. Lt. General Mahesh Senanayake
    Commander of Sri Lanka Army
    Army Headquarters,
    Colombo 03.

11. Vice Admiral Piyal De Silva,
    Commander of Sri Lanka Navy
    Naval Headquarters,
    Colombo 01.

12. Marshal Kapila Jayampathy
    Commander of Sri Lanka Air Force
    Air Force Headquarters,
    Colombo 02.

13. Mr. Ruwan Wijewardene
    Hon. State Minister of Defence and Non-Cabinet Minister of Mass Media
    Ministry of Defence,
    No. 15/5, Baladaksha Mawatha,
    Colombo 03.

14. Mr. Udaya Ranjith Seneviratne
    Secretary of His Excellency the President
    Presidential Secretariat,
    Galle Face, Colombo 01.

15. General S.H.S. Kottegoda
    Secretary to Ministry of Defence
    Ministry of Defence,
    No. 15/5, Baladaksha Mawatha,
    Colombo 03.

16. Mr. C.D.Wickramaratne
    Acting Inspector General of Police,
    Senior Deputy Inspector of Police,
    Police Headquarters, Colombo 01.

17. Mr. Priyalal Dasanayake
    Deputy Inspector of Police –Special Security
    Office of Deputy Inspector of Police-Special Security,
    No. 440A, Dr. Colvin R. De Silva Mawatha, Colombo 02.

18. Mr. Johan Amarathunga
    Minister of Tourism Development,
    Wildlife and Christian Religious Affairs
    Ministry of Tourism Development,
    Wildlife and Christian Religious Affairs,
    6th Floor, Rakshana Mandiriya ,
    No. 21, Vaushall Street, Colombo 02.

19. Mr. Gamini Jayawickrema Perera,
    Minister of Buddhasasana and Wayamba Development
    Ministry of Buddhasasana and Wayamba Development,
    No. 135, Sreemath Anagarika Dharmapala Mawatha, Colombo 07.

20. Mr. Laxman Kiriella
    Minister of Public Enterprise, Kandyan Heritage and Kandy Development
    Ministry of Public Enterprise, Kandyan Heritage and Kandy Development,
    36th Floor, West Tower,
    World Trade Centre, Echelon Square,
    Colombo 01.

21. Mr. Rauff Hakeem
    Minister of City Planning, Water Supply and Higher Education
    Ministry of City Planning, Water Supply and Higher Education
    Lakdiya Medura,
    No. 35, New Parliament Road,
    Pelawatta, Battaramulla.

22. Dr. Rajitha Senaratne
    Minister of Health Nutrition and Indigenous Medicine
    Ministry of Health, Nutrition and Indigenous Medicine,
    "Suwasiripaya", Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

23. Mr. Ravi Karunanayake
    Minister of Power, Energy and Business Development
    Ministry of Power, Energy and Business Development,
    No. 72, Ananda Coomaraswamy Mawatha, Colombo 07.

24. Mr. Vajira Abeywardena
    Minister of Internal and Home Affairs and Provincial Councils and Local Government

Ministry of Internal and Home Affairs
and Provincial Councils and Local
Government,
No. 330, Union Place,
Colombo 02.

25. Mr. Rishad Bathiudeen
Minister of Industry and Commerce,
Resettlement of Protracted Displaced
Persons ad Co-operative Development
Ministry of Industry and Commerce,
Resettlement of Protracted Displaced
Persons and Co-operative Development,
No. 73/1, Galle Road, Colombo 03.

26. Mr. Patali Champika Ranawaka
Minister of Megapolis and Western
Development
Ministry of Megapolis and Western
Development,
17th and 18th Floors, ''SUHURUPAYA"
Subhuthipura Road, Battaramulla.

27.Mr. Navin Dissanayake,
Minister of Plantation Industries
Ministry of Plantation Industries,
08th Floor, "Sethsiripaya", 2nd Stage,
Battaramulla.

28.Mr. P.Harison
Minister of Agriculture, Rural Economic
Affairs, Livestock Development,
Irrigation and Fisheries and Aquatic
Resources Development
Ministry of Agriculture, Rural Economic
Affairs, Livestock Development,
Irrigation and Fisheries and Aquatic
Resources Development,
8th Floor, No. 288,
Sri Jayawardhanepura Mawatha,
Rajagiriya.

29.Mr. Kabir Hashim
Minister of Highways and Road
Development and Petroleum Resources
Development, Ministry of Highways and
Road, Development and Petroleum
Resources Development, 9th Floor,
Maganeduma Mahamedura,Denszil
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Koswatta, Battaramulla.

30.Mr. Ranjith Madduma Bandara
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31.Mr. Gayantha Karunathilaka
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Battaramulla.

32.Mr. Sajith Premadasa
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Battaramulla.

33.Mr. Arjuna Ranatunga
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Ministry of Transport and Civil Aviation,
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Battaramulla.

34.Mr. U. Palani Digambaram
Minister of Hill Country New Villages, Infrastructure and Community Development,
Ministry of Hill Country New Villages, Infrastructure and Community Development,
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Colombo 03.

35.Ms. Chandrani Bandara
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36. Ms. Thalatha Atukorala
Minister of Justice and Prison Reforms
Ministry of Justice and Prison Reforms,
Superior Court Complex, Colombo 12.

37. Mr. Akila Viraj Kariyawasam
Minister of Education,
Ministry of Education,
"Isurupaya", Pelawatta, Battaramulla.

38. Mr. M.H.A. Haleem,
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Ministry of Postal Services and Muslim Religious Affairs,
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Ministry of Telecommunication, Foreign Employment and Sports,
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Ministry of National Integration, Official Languages, Social Progress and Hindu Religious Affairs,
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Minister of Primary Industries and Social Empowerment, Ministry of Primary Industries and Social Empowerment,
1st Floor, Stage 11, "Sethsiripaya",
Battaramulla.

43. Mr. Malik Samarawickrema
Minister of Development Strategies and International Trade,
Ministry of Development Strategies and International Trade, Level 30, West Tower, World Trade Centre, Colombo 01.

44. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

44A. Mr. Maithripala Serisena
Hon. Former President of Sri Lanka
No. 61, Mahagamasekara Mawatha,
Colombo 07.

Respondents

Dr. Visakesa Chandrasekaram,
No. 62/3, Mayura Place,
Colombo 06.

SC FR Application No. 197/19

Petitioner

Vs

1. Mr. Ranil Wickramasinghe,
Hon. Prime Minister of the Republic, Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation,
Northern Province Development and Youth Affairs,
Prime Minister's Office,
No. 58, Sir Ernest de Silva Mawatha,
Colombo 07.

2. Mr. Tilak Marapana,
Minister of Foreign Affairs,
Ministry of Foreign Affairs,
Republic Building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

3. Mr. Mangala Samaraweera,
Minister of Finance and Mass Media,
Ministry of Finance and Mass Media,
The Secretariat, Lotus Road,
Colombo 01.

4. Mr. Ravinatha Aryasinha,
   Secretary to Ministry of Foreign Affairs,
   Ministry of Foreign Affairs,
   Republic Building,
   Sir Baron Jayathilake Mawatha,
   Colombo 01.

5. Dr. R.H.S. Samarathunga,
   Secretary to the Treasury and Ministry of Finance,
   Ministry of Finance,
   The Secretariat,
   Lotus Road, Colombo 01.

6. Mr. Hemasiri Fernando,
   Former Secretary to Ministry of Defence,
   C/O of Secretary to Ministry of Defence,
   Ministry of Defense,
   No. 15/5,
   Baladaksha Mawatha,
   Colombo 03.

7. Mr. Pujith Jayasundera,
   Inspector General of Police,
   C/O Acting Inspector General of Police,
   Police Headquarters,
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8. Mr. Nilantha Jayawardena
   Senior Deputy Inspector General of Police – State Intelligence Service,
   Police Headquarters,
   Colombo 01.

9. Admiral Ravindra C. Wijegunaratne,
   Chief of Defense Staff,
   Office of Chief of Defense Staff,
   Block No. 5, BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

10. Lt. General Mahesh Senanayake,
    Commander of Sri Lanka Army,
    Army Headquarters,
    Colombo 03

11. Vice Admiral Piyal De Silva,
    Commander of Sri Lanka Navy,
    Naval Head Quarters,
    Colombo 01.

12. Marshal Kapila Jayampathy,
Commander of Sri Lanka Air Force,
Air Force Headquarters,
Colombo 02.

13. Mr. Ruwan Wijewardana,
Hon. State Minister of Defense and Non Cabinet Minister of Mass Media,
Ministry of Defense,
No. 15/5, Baladaksha Mawatha,
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14. Mr. Udaya Ranjith Seneviratne,
Secretary to His Excellency the President,
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Galle Face,
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15. General S.H.S. Kottegoda
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Colombo 03.

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Senior Deputy Inspector of Police,
Police Headquarters,
Colombo 01.

17. Mr. Priyalal Dassanayake,
Deputy Inspector of Police – Special Security,
Office of Deputy Inspector of Police – Special Security,
No. 440A, Dr. Colvin R. De Silva Mawatha,
Colombo 02

18. Mr. John Amarathunga,
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Ministry of Plantation Industries,
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Respondents

SC FR 198/2019

Pussewela Kankanamge Kasun Amila Pussewela

No. 36, Thalgahahena Lane,

Bataganvila,

Galle,

Petitioner

Vs

1. Mr. Ranil Wickramasinghe,
Hon. Prime Minister of the Republic, Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation,
Northern Province Development and Youth Affairs,
Prime Minister's Office,
No. 58,
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Ministry of Foreign Affairs,
Republic Building,
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Ministry of Finance and Mass Media,
The Secretariat, Lotus Road, Colombo 01.

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C/O of Secretary to Ministry of Defence,
Ministry of Defence,
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C/O Acting Inspector General of Police,
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Chief of Defense Staff,
Office of Chief of Defense Staff,
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17. Mr. Priyalal Dassanayake,
Deputy Inspector of Police – Special Security,
Office of Deputy Inspector of Police – Special Security,
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Ministry of Health, Nutrition and Indigenous Medicine,
"Suwasiripaya",
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Ministry of Power, Energy and Business Development,
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Ministry of Lands and Parliamentary Reforms,
Stage II,
Sethsiripaya, Battaramulla.

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Ministry of Transport and Civil Aviation,
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Ministry of Justice and Prison Reforms,
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Ministry of Education,
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44. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

SCFR 293/2019

Moditha Tikiri Bandara Ekanayake,
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Thalangama North,
Thalangama.

Petitioner

Vs.

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Ministry of Defense,
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   Police Headquarters,
   Colombo 01.

4. Priyalal Dasanayake,
   Deputy Inspector of Police – Special
   Security Office of Deputy Inspector of
   Police - Special Security,
   No. 440A, Dr. Colvin R. De Silva Mawatha,
   Colombo 02.

5. Hon. Ruwan Wijewardana,
   Hon. State Minister of Defense and Non -
   Cabinet Minister of Mass Media,
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Colombo 10.

30. Sagala Ratnayake,
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31. Harin Fernando,
Minister of Telecommunication, Foreign Employment and Sports,
Ministry of Telecommunication, Foreign Employment and Sports,
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32. Mano Ganesan,
Minister of National Integration, Official Languages, Social Progress, and Hindu Religious Affairs,
Ministry of National Integration, Official Languages, Social Progress, and Hindu Religious Affairs,
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34. Malik Samarawickrema,
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Ministry of Development Strategies and International Trade,
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35. Ravinatha Aryasinha,
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Ministry of Foreign Affairs,
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Colombo 01.

36. R.H.S. Samarathunga,
Secretary to the Treasury and Ministry of Finance,
Ministry of Finance,
The Secretariat,
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37. Admiral Ravindra C. Wijegunaratne,
Chief of Defense Staff,
Office of Chief of Defense Staff,
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38. Lt. General Mahesh Senanayake,
Commander of Sri Lanka Army,
Army Headquarters, Colombo 03.

39. Vice Admiral Piyal De Silva,
Commander of Sri Lanka Navy,
Naval Head Quarters, Colombo 01.

40. Marshal Kapila Jayampathy,
Commander of Sri Lanka Air Force,
Air Force Headquarters, Colombo 02.

41. General S.H.S. Kottegoda
Secretary to Ministry of Defense,
Ministry of Defense,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

42. Mr. C.D. Wickramaratne,
Acting Inspector General of Police,

Senior Deputy Inspector of Police,
Police Headquarters,
Colombo 01.

43. Mahamood Lebbe Alim Mohomed
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AND NOW
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44. Hon. Attorney General,
Attorney Generals Department,
Colombo 12.

RESPONDENTS

Before : Jayantha Jayasuriya, PC, CJ

B.P. Aluwihare, PC,J

L.T.B.Dehideniya, J

Murdu N.B. Fernando, PC,J

S. Thurairaja, PC,J.

A.H.M.D.Nawaz, J .

A.L. Shiran Gooneratne, J

Counsel : Gamini Perera with Ishara Gunawardana, Leel Gunawardana , Ravindra Dabare and Wijitha Salpitikorala for the Petitioners in SCFR No. 163/19 & 166/19.

Dharshana Weraduwage with Dhanushi Kalupahana and Ushani Atapattu for the Petitioner in SCFR 165/2019.

Wardani Karunaratne for the Petitioner in SC.FR.No.184/19.

Lakshan Dias with Maneesha Kumarasinghe and Dayani Panditharathne for the Petitioner in SCFR 188/19.

Saliya Peiris, PC with Thanuka Nandasiri for the Petitioners in SCFR 191/19.

Rushdhie Habeeb with Samadhi Lokuwaduge, Riswan Uwiz and Azad Mustapha for the Petitioner in SC.FR.No.193/19.

Sanjeewa Jayawardena, PC with Ms. Dilumi de Alwis, Charitha Rupasinghe, Ms. Lakmini Warunwithana, Niranjan Arulpragasan, Milhan Mohammed, Ms. Ridmi Benaragama and Gimhani , Arthanayaka, Ms. Ranmali Meepagala & Eranga Tilekeratne for the Petitioner in SC.FR.No.195/19.

Nuwan Bopage for the Petitioner in SCFR No. 196/19.

Kameel Maddumage for the Petitioner in SCFR No. 197/19.

Janaka Basuriya for the Petitioner in SC.FR. 198/19.

Manohara de Silva, PC with Mrs. Nadeeshani Lankatileka for the Petitioner in SC.FR. 293/19.

Priyantha Nawana, PC, SASG with Nerin Pulle, PC, ASG, Dileepa Peiris, DSG, Dr. Avanthi Perera, SSC, Sureka Ahmed, SC and Induni Punchihewa, SC for the 3rd 4th Respondents in SCFR 163/19 & 166/19. 6A & 7th Respondent in SCFR 165/19. 34th Respondent in SCFR 184/19. 6th , 9th 15th and 16th Respondents in SCFR 188/19. 4th, 11th,12th and 13th Respondents in SCFR 191/19. 1st, 6th & 13th Respondents in SCFR 193/19. 4th, 44th, 48th, 52nd , 54th, 55th, 56th, 77A, 78A, and 64th Respondents in SCFR 195/19. 4th, 8th, 16th, 17th & 44th Respondents in 196/19, 197/19 , and 198/19. 3rd, 4th, 35th, 42nd and 44th Respondents in SCFR 293/19.

Faizer Musthapa , PC with Shaheeda Barrie, Pulasthi Rupasinghe, Amila Perera, Ashan Bandara, Dhananjaya Perera and Ms. Nilma Abeysooriya for the 1st Respondent in SCFR 165/19, 184/19 & 1A Respondent in 193/19, for 44A Respondent in SCFR 196/19, 197/19 & 198/19, for 66A Respondent in SCFR/195/19.

Anuja Premaratna, PC. with Tarangee Mutucumarana for 45th, 46th, 49th and 52nd Respondents in SCFR 195/19.

Mohan Weerakoon PC with Mr. Prabuddha Hettiarachchi and Nuwan de Alwis for 2nd Respondent in SCFR 163/19,and 195/19.4th Respondent in SCFR 165/19. 2nd Respondent in SCFR 166/19. 3rd Respondent in SCFR 188/19, for 1st Respondent in SCFR 191/19 and 293/19, for 5th Respondent in SCFR 193/19, for 6th Respondent in SCFR 196/19, 197/19 and 198/19, and for 32nd Respondent in SCFR 184/19.

Shamil Perera, PC with Duthika Perera, Varuna Senadeera and Avinda Silva for the 57th Respondent in SCFR 195/19.

Dulindra Weerasuriya PC with Chamith Marapana and Saman Malinga for the 12th Respondent in SCFR 184/19, 7th Respondent in SCFR 188/19 and 293/19, 10th Respondent in SCFR 195/19, 3rd Respondent in SCFR 193/19 and 2nd Respondent in SCFR 196/19, 197/19 & 198/19.

Viran Corea with Niran Anketel, Dushinka Nelson and Thilini Vidanagamage for the 1st Respondent in SCFR163/19 &166/19, for the 2nd Respondent in SCFR 293/19, for 3rd Respondent in SCFR 191/19 &195/19, for 5th Respondent in SCFR 188/19, for 6th Respondent in SCFR 165/19, for 7th Respondent in SCFR 196/19, 197/19 & 198/19, for 12th Respondent in SCFR 193/19 and for 33rd Respondent in SCFR 184/19.

Suren Fernando with Sanjith Dias for the 2nd Respondent in SCFR No.165/19, 184/19, 188/19 & 193/19, for 6th Respondent in SCFR 191/19 & 293/19, for 8th Respondent in SCFR 195/19 and for the 1st Respondent in SCFR 196/19, 197/19 &198/19. 6th Respondent in SCFR 293/19.

Sudarshana Gunawardana for the 10th Responded in SCFR 188/19, 38th and 45th Respondent in SCFR 193/19, 5th and 14th Respondents in SCFR 196/19, 197/19 and 198/19. 36th Respondent in SCFR 293/19, 38th, and 45th Respondents in SCFR 195/19.

K.V.S. Ganesharajan with Sri Ranganathan Ragul and Nasikethan for the 94A Respondent in SCFR 195/19.

Harsha Fernando with Chamith Senanayake, Ruvan Weerasinghe and Yohan Coorey for the 11th and 13th Respondents in SCFR 188/19, 7th and 9th Respondents in SCFR 191/19, 8th and 10th Respondents in SCFR 193/19, 40th and 42nd Respondents in 195/19, 9th and 11th Respondents in SCFR 196/19, 197/19 and 198/19. 37th and 39th Respondents in SCFR 293/19.
J.M. Wijebandara with Chamodi Dayananda, Lakshika Hettiarachchi for the 49th Respondent in SCFR 195/19

Shantha Jayawardana with Ms. Azra Basheer for the 69th Respondent in SCFR 195/19.

Argued on : 14.03.2022, 15.03.2022, 16.03.2022, 18.03.2022 29.03.2022 06.06.2022, 07.06.2022, 08.06.2022, 09.06.2022, 10.06.2022 ,

20.07.2022, 26.07.2022, 27.07.2022, 02.08.2022, 29.09.2022, 04.10.2022 and 05.10.2022.

Decided on : 12.01.2023

On the ill-fated day of 21st of April 2019, this island home was awoken rudely to witness one of its most tragic events in the annuls of its history and in a series of bomb explosions that sent the nation reeling in shock and disbelief, scores of innocent worshippers at several churches as well as citizens in several locations were plucked away from their loved ones in the most macabre and dastardly acts of terrorism that this country has ever seen. In what has now come to be known as the Easter Sunday Attack or the Easter Sunday Tragedy in its melancholy sense, there was desolation and despair all-round the country and it may not be denied that it took a long while for this country to limp back to normalcy from the ravages of this tragedy. The trail of destruction and dislocation that the Easter Sunday Attack has left in its wake is a memory that this country will long live with and this Court is not spared its reverberations.

Several Petitioners have moved this Court in its fundamental rights jurisdiction invoking just and equitable remedies against some of the Respondents for what they plead as circumstances of inaction. It is only when the executive or administrative action or inaction gives rise to an infringement of a fundamental right, liability is predicated under Article 126 of the Constitution and the range of Respondents against whom declarations of infringement of fundamental rights are sought includes *Maithripala Sirisena* who held the office of the President in 2019, *Hemasiri Fernando*, the then Secretary to the Ministry of Defence, *Pujith Jayasundera*, the then Inspector General of Police (IGP), *Sisira Mendis*, the Chief of National Intelligence (CNI) and *Nilantha Jayawardena* [the then Director, State Intelligence Service (SIS)], to name but a few.

The Petitioners who allege inaction against these Respondents and attribute the Easter Sunday Blasts to the Respondents range from the President, Bar Association of Sri Lanka and 4 others (SC/FR/ Application No.195/2019), to several others who have filed similar public interest litigation and some who have suffered personal tragedies themselves. The Petitioners include an Attorney-at-law who sustained grievous injuries in the blast and a father who lost his children, while they were engaged in their religious worship at St. Anthony's Church, Kochchikade. This judgment will uniformly apply to all these applications namely SC/FR/163/19,SC/FR/165/19,

SC/FR/166/19, SC/FR/184/19, SC/FR/188/19, SC/FR/191/19,SC/FR/193/19, SC/FR/195/19, SC/FR/196/19, SC/FR/197/19, SC/FR/198/19, and SC/FR/293/19.

These applications deal with the aftermath of the Easter Sunday attacks that took place on the 21st of April 2019. Easter Sunday is a sacred day in the annals of the Christian Church. Easter Sunday is really a climax of a holy period, signalling a sacrificial period. The Easter Sunday service commemorates the most significant importance of the Resurrection of the Christ in the calendar of the Christians and Roman Catholics when churches are packed to capacity on this day. It is on such a day that these acts of terrorism were planned to be perpetrated on innocent worshippers and as a result more than 200 people died and several grievously injured. The terrorists set off their horrendous atrocities, not only on churches but also on hotels of the country, killing several people including overseas visitors and causing gruesome injuries on those who happened to be present at the places.

The petitions before us narrate harrowing tales of woe and seek redress from this Court by virtue of its sole and exclusive jurisdiction under Article 126 of the Constitution, which could afford just and equitable relief for action or inaction on the part of the Executive branch of the country. Some of the allegations of violations of Fundamental Rights engage the following articles of the Constitution- Article 12(1) (equal protection of the law), Article 14(1)(b) (the freedom of peaceful assembly), Article 14(1)(e) (the freedom either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching), Article 14(1)(g) (the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise) and Article 10 (every person is entitled to the freedom of thought, conscience and religion, including the freedom to have or to adapt the religion or belief of his choice).

In a conspectus the applications allege that these guarantees recognized by the Constitution have been infringed by some of the Respondents by their not acting with due care and attention so as to ensure the personal liberty and national security of this country.

The applications contain revelations of reckless failure on the part of the Executive Branch of the government and the Petitioners allege that these illegal omissions effectively betray the people and public trust by recklessly failing to take cognizance and accord due priority to intelligence information received regarding the premeditation of the attacks which could have been prevented if proactive and timely response had been taken. The Petitioners also submit that procrastination

in proscribing the terrorist groups and non-declaration of a state of emergency as a vital pre-emptive strike, contributed in no small measure to the growing menace of terrorism resulting in the most gruesome bomb blast and massacres that this country witnessed on the 21st of April 2019. The Petitioners further allege that no supporting structures were put in place in order to deal with an event of such magnitude that shocked this nation on the 21st of April 2019.

The Court will presently deal with the allegations which are relevant to the articles in which leave to proceed was granted-Articles 12(1) and 14(1)(e).

Thus, it becomes necessary to look at the powers, functions and duties of the state functionaries and ascertain as to how any breach of the obligations or omissions to discharge those obligations has resulted in deprivation of Fundamental Rights as alleged by the petitioners.

In order to indulge in this task, this Court will look at the constitutional, statutory and common law duties and functions entrusted to the Executive Branch and collate the facts and law in order to arrive at our conclusions.

We begin with a subordinate legislation that had been promulgated from time to time setting out the duties and functions of the President who was the Minister of Defence at all times material to the matter in issue.

By virtue of the Gazette bearing No. 2103/33 and dated 28th December 2018, Former President Maithripala Sirisena acting in terms of Article 43(1) and Article 46(1)(a) of the Constitution had issued a notification pertaining to the allocation of duties, functions, subjects, departments and instructions to Ministers and the responsibilities of such Ministers to implement specific laws of Parliament. This was the prevailing gazette at the time of the Easter Sunday attack.

Immediately at the end of the introductory paragraph of the said Gazette, one finds in bold letters numbered (1), the words **"Minister of Defence**". The Schedule pertaining to the Minister of Defence is divided into three columns.

Column I of the Gazette deals with duties and functions of the Minister of Defence. Whilst Column II deals with departments, statutory institutions and public corporations, Column III contains the laws and ordinances to be implemented by the Ministry of Defence. Item No.1 under Column I titled duties and functions contains the following as those of the Minister:

(i) *Formulation of policies, programmes and projects;* ***implementation, monitoring and evaluation in relation to the subject of Defence****, and those subjects that come under the purview of Departments, Statutory Institutions and Public Corporations listed in Column II.*

Apart from Sri Lanka Army, Navy and Air Force, some of the departments specified in Column II are Department of Civil Security, State Intelligence Service, Department of Police etc. In item No.2 in Column I, a duty to ensure the defence of the country by facilitation of the functions of the defence services is cast upon the Minister of Defence. In Item No.3, the Minister of Defence is tasked with the maintenance of internal security. The maintenance of defence and internal security related intelligence services, is another duty devolving on the Minister of Defence in terms of Item No.4. In Column III, the following laws *inter alia* are specified to be within the purview of the Minister of Defence:

- Prevention of Terrorism Act, No. 48 of 1979
- Public Security Ordinance, No 25 of 1947
- Suppression of Terrorist Bombings Act, No. 11 of 1999

In the last item of Column III, a residual power is vested in the Minister of Defence in the following tenor:

> All other legislations pertaining to the subjects specified in Column I and II, and not specifically brought under the purview of any other Minister.

It is pertinent to observe at this stage that State Intelligence Service (SIS) and the Department of Police are two separate departments existing respectively as items No. 11 and 15 in the Gazette. A comparison of the previous Gazette notifications namely, Gazettes bearing No. 1897/15 dated 18th January 2015, No. 1933/13 dated 21st September 2015 and No.2906/17 of 5th November 2018 *vis a vis* the Gazette bearing No. 2103/03 of 28th December 2018, shows a recognizable and increasing spectrum of powers assigned to the Minister of Defence over all aspects of public security, internal security, law enforcement and intelligence agencies as well as the relevant Acts of Parliament. For instance, whilst the Gazette Extraordinary bearing No.1897/15 listed out only 14 items of duties and functions of the Minister of Defence, the second Gazette issued in 2015

namely No.1933/13 dated 21st September 2015 set out 15 duties and functions. The first Gazette in the year 2018 bearing No.2096/17 contained 22 duties. The second gazette issued in the year 2018 namely Gazette Extraordinary bearing No.2103/33 and dated 28th of December 2018 bestowed on the President 23 duties as a Minister of Defence.

Thus, there was an increase of duties vested in the Minister. As for the departments, statutory institutions and public corporations, initially there were only 14 departments that were brought under the Minister of Defence in the year 2015 but come the year 2018, the number of departments rose to 17 in the first Gazette and ended at 21 in the second Gazette. The Department of Police itself was never there under the Minister of Defence in 2015 until it was brought under his purview in the year 2018. It has to be pointed out that the State Intelligence Service (SIS) continued to be vested in the charge of the Minister of Defence from the year 2015. One can thus observe that an exponential range of powers over security continued to be bestowed on Minister of Defence as the years rolled by and it cannot be gainsaid that the Minister of Defence was the repository of the national security of the country.

In other words, it could be said that the custody of personal liberty and security of the nation were enshrined in this long list of duties and functions and bestowed in the hands of the Minister of Defence. Around the fateful day of the Easter Sunday Attack namely 21st of April 2019, the source of specific duties and functions of the then President with regard to national security of the country had all been set down in the aforesaid Gazette notification bearing No. 2103/03 and dated 28th December 2018.

These are the duties and functions which the President had assigned to himself in terms of Article 44(2) of the Constitution.

If one may take a look at the Constitution, Article 4(b) of the Constitution pinpointedly declares that the executive power of the people, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the people. Article 30(1) of the Constitution states that there shall be a President of the Republic of Sri Lanka, who is the Head of the State, Head of the Executive and of the government and the Commander-in-Chief of the Armed Forces. Article 52(2) of the Constitution vests with the Minister of Defence the power of direction and control of

the Secretary to the Ministry of Defence. Put in a nutshell, the Minister himself is enjoined to personally direct and exercise control over the Secretary as regards supervision over the departments and other institutions in charge of the Minister. As was stated before, it has to be kept in mind that the duties and functions enumerated in the relevant Gazette on the day of the disaster (Gazette No 2103 of 28th December 2018) had brought under the purview of the Minister of Defence, two different pivotal departments of national security namely the State Intelligence Service (SIS) and the Department of Police.

The Constitution casts upon the Minister of Defence, a duty to give directions and exercise control as regards the supervision of these departments. A conjoint reading of the constitutional imperatives such as Articles 4(b), 30(1), 44(2) and 52(2) makes it patently clear that the Minister of Defence is placed under a charter of duties and obligations from which he cannot resile as regards national security and internal security of the country. It is often said that national security and liberty of individuals stand out as two sides of a coin which binds the state to a strong commitment. On the day in question, to wit the 21st of April 2019, the President of the country who was also the Commander-in-Chief of the Armed Forces had undertaken these obligations, which our Constitution, domestic laws and regulations, amply declare aloud demanding allegiance to the commitment of maintaining defence and security of the nation.

The Magna Carta of 1215 was the earliest example of such an undertaking to protect the liberty and security of the citizen given by King John of England.

Just as the declarations in the Magna Carta, solemnly executed by the King and the barons on 15 June 1215 at Runnymede, in the meadows outside Windsor, proclaim the underpinnings of the age old fundamental rights and the rule of law, so does our Constitution have their modern articulations writ large in 1978, and with the people of the country solidly behind it appealing to the venerable undertakings in our Charter to be respected, upheld and advanced by all arms of the government viz the legislature, executive and the judiciary.

As this Court said at the outset, the gravamen of the serious allegations of infractions made in the several petitions would boil down to an assertion of inaction, that is made actionable at the instance of an aggrieved party under Article 126 of the Constitution. The Petitioners allege in unison that when the tragedy struck this country on 21 April 2019 and innocent lives were taken away and property damaged and razed to the ground, there had been indications that a disaster

would be a long time coming. The Petitioners further contend that the executive branch of the government chose to ignore the semaphore signals and turned a Nelsonian eye to an obvious catastrophe. This would appear to be the nub of the Petitions and this Court would proceed to assay and appraise the facts which are either uncontested or common denominators among the parties.

The allegation of executive inaction springs from security warnings, intelligence messages, concept papers and correspondence that took place among some principal protagonists of the executive branch i.e *Nilantha Jayawardena* (the then Director, SIS), *Sisira Mendis* (the then Chief of National Intelligence, CNI), *Pujith Jayasundera* (the then Inspector General of Police) and *Hemasiri Fernando* (the then Secretary to the Ministry of Defence). The Petitioners make the pinpointed allegation of executive inertia against the then President *Maithripala Sirisena* for not taking steps to avert the bizarre mayhem and destruction and they contend that it was within his powers to have ensured the personal liberty and security of the people and prevented the precarious slide into anarchy.

After having indulged in an analysis of what we would call notorious facts and other collateral facts, we propose to deal with individual aspects of liability under Article 126 of the Constitution. These facts indicate the extent of the gravity of a threat that had snowballed into an alarming incubus and we must state that coming events had cast their shadows long prior to 2019 - the annus horribilis. The prior events foretold the incalculable disaster that was about to unfold and we point out that the pleadings and accompanying documents are rife with warnings and danger signals that had existed since 2015. There were visible signs of a growing menace of extremism and an open warrant had long been issued against Zahran Hassim-the enfant terrible of this extremist outfit. The writing on the wall notwithstanding, this purveyor of terrorism and his cohorts were allowed to remain at large and there was inadequate and inadvertent response to an obvious risk. The above would constitute the pith and substance of the cumulative submissions of all learned Counsel for the Petitioners.

We would, albeit the danger signals emanating from 2015, focus on the more immediate red flags on the eve of the disaster, which principally form the fulcrum of the complaints of the Petitioners. We would begin from 4th April 2019 - a few hoots away from the tragic events of 21st April 2019. In this process we would make the preliminary observation that there were different proceedings at different times in relation to the tragic events of 21st April 2019 before

several fora and some Respondents have appended to their statements of objections the Minutes of Evidence before the Select Committee of Parliament that had been appointed to look into and report to Parliament on the Terrorist Attacks of 21st April 2019. Some of the Respondents before this Court had given evidence before the Parliamentary Select Committee (PSC) and those minutes of evidence pertaining to their evidence are before this Court. Some of the Petitioners rely on the prior evidence given by the Respondents before the PSC and seek to juxtapose the later statements before this Court *vis a vis* the previous out of Court statements of the Respondents. We bear in mind that Section 57 (4) of the Evidence Ordinance which states that the Court shall take judicial notice of the course of proceedings of Parliament and of the legislature of Ceylon. Section 2 of the Parliament (Powers and Privileges) Act, No 21 of 1953 as amended defines Parliament to mean the Parliament of Sri Lanka, and to include a committee. In the case of ***S.N. Kodakan Pillai v P.B. Mudunayake***[1] the Privy Council declared that judicial notice may be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature where the Citizenship Act and the Parliamentary Elections Amendment Act were passed. The use of the words "such matters", in our view, would include a previous statement made by a witness who subsequently becomes a Respondent in judicial review proceedings such as under Article 126 of the Constitution.

The Indian Supreme Court repeated the same dictum as in ***Kodakan Pillai v P.B. Mudunayake*** in ***Additional Commissioner of Income Tax (C.I.T) v Surat Art Silk etc***.[2] Thus it is open to this Court to test the veracity of the statements made before this Court vis-à-vis a previous statement made by a Respondent in his evidence before the Parliamentary Select Committee (PSC). Both Section 57 (4) of the Evidence Ordinance and the case law permit this Court to take judicial notice of the proceedings before the Parliamentary Select Committee, more particularly when such proceedings have been brought to the notice of this Court. In fact, no serious objection as to the admissibility of the evidence given by some of the Respondents before the PSC was ever raised before this Court.

[1] (1953), 54 N.L.R 433
[2] A.I.R. (1980) S.C.387.

We now turn to some of the facts that are germane to the issue before us namely whether the conduct of the Respondents was so serious an omission that in the end caused the destruction and desolation and thereby infringed the fundamental rights of the Petitioners.

Nilantha Jayawardena Senior Deputy Inspector General of Police, the then Director, State Intelligence Service (SIS) who figures as a Respondent in SC/FR/188/19,SC/FR/191/19, SC/FR/193/19, SC/FR/195/19, SC/FR/196/19, SC/FR/197/19, SC/FR/198/19 and SC/FR/293/19 sets out a chronology of these factual matters in a final affidavit filed before this Court on 15th November 2019. The Court will be making its observations thereto as and when it deems it appropriate.

On 04.04.2019, Nilantha Jayawardena personally received information from a highly delicate source (via WhatsApp), to the effect that the National Thawheeth Jama'ath (NTJ) leader and his associates were planning to carry out a suicide terror attack on important churches. The source also indicated that the attackers had conducted a reconnaissance of the Indian High Commission. On receipt of the same, a report was called for from the Deputy Director, Counter Terrorism and the Assistant Director of the SIS. The information received through WhatsApp on 04.04.2019 was subsequently confirmed in writing on 05. 04.2019 at 0900 hours. On the same day, a similar information was received in writing from another delicate source at 12.15 hours.

Nilantha Jayawardena goes on to state that immediate action was taken by him to instruct responsible officers to transform the above information into intelligence in order to establish the true identities of persons. After an initial briefing on the 6th April 2019, he wrote to the then Chief of National Intelligence (CNI) seeking instructions, and had informed the then Secretary, Defence Hemasiri Fernando on the evening of 6th April 2019.

Nilantha Jayawardena does not elaborate on the exact nature of the initial briefing on 6th April 2019. As to why he characterizes the information he received via WhatsApp on 04.04.2019 as just an input which does not amount to intelligence is also not explained in his affidavit. If that vital information needed transformation into intelligence, the rationale for the entertainment of such a view has not been put forth in the affidavit of Nilantha Jayawardena given the fact that the targeted entities for attack were churches and the Indian High Commission. If the provider of the vital information was believed to be a highly delicate source as described by Nilantha

Jayawardena, the reason for the Director of SIS to treat the information as a mere input and not intelligence must have been set forth and explained in the affidavit, leave alone his omission to refer to his source in his communications. There is ample material placed before this Court that the miscreants of this brand of terrorism had long been identified and having regard to the fact that the police had been keeping a tab on them since 2015, it strikes this Court as more than passing strange as to why the true identities of persons have to be established as the identities of these extremist elements had long been established.

Come 4th April 2019, it is undeniable that Nilantha Jayawardena himself was too well equipped with a large volume of material on the likely assassins to plead ignorance of their identities and in these circumstances, Nilantha Jayawardena cannot put forward a facile argument that the intelligence received on 04.04.2019 was nothing more than mere information.

According to the final affidavit tendered by Nilantha Jayawardena, he had submitted to Pujith Jayasundara - the IGP, a number of reports during the period 20.04.2016 to 29.04.2019 relating to ISIS and Radicalization, including information about Zahran Hashim and his network. The summary of reports titled "*Reports sent to IGP on ISIS & Radicalization in Sri Lanka (including Sahran's network from 20th April 2016 to 30th April 2019*" shows a grand total of 97 reports, whilst reports sent to Secretary, Defence from 1st November 2018 to 25 April 2019 number around 11.

This testimony before this Court demonstrates that Nilantha Jayawardena, and Pujith Jayasundara were both aware of the potential threats by Zahran, his cohorts and the NTJ long prior to the Easter Sunday attacks. Even the Secretary, Defence cannot plead ignorance of the radicalization of Zahran and his complicit partners as he had continued to receive reports regarding this from November 2018.

The list provided by Nilantha Jayawardena, State Intelligence Service (SIS) to the IGP on the 31st of October 2017 shows that 94 individuals had been radicalized. Another list given on 31st January 2019 contains the name of 129 persons. It was three months thereafter that the Easter Sunday tragedy shook this country and sent unbearable tremors of fright and agony around the country.

Both these two lists invariably contained the names of one and the same persons. For instance, a person called Jameel was on top of each list, and they also contained the names of Zahran, Rilwan (the brother of Zahran) and Milhan – the names that were mentioned by the Indian counterpart in its message to Nilantha Jayawardena on the 4th of April 2019. Therefore, these likely attackers were far too notorious to be overlooked by the security brass of this country including the IGP and the Secretary, Defence. The likes of Zahran had long been known in the interlocking network of intelligence of this country, and when Nilantha Jayawardena received the message from India on the 4th of April 2019 naming the very same individuals, it is fatuous of Nilantha Jayawardena to contend before this Court that it was mere information and not intelligence.

In the circumstances, it cannot be accepted that Nilantha Jayawardena needed time to transform the so-called information into intelligence. In these circumstances it is too simplistic for him to aver in his affidavit that he needed to establish the true identities of the attackers, as the very names mentioned in the so-called information of 4th of April 2019, and the places they had been frequenting were far too entrenched in the knowledge and domain of national security mechanisms set up by the Ministry of Defence.

It has to be pointed out that in the reports sent to both the IGP and the Secretary, Defence, Nilantha Jayawardena had already identified the likely members of the imminent attack namely Mohamed Cassim Mohamed Zaharan, Mohamed Mufaisil Mohamed Milhan and Mohamedu Cassim Mohamedu Rilwan as those who had been disseminating ISIS ideology.

It is relevant to note that though there was a reference to planned attacks on some important churches, there is nary a narration of any consequential actions Nilantha Jayawardena took in regard to his own strategic intelligence and analysis of the degree of threat facing the churches. Easter Sunday was just a few weeks away when the heads-up about the imminent attack came from India, but there is little alertness or perceptiveness shown by officials to carry out any measures to safeguard any of the churches in the country.

The want of attention on the part of the important players heading the security apparatus of this country is unpardonable. There is evidence before this Court that in April 2018, a full one year before the Easter Sunday attacks, the Director, SIS had requested the IGP in April 2018 a closure

of investigations by others into Zahran, which resulted in the SIS becoming the sole investigator into Zahran. This casts upon Nilantha Jayawardena a greater burden and responsibility.

Except for the fact that Nilantha Jayawardena dispatched this warning to CNI who in turn communicated it to Secretary, Ministry of Defence, the final affidavit of Nilantha Jayawardena offers little assistance in the way of any evidence of an immediate launch of investigation and preventive action in light of the fact the Easter Sunday celebrations at all churches were in the offing.

Thus, this Court cannot get away from an irresistible conclusion that the churches lay vulnerable and exposed to imminent attacks. No evidence of consequential counter-measures taken to prevent the attack has been placed before this Court. This stark reality assumes greater importance when Nilantha Jayawardena himself avers in his final affidavit that "*as stated above, **due to the importance of the information** received in this regard, the Original Information was sent to Chief of National Intelligence (CNI) seeking instructions…".*

Just three days after the receipt of the all-important initial information on the 4th April 2019, the first person to whom the Director, SIS transmitted the news was the CNI informing him of the alleged plan of attack. This was on the 7th of April 2019 where the letter carrying the logo "top secret" contains the following as its contents:

1. *As per an input, Sri Lanka based Zahran Hasmi of National Towheed Jamaat and his associates are planning to carry out suicide terror attack in Sri Lanka shortly. They are planning to target some important churches. It is further learned that they have conducted reconnaissance of the Indian high commission and it is one of the targets of the planned attack.*

2. *The input indicates that the terrorists may adopt any of the following modes of attack.*

a) *Suicide attack*
b) *weapon attack*
c) *knife attack*
d) *the truck attack*

3. *It is also learned that the following are the likely team members of the planned suicide terror attack.*
    i. Zahran Hashmi
    ii. Jal Al Quithal
    iii. Rilwan
    iv. Sajid Moulavi
    v. Shahid
    vi. Milhan and Others

4. *The input may kindly be enquired into on priority and a feedback given to us.*"

Thus, there was specificity, exactitude and clarity as to the likely attackers, modes of attack and their targets. Upon receipt of the above, Sisira Mendis the CNI, communicated it to the IGP Pujith Jayasundera on the 9th April 2019 by way of a letter. That letter too discloses the identities of the attackers as revealed in Nilantha Jayawardena's document.

As is evident from the affidavit of the CNI, he is expected to have an "Intelligence Coordinating meeting" on every Monday prior to the main "Weekly Intelligence Coordinating Conference" (ICM) on Tuesday. Accordingly, the CNI had scheduled an Intelligence Coordinating Meeting (ICM) for the 9th of April 2019. Nilantha Jayawardena states in his affidavit that at this ICM held on the 9th of April 2019, he was not questioned regarding the information that he had provided to the CNI by way of his letter dated 7th of April 2019, nor was he instructed to provide further reports. But the agenda of the meeting on 9.04.2019 had an item titled "*Current Security/Intelligent update*" at which Director, SIS had to brief the participants. The fact remains that Nilantha Jayawardena provides no evidence that at this particular Intelligence Coordinating Meeting he alerted the participants to the looming likelihood of attacks on churches, except for a bare assertion to the following effect:

> *When I entered the meeting, the CNI showed me the Information Sheet that I had annexed to my letter dated 07.04.2019 addressed to him, and I requested him to take immediate action as it is important. On being questioned by Mr. Hemasiri Fernando regarding the action I was to take pertaining to the information sheet attached to my letter dated 07.04.2019 sent to the CNI, I informed Mr. Hemasiri Fernando, that I will*

be submitting a special report to IGP and CID on the same evening, which I did. Having checked from the relevant sources and records, and being satisfied that the said information was "probably true", I sent the initial report to the IGP and CID on the 9th April 2019.

The agendas of the weekly Intelligence Coordinating Meetings (ICM) furnished to this Court reveal that National Security was a priority on the agendas and whilst, just one month prior to the attack in March 2019, the activities of Mohamed Cassim Mohamed Zahran had taken centre stage at ICMs, it is surprising that we hear nothing of any briefing by Nilantha Jayawardena at the meeting held on the 9th of April 2019 on an all-important and vital intelligence that he had received on the 4th of April 2019. Sisira Mendis, CNI in his affidavit dated 8th November 2019 is quite specific that the Director, SIS presented a briefing on several matters other than the vital intelligence referred to in his letter dated 7th April 2019.

The Chief of National Intelligence (CNI) is quite emphatic that Nilantha Jayawardena did not conduct a briefing on the information he had received on the 4th April 2019. This is not expressly contradicted by Nilantha Jayawardena himself in his affidavit. By recourse to Section 114 (e) of the Evidence Ordinance the learned Senior Additional Solicitor General sought to buttress his argument that common course of business may have been followed on the 9th April 2019. He invited this Court to draw the presumption in favor of Nilantha Jayawardena that he had raised the vital issue of the likely attack in the presence of all the participants at the meeting, but the facts do not lend themselves amenable to such a presumption being drawn. Though Nilantha Jayawardena's briefing figures prominently as one of the important items of the agenda for the meeting on 9th April 2019, there is no record provided to this Court that he addressed the specific security threat at the briefing.

In this regard, paragraph 36 of the affidavit of Sisira Mendis CNI, is as follows:

"*I state that I discussed the contents of the letter sent by Director SIS with former Defence Secretary on the 8th April who directed that SIS presents the matter at the weekly intelligence meeting on the 9th April. I state that as a matter of practice that the Director of SIS is required to address the intelligence meeting first however Director SIS did not address the meeting on this issue although the meeting presented an ideal forum to alert the participants which included the commanders of the tri forces…"*

What is asserted in the affidavit of Nilantha Jayawardena to some extent proves the veracity of what the CNI says had actually happened on the 9th April 2019. Except for a briefing by the Director SIS on the general situation in the country, it is clear that there had been no formal discussion or briefing by Nilantha Jayawardena on the intelligence that he had received on the 4th of April 2019.

Here is a Director of the State Intelligence Service who had given extensive briefing on the 13th of March 2019 on Zahran and his associates and by 9th April 2019, he had already written to the CNI about the delicate information from India. He had also personally briefed the Inspector General of Police via phone on the aforesaid intelligence information on the 7th April 2019. When he went for the ICM on 9th April 2019, there were ominous warnings of an impending disaster but he chose not to discuss the matter in his briefing, except for an informal discussion among himself, Sisira Mendis (CNI) and Secretary, Defence Hemasiri Fernando. This only shows that Nilantha Jayawardena attached little weight to the intelligence provided by the foreign counterpart. In view of the enormity of the intelligence gatherings, meetings, reports and events which had preceded the intelligence received on 04.04.2019, it is idle to contend that the information received was not actionable. It was of national interest that the Director, SIS should have brought this matter up at the ICM. In fact, he should have alerted and informed the Secretary to the President but he failed to do so.

We heard arguments that he maintained no close nexus to the President and this has been his consistent position in his affidavit. We will advert to this assertion sooner but the fact is glaring that nowhere does he assert that he sent a security report as regards the intelligence that he had received, to Secretary, Defence, who he says was his superior in the Ministry of Defence. The Director, SIS also does not take the position that he was seeking assistance from other agencies such as the Army, STF, CID and TID with regard to the intelligence given to him on 4th April 2019.

Though the accounts of Hemasiri Fernando, Secretary of Defence, Nilantha Jayawardena, Director SIS, and Sisira Mendis, CNI differ on the actual events of the Intelligence Coordinating Meeting, there is convergence among all three that the intelligence received from the foreign counterpart was not discussed at the meeting. The IGP had been present at that meeting on the 9th April 2019, and here was a Director, SIS who did not volunteer to speak when there was a

duty to speak formally at the meeting. There was no impediment to refer specifically to the intelligence in the course of his general briefing and this omission is quite blatant and egregious having regard to the fact that there were instances where the Director, SIS had previously briefed the participants of the ICM about Zahran Hashim.

All this signifies a lackadaisical approach and it is clear that it does not befit the office of Director, SIS. One cannot assert that one was actively engaged in collecting and collating intelligence, whilst the activity undertaken in the end was not anything but serving as a mere conduit for passing information. Nilantha Jayawardena was not a mere cog in the wheel but an indispensable adjunct to the wheels of counter terrorism caravan which had to move with lightning speed and dispatch. But its wheels were grinding not only unsurely but slowly.

The chronology of events unmistakably points to an indifferent approach to an obvious risk lurking in the corner and it is on this plinth that the Petitioners have rested their case.

All this shows that there was so much information that was available before Nilantha Jayawardena betokening doom and but it cannot be said that Nilantha Jayawardena acted with alacrity and promptitude. He never sent the information of the 4th April 2019 by way of a report to his constitutionally appointed supervisor, Secretary to the Ministry of Defence. He was quite content transmitting the so-called input only to the CNI. He was given the floor to apprise the participants of the meeting on 9th April 2019 but he never chose to share the information with those present at the meeting.

The Agenda of the ICM meeting on 9th April 2019 indicates items pertaining to National Security to be addressed by the CNI, CDS, Tri-Service Commanders and IGP. With such a powerful contingent in attendance it was incumbent on the Director, SIS to have briefed them on the vital intelligence he had received. This failure to speak becomes all the more culpable in the light of Nilantha Jayawardena's own admission in his affidavit pertaining to the meeting on 9th April 2019 to wit "… *However, or the intelligence agencies were aware of the activities of Zahran Hashim, and its desire to kill "non-believers", which was common knowledge amongst the attendees of the said conference*…".

If tri-service commanders who were aware of the propensities of Zahran had been present at the meeting, why was it that the Director, SIS kept them in the dark about the vital information that

he had received? By this time, Nilantha Jayawardena had reliable information that Zahran Hashim and Shahid had been hiding in Oluvil, Akkaraipattu. Rilvan-the brother of Zahran was also holed up in Oluvil and he was surfacing only in the nights to go to visit his family in Ariyampathy. By maintaining an air of confidentiality over these matters which were within his knowledge, the Director, SIS committed unpardonable lapses quite unbecoming of a super sleuth who should be heading such a powerful department under the Ministry of Defence. At this stage one must remember the duty of the CNI as well, By the 9th April 2019, he was fully acquainted with the facts of intelligence from India. If the Director, SIS kept quiet about this at the meeting, is it consonant with the requirements of CNI's duties not to broach the subject himself? As we have pointed out, there was an item on the agenda for both him and the Secretary, Defence to speak but both turned out to be mute bystanders. In summation all three of them, Hemasiri Fernando, Sisra Mendis and Nilantha Jayawardena kept the information to themselves and never bothered to edify those present at the meeting on the 9th April, 2019.

Post-meeting of the 9th April 2019, it has to be noted that Nilantha Jayawardena, Director SIS, wrote a letter to Pujith Jayasundara, IGP on the same day setting out in detail the activities of Zahran, Shahid and Rilwan and stated in the letter that Zahran was in a hideout at a place called Oluvil, Akkaraipattu. This letter in Sinhala also contains the logo "***Top Secret***".

At the end of the letter, Nilantha Jayawardena states that he was carrying out his secret investigation. If one were to recap, the IGP had two letters by 9th April 2019-one letter had arrived from the CNI whilst the other had come from Director SIS. The IGP then sent both these letters to SDIG (Western Province and Traffic), SDIG (Crimes and STF), DIG (Special Protection Range) and Director, CTID with a note "**F.N.A.".**

One could see a notable failure. The intelligence information received must have been shared with the DIG, Eastern Province. It was the bounden duty of the IGP, as the head of the police to have taken steps to keep his subordinates acquainted. We take the view that the IGP should have shared the intelligence information received with senior DIGs and other relevant parties in the police service. One conspicuous failure is to inform the DIG, Eastern Province, of the intelligence information received having regard to the fact that there was a dry run on 16.04.2019 in the Eastern Province namely in Palmunai, Kattankudy.

This failure to notify his men in the provinces is quite a flagrant violation of his police duties and we take the view that the IGP as the head of the police service should have taken all

necessary steps to keep the police and also the political leadership informed. The IGP also had ample opportunities to do this.

In the backdrop of all this, an important question arises. If the whereabouts of Zahran and his guilty associates were known to the security echelons of the country, the question looms large- why were these men on the prowl not apprehended before they could unleash their reign of terror? The State had the wherewithal to trace Zahran and arrest him because he had been around for too long a time for any police officer to feign ignorance. It is a question that goes a-begging. It is also a question that begs an answer from the IGP.

It has to be noted that despite the availability of intelligence information indicating a potential attack, no meeting of the ICM was held on the 16th April 2019-the week following 9th April 2019 and if the Director, SIS had been more outspoken about the impending attack or had even demanded or requested a constant gathering of the top brass, the importance of having a follow up meeting would not have passed muster. Let us also point out that no National Security Council Meeting (NSC) was summoned between the receipt of intelligence on the 4th April 2019 and the Easter Sunday Attack on the 21st April 2019. We will comment on the absence of this mechanism later in the judgment.

This Court is also apprised of a meeting that took place between the former President (the Minister of Defence) and some senior police officers on 8th April 2019. Udaya Seneviratne, the Secretary to the former President states in his affidavit dated 23rd July 2019 that the IGP, Senior DIGs from the CID and TID were all present at this meeting along with Nilantha Jayawardena-the Director, SIS. The President was never notified of the intelligence relating to the threat of a terrorist attack by Zahran Hashim and his associates. The President was due to visit Batticaloa on 12th April 2019-a city situated in close proximity to Kattankudy-the hometown of Zahran but the Director, SIS did not proffer any threat assessment of the situation to the President. This shows that Nilantha Jayawardena never gave any credence to the intelligence he had received from his foreign counterpart on the 4th April 2019. The intelligence was a foreboding of what was to follow but its weight was lost on the Director, SIS except for the fact that he had been investigating the information with his team fanning out to the East. Nilantha Jayawardena never wrote directly to his supervisor Hemasiri Fernando-the Secretary to the Defence for reasons best known to himself.

As the head of State Intelligence, could Nilantha Jayawardena have remained tight-lipped with his topmost executive in the Ministry -the Minister who was also the President?

It is not as though Nilantha Jayawardena had not maintained direct communication with the President of the country though Nilantha Jayawardena and the former President discount before this Court any such communication between them on intelligence matters. We will deal with this aspect after having dealt with the developments subsequent to the 9th April 2019 meeting.

There was information that was initially available to Nilantha Jayawardena and later transmitted to CNI and passed on to Hemasiri Fernando. Information and Intelligence received subsequent to the ICM on 9th April 2019 were quite ominous and required immediate action. This was on the eve of the bomb explosions on 21st April 2019. In the final affidavit dated 15.11.2019, Nilantha Jayawardena alludes to what he classifies as the most vital, specific and reliable intelligence which was received by him on 20.04.2019 at 16.12 hours - a day prior to the day of carnage. This message, received from a source via WhatsApp gave him a telling heads-up that Zahran Hashim of NTJ and his associates had planned to carry out the attack on or before 21.04.2019 and that they had reportedly selected 8 places including a Church and a Hotel. The source further revealed that they had conducted a dry run and caused a blast with an explosive laden motorcycle at Palamunai near Kattankudy on 16.04.2019.

On 20th April 2019, at 16.12 the foreign counterpart sent the following WhatsApp message:

> *"As per a reliable input, Zaharan Hasim of National Towheed Jamath of Sri Lanka and his associates have hatched a plan to carry out an Istishhad attack in Sri Lanka. It is further learnt that they have conducted a dry run and caused a blast with explosives laden Motorcycle at Palamunai near Kattankudy in Sri Lanka on 16.4.2019 as part of their plan.*

The copies of WhatsApp messages have been appended to the affidavit of Director, SIS and another response goes as follows.

> *"It is learnt that they are likely to carry out their attack in Sri Lanka at any time on or before 21.04.2019. they have reportedly selected eight places including a church and a hotel where Indians inhabit in large numbers. Further details awaited"*

According to the Director, SIS, he briefed the following officers accordingly via SMS and WhatsApp.

a) Secretary Defence (1653 hrs) - WhatsApp
b) SDIG / CID (1654 hrs) - WhatsApp
c) CNI (1702 hrs) - SMS.
d) IGP (1707 hrs) - SMS

The Director, SIS states before this Court that apart from sending information by WhatsApp and SMS, he personally briefed the following officers over the phone of the impending threat on 20th April 2019.

a) Secretary, Defence (1802 hrs)
b) IGP (1703 hrs)
c) SDIG/WP (1755 hrs)
d) SDIG/CID (1657 hrs)
e) SDIG/STF (1927 hrs, 2009 hrs)
f) DIG Colombo (1909 hrs, 2124 hrs)

One can immediately see an omission to transmit this message to DIG, Eastern Province where a dry run had been executed by Zahran and Company on 16.04.2019 - a fact which was peculiarly within the knowledge of the Director, SIS. In view of the fact that Zion Church in Batticaloa suffered its worst suicide attack on 21st April 2019 where 31 deaths occurred of which the majority were children, it is a serious omission on the part of Director, SIS to have kept the DIG, Eastern Province in the dark.

Eventually the Director SIS gives an account of the disappointing tale of not receiving any assistance, instructions or feedback from the Ministry of Defence, police or any other investigative agency and notwithstanding the negative response, the Director, SIS asserts that he carried on regardless gathering, sharing, briefing and debriefing of intelligence continuously.

That is how his account is told and retold as to how he had discharged his duties but despite such a declaration of fealty to his duties, the conclusion is inescapable. The intelligence received proved true but the mobilization of counter terrorism measures or its facilitation through an

effective dissemination of forebodings to stem the impending disaster was totally absent and this clearly shows how security mechanisms in the country remained fragile and in shambles. Sri Lanka experienced it worst moment in history when bombs began to explode at churches and hotels causing destruction and devastation.

The toll of destruction and decimation is a story of unspeakable grief, unbearable pain and agonizing loss of lives and Sri Lanka came to a standstill frozen in time seeing its people and foreigners who had visited this country getting snuffed away in bizarre tragedy. One of the Petitioners before this Court is an attorney at law who suffered irreparable injuries which have debilitated him. The Public Interest Litigations that the Petitioners have mounted testify to the gravity and enormity of the tragic events.

The unsuspecting faithful members of the Catholic community, children and families took a heavy brunt of this dastardly act of the terrorists for no fault of theirs. St. Sebastian's Church, Katuwapitiya, St. Anthony's Church, Kochchikade and Zion Church, Batticaloa as well as Kingsbury Hotel, Shangri-La Hotel and Cinnamon Grand Hotel, remain etched in memories and will remind the people of the country of the carnage of 21st April 2019 for a long time to come.

Some of the applications before this Court are motivated by public interest litigations and as we have said, all the applications urge that if not for the soft approach and lackadaisical treatment of warnings and signals adopted by the Respondents specifically referred to above, these consequences which put this country and its people asunder would not have occurred. The liability is sought to be cast on the police officers including the IGP and the President of the country based on illegal omissions and inaction. Before we proceed to determine the liability on the common denominators that we have enumerated above, certain preliminary observations have to be made.

If one were to look at the facts and circumstances pertaining to the Director, SIS, it is true that the warning signals all arrived at his doorstep. Did he carry out his duties in all earnest? or he infringed the fundamental rights of these Petitioners. We are compelled to observe that he undoubtedly presents the piteous story of a lonely boy on the burning deck with no one coming to his assistance.

As the head of State Intelligence Service - an indispensable component of the Defence mechanisms in the country, did he present before this Court a genuine story of commitment to national security? Can he declare to this Court that he was not bound to report to the President? Can the President justifiably support him in this defence? Can this Court give credence to his assertion that he had a dissociative nexus with the President of the country?

A salient feature of the affidavit of Nilantha Jayawardena is the overtly explicit attempt to disassociate himself from the then President of the country, Maithripala Sirisena who was holding the portfolio of the Ministry of Defence at the relevant time. Some of the averments in his affidavit seek to proclaim a distant relationship he had allegedly maintained with the Minister of Defence. This cautious approach is also adopted by the former President in his stolid acceptance of Nilantha Jayawardene's assertion that he was not required to report to the President. There is a studious choice in both affidavits to treat each other's functions as distinct and discrete. Both affidavits seek to make out that there existed between the Minister and a head of a Department under the Ministry a relationship as though they were dealing with each other at arm's length. Nilantha Jayawardena's account on a hands-off way of handling security in the country is put forth in two declarations by him in his affidavit which are to the following effect:

> *I state that I have not been instructed or directed, nor am I expected to report directly to His Excellency the President and /or the Prime Minister, or share directly with His Excellency the President and /or the Prime Minister, on actionable information relating to security.*
>
> *As such, I state that I am not duty bound or expected to share with His Excellency the President and the Prime Minister, nor did I communicate to them the actionable information I had gathered and had already forwarded to the Inspector General of Police and the then Chief of National Intelligence, in regard to the possible bomb attacks, that eventually took place on 21st of April 2019.*

We take the view that this is an impermissible attempt to disengage himself from any ministerial supervision and control. Both the affidavit of Nilantha Jayawardena and the former President echo the same language as regards Nilantha Jayawardena's accountability to his Minister. It has to be remembered that Nilantha Jayawardena was occupying the position of a head of a separate department under the Ministry of Defence. The three Gazettes where the former President

allocated powers and functions to himself with regard to national security, make it quite clear that State Intelligence Service (SIS) has always remained a distinct and separate department under the Minister of Defence. The Department of Police was brought under the Ministry of Defence only in November 2018 by Gazette Notification bearing No. 2096/17. It was only in November 2018 that the Department of Police was brought within the purview of the Ministry of Defence, whereas the State Intelligence Service had remained with the former President at all times since 2015. It is crystal clear that though Nilantha Jayawardena was a Senior Deputy Inspector General of Police, he continued to function as the head of a distinct and separate department called the State Intelligence Service, whereas Pujith Jayasundara-the IGP continued to remain as the Head of the Department of Police.

In a nutshell, State Intelligence Service and Department of Police were described as separate and distinct departments under the Ministry of Defence – see items 12 and 14 of the Gazettes bearing Nos. 2096/17 and 2103/33.

This bifurcation of State Intelligence Service and Department of Police make it patently clear that no one institution was above another, and this parity of status puts paid to any argument of a hierarchical distinction that can be made between two separate and different departments under the same portfolio – the Ministry of Defence. While not gainsaying the importance of a close nexus and coordination they must maintain between the two departments, it can in no way be argued that the IGP stands as *primus inter pares vis a vis* the Director, State Intelligence Service. Whilst serving the same cause of national security of the country, both the IGP and Director, SIS have one Minister who would have the same degree of oversight over the two departments. There is one Secretary to the Ministry who shall, subject to the direction and control of the Minister of Defence, exercise supervision over the ***departments of government or other institutions in the charge of his Minister*** – Article 52(2) of the Constitution.

This constitutional provision places the Minister at the apex of the hierarchy under whose charge the distinct and separate departments of his Ministry lie. In the circumstances, it is contrary to constitutional principle for the former President to make a distinction between SIS and the Department of Police. When Maithripala Sirisena, the former President contends in his affidavit that only the IGP and the Secretary, Defence are bound to report to him and not the Director, SIS, it goes against the constitutional grain.

When the Constitution itself places the several departments coming under the Ministry on a co-ordinate and parallel plane, it goes contrary to the constitutional scheme for the former President to put forward a preposterous position that a particular Head of his department is not bound to report to him. The proclivity to exclude the Director, SIS and only include the IGP and the Secretary, Defence under his ken is quite surprising and unconstitutional given that it amounts to an unequal and illegal treatment of two heads of his departments. In the same breath, it cannot lie in the mouth of Nilantha Jayawardena to say that he was not bound to report to the President who was the Minister of Defence at the relevant time.

We hold that Nilantha Jayawardena was under an obligation to report to the Minister of Defence who was the President of the country. Therefore, the assertions in the affidavits of both Maithripala Sirisena and Nilantha Jayawardena are misstatements of the long held constitutional principle that the departments and institutions in his charge under a Minister are equidistant and co-ordinate. Therefore, the fictitious distinctions that both the former President and Director, SIS are making in their affidavits are artificial and have no legal or constitutional basis. The distinction is selectively made for reasons best known to the deponents of the two affidavits.

An identical attempt was sought to be made to perpetuate this misconception by the contention advanced by the Senior Additional Solicitor General that the ***Carltona*** doctrine would apply only in the case of the Secretary of Defence, whilst there was a total absence of any reference of the applicability of this principle in the case of Director, SIS or the IGP. The distilled essence of the ***Carltona*** principle is that it applies equally to all the responsible officers of a Ministry and thus it applies to Nilantha Jayawardena with the same vigor as it does to Hemasiri Fernando and Pujith Jayasundera.

The general constitutional principle enunciated by Lord Greene in ***Carltona Ltd v Commissioner of Works***[3] has the effect that acts done by officials in the exercise of Ministerial functions are to be treated as the Minister's own acts regardless of whether these acts are done personally by the Minister himself or by a Junior Minister or departmental officials. The ***Carltona*** doctrine does not involve any question of agency or delegation but rather the idea of the official as alter ego of the Minister; the official's decision is seen to be the Minister's decision.

The application of the aforesaid constitutional principle to the facts of the case would boil down to just this proposition. The former President had assigned to himself a number of duties and

[3] (1943) 2 All ER 560

functions by way of the Gazette notification and had also named departments to perform those duties and functions. The ***Carltona*** is to the effect that he need not personally perform those functions and duties. There is an implied delegation that his responsible officials heading the Departments can perform those functions and duties on his behalf. Thus the Secretary, Defence, Chief of National Intelligence, Inspector General of Police and Director, SIS can perform those functions on his behalf and they are not treated as agents but rather they are conceived as his alter ego. In other words, the performance of these officials is treated as the performance of the Minister. It does not mean that these officials, particularly senior officials and heads of departments in the case, can choose not to perform the functions and duties because Article 52 (2) of the Constitution places the supervision of performance on the Secretary subject to the direction and control of the Minister. The common law constitutional principle is added on by the accretion of the constitutional supervision imposed on both the Minister and the Secretary, Defence who is vested with national security not only by the Constitution but also by subordinate legislation published in the Gazette. The alter egos are obligated to perform and if they perform the acts, they are akin to performance of the acts by the Minister.

This aspect of performance subject to supervision therefore introduces the obligation of consulting the Minister in cases of extreme importance and the officials cannot get away with the argument that they cannot have direct access to the Minister who becomes answerable to Parliament if he has not properly exercised oversight and supervision. The Minister cannot absolve himself from his non-supervision by putting forward an argument that an officer concerned did not give him information or he is not bound to report to him.

The Minister remains the constant watchdog of his departments and any failure of supervision that results in a violation of fundamental rights will amount to a dereliction of duty on the part of the Minister. There is case law which imposes the requirement of personal attention to be paid by the Minister. For instance, orders drastically affecting the liberty of the person – e.g. deportation orders,[4] detention orders made under wartime security regulations[5] and perhaps discretionary

[4] R v Chiswick Police Station Superintendent Ex p. Sacksteder [1918] 1 K.B. 578 at 585-586, 591-592 (dicta). The decision has in fact been taken by the Home Secretary personally (Cmnd 3387 (1967),16). In Oladehinde v Secretary of State for the Home Department [1991] 1 A.C. 254, which concerned the provisional decision to deport, the HL appeared to accept that the final decision to deport had to be taken by the Secretary of State personally or by a junior Home Office minister if he was unavailable. R v Secretary of State for the Home Department ex p. Mensah [1996] Imm. A.R. 223.

orders for the rendition of fugitive offenders[6] require the personal attention of the minister.[7] The above jurisprudence emphasizes the imperative requirement of consultation and personal attention by the Minister with his responsible officials and briefings of the Minister to be done by those officials necessarily take pride of place.

Just as much the Minister states that the Secretary, Defence and the IGP were bound to report to him, so was the Director, SIS placed under a constitutional duty to access his Minister and keep him abreast of the impediments and problems he was confronted with. That places the Minister under an obligation to treat his officials equally and not keep them disengaged and distant because non-performance of any of his duties and functions is bound to infringe the fundamental rights of those whom the Minister is sworn to serve, and as such he must take guard and exercise supervisory guardianship over the guardians of national security. Given the fact the Constitution accords Defence of the Nation to him, the President is obligated by the Constitution, subordinate legislation and common law (*Carltona*) to consult his officials. He has to set up his mechanisms and structures where there is a free flow of discussion.

The heads of the Department and responsible officers remain liable for the infractions of not performing their duties assigned to them to safeguard the security and integrity of the nation. The Minister becomes liable when he fails in his constitutional and common law duties to have robust systems and mechanisms to protect and promote national security. It is for this reason that there has to be constant supervision and control of his officials. There must be structures and mechanisms which facilitate transparent exchange of intelligence and information. A proper mechanism to acquaint himself with intelligence and information would serve the Minister proper notice of intelligence and information and such an absence of supervisory mechanism will expose the Minister to allegations of failure of his constitutional, statutory and common law duties.

Assessed with this yardstick and benchmark, we take the view that given the knowledge of warnings, caveats and intelligence information, there were several duties cast upon the Secretary, Defence, Chief of National Intelligence, Director, SIS and the Inspector General Police. From the chronology of the factual matrix that we have set out above, each one of them assigned with

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[5] Liversidge v Anderson [1942] A.C.206 at 223-224, 265, 281; Point of Ayr [1943] 2 All E.R. 546 at 548 (dicta).

[6] R v Brixton Prison Governor Ex p. Enaharo [1963] 2 Q.B. 455 at 466.

[7] See D. Lanham, "Delegation and the Alter Ego Principle" (1984) 100 L.Q.R. 587, 592-594 (who argues that where life or personal liberty are at stake, the alter ego principle may not apply).

constitutional and statutory duties to police the nation and prevent mayhem and disaster was derelict in their duties and had they exercised the duty of care that was mandatorily expected of them, this nation would not have been impaled in the horrible murders and destruction that followed the bomb explosions on 21st April 2019.

The assertion of no access is given the lie to by Nilantha Jayawardena himself as is evident on the facts.

There is a total misappreciation of ***Carltona*** doctrine in the way it was advanced in the arguments on behalf of the two Respondents against whom infringements of fundamental rights have been alleged namely Nilantha Jayawardena and the former President. Though Nilantha Jayawardena asserted in his affidavit that he had not been reporting to the President or he had no access except through the Secretary to the President, his statements before the Parliamentary Select Committee (PSC) show that if he wished to contact the President, there was no impediment at all. The minutes of evidence before the PSC have been appended to the affidavit of Hemasiri Fernando and at pages 879 and 880 of the minutes of evidence (Volume 2) we could see the prior statements made by Nilantha Jayawardena.

Q: Have you ever spoken to His Excellency the President? Have you ever spoken to him?
Nilantha Jayawardena: On what?

Q: On anything?

Nilantha Jayawardena: If he calls me and asks various things – so many people are going and giving him information and sometimes he calls me and asks, "Find this for me." Then I look back to see whether it comes under my purview. Then I speak to him and say that. I do not speak to him over his mobile; never.
(*This response of Director, SIS before the PSC shows that the President had called him*)

Q: So, it has so happened - that he asks you for information, you get back to him on that. That has happened.

Nilantha Jayawardena: Yes.

Q: Then that happens directly? Direct communication between you and the President –

Nilantha Jayawardena: That is up to His Excellency to decide. Sometimes he sends messages through the Secretary. Secretary calls me and says, "මේක බලල කියන්න කිව්වා කියලා;" then sometimes when he is outside and something like that or not in office. He does not call me directly. He always comes through certain exchange or something like that. So, he has asked certain things from me. So, whatever he asks from me directly, I directly talk to him. If he asks whatever through the Secretary, I talk to the Secretary.

Q: In the evidence laid before this Committee, it transpired that you have direct access to the President on matters of serious security that you brief the President directly.

Nilantha Jayawardena: Sir, this is the same answer, I have to give. When others have not done their job, they cannot say I expected him to do it. So, I do not brief the President on information every day. It is not my practice. If somebody is telling that I am briefing the President on information, that is not correct. That is not correct because-the same answer, I have to give you if he calls me and ask certain things because people go and tell him this thing, I will reply, but I don't talk to him and say, "Sir, there is a thing like this or there is a thing like that." No, it is not my practice. It is not done by me-not the Director-State intelligence. But I brief them at the Security Council.

The above shows without an iota of doubt that there were occasions when Director, SIS had briefed the President. There were occasions where he had briefed them at Security Council meetings. There were several opportunities that he had without any kind of impediment to reach the President. Given that law imposes an obligation to keep the President acquainted with intelligence and information, this Court entertains no doubt that he failed in his duty to keep his Minister informed. In the same may he admits that he had briefed the National Security Council meetings and that imputes knowledge of preceding events and threats posed by Zahran to the President. Given this background, had the supervision, either through himself or National Security Council meetings, been continued, the President ought to have been put on notice of the impending disaster. The President had been remiss in this duty of keeping abreast of the latest information on Zahran and his associates.

As the English cases cited above unmistakably point out, there is a reciprocal duty of consultation and briefings particularly when national security is bestowed on the Minister.

If the Director, SIS was confronting obstacles in the way of implementing the safety and security of the people, it was his obligation to have sought out his Minister and briefed him and he cannot take refuge under a tattered veil of a self-imposed restraint. By virtue of his previous evidence before the PSC, he has himself lifted the veil behind what had gone on as regards his communications with the President and in the same way it does not lie in the mouth of both Hemasiri Fernando and the IGP that they had been disabled by their own minister. They had opportunities to liaise with the Minister of Defence. The opportunity presented itself when they met the President to wish him for the Sinhala and Tamil New Year on 14th April 2019 and in view of the intelligence both of them were possessed of, they could have collectively appealed to their Minister to exercise his powers under both the Constitution and others statutes such as the Public Security Ordinance. It was an egregious omission on their part even if the President had grown alienated from them.

As for the President it is his obligation to have had a constant vigil over his ministerial functions, as National Security was his portfolio and he should have exercised his supervision over his Departmental Heads regardless of personal predilections for particular officers. When it was within the competence of the Director, SIS, he had not provided any information to the President, which fact is corroborated by the President. But that does not relieve the President from his constitutional obligation of ensuring the national security of the country by remaining engaged with the responsible officials of his Ministry given the fact that Article 4 (b) of the Constitution declares that the executive power of defence of Sri Lanka lies with him.

Based on the narrative of inaction and omissions on the part of Nilantha Jayawardena – Director, SIS we hold that Nilantha Jayawardena is liable for having violated the fundamental rights specified under Articles 12(1) and 14(1)(e) of the Constitution.

Having arrived at that finding, we now proceed to look at the lapses on the part of Hemasiri Fernando-the Secretary, Defence.

Hemasiri Fernando-Secretary, Defence

Under Article 52(1) of the Constitution a secretary is appointed for each Ministry by the President. Article 52(2) provides that "The Secretary to the Ministry Shall, subject to the direction and control of his Minister, exercise supervision over the Departments of Government or other institutions in the charge of his Minister".

On 30th October 2018, the President acting in terms of Article 52(1) had appointed Hemasiri Fernando who has been cited as a respondent in all these applications. He had been entrusted with the responsibility of steering and / or conducting the affairs of the government departments and other establishments on the direction and control of the Minister to whom such departments and establishments are assigned.[8] Fernando has served in this capacity until he resigned on 25th of April, 2019.

In December 2018, the President acting in terms of Article 44(1)(a) had allocated *inter alia* Sri Lanka Army, Sri Lanka Navy, Sri Lanka Air Force, State Intelligence Service and Police Department to the Minister of Defence. It is also pertinent to observe that Public Security Ordinance, Prevention of Terrorism Act No 48 of 1979 and Suppression of Terrorist Bombings Act No 11 of 1999 are three laws among others that are to be implemented by the Ministry of Defence.

In the afternoon of Monday, 08th April 2019, the Chief of National Intelligence had brought to the attention of Hemasiri Fernando, the contents of the communication he had received from the Director State Intelligence Services on the same day. Upon receipt of this information, the former secretary, defence had discussed with the CNI its content and wanted the matter to be raised and discussed at the weekly intelligence coordinating meeting that was already scheduled for the following day (09 April 2019). As we said before, on 9th April 2019, the former secretary, defence had chaired the ICM but surprisingly, the former Secretary Defence under whose supervision the State Intelligence Service was placed did not take any initiative to open a discussion on this vital piece of intelligence. In our view the former secretary had failed in his duty as the supervisory authority of the State Intelligence Service as he remained silent without raising this issue at the meeting.

The failure on the part of the Director SIS to brief the audience as well as the failure on the former Secretary, Defence to raise it with the Director SIS in the presence of other attendees, including the tri-force commanders, Heads of Intelligence units of tri-forces and the IGP resulted in the loss of an opportunity to strategize a proper plan of action with the collaboration of all important defence establishments to prevent any possible attack as had been forecast in the said intelligence report. However, Hemasiri Fernando himself having recognized the importance of taking precautionary measures at that initial stage itself later on instructed the CNI to share that information with the IGP. It is difficult to comprehend the reason for the failure to raise this

[8] 2R3 in SC FR 195/19.

matter at the Weekly Intelligence meeting, the first earliest opportunity that arose. The failure on the part of the Director SIS and the former Secretary Defence in this regard resulted in the tri-force commanders being completely kept in the dark on any possible threat to security as revealed in the information, until the attacks took place twelve days later. The Secretary himself admitted in his affidavit before this Court that "*if the said matters adverted to in the said letter was discussed at the said weekly intelligence meeting, all those present at the said meeting would have been adequately apprised of the matters adverted to therein".*

Hemasiri Fernando has placed the full responsibility on the Director SIS for the failure to raise this matter at the Weekly Intelligence Meeting. Furthermore, he attributes the responsibility to the Director SIS for the failure to draw his personal attention to the information and the omission to highlight what counter-measures should be adopted to neutralize the threat of any attack and claims that the Director SIS had acted in complete dereliction of duty.

As we have already observed, the responsibility for the failure to raise this matter at the Weekly Intelligence Meeting rests not only on the Director, SIS but also the Secretary, Defence. Additionally, the CNI could have coordinated the initiation of the discussion. The Secretary cannot absolve himself from this responsibility by shifting it to the Director, SIS, because his supervisory role mandates him to raise it himself. Hemasiri Fernando claims that he could have "*put in motion a coordinated security plan with the assistance / participation of the different law enforcement agencies, including the Police and Armed Forces with the concurrence of the political leadership of the country".*

In fact the CNI on the 09th April 2019, after the weekly intelligence meeting, had conveyed to the IGP the intelligence information he had received from the Director, SIS highlighting the importance to alert Law Enforcement Agencies to be vigilant concerning the information. The CNI signed this communication on behalf of the Secretary, Defence. However, the Secretary, Defence thereafter took no steps on his own or through the CNI to seek any verifications or reports either from the Director, SIS or from the IGP on any further developments relating to the information on the planned attacks.

There had been complete silence on the part of the Secretary on this matter until he received a text message from the Director, SIS. The said message was delivered to Hemasiri Fernando's phone at 16.53 on 20th April 2019. According to Hemasiri Fernando, he read this message only after Director SIS called him and drew his attention. At 18.23 Hemasiri Fernando replied "*well received*". Hemasiri Fernando claims that he was not in the habit of perusing WhatsApp

messages as he did not consider it a secure mode of communication. However, at 21.10, on the same day he had sent another message to the Director SIS saying "*Discussed with IGP on your advice*".

Has Hemasiri Fernando paid necessary attention and taken sufficient measures consequent to the receipt of the aforesaid text message? The said message not only discloses the dry run explosion that took place in *Palamunai, Kattankudi* on the 16th April 2019 but proceeds to warn of the likelihood of an attack anytime on or before 21st April 2019 targeting eight places including a church and a hotel. Having himself procliamed his ability that he had the capacity to put in place a coordinated security plan with the participation of law enforcement agencies with the concurrence of the political leadership of the country, did he take reasonable measures in response to the reported threat? According to his own version, he had not taken any steps other than having a discussion with the IGP. Did he not have a duty to apprise the Defence Minister who was the President and seek his directions in this situation? It is undisputed that Hemasiri Fernando did not apprise the Minister nor did he make any attempt to do so at any time from the time he came to know of the intelligence information on the possible attack. It is his position that the President himself had informed him that the Director SIS briefed him on all matters pertaining to intelligence and the need for the Secretary, Defence to apprise him on such matters did not arise. However, Hemasiri Fernando at no stage takes up the position that there was no need for the President to have been briefed regarding the intelligence information on the possible attack.

In our view it is the duty of the Secretary under whose supervision the State Intelligence Service was placed to take necessary measures to brief the President by himself or through any other source. Hemasiri Fernando at no stage inquired from the Director, SIS whether he took necessary steps to brief the President on the situation. It remained his responsibility to ensure that the President was briefed given the gravity of the situation at least after the information he received in the evening of the 20th April. Furthermore, at no stage he notified the Secretary to the President on this matter. Considering all the circumstances relating to the matters under consideration, in our view the Secretary, Defence failed to exercise his duties with due diligence. He was derelict in his duties by failing to take necessary measures in the given situation and his inaction contributed to the violation of the right to equal protection of the law guaranteed to all persons including petitioners. There was a constitutional duty imposed on the Secretary to exercise control over the departments but in the circumstances, there had been a flagrant dereliction of the duty. Thus, there has been inaction on the part of the Secretary resulting in the

infringement of the fundamental rights of the citizens under Article 12(1) and 14(1)(e) of the Constitution.

Sisira Mendis-Chief of National Intelligence

In his affidavit dated 8th November 2019, he speaks of the scope of his duties and functions. He was appointed to the position with effect from 10TH April 2015. The position of the Chief of National intelligence (CNI) had been established in order to ensure coordination between intelligence agencies. This would appear to be the pivotal role of the CNI.

Despite an absence of a list of duties specifically assigned to him, he had been signing letters and reports on behalf of the Secretary, Defence. Upon a perusal of documents appended to his affidavit, this Court observes that he had forwarded a concept paper to Secretary, Defence on 20th July 2016 titled "*Countering the threat posed by the Islamic State of Iraq and Syria*" (ISIS). Emphasizing the need for capacity building training, he states in the concept paper "it is vital that officials are provided training on the United Nations Security Council Resolution 2178 to ensure a foundational understanding of countering violent extremism (CVE). He also lists out threats to Sri Lanka and states that the most visible efforts to count of the ISIS threat are in the areas of Law, Policing and Intelligence. In November 2017, he sends a report on the same topic to Inspector General of Police drawing attention to the United Nations Security Resolution 2253 of 2015 (UN SCR 2253), to come to the activities of ISIS. In fact, it is worth quoting the UN SCR 2253;

> "*terrorism in all forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed, and reiterating its unequivocal condemnation of the Islamic State in Iraq and the Levant (ISIS, also known as Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability…"*

Even in March, 2019 - one month away from the attack, this Court finds Sisira Mendis distributing to Chief of Defence Staff, Commander of the Army, Commander of the Navy, Commander of the Air Force, Director, State Intelligence Service and Director, Military Intelligence a document titled "***Matters discussed at the weekly intelligence coordinating***

meeting." One of the items that had been discussed at the meeting was pertaining to the activities of Mohammed Cassim Mohammed Saharan.

All this shows that he had been sensitive to the ideology of Zahran and cohorts since 2016. Even on 4th April 2019, he had collated information on Zahran and distributed it.

But subsequent events clearly show that he falls short of his duties. It is the CNI to whom the Director, SIS first passed his intelligence he had received on 4th April 2019. The CNI received this information on the 7th and passed it on to the Secretary, Defence on the 8th April. He forwarded it to the IGP. Other than for bringing it to the attention of IGP and Secretary, Defence, there was no one whom he informed.

Then the ICM took place on 9th April 2019 where the IGP himself was a participant. There is no evidence before us whether he checked with the IGP as to the counter measures taken by Police having regard to the intelligence received. Submissions were made that a large number of officials worked under the CNI. There is no evidence that he took immediate steps to have the intelligence information verified by his own staff apart from his failure to share it with all other relevant officials.

The facts established before this Court clearly show that he fell short of his primary duty of sharing intelligence. It is in evidence that he omitted to ensure that the intelligence received on 4 April 2019 was disseminated to other intelligence agencies, for instance Director of Military Intelligence. This becomes critical given that the largest force of intelligence officials is with the DMI.

At the crucial ICM on 9 April 2019, he complains that the Director, SIS did not take the opportunity to discuss the intelligence that he was possessed of. But this failure does not relieve the CNI from his obligation to raise this issue as his primary duty was one of coordinating intelligence among agencies of the state and moreover the item No 3 of the agenda for the 9th meeting shows clearly that he was entrusted with a duty to brief the participants on National Security.

AGENDA FOR THE WEEKLY INTELLIGENCE MEETING 19 MARCH 2019

1. *Opening Statement by the Secretary Defence.*
2. *Current Security/Intelligence Update*
    a. *Briefing by Director/ State Intelligence Service*
    b. *Briefing by Director Military Intelligence*
3. ***Any other matters pertaining to the National Security – to be taken by CNI, CDS, Tri-Services Commanders and IGP.***
    a. ***Activities of Mohammed Cassim Mohammed Saharan – Leader of National Thowheeth Jama'ath (NTJ)***
    b. *Usage of pro LTTE symbols at the School Sports Meet in North.*
    c. *Poaching by Indian fishermen in territorial waters of Sri Lanka.*
    d. *ISIS returnees to Sri Lanka*
    e. *40th session of the United Nations Human Rights Council (25 February – 22 March 2019).*
4. *Any other intelligence related matters – to be briefed by Naval and Air Intelligence Directors.*

Closing Remarks

His failure to share Nilantha Jaywardena's information created a lack of awareness among crucial intelligence officials and had that duty been discharged by the CNI, a well-coordinated plan to locate and apprehend the dangerous outfit of terrorists could have been launched. By virtue of his office, the CNI Sisira Mendis had known the extent of infiltration of destructive ideologies having regard to the fact he himself produced reports on them and he ought to have realized the threat brought to light by the intelligence.

But the CNI failed in his duties by turning a blind eye to the onerous responsibilities attendant upon his office. In the circumstances this Court is of the view that Sisira Mendis stands liable for infringement of fundamental rights guaranteed under Articles 12(1) and 14(1)(e) of the Constitution.

Pujith Jayasundera-Inspector General of Police

It could be said that it is in the same way that the IGP has committed his own omissions, when there were obvious risks to which he paid no attention. His inadvertence to those obvious risks

amounts to a violation of his statutory duties which he owes the citizenry and there is a clear infraction of his duty to implement the provisions of the legislation guaranteeing national security and integrity to every citizen in the country. One need not trawl through a whole host of duties enjoined upon the IGP. The IGP is bound by the Police Ordinance and it cannot be denied that it is the Inspector General of Police, who had the statutory authority, and the machinery under him, to act.

Section 56 of the Police Ordinance on the duties and liabilities of police officer states:

> *Every police Officer shall for all purposes in this Ordinance be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka. It shall be his duty (a) to use his best endeavors and ability to prevent all crimes, offenses, and public nuisances; (b) to preserve the peace….. (f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority*.

It is quite clear from the above that each policeman is notionally equal as being answerable to the law alone, and being obliged to enforce it.

The main objective of police is to apprehend offenders, to investigate crimes and to prosecute them before the Courts and also to prevent commission of crime and above all to ensure law and order to protect the citizens life and property. It is unfortunate that these objectives have remained unfulfilled in this case. Even if the President had become estranged with the IGP, the IGP had the statutory authority to seek out and apprehend Zahran and his associates. There could have been a well coordinated network put in motion by the IGP to go after and stake out Zahran as he was an absconder and his whereabouts were well known. Urgent and accurate Indian warnings elicited a tardy and confused response and it does not augur well for the Police Department to let go of a fugitive from justice to flee from town to town and allow him to let loose his trail of devastation.

If one may list out some of the other omissions on the part of the IGP, so glaring are the following:

The IGP had been briefed of the intelligence by 8th April 2019 when he attended the meeting with the President. The obvious question arises-why is it that he did not apprise the President at this meeting? We have already referred to his limited dissemination of intelligence to a few subordinates on the 9th April 2019. The IGP never took steps to inform the President, Prime

Minister and the relevant security personnel. Even if he had been alienated by the President, the IGP did meet the President and the closer association of the head of another department with the President is no ground for refusing to broach intelligence related matters with the Minister. Though he was notified of the dry run in Palamunai, this vital intelligence was not shared by him with a wide spectrum of personnel.

He had also not given sufficient instructions to his subordinates as to the measures that should be taken at the ground level. Statutorily enjoined as he was, more could have been done to either prevent or at the very least mitigate the attacks if the IGP had taken robust and speedy measures and given clear instructions for preparations on the ground. Churches could have been informed and there could have been a public alert.

What earthly use did the IGP make of the periodical reports that the Director, SIS had sent him? These reports constantly refer to Zahran's preaching and extremist views. We have seen efforts made by the IGP to take some proactive action in regard to extremism but several factors indicate that his responses were inadequate and are not emblematic of the head of the Police Force.

The fact that he signed some of the reports with notations such as *F.N.A and Report Back* show that he acquired knowledge of the magnitude of the rising extremism. In light of these reports provided by the SIS, was he not put on notice? Did not this mass of information trigger a response so as to activate the TID and CID to arrest Zaharan, Rilwan et al from their hideouts? If there was a failure to arrest these aberrant fugitives on the run, why did not that failure engage his attention and gnaw at his conscience? Did he remain engaged with all the SDIGs from the 9 provinces? Why did not he hold a face-to-face conference with the highest police officials from the provinces *ex abundanti cautela*? Did he seek responses with the 4 senior police officers to whom he had copied the intelligence?

What was the strategic counter measure which he devised in the face of the mounting intelligence? These questions remain unanswered. The dry run explosion on 16th April 2019 in Kattankudy indicated the magnitude of the danger facing the nation but it does not appear that the IGP took any step further than putting minutes to the effect- "for necessary action".

In view of the voluminous nature of information and intelligence the IGP had in his possession (for instance 97 reports between 20.04.2016 and 29.04.2019 and subsequent information and

intelligence), the IGP had a duty of care towards the nation and we do not feel satisfied that the IGP took all steps necessary to avert the likelihood of the disaster. Despite the most proximate relationship that both the Secretary, Defence and IGP say Nilantha Jayawardena was having with the then President, it was incumbent on both of them to have also raised these matters of national interest with the President. The mere assumption that Nilantha Jayawardena would convey the information to the Minister of Defence is an omission on their part as they were both aware of the serious consequences of the intelligence and they should have ascertained whether extra steps should be taken or they should have acted over and above their call of duty. Even if the President had been averse to the information being provided by them, the rest of the political leadership including the Prime Minister should have been informed.

What takes the cake is what the IGP did on 21st April 2019. There is evidence before this Court that though Nilantha Jayawardena had submitted reports to the IGP on the 18th, 19th and 20th April 2019, the IGP made an endorsement on the report only on 21st April 2019 calling upon Nilantha Jayawardena to submit further reports on 5th May 2019. If one may elaborate on these reports, the report on the 18th April 2019 was delivered to the IGP indicating the findings of the State Intelligence Service with regard to the dry run explosion in Kattankudy on 16th April 2019, which was attributed to Mohamed Cassim Mohamed Zahran and NTJ. The report requested the IGP to alert all police stations about another motorcycle which had been purchased by the outfit. The report sent to the IGP on 19th April 2019 provided details of additional persons suspected to be behind the explosion of the motorcycle on 16th April 2019 and requested the IGP to conduct inquiries into the explosion in order to thwart future plans of Zahran Hashim. On 20 April 2019, another report had been delivered to SDIG/CID with a copy to the IGP indicating the closest network of Zahran Hashim. This report revealed the names of 14 persons out of which 06 died in the Easter Sunday Explosions. Undoubtedly this Court finds a quick frequency with which the Director, SIS kept the other officers including the IGP informed but we must make the observation that the same degree of enthusiasm was not displayed by the Director, SIS at an anterior point of time, when he had received tell-tale signs of the impending disaster by way of information and intelligence. The enthusiasm to inform the other officers including the CID appears to have assumed greater proportions only when the danger was right round the corner.

Be that as it may, what this Court observes is a total lack of attention of the IGP to these reports. On all these 3 reports the IGP appended his endorsements only on 21st April 2019, long after the destruction and desolation had been wrought upon the country by the terrorists and as if this

dereliction was not glaring enough, the IGP proceeded to call for a report from the Director, SIS by 5th May 2019.

Nothing is more lackadaisical than this approach and it is indubitable that the IGP acted with a serious want of care and devotion towards his duties and functions.

These omissions on the part of the IGP exposes him to infringements of fundamental rights the Petitioners have alleged against him and we conclude that by his inaction and omissions he has committed the infringement of the fundamental rights under Articles 12(1) and 14(1)(e).

Next, we turn to the Minister of Defence for his accountability in regard to the tragedy that engulfed this nation on 21st April 2019 and we must observe that we have already alluded to his constitutional, statutory and common law duties and functions elsewhere in the judgment.

Maithripala Sirisena-Former President/Minister of Defence

We have made some preliminary observations before on the executive powers which the President enjoy under the Constitution. We also look to case law to ascertain the extent of his powers. We would advert to them briefly.

Article 4(b) of the Constitution directs that the executive power of the People including the defence of Sri Lanka shall be exercised by the President of the Republic elected by the People. We have already adverted to Articles 30 (1), 44 (2) and 52 (2) of the Constitution. We have already alluded to his duties and functions assigned to him under the Gazette bearing No. 2103/33 and dated 28th December 2018.

In ***Re Nineteenth Amendment to the Constitution*** (***Special determination 04/2015 to 10/2015, 14/2015 to 17/2015 & 19 of 2015***) the Supreme Court declared as follows:

> *"…The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to the exercise of his executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the people*…."

The above observation puts it beyond doubt that the President has to exercise constant supervision and monitoring of his subordinates and there is no warrant for the former President's

assertion that certain heads of departments are not under an obligation to report to him, while others are. An absence of such a monitoring mechanism on his part leads to a prejudicial impact on the sovereignty of the people and we certainly see a failure in this regard on the part of the then President Sirisena.

The Supreme Court had occasion to make its pronouncement on the nature and extent of the powers of the Minister of Defence in a reference sought by the then President Chandrika Bandaranaike in terms of Article 129 (1) of the Constitution. The Supreme Court observed in that determination (***SC Reference No 2/2003)*** that the plenary executive power including the defence of Sri Lanka is vested and reposed in the President of the Republic of Sri Lanka and that the Minister appointed in respect of the subject of defence has to function within the purview of the plenary power thus vested and reposed in the President.

The following observations of the Supreme Court bears repeating:

> *We have to express our opinion in accordance with the constitutional determination made by a bench of 7 Judges of this Court that the executive power being a component of the sovereignty of the people, including the Defence of Sri Lanka, is reposed in and exercised by the President and any transfer, relinquishment or removal of such power from the President would be an alienation of sovereignty which is inconsistent with the Constitution.*
>
> *A balance is struck in relation to the executive power thus vested in the President by Article 42 which provides as:*
>
> *the President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law related to public security…."*

Apart from the above, the scope and ambit of the executive power exercised by the President are delineated and expatiated by the several notifications that appear from time to time and such notifications were published in Gazettes extraordinary No 1896/28 as amended by No 1897/15 dated 18th January 2015 and No 1933/13 of 21st September 2015. At the relevant time the Gazette bearing No. 2103/33 and dated 28th December 2018 governed the scope and ambit of the presidential powers under the Ministry of Defence.

Prior to 4th April 2019, the National Security Council (NSC) had been in existence for several years and it would appear that it had functioned without any legal framework. It was given statutory recognition under the Public Security Ordinance in terms of Emergency (National Security Council) Regulation No 1 of 1999 published in Gazette Extraordinary No 1081/19 and dated 27th May 1999. This subordinate legislation established an NSC with the President as its head, tasked with the maintenance of national security with authority to direct security operations and matters incidental to it.

This Court heard submissions that prior to January 2015, the NSC used to meet every week on Wednesdays under the chairmanship of the President, before which an intelligence coordination meeting was held on Tuesdays presided over by the Secretary, Defence. This arrangement paved the way for many an aspect of national security to be thrashed out at these meetings and intelligence and other useful information used to be freely exchanged at these meetings. It is how the executive was kept apprised of the national security situation in the country and that facilitated the discussion of all matters pertaining to national security.

It would appear that under the presidency of the former President Sirisena the NSC meetings were sporadic and not regular. If one were to formulate policies with regard to national security and exercise supervision over the security echelons of the Government, the NSC was a useful tool in the hands of the President but a notorious misappreciation of the duties and functions of the Minister of Defence has led to an appalling lack of appreciation of the importance of the National Security Council. The dangers posed by Zahran and his terrorist outfit could have been effectively appreciated and dealt with had this mechanism been in place but its efficacy had been lost on the then President.

The Court finds that there was no meeting summoned for of either ICM or NSC after 9 April 2019 and in our view, it is a serious lapse having regard to the nature of intelligence information received and following the 16 April 2019 dry run explosion. It would appear that despite the 1999 Gazette which provided for the Constitution of the NSC, the attendance at the NSC had been determined solely by the President with no reasons given for the exclusion of key members who should have been an indispensable part of security and intelligence briefings such as the Prime Minister, State Minister for Defence and the IGP. There was extensive submission that the Prime Minister was kept out of the NSC and was not provided with any information.

All this is a stark reality that strikes this Court as a serious omission on the part of the then President. In 2019 there had been only two NSC meetings convened by him. One was on 14th January before the discovery of the Wanathawilluwa explosives and arms cache and the next on 19th February. This was one of the largest discoveries of explosives after the end of the war in 2009. It cannot be gainsaid that the former President Sirisena was made aware of these discoveries at Wanathawilluwa. In these circumstances it was obligatory on the part of the former President Sirisena to have convened the NSC every week and put in place a mechanism to address the threat posed by Zahran and his cohorts. This was never done much to the discomfiture and dislocation of the security apparatus. It has to be pointed out that only after the bombs ripped through the nooks and crannies of this country, wisdom dawned upon the importance of NSC meetings.

This dismal failure on the part of the former President Sirisena resulted in disastrous consequences for this country and not only lives were lost and properties destroyed but inter racial tension and inter-ethnic hatred began to raise their ugly heads causing the very fabric of this nation to be broken and become fragile. There were fear psychosis, apprehension and inter-ethnic alienation that were palpable through the length and breadth of the country. The due care with which the Minister of Defence must have exercised his wide powers in the greater good of the country was totally non-existent having regard to the evidence that has been placed before this Court. The consistent declaration of this Court that "Public Trust" doctrine is not a mere matter of contract bears particular repetition at this stage.

> "*We are not concerned with contractual rights, but with the safeguards based on the Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers. Discretionary powers can never be treated and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred-not at the whim and fancy of officials, for political advantage or personal gain*."-see ***Pryangani v Nanayakkara***[9]

Given the constitutional, statutory and common law duties as expounded by ***Carltona***, other case law both domestic and overseas and SC determination in regard to national security, it was the bounden duty of the former President Sirisena to have supervised his departments. The then

[9] (1996) 1 Sri.LR 399 at 404-405.

President Sirisena presided over several of the NSC meetings until he terminated the mechanism and he cannot deny that he was fed with a large volume of information on Zahran and his destructive tendencies. If he was not informed by the Secretary, Defence, IGP or even Director, SIS as he puts an unconstitutional and illegal muzzle on this officer for reasons best known to himself, the question arises as to how he was getting his information regarding national security, which is constitutionally vested in him. As we have pointed out, his personal attention is required in extreme cases of emergency and it is for this reason Public Security Ordinance clothes him with awesome powers. The citizenry is entitled to the protection that the Constitution and laws accord them.

In a nutshell the importance of not only the NSC, but other established structures and practices enjoined by case law and determinations of this Court appear to have been shelved aside by the President and his own Secretary, Defence and IGP have not been directed to share information and though this Court does not look at the conduct of the officials themselves with favor, it strikes us that this non communicative and distant style of handling the all-important Ministry of Defence has caused fissures in the national security mechanisms of the country and thus there was a collapse of the structures and practices that should be in place to strengthen and ensure the efficient and effective security apparatus.

We conclude that the former President Sirisena has been lax in affording the protection and guarantees enjoined under the Constitution and other laws and he has breached his duty to protect. Thus we hold that he has infringed the fundamental rights enshrined under Article 12(1) and 14(1)(e) of the Constitution.

Further on the question of liability the learned President's Counsel in SC/FR /293/2019 submitted that the cabinet of ministers must also be held liable on the strength of **Section 12 of the Suppression of Terrorist Bombings Act 1999** which reads as follows:

> *The Government of Sri Lanka shall take appropriate measures to prevent any person or group of persons from committing or encouraging, instigating, organizing or knowingly financing the commission of, an offence under this Act, or of an offence specified in the Schedule to this Act, whether in or outside Sri Lanka.*

The learned President's Counsel relied on Section 2 (bb) of the Interpretation which goes as follows:

"the Government" where no other meaning is indicated by any descriptive or qualifying words or by the context, and the "the Ceylon Government" or the "Government of Ceylon" or "the Government of this Island" or the "Government of the Island of Ceylon", shall notwithstanding any provisions of written law to the contrary, mean the Cabinet of Ministers appointed under the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947:

Though the Constitution does not define the term 'government", the interpretation offered by the Interpretation Ordinance does not serve as a useful guide, as it deals with a cabinet of a bygone era and such interpretation will be inappropriate in the context when the executive power of the people, including the defence of Sri Lanka is to be exercised by the President. In any event leave to proceed in these applications was given only against some respondents and not all members of the Cabinet. In the circumstances we do not subscribe to the argument of the learned President's Counsel that the Cabinet must be imputed with liability as the facts and circumstances prove otherwise. The specific assignment and supervision of Defence in the President will militate against any member of the Cabinet being fixed with liability when there is no evidence before this Court that none of them was invested with intelligence with reference to the impending attack. Some of the members of the Cabinet including the Prime Minister were kept out of what appears to be a jealously guarded intelligence and in the circumstances it is inequitable to hold them liable as they are not similarly circumstanced as the respondents we have found liable.

Having dealt with the accountability and liability of the respondents we have identified as culpable, we now turn to set down the general principles that guide us in arriving at the accountability of the State and the Respondents we have referred to above.

It is often the case that today the Courts do take cognizance of tortious or delictual principles in the adjudication of fundamental rights violations and who can deny the intrusion of private law principles into public law domain?

Do the Courts of Sri Lanka have to sit idly by when several jurisdictions abroad have embraced the concept of constitutional torts in human rights law adjudications? Our Constitution states in Article 126 that the Supreme Court has the exclusive jurisdiction to deal with cases involving infringement of fundamental rights. Indeed, in ***Vivien Gunawardena v Hector Perera***[10] Soza J stated that the Constitution of 1978 provided a special forum and machinery for enforcement of

[10] (1983) 1 Sri LR 305 at 320.

fundamental rights but that "old remedies co-exist with the new". Even in ***Saman v Leeladasa***[11] Justice Mark Fernando proceeded to link the constitutional remedy and the delict remedy. He went on to hold that the delictual liability provides a basis for awarding compensation against the State according to the ordinary common law principles of vicarious liability in delict. He drew on the concept of vicarious liability in delict to determine the liability of the State under the Constitution to pay compensation to the victim of a violation. Justice Fernando famously said[12]

> "*The principles whereby an employer or principal is to be made responsible for the act of his employee or agent have not been laid down by the Constitution and there must be determined by reference to other (statutory or common law) principles of law..*"

It is apparent that Justice Mark Fernando had in mind constitutional delicts and this Court agrees that such principles (statutory or common law) could be engrafted onto public law remedies to determine liability.

A constitutional tort is a violation of the fundamental rights of a person or citizen by the State or any of its agencies or instrumentalities, as distinct from tortious injuries caused by private person or entity. The development of this judicial device was predominantly informed by the need to hold a government vicariously liable for the acts of its agencies or employees. One of the ways in which a constitutional tort action differs from a tort action is that the former is a public law remedy for violation of fundamental rights in which the Supreme Court awards compensation- see ***Chairman, Railway Board v Chandrima Das***[13]**.** For a recent pronouncement by the Indian Supreme Court on constitutional torts, see ***Kaushal Kishor v State of UP***[14]

There are other relevant factors that determine the standard of care of the individual respondents in regard to omission liability. The Courts will take into account all the circumstances of the case. This will possibly involve consideration of a number of other relevant factors including

- the magnitude of the risk
- the cost and practicability of precautions
- the social value of the respondent's activities
- what reasonable man would have foreseen.

[11] (1989) 1 Sri.LR 1
[12] Ibid at p 25.
[13] (2000) 2 SCC 465.
[14] Writ Petition 113/2016 decided on 3rd January 2023.

The magnitude of the risk is determined by the likelihood of the risk occurring and the seriousness of the potential injury. In ***Blyth v Birmingham Waterworks***[15] Alderson B defined breach of duty of care as

> *the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct human affairs would do, or doing something which a prudent and reasonable man would not do.*

It is quite clear that that the enormity of the risk was so great and the potential injury was so serious that a reasonable man placed in the position of the respondents whose omissions we have referred to above would have acted but the respondents did not. So even on the basis of delictual principles infusing Article 126 adjudication, the respondents we have alluded to become liable for infringement of the fundamental rights of the Petitioners.

Comparative jurisprudence reminds us that the Petitioners in these applications would not be shut out from pursuing their claims in most of the world's leading jurisdictions. In Canada Courts have acknowledged the existence of these types of claims against public service notably police: ***Doe v Board of Commissioners of Police for Metropolitan Toronto***[16] ; ***Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto***[17] ; ***Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto***[18]; ***Odhavji Estate v Woodhouse and others***[19]**.**

Similarly, in South Africa the Constitutional Court did not follow the negative approach of the English Courts that had been adopted in the well known case of ***Hill v Chief constable of Yorkshire***[20]. For the fresh winds of change in South Africa see the groundbreaking decision of its Constitutional Court in ***Carmichele v Minister of Safety and Security***[21]; ***Hamilton v Minister of Safety and Security***[22].

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[15] (1856) 11 Exch 781.
[16] (1989) 58 DL (4th) 396
[17] (1990) 72 DLR (4th) 580
[18] (1998) 168 DLR (4th) 697
[19] (2003) 3 SCR 263.
[20] (1983) AC 53.
[21] (2001) 12 BHRC 60.
[22] (2003) (7) BCLR723 (c)

In ***Carmichele***, the Constitutional Court of South Africa held that "in some circumstances" the guarantees in the Bill of Rights ought to be read to include "a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."

Our understanding of German law, derived from Professor Sir Basil Markensinis's magisterial work on the *German Law of Torts*[23] leads this Court to think that the German Courts, relying on Article 14 of the Constitution and Section 839 of the BGB, would find the public service liable for infractions of rights based on the facts before us. It would be necessary to show fault, understood in a broad way, and clearly demonstrable on the facts, and also, importantly, a duty owed to the individual and not only to the public at large. Fairness and justice are held to require the state to be held liable to the individual, except where the duty is owed to the public at large.

Jurisprudence Across the Palk Strait

In ***Kamla Devi v Government of NCT***,[24] Uday Singh died in a terrorist related incident. Kamla Devi-the widow moved the Delhi High Court which famously held:

> *Apart from the general inability to tackle the volatile situation, in this case, the State agencies failed in their duty to prevent terrorists from entering Delhi. It was their responsibility to see that dangerous explosives such as RDX were not available to criminals and terrorists. The incident occurred as there was a failure on the part of state to prevent it. There was failure of intelligences they did not pick up the movement of this known and dangerous terrorist. So, it would be extremely difficult even to suggest that the State did not fail in its duty towards the late Uday Singh and his family.*

The Court went on to state

> *A crime has been committed. A wrong has been done and a citizen has lost his life because the State was not vigilant enough. A fundamental right has been violated. But, mere declarations such as these will not provide any succour to the petitioner.*

[23] 4th edn (Hart Publishing, 202), pp 893-899.
[24] 114 (2004) DLT 57.

She needs to be compensated. It is too late in the day to now suggest, that in a situation such as this, the petitioner should be relegated to the ordinary civil Courts to seek her tort law remedy.

The learned single judge of the Delhi High Court Justice Badar Durrez Ahmed while invoking the power under Article 226 of the Constitution directed the government of NCT of Delhi to pay compensation to the petitioner who was a victim of a bomb blast due to a terrorist attack. The learned single judge also laid down the following principles which would govern the award of compensation:

The principles which emerge from this case can be summarized as follows:-

1. Whenever an innocent citizen is killed as a result of a crime, particularly when it is an act of terror or communal violence or a case of custodial death, the State would have failed in its public duty to ensure the guarantee enshrined in Article 21 of the Constitution.
2. The modern trend and the international norm is to focus on the victims of crime (and their families) by, inter alia, ensuring that they are promptly compensated by the State in adequate measure under a well-laid out scheme.
3. In India, there is no such criminal injury compensation scheme in place and the private law remedies of damages and compensation are grossly inadequate. Legislation on this aspect is not forthcoming.
4. In such a situation the High Court, in exercise of its powers under Article 226 of the Constitution can and ought to direct the State to compensate the crime victim and/or his family.
5. The compensation to be awarded by the Courts, based on international norms and previous decisions of the Supreme Court, comprises of two parts:-
   (a) 'Standard compensation' or the so-called 'conventional amount' (or sum) for non-pecuniary losses such as loss of consortium, loss of parent, pain and suffering and loss of amenities; and
   (b) Compensation for pecuniary loss of dependency.
6. The 'standard compensation' or the 'conventional amount has to be revised from time to time to counter inflation and the consequent erosion of the value of the rupee. Keeping this in mind, in case of death, the standard compensation in 1996 is worked out at Rs. 97,700. This needs to be updated for subsequent years on the basis of the Consumer Price

Index for Industrial Workers (CPI-IW) brought out by the Labor Bureau, Government of India.

7. Compensation for pecuniary loss of dependency is to be computed on the basis of loss of earnings for which the multiplier method is to be employed. The table given in Schedule II of the MV Act, 1988 cannot be relied upon; however, the appropriate multiplier can be taken therefrom. The multiplicand is the yearly income of the deceased less the amount he would have spent upon himself. This is calculated by dividing the family into units – 2 for each adult member, and 1 for each minor. The yearly income is then to be divided by the total number of units to get the value of each unit. The annual dependency loss is then calculated by multiplying the value of each unit by the number of units excluding the two units for the deceased adult member. This becomes the multiplicand and is multiplied by the appropriate multiplier to arrive at the figure for compensation of pecuniary loss of dependency.
8. The total amount paid under 6 and 7 above is to be awarded by the Court along with simple interest thereon calculated on the basis of the inflation rate based on the Consumer Price as disclosed by the Government of India for the period commencing from the date of death of the deceased till the date of payment by the State.
9. The amount paid by the State as indicated above would be liable to be adjusted against any amount which may be awarded to the claimants by way of damages in a civil suit or compensation under the Criminal Procedure Code."

It has to be noted that some of the criterial that the Delhi High Court refers to above find no parallels in Sri Lanka and it is only a persuasive guide for law reform in this country on computation of compensation.

Ashwini Gupta v Government of India[25] was a case where the Petitioner aged about 19 years suffered 90 per cent disabilities of permanent nature as a result of a bomb blast. The incident had completely derailed his life and drastically affected his earning capacity and potential for a job. He had been granted only an ex-gratia payment of Rs 25,000. The Petitioner pleaded the issue of monetary compensation as the respondents had refused to pay anything more than Rs 25,000.

[25] ILR (2005) 1 DELHI 7.

The Delhi High Court held:

> *In a civic society, there is not only to be a punishment for the crime of violation of the laws of the society, but also compensation to the victim of the crime. The very object of creating a State giving a governor for governance of the society to adhere to the norms itself imposes a responsibility on the Governors. The inability to protect life and limb of the citizen must result in a consequential remedy for the citizen to be paid by the Governors…"*

If a member of the public whom public service exists to serve suffers irreparable injury or loss though the culpable fault or reprehensible failure of that service to act as it should have, is it not consistent with ethical and, perhaps, democratic principle that the many, responsible for discharging that service in public trust, shall bear the cost of compensating the victim? This Court cannot leave that as a rhetorical question, and stand as mute bystanders, as we are confident that our own answer on the law and facts is as clear as a pikestaff.

It follows as the crow flies that if laws and structures are declared to the public as the benchmarks of safeguarding the security of the country and thus the protection of its people, it is no defensive argument that subordinates who were delegated with the powers both by Constitution and statute failed the repository of the main powers. These subordinates like the Secretary to the Defence or the heads of department such as Director, SIS and the IGP were only alter egos of the President and the Director, SIS, the IGP and the Secretary, Defence are really liable for their omissions and in addition to their non-performance which impacts on the Minister who had undertaken such enormous powers under the Ministry of Defence, the Minister is also liable for serious omissions to have put in place mechanisms and structures which could have easily averted the disaster the country faced. We take the view that the Petitioners have established a violation of fundamental rights by the Respondents we have named namely the then *President*, the then *Secretary, Defence, the then Chief of National Intelligence (CNI),* the then *Inspector General of Police (IGP)* and the then *Director, SIS.*

We declare that all these Respondents named above have violated the fundamental rights enshrined in Articles 12 (1) and 14 (1) (e) of the Constitution.

In the exercise of the just and equitable jurisdiction of this Court, we proceed to hold the above respondents liable to pay compensation to the victims and the families of the deceased. This Court orders that the former President Maithripala Sirisena who held the office of the Minister of Defence pays a sum of Rs 100 million as compensation. The former IGP, Pujith Jayasundera and

Director, SIS, Nilantha Jayawardena are each ordered to pay a sum of Rs.75 million as compensation. The former Secretary, Defence Hemasiri Fernando is ordered to pay a sum of Rs 50 million as compensation. Sisira Mendis, the former Director, CNI is ordered to pay compensation in a sum of Rs 10 million. The above sums of money ordered as compensation are ordered to be paid out of the personal funds of the aforesaid respondents. These payments have to be made to a Victim Fund to be set up at the Office for Reparations and maintained in an escrow.

We will set out the mode of payments after having dealt with the submissions on state liability.

State Liability

As regards state liability for the infringements we would like to observe that by putting the lives and liberty of common citizens at risk, the Respondents caused the possible collapse of public order and of the rule of law and it cannot be denied that it entailed the potential to destroy the faith of citizens in its state and erode its legitimacy. Large scale destruction, disruption and consequential violence can threaten a country's social fabric, endanger national unity and destroy prospects for economic growth and development. If there is a failure of public order, it is because of the inadequacies of the branches of government and we need to address them holistically in order to change things for the better.

A human being cries out for justice when he feels that the insensible act has crucified his personal liberty and family. That warrants grant of compensation under the public law remedy against the state as well. We are absolutely conscious that compensation was decided upon by the State to be paid to the victims.

Submissions have been made that the Ministry of Public Administration and Disaster Management was notified to ensure that the funeral expenses of the deceased were borne by the State. The then Cabinet of Ministers, by way of a decision dated 23.04.2019, directed the Office for Reparations to pay a sum of Rupees One Million to each of the families of the persons who died and those who were permanently disabled. Further, a decision had also been taken to pay compensation in a sum of Rupees Five Hundred Thousand each to persons who were injured in the said explosions and, such instruction, it was submitted, has been given to the Office for Reparations.

But the learned President's Counsel who appeared for the Respondent Archbishop of Colombo) in SC/FR/195/2019 submits in his written submissions that there has been not only an underpayment of compensation but also nonpayment as far as the majority of the victims and families are concerned.

This Court orders this fact of the matter to be investigated by the Office for Reparation and an accurate information by way of a motion should be made available to this Court as to the above facts within 3 months from the date of this judgment. The Attorney General is directed to liaise with the Office for Reparation and notify this Court of the same.

Be that as it may, quite contrary to the voluntary payment the State has decided to make for the benefit of the victims and families, the learned Senior Additional Solicitor General adverted to a requirement to prove an *"administrative practice*" on the part of the State to make it liable. However, this view of "*administrative practice*" that was first expressed by Wanasundera J in ***Thadchanamoorthi v AG***[26] no longer holds good in this country. It has to be recalled that even in ***Velmurugu v Attorney General***[27] Wanasundera J repeated his view in ***Thadchanamoorthi'*** s case. Both cases involved allegations of torture against police officers and in Velmurugu's case there was also an allegation against Army Personnel.

The view of Wanasundera J in ***Thadchanamoorthi*** on the question of the liability of the State is long recognized as *obiter* as the concept of administrative practice was not necessary for the *ratio decidendi* of the two cases. In ***Thadchanamoorthi*** the Court held on the facts that there was no infringement of fundamental rights. In ***Velmurugu*** too, the majority view was that on the facts, there was no infringement of fundamental rights and as such Wanasundera J's view on administrative practice is clearly obiter. In any event what is alleged against the Respondents is an omission on their part and therefore an imposition of a requirement for establishing an *administrative practice* in regard to omissions would be preposterous and illogical.

As for state liability, recourse must also be had to the decision of the Privy Council in ***Maharaj vs. Attorney-General of Trinidad and Tobago (No.2),***[28] wherein it was said in relation to the liability of the state for fundamental rights:

[26] (1978) 1 Sri.LR 154
[27] (1981) 1 Sri.LR 406 at 454.
[28] (1978) 2 All ER 670

"*This is not vicarious liability; it is a liability of the State itself. It is not a liability in tort at all; it is a liability in the public law of the State*"

In ***Nilabati Behera v. State of Orissa***[29], the Supreme Court of India delineated the principles on which compensation can be directed to be paid by the state or its agency in a writ petition under either Article 32 by the Supreme Court or Article 226 by a High Court, and explained it in the following words.[30]

> *"It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in action on tort. It may be mentioned straightway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings.."*

It follows then that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental rights is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental rights is claimed by resort to the remedy in public law under the Constitution by recourse to Article 126 of the Constitution. In the circumstances this Court

[29] (1993) 2 SCC 746
[30] Id p 758.

would hold that the State is liable to compensate the victims for the incalculable harm and damage that have caused to people and property.

Right to Life

There is another basis through which state liability is predicated. Though leave was not granted under Article 13(4) of the Constitution, this Article has been declared by previous dicta of this Court to recognize right to life.

> "*No person shall be punished with death or imprisonment except by order of a competent Court, made in accordance with procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law*".

A careful consideration of Article 13(4) of our Constitution makes it clear that if there is no order from a competent Court, no person should be visited with death and unless and otherwise such an order is made by a competent Court, any person has a right to live. Considering the content of Article 13(4) of the Constitution, Justice Mark Fernando made the pronouncement in ***Kotabandu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station, Payagala***[31]

> "*expressed positively that provision means that a person has a right to live, unless a Court orders otherwise..*"

This aspect was considered by the Supreme Court at the leave to proceed stage in ***Kotabandu Durage Sriyani Silva***[32] as well as ***Wewalage Rani Fernando v Officer-in-Charge, Police Station, Seeduwa***[33] and the Court took the view that when Article 13 (4) of the Constitution creates a right even impliedly, there cannot be a situation where such right is without a remedy. Alluding to the decision in ***Kotabadu Durage Sriyani*** Silva it was stated in ***Wewalage Rani Fernando***:

> "*this concept, viz. a right must have a remedy is based on the principle which is accepted and recognized by the maxim 'ubi ius ibi remedium' viz. there is no right without a remedy'. One cannot therefore think of a right without a remedy as the right of a person*

[31] SC Application No 471/2000, SC Minutes of 08.08,2003; Reported in (2003) 2 Sri.LR 63.
[32] SC Application No 471/2000, SC minutes of 10.12.2002
[33] SC (Application) No. 700/2002, S.C. Minutes of 26.07.2004

and the remedy based on the said right would be reciprocal. Furthermore, when the rights of a person who has been subjected to torture or to cruel, inhuman or degrading treatment or punishment is protected by Article 11 of the Constitution which could be treated as a lesser infringement, compared with the situation where the death occurs as a result of torture or cruel, inhuman or degrading treatment or punishment, it is difficult to comprehend as to how the graver infringement could be ignored."

It was therefore held in ***Wewalage Rani Fernando***'s case that Article 13(4) should be interpreted broadly to mean that the Article recognizes the right to life and Article 13(4) read with Article 126(2) of the Constitution would include the lawful heirs and/or dependents to be able to bring an action in a situation where death has occurred as a result of violation of Article 11.

We hold that when either executive action or inaction infringes the fundamental right of right to life resulting in harm or loss to a person or citizen, it is actionable as a constitutional tort and security lapses and anomalies on the part of the executive that are writ large upon the facts in the case render the socially harmful behaviour liable to be cast in compensation and though the value of the lives lost is inestimable and beyond measure, it is not just and equitable that the state is not ordered to make amends and reparation and the Berlin Declaration on Upholding Human Rights and the Rule of Law on Combating Terrorism adopted by the ICJ affirms that in suppression of terrorism, States must give full effect to the principle of duty to protect. The cardinal duty is couched in the following tenor:

"All states have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons, from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination."[34]

None of the protections granted by Chapter III of the Constitution can really be enjoyed without the provision of safe, secure and protective environment in which a citizen of Sri Lanka may realize full potential of his existence. A person's right to life is, thus, not negotiable. The inability of the State to provide for such secure environment is, thus, clearly in breach of and in violation

[34] International Commission of Jurists, adopted on 28 August 2004

of the constitutional mandate and the privilege provided to a citizen of this country under the Constitution.

The Supreme Court has in the exercise of its just and equitable jurisdiction awarded compensation concurrently against both the State and individual actors or omitters- see ***Sirisena and Others v Ernest Perera and Others***[35] (“*..In fact relief has been freely granted previously not only against the State but also against Respondents who were found to have been personally responsible for infringement of fundamental rights. Even if the liability is not based on delict but liability sui generis under public law, this Court has the power under Article 126(4) read with Article 4(d) to grant relief against the offending public officer and the State…”) ; **Samanthilaka v Ernest Perera and Others***[36] (.. “*The State, necessarily, acts through its servants, agencies and institutions: But it is the liability of the State and not that of its servants, agents or institutions that is in issue. It is not a question of vicarious liability. It is the liability of the State itself….”*); ***Amal Sudath Silva v Kodituwakku, Inspector of Police and Others***[37] (“…*Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this Court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion*…”).

Based on these indicia the State should pay fair compensation for the pain, agony, distress, suffering and destruction undergone by the victims and families as a result of the contraventions by the Respondents we have identified. We direct the State to pay Rs 1 million as such compensation to the Victim Fund we have already ordered to be established at the Office for Reparation. This sum would be in addition to the compensation that the State had decided to pay by way of its cabinet decision, on which we have called for a report through the Attorney General.

[35] (1991) (2) Sri.LR 97 at 125 and 127
[36] (1990) 1 Sri.LR 318 at 324
[37] (1987) 2 Sri.LR 119 at 126

Recommendations

Before we proceed to summarize the compensation payable and part with the judgment, we must express our shock and dismay at the deplorable want of oversight and inaction that we have seen in the conduct of affairs pertaining to Security, Law and Order and Intelligence. There are glaring examples of a lack of strategic co-ordination, expertise and preparedness that need a critical examination as to the way forward. The failures that eventuated in the Easter Sunday attacks and the concomitant deaths and devastations have left behind an indelible blot on the security apparatus of the Country and this Country which is blessed by a multi-cultural and multi religious polity cannot be left to the vagaries of these follies and made to suffer leading to violence, fear, apprehension and uncertainty. These events must recede into oblivion but they remind us starkly of the necessity to effect legislative, structural and administrative changes.

It is evident from the evidence placed before us that there is an urgent need to place the National Security Council (NSC) on a statutory footing and its composition specified with clarity so that there are no maneuvers to manipulate hostile exclusions and selective inclusions. The affidavit testimonies and the large volume of documents we have perused highlight the necessity to revamp the security systems and intelligence structures so that the expanding threats of terrorism and emerging challenges could be nipped in the bud and arrested as this Country cannot descend into anarchy once more. The course of conduct we have scrutinized demonstrates a woeful lack of expertise in intelligence gathering and dissemination among important individuals entrusted with the task. For instance, the office of Director, SIS and CNI must be occupied by individuals with necessary skill and expertise and the conduct of the Respondents who held the office, upon receiving sensitive intelligence, shows a lack of awareness and understanding of strategic vision. We recommend that the duties and functions of the office of Chief of National Intelligence (CNI) must be stipulated with definite certainty and the office should be occupied by a person having the necessary expertise, training and qualification.

We now turn to crystallize the orders we would make in addition to the orders, recommendations and directions we have indicated above.

Summary of Orders

1) A Victim Fund must be established at the Office for Reparation, which must formulate a scheme to award the sums ordered as compensation in a fair and equitable manner to the victims and families.
2) The former President, Mathripala Sirisena is ordered to pay a sum of Rs 100 million as compensation.
3) The former IGP Pujith Jayasundera and the former Director, SIS Nilantha Jayawardena are directed to pay Rs 75 million each as compensation.
4) The former Secretary, Defence Hemasiri Fernando is ordered to pay Rs 50 million as compensation.
5) The former CNI Sisira Mendis is directed to pay Rs 10 million as compensation.
6) The State is ordered to pay Rs 1 million as compensation.

The State and the individual respondents named above must make their payment of compensation to the victim fund maintained at the Office for Reparation. Respondents are directed to pay the aforesaid sums out of their personal funds.

7) The Office for Reparation must also investigate the alleged underpayment and nonpayment with regard to the cabinet decision taken to compensate the victims.

8) We also direct the Office for Reparations to invite any generous benefactors and donors to contribute towards the Victim Fund, by way of notifications in the media.

9) A progress report on the scheme of payment and the details about payments made by the above respondents and any benefactors must be made available to this Court within 6 months from today.

10) The Attorney General is directed to coordinate and liaise with the Office for Reparation in giving effect to this order.

11) In view of the observations we have already made as regards the conduct of Director, SIS, we direct that the State take appropriate disciplinary action forthwith against the former Director, SIS Nilantha Jayawardena for his aforesaid lapses and failures.

We wish to place our appreciation of all learned counsel both from the official and unofficial bar for the exemplary manner in which they presented their cases consistent with the highest traditions of the Bar.

Jayantha Jayasuriya, PC
Chief Justice

Buwaneka Aluwihare, PC
Judge of the Supreme Court

L.T.B. Dehideniya
Judge of the Supreme Court

Murdu N.B. Fernando, PC
Judge of the Supreme Court

S. Thurairaja, PC
Judge of the Supreme Court

A.H.M.D. Nawaz
Judge of the Supreme Court

A.L. Shiran Gooneratne
Judge of the Supreme Court

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

In the matter of an Application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Application No. SC/FR/ 329/2017

1. Chandana Suriyarachchi
   No. 55B, Pahala Kosgama,
   Kosgama.

2. G.V. Siripala
   No. 11,
   Salaawa, Kosgama.

3. W.S. Sudath Kumara
   No. 8,
   Salaawa, Kosgama.

4. W. Dharmadasa
   Saraswathie Salon,
   Salaawa, Kosgama.

5. N. Nimalsiri
   Nandana Hotel,
   Salaawa, Kosgama.

6. K.A. Walter
   Kirisena Stores,
   Salaawa, Kosgama.

7. M.D.H. Joseph Perera

Karangoda Tailors,
Salaawa, Kosgama.

8. P.K. Rupasinghe
   No. 317, Boralugoda,
   Kosgama.

9. T.A.D.C. Gunarathna Jayathilake
   No. 67, Vidyala Mawatha,
   Akarawita, Kosgama.

10. W.K. Senarathne
    No. 250,
    Salaawa, Kosgama.

11. W.K.P.D. Senarathna
    No. 15/2/B, Salon Purnima,
    Salaawa, Kosgama.

12. W.M. Kamal Priyantha
    No. 5/A, Upper Floor of Hemantha Hardware,
    Salaawa, Kosgama.

13. H.W. Charith Widuranga
    No. 217, Widuranga Salon,
    Salaawa, Kosgama.

14. N. Ranasinghe
    No. 272, Lenadora Hotel,
    Salaawa, Kosgama.

15. Deraniyagala Janak Priyalal
    No. 30/1/B, High Level Road,
    Salaawa, Kosgama.

16. J.A.S.P.C. Jayasuriya
    Sanjeewa Food Corner,
    No. 30/1/1/A, Salaawa, Kosgama.

17. W.C. Senarath Kumara
    Super Son Institute,
    Upper Floor of Hemas Hardware,
    Salaawa, Kosgama.

18. H.M.N. Bandara
    Sala Factory Hotel,
    Salaawa, Kosgama.

19. D.G.B. Pathma Kumara
    No. 20/8, Akarawita, Kosgama.

20. K.A.D. Priyantha Kumara Thilaka
    No. 256, New Sala Maha Kade,
    Salaawa, Kosgama.

21. S.H. Hemantha Priyankara Rodrigo
    Hemas Hardware,
    Salaawa, Kosgama.

22. P.K.D.K. Perera
    No. 55, Salaawa, Kosgama.

23. R.H. Kamal Surendra
    Kamal Motors, Near the Hospital,
    Salaawa, Kosgama.

24. H.V. Premalalachandra
    No. 25/1, Thalakoratuwa,
    Arapangama, Kosgama.

25. R. Mallika Kariyawasam Perera
No. 33, Hospital Road,
Salaawa, Kosgama.

26. M.A. Helan Thushari
No. 277/01, Salaawa,
Kosgama.

27. N.W.H.L. Saman Kumara
No. 9B, Athkam Niwaasa,
Salaawa, Kosgama.

28. N.A. Hemantha Kumara
No. 27B, Athkam Niwaasa,
Salaawa, Kosgama.

29. R.A. Shalika Sandaruwani
No. 8/1, Athkam Nowaasa,
Salaawa, Kosgama.

30. W.A. Dhammika Sajee
No. 22A, Athkam Niwaasa,
Salaawa, Kosgama.

Petitioners

Vs.

1. Secretary
Ministry of Defence,
Baladaksha Mawatha,
Colombo 3.

2. Secretary
Ministry of Disaster Management,
Vidya Mawatha, Colombo 7.

3. Secretary
   Ministry of Finance,
   Colombo 1.

4. District Secretary
   District Secretariat of Colombo,
   Narahenpiya, Colombo 5.

5. Divisional Secretary
   Divisional Secretariat,
   Seethawaka, Hanwella.

6. Commander of the Army
   Army Headquarters,
   Colombo 1.

7. Hon. Anura Priyadharshana Yapa
   Minister of Disaster Management,
   Vidya Mawatha, Colombo 7.

7A. Hon. Chamal Rajapaksa
   Minister of Disaster Management,
   Vidya Mawatha, Colombo 7.

8. Hon. Mangala Samaraweera
   Minister of Finance and Mass Media,
   The Secretariat Building,
   Lotus Road, Colombo 1.

9. Hon. Susil Premajayantha
   Minister of Science, Technology and Research,
   No. 408, Galle Road,
   Colombo 3.

10. National Council for Disaster Management
Ministry of Disaster Management,
Vidya Mawatha, Colombo 7.

11. Chief Valuer
Department of Valuation,
'Valuation House', No. 748,
Maradana Road, Colombo 10.

12. K.C. Niroshan
Additional District Secretary,
District Secretariat of Colombo,
Narahenpiya, Colombo 5.

13. Honourable Attorney-General
Attorney General's Department,
Colombo 12.

Respondents

Before : **Honourable L.T.B. Dehideniya, J**
Honourable E.A.G.R. Amarasekara, J
Honourable Yasantha Kodagoda, PC, J

Appearance: Shantha Jayawardena with Chamara Nanayakkarawasam and Hiranya Damunupola for the Petitioners instructed by Sunil Watagala.
Rajiv Goonethilake, Senior Deputy Solicitor General for the 1st to 6th and 11th Respondents.

Argued on: 5th May, 2022

Written Submissions:
For the Petitioner filed on 15th October 2020 and 26th October 2022
For the Respondents filed on 20th October 2020 and 27th May 2022

Decided on: 12th January, 2023

Yasantha Kodagoda, PC, J

This judgment relates to an Application filed by the Petitioners in terms of Articles 17 and 126 of the Constitution. Following the Application being supported for the grant of leave to proceed, the Supreme Court has granted leave in terms of Article 12(1) of the Constitution.

Case for the Petitioner

All the Petitioners are residents of the Salawa area in Kosgama. At the time of the incident referred to in this judgment, they had engaged in various businesses and vocations, and their business establishments and places of work were also located in the same area.

In 1994, the Sri Lanka Army established an Army camp at the site of the former State Timber Corporation in Salawa, located adjacent the Colombo – Avissawella main road, in Kosgama. Within the army camp was one of the main armories of the Sri Lanka Army. On the night of 5th June 2016, an explosion occurred within the army camp (not suspected of having been intentionally caused), which resulted in the entirety of the armory catching fire and a series of dangerous and huge explosions occurring. Projectiles (some of which were parts of explosives) from within the camp flew out, resulting in a large number of houses and business establishments in the area of Salawa catching fire and getting fully or partly destroyed. The entire armory was destroyed.

The Petitioners and other inhabitants of the area who lived within a 3 km radius were initially evacuated from the area and temporarily located for several weeks. After several weeks, they were permitted to return to their premises. In addition to the Petitioners, approximately 250 other families were also affected by this explosion and the ensuing fires.

Based on the degree of damage caused, those who could not live in their houses, were provided money to rent-out alternate housing. After some time, the police recorded statements of the Petitioners and others whose properties and business were affected.

The Petitioners have presented to this Court details of damage caused to their dwellings, personal belongings, business premises and to their cultivation and livestock.

The Petitioners have stated that the Cabinet of Ministers took certain decisions regarding this matter and thereby authorized the granting of relief to the victims of the explosion and fire, which included the Petitioners. The Cabinet of Ministers had also allocated funds for the payment of compensation. A committee chaired by Dr. S. Amalanadan, an Additional Secretary to the Ministry of Disaster Management had been established to assess and determine compensation payable to the affected persons. The 1st, 19th, 20th and 21st Petitioners were members of the committee.

Meanwhile, as part of the scheme put in place by the government, from about 15th June 2016, officers of the Valuation Department visited the area, inspected affected sites and engaged in a process of assessing the losses and damages suffered by the affected families. Though not the subject matter of this Application, the Petitioners have alleged that the losses suffered by them were not properly assessed by these officials. Officers of the Sri Lanka Army have also engaged in a process of assessing the damage suffered by the residents of the area. Some of the residential properties which had been partially damaged had been repaired by members of the armed forces and returned to their respective former occupants. However, the Petitioners claim that their business premises were not repaired. The Petitioners have also received monetary compensation from the government. However, they allege that in comparison with the loss to their property and businesses, the compensation so received was grossly inadequate. The Petitioners claim that they did not receive any compensation for loss of income from their business activities for the period following the incident. Once again, this aspect is also not the subject matter of this Application.

Meetings of the above-mentioned committee had been held on 15th, 22nd and 29th July 2016. The 12th Respondent – K.C. Niroshan, Additional Divisional Secretary who was also a member of the committee had openly showed his displeasure towards the Chairman of the committee. The Petitioners claim that the 12th Respondent 'scuttled' progress being achieved by this committee, as he disliked being subordinate to the Chairman Dr. Amalanadan. When the Petitioners who were members of the committee requested the 12th Respondent to convene meetings of the committee so that progress could be made with regard to payment of compensation, the 12th Respondent is alleged

to have told them that he cannot work subordinate to Dr. Amalanadan, referring to him in a derogatory term.

Once compensation payable to the affected persons had been computed, those amounts were notified to them and those dissatisfied had presented administrative appeals. Sequel thereto, some amounts had been increased. The Petitioners have presented to this Court details of compensation they received and reasons as to why they claim that the amounts given by the government is insufficient. Further appeals presented by the Petitioners to higher authorities have not yielded a positive outcome.

In view of the foregoing, on or about 6th September 2016 the 1st Petitioner acting on behalf of the Petitioners has presented a complaint in this regard to the Human Rights Commission of Sri Lanka (hereinafter sometimes referred to as 'the HRCSL' and sometimes as 'the Commission') seeking the following reliefs:

(i) Cause a re-assessment of the damages caused to movable properties of those who are disputing the original assessment carried out by government authorities.
(ii) Cause a declaration to be issued disclosing the criteria applied for the assessment of damages to movable and immovable properties.
(iii) Cause a direction that the amount expended by the Army to carryout temporary repairs not be deducted from compensation payable.
(iv) Cause the grant of relief to businessmen and others whose livelihoods have been affected until their businesses / livelihoods are revived.
(v) Cause the grant of compensation for damages and destruction caused to agricultural lands, farms and vehicles.

On 29th December 2016, the HRCSL conducted an inquiry into the complaints. The 1st, 2nd, 3rd, 5th, 6th, and 11th, Respondents were represented at the inquiry. On 23rd January 2017 and 29th March 2007 further sessions of inquiry were held. At the end of the proceedings of 29th March 2017, the Commission observed the need for the following:

(i) A proper assessment of the damage caused to all property, with the participation of officers who have technical expertise;
(ii) Determine the compensation payable for loss of money, jewellery and misplacement of property;

(iii) Provide relief or concessions with regard to inability on the part of the Petitioners to pay for goods purchased and loans obtained;
(iv) Establishment of a fair procedure to consider objections and appeals submitted in respect of assessment of compensation.

On 3rd May 2017, the Commission announced the following 'interim recommendation' ("P19"). The Petitioners state that the 1st to 3rd, 5th, 6th and 11th Respondents expressed agreement with these interim recommendations.

(i) Establishment of an Appeals Committee comprising of the Respondents.
(ii) Preparation of a template to obtain information regarding damages caused to property and distribute such forms.
(iii) Provide fresh opportunity for dissatisfied parties to present appeals.
(iv) Collect information pertaining to damage within 14 days of the distribution of the above-mentioned forms.
(v) Prepare assessments in respect of every application.
(vi) Report to the HRCSL regarding the reason for the staying of the monthly interim payment of Rs. 50,000/=.
(vii) Look into the welfare of children.

In terms of this 'interim recommendation' made by the HRCSL, the Respondents were required to submit a report to the HRCSL before 5th June 2017. They were required to provide information regarding the status of implementation of the recommendations. The Petitioners claim that the Respondents did not take any steps to implement the recommendations of the HRCSL and did not submit a Report to the HRCSL. In the circumstances, by letter dated 30th June 2017, the Commission called upon the Chief Assessor to inform the HRCSL by 14th July 2017 regarding steps taken to implement the recommendations of the HRCSL. Subsequently, the HRCSL called upon both the Petitioners and the Respondents for a further inquiry to be held on 23rd August 2017. On that date, only a nominee of the 2nd Respondent attended the inquiry. He notified the HRCSL that the Ministry of Disaster Management was not prepared to establish the mechanism recommended by the HRCSL. He has further stated that the said Ministry is of the view that reliefs have been adequately provided to the Petitioners.

In view of the foregoing, the Petitioners claim that the Respondents have failed to give effect to the interim recommendations of the HRCSL. The Petitioners further claim

that the Respondents have no valid reason to refuse to comply with the recommendations made by the HRCSL. In the circumstances, the Petitioners claim that the failure and refusal on the part of the Respondents to implement the interim recommendations made by the HRCSL is an infringement of the Fundamental Rights of the Petitioners guaranteed under Article 12(1) of the Constitution.

Case for the Respondents

The case for the Respondents was presented by the 2nd Respondent – Secretary to the Ministry of Disaster Management.

The position of the Respondents is that sequel to the explosion and fire referred to in the Petition, a mechanism was developed to assess the damage caused to residents of the affected area, and in terms of that mechanism, following the police having recorded the statements of those affected, officers of the valuation department visited the area, examined affected premises and engaged in a valuation. As an interim measure, all affected persons were given an interim allowance of Rs. 50,000/= per month for a period of 3 months, for temporary accommodation. An allowance of Rs. 50,000/= per month had been paid due to loss of monthly income and Rs. 10,000/= per month had been paid to workers of damaged business premises and owners of damaged three-wheelers. All the affected houses were repaired by members of the Sri Lanka Army. Thereafter, in terms of certain decisions taken by the Cabinet of Ministers, compensation had been granted to those affected by the incident.

The 2nd Respondent presented to this Court detailed information regarding compensation awarded to the Petitioners. The 2nd Respondent has denied the allegation that the compensation granted was grossly inadequate. His position is that the government made maximum effort to compensate the victims by rebuilding the affected premises and establishing a mechanism for valuation of damages and payment of compensation. Those who were dissatisfied with the award of compensation were provided an opportunity of presenting an appeal.

According to the 2nd Respondent, following the HRCSL having made certain interim recommendations on 3rd May 2017, the then Secretary to the Ministry of Disaster Management had by letter dated 31st August 2017 (R1) written to the HRCSL explaining why in accordance with the interim recommendation made by the HRCSL, a separate

mechanism was not established afresh to consider the grievances of the Petitioners and the others affected by the incident.

The position advanced by the 2nd Respondent is that two opportunities were given to the Petitioners to present appeals against valuation of damage and losses caused and regarding the compensation granted.

The concluding position of the 2nd Respondent is that in view of the mechanism established by the State to assess the damage, and award compensation to affected persons and the award of interim relief and compensation, the interim recommendations made by the HRCSL became redundant.

According to the 2nd Respondent, even as at 16th October 2018, the inquiry regarding this matter before the HRCSL was pending and no final determination had been made by it. Further, no action has been taken by the HRCSL regarding the alleged non-compliance of the interim recommendations made by the HRCSL.

Submissions made on behalf of the Petitioners

The primary submission made by learned counsel for the Petitioners was that there was a failure and refusal on the part of the Respondents to comply with the 'interim recommendation' made by the HRCSL that a mechanism (as recommended by the HRCSL) be put in place and implemented for the purpose of assessing / re-assessing the damage and losses caused to the Petitioners and the other inhabitants of the area and awarding compensation based upon acceptable criteria. It was submitted that such failure and refusal was arbitrary.

Learned counsel drew the attention of this Court to section 10(b) of the Human Rights Commission of Sri Lanka Act (hereinafter sometimes referred to as 'the Act') and submitted that the Commission has been empowered to inquire into and investigate complaints pertaining to infringement of fundamental rights and to provide resolution thereof by conciliation and mediation. He submitted that the interim recommendations which the Commission made were 'with the agreement of the 1st to 9th Respondents'. He submitted that the Act does not state that a recommendation made by the Commission is not binding. Therefore, he submitted that there was an obligation in law for the Respondents to comply with the recommendations made. Citing the case of ***Sri***

Lanka Telecom Ltd. v. Human Rights Commission of Sri Lanka*, [SC Appeal No. 215/12, SC Minutes 1st March 2017]* learned Counsel submitted that the Supreme Court has held that a recommendation made by the HRCSL can be judicially reviewed in the exercise of the writ jurisdiction. Citing an excerpt from the judgment, he submitted that the Supreme Court had rejected the notion that as a decision of the Commission was a mere recommendation which could not be enforced, and that nothing could be done in an instance where a recommendation is not implemented.

Learned counsel for the Petitioners submitted that if officers of the state are permitted not to implement recommendations made by the HRCSL, the entire purpose for which the Commission has been established will be rendered nugatory and futile.

In view of the foregoing, learned counsel for the Petitioners submitted that this Court should determine that the refusal on the part of the Respondents to carry-out the interim recommendations of the Human Rights Commission of Sri Lanka was an infringement of the fundamental rights of the Petitioners.

Learned counsel for the Petitioners further submitted that if a state official does not comply with a recommendation made by the HRCSL, the Commission may acting in terms of section 15(8) of the Act present to the President a full report on the matter to be placed before the Parliament. He stressed that a public authority should not be permitted to arbitrarily refuse to give effect to a recommendation made by the HRCSL, taking up the position that a recommendation of the HRCSL is not binding.

Submissions made on behalf of the Respondents

Learned Senior Deputy Solicitor General submitted that the legal issue presented to this Court was unique, in that there was no judicial precedent on the questions (i) whether the state was legally obliged to give effect to a recommendation made by the Human Rights Commission of Sri Lanka, and (ii) whether non-implementation of a recommendation made by the HRCSL amounted to an infringement of a fundamental right. He submitted that the failure or refusal of the Respondents to implement the 'interim recommendations' made by the HRCSL sequel to a complaint inquired into by the Commission does not give rise to an infringement of a fundamental right of the complainant. He further submitted that the HRCSL Act contains a specific mechanism to deal with a possible failure or refusal to carry-out such recommendation. In terms of

section 15(8) of the HRCSL Act, the HRCSL may prepare and submit a report on the matter to the President who is required to cause such report to be placed before Parliament. Learned Senior DSG submitted that the report of the Commission being submitted to the President and subsequently placing it before the Parliament is to enable policy or administrative action to be taken as regards the impugned conduct and for the head of the Executive (the President) and for the legislature (Parliament) to consider 'a deviation in policy or action being taken, if deemed appropriate'.

Responding to the primary allegation made by the Petitioners against the Respondents, learned Senior Deputy Solicitor General for the Respondents submitted that by letter dated 31st August 2017 ("R1"), the 2nd Respondent had explained to the Commission reasons as to why the interim recommendations of the Commission could not be given effect to. The Commission had thereafter not made any further decisions or recommendations, and thus, the matter complained of remains 'within the jurisdiction of the Commission for a final decision'. Thus, as the matter is still before the HRCSL, the Petitioners cannot complain of an infringement of their fundamental rights. He also submitted that the refusal on the part of the Respondents to implement the interim recommendations of the HRCSL was reasonable and certainly not arbitrary and therefore it cannot be alleged that the Respondents had infringed the fundamental rights of the Petitioners.

Learned Senior DSG further submitted that as revealed in "R1", (i) two rounds of assessments had been carried out by state officials of damaged and destroyed property, (ii) wide publicity had been given to enable dissatisfied persons to present appeals in respect of assessments carried out, (iii) appeals had been accepted even though some appeals had been presented out of time, (iv) Rs. 50,000/= interim allowance had been given to affected persons till such time the Army reconstructed their damaged dwellings and other places affected, (v) the payment of the interim allowance had been terminated only after the affected persons were resettled, and (vi) needs of affected school children were fulfilled. In the circumstances, he submitted that carrying out the interim recommendations made by the HRCSL was made redundant. He pointed out further that, as revealed in "R11" the 30 Petitioners have been adequately compensated, with the highest amount being Rs. 30 million being paid to the 21st Petitioner.

Concluding his submission, learned Senior DSG submitted that it appears that the HRCSL not having taken any action following the receipt of "R1" reveals that the Commission was satisfied with the action taken by the Respondents. He submitted that the Commission had not taken any action under section 15(8) of the HRCSL Act, since it was content that meaningful action had been taken by the Respondents and hence no further action was necessary. In view of the foregoing submissions, learned Senior DSG submitted that the Respondents had not infringed the fundamental rights of the Petitioners and therefore urged that this Application be dismissed.

Consideration of material placed before Court, submissions made by Counsel and conclusions reached

A consideration of the material placed before this Court and the submissions made by learned counsel for the Petitioners and the Respondents reveal clearly that the ground of complaint before this Court is that the Respondents have failed to give effect to and implement certain recommendations made by the Human Rights Commission of Sri Lanka referred to in these proceedings as 'interim recommendations'. The contention of the Petitioners was that the non-implementation of these recommendations was arbitrary and unreasonable, and that such conduct on the part of one or more Respondents amounted to an infringement of the fundamental right to equal protection of the law, guaranteed under Article 12(1) of the Constitution.

For the purpose of clarity, it must be noted that in the present Application, the Petitioners do not allege that their fundamental rights were infringed by the government by non-payment or insufficient payment of compensation. What they allege is that the non-implementation of the interim recommendations made by the Commission by officials of the government, amounts to an infringement of their fundamental right to equal protection of the law guaranteed by Article 12(1) of the Constitution.

In view of the foregoing circumstances, it is necessary to consider whether the Respondents are *'guilty'* of what has been alleged by the Petitioners, namely unreasonable and arbitrary non-implementation of the interim recommendations made by the HRCSL. However, prior to considering that aspect of the case, it is my view that a survey and examination of certain provisions of the HRCSL Act would be useful for the purpose of appreciating the 'determination of the truth' and 'dispute resolution

function' of the HRCSL and the legal significance of 'recommendations' of the Commission connected with these functions.

The centerpiece so to say of the legislative infrastructure and the ensuing system created by the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 (hereinafter referred to as 'the Act') towards the promotion and protection of fundamental rights, is an institution created by the Act called the *"Human Rights Commission of Sri Lanka"* (HRCSL), a body corporate, consisting of five members having knowledge of or practical experience in matters relating to human rights, and appointed by the President on the recommendation of the Constitutional Council. It is evident that the HRCSL Act has been enacted (a) for the promotion and protection of fundamental rights, (b) to advise and assist the government on the manner in which fundamental rights may be promoted and protected by legislative and administrative means, (c) **provide for the ascertainment of truth, and for dispute resolution with regard to alleged infringement or imminent infringement of fundamental rights**, (d) to facilitate compliance with international norms and standards relating to human rights, and (e) to create awareness regarding human rights. The Human Rights Commission of Sri Lanka is a 'national human rights institution' (generally referred to as a "NHRI") and is called upon to perform vital and critically important functions aimed at the promotion and protection of Human Rights.

The creation of an independent, para-judicial or administrative state (nevertheless independent) institution statutorily empowered to engage in investigation and inquiry, ascertainment of the truth, possessing authority to engage in dispute resolution pertaining to infringement of human rights, and for the performance of a multitude of other functions aimed at the promotion and protection of human rights, is a globally recognized, critically important norm. An independent, competent and effective national human rights institution is a cornerstone of a country's mechanism for the promotion and protection of human rights. In Sri Lanka's context, it is aimed at subordinately augmenting the role of the Supreme Court in the area of disputes arising out of alleged infringement / imminent infringement of fundamental rights.

Needless, I assume to emphasize, when a dispute exists pertaining to the infringement or imminent infringement of a fundamental right and a complaint is made to the Commission, engaging in truth-seeking through mechanisms such as investigation and

inquiry, thereby ascertaining the truth, causing the dispute to be resolved, and awarding relief to the affected person, is only one function of the Commission. The investigative, inquisitorial and dispute resolution mechanisms provided for in the Act are subordinate and alternate to the Constitutional mechanism created by Article 17 read with Article 126 of the Constitution for the protection of fundamental rights through judicial adjudication of disputes pertaining to the infringement and imminent infringement of fundamental rights. A careful consideration of the provisions of the Act clearly reveals that the HRCSL has not been created to make inroads towards the jurisdiction of the Supreme Court. Nor has the Commission been established to create a parallel system for judicial or quasi-judicial adjudication of disputes.

Nevertheless, it must be appreciated that the investigational, inquisitorial and dispute resolution mechanisms created by the HRCSL Act is aimed at *inter-alia* providing the public a mechanism to which they may have convenient and expeditious access for the resolution of disputes arising out of the alleged infringement of their fundamental rights and to obtain relief, without having to access the Constitutional mechanism by invoking the jurisdiction of the Supreme Court. In the circumstances, for the purpose of having fundamental rights related disputes resolved and to obtain relief, if they choose to, the public need not go through what is now observable as being a cumbersome, complicated, time-consuming and possibly expensive method of judicial adjudication of disputes.

A consideration of the HRCSL Act amply reveals that the Act had been enacted with the noble objectives of *inter-alia* promoting and protecting fundamental rights and to provide people with an alternate and convenient route to have disputes resolved and to secure relief. I repeat, while emphasizing that the purpose for which the Human Rights Commission of Sri Lanka has been established by the Act is manifold, ascertainment of the truth and dispute resolution pertaining to alleged infringement and imminent infringement of fundamental rights is only one such purpose. I observe that if the system for dispute resolution of the Commission works efficaciously, it will, while providing relief to the public, also serve the invaluable purpose of lessening the burden on the Supreme Court. Such reduction of the inflow of fresh fundamental rights Applications will contribute towards making the justice delivery system more efficient. However, I must state that the efficacy of the system created by the HRCSL Act, is a different matter altogether.

In terms of section 10 of the HRCSL Act, the **functions** of the Commission include – the duty to **inquire into and investigate complaints** regarding infringement or imminent infringement of fundamental rights, and in accordance with the provisions of the Act provide for resolution thereof by **conciliation** and **mediation**. For the purpose of giving effect to the functions of the Commission, section 11 of the HRCSL Act has conferred on the Commission certain **powers**. Those powers include the power to **investigate** any infringement or imminent infringement of fundamental rights in accordance with the provisions of the Act. Section 14 of the Act provides (a) the manner in which the Commission may take cognizance of an alleged infringement or imminent infringement of a fundamental right (on its own motion or on a complaint made to it), (b) who may present a complaint (an aggrieved party, aggrieved group of persons, or a person acting on behalf of an aggrieved person or a group of persons), (c) what type of matter the Commission may investigate into and limitations thereto [allegations of the infringement or imminent infringement of a fundamental right caused (i) by **executive or administrative action** or (ii) as a result of an act which constitutes an action under the Prevention of Terrorism Act committed by **any person**]. Section 18 confers on the Commission powers to enable it to conduct an inquiry, including the power to summon persons to testify, examine witnesses, record their evidence under oath or affirmation, and to procure documents.

According to section 15(2) of the HRCSL Act, where an investigation conducted by the Commission under section 14 discloses the infringement or imminent infringement of a fundamental right, the Commission shall have the **power** to refer the matter, where appropriate, for **mediation** or **conciliation**. Under section 15(3) of the HRCSL Act, in the following situations, namely (i) where it appears to the Commission that it is not appropriate to refer the matter for conciliation or mediation, or (ii) where it appears to the Commission that it is appropriate to refer the matter for conciliation or mediation, or (iii) where it appears to the Commission that it is appropriate to refer the matter for conciliation or mediation, but all of any of the parties object or objects to conciliation or mediation, or (iv) where the attempt at conciliation or mediation is not successful, the Commission may –

(a) **recommend to the appropriate authorities**, that prosecution or other proceedings be instituted against the person or persons infringing such fundamental rights,

(b) **refer the matter to any court having jurisdiction** to hear and determine such matter in accordance with the rules of court as may be prescribed therefor, and within such time as is provided for invoking the jurisdiction of such court by any person, or

(c) **make such recommendations as it may think fit, to the appropriate authority** or person or persons concerned, with a view to preventing or **remedying** such infringement or the continuation of such infringement.

It would thus be seen that upon the receipt of a complaint alleging infringement or imminent infringement of a fundamental right, the Commission **shall** in terms of section 10 paragraph (b) of the Act, investigate and inquire into the incident said to have given rise to the alleged infringement. When one considers section 15(5), it is evident that during the inquiry, the principles of *audi alteram partem* should necessarily be adhered to by the Commission. Where the investigation and inquiry reveal an infringement or imminent infringement of a fundamental right, in terms of sections 14 and 15(3) of the Act, the Commission has been vested with a degree of discretionary authority (following a consideration of the findings of such investigation and inquiry) to refer the matter for mediation or conciliation of the dispute for the purpose of resolution of the dispute.

Notwithstanding the method of dispute resolution resorted to or attempted (may it be mediation or conciliation) the Commission may at its discretion where it deems doing so to be appropriate, make a **recommendation** aimed at the resolution of the dispute. That is primarily for the purpose of affording relief to the person whose fundamental rights have been infringed. The voluntary character of mediation and conciliation as dispute resolution mechanisms has been recognized by the Act, as section 15(3) indicates the possibility of a disputant party to object to participate in mediation or conciliation.

In terms of section 16(5), where mediation or conciliation is successful in resolving the dispute, the mediator or conciliator shall report to the Commission the outcome including the settlement arrived at. Section 16(6) provides that where settlement has been arrived at through mediation or conciliation, the Commission shall make such **directions** (including directions as to the payment of compensation) as may be necessary to give effect to the settlement reached.

Section 15(3) provides that the Commission has been empowered to make a recommendation (i) notwithstanding the outcome of mediation or conciliation, and (ii) even in instances where mediation or conciliation has not taken place either because the Commission has deemed that engaging in such process is inappropriate, or one or both parties have declined to participate in mediation or conciliation, or the attempt at dispute resolution through mediation or conciliation has not been successful. However, it is evident from the scheme of the Act that the Commission may make a recommendation only after conducting an investigation and inquiry. The Act does not specifically provide for the Commission to make an 'interim recommendation'. However, taking into consideration the objects and purposes for which the Parliament has enacted Act No. 21 of 1996 and thereby established the Human Rights Commission of Sri Lanka, I find nothing contrary to law for the Commission in appropriate circumstances (following an investigation and inquiry conducted and a finding being arrived at that a fundamental right has been infringed or is imminently likely that a fundamental right will be infringed), making appropriate 'interim' recommendations.

In the instant case, an examination of the positions taken up by the Petitioners and the Respondents and the material placed before this Court, it is evident that by letter dated 6th September 2016 ("P15") the Petitioners have presented a complaint to the HRCSL regarding the insufficiency of the relief granted by the government in respect of the losses and damage suffered by them arising out of the explosion and fire that occurred at the Salawa Army camp on 05.06.2016. On 29.12.2016, 23.01.2017 and 29.03.2017 an '**inquiry**' into this complaint had been conducted by the HRCSL. That has been with the participation of the related Respondents. One can reasonably assume (and such position was not disputed by the parties) that associated with the inquiry, the Commission would have conducted an '**investigation**' into the complaint, as well.

Following the inquiry, whether the Commission attempted to resolve the dispute between the Petitioners and the Respondents through mediation or conciliation, is not clear. Neither party has taken up a specific position in that regard. However, according to the Petitioners, at the end of the inquiry held on 29.03.2017, the HRCSL made certain interim recommendations (which the Commission was entitled to) and they were read over by the Chairperson of the Commission. ("P19") The Petitioners claim that the 1st, 2nd, 3rd, 5th, 6th and 11th Respondents who were present, 'agreed' with these interim

recommendations. These recommendations were aimed at causing the establishment of a mechanism to provide relief to the Petitioners. An examination of "P19"reveals that agreement was reached between the complainants (Petitioners) and the Respondents regarding the said interim recommendations.

Though the Petitioners claim that the Respondents did not take steps to implement the interim recommendations of the HRCSL and did not submit a Report to the HRCSL, this position is contested by the Respondents. Their position is that in terms of the several Cabinet decisions, government officials continued with the payment of compensation and granting of other relief.

By letter dated 30th June 2017, the Commission has inquired from the Chief Valuer of the government (11th Respondent) regarding steps taken to implement the interim recommendations. Subsequently, on 23rd August 2017, a further session of inquiry had been conducted by the HRCSL. On that date, a nominee of the 2nd Respondent had informed the HRCSL regarding steps taken and details of compensation paid and other reliefs granted to those affected, and in the circumstances had stated that the Ministry of Disaster Management was not prepared to establish a new mechanism as recommended by the HRCSL.

According to the 2nd Respondent, by letter dated 31.08.2017 ("R1") addressed to the Commission, the Respondents have explained in detail action taken for the assessment of the damage and the payment of compensation and had accordingly explained that it would not be necessary to commence a fresh process aimed at re-appraisal of damage and losses and payment of compensation. Basically, the position of the Respondents is that the need to implement the 'interim recommendations' made by the Commission does not arise. That is due to substantial action having been taken by government authorities to provide for an effective mechanism to assess and determine losses and damage caused to the Petitioners, to determine compensation to be awarded and for the payment of compensation and awarding of relief.

The Respondents have also placed before this Court details of compensation and interim relief granted to the Petitioners. An examination of the material placed before this Court by the Respondents reveal that in fact the relevant authorities of the government have discharged their duties towards inhabitants of the area affected by the

explosion and fire by awarding substantial compensation and interim payments. Whether the relief so granted was reasonable and adequate is not the subject matter of this Application.

In view of the foregoing, the allegation made by the Petitioners against the Respondents that they unreasonably and arbitrarily refrained from giving effect to the 'interim recommendations' made by the Commission is in the opinion of this Court, ill-founded. Available material indicates that, as the government on its own volition had provided adequate relief to the Petitioners and others affected by the incident that took place in Salawa on the night of 05.06.2016, the need did not arise from the point of view of the Respondents to give effect to the interim recommendations made by the Commission.

It is also to be noted that upon the receipt of "R1", the Commission does not seem to have resumed its inquiry. In fact, following the receipt of "R1", the Commission seems to have satisfied itself that action taken by the Respondents sufficiently addressed the interim recommendations made by it. The Petitioners have not complained to this Court regarding the non-resumption of the inquiry by the HRCSL. The inference this Court can reasonably reach, is that upon a consideration of "R1", the Commission determined that as the Petitioners have been adequately compensated, no further inquiry was necessary.

In fact, in the instant matter, the Commission does not seem to have made a final recommendation in terms of section 15(3) of the Act. That is of course a matter of concern. The scheme of the HRCSL Act necessitates the Commission to arrive at a finding pertaining to each and every complaint it receives, and to do so within a reasonable period of time. Complaints received by the Commission cannot remain in limbo. However, the Petitioners have not complained to this Court regarding that failure on the part of the Commission to discharge its statutory function, and thus a finding in that regard by this Court is not necessary.

The Petitioners have also not complained to the Commission regarding the alleged non-implementation of the interim recommendations made by the Commission. That is a step that was well within the reach of the Petitioners. The inference to be reached is that the Petitioners themselves at that point of time were satisfied regarding the status of the payment of compensation and other relief granted by the Respondents. In the

circumstances, the Commission has not been called upon to take steps in terms of section 15(8) of the Act to report the matter to the President, who is required to place such report before Parliament.

In view of the foregoing, I am unable to agree with the position advanced on behalf of the Petitioners that the Respondents had arbitrarily and unreasonably failed to give effect to the interim recommendations made by the Commission. I find myself in complete agreement with the submissions made in that regard by learned Senior Deputy Solicitor General.

As the Commission has not made a **recommendation** (final recommendation) under section 15(3) of the Act or any other finding in terms of the HRCSL Act, the question as to whether non-implementation of a recommendation made by the Commission under section 15(3) founded upon unreasonableness or arbitrariness on the part of one or more Respondents, is only a moot point. In any event, as stated above, it is the view of this Court that there is no basis in fact or law to conclude that the Respondents have acted in an unreasonable or arbitrary manner.

However, in my opinion, it is necessary to observe that notwithstanding the fact that what the Commission acting in terms of section 15(3) of the Act is empowered to make *'is only a recommendation'* (terminology used by the learned Senior DSG) as opposed to a *'an order'* or *'a direction'*, it remains incumbent on the government to give effect to such recommendation. They are called upon to do so in the name and style of good governance and in the spirit of its obligations under the Constitution and international law to promote and protect human and fundamental rights. Should the government find itself in any difficulty in giving effect to or implementing the recommendations made by the Commission, as done by the Respondents in this matter, it must communicate its position to the Commission. In any event, section 15(7) read with section 15(8) of the Act gives rise to the requirement that the persons to whom the recommendation has been addressed to, should within the time period specified in the recommendation report back to the Commission on the status of the implementation of the recommendation. Arbitrary or unreasonable failure to comply with a recommendation made by the Commission, will give rise to legal repercussions (particularly from the perspective of Article 12(1) of the Constitution), which in the circumstances of this matter, need not be discussed in this judgment. It would be

pertinent to note that this Court has held in several judgments that arbitrary or unreasonable executive action would under certain circumstances amount to an infringement of Article 12(1).

In view of the foregoing, I hold that the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution have not been infringed by any of the Respondents. Therefore, this Application is dismissed. In the circumstances of this case, no order is made with regard to costs.

As this judgment relates substantially to the functioning of the Human Rights Commission of Sri Lanka and the Commission is not a party to the Application, the Registrar is directed to forward a copy of this judgment to the Chairperson of the Human Rights Commission of Sri Lanka.

Judge of the Supreme Court

L.T.B. Dehideniya, J

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Article 126 of the Constitution read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wijewickrama Manamperig Leelawathi
Udahawatta,
Ulahitiyawa,
Middeniya.

Petitioner

S.C.(FR) Application No. 85/2015

Vs.

1. Priyantha Kulathunga,
   Police Sergeant (54471),
   Sooriyawewa Police Station,
   Sooriyawewa.
2. Chaminda Prabath,
   Police Constable (35079),
   Sooriyawewa Police Station,
   Sooriyawewa.
3. J. Chandana,
   Police Constable (38261),
   Sooriyawewa Police Station,
   Sooriyawewa.
4. Sunil Shantha,
   Police Constable (40720),
   Sooriyawewa Police Station,
   Sooriyawewa.
5. K.A.Sampath Peiris,
   Police Constable (39716),
   Sooriyawewa Police Station,

Sooriyawewa.

6. Sisira Padma Kumara,
Police Constable (61985),
Sooriyawewa Police Station,
Sooriyawewa.

7. N.K.Illangakoon
Inspector General of Police,
Police Headquarters,
Colombo 01.

8. Hon. Attorney General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

Respondents

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BEFORE : **L.T.B. DEHIDENIYA, J.**
A.L. SHIRAN GOONERATNE, J.
ACHALA WENGAPPULI, J.

COUNSEL : Lakshan Dias with Maneesha Kumarasinghe for the Petitioner.
Anuja Premaratne P.C. with Naushalya Rajapaksha for the 1st, 2nd, 3rd and 6th Respondents.
Dushantha Kularatne with Roshan Pathirana instructed by Iranga Wijegunawardena for the 4th and 5th Respondents.
Ms. Induni Punchihewa SC for the Hon. Attorney General.

ARGUED ON : 09th August, 2021

DECIDED ON : 12th January, 2023

ACHALA WENGAPPULI, J.

The Petitioner, one *Wijewickrama Manamperige Leelawathi* of *Middeniya,* invoked the jurisdiction conferred on this Court under Articles 17 and 126 of the Constitution by her petition dated 13.03.2015, and sought a declaration that the fundamental rights guaranteed to her son *Liyana Arachchige Samantha*, under Articles 11, 12(1), 13(3),13(4) and 13(5), had been violated by the executive or administrative actions of the 1st to 6th Respondents on the allegation that he had died whilst being held under Police custody, after he was severely beaten with pipes, poles and sticks at the time of his arrest. It was averred by the Petitioner in her petition that 35-year old *Liyana Arachchige Samantha* is the third of her six children. He was living with one *Kadukannage Sriyalatha* at the time of his death and earned his living as a mason. He was known to his fellow villagers as *Pallam Sudu Putha or Pallam Sudu Aiya.*

When this application was supported on 09.01.2017, this Court granted Leave to Proceed for alleged infringement of Articles 11, 12(1) and 13(4) of the Constitution.

In describing the chain of events that culminated with the death of her son, the Petitioner stated that her son was arrested by two Police officers on 19.02.2015 between 4.00 – 5.00 p.m. while returning home on his motorcycle. Two Policemen had stopped *Samantha* near the 2nd sluice gate of the 4th bund of *Viharagala* Tank and questioned him about a hidden stock of illicit liquor. Thereupon, the Policemen removed his shirt and tied his hands with it. They had then questioned *Samantha* and demanded to reveal where he had kept his stock of illicit liquor concealed. The questioning by the two Policemen had turned violent,

when they repeatedly assaulted *Samantha* with a hose pipe, which continued even after he had fallen on the ground. *Samantha* was initially crying out loud calling for help but started screaming murder as the assault had continued with heightened intensity. Upon hearing his screams, some of his fellow villagers have come near the place and saw the attack on *Samantha.* He was thereafter taken to his house, that had been lay abandoned after his wife deserted him few years back, and there too the assault continued. He was initially beaten with a black hose pipe by the two Policemen and when joined by another four, who were in uniform and had arrived there in two motorcycles, poles and sticks were also used. The reinforcements had arrived after one of the two Policemen gave a call to someone asking to come. One of the Policemen had emerged from the nearby abandoned house with a bottle in his hand and poured its contents into a 10 litre can, which the officers had brought along with them. Thereafter, the group of Policemen had left the scene, carrying *Samantha* with them, in one of their motorcycles.

The 1st, 2nd, 3rd and 6th Respondents have collectively filed their objections resisting the application of the Petitioner, whereas the 4th and 5th Respondents have filed their objections individually. Despite being represented by their respective Counsel, the 1st to 6th Respondents were unanimous in adopting their stance that the deceased *Liyana Arachchige Samantha* did not die in Police custody and his death had occurred whilst in the custody of Prison officers, who kept him under their detention, until he fulfilled his bail conditions. They also specifically deny having assaulted *Samantha* and assert that he did not disclose of any assault by 1st to 6th Respondents, either to the medical staff or to the Magistrate, who visited him at *Hambantota* Hospital.

According to the 1st, 2nd, 3rd and 6th Respondents, they left their station at 8.30 a.m. on 19.02.2015, as they were to conduct preventive measures under the Excise Ordinance. Whilst on duty, the 2nd Respondent received information that a person possessing a quantity of illicit liquor was travelling near *Viharagala* junction. The officers decided to make a detection and have positioned themselves near *Viharagala* tank, awaiting the arrival of that person. Then they saw one person, matching with the description given by the informant, walking along the bund carrying a can. When they approached him, he started to run, leaving behind his can. After giving a chase, he was apprehended and the officers have identified him as *Samantha* alias *Pallan Sudda,* who by then had several prosecutions for illegally possessing illicit liquor. According to the 1st, 2nd, 3rd and 6th Respondents, *Samantha* had sustained injuries due to a fall, after fleeing from them. They recovered 8250 ml of suspected illicit liquor from the possession of *Samantha.* None of the officers involved with the arrest did assault him. He was then produced at the Station at 6.48 p.m. along with the productions and his personal belongings, which included some cash and a hand phone.

In replying to the allegation of assault, the 1st, 2nd, 3rd and 6th Respondents state that *Samantha* had sustained abrasions "*on the back of his body*" after being tripped over the protruding *Margosa* roots, while running away from them. They further state that, in the following morning it was found that *Samantha* had suffered injuries to his eyebrow, nostrils and cheek after a fall from a cement bench, whilst being kept in the cell of *Sooriyawewa* Police, subsequent to his arrest. The 1st to 6th Respondents tendered their notes of investigation along with their individual affidavits, in support of their respective positions.

The 4th Respondent takes up a preliminary objection in his objections as to the standing of the Petitioner to invoke jurisdiction of this Court and further claims that it was the 2nd and 6th Respondents, who made the arrest and he had merely gone to the place of arrest, having assumed duties just four days before. He makes an allegation that *Samantha* had been brutally assaulted by Prison guards, after he made a failed attempt to escape from their custody. The 4th Respondent challenges the accuracy of the out entry made by the 1st Respondent on 19.02.2015 at 8.30 a.m., which indicated that he (the 4th Respondent) too had left the station with other Respondents and thereby contradicting his claim that he went there only after the arrest was made.

The preliminary objection on the standing of the Petitioner was also taken up by the 5th Respondent. He too claims that *Samantha* was taken to the Station by the 1st Respondent in his motorcycle and despite the arrest was made by the 3rd Respondent, the 1st Respondent had made notes claiming responsibility to the arrest. The 5th Respondent also takes up the position that he had merely visited the place of arrest and *Samantha* had no visible injuries when the latter was handed over to the reservist. The 5th Respondent also alleged that it was the Prison guards, who have assaulted *Samantha* after his failed attempt to escape and as a result his "*condition has got worsen*". He further suspects foul play, in stating that *Samantha* had died after he was administered an injection by the medical staff at *Hambantota* Hospital.

At the hearing, the 4th and 5th Respondents did not pursue their preliminary objection, perhaps in view of the pronouncement made by this Court in rejecting a similar objection, in the Judgment of ***Lama Hewage Lal (Deceased), Rani Fernando (Wife of deceased Lal) and***

Others v Officer in Charge - Minor offences, Seeduwa Police Station and Others (2005) 1 Sri L.R. 40, by observing thus;

> *"It is therefore settled law that the lawful heirs and/or dependants of a person who is deceased as a result of an act of torture should be entitled to a declaration of the violation and compensation"*.

In this instant, the Petitioner is the mother of the deceased person and for that reason she is also one of the lawful heirs of her deceased son. Therefore, she has the necessary standing to invoke jurisdiction of this Court for violation of the fundamental rights of her son.

Now I proceed to consider the merits of her application.

It is the 1st to 6th Respondents' contention that the Petitioner had failed to establish her allegation of violation of fundamental rights that had been made against them to the required degree of proof, being a "*high degree of certainty*". The Respondents further contended that when the several discrepancies in the version of events, as narrated by the witnesses of the Petitioner, are considered along with the reason attributed by the deceased himself as to the cause of the injuries he had suffered to his face, the Petitioner has failed to prove that the fundamental rights guaranteed under Articles 11, 12(1) and 13(4) of the Constitution had been infringed by them.

In ***Malinda Channa Pieris*** **vs. AG. and** ***Others*** *1994 1 Sri LR 1* it was stated that unless the petitioner had adduced sufficient evidence to satisfy the Court, he will fail to obtain a declaration of infringement of his fundamental rights. This has been the accepted norm in International Courts as in ***Fillkastre*** **vs.** ***Bolivia*** *(HRC. 5.11.1991 - UN Committee on Human rights)* the U.N. Committee on Human Rights had

held that there was no violation because the allegations had not been substantiated or corroborated.

A series of decided cases ***Thadchanamoorthi v Attorney-General*** (1980) FRD 129, ***Goonewardene v Perera*** (1983) 1 Sri LR 305, ***Kapugeekiyana v Hettiarachchi*** (1984) 2 Sri LR 153, ***Channa Peiris & Others v Attorney-General*** (ibid) had clearly laid down the principle that the civil standard of persuasion would apply and a high degree of certainty would be required *'before the balance of probability might be said to tilt in favour of a petitioner'* who has been attempting to discharge his burden in proving that his fundamental rights guaranteed in terms of Article 11 had been violated by the respondents, whereas the Judgments of ***Velumurugu v Attorney-General*** (1981) 1 Sri L.R. 406, ***Jeganathan v Attorney-General*** (1982) 1 Sri LR 294, ***Sasanasiritissa Thero and Others v P.A. de Silva, Chief Inspector – CID and Others*** (1989) 2 Sri L.R. 356, and ***Erandaka and Another v Hawlea, Officer in Charge – Hakmana and Others*** (2004) 1 Sri L.R. 268, speaks of "*strict proof*" of such allegations, in view of the seriousness of the consequences it would carry.

Clearly the Petitioner did not witness the alleged assault on her son but, in order to substantiate her allegation, she had relied on the contents of the sworn statements made by witnesses *Kudakella Gamage Kusumawathie, Ratnayakage Niroshan, Ratnayakage Nandasena* and *Kadukannage Sriyalatha,* tendered to Court along with her petition. Perusal of these sworn statements of the persons who claims to have witnessed the assault on the deceased *Samantha* reveal that none of them had individually identified any of the 1st to 6th Respondents, but they merely claim to have seen the assault on the deceased, which was

initially started by two Police officers, who had their Police helmets on. The assault on *Samantha* had continued even after the joining of four other officers, who arrived at the scene subsequently. They were instructed to do so by the two officers, who were already there. Of the several witnesses, *Kusumawahie* had seen two persons assaulting another, who looked like *Samantha* with what appeared to her as a piece of black hose pipe. The person who was being assaulted pleaded with the two, not to assault him and screamed not to kill him. She then asked one of her neighbours, *Niroshan* to verify the identity of the victim, as she could not properly see him due to the distance. *Niroshan* had confirmed that it was *Samantha* who was being assaulted. This witness saw *Samantha* had no clothes on his upper body and his hands were tied in front with a shirt. He further described the manner of the assault on *Samantha*, comparing it with an instance of assaulting an animal. *Kusumawathie* left the place as she did not wish to witness the brutality of the assault. *Nandasena,* another witness, who happens to ride past the place, had seen *Samantha* lying on the ground bare bodied and his hands tied with a shirt. He also noted that one of the two Police officers, who was standing there, had phoned someone claiming that they made an arrest and asking the other person to come over.

In their objections, the 1st, 2nd, 3rd and 6th Respondents admit the fact that they made the arrest and claim that there were altogether seven officers. The 4th Respondent, having denied the Petitioner's claim that four officers joined the other two, had not provided information as to the circumstances under which the arrest was made. This is understandable as the 4th Respondent admits that he had accompanied the 1st Respondent and he "*merely*" went to the place of arrest with the 1st Respondent and that too only after the arrest was made by the 2nd

and 6th Respondents. The 5th Respondent also admits that he too had "*merely*" went to the place of arrest, but only after the 3rd Respondent had made the arrest. Thus, all of the 1st to 6th Respondents admit that they were present at the place where the deceased person was arrested, although the 4th and 5th Respondents claimed they have joined only after the arrest was made. In the circumstances, the identities of the officers who were involved with the circumstances relating to the arrest of the deceased, as alleged by the Petitioner through her witnesses, are established through their own admissions.

Since the Petitioner's primary allegation, that her son's right to freedom from torture, as guaranteed by Article 11 of the Constitution had been violated by the 1st to 6th Respondents, was specifically denied by these Respondents, I must then examine the available material, in order to determine whether she had established that particular allegation to the required degree of proof. In view of the description of the account on the attack, as contained in the sworn statements of the witnesses, *Samantha* was severely beaten with pipes, sticks and clubs by the officers who arrested him. In allegations of violation of the fundamental right to freedom from torture, ordinarily this Court would consider whether such allegations are supported by medical evidence.

One such witnesses, relied upon by the Petitioner in this regard was *Sriyalatha*. Witness *Kadukannage Sriyalatha* was left destitute when her husband decided to leave her with three children and she was living with *Samantha* at the time of his arrest, since his wife too had deserted him by then, also leaving their three children to him.

On 19.02.2015, at about 5.00 p.m., upon hearing *Samantha* was pleading with someone not to kill him, she too had rushed in to

investigate. She then saw *Samantha,* lying on the ground with his hands tied and being beaten by six Police officers. She also saw them dragging him into an abandoned house and continuing with their assault using sticks and clubs. The officers were questioning *Samantha* as to the place where he kept his stock of illicit liquor hidden. After some time, one of the officers came out of the house and poured contents of a white bottle into a plastic can. Thereafter, the Police party left the scene, taking *Samantha* along with them. She was handed over the motorcycle, which belonged to *Samantha* along with its ignition key.

After the death of *Samantha* on 22.02.2015, *Sriyalatha* made a statement to Police as to what she had learnt from *Samantha* during her visit to see him on 20.02.2015 at *Hambantota* Hospital, where she had quoted him making an accusation against the Police officers that he was severely beaten with clubs ("මට හොඳටම පොලු වලින් ගැහුවා"). It is very relevant to note that she made this statement at 3.00 p.m., on 23.02.2015 and the autopsy on the body of *Samantha* was performed by Consultant JMO on the same day at 5.00.p.m. But she made her statements two hours before the commencement of the autopsy and had stated what she learnt from *Samantha. Sriyalatha* had no way of knowing the expert opinion of the Consultant JMO before making her statement to Police that *Samantha's* death was due to multiple deep contusions following assault with heavy cylindrical weapon like wooden clubs. Clearly, she had accurately narrated what she was told by *Samantha* on 23.02.2015, before she made the sworn statement on 11.03.2015, in support of the petition of the Petitioner.

The Petitioner, in order to substantiate her allegation of torture, has relied on the post-mortem report of the Consultant JMO of *Hambantota* Hospital. The post-mortem examination on the body of

Samantha was conducted by Dr. *A.S. Seneviratne* on 23.02.2015, who confirms that the cause of death was due to multiple deep contusions over the head, back of the body and limbs. There were altogether 32 ante mortem injuries on the body. Of these injuries, injury No. 2 was found to be a contusion measuring 3X2 cm on the right eyebrow and injury No. 1 refers to a black eye due to haematoma. There was a laceration on the right lip while multiple contusions were observed on his tongue. These were the four injuries observed on his head by the consultant JMO.

Injury Nos. 5, 6, 7, 8, 9, 10, 11 and 18 were categorised as contusions, located on the anterior and posterior aspects of the length of his right arm whereas injury Nos. 16 and 17, termed as two contusions were also located on the posterior aspect of the left shoulder. There were five contusions (injury Nos. 19, 20, 21, 22 and 23) located on the back of the chest. Examination of the genitals had revealed two abraded contusions on both sides of the scrotum, referred to as injury Nos. 13 and 14, while injury No. 15 referred to a contusion on right foot and injury No. 26 was also a contusion deep into the underlying muscle, located on the back of the left upper thigh.

In addition to above, there were three contusions located on the buttocks (injury Nos. 23, 24 and 25) whereas contusions referred to as injury Nos. 26, 27, and 28, were seen on the back of the left thigh. Injury Nos. 29, 30, 31 and 32 were also contusions but located on the back of the right thigh. The Consultant JMO had also noted the contusions referred to as injury Nos. 27, 28, 29, 30, 31 and 32 were deep and extending into the underlying muscles, as in the case of injury No. 26.

Thus, the witnesses of the Petitioner have supported each other's version of what they saw on the assault on the deceased and corroborated by the findings of the autopsy. The witnesses were consistent with the number of officers who participated with the assault, the stages at which others have joined the initial two, the intensity of the assault, what they have used in the attack, the duration of assault and how *Samantha* cried out.

In view of the specific denial of any assault by the 1st to 6th Respondents, and particularly in view of the allegation of the 4th and 5th Respondents that the deceased had suffered injuries at the hands of the Prison officers, this Court must then examine the available material to conclude whether this is a probable proposition, as to the manner in which the deceased had suffered his injuries.

It is stated in the notes of investigation, in relation to the arrest of *Samantha,* indicated that he had suffered abrasions over back of his lumber region. These injuries were caused when he had tripped himself over protruding *Margosa* tree roots, whilst running away from the officers (1R3). However, when *Samantha* was handed over to the reservist PC 81754 *Saman*, there were no such external injuries noted by that officer. On the following morning, the reservist had seen *Samantha* lying on the cell floor, and upon inquiry, it was revealed that he had fallen off from the bench and had suffered injuries to his right eyebrow and was bleeding. The Officer-in-Charge was notified immediately of this development and *Samantha* was thereafter rushed to *Sooriyawewa* hospital, where he was initially admitted, before being transferred out to *Hambantota* Hospital, later in the same day.

Considering the relative probabilities of suffering abrasions over the lumber region of a person who falls being tripped over roots, while running away in order to escape from his captors, it is significant to note from the Health 1135A form, that *Samantha* did not have a single injury to justify such a proposition. There were no injuries seen on the knees of his legs or to his hands in the form of abrasions, which could reasonably be expected find in the limbs after such a fall, whilst running away from his pursuers. The contradictory positions of the notes of the 1st Respondent with that of the reservist further weakens the reliability of such a claim. After the death of *Samantha,* SI *Pannadas*a of *Sooriyawewa* Police had visited the place of arrest and was shown by a brother of *Samantha*. He had not observed any *Margosa* trees in the vicinity but saw only a *Kumbuk* tree. There was no indication of any protruding roots of that particular tree. He also noted that the house of the witness *Kusumawathie* is the closest to the place of arrest.

In the circumstances, the position of 1st, 2nd, 3rd and 6th Respondents that *Samantha* had suffered injuries to his back after falling down, becomes a proposition on which one could not place any reliance, primarily due to its inherent improbabilities. The other instance in which the 1st to 6th Respondents claim that *Samantha* had sustained injuries was his fall from the bench in the following morning. The 1st to 6th Respondents relied on the inconsistent history given by *Samantha* as to the cause of those injuries. According to them, *Samantha* had claimed that he fell from a push bicycle at the time of his admission to *Sooriyawewa* Hospital and thereafter changed that position to indicate that he had a fall from the cement bench, on which he slept during the night. This factor must be probed further into by this Court.

It is correct that the BHT of *Samantha* (1R1) indicates that the admitting medical officer of *Sooriyawewa* Hospital, had recorded therein "*patient was stating that he got injured after falling from a push bicycle on 19.02.2015*." It is also evident that the word 'motorbike' was cut off from the text and instead, the words 'push bicycle' were inserted. *Samantha* was admitted to hospital by one *Susantha* of *Sooriyawewa* Police Station. The BHT indicates that the admission was made at 8.00 a.m. on 20.02.2015, and at that time the admitting medical officer had noted haematoma around right eye and blood clots in his nostrils.

On the same day, the Officer-in-Charge of *Sooriyawewa* Police Station, reported facts to Magistrate's Court of *Hambantota* under BR 177/15 (1R2) and requested the Magistrate to examine a suspect, who had suffered injuries due to a fall in the cell. The Magistrate had thereafter visited the Hospital at 4.30 p.m. on the same day and when questioned as to how he had sustained the injury, *Samantha* had replied "**නින්ද ගියා වැටිලාද දන්නේ නෑ**". This enquiry was made by the Magistrate, in the presence of the Police officer who described to the Judicial officer as to the nature of the accusation *Samantha* was arrested on. The Magistrate had thereafter decided to enlarge him on bail.

Then why did *Samantha* complain to the admitting medical officer of *Sooriyawewa* hospital at 8.00 a.m., that he fell off from his push bicycle and it was due to that fall his right eye was injured? If he actually fell off from the push bicycle, as he said to the medical officer, then why did he changed that story and replaced it with an obviously a facile version by stating "**නින්ද ගියා වැටිලාද දන්නේ නෑ**" to the Magistrate? These different and inconsistent versions as to the explanation of the injury on the right eye were highlighted by the 1st to 6th Respondents, in order to convince

this Court that the reliability of the Petitioner's claim is at least questionable and therefore should not be acted upon.

The said answer by *Samantha* to the Magistrate would indeed run contrary to the claim of the Petitioner, which alleged that *Samantha* had suffered injuries due to the beating by the 1st to 6th Respondents. But there is an explanation to the said conduct of *Samantha.* When his partner did pay a visit to him at *Hambantota* Hospital on the same day and that too in the afternoon, she was told that he was severely beaten by the Police officers. He had described the manner in which they assaulted him by relating that they had severely beaten him, after asking him to kneel and then to lie down on the bund. *Sriyalatha* had then clarified from him as to the reason for not making that complaint to the medical staff or to the Magistrate. The reply she received was that he did not wish to antagonise them by making complaints against them. This is a reasonable explanation, coming from a person, who had been placed in a set of circumstances as *Samantha* was. This is not his very first encounter with the Police. He already had several prosecutions pending for committing similar type of offences. Clearly, *Samantha,* in view of his social standing and background, would have considered the probable consequences he might have to endure after making a formal complaint of the beating he received in the hands of the 1st to 6th Respondents of to a person in authority and decided against it.

In this regard, it is relevant to refer to a quotation contained in the dissenting Judgment of *Sharvananda* J (as he then was) in ***Velumurugu v Attorney-General & Another*** (1981) 1 Sri L.R. 406, where his Lordship had reproduced a passage from the Judgment of *Greek Case,* as reported in the Journal of Universal Human Rights, on the difficulties faced by

litigants alleging that public officers had inflicted or instigated acts of torture, which included the following observation, and is very relevant to the issue at hand.

> " *a victim or witness able to corroborate his story might hesitate to describe-or reveal all that has happened to him for fear of reprisals. upon himself or his family*.

The above quoted observation is only a part of a long quotation, which included several other similar considerations, that had been reproduced in its entirety in the Judgment of ***Channa Peiris & Others v Attorney-General*** (supra).

After his admission to *Sooriyawewa* Hospital and until his custody was transferred to Prison officers, *Samantha* was under the watchful eye of Police officers. This was more evident from the proceedings in which the examination of *Samantha* by the Magistrate at *Hambantota* hospital are recorded. The Police officer had informed the Judicial officer of the circumstances under which *Samantha* was arrested and had sustained an injury. Thereafter, the Magistrate had questioned *Samantha,* in the presence of that Police officer, who repeated the version that had already been reported to Court. If *Samantha* were to reveal the manner in which he actually suffered that injury at that point of time, that would have had the effect of directly contradicting the version of events, as narrated by the Police. In such circumstances, it is reasonable to expect that *Samantha* would have not wanted to invite more trouble by making such serious accusation against the arresting officers, regarding the severe beating he had received at their hands.

The Courts, in assessing the reliability of such claims are mindful of such limitations faced by the victims, who are reluctant to make a very descriptive and truthful disclosure of what they have actually experienced during their arrest and detention. It is not uncommon, that persons who made such accusations were severely dealt with by the concerned officers, once his custody is returned back to them by the Magistrates, as revealed in the case of ***Somawardena v Superintendent of Prisons and Others*** (SC Application 494/93 (Spl) – decided on 22.03.1995). The observations of *Atukorale* J in ***Amal Sudath Silva v Kodituwakku, Inspector of Police & Others*** (1987) 2 Sri L.R. 119, aptly describe the approach this Court had adopted in such circumstances, on the assessment of the reliability of claims of torture to a medical officer or to a Judge, as revealed in the instant application;

> *"It seems to me to be preposterous for any medical officer before whom a suspect is produced for a medical examination in the custody of a police officer to expect him to tell the officer in the very presence of that police officer that he bears injuries caused to him as a result of a police assault. This seems particularly so when the suspect is produced at the instance of the police themselves and not upon an order of Court."*

The evasive nature of the answer given by *Samantha* to the Magistrate, in reply to the latter's query as to how he was injured, by stating "**නින්ද ගියා වැටිලාද දන්නේ නෑ**", and thereby pleading total ignorance as to the cause of his injuries, is indicative of this unfortunate reality.

Coming back to the issue of how the deceased *Samantha* had suffered 32 *ante mortem* injuries, the Petitioner asserts that the 1st to 6th Respondents have repeatedly beaten him with pipes, clubs and sticks. She also alleged that during this severe physical assault, *Samantha* was

lying on the ground with his hand tied from his shirt to the front of his body. He was crying out loud, not to kill him. Injury Nos. 5, 6, 7, 8, 9, 10 were on his anterior aspect of his right arm and only injury Nos. 11 and 12 were seen on dorsal aspect of his left hand and near root of the left thumb. This pattern of injuries indicates that one hand had suffered more injuries than the other and that too on the outer aspect. Except for six of his injuries, all other injuries were located on the back of his body and the injuries that were noted on the back of the thigs had extended deep into underlying muscles, indicating the degree of force used to inflict them.

It had already been referred to the fact that the Consultant JMO was of the opinion that the contusions and abrasions on the body of *Samantha* were compatible with blunt force trauma following assault with heavy cylindrical weapon like wooden clubs. Thus, the available medical evidence is not only consistent with the Petitioner's allegation of repeated assaults with pipes, clubs and sticks, but also corroborates that assertion. The death of *Samantha* was due to multiple contusions to head, back of the body and limbs. The claim of the 4th and 5th Respondents, that these injuries were caused to the deceased by the Prison guards after his unsuccessful escape attempt, too was effectively negated by the medical evidence as the Consultant JMO had opined that the injuries, he had seen on the body of the deceased were in the process of healing and therefore were 3 to 4 days old. The arrest of *Samantha* had taken place in the evening of 19.02.2015 after 4.00. p.m. and his death had occurred around 5.00 p.m. on 23.02. 2015, just short of less than one hour to complete the four-day duration. The 'witnesses' who had seen the escape attempt say it had happened on 21.02.2015, soon after midnight but no injuries were observed by the Consultant

JMO, matching with this claim. Therefore, I reject the 1st to 6th Respondents' contention that the injuries that resulted in the death of *Samantha* were caused to him while under the custody of the Prison officers and their denial of any responsibility owing to that reason.

It is not clear as to the reason to unleash such a sustained severe assault on *Samantha* at the time of his arrest. There is no material to suggest that he resisted the arrest, and if he had resisted the arrest, obviously the 1st to 6th Respondents would have sought to justify the '*minimum force*' used to make the arrest. The Petitioner's contention was that *Samantha* was tortured by the 1st to 6th Respondents to extract information as to a stock of illicit liquor. Similarly, there is no material even to suggest that *Samantha* was assaulted during the time he was detained in the cell of *Sooriyawewa* Police. When he called *Sriyalatha* after he was put into a cell, he did not claim there too he was assaulted. In view of the consultant JMO's opinion, it is more probable that the black eye was a result of a deep contusion underlying beneath the injury No. 2 and it is not due to the 'fall' from the bench or due to the failed attempt to escape, as per the explanation offered by the 1st to 6th Respondents.

The allegation of the Petitioner that her son had died due to an act of assault by the arresting officers was presented to a person in authority at the first available opportunity. *Samantha* had died on 22.02.2105 and during the inquest proceedings conducted on the same day, the Petitioner had made the identical accusation to the Magistrate and when questioned on what material she makes such an accusation, she had replied that there are witnesses who saw the assault on her son and they will be produced.

In view of the above, it is my considered opinion that the Petitioner, by adducing credible and reliable eyewitness account as well as medical evidence, had sufficiently discharged her burden of proof on her complaint that her son's fundamental right to freedom from torture had been violated by executive and administrative actions of 1st to 6th Respondents, and thereby established her allegation against them.

The fact that *Samantha* was in possession of a significant quantity of illicit liquor (assuming the notes reflect the actual reason for the arrest) and having several prosecutions pending for similar offences, in any way would not justify the conduct of the 1st to 6th Respondents. Despite the fact that almost twenty-eight years ago to the date of arrest of *Samantha*, this Court had very forcefully stated in the Judgment of ***Amal Sudath Silva* vs. *Kodituwakku*** (1987) 2 Sri LR 119, that "*Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment ... Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set up, it is essential that he be riot denied the protection guaranteed by our Constitution*". It is evident from complaints such as the instant application, that there are officers, who continue to employ "*barbarous methods of treatment*" on the suspects they happen to take charge and pay scant regard to the repeated and consistent emphasis by this Court on them to act within the Law.

The complaint of the Petitioner that the 1st to 6th Respondents have violated the fundamental right guaranteed to her son under Article 13(4) needed to be examined next.

Article 13 (4) of the Constitution reads as follows: -

> *"No person shall be punished with death or imprisonment except by order of a competent Court, made in accordance with procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."*

In ***Lama Hewage Lal (Deceased), Rani Fernando (Wife of the Deceased) & Others v Officer in Charge – Minor Offences, Police Station, Seeduwa & Others*** (2005) 1 Sri L.R. 40, this Court has held thus: -

> *"A careful reading of Article 13 (4) of the Constitution clearly reveals that no person should be punished with death or imprisonment except by an order of a competent Court. Accordingly, if there is no order from such a Court no person should be punished with death and unless and otherwise such an order is made by a competent Court, any person has a right to live. Considering the contents of Article 13 (4) of the Constitution, Fernando, J. in* ***Kotabadu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station Payagala*** *(2003) 1 Sri L.R. 14, stated that, "expressed positively, that provision means that a person has a right to live, unless a Court orders otherwise".*

It is clear from the PMR that *Samantha's* death had a causal nexus to the injuries caused to him by the 1st to 6th Respondents, during the former's arrest. Despite the fact that the death of *Samantha* had occurred during the period he was detained by the Prison officers, the cause of death is attributable to the injuries suffered during the arrest. Clearly the right to life of *Samantha* had been violated by the 1st to 6th Respondents by their collective actions, and thus the claim of infringement of the fundamental right guaranteed to *Samantha* under Article 13(4) by them too is established by the Petitioner.

Therefore, I hold that the 1st to 6th Respondents have violated fundamental rights of the deceased *Liyana Archchige Samantha,* guaranteed to him under Articles 11 and 13(4) of the Constitution and is entitled to such a declaration along with compensation awarded to his next of kin.

Learned State Counsel who represented the 8th Respondent, informs this Court that an inquiry under Establishment Code (reference No. S/DIG/SP/E/60/2015 was conducted by the Police Department against the 1st to 6th Respondents. After the said inquiry, promotions of the 2nd Respondent were deferred for a period of three years and the 1st, 3rd, 4th 6th Respondents were severely warned. The 5th Respondent was discharged after the said inquiry. She further informed Court that after conclusion of the non- summary inquiry, the 8th Respondent had taken a decision to forward an indictment against the 1st, 2nd 3rd and 6th Respondents under Section 296 of the Penal Code, in addition to charges under Section 2 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Act No. 22 of 1994. The 4th and 5th Respondents were discharged from the said

criminal prosecution, owing to the reason there was no admissible evidence revealed against them during the non-summary inquiry.

The attack on *Samantha* took place during a time duration of little over an hour. Despite the attack commenced by two officers, the other four had joined well before the party had returned to Station with *Samantha.* The material available before this Court does not provide a reasonable basis to apportion the individual responsibility in the infringement of *Samantha's* right to freedom from torture. Having considered all the attendant circumstances, I order each of the 1st to 6th Respondents to pay a sum of Rs. 100,000.00 as compensation from their personal funds. Since the 1st to 6th Respondents have infringed the fundamental rights of *Samantha* by torturing him, whilst acting in the colour of lawful authority of making an arrest under the provisions of the Excise Ordinance, I order the State to pay Rs. 300,000.00 as compensation.

The 1st to 6th and the 7th Respondent to deposit these amounts in the Registry of this Court within a period of three months from this Judgment. This award of compensation should not be a bar for any other Court from awarding compensation to the dependents of the deceased *Samantha.*

It is evident from the petition of the Petitioner that her son's three children were left in the lurch, without the care and protection of both their parents.

In the circumstances, the registered Attorney of the Petitioner is directed to tender the birth certificates of the three children of the deceased *Samantha* forthwith to the Registry of this Court. The Registrar

of this Court thereupon will take steps to deposit Rs. 300,000.00 each, in the names of the three children in the *Sooriyawewa* branch of the National Savings Bank. The three of them are entitled to the principal sum deposited in their names, upon reaching 18 years of age.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to appeal to the Supreme Court under and in terms of section 5C of the High Court of the Provinces Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC APPEAL 34/2014

SC/HCCA/LA 471/2011

CP/HCCA/KN 477/04

DC KANDY NO: P13000

1. P.G. Punchimanike,

   33B, Galamuna, Manikhinna.

2. Waiyeli Mudiyanselage Agnus,

   Nikahetiya, Manikhinna.

3. Waiyeli Mudiyanselage Bisomanike

   Nikahetiya, Manikhinna.

Deceased

4. Talagollegedara Mathusena

   Galamuna, Manikhinna.

4A. Wahindara Mudiyanselage Kasthurigedara

   Heenmanike, 65, Galamuna, Manikhinna

4B. Waiyeli Mudiyanselage Chandrika Damayanthi-

   Same address

5. B.K.G. Ebert Wijeratne,

   Galamuna, Manikhinna.

   And 6A,7,8,9,12

Defendants/Appellants

Vs.

1. Waiyelli Mudiyanselage Chandana Jayathissa,

58, Bogahakuburawatta, Udagamadda,

Menikhinna.

Plaintiff-Respondent

2. Wahindra Mudiyanselage Thalkotuwegedara Koinmanike

3. Waiyelli Mudiyanselage Cholmondeley Jayawardana

4. Waiyelli Mudiyanselage Subadra Nilanthi Kumari-

5. Waiyelli Mudiyanselage Chaminda Jayathilaka

6. Co-operative Rural People's Bank, Manikhinna

And 1,2,3,4,11 Defendants.

Defendants/Respondents

1. Waiyelli Mudiyanselage Chandana Jayathissa,

58, Bogahakuburawatta, Udagamadda,

Menikhinna.

Plaintiff-Respondent-Petitioner-Appellant

Vs.

1. P.G. Punchimanike,
33B, Galamuna, Manikhinna.
2. Waiyeli Mudiyanselage Agnus,
Nikahetiya, Manikhinna.
3. Waiyeli Mudiyanselage Bisomanike
Nikahetiya, Manikhinna.

Deceased

4. Talagollegedara Mathusena
Galamuna, Manikhinna.
4A. Wahindara Mudiyanselage Kasthurigedara
Heenmanike, 65, Galamuna, Manikhinna
4B. Waiyeli Mudiyanselage Chandrika Damayanthi-
5. B.K.G. Ebert Wijeratne,
All of Galamuna, Manikhinna.
And
6A. P.G. Punchimanike,
33B, Galamuna, Manikhinna
7. Waiyeli Mudiyanselage Agnus,
Nikahetiya, Manikhinna.
8. Waiyeli Mudiyanselage Bisomanike
Nikahetiya, Manikhinna.
9. Thalagollegedara Bisomanike,
62, Udagammadda, Manikhinna.
10. Talagollegedara Mathusena
Galamuna, Manikhinna.
12. B.K.G. Ebert Wijeratne,
Galamuna, Manikhinna.

Defendant- Appellant-Respondents

2. Wahindra Mudiyanselage Thalkotuwegedara
Koinmanike- same address

3. Waiyelli Mudiyanselage Cholmondeley Jayawardana-
same address

4. Waiyelli Mudiyanselage Subadra Nilanthi Kumari-
same address

5. Waiyelli Mudiyanselage Chaminda Jayathilaka-
same address

6. Manikhinna Co-operative Rural People's Bank,
Manikhinna,

And

1. Wahindra Mudiyanselage Thalkotuwegedara
Koinmanike,
58, Bogahakuburawatta, Udagamadda,
Menikhinna.

2. Waiyelli Mudiyanselage Cholmondeley Jayawardana-
same address

3. Waiyelli Mudiyanselage Subadra Nilanthi Kumari-
same address

4. Waiyelli Mudiyanselage Chaminda Jayathilaka-
same address

11. Manikhinna Co-operative Rural People's Bank,
Manikhinna,

Defendant-Respondents

Before: Buwaneka Aluwihare, PC, J.
Priyantha Jayawardena, PC, J.
L.T.B. Dehideniya, J.

Counsel: Manohara de Silva PC for the Plaintiff-Respondent-Appellant.
H. Withanachchi with Shantha Karunadhara for the 6th to 10th Defendant-Appellant-Respondents.

Argued on: 11th February 2019

Written Submissions: 30th June 2014, 22 September 2015 & 04th April 2019

Decided on: 13.01.2023

JUDGEMENT

Aluwihare PC. J.,

(1) This matter relates to a partition action. The parcel of land in question, described in the second schedule to the Plaint, is a divided portion of a larger land called *Bogahakumburehena*. The corpus is depicted as Lot No. 1 in Plan No. 86/87B, prepared by S.M.K.B. Mawalagedara, Licensed Surveyor, for the previous partition action bearing No. P/7799 (P15), which lot was left unallotted in the Final Decree of that action, [i.e P/7799]. The said Lot 1 is

shown as Lots 1 and 2 in the Preliminary Plan No. EL/ 529 dated 5th July 1994, which was prepared for the instant case (P16).

(2) The learned District Judge delivered judgement and made order to partition the corpus as prayed for by the Plaintiff.

(3) Aggrieved by the said judgement the 6A, 7th, 8th, 9th, 10th and 12th Defendant-Appellant-Respondents who also claimed title to the corpus (hereinafter sometimes referred to as the "Defendants") preferred an appeal before the Civil Appellate High Court of the Central Province., the learned Judges of the Civil Appellate High Court delivering the judgment, set aside the judgement of the District Court and directed that decree be entered as prayed for by the Appellants, namely the 6A, 7th, 8th, 9th, 10th and 12th Defendant-Appellant-Respondents before this court.

(4) Aggrieved by the said judgment the Plaintiff Respondent-Petitioner-Appellant [Herein after referred to as the Plaintiff] moved by way of leave to appeal to the and this Court granted leave to appeal on the questions of law set out in sub- paragraphs (d) to (i) of Paragraph 17 of the Petition dated 21st November 2011;

The questions of law are as follows;

(d) Did the High Court of Civil Appeals err with regard to the flow of title of the Plaintiff-Respondent?

(e) Did the High Court of Civil Appeals err by being misdirected in respect of the documents 10V4 and 10V6- P20, 21, 22?

(f) Did the High Court of Civil Appeals err by being misdirected to consider that the 6A, 7, 8, 9, 10 and 12 Defendants failed to raise a specific issue in respect of P20, P21 and P22?

(g) Did the High Court of Civil Appeals err by failing to consider the evidence which are in the Petitioner's favour?

(h)Did the High Court err by holding that any title passed by virtue of fiscal conveyance 10V6 (deed 24349) dated 17th September 1968 when the transferor had no title at that time as the transference had sold his entitlement by deed No. 6810 dated 27th June 1958?

(i) Did the High Court of Civil Appeals err by misdirecting itself as to the identification of the corpus while both parties have admitted in respect of the identification of the corpus?

(5) After considering the appeal, the learned judges of the High Court of Civil Appeals had arrived at the following conclusions which are material to determine the issues before us,

(a) The plaintiff or the 1st to 4th Defendants have failed to establish any interest to the unallotted portion [lots 1 plan No. 86/87B]

(b) That the title of Siyathu to the corpus had been seized, on the strength of the judgement in case No. L 6625 and sold by the fiscal conveyance.

The claim of the Plaintiff [Appellant]

(6) There had been no dispute as to the identity of the corpus. Both parties admitted that the land described in the 1st schedule to the Plaint, namely *Bogahakumburehena* in extent of two amunams of paddy sowing, was owned by one Talagollegedara Appu. By Deed No. 10198 dated 2nd June 1909 (P7), he gifted his rights to said land to his six children in equal shares. The six children were; (1) Punchirala, (2) Mudalihamy, (3) Kirihamy, (4) Siyathu, (5) Ukku Menika and (6) Punchi Menika. However, both, Mudalihamy(2) and Ukku Menika(5) had died intestate and issueless and each of the surviving four children[i.e.. (1), (3), (4) and (6)] became entitled to an undivided 1/4th share of the land. [For ease of reference, the

number assigned to each of Thalagollegedera Appu's children referred to above, is carried throughout this judgement]

(7) It is also common ground that the undivided 1/4th share of Punchirala (1), after his death, devolved on his child the 5th Defendant [Aloysius] and that Kirihamy (3) by Deed No. 10510 dated 21st August 1967 conveyed half of his undivided 1/4th share to the 5thDefendant [Alloysious], who thus, became entitled to an undivided 3/8th share of *Bogahakumburehena*.

(8) According to the Plaintiff, the abovementioned Kirihamy (3) sold and transferred the balance half of his undivided 1/4th share (1/8th) by Deed No. 9606 dated 30th May 1919 (P18) to one Kiri Ethana and she in turn, by Deed No. 29848 (P19) transferred the said share to the Siyathu(4), who thus became entitled to an undivided 3/8th share of *Bogahakumburehena*. It appears that there is no dispute that at one point in time Siyathu accrued title to 3/8th of the corpus.

(9) To place it in context; it is reiterated that the present partition action was to partition the land depicted as Lot No. 1 in Plan No. 86/87B which was kept unallotted in the earlier Partition action[P7799] and this lot represents the 3/8 share of Siyathu(4), the devolution which both the Plaintiff on one hand and the 6A-10th and the 12th Defendants on the other, are disputing.

(10) On the perusal of the proceedings of the action P/7799(vide page 455 of the Brief), it appears that Lot No.1 was left unallotted on the basis that the Fiscal Conveyance [10V6] had not been tendered in evidence. Hence the share of Siyathu and Kiri Ethana from whom Siyathu had accrued further rights to *Bogahakumburehena*, was left unallotted.

The Respective positions of the Plaintiff and the 6A-10th & the 12 Defendants

(11) The **Plaintiff** avers that Siyathu (4), in 1958, by Deed No. 6810 (P20) sold and transferred his undivided 3/8th share to one W.M.B.K.G. Ranatunga, who, in 1966, by Deed No. 6180 (P21) sold the said 3/8th share to the Plaintiff's father, Punchi Appuhamy.

(12) It is the Plaintiff's contention that, on the death of Punchi Appuhamy, his rights to the corpus, devolved on his children, that is, the Plaintiff and the 2nd to 4th Defendants, subject to the life interest of the 1st Defendant, Koin Menike (the widow of Punchi Appuhamy).

(13) It is further averred that Punchi Menika's (6) rights to *Bogahakumburehena* (an undivided 1/4th share) devolved on her child Tikiri Menika who by Deed No. 1301 dated 7th May 1969, sold and transferred the same to the Punchi Appuhamy, the Plaintiff's father . Punchi Appuhamy had transferred the said ¼th share, to his wife, the 1st Defendant, by Deed No. 5973 in 1973 and thus the 1st Defendant had rights to an undivided 1/4th share of *Bogahakumburehena.*

<u>The claim of the 6A-10th and 12th Defendant- Respondents</u>

(14) The 6A to the 10th and 12th Defendants also claimed title to the corpus from Siyathu(4). In their Statement of Claim, it is averred that, the 5th Defendant Alloysious [Punchirala's (1) son] who was a minor, through Kirihamy (3), as his next friend, instituted action bearing No.6625/L, against Siyathu (4), for a declaration of title to an undivided 1/4th share of three lands originally owned by Talagollegedara Appu, namely, *Bogahakumburegedera watta*, *Bogahakumburehena* and *Kosgahayatatennehena*.

(15) The District Court entered judgment and decree in favour of the 5th Defendant Aloysius (10D4), and Siyathu was ordered to pay costs. It is stated that since Siyathu(4) failed to pay costs a writ of execution was issued and his interests in the 3 aforementioned lands were seized and auctioned in

order to recover the costs. At the auction held by the Fiscal in execution of the writ, the rights, title and interest of Siyathu(4) in all 3 lands were sold and purchased by Kirihamy(3) in 1967. The sale was confirmed by the District Court on 9th January 1968 (vide page 492 of the Appeal Brief) and the Fiscal's Conveyance No. 24349 (marked 10V6- at page 490 of the Appeal Brief) was executed in favour of Kirihamy (6).

(16) It is thus contended that Kirihamy (3) purchased Siyathu's rights to *Bogahakumburehena* (an undivided 3/8th share), and upon Kirihamy's death, his interests devolved on his heirs, that is the 6th -10th Defendants and the 12th Defendant, and that each of them were entitled to Siyathu's share from Lot No. 1 in *Bogahakumburehena*.

<u>The points of contention</u>

(17) The learned President's Counsel on behalf of the Plaintiff contended that at the time the Fiscal sale took place on 27th November 1967, and the Fiscal Conveyance [10V6] was executed on 9th January 1968, Siyathu had no title to *Bogahakumburehena* as by then, by Deed No. 6810 dated 27th June 1958, Siyathu had already sold his 3/8th share in the said land to W.M.B.K.G. Ranatunga. It was argued, therefore, that Kirihamy (3) did not acquire any title to the said land by the Fiscal sale and as such the claim of the competing Defendants should fail.

(18) The main contention, on the other hand, of the learned Counsel for the 6A-10th and 12th Defendants was that the title deeds relied on by the Plaintiff, namely Deeds No. 6810 (P20), 6180 (P21) and 6197 (P22), all refer to a land called *Egodawatte* of about 3 pelas and 1 amunam in extent whereas, the corpus that was subject to partition; Lot No.1 in Plan 86/87B, is a divided portion of *Bogahakumburahena*, and not *Egodawatte*.

(19) It is argued, therefore, that, Siyathu's interests in *Bogahakumburahena* had devolved on the 6A-10th and 12th Defendants under and by virtue of the Fiscal's Conveyance marked 10V6, while Siyathu's interests in *Egodawatte* had devolved on the Plaintiff and the 1st to 4th Respondents under and by virtue of Deeds P20 and P21. Hence, it is submitted that neither the Plaintiff nor the 1st to 4th Respondents have any title to the said Lot No.1 of Bogahakumuburahena.

(20) The learned Counsel on behalf of the competing Defendants also highlighted the fact that in the execution of the writ against Siyathu for non-payment of costs in Case No. L/6625, Punchi Appuhamy [from whom the Plaintiff and the 1st to 4th Defendants derive their title], made claims to the properties seized and at the proceedings at the Claims Inquiry (at page 512 of the Appeal Brief), it is recorded that Punchi Appuhamy did not claim any interests in the lands seized, i.e., *Bogahakumbure Watta*, *Bogahakumburehena*, and *Kosgahayatatennehena*. It is stated that he only claimed a land called *Egodawatte* which was not seized. Mr Walgampaya who appeared for Punchi Appuhamy had informed court that the claim made, as a prohibitory notice had been posted on *Egodawatta*. Concluding the proceedings, the District Court made the following order, "*The judgement creditor will be entitled to sell the judgement debtor's interest in the lands called Bogahakumburegedera Watta, Bogahakumburehena and Kosgahayatatennahena, but not any portion of the land called Egodawatte belonging to the Claimants*". The Plaintiff, however, contends that *Egodawatte* is but another name for *Bogahakumburehena*.

(21) This case, therefore, revolves around a solitary question; that is, whether the rights of Siyathu(4) with respect to *Bogahakumburehena* devolved on

Punchi Appuhamy on Deeds Nos. 6810 (P20) and 6180 (P21) or whether those rights were seized in the execution of the Decree in Case No. L/6625 and were sold to Kirihamy.

(22) Although this court granted leave to appeal on six questions of law, the thrust of the argument on behalf of the Plaintiff-Appellant, was on two issues;

(1) That the High Court **erred in holding** that Kirihamy, [the predecessor in title of the 5th Defendant] obtained Siyathu's share by fiscal conveyance, when in fact, Siyathu did not have title to the land at the time the fiscal conveyance was executed.

(2) That the High Court **erred in holding** that the Plaintiff's title deeds do not relate to the corpus but to a different land called "Egodawatte".

The (1) above, is the question of law referred to in sub-paragraph (h) of Paragraph17 of the Petition on which leave to appeal had been granted, whereas (2) above touches the question of law referred to in sub-paragraph (e) of 17.

The Questions of Law

(23) In view of the submission aforesaid, I wish to deal with the questions of law raised on behalf of the Plaintiff- Appellant referred to in the preceding paragraph.

(24) The main thrust of the argument of the learned President's Counsel was that, the 5th Defendant Alloysious instituted action against Siyathu(4) and others claiming undivided 1/4th of Bogahakumburahena upon death of his father Punchirala(1) and when Siayathu defaulted payment of costs ordered by

court, fiscal conveyance was executed in **1968** over Siyathu's rights in three lands inclusive of Bogahakumburahena and it was Kirihamy (3) who purchased those rights. However, it was pointed out that, prior to the fiscal conveyance, in **1958** by deed no.6810[P20], Siyathu(4) had sold his 3/8th share to W.M.B. Ranathunga and as such Kirihamy(3) did not get any title to the said lands. It was thus argued that the High Court erred and misdirected itself by not considering this aspect.

(25) Perusal of the schedule to the deed No. 6810[P20], it appears what has been sold by Siyathu(4) to Ranathunga is a land called "Ëgodawatte" and the schedule further states " Egodawatte forms part and parcel of all three contiguous lands called- (1) Boghakumburegedarawatte, (2) Gederagawakumbura and (3) Egodawatte Registered in E 365/212" . It is to be noted that the name Bogahakumburehena is nowhere mentioned in this deed. Yet, the, learned President's Counsel argued that the boundaries describing the land Siyathu sold by Deed 6810[P20] and the land described in the 2nd schedule to the plaint [that was sought to be partitioned] in the instant case are identical and as such both refer to one and the same land.

(26) This court considered the contention of the learned President's Counsel for the Plaintiff and in that regard the following observations are made;

(a) The 1st Schedule to the Plaint in the present case describes the larger land [presumably which was the subject matter in the Partition action P/7799] as "Bogahakuburahena" in extent of 2 Amunams of paddy sowing.

(b) Even in the case L/6625 filed on behalf of the 5th Defendant Alloysious way back in 1961, the land is described as Bogahakumburahena, a land in extent of 2 Amunams of paddy sowing.

(c) The schedule of Deed No. 6810 on which the Plaintiff relied to support his claim, however, describes the land as "Egodawatte", in extent of one Amunam of paddy sowing.

(d) Partition action P/7799 was instituted in 1970 [P23] and Deed no. 6810 was executed in 1958. As such if Siyathu sold his rights of Bogahakuburahena to Ranathunga by the said deed, it necessarily would have been an undivided portion of Bogahakuburahena. If that was the case the boundaries referred to in the schedule of the deed 6810 must tally with the boundaries of Bogahakumburahena depicted in plan No.86/87. In **Deed no.6810, the Eastern boundary** is stated as, the lands of Mudunkothgedera Sundera, Kirihamy and the ditch and fence of Tikiri Menika, whereas the **Eastern boundary** according to the **Plan No.86/87** are the lands of 'Dingirala and Bajjurala'. Western boundary of the land according to Deed No.6810 is Pangollewatthe of C.P.H Dharmaratne whereas according the Plan No.86/87, it is 'Heenhami's land' and land of Alice Dharmarathne.

(e) Interestingly, the southern boundary of the land referred to in Deed No. 6810 is depicted as 'Ima of Bogahakuburegedera-gawa-kumbura' of the vendor Siyathu, which is an indication, in my view, that Siyathu owned other property or properties in that name.

(f) It is also to be noted that in Deed no 6810 executed by Siyathu, he does not say as to how he became entitled to property called Egodawatte. As far as the land Bogahakumburahena was concerned, he become a co-owner along with his siblings by virtue of Deed No. 10198 dated 2nd June 1909 (P7), when his father gifted his rights to said land to his six children in equal shares.

(g) The most crucial evidence, as far as I see it, comes from the claim inquiry in case No. L.6625 dated 11th July 1967.[Pg 512 of the appeal

brief]. The Claimant W.M. Punchi Appuhamy the Plaintiff's father, who was present before court stated that he does not claim any interest in the lands called -Bogahakuburegederawatte

-**Bogahakuburehena** and

- Kosgahayatathennehena referred to as

lands seized. He claimed a land called Egodawatte and his Attorney informed court that 'Egodawatte is a different land.

(27) Considering the above this court cannot fault the findings by the learned judges of the High of Civil Appeals in arriving at the findings that the Plaintiff's title deeds do not relate to the corpus, but to a land called "Egodawatte".

(28) In the circumstances referred to above, I answer the two issues referred to in paragraph 22 above [question of law (h) and (f)] in the negative.

(29) Accordingly I hold that; the rights of Siyathu(4) with respect to *Bogahakumburehena* did not devolve on Punchi Appuhamy on Deeds Nos. 6810 (P20) and 6180 (P21) and I hold further that the rights of Siyathu were seized in the execution of the Decree in Case No. L/6625 and were sold to Kirihamy.

(30) Furthermore, the learned Judges of the High Court of Civil Appeals were correct in arriving at the conclusion that the plaintiff or the 1st to 4th Defendants have failed to establish any interest to the unallotted portion, i.e., lots 1 of plan No. 86/87B.

(31) I do not see any merit in the questions of law referred to in sub-paragraphs (d) (f) (g) and (i) of Paragraph 17 of the petition and the said questions are also answered in the negative.

Accordingly, the appeal is dismissed, subject to costs

Appeal Dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE L. T. B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal under and in terms of Section 5(1) of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter L VIII of the Civil Procedure Code.

J. D. Corporation (Private) Limited
No. 37, W. A. D. Ramanayake Mawatha
Colombo 02

PLAINTIFF

S.C. CHC Appeal No: 35/2012

H.C. Civil No: 198/2006 (1)

Vs.

Lafarge Mahaweli Cement (Private) Limited
No. 69, New Kelani Bridge Road
Orugodawatte
Colombo 14

DEFENDANT

AND NOW BETWEEN

J. D. Corporation (Private) Limited
No. 37, W. A. D. Ramanayake Mawatha
Colombo 02

PLAINTIFF-APPELLANT

Vs.

Lafarge Mahaweli Cement (Private) Limited
No. 69, New Kelani Bridge Road
Orugodawatte
Colombo 14

DEFENDANT-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J,
L. T. B. Dehideniya, J &
E. A. G. R. Amarasekara, J

COUNSEL: Gamini Perera with Wijitha Salpitikorala instructed by Saumya Hettiarachchi for the Plaintiff-Appellant.

Anura Meddegoda, PC with Ms. Nadeesha Kannangara instructed by Varners for the Defendant-Respondent.

ARGUED ON: 09.05.2022

WRITTEN SUBMISSIONS; 05.08.2022 Defendant Respondent
10.11.2022 Plaintiff-Appellant

DECIDED ON: 13.01.2023

JUDGEMENT

Aluwihare, PC, J.

(1) **The Plaintiff-Appellant** (hereinafter referred to as the "Plaintiff") instituted this action in the Provincial High court of the Western Province (Exercising Original Civil Jurisdiction) Holden in Colombo (hereinafter referred to as the "Commercial High Court") against the Defendant-Respondent (hereinafter referred to as the "Defendant") on 12th September 2006 seeking a Judgement and Decree against the Defendant in a sum of Rupees 75 million with legal interest thereon till date of Decree, and thereafter legal interest on the aggregate amount of Decree till payment in full.

(2) The Defendant by their Answer filed on 08th December 2006 sought a dismissal of the Plaintiff's action. After the conclusion of the trial, the learned Judge of the High Court by Judgement dated 09th March 2012, decided in favour of the Defendant and dismissed the action. Being aggrieved by this Judgement, the Plaintiff has preferred this appeal seeking to set aside the Judgement of the learned High Court Judge.

Factual background

(3) The Plaintiff in their Plaint have averred that; the Plaintiff is a Company mainly engaged in the business of purchasing bulk cement in Sri Lanka, bagging it into branded 50kg bags and supplying it to customers. The Defendant is a Company engaged in importing cement into Sri Lanka in bulk. A third Company called

Zeeniya Traders (Pvt) Ltd has at all times material to this action, acted as the agent of the Defendant Company, for the purpose of, *inter alia*, selling and/or entering into a contract on behalf of the Defendant Company for the sale of such Cement.

(4) On or about 07th of October 2005 the Defendant Company agreed and/or undertook through its agent Zeeniya Traders (Pvt) Ltd to supply in bulk a quantity of 40,000 metric tons of Ordinary Portland Cement from the month of October 2005 to November 2006, at a rate of Rs. 8,100/- per Metric ton less a confidential discount of 20%. For arranging the above contract, the agent, Zeeniya Traders (Pvt) Ltd was paid an additional sum of Rs. 15 Million upfront by the Plaintiff Company calculated at Rs. 375/- per Metric Ton of Cement. The Plaintiff duly paid the said sum of Rs. 15 million to Zeeniya Traders (Pvt) Ltd.

(5) The Defendant acting on the said agreement, supplied to the Plaintiff 18,500 Metric Tons of Ordinary Portland Cement in bulk up to 29th of May 2006 in respect of which the Defendant received full payment due from the Plaintiff. Thereafter, by a letter dated 30th May 2006, marked "***P22***", the Defendant informed the Plaintiff that no further bulk cement will be supplied to the Plaintiff, thus the Plaintiff claims, since 30th May 2006, the Defendant has wrongfully failed or neglected to supply the balance quantity of 21,500 Metric tons of the said Bulk Cement thus causing damage and loss to the Plaintiff.

(6) Owing to the failure of the Defendant in honouring their contract, the Plaintiff alleges to have suffered loss and damage to its business reputation, financial loss, a loss of Rs. 8,064,750/- being the balance sum of the advance payment of Rs. 15 million paid by the Plaintiff to Zeeniya Traders (Pvt) Ltd, in respect of which the Defendant has not supplied the balance quantity of the said bulk cement, as

well as having been wrongfully deprived of the income which the Plaintiff would have otherwise earned.

(7) **The Defendant** in their answer has stated as follows; The Defendant supplied cement to the Plaintiff Company solely at the request of the Chairman of Sri Lanka Cement Corporation, and that **there was no contract or agreement** between the Plaintiff and the Defendant stipulating the rate or quantity of cement to be supplied. Zeeniya Traders (Pvt) Ltd was not a party to these transactions and that the Defendant did not know of any agreement that existed between the Plaintiff Company and Zeeniya Traders (Pvt) Ltd. At any rate, Zeeniya Traders (Pvt) Ltd has no authority to enter into a contract on behalf of the Defendant Company as an agent for the Defendant.

(8) The Defendant also claims that the supply of cement by the Defendant to the Plaintiff was later stopped at the request of the said Chairman of Sri Lanka Cement Corporation. The Defendant alleged that since **no contract exists** between the Plaintiff and the Defendant, **there is no cause of action** for the Plaintiff to sue the Defendant. Accordingly, the Defendant sought for a dismissal of the Plaintiff's action.

(9) On behalf of the Plaintiff Company, witness Janath Sri Vidanage, the Managing Director of the Plaintiff Company, testified. According to the evidence [Affidavit] of the witness, when the witness first approached the Defendant Company with an offer of purchasing cement, a price of Rs. 8,100/- per Metric Ton of cement was quoted, which was the usual price at which Lafarge Cement sold to its customers. When the Witness thereafter inquired from one Nithyanandan, the Supply Chain Manager of the Defendant Company, as to how a previous purchaser had obtained a 20% discount on this price, Nithyanandan had informed that any discount was at the sole discretion of Rex Hatherly, the

Managing Director of the Defendant Company. Thereafter, Sri Vidanage and Dilshan Rajapakse who was another Director of the Plaintiff Company had met with one Mohamed Maharoof, who was a former Chairman of the Defendant Company, with the aim of approaching Rex Hatherly. During this meeting between Sri Vidanage, Dilshan Rajapakse and Mohamed Maharoof, Maharoof had informed that Zeeniya Traders (Pvt) Ltd of which his wife. Zareena Zainab Maharoof is the Chairperson and his sister Zainab Zeenia Maharoof Osman is a director, and he himself is a shareholder, is the main agent for the Defendant Company in selling imported Cement. Maharoof had also informed at this meeting that he would be able to arrange for the purchase of bulk cement at the discounted price. Thereafter Maharoof had informed the Directors of the Plaintiff Company that he could arrange with the Defendant Company to issue 20,000 Metric Tons of bulk cement with a discount of 20% on the normal selling price of Rs. 8,100/- per ton, provided that the Plaintiff Company make an upfront payment of Rs. 6 million to Zeeniya Traders (Pvt) Ltd.

(10) According to the evidence [affidavit] of the witness Sri Vidanage, on 22nd of March 2005 Sri Vidanage and Dilshan Rajapakse had met with Maharoof and Rex Hatherly, to discuss this arrangement. At the said meeting Rex Hatherly had agreed and guaranteed the supply of 20,000 Metric tons of bulk cement with a special discount of 20% on the normal price of Rs. 8,100/- per ton. It was stated in this meeting that as a condition of this arrangement Rs. 6 million had to be paid by the Plaintiff Company to Zeeniya Traders (Pvt) Ltd, calculated at Rs. 300/- per Metric ton for the quantity of 20,000 Metric tons, which was termed a "quantity booking charge". The Plaintiff Company had thereafter made this payment of Rs. 6 million to Zeeniya Traders (Pvt) Ltd. Upon this payment being made Rex Hatherly had written to the Plaintiff Company a letter dated 11th May 2005, marked "***P7***" which stated,

> "I can Confirm we will be able to supply Bulk Cement to you at Rs. 8,100/- per metric ton less of course our agreed confidential discount.

Please ensure that you operate on a strict "cash and carry" basis at all times. Therefore, to start the sequence of deliveries, please remit to us the funds sufficient to cover your first delivery."

The letter "***P7***" has not been marked subject to proof (vide page 2 of proceedings of 28.09.2007)

(11) Thereafter, according to Sri Vidanage, the Defendant had supplied 20,000 Metric tons of Cement to the Plaintiff as agreed from 11th May 2005 to 02nd of November 2005.

(12) According to the evidence [affidavit] of Sri Vidanage, it is in this backdrop that the purported contract between the Plaintiff and the Defendant which forms the subject of the present action was entered into. According to his evidence, Sri Vidanage and Dilshan Rajapakse had once again met with Rex Hatherly and Maharoof for the purchase of 40,000 Metric tons of Cement. They had been informed that this time, Rs. 15 million be paid to Zeeniya Traders (Pvt) Ltd upfront, calculated at Rs. 375/- per Metric ton to **secure the supply of 40,000 Metric tons of Cement** by the Defendant Company to the Plaintiff Company for a price of Rs. 6,500/- per metric ton to be supplied from October 2005 to November 2006. Sri Vidanage and Dilshan Rajapakse had accepted these terms and had paid the said Rs. 15 million to Zeeniya Traders (Pvt) Ltd. The copies of the receipts issued by Zeeniya Traders (Pvt) Ltd were tendered in evidence marked "**P11**", "**P12**", "**P13**" and "**P14**". Thereafter the Defendant Company had issued a total of 18,500 Metric tons of cement to the Plaintiff up until the 29th of May 2006 in pursuance of this agreement. Memos issued by the Defendant Company to the Plaintiff Company in respect of this supply of cement were marked as "***P15(1)***" to "***P15(72)***". Sri Vidanage stated that the Plaintiff Company had made a total payment of Rs. 120,250,000/- in respect of the said quantity of 18,500 Metric tons of cement supplied by the Defendant, and payment receipts issued by the Defendant Company to the Plaintiff verifying this payment were marked as "***P16(1)***" to "***P16(58)***".

(13) According to the evidence of Sri Vidanage and Nithyananda, the Supply Chain Manager of the Defendant Company, by a letter dated 09th March 2006 addressed to Zareena Zainab Maharoof, Director, Zeeniya Traders (Pvt) Ltd, marked "***P17(a)***" purported to have been signed by the Supply Chain Manager Nithyananda, had confirmed the existence of this agreement between the Plaintiff and the Defendant. The letter states as follows,

> "Balance Confirmation of Bulk Cement Contracted on behalf of J. D. Corporation (Pvt) Ltd
>
> "This is to confirm, as at 07th March 2006 we have supplied 14250 Mt to J.D. Corporation out of 40,000MT of bulk cement contracted through your company as our agent."

(14) According to the evidence of Sri Vidanage, the Defendant Company thereafter by letter dated 30th May 2006, signed by Rex Harthely ["***P22***"] had informed the Plaintiff that no further cement would be supplied to the Plaintiff.

(15) Witness Tharanga Priyawansha, an accountant attached to the Plaintiff Company gave evidence to the effect that the loss suffered by the Plaintiff owing to the failure of the Defendant Company to supply the outstanding quantity of 18,500 Metric tons of cement was Rs. 22,897,500/-. He also gave evidence that on many occasions he had personally seen Nithyanandan, the Supply Chain Manager, place his signature on numerous documents, and that he identifies the signature placed on **[P17(a) 1]** as being that of Nithyanandan.

(16) Koggala Wellala Bandula, who was the Chairman of the Sri Lanka Cement Corporation and a director of the Defendant Company during 2004 to 2005 also had given evidence on behalf of the Plaintiff. The Witness in his evidence stated that during his time as a director in the Defendant Company he was familiar

with the signature of Nithyanandan and that he identifies the signature appearing in "**P17**" marked as **P17(a)(1)** as being that of Nithyanandan. Two other witnesses were also called to give evidence by the Plaintiff.

(17) On behalf of the Defendant, Nithyanandan, who was the Supply Chain Manager of the Defendant Company during the said period, gave evidence. Nithyanandan in his evidence [affidavit] denied having written the letter marked **P17**. He stated that he has never had any written communication with any director or staff member of Zeeniya Traders (Pvt) Ltd during his employment in the Defendant Company. He claimed that the font used in the letter "***P17***" varies from what is usually used by the Defendant Company, that his signature appears somewhat distorted and that his name is spelt wrong in the said letter. He also stated that he had no authority to officially enter into any agreement or approve any contract on behalf of the Defendant Company.

(18) Sandaya Darshini Siriwardena, the Finance Manager of the Defendant Company was the other witness who gave evidence on behalf of the Defendant. Mrs. Siriwardena in her evidence stated that the Defendant Company started supplying cement to the Plaintiff Company on the request of M/s Sri Lanka Cement Corporation and that Zeeniya Traders (Pvt) Ltd was not a party to this transaction. Her evidence was to the effect that Zeeniya Traders (Pvt) Ltd has no authority to enter into contracts on behalf of the Defendant Company. The Witness also referred to the fact that the letter "***P17(a)***" does not have a reference number on the face of the letter whereas other letters originating from the Defendant Company do. The Witness, by referring to the series of documents marked "***P15(1)***" to "***P15(72)***" stated that the Defendant Company had supplied cement to the Plaintiff Company between 07th of November 2005 to 29th May 2006. Mrs. Siriwardena also stated that Nithyanandan, the Supply Chain

Manager of the Defendant Company has no authority to enter into contracts on behalf of the Defendant Company.

The Issues

(19) Accordingly, two main issues arise for determination in this appeal. The first is whether Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in the purported contract between the Plaintiff and the Defendant for 40,000 Metric tons of Cement. The second is whether a legally enforceable contract exists for the sale of 40,000 Metric tons of cement by the Defendant to the Plaintiff. Each of these issues will be dealt with, in sequence.

(20) On 02.03.2007, when recording the issues and admissions of the parties the following admissions were recorded by the Judge,

> "1. The Defendant is a duly Incorporated Company in Sri Lanka
>
> 2. The Defendant Company was engaged in importing ordinary Portland cement in bulk
>
> 3. Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant Company"

(Vide page 1 of proceedings of 02.03.2007)

(21) The Defendant in their Written Submission in the Commercial High Court as well as in their Submissions before this court has stated that the third admission, namely; Zeeniya Traders acted as agent of the Defendant, was recorded erroneously by the Learned High Court Judge. In support of this contention, they refer to paragraph 4 of the Answer whereby the Defendant has denied the averments contained in paragraph 3 of the Plaint.

(22) On a perusal of the Answer of the Defendant it does not appear that the Defendant has admitted that Zeeniya Traders (Pvt) Ltd acted as their agent. Additionally, in the issues and admissions of this action, the first issue raised by the Plaintiff is as follows,

> "1. At all times material to this action did Zeeniya Traders (Pvt) Ltd act as an agent for the Defendant Company for the purpose of selling and/or entering into contracts on behalf of the Defendant Company?"

(23) By raising this issue, the Plaintiff has taken upon themselves the burden of proving that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in relation to the agreement in question. Nevertheless, the Defendants' submission that this admission was erroneously recorded by the Judge cannot be justified as no attempt had been made to rectify it. This court, however, would proceed on the premise that the admission No.3 is a general admission and in view of the issue No.1 raised by the Plaintiff, that it was incumbent upon the Plaintiff to prove that Zeeniya Traders (Pvt) Ltd did in fact act as the agent of the Defendant Company in relation to the transaction in question.

(24) The submission of the Defendant was that there exists no contract of agency between Zeeniya Traders (Pvt) Ltd and the Defendant Company and, therefore, Zeeniya Traders (Pvt) Ltd has no authority to bind the Defendant Company. The Learned High Court Judge has also based her decision on the premise that Zeeniya Traders (Pvt) Ltd did not have authority to bind the Defendant and therefore no agreement for the sale of cement exists between the Plaintiff and the Defendant.

(25) On the subject of agency reference may be had to "**Bowstead and Reynolds on Agency" (18th Ed, London Sweet and Maxwell 2006)** by **F. M. B. Reynolds, QC** which details the different means by which agency could arise, [at page 37],

"(1) The relationship of principal and agent may be constituted-

(a) by agreement, whether contractual or not, between principal and agent, which may be express, or implied **from the conduct or situation of the parties.**

(b) retrospectively, by subsequent ratification by the principal of acts done on his behalf.

(2) A person may be liable under the doctrine of apparent authority in respect of another who is not his agent at all; or may be estopped as against a third party from denying the existence of an agency relationship"

(26) "**Bowstead and Reynolds on Agency"** discusses the doctrine of apparent authority; [page 335]

> "Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."

(27) In the leading case of *Freeman & Lockyer v, Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480, Diplock L.J stated,

> "An 'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created, the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an

estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent **had actual authority to enter into the contract."**

(28) In ***Colombo Shipping Co., Ltd v. Chirayu Clothing (Pvt) Ltd. (Case No. 2)*** [1999] 1 Sri L.R. 213 De Silva J. has referred to the doctrine of apparent or ostensible authority,

> "In any event the 1st defendant-petitioner has described itself as the agent of the defendant on the "Cargo Receipts P4A, P4B and P4C". It has therefore held itself out as the agent of the 2nd defendant who has ostensible or apparent authority.
>
> In *Hely-Hutchinson v. Brayhead Ltd. and another* apparent authority of an agent is thus explained by Denning, L.J. :
>
> > "Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the Board of Directors appoint one of their members to be a managing director they invest him not only with implied authority, but also with ostensible authority to do all such things as fallen within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director."
>
> Furthermore, in the instant case the 1st defendant-petitioner has represented itself to be the agent of the 2nd defendant through F4A, P4B and P4C and the plaintiff-respondent has acted on such representation. Therefore the 1st defendant-petitioner is estopped from claiming that it is an agent for a limited purpose."

(29) It may be noted that a contract of agency is not necessary for the creation of agency in all instances. A party may be estopped from denying the existence of a contract of agency with an agent if such party has made a representation to a contractor that the agent in fact has authority to contract on his behalf, and the contractor acting upon that representation enters into an agreement with the said agent. It is true that the Plaintiff has led no evidence as to the existence of

any written contract of agency between the Defendant Company and Zeeniya Traders (Pvt) Ltd. However, the issue to be determined in the present action is whether the Defendant Company either represented Zeeniya Traders (Pvt) Ltd as being its' agent or knowingly allowed Zeeniya Traders (Pvt) Ltd to represent themselves as being the agent of the Defendant Company for the purpose of entering into a contract for the sale of 40,000 Metric tons of cement. The issue is whether under the doctrine of apparent authority, Zeeniya Traders (Pvt) Ltd has acted as agent of the Defendant in relation to this contract.

(30) According to the evidence of Janath Sri Vidanage, Maharoof had initially represented Zeeniya Traders (Pvt) Ltd as being the main agent for the Defendant Company in selling imported cement. According to his evidence, on 22nd of March 2005, when directors of the Plaintiff Company had met with Maharoof and Rex Hatherly, the Managing Director of the Defendant Company at the time, Rex Hatherly had agreed to supply 20,000 Metric tons of Cement to the Plaintiff company, with a 20% discount given on the normal price of Rs. 8,100/- per ton, provided Rs. 6 million was paid up front to Zeeniya Traders (Pvt) Ltd as a "quantity booking charge". After this payment of Rs. 6 million was made by the Plaintiff Company to Zeeniya Traders (Pvt) Ltd, Rex Hatherly had authorized the supply of 20,000 Metric tons of Cement from the Defendant Company to the Plaintiff Company at the agreed price per ton. The Plaintiff has led in evidence the document marked "***P7(a)***", which has not been marked subject to proof, as corroboration of this claim.

(31) According to the evidence of Sri Vidanage, thereafter the Directors of the Plaintiff Company had met with Maharoof of Zeeniya Traders and Rex Hatherly once again to discuss the purchase of 40,000 Metric tons of cement, which is the subject-matter of this action. In the said meeting the Directors of the Plaintiff Company had been informed to make an upfront payment of Rs. 15 million to

secure the supply of 40,000 Metric tons of cement by the Defendant. The receipts issued by Zeeniya Traders (Pvt) Ltd in respect of the said payments were also marked in evidence as "**P11**", "**P12**", "**P13**" and "**P14**".

(32) It must be noted that the evidence given by Sri Vidanage, stands uncontradicted. Additionally, the Defence during cross-examination has not assailed the part of his evidence which detailed out the meetings that were had between the Directors of the Plaintiff Company and Rex Hatherly, the Managing Director of the Defendant Company.

(33) The receipts [invoices] issued by Zeeniya Traders (Pvt) Ltd to the Plaintiff Company [**P11** to **P14**] also corroborate Sri Vidanage's evidence. These receipts, state in its description,

> "Being Advance Payment for supply of OPC bulk. Through "LAFARGE" Mahaweli Marine Cement (Pvt) Ltd."

The signatures appearing on these receipts marked "***P11***" to "***P14***" has been proved by the Plaintiff by calling Mr. Weerasekara Arachchilage Balasuriya, who was a sub-police inspector of the Criminal Investigation Unit as a Witness.

(34) These documents marked "***P7***" as well as "***P11***" to "***P14***" gives credence to the testimony of Sri Vidanage of having had prior dealings with the Defendant Company and having met Rex Hatherly, the Managing Director of the Defendant Company in an attempt to secure the supply of 40,000 Metric tons of cement.

(35) The submission by the Defendant is that Zeeniya Traders (Pvt) Ltd is merely agents of the Defendant in the commercial sense who sell bagged cement on their own behalf and not on the behalf of the principal. The Defendant's claim

is that Zeeniya Traders (Pvt) Ltd never had authority to enter into contracts on behalf of the Defendant Company in respect of bulk cement.

(36) **"Bowstead and Reynolds on Agency"** by **F. M. B. Reynolds, QC** at page 25 describes the relationship that the Defendant alleges to have existed between Zeeniya Traders (Pvt) Ltd and the Defendant,

> "**Distributors, concessionaires, and franchisees.** A supplier of the goods of a manufacturer, whether on a retail or wholesale basis, who has some form of concession as a regular stockist, distributor or franchisee is often described as "agent", "selling agent", "main agent" and the like, for the manufacturer of the goods which he supplies. Although it is possible that he is an agent in the common law sense, it is nowadays much more likely that he actually buys from the manufacturer and resells to his own customer."

(37) The Defendant has also claimed in their submissions that Zeeniya Traders (Pvt) Ltd was only supplying bagged cement to purchasers and they did not in fact sell bulk cement. It may be true that in the ordinary course of business Zeeniya Traders (Pvt) Ltd functioned as a distributor for the Defendant Company who resells cement purchased by the Defendant Company to third parties after bagging the cement. However, the present transaction concerns the sale of bulk cement, as evidenced by the documents marked "***P11***" to "***P14***". If as the Defendant claims, Zeeniya Traders (Pvt) Ltd is not ordinarily in the business of selling bulk cement to purchasers, the fact that the transaction in question relates to bulk cement also gives credence to the claim that Zeeniya Traders (Pvt) Ltd was in fact entering into a contract on behalf of the Defendant for the sale of bulk cement in the present instance.

(38) The claim that Zeeniya Traders (Pvt) Ltd was merely a distributor of the Defendant Company with respect to the contract in dispute is not reconcilable with the evidence presented during the trial. There is no documentary evidence

to suggest that Zeeniya Traders (Pvt) Ltd bought cement from the Defendant Company and resold it to the Plaintiff Company. On the contrary, the Defendant Company has admitted to having supplied 18,500 Metric tons of Cement to the Plaintiff Company directly. The Defendant Company has also admitted having been paid by the Plaintiff Company directly in respect of the said supply of cement. According to the memos issued to the Plaintiff Company by the Defendant company marked "***P15(1)***" to "***P15(72)***", 18,500 Metric tons of cement have been supplied by the Defendant Company to the Plaintiff Company during the period between 07th of November 2005 to 29th May 2006. These dates coincide with the period for which supply of bulk cement in receipts ***P11***, ***P12***, ***P13*** and ***P14*** issued by Zeeniya Traders (Pvt) Ltd relates to. Both Witnesses who gave evidence for the Defendant Company have admitted to having made these supplies to the Plaintiff Company and having received payments for the same from the Plaintiff Company.

(39) All these facts indicate that it was in fact the Defendant who supplied cement to the Plaintiff directly, without any involvement of Zeeniya Traders (Pvt) Ltd in the supply of cement and payment for the same. Such an arrangement is inconsistent with the claim that the Defendant has made that Zeeniya Traders (Pvt) Ltd was merely a distributor of the Defendant in the given transaction. No goods have passed through Zeeniya Traders (Pvt) Ltd. Except for the payment of Rs. 15 million that has been made upfront by the Plaintiff, no money has passed through Zeeniya Traders (Pvt) Ltd in relation to the supply of cement between the Plaintiff and the Defendant. Accordingly, the evidence suggests that Zeeniya Traders (Pvt) Ltd has acted as the agent through which the Plaintiff Company has contracted with the Defendant Company for the supply of cement.

(40) The letter marked **P17,** which was led in evidence by the Plaintiff also supports the claim that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant for the said contract. The letter "**P17**" which is addressed to Zeeniya Traders (Pvt) Ltd by the defendant, states as follows,

"Balance Confirmation of Bulk Cement Contracted on behalf of J. D. Corporation (Pvt) Ltd

This is to confirm, as at 07th March 2006 we have supplied 14250 Mt to J.D. Corporation out of 40,000MT of bulk cement contracted through your company as our agent."

(41) This letter appears to have been written by Nithyanandan, who was the Supply Chain Manager of the Defendant Company at the time. In his Evidence [Affidavit] Nithyanandan claimed that his name had been incorrectly spelt in the said letter "***P17***". However, in cross-examination it was revealed that in the Evidence Affidavit submitted to court by Nithyanandan, his name had been spelt in the same manner as in "***P17***".

"Q. How have you spelt your name in your Affidavit?

A. Nithyanandan.

Q. So, is that spelling of your name as appearing in the document marked "***P17***" the same as you have spelt in your Affidavit tendered to Court?

A. It is spelt the same. But it is a typing error.

Q. Now you realize in your Affidavit also your name is spelt in the same way as your name has been spelt in the document marked "***P17***"?

A. Yes."

(vide pages 11 and 12 of Proceedings of 08.12.2009)

(42) In fact, it was also revealed that Nithyanandan's name had been spelt wrong in multiple other documents emanating from the Defendant Company he had signed.

"Q. When you went through the document marked "***P17***" did you go through "***P15***" documents?

A. I went through.

Q. You would have then realized "***P17***" has the same spelling as the spelling that is contained "***P15***" documents?

A. Yes.

Q. So therefore, you obviously would have known that is no mistake in "***P17***" in spelling of your name?

This is also a mistake done by my Marketing Executive which I overlooked and I signed, but my true spellings are **Nithianandan**."

(vide pages 15, 16 of proceedings of 08.12.2009)

(43) Nithyananda, also states in his evidence [Affidavit] that his signature that appears on P17 is distorted. The Plaintiff's submission was that the signature of Nithyananda which appears in "***P17***", is identical to that of his signature appearing in the series of memos starting from "***P15(1)***" to "***P15(72)***". Additionally, Sri Vidanage, Tharanga Sarathchandra Priyawansha, as well as Koggala Wellala Bandula, all of whom gave evidence on behalf of the Plaintiff have identified the signature which appears in "***P17***" as belonging to Nithyanandan. All these Witnesses gave evidence to the effect that they had personally seen Nithyanandan place his signature on documents and are therefore familiar with the signature of Nithyanandan.

(44) Nithyanandan in his evidence has also stated that the letter "P17" has been written in a different sequence and style to which he usually uses and that the font used in the said letter is different to that which is usually used by the Defendant Company. Referring to the signature of P17 witness had said "My signature too seems to be somewhat distorted" but there is no categorical denial on his part to say that he was not the author of P17, and appears to be an attempt to impress upon the court, that he was not the author of P17.

(45) However, it is to be noted that Mr. Nithyanandan's evidence has at times been contradictory or unreliable. In fact, he has made contradictory claims during re-examination by the Counsel for the Defendant with regards to the document marked "***P17***".

During re-examination Mr. Nithyanandan has stated as follows,

"Q. Shown document "***P17***", what is the date of that document?

A. 9th March 2006

Q. And that is the document that is a letter addressed to Ms. Maharoof? Who has signed that letter?

A. Nithyanandan

Q. That is yourself?

A. Yes.

…

Q. To whom is this letter addressed?

A. To Director, Zeeniya Traders Pvt Ltd, Colombo: 14,

Q. And who is the addressee in that letter?

A. Ms. Zarina Seinab Maharoof

Q. So she is a director of Zeyniya Traders Pvt Ltd?

A. Yes.

Q. By way of that letter you had conveyed certain information to Ms. Maharoof?

A. Yes."

(vide pages 8, 9 of proceedings dated 30.04.2010)

However, he has put forward a completely different position later on during re-examination,

"Q. Shown document marked P17,

Witness does the document marked P17, have the reference number?

A. There is no reference number.

Q. Earlier you said to this court that this is the letter address to Ms. Maharoof a director of Zeyniya Traders?

A. Yes

Q. Did you write this letter to Ms. Maharoof?

A. I cannot recollect having written any letter.

Q. Have you written any letters to Ms. Maharoof in the cause of your duties as supply change manager of the defendant company?

A. No.

Q. Have you written to any director of Zeniya Traders in the course of your duties as supply chain manager of the defendant company?

A. Never written any letters."

(vide pages 13, 14 of proceedings dated 30.04.2010)

(46) Sandaya Darshini Siriwardena, giving evidence on behalf of the Defendant Company also tried to cast doubt on the authenticity of "**P17**", by stating that the letter has no reference number whereas other letters originating from the Defendant Company do. However, in cross-examination it was revealed that many other letters originating from the Defendant Company, signed by Mrs. Siriwardena herself bore no reference numbers. (vide pages 9-13 of proceedings dated 17.06.2010). The Learned High Court Judge too had made this observation [page 13 of the judgement]. Accordingly, many attempts made by the Defendant to attack the credibility of the letter "**P17**" has failed.

(47) On a perusal of the evidence given by Mr. Nithyanandan at trial it can be concluded that his claim that "***P17***" was not signed by him lacks credibility. On balance, the evidence of three Witnesses called by the Plaintiff who identified the signature placed on "***P17***" as being Mr. Nithyanandan's, as well as on a

comparison of the signature placed in "***P17***" with the signature in other documents in the series of documents marked "***P15(1)***" to "***P15(72)***" by the Plaintiff to which Nithyanandan has admittedly placed his signature, gives more credibility to the claim that "**P17**" was in fact signed by Nithyanandan. It is apt to point out that the learned trial judge having analysed the evidence in relation to P17, had concluded that:

> *"Therefore, the Defendant's position that Mr. Nithyanandan has not signed and he did not have the authority to do so has been attacked and lacks probity."*
>
> (vide pages 11, 12 of the Judgement1)

(48) The evidence given by the two Witnesses called by the Defendant also supports the claim that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in entering into the contract which forms the subject of this action. Attention is drawn to the following statement by Mr. Nithyanandan during cross-examination.

> "Q. And you told court on the other day that at the point of stopping further supply there was a quantity that had been supplied to the plaintiff company?
>
> A. Yes.
>
> Q. In to that contract to supply a further quantity to the plaintiff the Chairman of Sri Lanka Cement Corporation was not a party, because it was something between the plaintiff and the defendant company?
>
> A. Yes, actually it was between JD Corporation and Larfarge. And actual contract was with a Zeeniya and JD Corporation and Lafarge was only supplying."
>
> (vide pages 3, 4 of proceedings dated 30.04.2010)

(49) Sandaya Darshini Siriwardena who gave evidence on behalf of the Defendant Company initially claimed that Zeeniya Traders (Pvt) Ltd merely was a

distributor of the Defendant Company who sold cement on their own right. She has stated this position during her cross-examination.

> "Q. M/s Zeeniya Traders (Pvt) Ltd., has been an agent of the Defendant company?
>
> A. Yes.
>
> Q. Agent for what purpose?
>
> A. To distribute our cement.
>
> Q. They take orders on behalf of the Defendant company and distribute cement on behalf of the Defendant company?
>
> A. They had the right to distribute our cement. They sold on their own right."

(vide page 14 of proceedings dated 29.06.2010)

(50) The above statements are in line with the claim of the Defendant Company that Zeeniya Traders (Pvt) Ltd was merely a distributor of the Cement imported by the Defendant Company. However, later during cross-examination Mrs. Siriwardena stated as follows,

> "Q. How do they act as the agent of your company?
>
> A. They sell orders to any persons as they wish.
>
> Q. What do you mean by they sell orders?
>
> A. They sell orders to collect cement.
>
> Q. They sell orders on whose behalf?
>
> A. They are our commercial agents and they sell the orders to whom they want.
>
> Q. On whose behalf? You can understand English?
>
> A. Yes.
>
> Q. <u>On whose behalf do they sell orders?</u>
>
> A. <u>On behalf of the company.</u>

Q. On behalf of the Defendant company. So, they are taking orders on behalf of the Defendant company and selling cement on behalf of the Defendant company?

A. Yes."

(vide pages 14, 15 of proceedings dated 29.06.2010)

(51) The above statements by Mrs. Siriwardena cannot be reconciled vis-à-vis the claim that Zeeniya Traders (Pvt) Ltd was an agent in the commercial sense, who merely sold cement in their own right. The statements above make it quite clear that Zeeniya Trader (Pvt) Ltd was entering into contracts on behalf of the Defendant Company, by taking orders on behalf of the Defendant Company. Accordingly, it appears that Zeeniya Traders (Pvt) Ltd did in fact have authority to bind the Defendant Company by entering into contracts on its behalf.

(52) Therefore, on a balance of probability, the Defendant's claim that Zeeniya Traders (Pvt) Ltd was merely "an agent in the commercial sense" or a distributor who had no authority to enter into contracts on behalf of the Defendant Company cannot stand.

(53) The evidence of Sri Vidanage, which is materially corroborated by documents marked "**P11**" to "**P14**" and the letter marked "**P17**", as well as the evidence of Nithyanandan and Darshani Siriwardena who gave evidence on behalf of the Defendant, indicates that Rex Hatherly, the Managing Director of the Defendant Company has either represented Zeeniya Traders (Pvt) Ltd as being the agent of the Defendant Company or knowingly allowed Zeeniya Traders (Pvt) Ltd to represent themselves as the agent of the Defendant Company. Although Zeeniya Traders (Pvt) Ltd may not have had a written contract with the Defendant Company authorizing them to enter into contracts on their behalf, by allowing Zeeniya Traders to be represented as the agents of the Defendant Company, the

Defendant Company has become liable under this contract entered into between the Plaintiff Company and Zeeniya Traders (Pvt) Ltd for the supply of 40,000 metric tons of Cement.

(54) The Learned High Court Judge has, therefore, erred in fact and in law in holding that Zeeniya Traders (Pvt) Ltd had no authority to enter into contracts on behalf of the Defendant. Although Zeeniya Traders (Pvt) Ltd may act merely as a distributor in the ordinary course of business between Zeeniya Traders (Pvt) Ltd and the Defendant Company, under the present circumstances Zeeniya Traders (Pvt) Ltd has acted as the agent of the Defendant Company when entering into a contract with the Plaintiff for the supply of 40,000 metric tons of bulk cement. The conduct of the Defendant Company, and in particular of. Rex Hatherly, the Managing Director of the Defendant Company has estopped the Defendant Company from denying that any such agency exists.

(55) Accordingly, I answer the first issue as to whether Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in the purported contract between the Plaintiff and the Defendant for 40,000 metric tons of Cement in the affirmative.

(56) Moving into the next issue of whether a legally enforceable contract exists for the sale of 40,000 Metric tons of cement by the Defendant to the Plaintiff. With regards to contracts for the sale of goods, **Law of Contracts - Volume I (Stamford Lake Publication 2017) by Prof. C. G. Weeramantry** at page 202 states as follows,

> "By section 5 of the Sale of Goods Ordinance a contract for the sale of any goods shall not be enforceable by action unless
>
> 1.the buyer shall accept part of the goods so sold and actually receive the same, or
>
> 2. pay the price or a part thereof, or

3. some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent.

The object of the Statute is to ensure that where there is no contract in writing, there is some overt act to render the bargain binding. Consequently, in the absence of writing, the effect of acceptance of part of the goods or of payment of the price or a part thereof, is to establish the existence of an enforceable contract of sale between the parties."

(57) Accordingly, a contract can arise by a written agreement between the buyer and the agent of the seller or alternatively, in the absence of any such written agreement if the buyer has accepted and paid for a part of the goods to be delivered by the seller.

(58) If the claim that Zeeniya Traders (Pvt) Ltd acted as the agent of the Defendant in entering into the agreement is believed, the receipts issued by Zeeniya Traders (Pvt) Ltd marked "***P11***" to "***P14***" would be evidence that an agreement for the sale of 40,000 Metric tons of bulk cement by the Defendant to the Plaintiff existed.

(59) However, quite independent of whether Zeeniya Traders (Pvt) Ltd was the agent of the Defendant, there exists a separate issue of whether a verbal agreement between the Plaintiff and the Defendant to sell 40,000 Metric tons of existed. The absence of any written agreement between the parties directly, does not invalidate the Plaintiff's claim that such an agreement existed.

(60) In ***Walakdas v Suppramaniam chetty*** **(1917) 20 N.L.R. 23** it was held that even in the absence of a writing embodying the terms of the contract, a buyer who has accepted part of the goods may maintain an action for damages against the seller for non-delivery of the balance. In the present action, the Defendant has admitted to having supplied a quantity of 18,500 Metric tons of cement to the

Plaintiff. This fact established that there was some form of contract for the sale of cement that existed between the Plaintiff and the Defendant. The issue then is to determine whether such contract was for the supply of 40,000 Metric tons as the Plaintiff claims or whether such supply of cement was solely on a request made by the Chairman of Sri Lanka Cement Corporation as claimed by the Defendant.

(61) According to the evidence of Sri Vidanage, the Managing Director of the Plaintiff Company, on a meeting between two directors of the Plaintiff Company with Rex Hatherly, the Managing Director of the Defendant Company, Rex Hatherly had agreed to supply 40,000 Metric tons of Cement to the Plaintiff Company. It was never suggested in cross examination of the witness that he had not in fact met with Rex Hatherly and such discussion never took place. As stated earlier, this part of the evidence of Sri Vidanage is unchallenged. The only suggestion had been that there had been no documentary proof of the contract entered into between the Plaintiff Company and the Defendant Company. But as stated earlier documentary proof of a contract of such nature is not essential to determine the existence of such a contract.

(62) The letter marked "**P17**" is material in this regard. The Defendant, through the evidence of their Witnesses as well as their written submissions has maintained that since Nithyanandan has no authority to enter into contracts on behalf of the Defendant company, "**P17**" does not create an enforceable contract. It is true that "**P17**" does not create an enforceable contract. However, the position of the Plaintiff is not that "**P17**" creates a legally enforceable contract, but rather that "**P17**" is evidence of a verbal contract for the sale of cement that existed between the Plaintiff and the Defendant. In this regard reference may be had to the cross-examination of Sri Vidanage, the Managing Director of the Plaintiff Company,

"Q. Any agreement or understanding you had, was with M/s Zeenia Traders (Pvt) Ltd., directly?

A. No,. ***P17*** confirms contract and they have executed the contract. They have acted upon the contract."

(vide page 7 of proceedings of 30.11.2007)

(63) The thrust of the Plaintiff's claim is that the Defendant has accepted and acted upon the contract for the sale of cement that the Plaintiff alleges exists between the Defendant and the Plaintiff. "**P17**" is an admission by Nithyanandan, the Supply Chain Manager of the existence of the existence of a contract.

(64) Nithyanandan has also admitted to the existence of this contract to supply 40,000 Metric tons of Cement by the Defendant to the Plaintiff on numerous occasions during his cross-examination.

"Q. So Rex Hartherly the M.D. was giving a confidential discount? Is it confidential discount 20%?

A. Yes.

Q. Normal price per Metric ton was Rs. 8100?

A. Yes.

Q. Your company had agreed to supply to the Plaintiff per ton for a price minus 20% confidential discount. And that confidential discount you say was something that had been agreed between your Managing Director Mr. Rex Hartherly and the Plaintiff Company?

A. Yes"

(vide pages 20, 21 of proceedings of 08.12.2009)

"Q. You cannot recall what was the quantity that was agreed to be supplied?

A. Yes.

Q. Now can you recall?

A. Yes.

Q. What is the quantity they have agreed to supply?

A. 40,000 metric tons.

Q. And they have set out that is between this period?

A. Yes.

Q. What is the period? From October 25 to November 2006? That was the time you were also working there?

A. Yes.

Q. The agreement had been the Defendant should be supplied what is the quantity?

A. 40,000 tons.

Q. 40,000 tons of what?

A. Bulk Cement.

Q. Bulk Cement to whom?

A. To J. D Corporation.

Q. But that quantity was not in fact supplied?

A. It was stopped."

(vide page 26 of proceedings of 08.12.2009)

"Q. Did you tell to Court today that the quantity was agreed upon between the parties to supply?

A. I cannot remember. I do not know the agreed quantity.

Q. Did you tell court today? That the quantity was agreed upon to be supplied by the Defendant to the Plaintiff?

A. I would have said.

Q. You told court today that the quantity was agreed upon to be supplied?

A. Yes.

Q. Did you also tell Court today that out of the quantity that was agreed upon only a certain quantity was supplied?

A. Yes.

Q. Did you also tell Court today in your recollection the quantity that was supplied was about 20,000 tons?

A. Yes.

Q. You also tell Court today that there was an agreement for a confidential discount of 20%?

A. Yes.

Q. Did you also tell court that the quantity that was agreed upon to be supplied was 4000 metric tons?

A. Yes.

Q. Did you tell court out of 4000 metric tons that was agreed only 1800 metric tons have been supplied?

A. I said 20000 metric tons.

Q. Less than that?

A. Yes.

Q. Out of 40000 metric tons your company has supplied only 18500 metric tons?

A. Yes.

Q. Therefore, out of the agreed sum 21500 metric tons had to be supplied?

A. Yes.

Q. That is the quantity that the Defendant company had not supplied although they agreed?

A. Yes."

(vide pages 28, 29 and 30 of proceedings of 08.12.2009)

"Q. Your company had undertaken to supply a quantity of cement?

A. Yes.

Q. That you told Court was bulk cement, and that you had already told the court was a quantity of 40,000 Mt?

A. Yes.

Q. Which full quantity was not supplied?

A. Yes.

Q. So that supply was terminated by letter sent to JD Corporation, which has been produced In this case marked P22?

A. Yes.

Q. And that point of time the entire 40,000 was not supplied?

A. No.

Q. The balance quantity was 21,500mt?

A. Yes."

(vide pages 3, 4 of proceedings dated 30.04.2010)

(65) These evidence referred to above given by the Witness of the Defendant Company is completely inconsistent with the claim made by the Defendant in their answer that the Defendant Company was merely supplying cement to the Plaintiff on the request Sri Lanka Cement Corporation and that the Defendant was not bound by any stipulated price or to supply any stipulated quantity when supplying cement to the Plaintiff (vide paragraph 06 of the Answer of the Defendant).

(66) In fact, under cross-examination Nithyanandan has stated that "**P17**" refers to this verbal contract which existed between the Plaintiff and the Defendant Companies.

"Q. That is the agreement which is reflected in the document marked "***P17***"? That is what is reflected in the document marked "P17" is that agreement of which you have now told Court?

A. 40000 metric tons.

Q. So the document marked "P17" contains what you have in fact told Court?

A. Total quantity.

Q. And the total quantity according to the document marked "P17" is 40000 metric tons?

A. Yes.

Q. It is the bulk cement?

A. Yes.

Q. It is the contract?

A. Yes."

(vide pages 30, 31 of proceedings of 08.12.2009)

(67) The Defendant, on the other hand has not produced any material to support their claim that the supply of Cement to the Plaintiff was done solely on the request made by the Chairman of Sri Lanka Cement Corporation. The document "***P22***" which the Defendant relies on which was written by Rex Hatherly merely states that the supply of cement to the Plaintiff was stopped at the instructions of the Chairman of Sri Lanka Cement Corporation. Even if this fact is accepted as true, it does not necessarily follow that the supply of cement to the Plaintiff Company was initiated at the request of the Sri Lanka Cement Corporation.

(68) Sandaya Darshani Siriwardena who gave evidence on behalf of the Defendant has stated that supply of cement to the Plaintiff was initiated at the request of the Sri Lanka Cement Corporation. However, Koggala Wellala Bandula , who was the Chairman of Sri Lanka Cement Corporation during 2004 to 2005, the period during which the Defendant Company started supplying cement to the Plaintiff Company, who was called as a Witness by the Plaintiff stated that Sri Lanka

Cement Corporation had given no instructions to the Defendant Company to supply cement to the Plaintiff Company,

> "Q. Did you or your corporation instruct the defendant LAFARGE Cement to supply the cement to the plaintiff company J P Corporation?
>
> A. No."

(vide page 5 of proceedings dated 26.01.2009)

This part of Koggala Wellala Bandula's evidence had not been assailed under the cross-examination of the witness.

(69) Additionally, Sri Vidanage, in his evidence has consistently maintained that the claim, the supply of cement to the Plaintiff Company was due to a request made by the Sri Lanka Cement Corporation, was false. During the cross-examination of Sri Vidanage it was suggested to him that the supply of cement was halted due to the Plaintiff Company selling cement openly in the market to third parties, in contravention of an agreement that existed between the Plaintiff Company and the Defendant Company. However, this position is again not supported by any other evidence and in fact, not even mentioned in the Answer filed by the Defendant Company. This position is inconsistent with the position maintained by the Defendant in their answer that there existed no agreement as to the price or the quantity of cement to be supplied between the Plaintiff and the Defendant (vide paragraph 6 of the Answer of the Defendant). Accordingly, the Defendant has failed to provide a consistent explanation as to why cement was admittedly supplied by them to the Plaintiff Company.

(70) Therefore, it could be concluded that the Defendant has failed to establish their assertion that cement was supplied to the Plaintiff solely on the request made by the Sri Lanka Cement Corporation. On a balance of probability, the Plaintiff has clearly established that cement was supplied to the Plaintiff by the Defendant in

pursuance of a verbal contract that existed between the two parties for the sale of 40,000 Metric tons of cement. The document "**P17**" as well as the evidence of Nithyanandan, the Supply Chain Manager of the Defendant Company at the time, who was called as a Witness by the Defence, gives credence to this claim.

(71) Accordingly, I answer the second issue as to whether a legally enforceable contract exists for the sale of 40,000 Metric tons of cement by the Defendant to the Plaintiff in the affirmative. It must be noted that independently of the first issue, the Defendant would be liable for a breach of contract on the finding of the second issue alone.

(72) Since both issues have been found in favour of the Plaintiff, it must be examined whether the Plaintiff has sufficiently proved the quantum of damages that they are entitled to for the breach of contract by the Defendant Company.

(73) Witness Tharanga Sarathchandra Priyawansha, an accountant attached to the Plaintiff Company in his evidence has quantified the loss of profit which has resulted from the breach of contract by the Defendant as amounting to Rs. 22,897,500/- based on "**P29**" which is a document prepared by the said Witness. In his evidence the witness states that he has calculated the total profit earned through the quantity of 18,500 Metric tons of cement that was supplied by the Defendant Company to the Plaintiff Company as being Rs. 15,734,640.65. The relevant documents, memos and invoices which support this calculation has been marked as "***P25***", "***P25(1)***" to "***P25(127)***", "***P26***", "***P26(1)***" to "***P26(39)***", "***P27***", "***P27(1)***" to "***P27(103)***". Witness Koggalla Wellala Bandula, who was the Chairman of Sri Lanka Cement Corporation from 2004 to 2005, who was called to give evidence by the Plaintiff, has identified the documents "***P26(1)***" to "***P26(19)***" as being purchase orders issued to the Plaintiff Company from the Sri Lanka Cement Corporation. Ponniah Sri Skandarajh, who was an accountant of

Lanka Cement Ltd, who testified on behalf of the Plaintiff, has identified the documents marked "***P25(1)***" to "***P25(64)***" as being purchase orders issued on behalf of Lanka Cement Ltd to the Plaintiff. The Witness has also admitted to having signed the document "***P25***" which details the total income earned by the Plaintiff Company by supplying cement to Lanka Cement Ltd.

(74) The Witness Mr. Tharanga Sarathchandra Priyawansha has calculated the estimated profit that the Plaintiff Company would have earned if the Defendant supplied the remaining 21,500 Metric tons of cement as agreed in the contract, as amounting to Rs. 22,897,500/-. He has based this estimate on the total income earned and expenses incurred by the Plaintiff Company by the sale of 18,500 Metric tons of cement that were supplied by the Defendant Company to the Plaintiff Company. This estimated loss of profit has not been sufficiently challenged during the cross-examination of the Witness. The Counsel for the Defendant during cross-examination has suggested that the loss of profit of Rs. 22,897,500/- calculated by the Witness is a fictitious amount as no damage has actually been caused to the Plaintiff. However, the Witness has maintained that this is the loss of profit that the Plaintiff Company has suffered owing to the breach of contract by the Defendant Company.

(75) In this regard the treatise "The Law of Contracts Volume – II" (Stamford Lake Publications 2017) by Prof. C. G. Weeramantry states at page 888,

> "The award of damages is based upon the general principle that a sum of money to be given in reparation of the damage suffered should, as nearly as possible, be the sum which will put the injured party in the position he would have enjoyed had he not sustained the wrong for which the award of damages is made, and that <u>it should include both actual loss and loss of profit</u>."

(76) Accordingly, the Plaintiff is entitled to claim any loss of profit arising from a breach of contract as damages from the Defendant.

(77) The Plaintiff in their Plaint has also quantified a loss of Rs. 8,064,750/- as being the balance sum of advance payment of Rs. 15 million made by the Plaintiff to Zeeniya Traders (Pvt) Ltd in respect of which the Defendant has defaulted to supply cement. However, if this amount is awarded, in addition to the loss of profit from the breach of the contract, that would place the Plaintiff in a better position than which they would have been placed if the contract had been performed by the Defendant. Accordingly, the Plaintiff is not entitled to recover the said amount.

(78) The Plaintiff in their Plaint has also claimed loss and damage to its business reputation and goodwill. However, the Plaintiff has failed to sufficiently prove or quantify any such loss resulting from damage to its business reputation and goodwill.

(79) In these circumstances, I hold that the total loss that the Plaintiff is entitled to recover is the loss of profit arising from the breach of contract amounting to Rs. 22,897,500/- and the legal interest thereof.

(80) For the reasons set out above, I make the following orders;

The judgement of the (Commercial) High Court dated 9.03 2012 is hereby set aside.

I hold that the Defendant has acted in breach of the contract entered between the Plaintiff and the Defendant to supply 40,00 metric tons of [bulk] Cement.

The Plaintiff is entitled to the judgment as prayed for, and is entitled to damages in a sum of Rs.22, 897,500/- with legal interest.

The Learned Judge of the (Commercial) High Court is hereby directed to enter decree accordingly,

Appeal Allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R AMARASEKERA

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal under the provisions of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 52/2020
SC Special LA No: 263/19
CA Writ Application No: 157/2016

1. Weragoda Kapuge Priyantha,
"Agra", Pahala Karannagoda,
Warakagoda.

2. Hewage Don Ananda,
Sri Sarananda Road,
Pahala Naragala, Gowinna.

3. Lalith Samantha Wijesinghe,
179/01, Pannil Kandha,
Kananwila, Horana.

4. Kurukulasooriya Oswal Chanditha
Mario Fernando,
No. 77, Kirigala Road, Handapangoda.

PETITIONERS

vs

1. Secretary,
Ministry of Education,
"Isurupaya",
Sri Jayawardenapura, Battaramulla, Kotte.

2. Upali Marasinghe,
Former Secretary,
Ministry of Education, "Isurupaya",

Sri Jayawardenapura, Battaramulla, Kotte.

3. P.D. Jayarathne,
   Principal,
   Ashoka College, Horana.

4. Ven. Opalle Gnanasiri Nayaka Thero,
   Rajamaha Viharaya, Horana.

5. Vidyarathna (incorporated) Society,
   Rajamaha Viharaya, Horana.

6. P.D. Jayarathne,
   Principal,
   Ashoka College, Horana.

7. Commissioner General of Examinations,
   Ministry of Education,
   Pelawatta, Battaramulla.

RESPONDENTS

And now between

1. Secretary,
   Ministry of Education,
   "Isurupaya",
   Sri Jayawardenapura, Battaramulla, Kotte.

7. Commissioner General of Examinations,
   Ministry of Education,
   Pelawatta, Battaramulla.

1ST & 7TH RESPONDENTS – APPELLANTS

vs

1. Weragoda Kapuge Priyantha,
   "Agra", Pahala Karannagoda,
   Warakagoda.

2. Hewage Don Ananda,
Sri Sarananda Road,
Pahala Naragala, Gowinna.

3. Lalith Samantha Wijesinghe,
179/01, Pannil Kandha,
Kananwila, Horana.

4. Kurukulasooriya Oswal Chanditha
Mario Fernando
No. 77, Kirigala Road, Handapangoda.

PETITIONERS – RESPONDENTS

2. Upali Marasinghe,
Former Secretary,
Ministry of Education, "Isurupaya",
Sri Jayawardenapura, Battaramulla, Kotte.

3. P.D. Jayarathne,
Principal,
Ashoka College, Horana.

4. Ven. Opalle Gnanasiri Nayaka Thero,
Rajamaha Viharaya, Horana.

4A. Ven. Dr. Labugama Naradha Thero,
Rajamaha Viharaya, Horana.

5. Vidyarathna (incorporated) Society,
Rajamaha Viharaya, Horana.

6. P.D. Jayarathne,
Principal,
Ashoka College, Horana.

2ND – 4TH, 4A, 5TH & 6TH RESPONDENTS – RESPONDENTS

Before: **L.T.B. Dehideniya, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Sureka Ahmed, Senior State Counsel for the 1st and 7th Respondents – Appellants

Dr. Sunil Coorey with Sudharshani Coorey for the 1st – 4th Petitioners – Respondents

J.A.J. Udawatte with Anuradha Ponnamperuma for the 4A and 5th Respondents – Respondents

Argued on: 5th November 2021

Written Submissions: Tendered on behalf of the 1st and 7th Respondents – Appellants on 27th August 2020

Tendered on behalf of the 1st – 4th Petitioners – Respondents on 20th October 2020

Tendered on behalf of the 4A and 5th Respondents – Respondents on 7th August 2020

Decided on: 13th January 2023

Obeyesekere, J

This appeal has been preferred against the judgment of the Court of Appeal which quashed the direction given by the Ministry of Education to the Horana Asoka College [*the School*] to refrain from conducting classes solely in the English language and to adopt the bilingual policy of the Government.

Background facts

By letter dated 2nd September 2015 [P12], the Secretary, Ministry of Education who is the 1st Respondent – Appellant [*the 1st Appellant*], informed the 4th Respondent – Respondent [*the 4th Respondent*] who at that time was the Manager of the said School that:

(a) Section 6 of the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960 [*the 1960 Act*] requires all 'Government approved unaided private Schools' to comply with the general education policy of the Government; and

(b) the said School, by conducting classes solely in the English medium from Grades 1 to 11 is acting contrary to the education policy of the Government on the medium of instruction that should be adopted by schools.

Furthermore, by P12, the 1st Appellant directed the 4th Respondent to adopt the bilingual policy of the Government of teaching part of the subjects in English and the balance subjects in Sinhalese or else, to adopt Sinhalese solely as the medium of instruction and thereby comply with the Government policy with regard to the medium of instruction.

The 1st – 4th Petitioners – Respondents [*the Respondents*] whose children are students of the said School and who were concerned that compliance with P12 would result in the medium of instruction being changed from English to bilingual [i.e., Sinhalese and English] or Sinhala, invoked the Writ jurisdiction of the Court of Appeal and sought a Writ of Certiorari to quash P12 and a Writ of Prohibition prohibiting the implementation of the decision contained therein. By its judgment delivered on 10th June 2019, the Court of Appeal issued a Writ of Certiorari quashing P12, the Writ of Prohibition as prayed for, and imposed costs in a sum of Rs. 400,000 payable by the 1st Appellant to the 1st – 4th Respondents.

Dissatisfied with the said judgment, the 1st Appellant and the 7th Respondent – Appellant, the Commissioner General of Examinations [*the 7th Appellant*] [*collectively the Appellants*] sought and obtained leave to appeal on 2nd July 2020 on four questions of law, which I shall refer to later in this judgment. It would suffice to state at this stage that the critical issue that needs to be determined in this appeal is whether the School is required to comply with the general education policy of the Government, and more particularly with the policy of the Government with regard to the medium of instruction, if any such policy exists.

Legislation relating to education

In order to place the above issue in perspective, it would be important to consider very briefly the development of the legislation relating to education since the turn of the Twentieth Century, the manner in which State responsibility for education and the medium of instruction has evolved during that period.

The starting point would be the Town Schools Ordinance No. 5 of 1906, which was an Ordinance to provide for compulsory vernacular education in Municipal and Local Board Towns, and the Rural Schools Ordinance No. 8 of 1907, which was an Ordinance to provide for the education in the vernacular languages of children in rural and planting districts for whose education other adequate provision has not been made. In terms of the latter Ordinance, vernacular schools include schools in which instruction is given in English, in addition to the vernacular, provided that English does not form one of the subjects in which it is compulsory to receive instruction.

The above Ordinances were repealed and replaced by the Education Ordinance No. 1 of 1920, which sought to revise and consolidate the law relating to education. This Ordinance refers to two types of schools, namely (a) Government Schools, which meant schools, whether secondary or elementary, established by or transferred to the Government and maintained entirely from the public funds of the State, and (b) Assisted Schools, which meant schools, whether secondary or elementary, to which aid is contributed from the public funds of the State. Although not referred to in any of the above Ordinances, there also existed in the country schools which had been commenced by the missionaries commonly referred to as *denominational schools* where the medium of instruction was generally in English, and where fees were levied from its students, even though such schools may have received financial assistance from the State.

State responsibility for Education

In the chapter titled, 'Full State Responsibility for Education', in the book 'Education in Ceylon – A Centenary Volume' [(1969) Ministry of Education and Cultural Affairs], it has been stated as follows:

"*Since the establishment of the Department of Public Instruction, the State, whilst continuing to assist denominational schools, started schools of its own. Christians, Buddhists, Hindus and Muslims vied with one another in establishing schools, towards the end of the nineteenth century, thus adding to the number of denominational schools. These two types, called Assisted Schools and Government Schools respectively, existed side-by-side till 1960 in which year the State assumed full responsibility for almost all schools in the Island .*

During the Donoughmore period the government in its endeavour to build a welfare state began to assume greater responsibility for education. The Executive Committee for Education, with its Chairman designated the Minister of Education, had control of general policy, finance and administration of education. The task of executing the education programme to build a welfare state fell on this Executive Committee of Education, which, during the period 1931 – 1947 under the distinguished Minister of Education Dr. C.W.W. Kannangara made significant changes in the Island's school system, through a series of measures that widened the responsibility of the State for education.

After tiding over the epidemic of malaria in 1935, the Ministry of Education continued its policy of expansion opening up more and more schools in still unserved areas. Dr. C.W.W. Kannangara whilst pursuing this policy was quite determined on widening State control of the Island's school system. He remarked thus in 1938: "In all justice to the country and the State Council, if the State Council pays the money for educating the youth of this country, it should be able to control education; he who pays the piper, should be able to call the tune."

The gradual control that the State began to exercise over education through the Education Ordinance of 1920 has been discussed in a Chapter titled, 'Unaided Schools' in the aforementioned book 'Education in Ceylon – A Centenary Volume' [supra], where the author states as follows:

"*State Control began to be deemed necessary for the effective planning of education and for the provision of educational opportunity for all. In 1931, the Minister of Education took upon himself the responsibility of planning education on a national scale. Denominational activity was as a result curtailed and some of the missionary schools were taken over when their managers willingly handed them over to the State. In 1934, restrictions were placed on the opening of new schools by private and denominational bodies and there were signs of increasing State control of denominational schools.*

Education Ordinance No. 31 of 1939 and Unaided Schools

The Ordinance of 1920 was replaced by the Education Ordinance No. 31 of 1939, which Ordinance, subject to several amendments, exists to this date [*the Ordinance*]. Among the many provisions of the new Ordinance was Section 32(1) which enabled the Minister to make regulations for the purpose of giving effect to the principles and provisions of the Ordinance.

The first amendment to this Ordinance came by way of the Education (Amendment) Act, No. 26 of 1947, and contained three significant amendments to the principal enactment. The first was the power to make regulations in respect of the language through the medium of which instruction shall be given in any class in any Government School or Assisted School – vide Section 32(2)(ca). The second was Section 41A(1), which stipulated that no fees shall be charged in respect of admission to, or for the education provided in a Government School or an Assisted School. The third was Section 43A, which perhaps for the first time, contained provisions with regard to a third category of schools referred to as Unaided Schools, which were those schools that did not receive any financial assistance from the State. This section empowered the Director of Education to examine such Unaided Schools upon complaints on certain specified matters and give directions on the remedial measures that were to be taken, or where such school failed to remedy the situation, to discontinue such schools.

In the above mentioned chapter titled 'Unaided Schools', the author states as follows:

"*Ordinance No. 26 of 1947 abolished fees in government and assisted schools and ushered in the Free Education scheme recommended by the Special Committee on Education in 1943.* ***Assisted schools which did not join the Free Education Scheme were allowed to become private schools unaided by Government****. Out of 3079 assisted schools in 1945, the majority of which were denominationally managed, only 115 assisted schools remained outside the Free education scheme. The schools that remained outside the Free Education Scheme became "fee levying private schools" and the others became "non-fee levying private schools under denominational management".*

Compliance with the free education scheme on the part of assisted schools was purely voluntary according to the new educational policy formulated in 1946, but the decision had to be made by the schools before 30th April 1948. ***Schools which did not join the free education scheme ceased to receive aid of any kind after first October 1948.***

Schools outside the Free Education Scheme were allowed to levy fees and run as unaided fee-levying private schools*.* ***But they had to conform to set standards and follow State policy regarding education****. Thus, the hand of the State was felt to touch the private schools in more than one way.*" [emphasis added]

Thus began legislation empowering the Director of Education to exercise control over Unaided Schools. While previous legislation sought to regulate schools that received in some measure State assistance, the 1947 Amendment sought to establish the State's control over all schools. What is important is that at the time of Independence, there existed in Ceylon three categories of schools, namely Government Schools, Assisted Schools and Unaided Schools.

<u>The Education (Amendment) Act No. 5 of 1951 and the Education Regulations, 1951</u>

It is acknowledged by the author of the aforementioned chapter titled 'Unaided Schools' that, "*The White Paper (Government Proposals for Education Reform in Ceylon) of 1950 brought all unaided schools, assisted schools and government schools under one system*

in the greater interests of the nation. The Education (Amendment) Act No. 5 of 1951 provided the necessary legislation to give effect to some of the changes envisaged in the White Paper."

The Education (Amendment) Act No. 5 of 1951 contained two important provisions with regard to Unaided Schools. The first was Section 42A(1), which stipulated that "*No person shall, on or after the 1st day of June, 1951, maintain any unaided school unless the principal or other person for the time being in control of the school has notified to the Director in writing all such particulars relating to the school as the Director may, by notice published in the Gazette, require to be furnished to him in respect of unaided schools*."

The second was Section 43A(1), which was amended by the inclusion of a new paragraph (e) that enabled the Director to issue an Order where, "*the education and training at the school does not accord effectively with the national interest or* ***with the general educational policy of the Government, including the policy regarding the medium of instruction in schools***." These two amendments further strengthened State control over Unaided Schools.

Regulation 2 of the Education Regulations, 1951 required the proprietor of any school who required assistance from the State to make an election in that regard, thus making such school an Assisted School.

Regulations 4 and 5(1) of the said Regulations contained provisions relating to the medium of instruction, which may be summarised as follows:

(a) Where there are not less than 15 Sinhalese or Tamil pupils in all the classes of any primary school, instruction shall be given to all such Sinhalese pupils or Tamil pupils, as the case may be, through the medium of the Sinhalese or Tamil language;

(b) Where the parents of at least 15 Muslim pupils in any primary school who are neither Sinhalese nor Tamil requests that instruction shall be given to each of those pupils in Sinhalese, English or Tamil, instruction shall be so given to all these pupils through the medium of the specified language;

(c) In the case of every pupil in any primary school to whom instruction is given in Sinhalese or Tamil, English shall be taught to such pupil as a compulsory second language from Standard Three upwards;

(d) Where a student receives his instruction in English, Sinhalese or Tamil shall be a compulsory second language from Standard Three upwards;

(e) Every pupil in a secondary school, which, on 31st March 1951 was registered for the purposes of the said Regulations as a Sinhalese School shall be given instruction through the medium of the Sinhala language. There was similar provision with regard to Tamil Schools;

(f) The Minister however had the power to authorise or direct that instruction in any subject specified by him be given in any specified class of any such school through the medium of the English language, if the Minister was satisfied having regard to all the circumstances, that the use of the appropriate national language is not practicable;

(g) There shall be provided in every secondary school, a compulsory course in English complying with such minimum requirements as may be prescribed by the Director.

While the said Regulations therefore provided for all three languages to be the medium of instruction in the circumstances set out in the said Regulations, I shall refer to in detail later in this judgment to the provisions of Regulation 5(2) and (3) of the said Regulations where the Minister could change the medium of instruction in schools registered as English schools to one of the national languages, and the direction made by the Minister in that regard in 1963 [R2].

The Respondents have annexed to the petition a document marked X2 said to be based on a book titled, '*History of Education in Ceylon*' by K.H.M. Sumathipala, which briefly sets out the evolution of English as a medium of instruction. It is claimed in X2 that when Sinhala was declared as the Official language by the Official Languages Act, No. 33 of 1956, the medium of instruction in education, even in schools where English was the medium

of instruction was changed and all subjects were taught in Sinhala. The said Act however does not contain any provision with regard to a change in the medium of instruction in schools and the Respondents have not submitted any material to explain the manner in which the change in the medium of instruction was implemented.

Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960

The next significant milestone in the education sector of this Country took place in 1960, when the Government of that time introduced the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960 [*1960 Act*]. The developments that led to the introduction of the 1960 Act are explained in the aforementioned chapter titled, 'Full State Responsibility for Education' in the following manner:

> "*In the 1950s, the education policy of the State came to be criticised for making financial provision for a system of denominational schools which was controlled by non-government, sectarian agencies. The demand for full State control of education had gathered the force of a widespread social movement. To bring about a just distribution of educational opportunities it was demanded that all denominational schools be taken under direct State control. Whilst this controversy raged on, public opinion in favour of the State assuming full responsibility for education gathered greater and greater momentum. Responding to this widespread public agitation, the State passed legislation to take over all Assisted Schools and Training Colleges. The State in agreeing to take over active administration of all Assisted schools brought to a close a trend towards full State control of education which had been latently developing within its own policy, simultaneous with the increase in the State's financial obligation for education*."

While the said Act defined 'Assisted School' to mean, "*any school or training college to which* ***aid is contributed from State funds*** *or was contributed from such State funds on July 21, 1960*", Section 3(1) of the 1960 Act provided that, "*The Minister may, by Order published in the Gazette, declare that, with effect from such dates as shall be specified in the Order*, *the Director shall be the Manager of every Assisted School to which this Act applies*."

In terms of Section 5(1), "*The proprietor of any Assisted school (not being an Assisted training college) which is a Grade I or Grade II school may, at any time before the date specified in the Order made and published under section 3,* ***elect to administer such school as an unaided school*** *and if, before that date, he serves a written notice on the Director to the effect that he has made such an election and specifying the date of such election (such date being a date earlier than the date specified in the Order) the provisions of the proviso to the said section 3 shall apply in the case of such school with effect from the date of such election*." [emphasis added]

The proviso to Section 3(1) reads as follows:

> "*… where the proprietor of any Assisted school to which this Act applies (not being an Assisted training college) has, at any time before the date specified in such Order, served under Section 5, a written notice on the Director under this Act to the effect that he has from the date specified in the notice elected to carry on the administration of such school as an unaided school, such Order shall, with effect from the date so specified in the notice, cease to apply to such school*."

Section 6 of the Act provided as follows:

> "*The proprietor of any school which,* ***by virtue of an election made under Section 5, is an unaided school*** *–*
>
> *(a) shall* ***educate and train the pupils in such school in accordance with the general educational policy of the Government****; …*
>
> *(g) shall comply with the provisions of any written law applicable to such school and matters relating to education*;" [emphasis added]

With the introduction of the 1960 Act, the number of Unaided Schools that existed at that time came down as a result of several Unaided Schools opting to become and thereafter be classified as Assisted Schools. What continued thereafter as Unaided Schools were

those schools that levied fees from their students and therefore had the financial capacity to continue without funding of any form from the State.

The following excerpts from the aforementioned Chapter titled 'Unaided Schools' places in perspective the position of Unaided Schools:

> "*The story of Unaided Schools in Ceylon is the story of a 'rise and decline,' the decline having accompanied a rise in the State control of schools in the face of a growing demand for a comprehensive national system of education. Today the Unaided Schools number a mere 92, and have a pupil enrolment of less than one per cent of the school-going population. In their heyday, they … numbered over 3000.*
>
> *The majority of today's Unaided Schools have had a long and illustrious history going back to early British times when the Missionary school system emerged as a distinctive feature of education in Ceylon, especially at a time when direct governmental activity in the sphere of education was meagre or non-existent… Most of the schools which remain today as Unaided Schools were associated with one religious denomination or another and bore a resemblance to the public schools of England*."

Establishment of the National Education Commission

I must at this stage refer to the National Education Commission, which was established in terms of the National Education Commission Act, No. 19 of 1991, to make recommendations on education policy in all its aspects to the President.

Section 2(1) of the Act provides that the President, subject to the provisions of the Constitution, may, declare from time to time the National Education Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. As provided in Section 2(2), the National Education Policy includes the **medium of instruction**. Although the National Education Policy is yet to be declared, the Commission has made certain recommendations with regard to bilingual education in its National Education Policy Framework (2020 – 2030) [2022], to which I shall refer to later in this judgment.

The gradual decline in the use of English as a medium of instruction and its reintroduction

It is common knowledge that the waves of nationalism, cultural revivalism and nationalisation that swept across newly independent Asian and African countries in the 1950's and 1960's including Sri Lanka contributed to English as a medium of instruction being gradually done away with in our Country in favour of instruction in Sinhalese and Tamil. Although the 1960 Act did not contain any provisions relating to the medium of instruction, it is widely acknowledged that the said Act contributed to the above change.

The use of English as a medium of instruction in our education system and its gradual decline have been summarised in the following paragraph from the National Education Policy Framework (2020-2030) prepared by the National Education Commission [page 139]:

> *"Since the inception of the island-wide school system in Sri Lanka, which evolved under British colonial rule, the medium of instruction has been Sinhala or Tamil in most schools except in the urban elite schools. The first effort to formulate a policy on medium of instruction was attempted in 1943, and the report of the committee, which is widely known as "Kannangara Report" declared that the "mother tongue is the natural medium of education and the genius of a national finds full expression only through its own language and literature". There were two other historical events in the mid-twentieth century that influenced the policy on the medium of instruction in schools. Firstly, the Free Education Act of 1947 and secondly bringing the whole education system under government control in the 1960s. Concurrently, with the increase in demand to switch the medium of instruction to the national languages, Sinhala or Tamil, the government in the 1970s decided to change the medium of instruction gradually by stopping the English medium in the Grade I class from 1971 and eliminating it class by class in succession. By 1983, there were no English medium classes in government or private schools."*

Even though English was taught as a second language in urban and suburban schools, the National Education Commission, referring to the removal of English as a medium of

instruction has acknowledged that *"this policy proved to be a setback for the individuals concerned and society. The government, educators, and the public began to notice the vacuum created by the neglect of teaching in the English medium, and the promotion of the English medium in the last decade is a consequence of this change of perception."*

To cater to this need of having English as a medium of instruction, we saw the emergence of international schools in the early 1980's, with the National Education Commission identifying the following as the categories of international schools that exist today*:*

(i) schools following an international curriculum;
(ii) schools offering both international and local curricula; and
(iii) schools offering local curriculum only.

In its judgment, the Court of Appeal has referred to a speech made in 2011 by Professor Rajiva Wijesinha, one time Member of Parliament and Senior Professor of English at the University of Sabaragamuwa, where he has stated as follows:

> "*English is no longer just the language of the British, a legacy we could do without. Rather it is the principal international language, one of increasing opportunities all over the world. The comparative advantage we had with regard to English has been sacrificed at the altar of a divisive linguistic nationalism, which I fear has contributed to our nation being deprived of a tool that could have helped us immeasurable. While the privileged continued to benefit from their possession of this tool, the vast majority of our people, of all communities, had no access to it. We owe it to them and to the nation as a whole to take all possible steps, in the interests of equity as well as national prosperity, to set right this sad situation.*"

The Court of Appeal has also made the following extremely important observation with which I wholeheartedly agree, on the importance of English for every student of this Country:

> "*Competence in English is essential for personal success in today's globalized world. English should not be the language of the urban elite to downgrade otherwise*

talented rural youth. In my view, it is hypocrisy to make it compulsory to the children of under-privileged to study in Sinhala or Tamil Medium, while making it possible for the children of the elite and affluent to study in English Medium at International Schools or overseas, may be, to keep the distance."

Circulars relating to English as a medium of instruction and bilingual education

Circular No. 5 of 2001 dated 22nd February 2001 issued by the Ministry of Education [P7A] saw the re-introduction of English as a medium of instruction in Government schools, although limited to the Advanced Level Science Stream. The said Circular clearly highlights that globalisation and rapid changes in the field of Information Technology have led to much significance being placed on English, and that it is timely that those entering universities acquire expertise in English.

According to P7A, a survey carried out by the Ministry of Education had revealed that 26% of those students intending to follow Science subjects at the Advanced Level examination were keen to pursue the said subjects in English and that 50% of the graduates were keen to teach in English. Thus, the Government had decided to implement as a pilot project, the teaching of five subjects [Bio-science, Physics, Chemistry, Applied Maths and Zoology] in the English medium for Advanced Level Students.

In May 2002, the Ministry of Education issued a further Circular [P7B] by which it introduced bilingual education. P7B accordingly permitted the teaching of three subjects at Grade 6 [Maths, Social Studies and Health & Physical studies] and four subjects from Grades 7 – 11 [Maths, Social Studies & History, Health & Physical Studies and Science] in the English medium, subject to the availability of teachers in the English medium.

Although approval had been granted for bilingual education from Grades 6 - 11, the Ministry of Education had noticed that some schools had commenced teaching in the English medium even for lower grades, which prompted the Ministry of Education to inform all schools, by its letter dated 5th May 2003 [P7C] that, "නමුත් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීම **ප්‍රතිපත්තියක් වශයෙන් පිලිගෙන නැත. එබැවින් ප්‍රාථමික පන්තිවල** ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීම නොකළ යුතුය."

By Circular No. 2008/12 dated 21st April 2008 [P7], the Ministry of Education issued the following directions to all schools relating to bilingual education.

"4.2 ඉංග්‍රීසි භාෂාවේ අවශ්‍යතාවය හා වැදගත්කම සැලකිල්ලට ගෙන 2002 වර්ෂයේ සිට 6 – 11 ශ්‍රේණි සඳහා සමහර විෂයයන් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීමට ඒ සඳහා අවශ්‍ය පහසුකම් පවතින පාසල්වලට අවසර දෙන ලදි.

2007 වර්ෂයේ සිට ද්විතියික ශ්‍රේණිවල (6-11) ක්‍රියාත්මක වන නව විෂයමාලාව යටතේ මෙම ද්විමාධ්‍ය පංතිවල උගන්වනු ලබන විෂයයන් සඳහා මින් ඉදිරියට පහත සඳහන් විධිවිධාන බලපැවැත්වේ.

4.3 පාසල්වල ද්විමාධ්‍යයයන් ඉගෙනුම ලබන සිසුන් සඳහා වෙනම පංතියක් ආරම්භ නොකල යුතුය. සිංහල හෝ දෙමළ මාධ්‍ය හෝ සිසුන් සමග ඉහත සිසුන් ද එකම පංතියේ සිටිය යුතු අතර අදාල විෂයයන් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගෙනගන්නා අවස්ථාවන්හි දී පමණක් වෙන්වී යා යුතුය. මේ ආකාරයට ක්‍රියාත්මක විය හැකි පරිදි පාසල් කාල සටහන සකස් කර ගැනීම විදුහල්පතිගේ වගකීම වේ. තෝරාගත් විෂයයන් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගෙනීම සඳහා තෝරාගත යුත්තේ පාසලේ 6 ශ්‍රේණියේ සිසුන් අතරිනි. පාසළට ඇතුළත්වීම සඳහා ද්විමාධ්‍ය පංතිය උපයෝගි කර ගැනීමට ඉඩකඩ නොදිය යුතය.

4.4 **කණිෂ්ඨ ද්විතියික ශ්‍රේණි (6 - 9) ශ්‍රේණි සඳහා ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්විය හැකි විෂයයන්**

i. ගණිතය
ii. විද්‍යාව
iii. සෞඛ්‍ය හා ශාරීරික අධ්‍යාපනය
iv. සෞන්දර්යය විෂයය යටතේ සංගීතය (අපරදිග)
v. භූගෝල විද්‍යාව
vi. පිවිත නිපුණතා හා පුරවැසි අධ්‍යාපනය

ඉහත සඳහන් විෂයයන් අතුරින් උපරිම වශයෙන් ඕනෑම විෂයයන් 05 ක් ඉංග්‍රීසි මාධ්‍යයෙන් හැදෑරීම සඳහා තෝරාගත හැකි ය.

4.5 ජ්‍යෙෂ්ට ද්විතියික ශ්‍රේණි (10 - 11) සඳහා ඉංග්‍රීසි මාධ්‍යයෙන් හැදෑරිය හැකි විෂයයන්

<u>හැර විෂයයන් යටතේ</u>

i. ගණිතය
ii. විද්‍යාව

<u>කාණ්ඩ විෂයයන් යටතේ</u>

i භූගෝල විද්‍යාව

ii පුරවැසි අධ්‍යාපනය හා ප්‍රජා පාලනය

iii. ව්‍යවසායකත්ව අධ්‍යාපනය

iv. සංගීතය (අපරදිග)

v. තොරතුරු සන්නිවේදන තාක්ෂණය

vi. සෞඛ්‍ය හා ශාරීරික අධ්‍යාපනය

හර විෂයයන් අතරින් ඉහත සඳහන් විෂයයන් 02 ද කාණ්ඩ විෂයයන් යටතේ සඳහන් විෂයයන් අතරින් ඕනෑම කාණ්ඩයකින් එක් විෂයයක් බැගින් විෂයයන් 03 ක් ද වශයෙන් විෂයයන් 05 ක් ඉංග්‍රීසි මාධ්‍යයෙන් හැදෑරීම සඳහා තෝරාගත හැකි ය.

4.6 **අංක 4.4 හා 4.5 හි සඳහන් සීමාවන් අ.පො.ස (සාමාන්‍ය පෙළ) විභාගයට පෙනී සිටින පෞද්ගලික අයදුම්කරුවන්ට බල නොපැවැත් වේ.**

4.7 6 - 11 දක්වා ශ්‍රේණි වලට ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්විය යුතු විෂයයන් සංඛ්‍යාව පාසලේ පවතින භෞතික හා මානව සම්පත් අනුව පාසල විසින් තීරණය කළ යුතුය. මෙය ඉංග්‍රීසි විෂය හැර අවම වශයෙන් එක් විෂයයක් හෝ උපරිම වශයෙන් විෂයයන් 05 ක් හෝ විය හැකිය. ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීමට හැකි ඉහත සඳහන් විෂයයන් අතුරින් ඉගැන්වීමට තීරණය කරනු ලබන විෂය හෝ විෂයයන් හෝ පිළිබඳව විදුහල්පති විසින් අධ්‍යාපන අමාත්‍යාංශයේ ද්විභාෂා අධ්‍යාපන ඒකකය දැනුවත් කළ යුතුය.

4.8 **ශිෂ්‍යයා ඉංග්‍රීසි මාධ්‍යයෙන් විෂයයන් කිපයක් ඉගෙනගනු ලැබුව ද පාසල් අයදුම්කරුවන් වශයෙන් අ.පො.ස. (සා.පෙ) විභාගය සඳහා අයදුම්පත්‍ර ඉදිරිපත් කිරීමේ දී ශිෂ්‍යයාගේ අභිමතය පරිදි විෂයයක් හෝ විෂයයන් කිහිපයක් හෝ සඳහා ඉංග්‍රීසි මාධ්‍යයෙන් ඉල්ලුම් කළ හැකිය.** එහෙත් ඉන්පසු කිසිදු හේතුවක් නිසා හෝ ඉල්ලුම් කරන ලද මාධ්‍ය වෙනස් කිරීමට ඉඩදෙනු නොලැබේ.

4.9 **2009 වසර 6 වන ශ්‍රේණියේ සිට ක්‍රියාත්මක වන පරිදි ඉතිහාසය විෂය ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැනීවිය නොහැකිය.** එහෙත් දැනටමත් ඉතිහාසය විෂයය ඉංග්‍රීසි මාධ්‍යයෙන් ඉගෙන ගැනීම ආරම්භ කර ඇති සිසුන්ට 11 ශ්‍රේණිය දක්වා ඉතිහාසය විෂයය ඉංග්‍රීසි මාධ්‍යයෙන් අඛණ්ඩව හැදෑරිය හැකි ය."

The Appellants have not explained the rationale for paragraphs 4.6 and 4.8, which in effect encourages English as the medium of instruction for all subjects that a student must sit for at the Ordinary Level examination.

Further instructions with regard to bilingual education in Grades 6-11 had been issued by Circular No. 27/2010, where it has been reiterated that bilingual education should only be implemented from Grade 6 upwards. Thus, the position of the Ministry of Education with regard to students from Grades 6 – 11 was that while such students can be taught in

Sinhala/Tamil and English [*bilingual*], at least Religion and History must be taught in Sinhala/Tamil.

Horana Asoka College

It is in the above background that I shall now consider the establishment of the Horana Asoka College [*the School*]. According to the 1st – 4th Respondents, in 1990, Ven. Kahatapitiye Rahula Nayake Thero had commenced a private school by the name of Asoka College, and located the said School within the premises of the Horana Raja Maha Viharaya. It is admitted by the Respondents that from its inception, other than the subject of Sinhala, all other subjects including Buddhism, Art and History have been taught in the said School in the English medium from Grade 1 upwards.

The Respondents have not produced any documents to establish that the said Ven. Thero had obtained the prior approval of the Ministry of Education, as required by Section 49(1) of the Education Ordinance, for the establishment and/or operation of the said School. It is in fact conceded by the Respondents that by 1990, the Government was no longer granting approval for the registration of a school as a private school. Thus, the establishment of the said school in 1990 was not in terms of the law. In spite of not being registered, the Respondents state that not only were the students of the said school permitted to sit for the examinations conducted by the Department of Examinations, including the Grade V scholarship examination, and to take part in several Zonal and District competitions conducted by the Department of Education, but they were also recipients of free school books, uniforms etc.

By letter dated 6th December 2007 [P2], the Zonal Director of Education had informed the Principal of the said School that as the said school was not a private school approved by the Government, its students would not be permitted to sit the Grade V scholarship examination, nor would they be entitled to free text books and uniforms. To overcome the aforementioned situation, the 5th Respondent – Respondent who by then was the Ven. Nayake Thero of the Raja Maha Viharaya had purchased a school situated in Dehiwela by the name of Marshall Preparatory School. While it is not in dispute, (a) that Marshall Preparatory School had been registered in the latter part of the Nineteenth

century, (b) that it had been an English medium private school at some point of its existence, and (c) was a 'Government Approved Unaided Private School', it is admitted by the Respondents that by 2007, Marshall Preparatory School was no longer functioning as a school, although its registration had not been cancelled by the Ministry of Education.

The 5th Respondent had thereafter sought the approval of the Ministry of Education to locate the said Marshall Preparatory School in the premises of the Horana Raja Maha Viharaya. In response to the said request, the Ministry of Education, by letter dated 12th February 2008 [P4] had informed the 5th Respondent that the re-location of Marshall Preparatory School could be allowed subject *inter alia* to the condition that "**අධ්‍යාපන අමාත්‍යාංශයේ ප්‍රතිපත්ති වලට අනුකූලව අනුමත විෂය මාලාව මෙම පාසලේ ක්‍රියාත්මක කිරීම කළ යුතු අතර එම ප්‍රතිපත්තින් සම්බන්ධව අධ්‍යාපන අමාත්‍යාංශය විසින් නිකුත් කරනු ලබන චක්‍රලේඛ/උපදෙස් පිළිපැදීමට ඔබ බැඳි සිටිනු ඇත.**"

The very next day, a further request had been made to change the name of Marshall Preparatory School to Horana Asoka College. By letter dated 26th February 2008 [P5], the approval of the Ministry of Education had accordingly been granted to the said request. It is through the aforementioned mechanism of purchasing Marshall Preparatory School and thereafter changing its name to Horana Asoka College that the said School was able to function in terms of the law. It is perhaps important to reiterate that pursuant to the approval that has been granted by P4 and P5, the school that is now being carried out at the said Raja Maha Viharaya is Marshall Preparatory School with its name having been changed to Horana Asoka College.

<u>Directions issued to Horana Asoka College – 2015</u>

Having carried out an inspection and an on-site examination of the said School, the Ministry of Education, by its letter dated 11th August 2015 [P10] had informed the Manager of the said School *inter alia* of the following:

> "**ප්‍රාථමික අධ්‍යාපනය ඉංග්‍රීසි මාධ්‍යයෙන් ලබා දීම රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට පටහැනි බැවින්**, වහාම ක්‍රියාත්මක වන පරිදි 1 ශ්‍රේණියේ සිට 5 ශ්‍රේණිය දක්වා ඉගෙනුම - ඉගැන්වීම් කටයුතු රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට අනුකූලව දරුවන්ගේ මව් භාෂාවෙන් (සිංහල/දෙමළ) සිදු කිරීම, 6 ශ්‍රේණියේ සිට 11 ශ්‍රේණිය දක්වා ද ඉගෙනුම් - ඉගැන්වීම් කටයුතු දරුවන්ගේ මව් භාෂාවෙන් (සිංහල/දෙමළ)

හෝ ද්වි මාධ්‍යයෙන් සිදු කිරීම සහ 5 ශ්‍රේණියේ ශිෂ්‍යත්ව විභාගයට ඉදිරිපත් වීමට සිසුන්ට අවශ්‍ය පහසුකම් සැපයීම කළ යුතු වේ.”

By his reply to P10 dated 23rd September 2015 [P13], the Principal of the School, while admitting that History, Buddhism and Art are being taught in English, agreed to comply with the circulars of the Ministry of Education, and sought permission to continue to teach the said subjects in English to those students who had already enrolled at Grade 6 or above.

P10 had been followed with the following letter dated 21st August 2015 [P11] sent by the Ministry of Education to the Commissioner General of Examinations, with copy to the Principal of Horana Asoka College, in respect of students who were scheduled to sit for the Ordinary Level examinations in 2015:

“එම ලිපියට අනුව එම විද්‍යාලයේ 11 ශ්‍රේණියේ සිසුන්හට 2015 වර්ෂයේ අ.පො.ස. (සා/පෙළ) විභාගයේ දී ඉතිහාසය හා බුද්ධ ධර්මය සහ චිත්‍ර යන විෂයයන් සඳහා ඉංග්‍රිසි මාධ්‍යයෙන් පෙනීසිටීම සම්බන්ධයෙන් අධ්‍යාපන අමාත්‍යාංශය වෙත ඉල්ලීමක් ඉදිරිපත්කර ඇත. (ඉල්ලීම කරන ලද ලිපියේ පිටපතක් අමුණා ඇත).

මේ සම්බන්ධයෙන් 2015.08.21 දින අධ්‍යාපන ලේකම්තුමා සමග පැවති සාකච්ඡාවේ දී චක්‍රලේඛ විධිවිධාන තරයේ පිළිපදින ලෙස දැඩිසේ අවවාද කරන ලද අතර පාසලේ ක්‍රියාකලාපය නිසා සිසුන් පත්වී ඇති තත්ත්වය සැලකිල්ලටගෙන 2015 වර්ෂයට පමණක් මෙම අවසරය ලබා දෙන බව පාසල වෙත දන්වන ලදි. අදාළ පාසල 2008/12 චක්‍රලේඛ විධිවිධාන නොසලකා කටයුතු කිරීම නිසා සිසුන් පත්වී ඇති අපහසුතාවය සලකා බලා මානුශික හේතූන් මත 2015 වර්ෂයේ අ.පො.ස. (සාමාන්‍ය පෙළ) විභාගය සඳහා පමණක් වලංගුවන පරිදි එම සිසුන්ට අදාළ පරිදි ඉතිහාසය හා බුද්ධ ධර්මය සහ චිත්‍ර යන විෂයයන් ඉංග්‍රිසි මාධ්‍යයෙන් පෙනී සිටීමට අවශ්‍ය කටයුතු සලසා දෙනමෙන් කාරුණිකව දන්වමි.”

Having granted the aforementioned permission, the Ministry of Education had written the impugned letter dated 2nd September 2015 [P12] to the Manager of the said School:

“2015.07.17 දින අධ්‍යාපන අමාත්‍යාංශයේ නිලධාරීන් විසින් ඔබ පාසල අධීක්ෂණය කර, මා වෙත ලබා දී ඇති වාර්තාවට අනුව මෙම පාසල ඉංග්‍රිසි මාධ්‍ය පාසලක් ලෙස පවත්වා ගෙන යන බව සඳහන් කර ඇත. 1960 අංක 5 දරණ උපකෘත පාඨශාලා හා අභ්‍යාස විද්‍යාල විශේෂ විධිවිධාන පනතේ 6 වන වගන්තියට අනුව රජයේ අනුමත පෞද්ගලික පාසලක හිමිකරුවකු රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට අනුකූලව සිසුන්ට සාමාන්‍ය අධ්‍යාපනය ලබාදීමට බැඳී සිටී.

නමුත් **ඔබ පාසලේ සිසුන්ට ඉංග්‍රීසි මාධ්‍යයෙන් අධ්‍යාපනය ලබා දීම, රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට පටහැනි වේ.** එබැවින් වහාම ක්‍රියාත්මක වන පරිදි ඉගෙනුම - ඉගැන්වීම් කටයුතු රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට අනුකූලව දරුවන්ගේ මව් භාෂාවෙන් සිංහල/දෙමළ) හෝ ද්වි මාධ්‍යයෙන් සිදු කිරීම කළ යුතුවේ.

තවද ඉංග්‍රීසි මාධ්‍යයෙන් අ.පො.ස. (සාමාන්‍ය පෙළ) විභාගයට සිසුන් ඉදිරිපත් නොකරන ලෙස මීට පෙර වසර දෙකක දී අධ්‍යාපන ලේකම් විසින් දැනුම් දී ඇති නමුත් එම නියෝගයට පටහැනිව මෙම වර්ෂයේත් ඉල්ලුම් පත්‍ර භාර ගන්නා අවසාන දිනයන්හි දී අදාළ ඉල්ලුම්පත්‍ර ඉදිරිපත් කර ඇත. එම අයදුම් පත්‍ර ප්‍රතික්ෂේප කිරීම මගින් සිසුන්ට සිදු වන අසාධාරණය වැලැක්වීම සඳහා මෙම වර්ෂයේ පමණක් අවසරය ලබා දීමට තීරණය කෙරිණ.

එමෙන්ම, මා පෞද්ගලිකව ඔබ වහන්සේ කැඳවා ලබා දුන් උපදෙස් මෙන්ම අධීක්ෂණ නිලධාරීන් විසින් ද ලබාදුන් උපදෙස්වලට පටහැනිව ක්‍රියා කරන්නේ නම් හා අධ්‍යාපන ලේකම් විසින් 2005.10.31 දිනැතිව නිකුත් කර ඇති අංක 2005/31 දරණ චක්‍රලේඛයට අනුව මූලික අධ්‍යාපනය (1-13 ශ්‍රේණි) සම්බන්ධව රජයේ ප්‍රතිපත්තිවලට අනුකූලව පාසල පවත්නා ගෙන යාමට අපොහොසත් වෙතොත් මා වෙත පැවරී ඇති බලතල අනුව ඔබ පාසලට දෙනු ලබන ආධාර/පහසුකම් නැවැත්වීම හෝ පාසල පවත්වාගෙන යාම තහනම් කිරීමට සිදු වන වන බව දන්වමි."

Challenge to P12

In November 2015, the parents of three children studying in Grade 10 of the said School and who were due to sit for the General Certificate of Education (Ordinary Level) examination in December 2016 had filed Fundamental Rights Application No. 442/2015 alleging that the decision contained in P12 would not only interrupt the education of their children but that it would cause great inconvenience to their children as they would have to sit the subjects of Buddhism, History and Art in Sinhala and is therefore violative of their fundamental rights guaranteed by Article 12(1). The said case had however been settled with the 1st Appellant agreeing to permit the children of the said petitioners to offer the said subjects at the 2016 examination in the English medium. This would appear to indicate that permitting students to sit for the said subjects in the English medium was a matter of discretion and not mandated by any Government policy.

On 13th May 2016, the Respondents whose children were studying in various grades at the said School filed the aforementioned Writ application seeking a Writ of Certiorari to quash P12, and a Writ of Prohibition preventing the 1st Appellant from taking any steps pursuant to P12.

The arguments of the Respondents before the Court of Appeal were twofold.

The first was that the Government Policy with regard to the medium of instruction is embodied in the Education Ordinance and in the Regulations made thereunder in terms of which English medium education is permissible. The second was that there is no national education policy in terms of Section 2(1) and 2(3) of the National Education Commission Act No. 19 of 1991 which makes bilingual education or education in the mother tongue compulsory, or precludes English as a medium of instruction.

As the Court of Appeal did not address the first of the above arguments of the Respondents, I shall address this at the outset.

Does the Ordinance provide for English as the medium of instruction?

The Respondents are correct when they state that English as the medium of instruction is permissible under the Ordinance. This is reflected in Regulation 5(2) of the Education Regulations, 1951, which reads as follows:

> "***Subject to the provisions of paragraph (3)*** *of this Regulation, every pupil in a secondary school, which, on March 31, 1951,* ***was registered for the purposes of the Code as an English school*** *shall for the time being be given instruction through the medium of the English language."* [emphasis added]

Regulation 5(3) reads as follows:

> *"The Minister may from time to time, if satisfied having regard to all the circumstances that the use of the appropriate national language is practicable, direct that in any specified class in a secondary school referred to in paragraph (2) of this Regulation, instruction in any specified subject shall be given through the appropriate national language to Sinhalese or Tamil pupils. The Minister shall in every such direction specify the date, not being earlier than twelve months after the date on which the direction is given from and after which the direction shall be operative.*"

The cumulative effect of the above two Regulations is that while English can be the medium of instruction in schools registered as English schools, the Minister may instruct that any specified subject be taught through the appropriate national language to Sinhalese or Tamil students.

The 1st Appellant has produced marked R2 the Direction made under Regulation 5(3) by the then Minister of Education and Cultural Affairs on 5th November 1963, published in the Ceylon Government Gazette No. 13,818 of 14th November, 1963 which reads as follows:

> *"In the exercise of the powers vested in me by Regulation 5(3) of the Education Regulations, 1951, I, Idampitiya Rallage Punchi Banda Gunatilleke Kalugalla, Minister of Education and Cultural Affairs, being satisfied having regard to all the circumstances that the use of the Sinhala or Tamil Language as a medium of instruction is practicable in the General Certificate of Education (Ordinary Level) Classes and the General Certificate of Education (Advanced Level) Classes of any school referred to in paragraph 2 of that Regulation (where instruction has hitherto been given through the medium of the English language) do hereby –*
>
> *(1) direct that the medium of instruction in all subjects, other than the subjects specified in the Schedule hereto, in the General Certificate of Education (Ordinary Level) Classes and in the General Certificate of Education (Advanced Level) Classes in any such school shall be Sinhala for Sinhalese and Tamil or Sinhala for Tamil pupils; and further,*
>
> *(2) specify that this direction shall be operative –*
>
> *(a) from and after 1.1.1965 in all the General Certificate of Education (Ordinary Level) Classes in any such school;*
>
> *(b) from and after 1.1.1966 in the first year of the General Certificate of Education (Advanced Level) Classes in any such school;*

(c) *from and after 1.1.1967 in all the General Certificate of Education (Advanced Level) Classes in any such school.*

SCHEDULE

Latin
Greek
English
French
Logic
Western Music
Shorthand and Typewriting (English) "

Thus, even assuming that Marshall Preparatory School had been registered as an English School, the argument of the Respondents that English medium education is permissible under the Ordinance is subject to an important limitation embodied in Regulation 5(3), which permits the Minister to specify that even in English schools, one or more subjects be taught in Sinhalese or Tamil. The Minister has made such a directive [R2] and in the absence of any other material placed by either of the parties, it appears to me that it is pursuant to this directive that English ceased to be the medium of instruction and was replaced by either Sinhalese or Tamil in all schools, whether they be Government, Assisted or Unaided. Thus, to my mind, the first argument of the Respondents cannot be sustained, even though the scope of R2 has been diminished by the aforementioned Circulars issued in 2001, and thereafter.

The reasoning of the Court of Appeal

The Court of Appeal took the view that although Section 6 of the 1960 Act requires an Unaided School to educate pupils in accordance with the general educational policy of the Government, and comply with the provisions of any written law applicable to such school and matters relating to education, Section 6 of the 1960 Act which forms the basis for P12:

(a) has no application to **all** Unaided Schools;

(b) applies only to former Assisted Schools but which later became an Unaided School by virtue of an election made under Section 5 of the 1960 Act;

(c) has no application to Asoka College as its predecessor [Marshall Preparatory School] did not become an Unaided School by virtue of an election made under Section 5 of the 1960 Act.

In other words, the position of the Court of Appeal was that Marshall Preparatory School was an Unaided School prior to the 1960 Act, and hence did not have to make an election under Section 5, with the consequence that the said School was not required to comply with a direction given under Section 6 to educate its pupils in accordance with the general educational policy of the Government. It is on this basis that the Court of Appeal concluded that the *decision contained in P12 is based on a wrong premise and is therefore bad in law*, and proceeded to issue the Writ of Certiorari quashing P12, and the Writ of Prohibition.

The Court of Appeal thereafter went on to consider the second argument of the Respondents that there is no Government policy,

(a) with regard to the medium of instruction, or

(b) that prohibits English as a medium of instruction.

Having done so, the Court of Appeal stated that the Government had failed to declare its National Educational Policy including its policy with regard to the medium of instruction in spite of legislation enacted in 1991 requiring it to do so and that the Circulars issued by the Ministry of Education from time to time displays a clear lack of vision on the part of the Government in that regard. The Court of Appeal in fact went on to state that while the Ministry of Education was attempting to impose restrictions on schools registered with it, entities registered under the Companies Act or as Board of Investment projects as international schools have been operating in a vacuum with no regulation, management or control by the Ministry of Education.

Questions of law

It is against this judgment of the Court of Appeal that special leave to appeal was granted on the following questions of law:

(1) Did the Court of Appeal err in law, by failing to appreciate that it is upon election within the limited time period given under Section 5 of the Assisted Schools and Training Colleges Act that a school would be categorised and operate as a 'Government Approved Unaided Private School'?

(2) In view of the predecessor to the subject school, Marshall Preparatory School admittedly operating as a 'Government Approved Unaided Private School' under the above Assisted Schools and Training Colleges Act, did the Court of Appeal err in law by failing to appreciate that the predecessor school [Marshall Preparatory School] had already elected under Section 5 of the Assisted Schools and Training Colleges Act to be categorised as a 'Government Approved Unaided Private School'?

(3) Despite the Court of Appeal acknowledging in the judgment dated 10th June 2019 that the subject school is a 'Government Approved Unaided Private School', did it err in law by failing to appreciate that therefore, the said school is bound to comply with the general education policy of the Government, and are thereby bound to educate and train students accordingly?

(4) Does the conclusion of the Court of Appeal that there was an error on the face of the record in the impugned order marked P12 constitute and/or amount to an error of law?

Should Asoka College comply with the education policy of the Government?

I have already stated that the critical issue that needs to be determined in this appeal is whether the said School is required to comply with the general education policy of the Government, and more particularly with the policy of the Government with regard to the medium of instruction. This issue is reflected in the third question of law raised by the

Appellants. In my view, the other three questions of law are not directly relevant to a proper determination of this appeal, and shall not be considered.

While it is admitted by both parties that Marshall Preparatory School functioned as a Government approved unaided private School from the time of the 1960 Act, there is no material to demonstrate the status of Marshall Preparatory School as at the time the 1960 Act was introduced – i.e., was it already an Unaided School or was it an Assisted School to which the 1960 Act applied and where an election had been made in terms of Section 5 of the 1960 Act? The Court of Appeal proceeded on the basis that Marshall Preparatory School was a Government approved unaided private School prior to 1960, and for that reason the 1960 Act did not apply to it. Regretfully, none of the parties have submitted any material to support or contradict such a finding.

If Marshall Preparatory School became a Government Approved Unaided Private School under the 1960 Act, then in terms of Section 6 of that Act, it was under a statutory duty to educate and train its pupils in accordance with the general educational policy of the Government. If, on the other hand, Marshall Preparatory School was a Government approved unaided private School prior to 1960 and the 1960 Act had no application, the provisions of the Education Ordinance would still be applicable to Marshall Preparatory School, and thereby to Asoka College.

Accordingly, in terms of Section 43A(1) of the Ordinance,

(a) the Ministry of Education has the power to issue directions to a school that does not accord effectively with the general educational policy of the Government, including the policy regarding the medium of instruction;

(b) Asoka College would have to comply with an Order that it acts in accordance with the general educational policy of the Government, including the policy regarding the medium of instruction in schools.

Thus, the issue is not whether Marshall Preparatory School had made an election as provided by Section 5(1) of the 1960 Act, or whether it was an Unaided School at the time the said Act was introduced, as either way, Marshall Preparatory School, and now Horana Asoka College, is required to comply with the general educational policy of the Government.

The fact that in issuing P12, the wrong statutory provision has been invoked does not make such a decision illegal or invalid, as long as the decision maker has the power to do what he is seeking to do. This position was emphasised in **L.C.H Peiris v Commissioner of Inland Revenue** [65 NLR 457] where it was held by Sansoni, J (as he then was) that:

> "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power*."

In **Kumaranatunga v Samarasinghe and Others** [(1983) 2 Sri LR 63 at 73], having cited **Peiris** with approval, Soza, J went onto state as follows:

> "*Bindra in his work on the **Interpretation of Statutes** states the principle as follows at p. 153:*
>
> > *"It is a well-settled principle of interpretation that as long as an authority has power to do a thing, it does not matter if it purports to do it by reference to a wrong provision of law."*
>
> *Bindra is here stating the principle as it was enunciated by Nain J. in the case of Deviprasad Khandelwas & Sons v. Union of India.*
>
> > *"It is a well-settled principle of interpretation that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong Provision of law. The order made can always be justified by reference to*

the correct provision of law empowering the authority making the order to make such order."

Peiris has also been followed in **K.P.K.L.P. Maduwanthi v S.M.G.K. Perera, District Secretary, Matale and Others** [SC (FR) Application No. 23/2021; SC Minutes of 18th November 2022] where Janak De Silva, J has cited the above passage with approval.

I am therefore of the view that it was competent for the Ministry of Education to issue directions to the said School to comply with Government Policy and therefore, P12 is not illegal, even if the 1960 Act does not apply to the said School.

Is the decision in P12 nonetheless illegal?

However, the question of the illegality of P12 is also contingent upon whether it was issued in pursuance of express Government Policy. If an administrative authority is empowered to act only upon the existence of certain conditions, but proceeds to exercise its power despite such conditions being absent, it would be acting ultra vires. Consequently, its actions would be illegal.

The Court of Appeal has noted that *the National Education Policy of the Government is to be understood on assumptions in bits and pieces* of circulars and directions issued by the Ministry of Education. Indeed, the material placed before us needs to be pieced together like a jigsaw, in order to determine the precise policy position of the Government with regard to bilingual education in Government, Assisted and Unaided Schools. Even then, there are several gaping holes, including the disparity in the manner in which English as a medium of instruction is being implemented, as noted by the Court of Appeal. This is amply demonstrated by the fact that a Sri Lankan student who is admitted to an international school could study all subjects in the English medium whereas a Sri Lankan student studying in a Government, Assisted or Unaided School can only take five of the eight subjects in the English medium, although both categories of students may sit for the same examination conducted by the Department of Examinations.

Indeed, no material has been placed before us to indicate as to why students are permitted to sit for examinations in English even though the purported Government Policy was that those subjects must be taught in the vernacular. The necessary implication of permitting some students to sit for those specified subjects in English is that the Government Policy does not prohibit it.

The fact that there is no clear Government policy on bilingual education is clearly borne out by three Reports that have been published since 2014.

In 2014, the National Education Commission had commissioned ten research studies in order to identify the important policy issues in the General Education System in Sri Lanka. In its report titled "Study on Medium of Instruction, National and International Languages in General Education in Sri Lanka", the Committee,

(a) having referred to the aforementioned Circulars by which the medium of instruction either as bilingual or in English have been implemented, have opined that, "*there is no clear policy regarding bilingual education in the Sri Lankan school system at present, irrespective of the practices of bilingual education itself under the common term, 'English medium education'*",

(b) have made many recommendations that should be considered in formulating the policy regarding bilingual education.

In 2016, the then Minister of Education had appointed a National Committee to formulate a new Education Act for general education, under the chairmanship of Dr. G.B. Gunewardena. The following two important observations that have been made by the said Committee in its Final Report reflects the concerns that the Court of Appeal had with regard to the lack of a coherent policy with regard to the medium of instruction.

The first is that "*Education in Sri Lanka appears to have moved on without the guidance of a holistic and coherently enunciated long term educational policy for the last few decades and the resultant lack of direction has brought on uncertainty in the minds of people*." The second is that "*the Education Ordinance of 1939 which is 69 years old is*

outdated and obsolete. The other Acts passed by Parliament need revision and amendment to meet the demands of effective implementation of reforms and changes introduced to the system ….".

In the National Education Policy Framework (2020 - 2030) published by the National Education Commission, under the title "*Absence of a sound bilingual education policy and discrepancies in implementing the MoE directives on bilingual education in schools",* the National Education Commission has stated as follows [page 141]:

> *"State and State-assisted schools have no uniformity in the selection of students and practice of bilingual education. Many schools have overlooked the directives of the MoE and followed their own implementation procedures. Although the MoE has recommended teaching only a few selected subjects in English from Grade six after the student has completed the primary education in the first language, some schools have introduced bimedium education from the primary school and some schools have adopted an all-English approach contravening the MoE guidelines.* ***It appears that this situation has arisen mainly due to the absence of a policy that states clear instructions to all the schools on bilingual education."*** [emphasis added]

The National Education Commission has thereafter made the following recommendations [Page 151]:

> *"The NEC in liaison with relevant stakeholders shall undertake a comprehensive review of current practices of implementation of bilingual education and* ***formulate a comprehensive policy and strategic framework on bilingual education and teaching of English as the second language****.*
>
> *The MoE by taking into consideration of the policy and strategic framework that would be recommended by the NEC based on the proposed review, shall take steps to issue comprehensive circular instructions to promote bilingual education while taking steps to improve English language standards of school children in an equitable manner across all schools in all regions. The MoE should promote bilingualism throughout the country by using English as the medium of instruction in selected*

subjects such as mathematics, science, information technology in the secondary grades, year by year from Grade 6.

The MoE should continue the current practice of students of secondary grades having the option to; (a) study any subject in the English medium in the G.C.E. (O/L) and G.C.E. (A/L) grades *subject to the availability of teachers, and (b) sit the G.C.E. (O/L) and G.C.E. (A/L) examinations in the medium of their choice."* [emphasis added]

The position therefore is that Asoka College must comply with the general education policy of the Government and the Government policy on the medium of instruction. However, compliance with the Government policy on the medium of instruction is contingent upon the existence of such a Policy, which is sadly not in place, although a period of twenty years have lapsed since the issuance of the first Circular relating to bilingual education.

Conclusion

In the above circumstances:

(a) I am in agreement with the Court of Appeal that the decision contained in P12 cannot be enforced against the said School in the absence of a clear policy decision by the Government with regard to bilingual education that prohibits such teaching;

(b) I would therefore answer the third question of law as follows – Horana Asoka College must comply with the general education policy of the Government and the Government policy on the medium of instruction, and educate and train its students in accordance with such policy. However, in the absence of a Government policy specifically precluding English as a medium of instruction, the Ministry of Education is not empowered to implement the decision in P12.

The National Education Commission must fulfil its statutory responsibility and submit its recommendations on the policy that should be adopted by the Government with regard to the medium of instruction that should be followed from Grades 1 – 11 of all Government, Assisted and Unaided Schools. The 1st Appellant is therefore directed to communicate this decision to the National Education Commission.

Subject to the above finding that the Court of Appeal erred when it held that *P12 is issued on a wrong premise and therefore bad in law*, and the setting aside of the Order for costs, the judgment of the Court of Appeal is affirmed. I make no order with regard to the costs of this appeal.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal in terms of Chapter LVIII and in particular in terms of Section 754 (1) of the Civil Procedure Code read together with the provisions Section 5 and 6 of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 against the Judgment of the Learned High Court Judge of the Commercial High Court of Colombo delivered on 12.12.2006.

1. S. Albert
2. A. Chakravarthy
3. A. Muralitharan
4. A. Muthukumaran
5. Miss N. Vadivuvathi
6. Miss T. Usha
7. Miss Susila Amal
8. Miss C. Ponmalar
9. Miss M. Pon Niraajan

All of No. 22, Lind Main Road, Kattoor Gardens, Kottoorpuram, Chennai No. 85, carrying on business in partnership in India under the name and style of S. Albert & Company duly registered in India. The Head Office situated at No. 75, Yavun Rajah Street, Tuticorin G. 628001 and the Branch Office situated at 13/1, Vanels Road, Egmore, Chennai.

S.C. (CHC) Appeal No. 04/2007
HC/Civil/183/2002 (1)

Plaintiffs

Vs.

S. Sivakumar,
Carrying on business in sole proprietorship under the name and style of "Udaya Enterprises" at P-168, 5th Cross street, Colombo 11.
Presently S. Sivakumar,
No.88, Wasala Road, Colombo 13

Defendant

AND NOW BETWEEN

1. S. Albert
2. A. Chakravarthy
3. A. Muralitharan
4. A. Muthukumaran
5. Miss N. Vadivuvathi
6. Miss T. Usha
7. Miss Susila Amal
8. Miss C. Ponmalar
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Plaintiff-Appellants

Vs.

S. Sivakumar,
Carrying on business in sole proprietorship under the name and style of "Udaya Enterprises" at P-168, 5th Cross street, Colombo 11.
Presently S. Sivakumar,
No.88, Wasala Road, Colombo 13

Defendant-Respondent

Before: **S. Thurairaja, P.C., J.**

A.L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Kushan De Alwis, P.C. with Kaushalya Nawarathna and Sashendra Mudannayake instructed by K. Upendra Gunesekara for the Plaintiff-Appellant

N.R. Sivendran with Ms. U. Kalehewatta Thavenesan and Fernando Attorneys-at-Law for the Defendant-Respondent

Written Submissions tendered on:

11.06.2012 and 15.03.2022 by the Plaintiff -Appellants

27.04.2012 and 07.03.2022 by the Defendant-Respondent

Argued on: 21.02.2022

Decided on: 23.01.2023

Janak De Silva, J.

This appeal arises from the judgment of the Provincial High Court of the Western Province (Exercising Original Civil Jurisdiction) Holden in Colombo ("High Court") dated 12.12.2006.

In or around December, 1997 and January, 1998, the Plaintiff-Appellants ("Appellants") sold and exported 225 metric tons of parboiled rice to the Defendant-Respondent ("Respondent"). It was sold and exported under two invoices bearing numbers SAC/MS/205/97-98 dated 27.12.1997 ("P2") for 100 metric tons of rice to the value of USD 27,500/- and SAC/MS/217/97-98 dated 02.01.1998 ("P4") for 125 metric tons of rice to the value of USD 34,375/-.

Excluding a part payment of USD 7000/-, made for the amount due under the invoice marked P2, no further payments were made by the Respondent to settle the amount owed under these transactions. Therefore, an amount of USD 54,875/- was due to the Appellants by the Respondent.

By fax dated 07.07.2000 ("P6"), the Appellants requested that the Respondent pay the outstanding balance. In response, by letter of 21st August, 2000 ("P7"), the Respondent informed the Appellants that arrangements are being made to settle the said sum of USD 54,875/- within one year. While the Appellants acknowledged the receipt of P7 by letter dated 23.08.2000 (“P8”) and thanked the Respondent, subsequently by letter dated 06.11.2000 (“P9”) they informed the Respondent that the payment of the said sum of USD 54,875/- must be made within one month’s time.

Since the Respondent failed to make any payment, the Appellants by letter of demand dated 08.01.2001 called upon the Respondent to make payment within fourteen days of receipt of the said letter. Subsequently, on or about 01.06.2001, the Appellants brought this action before the High Court against the Respondent seeking recovery of the said sum of USD 54,875/-.

After trial, the learned High Court Judge concluded that the Respondent owed the Appellant USD 54,875/- for rice sold and delivered. However, he dismissed the action on the basis that it was prescribed. He proceeded on the basis that the action is one for *goods sold and delivered* thus falling within the ambit of section 8 of the Prescription Ordinance. He rejected the position that P7 is an acknowledgement and concluded that, even if taken into account, the action must fail because it was not based on P7.

Aggrieved by the judgment, the Appellants have preferred this appeal. According to journal entry dated 02.12.2011, the learned counsel for both parties agreed that the written submissions maybe confined to the matters set out in paragraph 10 of the Petition of Appeal. The Respondent has, in his written submissions, sought to put forward the position that this is a suggestion made by the Court and seeks to rely on other grounds to oppose this appeal. The journal entry clearly indicates that the grounds on which the

appeal is to be decided was agreed upon by both counsels. Therefore, I am not inclined to consider reasons other than paragraph 10 of the petition of appeal.

They are:

"*10. The Plaintiff-Appellants plead that in the circumstances the following substantial questions of law arise for Your Lordship's determination:*

(a) Does the letter dated 21.08.2000 marked P7 sent by the Defendant-Respondent to the Plaintiff-Appellants, amount to an acknowledgment of liability in writing to pay the sum claimed for in the prayer to the Plaint?

(b) If so, in any event, is the cause of action of the Plaintiff-Appellants set out in the Plaint, taken out from the limitation imposed in terms of Section 8 of the Prescription Ordinance?

(c) *Thus, has the Learned Judge erred in holding that the cause of action of the Plaintiff-Appellants is prescribed in law?*"

Is P7 an acknowledgment of liability?

The first point to be determined is whether the document marked P7 is an acknowledgment of liability in writing to pay the sum claimed for in the prayer to the plaint.

However, before addressing this issue, I consider it relevant to deal with a submission made both before the trial court and before us on behalf of the Respondent. It was argued that the Respondent did not draft the contents of the document marked P7, but merely signed a blank document at the Appellants' request.

The document marked P7 is addressed to S. Albert and Company, the partnership business run by the Appellants and it is written on a letter head of M/S Uthaya Enterprises, the sole proprietorship business owned and run by the Respondent. Most importantly, the letter is signed by the Respondent, which was accepted by the Respondent during his testimony.

Addressing this submission of the Respondent, the learned Judge of the High Court has held as follows:

> "තව ද, මෙම සාක්ෂිකරු සාක්ෂි දෙමින් ප්‍රකාශ කර ඇත්තේ, පැ. 7 වශයෙන් සළකුණු කර ඇති ලිපිය මගින් විත්තිකරු මෙම මුදල් පැමිණිලිකරුවන් වෙත ගෙවීමට ඇති බව පිළි ගෙන ඇති බවයි. එම ලිපියේ ඇති අත්සන විත්තිකරුගේ බව විත්තිකරු සාක්ෂි දෙමින් පිළි ගෙන ඇත. (ඒ සඳහා බලන්න 2006.03.28 වන දින නඩු සටහන්වල 12 සහ 13 වන පිටු) ඒ සම්බන්ධයෙන් විත්තිකරු සාක්ෂි දෙමින් ප්‍රකාශ කර ඇත්තේ, එහි අත්සන ඔහුගේ බවත්, අත්සන් කරලා භාර දුන් නමුත්, එම ලිපිය විත්තිකරුගේ ලිපි ශීර්ෂයක නොතිබුන බවත්ය. නමුත් එහි ඇති ලිපි ශීර්ෂයේ විත්තිකරු සතු ව්‍යාපාරයේ නම සඳහන්ව ඇත. නෙසේ වෙතත්, එම ලිපි ශීර්ෂයට වෙනස් ආකාරයේ ලිපි ශීර්ෂයක් වෙළදාම් කටයුතුවලදී, විත්තිකරු විසින් යොදා ගන්නා බවට විත්තිකරු සාක්ෂි දෙමින් පවසා ඇති අතර, පැ.14 දරණ ලේඛණයේ ඇති ලිපි ශීර්ෂය විත්තිකරු භාවිතා කරන ලිපි ශීර්ෂය බවට කරුණු ඉදිරිපත් කර ඇත.
>
> කෙසේ නමුත්, පැ.7 දරණ ලිපියේ අත්සන විත්තිකරුගේ බවට ඔහු පිළිගෙන ඇත. එම ලිපියේ ඇති කරුණු පිළි නොගෙන, එවැනි වැදගත් කරුණු අඩංගු ලිපියකට මෙවැනි ව්‍යාපාරවල යෙදෙන පුද්ගලයෙකු අත්සන් කළා යයි කියන කරුණ, පිළි ගත නොහැක. එම ලිපියට අනුව විත්තිකරු විසින් පැහැදිලිව ම පැමිණිලිකාර සමාගම වෙත ඇමරිකානු ඩොලර් 54,875/= ක මුදලක් ගෙවීමට ඇති බව පිළි ගනිමින්, එය වර්ෂයක් ඇතුළත ගෙවන බවට පොරොන්දු වී ඇත. එහි පැහැදිලිව ම අදාළ ඉන්වොයිස් පත්‍රවල අංකයන් ද සඳහන් කර ඇත. ඒ අනුව පැ.7 දරණ එම ලිපිය මගින් විත්තිකරු පැමිණිලිකරුවන් ඇමරිකානු ඩොලර් 54,875/= ක මුදලක් මෙම සහල් ආනයනය කිරීම හේතුවෙන් ගෙවීමට ඇති බවට තීරණය කරමි."

Furthermore, the Learned Judge of the High Court answered in the affirmative issue no. 9 raised on behalf of the Appellants which reads as follows:

> *"9. Finally, by his letter dated 21/08/2000 has the defendant requested further one year to settle the said money?"*

Hence there is no doubt that the learned High Court Judge considered the document marked P7 to be a genuine document signed by the Respondent voluntarily with full knowledge as to its contents.

The primary findings of fact by trial judges who hear and observe witnesses should not be mildly disturbed on appeal. Moreover, upon perusal of the brief, I find no reason to reject the findings of the learned Judge of the High Court as to the authenticity of the document marked P7. As such I will proceed on the basis that the Respondent is the author and signatory (signee) of the document marked P7.

The relevant parts of P7 read as follows:

"*NON REALIZATION OF PARBOILED RICE EXPORT BILLS*
UNDER INVOICE NO. SAC/MS/205/97-98- USD. 27,500/-
AND INVOICE NO. SAC/MS/217/97-98- USD. 34,375/-"

"*WE ARE ALSO WISH TO STATE THAT OUR BUSINESS AT PRESENT ARE VERY SLOW, HOWEVER ARRANGEMENTS WILL BE MADE TO SETTLE THE BALANCE OUTSTANDING AMOUNT OF USD. 54,875/- WITHIN ONE YEARS TIME.*"

It is seen that the heading of P7 makes specific reference to the invoices marked P2 and P4. It is followed by an unequivocal statement that arrangements will be made to pay the outstanding balance within one year. The acknowledgement is in writing and refers to the exact amount that the Appellants are pursuing. Most significantly, it is signed by the Respondent. P7 is thus both an acknowledgement of the debt and an undertaking to pay it within one year. Accordingly, I have no hesitation in holding that the letter dated 21.08.2000 marked P7 sent by the Respondent to the Appellants, amounts to an acknowledgment of liability in writing to pay the sum claimed for in the prayer to the Plaint.

If so, in any event, is the cause of action of the Appellants set out in the Plaint, taken out from the limitation imposed in terms of Section 8 of the Prescription Ordinance?

The question is premised on the basis that the Prescription Ordinance No. 22 of 1871 as amended ("Prescription Ordinance") extinguishes the cause of actions covered in sections 5 to 10 therein and an acknowledgment of the debt takes the cause of action out of the limitation period. I will begin by reviewing the accuracy of this premise.

The doctrine of prescription works twofold. First, it can allow a person to acquire the *property* or *servitudes of property* belonging to another person by long and uninterrupted possession by adverse title to the other party. In a sense, this mode permits a person to acquire new rights while extinguishing the rights enjoyed by another party. This is acquisitive prescription which is given statutory recognition in section 3 of the Prescription Ordinance. On the other hand, extinctive prescription is where *obligations* are extinguished after a specified period of time. In extinctive prescription no new rights are created unlike acquisitive prescription although one may argue that in theory there is in fact a right created in one party not to be sued on the extinguished obligation.

Extinctive prescription can operate in two ways. On the one hand, it can prevent an action from being brought on a debt while safeguarding the debt as a natural obligation. The South African Prescription Act 1943 is a case in point. On the other hand, it may extinguish the debt or obligation as the Prescription Act 1969 of South Africa. This distinction has far-reaching consequences. Where the obligation survives but the action is prescribed, the surviving obligation has other utilities such as the possibility to be the basis of set off or *compensatio* which is not possible where the obligation is extinguished.

The point to be considered is what form of extinctive prescription is contained in sections 5 to 10 of the Prescription Ordinance. Before examining this point, I would like to examine briefly the situation under Roman Dutch law, which is our common law.

Lee traces the introduction of extinctive prescription in Roman Law to an enactment of Theodosius II (A.D. 424) whereby actions, in the absence of any other provisions in law, were barred by the lapse of thirty and in some cases forty years. No substantive rights were extinguished [Lee, *The Elements of Roman Law*, Sweet & Maxwell Limited, London, 4th Ed. (1956), page 125]. Grotious takes the view that in Roman Law, obligations are not extinguished by time and that a bar only is afforded against them, whilst Roman Dutch Law recognized both forms of extinctive prescription [See *The Introduction to Dutch Jurisprudence of Hugo Grotious*, Charles Herbert, John Van Voorst, Paternoster Row, London, 1844, page 469]. Voet is of the opinion that the effect of prescription is not *ipso jure* to destroy the obligation itself [Weeramantry, *The Law of Contracts*, Vol. II, p. 766].

However, in ***Terunnanse v. Menike*** (1 N.L.R. 200 at 202) it was held that the Prescription Ordinance and the previous Ordinance No. 8 of 1834, kept alive the repeal by Regulation No. 13 of 1822 of *"all laws heretofore enacted or customs existing "* with respect to the acquiring of rights and the barring of civil *"actions by prescription,"* and that the consequence of that Regulation and those Ordinances was to sweep away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown. Any doubt as to the applicability of extinctive prescription under Roman Dutch Law was cleared in ***Dabare v. Martelis Appu*** (5 N.L.R. 210 at 215) where it was held that the limitation of actions under the Common Law was completely abrogated, first by the Proclamation of 1801 and then by Ordinance No. 8 of 1834. The sweeping away of the whole of Roman Dutch Law on both acquisitive and extinctive prescription was confirmed by the Privy Council in ***Corea v. Appuhamy*** (15 N.L.R. 65 at 77) where it was held that the whole law of limitation is now contained in the Prescription Ordinance.

The question then arises whether there is any utility of decisions of English Courts in interpreting the Prescription Ordinance. In ***Emanis v. Sadappu*** (2 N.L.R. 261 at 269) Withers J. denied any such use and held that the Prescription Ordinance should be construed by its own language. Weeramantry (*The Law of Contracts, Vol. II, page 777*) appears to agree with this position in stating that resort should not be had to the principles of English law in construing the sections of the Prescription Ordinance. The only exception identified therein is where resort will be made to English law in those branches of our law governed by it, but that too merely to determine the time of accrual of the cause of action and no more. However, Weeramantry (*supra. at p. 803*) states that English decisions under Lord Tenterden's Act may be relied upon to aid in the interpretation of the Prescription Ordinance.

Moreover, Weeramantry (*supra. page 800*) takes the view that an acknowledgment or promise to pay a statute barred debt is valid and *may be sued upon*, whether the debt in question be one governed by English or Roman Dutch Law. In support of this proposition the decisions of ***Philips v. Philips*** [(1844) 3 Hare 281], ***Spencer v. Hemmerde*** [(1922) 2 A.C. 507 (HL)], ***Hoare & Co. v. Rajaratnam*** (34 N.L.R. 219 at 224) and ***Mohideen Saibo v.***

Walters [(1887) 8 S.C.C. 99] are cited. This statement appears to be a validation of the proposition found in some decisions of English Courts that the theoretical basis of an acknowledgment of a statute barred debt is a fresh obligation and not merely as an extension of the limitation period and hence the action must be based on the acknowledgment and not the statute barred debt.

Accordingly, I must out of the greatest of respect to the great judge and jurist, examine closely the position in English Law on limitation in general and acknowledgment in particular and its impact on the debt.

This examination must first recognize that English statutory law recognizes both acquisitive prescription (sections 3 and 17 of the Limitation Act 1980) and extinctive prescription. The point to be considered is what form of extinctive prescription English Law adopted.

The Limitation Act, 1623 did not recognize that an acknowledgment of a debt stopped the running of time. As far as this Act was concerned, nothing would allow simple contractual debts to be recovered after six years.

The doctrine of acknowledgment was developed by judges to mitigate the rigors of the Act. Thus, where the debtor acknowledges the debt or made a part payment, it was held that in the interests of justice the debtor will no longer be able to invoke the Limitation Act, 1623. Yet opinion was divided on the theoretical basis of that doctrine. Some judges took the view that the acknowledgment must also imply a promise to pay the debt and arguably therefore the plaintiff must sue on the fresh promise and not the old debt [See ***Tanner v. Smart*** (6 B. & C. 603)]. This line of authority was given statutory recognition in Lord Tenterden's Act 1828 and Mercantile Law Amendment Act 1856.

The first English case cited by Weeramantry in support of the proposition that an acknowledgment of a debt barred by statute may be sued upon is ***Philips v. Philips*** (supra. at p. 299) where Wigram V.C. held as follows:

> "*The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's rights*."

This reasoning was adopted in ***Arunasalem v. Ramasamy*** (17 N.L.R. 156), ***Walker Sons & Co., Ltd. v. Kandyah*** (21 N.L.R. 317 at 319, 320) and ***Hoare & Co. v. Rajaratnam*** (supra). De Sampayo A.J. in ***Arunasalam v. Ramasamy*** (supra) adopting this reasoning held that a payment on account amounts to an acknowledgement of the debt which implies a promise to pay the balance and that the implied promise creates a new obligation.

However, Mosely S.P.J. in ***Udumanchy v. Meeralevve*** (43 N.L.R. 59) after considering ***Arunasalam v. Ramasamy*** (supra) held that the payment on account made in that case, cannot be regarded as creating a new cause of action but it merely extended the period of prescription. He adopted the reasoning of Lord Sumner in ***Spencer v. Hemmerde*** (supra), an authority on which Weeramantry bases his support for the proposal that acknowledgment of a debt creates a new obligation.

In ***Spencer v. Hemmerde*** (supra), Lord Sumner made an exhaustive examination of the legal position in England on prescription and acknowledgement, including ***Philips v. Philips*** (supra). He went on to hold (at 524-525):

> *"I find that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise, which is inferred from the acknowledgement and "continues" or "renews" or "establishes" the original promise laid in the declaration, is one which corresponds with and is not a variance from or in contradiction of that promise…If so, there is no question of any fresh cause of action"*

Lord Sumner held (at page 533) that the implication of a promise, which is fixed as a test in ***Tanner v. Smart*** (supra) is rather the mode of determining the character of the acknowledgment than the basis in itself of the debtor's revived liability. He concludes (at p. 534) that *the new promise revives the old debt, but does not create a new one*; it revives it, however, not simpliciter, but subject to any conditions attached to the words, which operates the revival.

In fact, Farwell L.J. in ***Re Lacey*** [(1907) 1 Ch. 330 at 345] described acknowledgment as the withdrawal by virtue of the Statute of the abrogation of the remedy which leaves the old debt still recoverable at law. Lightwood in *The Time Limit on Actions* (Butterworth & Co., 1909, page 209) states:

> *"The Limitation Act 1623, and the Civil Procedure Act, 1833, do not extinguish the debt, but only bar the remedy. Hence, though the debt cannot be recovered by action if the debtor pleads the statute, nevertheless it remains an existing debt (Wainford v. Barker (1697), 1 Ld. Raym. 232), and can be made available whenever the creditor has it in his power to set it up without resorting to an action."*

In ***Busch v. Stevens*** [(1962) 1 All E.R. 412 at 415] Lawton J. held that the statement of Lord Sumner in ***Spencer v. Hemmerde*** (supra) was the correct view prior to the Limitation Act 1939. In fact, as far back as 1889, Cotton L.J. in ***Curwen v. Milburn*** [(1889) 42 Ch. D. 424 at 434] held that Statute-barred debts are due although payment of them cannot be enforced by action. More recently, in ***Royal Norwegian Government v. Constant & Constant and Calcutta Marine Engineering Company Ltd*** [(1960) 2 Lloyds List Law Rep 431 at 442] Lord Diplock held that in English law, subject to a few statutory exceptions, the expiry of the limitation period bars the claimant's remedy, but does not extinguish the claimant's right. He in fact referred to it as elementary law.

Accordingly, I am inclined to accept that, according to English Law, during the relevant period, the limitation period did not extinguish the debt, but only barred the right of action. Upon an acknowledgment of the debt been made by the debtor, to use the colourful words of Lawton J. in ***Busch v. Stevens*** (supra. at page 415), *the right of action is given a notional birthday and, on that day, like the phoenix of fable, it rises again in renewed youth-and also like the phoenix, it is still itself*.

I will now examine the provisions of the Prescription Ordinance to determine what form of extinctive prescription it recognizes.

Sections 5 to 10 of the Prescription Ordinance use the common phrase "*no action shall be maintainable"*. This is a clear indication, in my view, that these sections are not intended to extinguish an obligation. On the contrary, it only prevents an action being maintained on an obligation after the lapse of a specified period. The issue is put beyond doubt by section 11 of the Prescription Ordinance which reads:

> "*11. No claim in reconvention or by way of set-off shall be allowed or maintainable in respect of any claim or demand after the right to sue in respect thereof shall be barred by any of the provisions herein before contained*."

The words *right to sue in respect thereof* in this regard indicates the intention of the legislature to preserve the obligation and bar only the remedy. The action is barred but the obligation survives. Accordingly, I hold that the legal effect of sections 5 to 10 of the Prescription Ordinance is only to bar action on the cause of action and not extinguishment of the cause of action itself.

This position has been adopted in ***Moorthipillai v. Sivakaminathapillai*** (14 N.L.R. 30 at page 32) where Hutchinson C.J. held:

> *"When the time has expired within which an action to recover a debt is maintainable, and the debtor afterwards promises in writing to pay the debt or makes a payment on account of it,* ***the effect of the promise in writing, or of the payment (from which a promise to pay the balance is inferred), is not to revive a dead claim, but to take the case out of the operation of the enactments which prescribe the time within which an action must be brought.*** *That is sufficiently*

shown by the passage from Pothier quoted by the Commissioner in his first judgment. ***When the debt is prescribed it is not extinguished****; the bar must be opposed by the debtor; it is not supplied by the Judge; and it may be waived by a renunciation of it by the debtor; and an express promise to pay it (which is now required by the Ordinance to be in writing), or a part payment, is a renunciation of the benefit of the prescription. (Pothier on Obligations, p. 3, ch. 8, art. 1.)"* (Emphasis added)

Moreover, in ***Brampy Appuhamy v. Gunasekere*** (50 N.L.R. 253) it was held that the effect of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, is merely to limit the time in which an action may be brought and not to extinguish the right. Thus, in ***Ravanna Mana Eyanna & Co. v. The Commissioner of Income Tax*** (46 N.L.R. 121) it was held that a debt, although prescribed, can be still regarded as due to the business within the meaning of section 10(1)(b) of the Excess Profits Duty Ordinance. Similarly, in ***Perera v. Don Manuel*** (21 N.L.R. 81) it was held that a Proctor's lien may be enforced even though an action might not be brought by reason of section 11 of the Prescription Ordinance.

Further support for this position, if needed, is found in section 46(2)(i) of the Civil Procedure Code which permits the Court to reject a plaint when it appears from the statement in the plaint that *the action is barred* by any positive rule of law.

Therefore, the question formulated by the Appellant is incorrect and the question we have to consider is *if P7 is an acknowledgment of the debt, is the action of the Appellants set out in the Plaint, taken out from the limitation imposed in terms of Section 8 of the Prescription Ordinance*.

The learned High Court Judge has correctly concluded that the action was brought in respect of goods sold and delivered which is governed by section 8 of the Prescription Ordinance. Hence the Appellant should have filed this action within one year from the date of the accrual of the cause of action. The learned judge of the High Court correctly concluded that the action should have been instituted no later than January 8, 1999, whereas the action was instituted on June 1, 2001.

However, the P7 acknowledgement is dated August 21, 2000 and the action was filed within one year from that date. Nevertheless, the learned counsel for the Respondent submitted that an acknowledgement of the debt to be effective in terms of section 12 of the Prescription Ordinance must be made before the expiry of the limitation period and not thereafter. Hence, he submitted that the acknowledgment in this matter should have been made on or before January 8, 1999 and not later and as it is not the case, the action is prescribed.

The learned counsel for the Respondent relied on the decisions in ***Sampath Bank PLC v. Kaluarachchi Sasitha Palitha*** [S.C. Appeal 196/2011, S.C.M. 09.09.2019] and ***People's Bank v. Lokuge International Garments Ltd.*** [(2010 B.L.R. 261) SC (CHC) Appeal 13/2001].

The position articulated by the learned Counsel for the Respondent appears to be the position in the English Limitation Act 1980, for it is provided in section 29(7) that subject to subsection (6), a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment. However, this has no application in Sri Lanka.

In view of my finding that the Prescription Ordinance merely bars the remedy with lapse of time and does not extinguish the debt, there is no rational justification to insist that an acknowledgment must be made before the expiry of the limitation period to be effective. I hold that an acknowledgment of the debt to be effective for the purposes of section 12 of the Prescription Ordinance need not be made before the expiry of the period of limitation.

Before leaving this point, I must state that far from making any pronouncement in support of the contention of the Respondent, J.A.N. De Silva C.J. in ***People's Bank v. Lokuge International Garments Ltd.*** *(supra)* quoted with approval the statement of Weeramantry (*The Law of Contracts*, Vol. II, page 803) that an acknowledgment even after the full limitation period has run, will take the case out of the statute. That statement is based on ***Moorthipillai v. Sivakaminathapillai*** *(supra).*

Accordingly, I hold that an acknowledgment of the debt made in this matter by P7 is valid and effective to start time running again although it was made after the action on the debt was barred by the provisions of the Prescription Ordinance.

For the foregoing reasons, I hold that P7 is an acknowledgment of the debt, and the *action* of the Appellants set out in the plaint, is taken out from the limitation of time imposed in terms of Section 8 of the Prescription Ordinance.

Has the Learned Judge erred in holding that the cause of action of the Plaintiff-Appellants is prescribed in law?

The learned High Court Judge concluded that even if P7 is to be regarded as an acknowledgment, the action must to fail as the action was not based on P7. No reasons are given in the judgment as to why the Appellant should have based his action on P7. I can only surmise that this was on the basis that due to lapse of time the original debt was extinguished and the effect of P7 is to create a new obligation which then must form the basis of the action. In fact, the submissions of the learned counsel for the Respondent appear to be in that direction.

The Appellant has in the plaint pleaded both the two invoices, P2 and P4, forming the subject matter of the sale of goods transactions as well as the acknowledgment P7. It appears that P7 was pleaded in order to overcome the application of section 46(2)(i) of the Civil Procedure Code. A strict view of the rules of pleading may lead to the conclusion that the action is based on the invoices and not the acknowledgment as only the two invoices have been attached to the plaint.

Nevertheless, as morefully explained earlier, the lapse of time did not extinguish the original debt. There is no legal bar for the action to be founded on the old debt. The Appellants were correct in basing this action on the two invoices P2 and P4 and not on P7. No doubt P7 has to be pleaded to overcome the limitation period but it cannot certainly be the basis of a fresh cause of action. The legal effect of P7 is to take away the time bar to the action. Of course, if P7 only admitted part of the old debt, the Appellants can only maintain the action for that part and not the total debt. This is because P7 will then remove the bar on maintaining an action only for the amount acknowledged and no more.

For all the foregoing reasons, I set aside the judgment of the learned Judge of the High Court dated 12.12.2006 and enter judgment as prayed for in the plaint.

The answer to all the issues shall remain as in the judgment of the High Court, with the exception of issue no. 14 which is now answered in the affirmative and issue nos. 33 and 34 which are now answered in the negative.

The learned High Court Judge is directed to enter decree accordingly.

The Appellant is entitled to costs in both the High Court and this Court.

Appeal allowed.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court

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

In the matter of a Rule in terms of Article 105 (3) of the Constitution of the Democratic Socialist Republic of Sri Lanka against Hewa Aluth Sahal Arachchige Ajith Prasanna .

SC Contempt 03/2020

Hewa Aluth Sahal Arachchige Ajith Prasanna.
87/D, Parakrama Mawatha
Talahena,
Malabe
Respondent

Before: **P. Padman Surasena J**
S. Thurairaja PC J
E. A. G. R. Amarasekara J

Counsel: Shavindra Fernando, PC with Thivanka Attygalle, A. Arawwala and Natasha Wijesekara for the Respondent.
Janaka Bandara DSG for the Hon. Attorney General

Argued on : 08-09-2022
Decided on : 24-01-2023

P Padman Surasena J

This Court has issued a Rule against the Respondent Hewa Aluth Sahal Arachchige Ajith Prasanna (hereinafter sometimes referred to as the Respondent) directing him to appear before this Court and show cause as to why he should not be found guilty

and punished under Article 105 (3) of the Constitution, for Contempt of Court committed during a media briefing on or about 19th January 2020.

On 12th February 2021, Court read out and explained the Rule to the Respondent. On that day, the learned President's Counsel who appeared for the Respondent, had stated to Court that the Respondent pleads not guilty to the allegations levelled against him in the Rule. It was in those circumstances, that the court had fixed this matter for inquiry on several dates commencing from 8th September 2022.

Eventually, when Court took this matter up for inquiry on 8th September 2022, the learned President's Counsel who appeared for the Respondent informed court that his client does not wish to contest the charges against him, and wishes to withdraw the earlier plea of not guilty with a view of tendering a plea of guilty in respect of the charges in the Rule issued against him. The Court then once again, read out the Rule against the Respondent in Open Court. The Respondent then withdrew his earlier plea of not guilty and pleaded guilty to the charges in the Rule.

The Rule alleged, that the Respondent whilst participating in a media briefing on or about 19th January 2020 made the following statement in reference to the previous judgment of SC Case No. SC/TAB/2A – D/2017 pronounced by this Court in relation to the sentencing of Duminda Silva. The said media briefing was titled 'Thissa Aththanayake/ තිස්ස තිස්ස අත්තනායක හිරේ දැම්මේ කව්ද / Ajith Prasanna" uploaded onto YouTube via SL 360 TV Channel on or about 19th January 2020. The said statement made by the Respondent (according to the Rule) is as follows:

> ''මේ මානව මිහිකම් ගැන කතා කරනවා හැබැයි මෙතැනදී නිහඬයි. ඒ විතරක් නෙවෙයි ශ්‍රේෂ්ඨාධිකරණය නිහඬයි. අධිකරණ සේවා කොමිෂන් සභාව නිහඬයි. ඒ නිසා මම ඉල්ලනවා දුමින්ද සිල්වා එක දවසක් හරි වැඩිපුර සිරගතවෙලා ඉන්නවා කියන්නේ මේ පාපය කරගහන්න වෙන්නේ වෙන කාටත් නෙවෙයි. මේ රටේ අගවිනිසුරු ප්‍රමුඛ ශ්‍රේෂ්ඨාධිකරණයේ සමස්ත විනිසුරු මඩුල්ලටයි. ඊට අමතරව මේ රටේ අධිකරණ සේවා කොමිෂමේ ප්‍රධානියා ඇතුළු මණ්ඩලයට මේ සියලු දෙනා වගකියන්න ඕනේ'

> ‘‘දුමින්ද සිල්වා හිරේ එක දවසක් පාසා මම හිතනවා මේ රටේ ඉන්න අගවිනිසුරුවරු ප්‍රමුඛ ශ්‍රේෂ්ඨාධිකරණයේ සමස්ථ විනිසුරුවරුද, අධිකරණ සේවා කොමිෂමේ මන්ත්‍රීවරු, සමාවෙන්න අධිකරණ සේවා කොමිෂමේ සාමාජිකයෝද ඔහු එකදවසක් හිරේ ඉන්නවනම් දින දෙක බැගින් මේ අය හිරේ ඉන්න ඕනේ. දින දෙක බැගින් නීතිපතිතුමා සමග. මම කියනවා ඒ නිසා මම නැවත කියනවා මහත්වරුනි ඔබත් හිරේට යන්න. දුමින්ද සිල්වා නිදහස් නොවෙන තාක් කල් මේ රටේ අග විනිසුරු ඇතුළු ශ්‍රේෂ්ඨාධිකරණයේ විනිසුරුවරුන්ට එළියේ ඉඳීම සම්පූර්ණයෙන් ම වැරදි’’

The Respondent has now admitted his guilt for the allegations levelled against him in the Rule.

The Court then proceeded to hear the submissions of the learned President’s Counsel who appeared for the Respondent as well as the submissions of the learned Deputy Solicitor General.
The learned President’s Counsel on behalf of the Respondent, making submissions with regard to mitigation of sentence, submitted the following facts.

- The Respondent regrets having made the above statement and had given an affidavit on 09-01-2021 to the Court of Appeal in the bail application bearing No. CA/BL/37/2020.
- The Respondent had not participated in any media briefing thereafter.
- The Respondent had served in the Sri Lanka Army and had been injured during the civil war.
- The Respondent is a father of two children and his wife is currently unemployed.
- The Respondent had been in remand for nearly 01 year.
- The Respondent truly repents his action of making the relevant statement.

Concluding the submissions, the learned President’s Counsel stated that the general public would not have believed what the Respondent stated to media, as the public would have understood the Respondent’s statement to be one so foolishly made.

The learned Deputy Solicitor General who appeared for the Attorney General, in his submission highlighted the following facts.

- In the case referred to by the Respondent in the media statement, it was a five-judge bench of this Court which included Hon. Chief Justice, which affirmed the conviction of the accused (Duminda Silva).
- The Respondent had continued to defame lower court Judges who had become helpless after hearing the statements of the Respondent.
- Therefore, the conduct of the Respondent has affected adversely to the foundation of the administration of justice system in this country.
- The statements made by the Respondent was unacceptable to the extent that in a Court below, the DSG even had to move court to ascertain whether the Respondent was suffering from any mental ailment to have made such statements.
- The above media statement had come from the Respondent who is an Attorney-At-Law, and that fact has magnified the gravity of the offence.

Concluding his submissions, the learned DSG emphasized the gravity of the offence and moved Court to impose an appropriate sentence that would reflect the gravity of the offence committed by the Respondent.

At the outset, it must be noted that the Judiciary is one of the three pillars (the three pillars being the Executive, Legislature and Judiciary) upon which the smooth functioning of the State would depend. The Judiciary, stand independently in interpreting and applying the law to ensure delivery of justice to all persons. The Judiciary as well as the other two organs are the custodians of the sovereignty of people of this country.[1] The Constitution of this country expects the judiciary to function independently. As the disputes of citizens are resolved through the judicial system of this country, it stands to reason to expect that the citizens are expected to respect the administration of justice system of the country. Any derogation from this would lead the country to an anarchy. It is on this requirement that the legislature

[1] As per Article 4 (c) of the Constitution.

through Article 105 (3) of the Constitution had intended to vest this Court with wide powers to punish those who commit the offences of contempt of Court.

We shall now consider as to what would happen when a member of public who listens to a statement such as the one made by the Respondent. Two things can happen; the public may accept it as true; they may reject it as false. In the first scenario, if the Public believe the statement as true, there would be nothing left for the judiciary to stand on. This is because it is inevitable that public would regard the judiciary not as a justice maker but as an injustice maker. Who would then rely on the judiciary to resolve their disputes? They will be then inclined to settle their disputes by themselves by whatever means they deem fit. The effect by and large is the same in the second scenario, also. This is because those members of Public who would not believe the statement as true, would still wonder how dare a person has stated so serious statement against those hallowed institutions, with impunity. If such a situation is not immediately arrested, others would follow suit. That too would result in the citizens losing the confidence and coercive powers of Court. They would then be prompted to get assistance from illegal means to settle their disputes. Thus, in both the instances, effect of the statement made in public by the Respondent is same. That effect can be neutralized only when the maker of such serious statement is promptly visited with a deterrent sentence.

Learned President's Counsel who appeared for the Respondent in his submission went to the extent of saying that even the general public would not have believed what the Respondent had stated to media as that is a statement which is so foolishly made. An Attorney at Law; so foolish? A person who had served in the Army; so foolish?

What is the effect of this statement on society when the Respondent who is an Attorney at Law very seriously, strenuously and in a commanding language states with vigour in no uncertain terms in public that the Chief Justice, Judges of the Supreme Court, members of the Judicial Service Commission have all committed a serious offence in affirming a conviction of one or more accused. Doesn't this statement undermine the very foundation of the criminal justice system of this country? This is

more so because the accused referred to in the Respondent's statement is an accused who had been duly tried and convicted by the prevailing judicial system of this country.

Learned DSG brought to our notice that the Respondent had continued to defame lower court Judges who had become helpless as they had to continue to hear the statements made by the Respondent. Doesn't this conduct on the part of the Respondent affects the sustainability of the administration of justice system in this country?
We have no basis to answer the above questions in the negative. On what reasons/basis the Respondent had made that statement? No basis at all! What is his explanation for having to make that statement? Absolutely none!

In my view, the statement uttered by the Respondent is aimed at creating an image in the eyes of public that the administration of justice system in this country is not only unreliable for the general public but also causes only travesty of justice. Thus, the Respondent, in my view, has attempted very vigorously to make havoc in the administration of justice system in this country.
It is the fervent duty of this Court as the apex Court of the country to ensure that the administration of justice system in this country is primarily free from all forms of intimidations and undue influences. This is to enable the smooth functioning of that system. Maintaining this standard is essential for the well-being of the people of the country who would ultimately benefit from a trouble-free system of administration of justice in the country. We cannot wait passively until just one person, in this case the Respondent who is an Attorney at Law destroys everything in the system which is meant for the rest of the citizens. We have to step in, to stop that devastation.

The Constitution itself through Article 105 (3) has vested this Court with wide powers to punish those who commit such drastic offences i.e., contempt of Court.

When one listens to the statement which the Respondent had made in the instant case, it becomes unambiguously clear that the making of that statement is calculated to obstruct or interfere with the due Course of justice by intimidating the judges in

public. He had made it with the deliberate intention on his part, to obtain an order he had desired. This is because this Court had concluded the proceedings of the case which the Respondent had referred to in his statement, by the time he had made the statement. In other words, what he was trying to do was to force this court by intimidating the judges, to reverse the judgment it had already pronounced i.e., that is the judgment affirming the conviction of some accused in the case referred to by him. It is unimaginable that an Attorney-At-Law had done this only to plead guilty only when the Court was about to commence the inquiry. He had not shown any repentance up until that moment.

As stated by Amerasinghe, J, in **Re. Garumunige Tilakaratne**[2]:

> *"… whenever men's allegiance to the laws is so fundamentally shaken it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever…"*

The Court observes that every citizen of this country has a duty to protect the integrity of the system of administration of justice. Any destruction to the public trust reposed in the system can have serious collateral consequences for the welfare of Society and its well-being. As stated in **Kandoluwe Sumangala v Mapitigama Dharmarakitta et al**:[3]

> *"law of contempt of Court does not exist for glorification of the Bench. It exists – and exists solely- for the protection of the public"*

The judicial power of the people has been vested in this Court by the Constitution of this country. The Constitution has been put in place democratically for the benefit of people. It is the duty of the judiciary to protect and uphold the Constitution put in place by the citizens of the country. As stated by Wanasundera J, in **Hewamanne v. De Silva**:[4]

[2] Re Garumunige Tilakaratne (1991) 1 Sri L.R Page 168,
[3] Kandoluwe Sumanagala v Mapitigama Dharmarakitta et al. (**1908) 11 NLR 201 page 201**
[4] Hewamanne v De Silva and Other (1983) 1 S.L.R page 5

> *"The power vested in the Judges to safeguard the welfare and the security of the people is also a delegated part of the sovereignty of the People, referred to in Article 3 and 4 of the Constitution. Contempt against the judges is therefore an insult offered to authority of the People and their Constitution."*

Accordingly, when such damaging statements are made against the judiciary; it is essentially made against the power of the people and not the judicial officers of this Court. Therefore, in this matter, the Respondent has essentially jeopardised the right of the ordinary citizens of this country to have recourse to the Court system of this country which is a right guaranteed to them under the constitution.

In **Re Wickramasinghe**[5] it was stated;

> *"The objective of this branch of law, of course, is not the protection of the personal reputation of judges but the protection of the authority of the courts, which must be preserved in the interests of the community. It is therefore no less an offence to scandalise the judiciary generally than to scandalise the judge or judges of a particular court"*

As has been mentioned earlier, this proceeding has emanated from a Rule issued by this Court against the Respondent and this Court at no stage had placed the Respondent in remand custody pending this proceeding. The period of almost one year in remand claimed by the Respondent is not in respect of this proceedings but in respect of another case. Further, it appears from the submissions of the learned DSG that the Respondent was placed in remand to prevent him making continuous further utterances. That appears to be the reason as to why he had to swear an affidavit undertaking not to make any further statements of the kind he had made, to obtain bail. The Respondent appears to have been released on bail only after he had undertaken in the affidavit that he would not repeat such utterances again. Therefore, we are not inclined to consider the period the Respondent claims to have spent in remand for his benefit in the instant proceedings.

[5]Re S A Wickramasinghe (1954) NLR Page 511.

We are satisfied that the statement of the Respondent had been made with the deliberate intention to intimidate the Judges of the Apex Court in this country in order to obtain an order he had desired i.e., to get this Court to reverse the judgment it had already pronounced. The said action on the part of the Respondent is not an accidental or random one but a deliberate and a planned one calculated to somehow obtain the order he had desired. He had done it deliberately, on his own volition leaving no room for anyone else to stop him.

The Respondent, had pleaded not guilty to the offence when Court served a copy of the Rule and read it out to him at the first occasion. This means that the Respondent had neither remorse nor regret for his statement at least as at that date. However, when Court took this matter up for inquiry on 8th September 2022, he withdrew his earlier plea of not guilty and tendered a plea of guilty in respect of the charges in the Rule against him. It was thereafter that the learned President's Counsel who appeared for him submitted that he truly repents his action of making the relevant statement. Be that as it may, we have considered all the factors urged before this court by the learned President's Counsel who appeared for the Respondent as well as the learned Deputy Solicitor General.

In all the circumstances of this case, we are of the view that Court should not treat the statement made by the Respondent lightly. Such a course of action is not warranted by any yardstick.

Considering all the circumstances, we decide to sentence the Respondent to a term of four (04) years Rigorous Imprisonment and a fine of Rupees three hundred thousand (Rs. 300,000/=) with a default sentence of 06 months Rigorous Imprisonment. Registrar is directed to take all necessary steps to implement this punishment.

The Respondent who is an Attorney-at-Law now stands convicted and sentenced. Thus, we direct the Hon. Attorney General to draft a Rule to be issued against the Respondent Attorney-at-Law in terms of the relevant provisions in the Judicature Act. We also direct the Registrar of this Court to forward to Hon. Attorney General, certified copies of the relevant documents to enable the Hon. Attorney General to draft the said Rule against the Respondent Attorney-at-Law. In order to implement the above direction by Court, we further direct the Registrar of this Court to take necessary steps to institute proceedings against the Respondent Attorney-at-Law under a new SC Rule

case number by opening a case record under new SC Rule No. and mention that case in Open Court.

JUDGE OF THE SUPREME COURT

S. Thurairaja PC J

I agree,

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara J

I had the opportunity of reading the draft order written by His Lordship Justice Surasena.

I agree with the following views expressed or implicit in the said draft order;

a) That the statement made by the Respondent was aimed to create an image in the eye of the public that our administration of justice system is unreliable and cause travesty of justice;

b) That the said statement undermines the very foundation of our criminal justice system and affects the sustainability of our criminal justice system unless this court promptly and appropriately step in and take necessary measures to prevent such harm. With all due respect to his Lordship's views, I also intend to add my views as expressed below;

Even though, this court has no jurisdiction to revise a judgment pronounce by it, it appears from the context of the said statement was made, the Respondent was trying to create an impression in the minds of the people that the pronouncement made by this court should be reversed and if not, the judges of this court including the Chief Justice should be jailed. Being a Lawyer, he should have known the finality of the decision of this court and how those decisions are being made after hearing the relevant parties. Thus, clearly the impugned statement was made to bring this court

to disrepute and to indicate that this court is not competent and is comprised of judges who should be punished. The effect of the statement is targeted to destabilize the faith the public has in this court. The statement is thus intended to interfere with the administration of justice by this court.

Further, the relevant part of the statement quoted in the Rule has been taken from a statement made during a press conference and the said full statement apparently give the impression that the decision made in the relevant murder case is politically influenced decision which lacks impartiality. Thus, this statement had the potential of inciting certain politically motivated people to cause harmful acts against the administration of justice system including this court and the judges involved in decision making, though such things did not happen. Thus, as my brother judge observed, we should not treat this statement lightly.

An attack on the honesty and the impartiality of the judiciary has always been held to be contempt- see **Hewamanne V de Silva (1983) 1 Sri L R 1 at 97**. However, there is nothing before us to say that the Respondent's statement was a fair comment. Further, **In the matter of proceedings for contempt of Court, against Dr. S. Abeykoon reported in The Bar Association Law Journal Reports [1995] Vol.VI Part I**, it was held that Contempt of Court may be said to be constituted by any kind of conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudiced parties, litigants, or their witnesses during litigation. It was further held that intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of Court, but it is enough if the action complained of is inherently likely so to interfere. Moreover, there it is quoted from **Aiyar "Law of Contempt"** that it is the evil tendency of the act, rather than the mental element by which it is accompanied that makes it an offence.

Hence, whatever the angle we look at the statement made by the Respondent it constitutes the offence of Contempt.

In **The Matter of Proceedings Against an Attorney-At-Law for Contempt of Court (1983) 1 Sri L R 243 at 251**, this Court has highlighted the following principles in this respect.

"(a) that the object of discipline enforced by Courts in case of contempt is not to vindicate the dignity of the members of the Court, but to prevent undue interferences with administration of justice, in the interest of the public in general. In Re Johnson (1887) 2 QBD 68; Packer V Peacock 13 Commonwealth Law Reports 577.
(b) that the power to punish for contempt should be sparingly used only from a sense of duty and under the pressure of public interest, not so much to punish the particular offender as to deter like conduct in the future. Aiyar "Law of Contempt of Courts, Legislature and Public servants" p535 and McLeod V St Aubyan (1899) AC 549.
(c) that the power to punish summarily for contempt should be used with circumspection where it is absolutely necessary to do so, in the interest of justice, and to ensure that public confidence in the Courts will not be undermined."

Article 105(3) of the Constitution has vested this court with the power to punish contempt with an imprisonment or fine or both as the Court may deem fit. No specific punishment or upper or lower limit of a punishment has been prescribed. The legislature has left it to the Court to decide. It is understood as the nature of contempt may vary from a trivial one, where a warning from the court may suffice, to a profoundly serious one that may have been intended to challenge the fundamental supremacy of the rule of law the courts are bound to uphold. In the matter of **Dr. S Abeykoon** referred to above, this Court has stated that in both England and India the punishment for contempt is regulated by statute. This court has further observed that in England, superior courts have power to give imprisonment up to 2 years while there is no limitation for the fine that can be imposed. It is stated in that decision that the maximum imprisonment for contempt that can be given by an inferior court in England is limited to one month and the fine may be extended up to £500. In India, as per the said decision, the punishment appears to be simple imprisonment that may extend to 6 months or a fine which may extend to Rs.2000. These references were made in 1995. However, it appears our legislature had thought otherwise. The

Judicature Act has vested District Courts with powers to impose simple or rigorous imprisonments up to 2 years or a fine up to Rs.2500 and Magistrate Courts with power to impose simple or rigorous imprisonment up to 18 months or a fine not exceeding Rs.1500.00- vide section 55 of the Judicature Act. Furthermore, the Judicature Act has vested High Courts with powers to impose simple or rigorous imprisonment up to five years and/or to a fine up to five thousand rupees- vide section 18 of the Judicature Act. Thus, when Article 105(3) empowers our superior courts to impose an imprisonment or fine or both as the Court deems fit, it is logical to think that the legislature considered to empower superior courts with powers to impose punishment which may be harsher than the punishments that can be given by courts below if the circumstances demand such punishments. In fact, in **Chandradasa Nanayakkara V Liyanage Cyrill (1984) 2 Sri L R 193** Court of Appeal imposed a deterrent punishment of 7 years. However, it was a case where the person charged with contempt of court had forcibly entered the chambers of the magistrate and threatened to kill or cause bodily harm to the Magistrate. There it was held as follows;

"Of all contempts committed against the lawful authority of courts of law the most heinous are those which involve actual or threatened injury to the person of a judge with view to intimidating him into revoking or altering an order or decision made by him in the discharge of his judicial duties. The outrageous nature of the acts committed by the respondent constitutes not only an afront to the dignity and authority of the court but also a direct challenge to the fundamental supremacy of the law itself. It is a type of contemptuous conduct which appeared to us to be unprecedented in the annals of courts of this country. It is absolutely imperative that such conduct, whenever or whatever court it occurs, should be dealt with speedily, firmly and unmercifully. People like respondent who have but scan respect and regard for law and order and the courts of the land must be made to realise that the arm of the law is sufficiently long and sufficiently strong to repel any attempts at undermining the authority of courts. It is our duty in situations such as have arisen in the instant case to uphold and vindicate not the personal reputation of the holder of particular office, but the sanctity and supremacy of authority of courts so as to secure the

preservation of law and order and to ensure the protection of the future administration of justice."

The above indicates that our courts considered even long-term imprisonment for contempt when the circumstances demand such imprisonments. However, the perusal of decisions of our courts on contempt of courts show that the punishments vary according to the factual background in each case from warnings, fines and simple imprisonments to long term rigorous imprisonments or combination of such punishments.

In the above backdrop now, I prefer to consider facts that mitigate or aggravate punishments.

Aggravating circumstances

- The statement made by Respondent defames the Judges of the lower court as well as the judges of the Supreme Court who were involved in the decision making which can be considered as an attack on the honesty and impartiality of the judiciary. The said statement is an afront to the dignity and authority of the Court and it is a challenge to the supremacy of law. The Judges cannot go on making public statements in reply unless such actions are properly dealt with in an action for contempt.
- The Respondent is a lawyer and cannot be considered as a person ignorant of law or our legal system and of how a court comes to its findings. He should be aware why the dignity and sanctity of our courts should be protected and the harm that may be caused to law and order, if such dignity and sanctity is attacked. The protection of the sanctity and dignity of courts for the maintenance of law and order is for the benefit of the public. When a person knowledgeable in law makes adverse comments of our courts, people may tend to believe and accept such statements as true. Thus, the conduct of the Respondent adversely affects the faith people has on our administration of justice system.
- As mentioned above the statement referred to in the rule has to be understood in the context it was made during the press conference. It appears, when one

considers the full statement, the Respondent has attempted to give the impression that the decision in the relevant murder case was tainted with political influence. Even though no physical attack erupted due this statement, this type of statement may arouse politically motivated people to cause harm to courts and judges involved.

Mitigating Circumstances

- The Counsel for the Respondent submitted that the Respondents truly regrets his action and thus, pleads guilty. However, whether a belated apology sufficiently indicates his repentance is questionable since such a late apology may be tendered for various other reasons.
- I agree with what my brother Judge has stated regarding the period he spent in the remand prison, and I do not think that we should consider that in mitigation.
- I do not think that his service as an army officer during the civil war should be considered in mitigation to condone an attack on the judiciary which may affect law and order of the country.
- However, as it appears that he has not been convicted before and this seems to be the first conviction, I would prefer to consider it in mitigation.
- Finally, as per the submissions of the counsel, the Respondent is a father of two children and his wife is not employed at present. This court recognizes the hardships that may have to be faced by the family members, especially how it affects the upbringing of the children when the sole breadwinner is incarcerated. However, the severity of the statement made by the Respondent makes it difficult consider it in a lighter vein.
- I further foresee the issues the Respondent may have to face with this conviction as an Attorney-at-Law, since his conduct may be considered as a statement against the ethical standard expected from an Attorney-at-Law.

With all due respect to the decision of my brother judge, while keeping the principles stated in **The Matter of Proceedings Against an Attorney-At-Law for Contempt of Court (1983) 1 Sri L R 243 at 251 (Supra)** and after considering all the facts mentioned above, I sentenced the Respondent to a term of 30 months

rigorous imprisonment and a fine of Rs.300,000.00 with a default sentence of 6 months simple imprisonment. I also agree with my brother judge in directing the Hon. Attorney General and the Registrar of this Court to take necessary steps to institute proceedings against the Respondent Attorney-at- Law as this conviction relates to a conduct of an Attorney-at-Law.

JUDGE OF THE SUPREME COURT

FEBRUARY

2023

JUDGMENTS

FEBRUARY INDEX

1.	SC/APPEAL/85A/2009	703
2.	SC/FR/398/2008	728
3.	SC/APPEAL/228/2014	749
4.	SC/CONTEMPT/01/2023	762
5.	SC/APPEAL/98/2017	771
6.	SC/APPEAL/29/2022 with SC/APPEAL/29A/2022	789

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

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006, against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5A of the said Act.

SC Appeal No. 85A / 2009

SC HC (CA) LA Application No. 48 / 2009

WP / HCCA / Col / 17 / 2007 [LA]

DC Colombo case No. 17/99/CO

(IN THE DISTRICT COURT)

In the matter of a Winding Up Application in terms of sections 255 and 256 of the Companies Act No 17 of 1982

Hatton National Bank Limited,
No. 481,
T. B. Jayah Mawatha,
Colombo 10.
PETITIONER

Vs

Lanka Tractors Limited,
No. 45/100,
Nawala Road,

Narahenpita.

RESPONDENT

AND THEN BETWEEN

(IN THE DISTRICT COURT)

In the matter of an application in terms of sections 260, 261, 348, 350 and 352 of the Companies Act No. 17 of 1982 to stay execution of properties belonging to the Company after the commencement of winding up of the Company.

Hatton National Bank Limited,
No. 481,
T. B. Jayah Mawatha,
Colombo 10.

PETITIONER - PETITIONER

Vs

Seylan Bank Limited,
No. 90,
Galle Road,
Colombo 03.

PARTY RESPONDENT

AND THEN BETWEEN

(IN THE PROVINCIAL HIGH COURT)

Hatton National Bank Limited,
No. 481,
T. B. Jayah Mawatha,
Colombo 10.
PETITIONER - PETITIONER - APPELLANT

Vs

1. Seylan Bank Limited,
No. 90,
Galle Road,
Colombo 03.
PARTY RESPONDENT - RESPONDENT

2. Lanka Tractors Limited,
No. 45/100,
Nawala Road,
Narahenpita.
RESPONDENT - RESPONDENT

AND NOW BETWEEN,

(IN THE SUPREME COURT)

Hatton National Bank PLC,
No. 479,
T B Jayah Mawatha,
Colombo 10.
PETITIONER - PETITIONER - APPELLENT - APPELLENT

Vs

1. Seylan Bank Limited,
   No. 90,
   Galle Road,
   Colombo 03.
   PARTY RESPONDENT - RESPONDENT - RESPONDENT

2. Lanka Tractors Limited,
   No. 45/100,
   Nawala Road,
   Narahenpita.
   RESPONDENT - RESPONDENT - RESPONDENT

Before: **Buwaneka Aluwihare PC J**

P. Padman Surasena J

Janak de Silva J

Counsel: S. A. Parathalingam PC with Shamil Perera PC instructed by Sudath Perera Associates for the Petitioner-Petitioner-Appellant-Appellant.

Romesh de Silva PC with Sugath Caldera for the Party - Respondent - Respondent-Respondent.

Argued on: 28-10-2021

Decided on: 02-02-2023

P Padman Surasena J

The Petitioner-Petitioner-Appellant-Appellant (Hatton National Bank Limited), (hereinafter referred to as HNB), filed petition (case No. 17/99 CO) in the District Court of Colombo praying for the winding up by Court, the company by the name of Lanka Tractors Limited which stands in the caption of this judgment as the Respondent-

Respondent- Respondent. The said winding up application was filed in the District Court on 02nd June 1999.

The learned District Judge, by order dated 14th March 2000, had dismissed the said petition (filed by HNB which prayed for the winding up of Lanka Tractors Limited).

Being aggrieved by the said order of the learned District Judge (order dated 14th March 2000), HNB filed the application bearing No. CA LA 83/2000 in the Court of Appeal seeking Leave to Appeal against the said order of the learned District Judge. The Court of Appeal on 02nd November 2000, granted Leave to Appeal as prayed for, in that application.

Thereafter, the Court of Appeal having concluded the arguments of that case, by its judgment dated 28th June 2001 -, set aside the order of the learned District Judge dated 14th March 2000 and sent the case back to the District Court of Colombo to consider and make an order relating to the preliminary issue of publication.

Thereafter, the learned District Judge by her order delivered on 13th June 2002-, permitted the publication of the Petitioner's claim in three newspapers. Pursuant to the said order, a notice was published in the said papers after which creditors including the Party Respondent - Respondent- Respondent, Seylan Bank PLC, (hereinafter referred to as the Seylan Bank), filed their statements of claim. The claim put forward by Seylan Bank as at 31st August 2002 was for Rs. 44,677,226/92.

In the meantime, during the period between the time of dismissal of the petition filed by HNB praying for winding up Lanka Tractors Limited by the learned District Judge on 14th March 2000, and the setting aside of the said order of dismissal by the Court of Appeal on 28th June 2001, Lanka Tractors Limited, by way of Mortgage Bond No. 475 dated 12th May 2001 had mortgaged some of its properties and obtained credit facilities from Seylan Bank.

As Lanka Tractors Limited had defaulted the re-payment of the aforesaid credit facilities, Seylan Bank had taken steps to auction the property relevant to the said Mortgage Bond by way of Parate Execution. When Seylan Bank published the resolution of its board of directors which exercised its powers of Parate Execution in the newspaper on 10th March 2006-, HNB had made the application dated 21st March

2006 to the District Court of Colombo in terms of Sections 260, 261, 348, 359 and 352 of the Companies Act No. 17 of 1982 (hereinafter sometimes also referred to as the Companies Act), seeking an order to stay the said execution on the basis that the said execution proceedings had commenced after the winding up of Lanka Tractors Limited and hence would have the effect of nullifying the liquidation proceedings. This was on the basis that the said auction, if held, and the properties thereby sold, would cause an irreparable damage and irremediable loss to HNB and all other creditors (other than Seylan Bank) in the liquidation proceedings resulting in nullifying the effect of the liquidation proceedings. In the said application, HNB had also prayed that the Mortgage Bond relevant to the pending execution be set aside on the basis that it is a fraudulent preference under Section 348 of the Companies Act and/or in terms of Section 350 of the Companies Act. This application by HNB was on the basis that in terms of Section 352 of the Companies Act, Seylan Bank had no right to proceed with such execution of the property of Lanka Tractors Limited after the commencement of its winding up proceedings.

Having considered the submissions of the parties, the learned District Judge by his order dated 05th March 2007, restrained Seylan Bank from continuing with the Parate Execution of the relevant property. The learned District Judge in the same order had further held that the Mortgage Bond in question could not be declared null and void as there was insufficient material in that regard. In other words, the learned District Judge by its order dated 05th March 2007, though restrained Seylan Bank from carrying out the said Parate Execution, refused to declare that the relevant Mortgage was void.

Being aggrieved by the said order of the learned District Judge (dated 05th March 2007), HNB sought leave to appeal from the Provincial High Court of Civil Appeal of the Western Province in order to have the said order set aside and obtain a declaration that the relevant Parate Execution proceeding is null void.

HNB in its petition before this Court states that: the Provincial High Court of Civil Appeal of the Western Province on 30th July 2007 granted Leave to Appeal against the learned District Judge's order dated 05th March 2007and the matter was fixed for argument; when the case was taken up for argument on 15th November 2007 Counsel

for Lanka Tractors Limited took up a series of preliminary objections; arguments relating to the preliminary objections were concluded on the 3rd and 21st February 2008; High Court reserved its order on the preliminary objections for the 10th March 2008; thereafter the order had to be put off for number of dates as one of the Judges of the bench was elevated to the Court of Appeal; subsequently on 3rd February 2009, the judgement was delivered on the whole case despite the fact that the High Court had reserved its order only on the preliminary objections raised by Lanka Tractors Limited.

HNB complains before this Court that the learned Judges of the Provincial High Court of the Civil Appeal by their Judgment dated 3rd February 2009, wrongly dismissed the whole appeal.

Being aggrieved by the said judgment of the Provincial High Court of Civil Appeal, HNB sought Leave to Appeal from this Court and accordingly, on 30th June 2009, this Court granted Leave to Appeal on the questions of law set out in paragraphs 28 (1), 28 (2), 28 (4) and 28 (5), of the petition dated 16th March 2009. At the time the Court decided to grant Leave to Appeal to the afore-stated four questions of law, at the instance of Seylan Bank, two more questions of law (No. 5 and 6 below) were also framed. It was thereafter that HNB framed another question of law (No. 7 below) as a consequential question of law. The said questions of law being renumbered by me as 1-7 respectively, are to the following effect.

1) In the light of the conclusion that the disposition of property after a winding up application has been filed, is void and such disposition includes a mortgage as well, whether the Provincial High Court of Civil Appeal has erred in law when it held that the mortgage was in order as it was executed after the original petition was dismissed and prior to its restoration by the Court of Appeal, when in fact all claims against Lanka Tractors Limited are fixed as at the commencement of the winding up;

2) Whether the Provincial High Court of Civil Appeal has erred in law when they failed to take into account the fact that the Court of Appeal by its order dated 28-06-2001 had restored the HNB's application for winding up of Lanka Tractors Limited which resulted in the winding up of Lanka Tractors Limited deeming to

have commenced at the time of the filing of the application for winding up which was 02-06-1999 which was prior to the mortgage in question;

3) Whether the Provincial High Court of Civil Appeal has erred in law when they had failed to take into account the fact that the said disposition of the property by Lanka Tractors Limited was done with the sole object of defrauding the creditors of Lanka Tractors Limited thereby creating a diminution of the assets of Lanka Tractors Limited which was not an act done honestly and in the ordinary course of business.

4) Whether the Provincial High Court of Civil Appeal has failed to consider the fact that Lanka Tractors Limited had knowledge that Leave to Appeal was granted in the aforesaid application No. CA / LA 83 / 2000 when Lanka Tractors Limited executed the Mortgage Bond in favour of Seylan Bank after the order of dismissal of the application for winding up by the HNB on 14-03-2000;

5) Whether a Mortgage Bond is a disposition within the meaning of Section 260 of the Companies Act;

6) Whether the HNB's application to the High Court of the Western Province was correct; in that it was a Leave to Appeal application whereas in fact it should have been a final appeal.

7) Is the Seylan Bank entitled in law to raise the question of law No. (6) at this stage?

It would be appropriate to deal with the question of law No. (6) and (7) at the beginning itself. The question of law No. (6) has been formulated by Seylan Bank on the premise that HNB's petition to the High Court of Western Province should have been a petition of a final appeal. While this can be gathered from the wordings of the question of law No. (6) itself, Seylan Bank in its written submissions[1] also has confirmed its position by stating therein that "the correct application if at all is for revision and in any event, it is a final appeal". However, what Seylan Bank had sought to advance in the same written submission is the argument that an appeal is only

[1] Written submissions Dated 17-09-2009 filed before this Court by Seylan Bank.

possible when an act specifically gives permission to appeal. It is Seylan Bank's argument that there is no provision in law to permit an appeal against an order made in terms of sections 260 and 261 of the Companies Act. In support of the above position Seylan Bank has relied on authorities: Gunaratne vs. Thambinayagam and others,[2] Bakmeewewa vs. Raja,[3] Martin vs. Wijewardane,[4] People's Bank vs. Perera,[5] Dassenayake vs. Sampath Bank.[6]

In my view, the question whether a party has a right of appeal is different to the question whether an aggrieved party should file an appeal or a leave to appeal application against an order with which such party is dissatisfied with. In these circumstances, I find that Seylan Bank has made no submission regarding the question of law No. (6) in respect of which this Court has granted leave to appeal. This leads me to form the view that Seylan Bank has abandoned pursuing the question of law No. (6). In view of such abandonment of the question of law No. (6), the consequential question of law (question of law No. (7)) raised by HNB does not arise. Hence, I would not proceed any further to deal with both the questions of law No. (6) and (7).

The question of law No. (4) raises the issue whether Lanka Tractors Limited had knowledge of leave to appeal being granted to HNB's application No. CA / LA 83 / 2000 when it executed the relevant Mortgage Bond in favour of the Seylan Bank. Let me next consider this question.

HNB filed the winding up application[9] in the District Court on 02nd June 1999. The learned District Judge dismissed the petition on 14th March 2000. HNB filed the application No. CA LA 83/2000 in the Court of Appeal seeking Leave to Appeal against the said order of the learned District Judge dated 14th March 2000. The Court of Appeal granted leave to appeal on 02nd November 2000.-. It was on 12th May 2001 that Lanka Tractors Limited, by way of Mortgage Bond No. 475 had mortgaged the relevant properties to obtain credit facilities from Seylan Bank. Thus, it is clear that Lanka Tractors Limited, had executed the Mortgage Bond No. 475 to mortgage the

[2] (1993) 2 SLR 355.
[3] (1989) 1 SLR 231.
[4] (1989) 2 SLR 250.
[5] (2003) 2 SLR 358.
[6] (2002) 3 SLR 268.
[9] The winding up application is dated 02-06-1999.

relevant properties to Seylan Bank, more than 06 months after the Court of Appeal had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up.

Seylan Bank, neither in the statement of objections dated 27th June 2006 nor in the affidavit dated 22nd June 2006 filed by the Chief Manager, Foreign Currency Banking Unit of Seylan Bank T Jegatheeswaran has taken up any position that it was not aware of the fact that the Court of Appeal, on 02nd November 2000, had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up.

Moreover, the fact whether Lanka Tractors Limited was or was not aware that the Court of Appeal, on 02nd November 2000, had granted leave to appeal against the order of the learned District Judge is a matter exclusively within the knowledge of Lanka Tractors Limited. While no party has addressed this issue, I have to proceed on the basis that the said fact was well within the knowledge of Lanka Tractors Limited which was a party to the said proceedings in the Court of Appeal. I have no basis to hold the contrary. Section 106 of the Evidence Ordinance reads thus: "*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him*." Lanka Tractors Limited, has not taken up the position that it was not aware of such fact. Thus, I hold that Lanka Tractors Limited has failed to discharge its burden that it did not have any knowledge of Court of Appeal, granting leave to appeal against the order of the learned District Judge on 02nd November 2000 dismissing the petition for winding up. In those circumstances, I hold that at the time Lanka Tractors Limited executed the Mortgage Bond No. 475, it did so with full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up. Perusal of the judgment of the Provincial High Court of Civil Appeal shows clearly that it had not at all considered this aspect of the case.

Let me now proceed to consider the question of law No. 02. That revolves around the question whether the winding up of Lanka Tractors Limited should be deemed to have commenced at the time of filing of the application for winding up which was 02nd June 1999.

Section 262 of the Companies Act No. 17 of 1982 is relevant in this regard and is as follows:

> "*(1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.*
>
> *(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.*"

Thus, the plain reading of the above section clearly shows that the date of commencement of the winding up of a company by Court must be taken as the date of filing of the application for winding up. Legislature in its wisdom has mentioned it as a deeming provision for good reasons. It is because the actual winding up order is made after the petition praying for winding up is filed. What happens if the date of commencement of the winding up of a company is taken as the date of the actual order of Court that the company be wound up? In such event, the company under winding up is able to alienate its property leaving nothing for its creditors. If that be the case, any application for winding up would not achieve any practical result. Thus, it is clear that the legislature has intended to restrain (indirectly) the company under winding up from making any disposition after any petition for winding up of that company has been filed. This is the mischief the legislature has intended to suppress. This view is further supported by section 261 which states thus: "*Where any Company is being wound up by court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."* This means that the company under winding up has an obligation to stop such dispositions of its property after any petition for winding up of that company has been filed.

Following quotations would show that the above position is consonant with English law principles set out in various legal literature.

Sarah Worthington in *Sealy & Worthington's Text, Cases & Materials in Company Law,*[10] states the following.

> *"For many statutory purposes, a winding up takes effect from its 'commencement', which may involve some backdating. IA 1986 s 86*[11] *provides that a voluntary winding up is deemed to commence at the time of the passing of the resolution for winding up. In the case of a compulsory winding up, the liquidation is deemed to commence at the time of the presentation of the petition (and not the making of the order itself), but if the company is already in voluntary liquidation when the petition is presented, the relevant time is when the winding-up resolution was passed (s 129)."*

Gower Principles of Modern Company Law[12] comments on the above as follows.

> *"On the making of a winding up order the winding up is deemed to have commenced as from the date of the presentation of the petition (or, indeed, if the order is made in respect of a company already in voluntary winding up, as from the date of the resolution to wind up voluntarily). This dating back is important since it can have the effect of invalidating property dispositions and executions of judgments lawfully undertaken during the period between the presentation of the petition and the order, and of affecting the duration of the periods prior to "the onset of insolvency" in which, if certain transactions are undertaken, they are liable to adjustment or avoidance in the event of winding up or administration."*

[10] Sarah Worthington in Sealy & Worthington's Text, Cases & Materials in Company Law 11th Edition p. 851-852.

[11] Section 86 of the United Kingdom's Insolvency Act 1986 states that "A voluntary winding up is deemed to commence at the time of the passing of the resolution for voluntary winding up."

[12] Paul L. Davies and Sarah Worthington in Gower – principles of modern company law 10th edition p. 1157.

Thus, as the winding up application by the petitioner was presented to the District Court on 3rd June 1999, in terms of section 262 of the Companies Act, if an order to wind up has been made, the winding up must stand as having commenced from the date of presentation of the petition to Court.

The Court of Appeal by its order dated 28th June 2001restored HNB's application for winding up of Lanka Tractors Limited. After its restoration, there is winding up proceedings before Court to which section 262 of the Companies Act must apply. Thus, the effect of the restoration of HNB's application for winding up of Lanka Tractors Limited is that Lanka Tractors Limited must stand as having commenced its winding up proceedings from 02nd June 1999-i.e., the date of presentation of the petition to Court. Therefore, winding up of Lanka Tractors Limited is deemed to have commenced on 02nd June 1999 (at the time of filing of the application in Court for winding up). The Provincial High Court has failed to appreciate that aspect of the case.

It is now time to turn to the question of law No. 05. That is the question whether the Mortgage Bond executed by Lanka Tractors Limited is a disposition within the meaning of section 260 of the Companies Act. At the outset, it has to be noted that the original application dated 21st March 2006 relevant to this proceeding made in the District Court by HNB had been filed in terms of sections 260, 261, 348, 350 and 352 of the Companies Act No. 17 of 1982.

HNB argues that the Mortgage Bond No. 475 dated 12th May 2001 executed by Lanka Tractors Limited to obtain credit facilities from Seylan Bank is a "disposition of the property of the company, made after the commencement of the winding up", and therefore falls within the meaning of section 260 of the Companies Act. HNB therefore argues that the said Mortgage Bond shall be void as per the said section.

In contradiction to the above argument, Seylan Bank argues that the Mortgage Bond No. 475 dated 12th May 2001 is not a disposition within the meaning of section 260 of the Companies Act. It is the above issue that I have to decide in the question of law No. (5) which I would now proceed to consider.

Section 260 of the Companies Act No. 17 of 1982 is as follows:

> *"In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."*

Section 260 unambiguously states that any disposition of the property of the company made after the commencement of the winding up, shall, unless the court otherwise orders, be void. The several items specified in that section i.e., any transfer of shares, or alteration in the status of the members of the company are merely some of such dispositions and hence are not exhaustive. Therefore, what has been declared void by that section is any disposition. Thus, I need to now examine the meaning of the term 'disposition' set out in section 260.

As per Black's Law Dictionary,[13] the term 'disposition' is defined as follows:

> *The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property <a testamentary disposition of all the assets>.*

The District Judge in his order has held that the execution of Mortgage Bond No. 475 dated 12th May 2001 by Lanka Tractors Limited, to mortgage some of its properties to obtain credit facilities from Seylan Bank cannot be considered a disposition within the meaning of section 260 of the Companies Act No. 17 of 1982. However, on appeal, the Provincial High Court of Civil Appeal had held that the said execution of Mortgage Bond No. 475 dated 12th May 2001 is a disposition within the meaning of section 260 of the Companies Act No. 17 of 1982. Neither Lanka Tractors Limited nor Seylan Bank has canvassed the said conclusion by the Provincial High Court of Civil Appeal. However, in the instant appeal HNB had prayed inter alia in its Leave to Appeal application the followings:

i. to set aside the order of the Provincial High Court of Civil Appeal of the Western Province dated 3rd February 2009 and the order of the District Court dated 5th March 2007;

[13] 11th Edition page 592.

ii. to declare that the said Mortgage Bond No. 475 dated 12th May 2001 executed in favour of the Party Respondent (Seylan Bank) is null and void;

iii. to set aside and/ or rescind the said Mortgage Bond No 475 dated 12th May 2001 executed in favour of the Party Respondent (Seylan Bank).

It is the position of Seylan Bank that mortgages would not be considered as disposition as ownership is retained in the Mortgagor in the case of a mortgage. To the contrary, HNB argues that such mortgage is:

a) contrary to sections 260 and 261 of the Companies Act in light of the order made by their Lordships in the Court of Appeal reviving this case;

b) an act done to defraud the creditors of the company in the liquidation proceedings causing diminution of the Company assets; and

c) would render the liquidation proceedings a mere technicality and the entire purpose of those proceedings made nugatory.

In considering the above arguments, it would be relevant to refer to the following passage taken from Akers and others vs. Samba Financial Group[14] where Lord Mance observed the following regard to section 127 of the Insolvency Act 1986 of the United Kingdom which is similar to aforementioned section 260 of the Companies Act.

> *"However, it is fair to say that the word "disposition" is linguistically capable of applying to a transaction which involves the destruction or termination of an interest…*
>
> *And it is possible to claim support for such a view in relation to section 127 from respected authors. Thus, Professor Sir Roy Goode in Principles of Corporate Insolvency Law, 4th ed (2011) at para 13-127 states that "[s]ection 127 bites on beneficial ownership, not necessarily on the legal title". And at para 13-128, he says that "[t]he word 'disposition' ... must be given a wide meaning if the purpose of the section is to be achieved, particularly in view of the fact that there is no exception in favour of transfers*

[14] (2017) UKSC 6

> *for full value"; particularly relevantly for present purposes, this passage continues: "'[d]isposition' should therefore be considered to include not only any dealing in the company's ... assets by sale, exchange, lease, charge, gift or loan but also ... any other act which in reducing or extinguishing the company's rights in an asset, transfers value to another person". Sir Roy then explains that on this basis "'disposition' includes an agreement whereby the company surrenders a lease or gives up contractual rights". And McPherson's Law of Company Liquidation, 3rd ed (2013), para 7-015, states that section 127 "only [applies to] property which belongs in equity to the company" and "is confined to the company's beneficial interest in property"*

Further in Re Leslie engineers Co. Ltd.[15] Oliver J had observed that,

> *"on the true construction of section 227 of the Act of 1948, the term "dispositions" included dispositions of a company's property whether made by the company or by a third party or whether made directly or indirectly;…"*

Accordingly, it is apparent that in the context of winding up, the term disposition covers a wide range of transactions which diminish the value of the company's assets while transferring the same to another.

A mortgage bond in general is executed in such a way that it binds a property taken as a security for the repayment of a debt. In the instant case, Lanka Tractors Limited executed the Mortgage Bond No. 475 dated 12th May 2001 in regard to some of its properties in return for credit facilities from the Seylan Bank. Accordingly, by mortgaging the said properties to Seylan Bank, Lanka Tractors Limited has authorized Seylan Bank to sell it by public auction and recover its dues in case of a failure to settle credit facilities.

In the Australian case of Re Dittmer Gold Mines Ltd.[16] the Supreme Court of Brisbane reached the same conclusion holding that the memorandum of mortgage, although executed after the order for winding-up, was nevertheless a disposition of the property of the company made after the commencement of the winding-up within section 178

[15] (1976) 1 WLR 292.
[16] (No 3)[1954] St R Qd 275.

of The Companies Acts, 1931 – 1942, and was void unless the court otherwise ordered.

It would be relevant to note that the above decision (Re Dittmer Gold Mines Ltd.) was given in regard to section 178 of their Companies Acts, 1931 – 1942 which is in fact identical to section 260 of our Companies Act where the provision reads,

> *"In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up shall, unless the court otherwise orders, be void."*

Therefore, I find no reason to oppose the afore stated general consensus of courts which have observed the wide interpretation of the term 'disposition'. Moreover, section 352 of the Companies Act would also confirm the position that the legislature has placed expressed restriction on the rights of creditors as to execution attachment in relation to properties of a company under winding up. The said section is reproduced below for easy reference.

> *(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the date of commencement of the winding up.*
>
> *Provided that*
>
> *(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of the preceding provisions be substituted for the date of commencement of the winding up;*
>
> *(b) a person who purchases in good faith under a sale by order of court any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator;*

(c) the rights conferred by the provisions of this sub- section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit.

(2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver.

(3) In this section the expression " goods " includes all movable property. "

Thus, in light of the wide interpretation given to the term 'disposition' and the intention of the legislature to restrict the rights of creditors as to the execution of attachments in relation to properties of a company under winding up it can be stated that even the question of ownership would not be of strict relevance in interpreting whether a particular act could be regarded as a disposition. Therefore, the position taken up by Seylan Bank that mortgages would not be considered as disposition as ownership is still retained in the Mortgagor, cannot be accepted.

As has been clarified above, the term 'disposition' should be given a wider meaning than the 'transfer', which is used to interpret a change of title. This is why the legislature in its wisdom has used the term 'disposition' instead of the term 'transfer'.

What has happened in this case is that Lanka Tractors Limited has mortgaged the relevant properties to Seylan Bank just few months before the pronouncement of the judgment in the Court of Appeal and defaulted the repayment. The resultant position of this act is the commencement of Parate Execution proceedings by Seylan Bank to auction the property and recover its dues. Therefore, there is no doubt that the cumulative effect of the entire process of the execution of Mortgage Bond No. 475 by Lanka Tractors Limited and the subsequent default of repayment thereof which led Seylan Bank to commence Parate Execution of the property, has amounted to an act of transferring the beneficial interest of the relevant property to Seylan bank to enable it to become the owner through Parate Execution. That is the way Lanka Tractors Limited had chosen to relinquish its beneficial interest in the relevant property.

It would be only Lanka Tractors Limited which would know if it had any other purpose/intention other than that mentioned above. But Lanka Tractors Limited had not even attempted to explain why it decided to execute the Mortgage Bond No. 475. In light of the above, it would be absurd to hold that the Mortgage Bond No. 475 executed by Lanka Tractors Limited in favour of Seylan Bank cannot be invalidated on the mere fact that it is only a mortgage. The purpose of this section is clear and wide enough to bring the Mortgage Bond No. 475 under section 260 despite the word mortgage is not found in its list of items. In these circumstances, I have no hesitation to hold that irrespective of the fact that the title does not pass in a mortgage, the Mortgage Bond No. 475 is a disposition within the meaning of section 260 of the Companies Act.

I would now deal with the question of law No. (3). The primary issue raised in question of law No. (3) is whether the said disposition of the property by Lanka Tractors Limited was done with the sole object of defrauding its creditors. Section 348 of the Companies Act which describes about Fraudulent reference would be relevant in this regard. It is as follows:

> *(1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.*
>
> *(2) For the purposes of this section, the commencement of the winding up shall be deemed to correspond with the act of insolvency in the case of an individual.*
>
> *(3) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents."*

Having considered the arguments in relation to the question of law No. (4), I have already held that Lanka Tractors Limited had executed the Mortgage Bond No. 475 with full knowledge that the winding up process was still alive as the Court of Appeal

by that time had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up.

There can be two inferences from the above conclusion. One is that the disposition of the property relevant to the issue at hand by Lanka Tractors Limited was done with the sole object of defrauding its creditors. The other is that the said disposition of the property was done by Lanka Tractors Limited without any object of defrauding its creditors. As to which object Lanka Tractors Limited had when it had executed the Mortgage Bond No. 475 is only within the exclusive knowledge of Lanka Tractors Limited itself.

I have already mentioned about the rule of evidence that would be applicable in situations of this nature. The said rule is contained in section 106 of the Evidence Ordinance which I have already reproduced before.

The first illustration mentioned under the section of the Evidence Ordinance states thus:

> *"When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."*

Thus, when taking into the character and the circumstances under which the Mortgage Bond No. 475 has been executed coupled with the fact that it is Lanka Tractors Limited which has the exclusive knowledge of the relevant facts, Lanka Tractors Limited has a legal obligation to prove that it acted with some intention other than that which the character and circumstances of the aforesaid execution suggests. Lanka Tractors Limited, has not taken up any position in relation to the question whether the disposition of the relevant property was done with or without the object of defrauding its creditors. Thus, I hold that Lanka Tractors Limited has failed to discharge its burden that it did not have the object of defrauding its creditors when it executed the Mortgage Bond No. 475 with full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted leave to appeal against the order of the learned District Judge dismissing the petition for winding up.

Learned Counsel drew our attention to the views expressed by the Court of Appeal in the unreported case of L. M. Apparels (Pvt) Ltd. vs. E. H. Cooray & others.[17] In that case, S. N. Silva J. (as he was then) stated as follows:

> *"Submissions of learned President's Counsel relate to the ambit and effect of the provisions contained in section 260 of the Companies Act and the procedure to be adopted in a matter where the provisions of the section are sought to be applied…….*
>
> *The provision is identical with section 227 of the Companies Act of England. The ambit of operation of this provision may be more readily comprehended by reference to the commentary in Palmer's Company Law, 23rd ed. vol 1. page 1185. The commentary based on cases decided in England is as follows:*
>
> > *"A disposition of the property of the Company, including things in action and a transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, is void unless the Court otherwise orders (1948 Act. 'S 227): but the practice of the Court is to allow such payments or dispositions, pending the petition, if made honestly and in the ordinary course of business. The exercise of the discretion of the Court under this section is controlled only by the general principles of justice and fairness. Such an order may be made prior to the hearing of the winding up order."*
>
> *The foregoing commentary, made with reference to the practice of court, reveals that the provision is not to be construed as it were a guillotine which indiscriminately strikes down every disposition of property of the company made after the commencement of its winding up, with a reserved power vested in the Court to validate any such disposition. The words "unless the Court otherwise orders, be void" should be understood as subjecting every disposition of property of the company made after the commencement of the winding up, to the scrutiny of Court with a*

[17] CA Application No. 584/93, decided on 25th March 1994.

overriding discretion vested in the Court to permit such disposition to stand….." [18]

I have held that Lanka Tractors Limited has failed to discharge its burden that it did not have the object of defrauding its creditors when it executed the Mortgage Bond No. 475 when it had the full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted Leave to Appeal against the order of the learned District Judge dismissing the petition for winding up. Although the above conclusion is a sufficient answer to the question of law under consideration, in view of the fact that the above case was cited before us, I would briefly mention about the question whether it would be just and fair in the circumstances of this case for Court to permit this disposition to stand.

Lanka Tractors Limited was fully aware at the time they mortgaged the property to Seylan Bank Limited on or about 12th May 2001 the fact that HNB had sought Leave to Appeal from the Court of Appeal against the dismissal of the winding up petition. In fact, Leave to Appeal had already been granted on 2nd November 2000 by the time the mortgage bond was executed on or about 12th May 2001. Thus, Lanka Tractors Limited has not adduced any basis/material upon which I can hold that the said disposition was made honestly in its ordinary course of business.

The attention of court was also drawn to the case of Express Electrical Ltd v Beavis and Ors.[19] The case concerned with a validation order in a situation where a person had delivered goods to a company at the time when a winding up petition had been filed. The object of a validation order in that a case was to validate the payment made by the company for goods supplied. In that case Lord Justice Sales observed:

The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the

[18] at page 8.
[19] 2016 BCC 566

benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual pari passu principle.

I have already cited above, section 348 (1) of the Companies Act. That section specifically encompasses mortgages. I have no difficulty in holding that the execution of mortgage bond on 12th May 2001 i.e., the property relevant to the instant case if executed by or against an individual, would, be deemed in his insolvency a fraudulent preference. If that is so, then such mortgage if made or done by or against a company, shall be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly. (The commencement of the winding up shall be deemed to correspond with the act of insolvency in the case of an individual (section 348(2)).

Attention of the Court was also drawn in this regard to Re Kushler Ltd.[20] In that case, the appellant was the liquidator of the company and the respondents were the company's bankers. The appellant sought a declaration of fraudulent preference in respect of all payments made to the respondents between 23rd of February and 23rd of May 1941 which was the date of the resolution for voluntary winding up. The company had an overdraft at the bank which overdraft was guaranteed by a director of the company and secured by the deposit of certain policies belonging to him. Payments were made into the Bank as the result of which the overdraft was extinguished. The liquidator claimed that the payments to the bank constituted a fraudulent preference. In the above circumstances, it was held in that case, that the proper inference to be drawn was that the payments to the bank after May 10th May 1941, were made with a view of giving the bank a preference over the other creditors by so discharging the guarantee.

The sections 260, 261, 348, 350 and 352 of the Companies Act No. 17 of 1982 which HNB has referred to in the caption of its petition filed in the District Court are sections found under the PART IX of the Companies Act No. 17 of 1982. Section 348 thereof covers a mortgage as well. Cumulative effect of those provisions is to prevent the company under winding up, disposing its assets by some means in order to deprive

[20] (1943) 2 All ER 22.

its creditors, the value of those properties. In the instant case, Lanka Tractors Limited was well aware that the winding up proceedings against it was in progress. In these circumstances, there is a heavy burden on Lanka Tractors Limited to satisfy court that it did not intend to defraud the creditors by executing the relevant mortgage. However, as I have mentioned before, Lanka Tractors Limited has failed to place any acceptable material to satisfy court that its action was one that was in the course of the ordinary business.

In the above circumstances, I hold that Lanka Tractors Limited had executed the Mortgage Bond No. 475 with the sole object of defrauding its creditors.

What is now left for me is only to consider the question of law No. (1).

I have held that at the time Lanka Tractors Limited executed the Mortgage Bond No. 475, it did so with full knowledge that the winding up process was still alive as the Court of Appeal by that time had granted leave to appeal against the order of the learned District Judge dismissing the petition for winding up. [vide discussion relating to Question of law No. (4)]

I have also held that winding up of Lanka Tractors Limited is deemed to have commenced on 02nd June 1999(at the time of the filing of application in Court for winding up). [vide discussion relating to Question of law No. (2)]

I have further held that the Mortgage Bond No. 475 is a disposition within the meaning of section 260 of the Companies Act. [vide discussion relating to Question of law No. (5)]

I have also held that Lanka Tractors Limited executed the Mortgage Bond No. 475 with the sole object of defrauding its creditors. [vide discussion relating to Question of law No. (3)]

In the light of the above conclusions, I hold that that the Provincial High Court of Civil Appeal has erred in law when it held that the Mortgage Bond No. 475 was in order as it was executed after the original Petition was dismissed and prior to its restoration by the Court of Appeal, when in fact all claims against Lanka Tractors Limited are fixed as at the commencement of the winding up.

Thus, I proceed to set aside the judgment of the Provincial High Court of Civil Appeal of the Western Province dated 3rd February 2009 and the order of the District Court dated 5th March 2007. I hold that the Mortgage Bond No 475 dated 12th May 2001 executed in favour of the Party Respondent (Seylan Bank) is null and void and has no force or avail in law.

Hatton National Bank is entitled to the costs of litigation in both Courts.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare PC J

I agree,

JUDGE OF THE SUPREME COURT

Janak de Silva J

I agree,

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Mohammed Rashid Fathima Sharmila
No. 159/FB/54,
Maligawatte Place,
Maligawatte,
Colombo 10.

SC. FR Application No. 398/2008 — Petitioner

Vs.

1. K.W.G. Nishantha 31118,
   Police Sergeant,
   Police Station, Slave Island,
   Colombo 02.

2. Siddique 5004,
   Police Constable,
   Police Station, Slave Island,
   Colombo 2.

3. Karunathilake 30342,
   Police Sergeant,
   Police Station, Slave Island,
   Colombo 2.

4. K.N.C.P. Kaluarachchi,
   Police Inspector,
   Police Station, Slave Island,
   Colombo 2.

5. Officer in Charge,
   Police Station, Slave Island,

Colombo 2.

6. The Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Respondents

Before: Buwaneka Aluwihare, PC. J.
E.A.G.R. Amarasekara J
Kumudini Wickramasinghe J

Counsel: M.A. Sumanthiran, PC with Divya Mascaranghe for the Petitioner.
Madhawa Tennakoon, DSG for the Respondents.

Argued on: 07. 06. 2022

Decided on: 03.02.2023

Aluwihare PC. J.,

(1) This is a fundamental rights application by Mohammed Rashid Fathima Sharmila on behalf of her deceased husband, Mohammed Nizar Mohammed Irfan, (hereinafter also referred to as the 'deceased'). She petitions that her deceased husband was apprehended by the 1st to 4th Respondents along with three other police officers and was shot dead in the following morning by the 3rd Respondent. It is alleged by the 3rd Respondent that the shot was fired when exercising his right of private defence against an alleged violent attempt by the

deceased to escape the charge of the police officers accompanying him on a search for concealed weapons. The Petitioner claims that the arrest and execution of her husband is a violation of his fundamental rights guaranteed under Article 11, 12(1), 13(1) and 13(4). Leave to proceed, however, was granted for the alleged violation of all the Articles referred to above, sans Article 11.

(2) Prior to addressing the issue relating to the alleged violation of fundamental rights, an illustration of the incidents that transpired leading to the present application is merited.

(3) Around 1 p.m. on 2nd September 2008, the 1st to 4th Respondents along with three other police officers, had arrested the deceased on the charges of allegedly possessing a live hand grenade, murder, attempted murder, and robbery. About an hour later on the same day, the 1st and 2nd Respondents, according to the Petitioner, had brought her deceased husband to the Petitioner's home and searched the premises for concealed weapons, albeit unsuccessfully.

(4) In this instance, the 1st and 2nd Respondents had also assaulted the deceased's cousin Mohammed Azar Ghouse Mahamood, a boy of 15 years, who had visited the Petitioner's home after hearing the news about the arrest of the deceased. The 1st and 2nd Respondents had proceeded to arrest the cousin as well, and left with both the deceased and his cousin in their custody. The Petitioner's account of this fact is corroborated by the said Ghouse Mahamood's complaint to the Human Rights Commission marked and produced as P4a and his affidavit marked and produced as P4b.

(5) The deceased, thereafter, was allegedly detained at the Slave Island Police Station and he was allowed to contact his wife several times that day. According to the Petitioner, in the course of the telephone conversations, the deceased had informed her that he was threatened by the 1st and 2nd

Respondents that he would be executed if he failed to produce some weapons by 10 p.m. that night. The Petitioner who was distressed by these communications thereafter visited the Slave Island Police Station to meet the deceased and to ascertain the condition of his health, which had been around 8.30 p.m. on the same day. Police officers at the station had shown the deceased's skullcap and said "in jest" that her husband was safe and was being fed "කැඳ" [porridge]. Contradictorily, however, they have also told that her husband was safe and was taken to Anuradhapura and was no longer in the custody of the Slave Island Police Station, and that she would come to know what happened to her husband the next morning.

(6) Early next morning [3rd September], the deceased had been allegedly taken by the police to Maligawaththa and Kotahena, for the purpose of locating weapons and to arrest two other suspects. The Petitioner, becoming privy to rumours that her husband had been shot dead near 'Gaspaha' junction (ගෑස්පහ හංදිය), she had visited the said location to find her husband's dead body inside the Police vehicle No. 32-8466.

(7) The facts of this incident had been reported to the Chief Magistrate of Colombo under case number B6578/01/2008. (Vide P5). In the course of the evidence led at the Inquest before the Magistrate, it was revealed that the deceased was travelling within the police area of Pettah, in the Police vehicle No. 32-8466 with eight (8) Police officers. While so travelling, the deceased, who was handcuffed at the time, allegedly attempted to escape from the moving vehicle by seizing the weapon of Sergeant Pulleperuma and making an attempt to fire at 3rd Respondent, Sergeant Karunathilake. At that moment, the deceased had been shot twice by the 3rd Respondent; once in the chest and once in the abdomen, allegedly exercising his right of private defence.

(8) The cause of death, according to the Judicial Medical Officer, was "close range rifled firearm injury to the chest and abdomen." (Vide 4R3). With this sequence of events in mind, before venturing into the many inconsistencies

between the Petitioner's and Respondents' versions of events, it is pertinent to make a brief comment at the outset on the locus standi of the Petitioner.

Locus Standi of the Petitioner

(9) Earlier, the position pertaining to *locus standi* was that a Petitioner can complain only of the violation of his or her own fundamental rights. Action could only be filed by the Petitioner or by an Attorney-at-law acting on the Petitioner's behalf, as per a "plain, natural, ordinary, grammatical and literal" reading of Article 126(2) (***Somawathie v Weerasinghe*** **(1990) 2 Sri LR 121 at 124**).

(10) Subsequently, however, with the pronouncement of the principles laid down by Fernando J. in the case of ***Kotabadu Durage Sriyani Silva v Chanaka Iddamalgoda, Officer-in-Charge, Police Station Payagala*** **(2003) 1 Sri LR 14**, it is now well-established and solidified law that the next of kin has a right to sue on behalf of the deceased, in order to uphold the right to life implicit in Article 13(4). To hold that no one is entitled to sue the wrongdoers in the present case, would mean that there is no remedy for a violation of Article 13(4) by causing *death itself*, but an *imminent threat* to one's life and liberty is remediable; rendering the right to life impliedly recognised by this Court under Article 13(4) merely illusory. In such circumstances, the need to avoid anomalies, inconsistencies and injustice calls for an expansive interpretation of the constitutional remedy provided by Article 126(2).

(11) This view was endorsed by Justice Shirani Bandaranayake [as she then was] in ***Lama Hewage Lal (deceased) and Rani Fernando (wife of deceased Lal) v. OIC Seeduwa Police Station*** **(2005) 1 Sri LR 40, 45** where her ladyship held; that after the decision of *Sriyani Silva* (supra), *"it is therefore settled law that the lawful heirs and/or dependants of a person who is deceased as a result of an act of torture should be entitled to a declaration of the violation and compensation".*

(12) Furthermore, of particular relevance to the present case, is **Article 14.1** of the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,** to which Sri Lanka is a party, posits "in the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." The interpretation that the right to compensation accrues to or devolves on the deceased's lawful heirs and/or dependants brings our law into conformity with international obligations and standards, incorporated through the enabling legislation, the **Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994**, and must be preferred. Such an interpretation is also bolstered by **Article 4(d) of the Constitution**.

(13) In the present instance, the deceased's rights have accrued or devolved on his next of kin. The Petitioner, therefore avails herself of the remedy available to the deceased. Hence, the present Application is in accordance with Article 126(2) of the Constitution. Having established the locus standi of the Petitioner, it is apposite to consider the credibility of the Respondents' narrative.

Shifting stances in the Respondents' Narrative

(14) The credibility and consistency of the Respondents' narrative are called into question, due to the shifting of positions from the very inception to the conclusion of their account of the events that transpired, and the discrepancies that can be observed.

(15) There is an incongruity *inter-se* between the affidavits of the Respondents even after they were re-submitted after amending, in 2011. Inconsistency is observed even in the basic fact as to who arrested the deceased at the Maligawatte Applewatte Milad Mosque. In the 1st Respondent's affidavit, it is averred that he assisted Police Sergeant 'Karunathilake' in the arrest of the deceased, while the 2nd Respondent has taken up the position that it was one *Police Sergeant* 'Kaluarachchi' who made the arrest [paragraph 7 of the 2nd

Respondent's affidavit]. According to the affidavit of the 3rd Respondent Karunathilake, he has also assisted one *Police Sergeant* 'Kaluarachchi' in making the arrest of the deceased. Interestingly, it was the 4th Respondent, Kaluarachchi, who is an *Inspector of Police* who had made an entry in the Information Book pertaining to the arrest of the deceased (vide "4R2A"). This fact was also admitted in the testimonies of 1st, 3rd and 4th Respondents in the inquest Proceedings (vide "P5"). The lack of consistency in their own narration of events at the Magistrate's Court and before this Court is telling of the incoherence in their narrative.

(16) Further, it is submitted by the Petitioner that her deceased husband's cousin Mohammed Azar Ghouse Mahamood [hereinafter referred to as Ghouse], a young schoolboy of 15 years of age, who had visited her house upon hearing the distressing news of the deceased's arrest, had also been arrested by the Respondents when they brought the deceased to Petitioner's home for a search. Ghouse had made a complaint to the Human Rights Commission (HRC) on 4th September 2008 and submitted an affidavit in this regard (P4a and P4b, respectively) where he states that he was arrested without citing reasons, was severely beaten, detained inside a bus outside the Slave Island Police Station and subsequently released without any charges. In his affidavit, the details about the presence of the 1st, 2nd and 4th Respondents at the deceased's house, the time at which they visited the house, and the manner and the place where the deceased was detained after being taken to the Slave Island Police station, are consistent with the IB entries pertaining to the arrest of the deceased ["4R2A"]. His account of events is corroborated by the Petitioner and the parents of the deceased who have also filed complaints with the HRC (vide "P8a"). The Respondents merely deny such substantial claims of assault and arrest in their affidavits, without countering the allegation or providing any explanation, ebbs away the credence of their version of events.

(17) The root of inconsistency goes deeper, down to ascertaining the place of detention of the deceased. The Petitioner claims that her husband "was detained at the Slave Island police station" (paragraph 6(e) of the Petition). She had even visited the Slave Island police station in the hope of meeting her husband at which instance she received contradictory information about her husband being well and being fed porridge, and later was told that he was taken to Anuradhapura. The Petitioner's claim that the deceased was held at the Slave Island Police station is corroborated by the affidavit of Ghouse, who states that he witnessed the deceased being "placed in a room inside the Slave Island Police Station" (paragraph 6 of "P4b"). It is also lent credibility by the Human Rights Commission complaint filed by the deceased's parents where they state they were informed by the Legal Officer at the Human Rights Commission that their son was under the charge of one Kaluarachchi of the Slave Island police station, the location to which they hurried with the expectation of seeing their son, but were told to return the next morning. (vide "P8a" and "P8b").

(18) Yet the 4th Respondent [IP Kaluarchchi] claims, that as per the IB entry recording the arrest, the deceased's investigation was to be conducted under the supervision of Officer-In-Charge of Pettah Police Station, and he was presented to the Pettah Police Station after arrest. The 4th Respondent goes further to state that the Petitioner herself was informed of this fact when he took the deceased to Petitioner's house to search for concealed weapons. (4R2A). In the "out" entry, (4R5) which is extracted from the IB of the Pettah police station, the 4th Respondent claims that it was the Pettah Police Station they left on the morning of 3rd September 2008, taking the deceased along with them, and this is reiterated in his depositions at the Inquest Proceeding (vide "P5", page 16). But this account by the Respondents naturally raises the question as to why the aggrieved wife, mother and father of the deceased would concern themselves with calling over at the Slave Island police station and receive such perplexing responses from the officers therein, if they were

quite dependably informed of the whereabouts of the deceased by the 4th Respondent. The Respondents have offered no clarification regarding the same.

(19) The credibility of the Respondents' narrative is placed in peril owing to contradictions in the material facts regarding the scuffle in which the deceased's death ensued, as portrayed in the original and the amended affidavits of the Respondents. Given that these affidavits were filed by officers of the Police who are well-versed in and much dependent upon the accuracy of the detailed notes they take pertaining to each investigation, such lapses raise incredulity. The original affidavits of the 1st to 4th Respondents filed on 18th February 2010 had stated in unanimity that they "categorically *deny that the deceased was handcuffed* while he was travelling in the Police vehicle No. 32-8466 along with 8 armed police officers", which is inconsistent with the depositions of the 4th Respondent before the Inquest (vide "P5", page 15). It also contradicts the "in" entry of the IB on 3rd September 2008 (vide "4R5A"), where he stated that the deceased *was handcuffed*.

(20) However, the original affidavits were amended after a lapse of more than a year in August 2011, to read that the Respondents "categorically deny that the *handcuffed deceased* was travelling in the Police vehicle…", reverting from their original position and conjuring the unconvincing image of an individual defined by the Respondents themselves as an "an absconding under-world gang leader wanted by the police in connection with offences of attempted murders, murder and robbery" known to be adept at wielding a gun, being taken around with such scant security measures. This renders the narrative of the Respondents further implausible and wavering.

(21) Irregularities are also observed as to the time of death. It is stated in the "out" entry by the 4th Respondent (Vide 4R5) and in his depositions at the Inquest (Vide P5), that 8 Police Officers left the Pettah Police Station with the deceased to Kotahena and Maligawatte at the dawn of 3rd September, 2008 at 4.05 a.m. in order to locate some weapons and arrest 'Nilafer' and 'Azmi mama', based

on information revealed through the deceased's statements (Vide 4R5). However, the "in" entry registers that at 4.50 a.m. After 45 minutes] they were still travelling towards Barber Street along the Pettah Main Street when the scuffle occurred and the deceased was shot dead (Vide 4R5A). The distance from Pettah to Maligawatte (approximately 3 Km) and the time taken to make the trip, makes it questionable why this journey had to be made while the surrounding was still dark, given that the main aim of the journey was to locate weapons. The requirement of undertaking an urgent search operation, being pressed by some urgent concern is nowhere expressed by the Respondents. It was only bound to limit the efficiency and success of their search.

(22) The Respondents are seen to be well-aware that the deceased was an 'under-world gang leader' adept at handling weapons. Experienced Police officers acting with a mind to preventing exigencies routinely take sufficient care when transporting such a detainee. But a question is raised as to why such care was not exercised in the present instance, given that in the "out" entry, as they left for the search, Police Inspector Kaluarachchi had advised the police officers that, as they are embarking on an investigation to arrest hard-core underworld criminals and to look for their weapons, and suspects who are adept at using grenades, to be vigilant and careful (vide 4R5). Therefore, it is only natural that the officers should have, in the ordinary course of events, taken extreme care to ensure that their weapons are out of reach of the deceased suspect. However, an extra degree of care taken to prevent such an exigency is not exhibited in the conduct of the 8 police officers, with 6 out of them being armed, and the deceased's actions limited to the confined space of the moving Police vehicle.

(23) As per the above analysis, it is my considered opinion that the Respondents' version of the events is contradictory, improbable and thus must be refuted. In this context, it should be examined whether the conduct of the Respondents

have violated the rights afforded to the deceased under Article 12(1), 13(1) and 13(4).

Violation of Article 12 (1)

(24) Article 12 (1) of the Constitution embodies two vibrant concepts - *equality before the law* and *equal protection of the law* to all persons. The two limbs of this Article are lucidly elaborated by Ivor Jennings in, **'Law of the Constitution'**, 5th edition, at page 50 where he posits that,

> *"[e]quality before the law is a negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law. Equal protection of the law is a more positive concept and implies equality of treatment in equal circumstances."*

(25) In the present case, the alleged criminal record of the deceased is immaterial to a violation of his fundamental rights ensured by the Constitution. As each person ought to be subjected equally to the ordinary law of the country, the deceased should similarly be subjected to a fair trial before a competent court and be found guilty of any charges against him. In any case, he is equally entitled to receive the same protection of his fundamental rights as any other citizen in the same circumstances. It is quoted with approval that this was correctly noted by Fernando J in ***Sriyani Silva v. Iddamalgoda*** (supra) at pages 78-79, "[r]*espondents should have concentrated their efforts to have the allegations against the deceased determined by a competent Court, after a fair trial. Until then the deceased was entitled to the benefit of the presumption of innocence."*

(26) Annexure "4R1" which notes down fifteen allegations against the deceased is merely a sheet of paper on which 15 case numbers are typed alleging that the deceased was treated as a suspect in those cases. "4R1" is not a document maintained by the police in the normal course of their duties, but appears to be a document prepared to counter the allegations against the Respondents in the instant application, whereas the Respondents could have filed copies of the "B" Reports filed by the police when facts were reported to court citing the

deceased as a suspect in those respective cases. In this backdrop, it is difficult to place much credence on "4R1". Thus, the assertion on the part of the Respondents, that the deceased was a 'wanted man' in connection with many crimes cannot be relied upon by this court.

(27) In any case, any such supposed allegation has not been determined by a competent court after a fair trial and until such time, the presumption of innocence will prevail as per Article 13(5) of the Constitution. Even if his record was bad, it is now rendered more serious as the deceased has lost his life, and consequently, lost the opportunity to redeem his bad record. Thus, it submitted that the argument that the deceased was a known criminal has no credibility, and has no bearing on his fundamental rights.

(28) It is contended by the Petitioner, quoting ***Dumbell v. Roberts (1944) All ER 326, 329*** as cited in ***Muthusamy v. Kannangara*** **(1951) 52 NLR 324** and ***Faiz v. The Attorney General*** **(1995) 1 Sri LR 372,** that the principle 'innocent until proven guilty' applies to the Police function of arrest. Even in the context of the arrest being based on a mere list of cases allegedly pending against the deceased, (Vide 4R1) presented along with an IB entry claiming that the deceased held a live grenade in his possession at the time of arrest (Vide 4R2A), the deceased is nevertheless entitled to be protected by the law against violations of his life and liberty.

(29) This notion is expressed by Justice Sharvananda, in his Treatise, **'Fundamental Rights in Sri Lanka'** at page 84, where citing *Paliwadana v. A.G.*, he states,

> *"The fundamental fact is men are not alike […] what is postulated is equality of treatment of all persons in utter disregard of every conceivable circumstance of the differences…"*

(30) Therefore, despite the allegations against him of criminal conduct, in the absence of an order of a competent court handing down a sentence, the deceased was entitled to the ordinary and equal protection of the law against the violation of his fundamental rights by the actions of the 1st-4th Respondents,

which resulted in his death. The 5th Respondent who is the officer-in-charge of the Slave Island police station, was under a duty to take all reasonable steps to ensure that persons held in custody were treated humanely and in accordance with the law. This included monitoring the activities of his subordinates. He did not claim to have taken any steps to ensure that the deceased was being treated as the law required him to be.

(31) Thus, in light of the foregoing evaluation, it is my considered view that the 1st to 5th Respondents have violated the fundamental rights of the deceased by failing to afford equality before the law and equal protection of the law to the deceased, guaranteed by Article 12(1) of the Constitution.

Violation of Article 13 (4)

(32) Article 13(4) prohibits punishing any person with death or imprisonment except by order of a competent court, made in accordance with the procedure established by law. In the present case, it is admitted by both parties that the deceased was shot by the 3rd Respondent and thereafter the deceased succumbed to the injuries thus inflicted. Therefore, it is not contested that the death of the deceased was *not* in accordance with an order of a competent court.

(33) Bearing in mind the potential criminal liability of the 3rd Respondent, in the present case, the deceased was put to death by him in the absence of any order of a competent court to that effect, made in accordance with the procedure established by the law, in a deliberate violation of the sanctity of his life. This is corroborated in the Petition by the Petitioner who claims that the deceased had prior apprehension regarding his imminent execution, which was also communicated to her. (Vide paragraph 6(f) of the Petition)

(34) The learned Deputy Solicitor General argued on behalf of the Respondents that Article 12(1) is linked to Articles 13(1) and 13(4) and as such Article 12(1) cannot stand alone but intrinsically linked to the Articles referred to. His argument appears to be that if the court cannot come to a finding that the Respondents have infringed Article 13(1) and 13(4), the court cannot proceed to consider a violation under Article 12(1). He contended further that the

deceased was arrested for possession of a hand grenade and he was informed of the reasons for the arrest. As such, the respondents cannot be held to have infringed the rights referred to in Articles 13(1) of the Constitution. It was the position of the learned DSG that there is no material before court to conclude the shooting of the deceased was to mete out a punishment to the deceased and that the exercise of the right of self [private] defence operate as an exception to Article 13(4). However, it must be noted that a person can be arrested in accordance with the law, but cannot be punished in violation of it. And this would engender a denial of equal protection of the law.

(35) Section 89 of the Penal Code stipulates the general provision that '*nothing is an offence which is done in the exercise of the right of private defence*.' However, even though under Section 93, the right of private defence of the body may extend to causing death when faced with an assault that reasonably causes apprehension of death, according to Section 92(4), the right in no case extends to the inflicting of more harm than necessary for the purpose of defence.

(36) Even assuming that the deceased did make an attempt to escape ; in a situation where 8 trained policemen, (who were further instructed in advance to be prepared to face the dangers and exigencies involved in this operation [Vide "4R5"]) were accompanying the deceased, with 6 of them armed and easily able to overpower the deceased by inflicting lesser harm than killing him, the 3rd Respondent is seen to have acted in excess of self-defence. As per Section 92(4) therefore, that defence cannot be extended to the present case. Thus, the right of self-defence presents a weak case for exculpating the 3rd Respondent of criminal liability. Having given its mind to the attended facts and circumstances, the court indeed entertains serious doubts as to whether the scuffle has indeed transpired, as alleged by the Respondents.

(37) In the Case of **Wijesuriya v. The State, 77 NLR 25** (Premawathie Manamperi Case) which concerned the killing of a prisoner who was a suspected insurgent held in custody by a military officer, while a state of emergency prevailed in the country, Alles J. observed the following,

"…there was no justification for the shooting of a suspected insurgent taken into custody. What then is the position of a soldier subject to Military Law in such situation? He continues to remain the custodian of the civil law and it will be his duty to shoulder the responsibility of police duties, in the discharge of which he is as much subject to the civil law as the ordinary policeman" (at page 32, emphasis added).

(38) It is apparent that a military officer's duties during a state of emergency is equated to those of a police officer, who is the 'custodian of the civil law' and he/she can offer no justification for killing a prisoner in custody in violation of the civil law.

(39) Even though the Fundamental Rights Chapter of the Constitution of Sri Lanka does not consist of a standalone right to life, in ***Sriyani Silva v. Iddamalgoda*** (supra) at page 75, this Court has upheld this right to life as impliedly recognized by Article 13(4), even if it is of a person accused of a bad record. The Court held; "Although the right to life is not expressly recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter III of the Constitution. In particular, Article 13(4) [….] That is to say, a person has a right not to be put to death *because of wrongdoing on his part,* except upon a court order. Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise." (Emphasis added).

(40) This implication of right to life was also acknowledged in ***Lama Hewage Lal (deceased) and Rani Fernando (wife of deceased Lal) v. OIC Seeduwa Police Station*** (supra) at page 45. Bandaranayake J held that without a court order, no person could be put to death and therefore in the absence of such an order, any person has a right to live. And when such a right is created, it will naturally be followed with a remedy, as a right must have a remedy is based on the principle which is accepted and recognized by the maxim *ubi jus ibi remedium,* viz., 'there is no right without a remedy'.

(41) Right to life is the most fundamental and basic of human rights and the fountain from which all the other human rights spring and it therefore is deserving of the greatest respect. United Nations enshrined the right to life in **Article 3** of the **Universal Declaration of Human Rights**, postulating that "everyone has the right to life, liberty and security of person".

(42) The right to life is one of the four "non-derogable rights" which cannot be suspended even in a state of emergency, common to the **International Covenant on Civil and Political Rights** (Article 6), the **European Convention on Human Rights** (Article 2) and the **American Convention on Human Rights** (Article 4) and is considered as consisting the "irreducible core" of human rights and a part of customary international law. In light of this, the judgment of the European Court of Human Rights in ***Finucane v. The United Kingdom*** **(Application no. 29178/95)** 1 July 2003, upholding the states' obligation to protect the right to life enshrined in Article 2 of the European Convention on Human Rights is of great persuasive value of the present case.

> "The essential purpose of [official investigations when individuals have been killed as a result of the use of force] is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility." (para. 67)

(43) Therefore, prevention of extra-judicial killings or custodial deaths invites raising the domestic standards to meet international obligations in upholding the inviolability of life, supplementing the fundamental rights protections of the domestic law. The Article 13(4) of the Constitution as applicable to the present case should be interpreted broadly, especially in view of the State's responsibility of upholding fundamental rights, as enshrined in **Article 4(d) of the Constitution**, which requires all organs of government, including the Police, to "respect, secure and advance" the fundamental rights declared and recognized by the Constitution and to not "abridge, restrict or deny" such rights.

(44) Even in the absence of a separate standalone right to life, a purposive construction of Article 126(2) read with Article 4(d) of the Constitution, would in the present case, hold the State liable for the arbitrary deprivation of the deceased's life by the Respondents utilizing extrajudicial means, in addition to the liability of the Respondents.

(45) As Justice Sharvananda in the volume, **'Fundamental Rights in Sri Lanka'** at page 2, quoting Lord Templeman in ***Societe United Dock v. Government of Mauritius*** **(1985) A.C.585, 605** commendably postulates,

> *"A Constitution concerned to protect the fundamental rights and freedoms of the individual shall not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies."*

(46) Therefore, relevant Articles of the Constitution should be expansively interpreted to recognize the right to life inferred in Article 13(4) and the Petitioner's right to be granted relief. Where there is an infringement of the right to life implicit in Article 13(4), and Article 126(2) must be interpreted in order to avoid anomaly, inconsistency and injustice.

(47) This argument is in line with what Lord Wilberforce in ***Minister of Home Affairs v. Fisher*** **(1979) 3 A.E.R.21, 25 P.C.** illustrated regarding fundamental rights and freedoms provisions, stating that "those provisions 'call for a generous interpretation, avoiding what has been called the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms."

(48) Police brutality should in no terms be allowed to become a fact of normal life and such trends can only be arrested by the broad application of Fundamental Rights which should not merely be excellent in theory. Arbitrary executions in violation of the judicial procedure, by officers of the State should be condemned. The Police Force cannot, at any instance, undermine the criminal justice mechanism of the country.

(49) The Indian Supreme Court has delivered a string of judgements on **'encounter killings'**, which term is used to describe extrajudicial killings committed by the

law enforcement officers of that country, supposedly in self-defence, when they encounter suspects.

(50) In **Prakash Kadam et al v. Ramprasad Vishwanath Gupta and Another (2011) 6 SCC 189**, Supreme Court of India dismissing the appeal against the refusal of bail for several police officers held as follows; "The 'encounter' philosophy is a criminal philosophy, and all policemen must know this…Fake 'encounters' are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion, if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties."

(51) In ***Nilabati Behera v. State of Orissa and Others*** **1993 SCR (2) 581**, the Supreme Court asserted that,

"Convicts, prisoners or undertrials are not denuded of their fundamental rights… There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions." (Emphasis added)

(52) As for the liability of the 5th Respondent for violation of Article 13(4), reiterating what was stated above, he was the Officer-In-Charge of the Slave Island Police Station, and was under a duty to take all reasonable steps to ensure that persons held in custody were treated in accordance with the law. That included monitoring the activities of his subordinate officers of the Divisional Crime Detection Bureau-Colombo (Central), such as the 3rd Respondent, who are attached to the Slave Island Police Station and sanctioning their actions.

Therefore, he bears responsibility for the deceased being put to death in the absence of any order of a competent court to that effect, made in accordance with the procedure established by the law.

(53) For the aforesaid reasons this court holds that the deceased's Fundamental Right guaranteed under Article 13(4) has been infringed by the 3rd and 5th Respondents.

Violation of Article 13(1)

(54) Article 13(1) stipulates that 'no person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.'

The Petitioner has not shown substantial cause to the establishment of the fact that the deceased was arrested except according to the procedure established by law and that he was not informed of the reason for his arrest, which was attributed as being in possession of a live hand grenade. The Respondents' affidavits and the IB entry of the arrest unanimously claim that the reasons for the arrest were communicated to the deceased, and the reasons are consistent with those documents. Therefore, there is no material before court to hold that Article 13(1) was infringed in the present case.

Declarations and Compensation

(55) As per Article 126(4) of the Constitution, the Supreme Court is empowered to grant such relief as it may deem just and equitable in the circumstances in respect of any Petition referred to it under Article126(2). Hence, bearing in mind the Petitioner's situation in life; now a single mother with three children to support, and the emotional and psychological trauma she and the children may have suffered due to the death, in addition to being deprived of the care and companionship of a husband and father, compensation is ordered under the just and equitable jurisdiction of the Court.

(56) As referred to earlier the court held that the deceased's Fundamental Rights under Articles 12(1), have been infringed by the 1st, 2nd, 3rd, 4th and 5th

Respondents and Article 13(4) by the 3rd and 5th Respondents and by the State, and that the deceased's right to compensation has accrued to or devolved on the Petitioner.

(57) Therefore, I order the State to pay Rs.250, 000/- as compensation to the Petitioner. In addition, I order the 1st, 2nd and 3rd Respondent to pay Rs.25,000/- each to the Petitioner. Further, I order the 4th and 5th Respondent to pay Rs. 200,000/- each to the petitioner and all payments by the respondents are to be paid personally.

(58) Before I part with this judgement, I wish to advert to several matters which, are, to say the least, disturbing. Sri Lanka Police established in 1806, has a history of over two centuries and one would expect it to develop into a body that comprises of professional law enforcement personnel. I am at a loss to understand, in the present day and time as to why such an established law enforcement entity is incapable of affording due protection to a citizen who is in their custody. Unfortunately, it is not rare to hear instances of suspects dying in the hands of the police. It only highlights the utterly unprofessional approach to duty by the personnel who man it and as a consequence, people are increasingly losing trust in the police. It had lost the credibility it ought to enjoy as a law enforcement agency. The incident relevant to this application had taken place in 2008, however, this court observes that instances of death of suspects in police custody are continuing to happen, even today. It appears that the hierarchy of the administration had paid scant attention to arrest this trend which does not augur well for the law enforcement and the rule of law.

(59) In these circumstances we are of the view that we should direct the 6th Respondent, the Inspector General of Police to formulate, issue and implement, guidelines to the police, elaborating the steps that should be taken by each officer to avoid 'encounter deaths' of this nature in the future.

This matter will be mentioned on 24th March 2023 and the 6th Respondent is directed to report to this court the steps taken by the 6th Respondent in this regard.

Application allowed and compensation ordered

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

JUDGE OF THE SUPREME COURT

JUSTICE KUMUDINI WICKRAMASINGHE

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 228/2014
SC (SPL) LA Application No. 78/2014
CA Appeal No. CA 205/2008
High Court Colombo No. 9698/98

Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

1. Iddagodage Sarath Kumara,
2. Walpita Pathiranage Prasanna Perera alias Alli

Accused

AND BETWEEN

Iddagodage Sarath Kumara

1st Accused - Appellant

-Vs-

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

Respondent

AND NOW BETWEEN

Iddagodage Sarath Kumara

Presently at

Welikada Prison

Base Line Road,

Borella.

1st Accused - Appellant - Appellant

-Vs-

Hon. Attorney General,

Attorney General's Department

Colombo 2

Complainant – Respondent - Respondent

Before: **P. Padman Surasena J**

Mahinda Samayawardhena J

Arjuna Obeyesekere J

Counsel:

Amila Palliyage with Sandeepani Wijesooriya and Anthony Gunawardane for the 1st Accused-Appellant-Appellant

Haripriya Jayasundara PC, ASG for Hon. Attorney General

Argued on: 11.02.2022

Decided on: 08.02.2023

P Padman Surasena J

Two accused namely, Iddagodage Sarath Kumara who is the 1st Accused - Appellant - Appellant (hereinafter sometimes referred to as the 1st Accused Appellant), and Walpita Pathiranage Prasanna Perera alias Alli (hereinafter sometimes referred to as the 2nd Accused), stood indicted in the High Court of Colombo. In the sole charge in the said indictment, the Attorney General had alleged that those two accused together with Patapilige Athula Devendra who was dead at the time of filing the indictment (he will hereinafter be sometimes referred to as the Dead Accused), had committed the murder of one Managamage Anura Wickramanayake, an offence punishable under section 296 read with section 32 of the Penal Code.

Both the said Accused, upon the charge in the indictment being read over and explained to them, had pleaded not guilty to the said charge. Thereafter, the learned High Court Judge having conducted the trial against them, by the judgment dated 11.01.2008, has convicted the 1st Accused Appellant for the charge in the indictment and acquitted the 2nd Accused. The learned High Court Judge had accordingly imposed death sentence on the 1st Accused Appellant as required under section 296 of the Penal Code.

Being aggrieved by this conviction, the 1st Accused Appellant had appealed to the Court of Appeal. The Court of Appeal after the argument of the case, by its judgment dated 04th April 2014, has affirmed the conviction and the sentence imposed on the 1st Accused Appellant by the High Court and dismissed the said appeal.

The incident leading to the death of the deceased Managamage Anura Wickramanayake had occurred while he was returning from Galle Face where he had spent the previous evening with a group which had included some of the relatives and their family members. At the trial the prosecution had led the evidence of seven witnesses namely, the wife of the deceased Ranwilage Ajantha Malkanthi, Ramani Sandhya Kumari, the daughter of the deceased Managamage Sudheera Himashi, Assistant Judicial Medical Officer-Colombo, Assistant Superintendent of Police Ratnayake Mudiyanselage Ajantha Lal Samarakoon, Inspector of Police Saman Pushpa Kumara Ariyadasa and the Interpreter Mudaliyar of Colombo High Court. Out of the above witnesses, three witnesses namely, the wife of the deceased Ranwilage Ajantha Malkanthi, the daughter of the deceased Managamage Sudheera Himashi and the lady by the name Ramani Sandhya Kumari had travelled along with the deceased at the time he faced the incident relevant to the offence in the indictment.

Having being called by the prosecution to give evidence first at the commencement of the trial, the wife of the deceased Ranwilage Ajantha Malkanthi had testified that she saw the Dead Accused being armed with a Kris knife. She had seen the 1st Accused - Appellant and the Dead Accused going towards her husband (the deceased). After a while, upon hearing Ramani Sandhya Kumari shouting "අනුර අයියා අනින්න එපා" (Anura, don't stab) and "Anura Anura", she had proceeded towards the commotion and noticed her husband fallen on the ground. She also had testified that she saw the Dead Accused near her fallen husband. She had then proceeded to dispatch the deceased to the hospital.

The prosecution then called Ramani Sandhya Kumari to give evidence. She had testified that the 1st Accused - Appellant and the dead Accused were armed with a *Manna knife* and a Kris knife respectively. According to this witness's testimony, while she (along with the deceased)

was looking for her children (who appeared to have gone missing at that time), the Dead Accused had started chasing the deceased. While being chased by the Dead Accused, the deceased had fallen on the ground. It was then that the Dead Accused had stabbed the deceased with the Kris knife several times. At this point she had seen the deceased profusely bleeding. She had further testified that after continuous struggle for life, the head of the deceased had bent down.

The prosecution then called the daughter of the deceased Managamage Sudheera Himashi to give evidence. She had witnessed the murder of her father (the deceased). She had seen the 1st Accused - Appellant initially attacking the deceased by dealing a blow on the head of the deceased with a knife. According to her testimony, following the attack by the 1st Accused – Appellant, the deceased had started running whereupon the Dead Accused had started chasing him. It was thereafter that the deceased had fallen on the ground. The witness along with the other daughter of the deceased, at this point had witnessed their father (the deceased) being continuously stabbed by the Dead Accused several times.

Police in the course of the investigations had recovered a knife from the scene and a *Manna knife* on the section 27 statement made by the Dead Accused (Athula Devendra). The Judicial Medical Officer had observed two types of injuries on the deceased which he had concluded are compatible being caused with a Kris knife and a *Manna knife*. At the trial the prosecution showed him and produced the two weapons (a Kris knife and a *Manna knife*), which in his opinion are capable of causing the injuries observed by him. Medical evidence was not challenged by the defence at the trial. Thus, the evidence of the two eye witnesses can be taken as having being corroborated by the medical evidence.

During the trial in the High Court of Colombo, among the other witnesses to the incident the daughter of the deceased Managamage Sudheera Himashi had testified that she saw the 1st Accused Appellant dealing a blow on the head of the deceased with a *'Manna Knife'* prior to the deceased being stabbed by the dead accused. In regard to the above testimony, the defence, during cross examination had relied on the fact that the said witness (Managamage Sudheera Himashi Nimashi) had not stated during the non-Summary inquiry the fact that she saw the 1st Accused Appellant dealing a blow on the head of the deceased with a *'Manna Knife'*. The defence had brought this to the attention of the learned High Court Judge pointing it out as a vital omission on the part of the said witness at the non-Summary inquiry.

Although the said omission was not proved by the defence, having considered that aspect, the learned High Court Judge had held: that it is not a material omission that goes to the root

of the case; given the age of the witness at the time she gave evidence and the shock that she was in, it was natural for her to have failed to refer to the weapon that was used by the 1st Accused Appellant at the Non-Summary Inquiry. In considering this aspect of the case, the learned trial Judge has applied the principles laid down in an Indian judgment, where their Lordships had held that no immediate relation would want to falsely implicate an innocent person and let go of the real criminal. Having considered the evidence of the said witness (Himashi) at length, the learned trial Judge has categorically stated that a single omission will not discredit the witness. He has further stated that as there was no previous enmity between the witness and the accused persons, the witness did not have any reason to falsely implicate the 1st Accused Appellant in this case. (The witness was only 10 years old at the time of the incident). Having considered that aspect, the learned High Court Judge had decided against the 1st Accused Appellant.

Being aggrieved by the judgment of the High Court, the 1st Accused Appellant had appealed to the Court of Appeal complaining *inter alia* on the failure on the part of the learned High Court Judge to consider in his favour, the vital omission relied upon by the defence on the evidence of the prosecution eyewitness in relation to her evidence at the non- summary inquiry.[1]

At the time of hearing the appeal in the Court of Appeal, the learned counsel for the 1st Accused Appellant had drawn the attention of their Lordships of the Court of Appeal to the said omission which was raised as a ground of appeal. It is in that context that their Lordships of the Court of Appeal perused the Non-Summary proceedings and the Information Book Extracts.

The learned Judges of the Court of Appeal upon perusal of the Police statements and the evidence in the non- summary inquiry, had dismissed the appeal of the 1st Accused Appellant by their judgement dated 04.04.2014 holding that such omission in the non- summary inquiry has not prejudiced the substantial rights of the 1st Accused Appellant.

Being aggrieved by the decision of the Court of Appeal, the 1st Accused Appellant by Petition dated 12.05.2014 sought Special Leave to Appeal from this Court. Accordingly, this Court by order dated 25.11.2014 granted Special Leave to Appeal on the following questions of law.[2]

[1] Vide page 5 of the Petition of the Supreme Court dated 12.05.2014.
[2] Paragraphs 12 (v) and (vi) of the petition dated 12th May 2014 (reproduced in verbatim).

1. *Have their Lordships the judges of the Court of Appeal erred in law by perusing the Information book extracts, non-summary proceedings?*

2. *Is there a prejudice caused to the petitioner by perusing the Information book extracts, non-summary proceedings?*

The learned counsel for the 1st Accused-Appellant though did not seek to challenge the powers of Court to peruse the information book extracts in the exercise of its overall control of the proceedings and to use it as an aid at the trial, he complained before this Court that their Lordships of the Court of Appeal had wrongfully perused the information book extracts and arrived at a conclusion that there is no such omission as alleged by the defence. It was his submission that this had caused him an immense prejudice as the said conclusion has been contradictory to that of the trial judge. He took offence with the following paragraphs in the Court of Appeal judgment.

Paragraph 3, Page 8, CA Judgement dated 4th February 2014

> *I have perused the entirety of the Information Book extracts, non-summary and trial proceedings, the judgement of the learned trial Judge and finally the extensive written submissions and case law authorities submitted by both parties at the hearing of the appeal. It is now left to consider the several grounds of appeal urged on behalf of the appellant.*

Paragraph 2, Page 9, CA Judgement dated 4th February 2014

> *Further, in reviewing the veracity of a witness, the Appellate Court may employ certain rules and guidelines to elicit the truth as the Appellate Judges do not have the benefit of observing and questioning the witness first-hand. One such rule is to delve in to the police statement of the witness, not to use it as substantive evidence but to bolster a proper inference as to the credit-worthiness of a witness, as enunciated by F.N.D. Jayasuriya J in Keerthi Bandara vs Attorney General (2002) (2 SLR 245 at page 261). In the instant case a perusal of the police statement of witness Himashi clearly indicates that she had explicitly mentioned witnessing the appellant Sarath attacking her father with a weapon like a manna knife. A perusal of her evidence at the non-summary inquiry also indicate that she had testified that the appellant had attacked her father on the head while seated before the boutique which is consistent with her evidence at the trial, even though she had omitted to mention the use of a weapon like a manna knife. Evidence of Sandya Kumari (Page*

100 of the Record) corroborates the fact that the appellant was armed with a manna knife.

Paragraph 3, Page 10, CA Judgement dated 4th February 2014

In view of the above, the failure of the learned trial Judge to act on the purported omission in the evidence of Himashi at the non-summary inquiry has not prejudiced the substantial rights of the appellant. Accordingly, the main ground of appeal should fail.

I would commence the discourse relevant to the questions of law by first adverting to sub sections 3 and 4 of section 110 of the Code of Criminal Procedure Act No. 15 of 1979 which is as follows.

Section 110 (3) and (4) of the Code of Criminal Procedure Act.

(1) …..

(2) ……

(3) A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court;

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code.

(4) Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply:

> Provided that where a preliminary inquiry under Chapter XV is being held in respect of any offence, such statements of witnesses as have up to then been recorded shall, on the application of the accused, be made available to him for his perusal in open court during inquiry.

Thus, it can be seen from the above section that our law has not completely shut out any use of the statements recorded in a case under inquiry or trial. Moreover, it is mandatory under section 162 (2) of the Code of Criminal Procedure Act No. 15 of 1979 to attach to every indictment, the following documents:

> *(a) Where there was a preliminary inquiry under Chapter XV, a certified copy of the record of inquiry and of the documents and of the inquest proceedings if there had been an inquest;*
>
> *(b) Where there was no preliminary inquiry under Chapter XV, copies of statements to the police, if any, of the accused and the witnesses listed in the indictment;*

According to section 159 (2) of the Code of Criminal Procedure Act when the Magistrate commits the accused for trial he shall, forthwith transmit to the High Court-

> *i. the record of the inquiry together with all documents and things produced in evidence; and*
> *ii. a copy certified under his hand of such record and of such documents; and*
> *iii. one of the certified copies of the notes of investigation and of statements furnished by the officer in charge of the police station;*

Why have both the above sections insisted for those material to be transmitted to the trial Court? If it is completely prohibited for the trial judge even to touch them, they could have been completely kept away from the trial Judge. Our law does not envisage such a prohibition. This however should not be understood as giving a freehand for the trial Judge even to use such statements as evidence. The extent to which such statements can be used by trial judges was considered by His Lordship Ninian Jayasuriya J in Keerthi Bandara Vs. Attorney General.[3] Having considered the relevant provisions of law Jayasuriya J laid down the following principle:

> *We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission*

[3] 2002 (2) Sri. L. R. 245 at page 261.

> *or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point* [4].

Justice Ninian Jayasuriya while laying down the perusal of the statement recorded in the Information Book to interpret and determine the existence or non-existence of any omission, to be a personal duty of the trial Judge, also held that the Court of Appeal hearing the appeal of such case too has an undoubted right to do the same. It could be gathered by the following paragraph of the same judgment.

> *If the trial Judge has an undoubted right to do so, certainly the Judges in the Court of Appeal hearing an appeal would also have the undoubted right to peruse such statements for such limited purpose in the interest of justice and in determining whether there is an omission on a vital point or not. The Judges would in this exercise only be concerned with the issue of the credibility of the witness and they would not in that exercise be using the contents of the statement as substantive evidence to arrive at an adjudication on the main issues in the case. That is the significant distinction between the process indulged in by the High Court Judge in Sheela Sinharage's case and the issue that arises upon this appeal relating exclusively to the province of credibility* [5].

Although the learned counsel for the 1st Accused-Appellant had relied on Sheela Sinharage's case, as in Keerthi Bandara's case that case has no application to the instant case as the issues in this case too only revolve around some steps taken by the Judges of the Court of Appeal to peruse the information book extracts to consider the arguments advanced by the defence in relation to an omission which the defence had argued was vital for the credibility of the witness.

[4] 2002 (2) Sri. L. R. 245 at page 258, Paragraph 2.
[5] 2002 (2) Sri. L. R. 245 at page 261, Paragraph 2.

The above principle laid down by the Court of Appeal in Keerthi Bandara's case has thereafter been consistently followed not only by the Court of Appeal but also by this Court in numerous judgments. It would suffice to cite two of such cases to wit, Kahandagamage Dharmasiri Vs The Republic of Sri Lanka SC. Appeal No.04/2009, decided on 03.02.2012 and Rathnasingham Janushan & Another Vs The Officer in Charge Headquarters Police Station Jaffna & Others SC (Spl) Appeal No. 07/2018, decided on 04.10.2019.

I observe that the learned Judge of the Court of Appeal has not only referred to Keerthi Bandara's case but also referred to the need to guard against using the contents of such statement recorded in the Information Book as evidence in the case before them. I am satisfied that their Lordships of the Court of Appeal had taken adequate measures to stay within their boundaries when examining the statements recorded in the Information Book and the Non-Summary inquiry record.

Thus, I am of the view that the contents of the above paragraphs of the Court of Appeal judgment which is impugned by the learned counsel for the 1st Accused-Appellant are paragraphs merely setting out how their Lordships of the Court of Appeal had exercised their undoubted right and the fervent duty to personally peruse the previous versions of the statements recorded at various stages of the case to interpret and determine the existence or non-existence of the omission alleged by the 1st Accused-Appellant. Their Lordships in the Court of Appeal just like the trial judges are under a duty to examine such previous statements when such complaint is made before them.

However, the sentence *"I have perused the entirety of the Information Book extracts, non-summary and trial proceedings, the judgement of the learned trial Judge and finally the extensive written submissions and case law authorities submitted by both parties at the hearing of the appeal"* in Paragraph 3 of Page 8 of the Court of Appeal judgment when taken in isolation, at once gives the reader, the impression that the learned judges of the Court of Appeal had considered the material mentioned therein in deciding the issues they had decided.

Lord Chief Justice Hewart's well-known dictum "Justice should not only be done, but should manifestly and undoubtedly be seen to be done" uttered nearly 100 years ago, still rings true and is widely accepted and followed particularly throughout the common law countries. The importance of adhering to this principle is underscored by the most fundamental requirement of maintaining the impartiality of the adjudicator in any process of administration of justice.

Thus, I cannot accept that the statements such as the kind quoted above, used by the learned Judge of the Court of Appeal are in the best interest in complying with the above dictum.

The learned counsel for the 1st Accused-Appellant also complained against the content in the middle paragraph of page 14 of the Court of Appeal Judgment. For easy reference the said judgment is reproduced below:

> *A minute perusal of the Information Book Extracts would have thrown further light of previous enmity and evidence of motive between the deceased and the perpetrators, which the prosecuting State Counsel had failed to grasp and lead at the trial, which would have perhaps answered the pertinent question why the assailants attacked the deceased.*

At the outset, it would be useful to mention here that the focus of the complaint made by the learned counsel for the 1st Accused-Appellant against the above paragraph was on the prejudice such perusal of such Information Book Extracts would have caused in their Lordships' minds. Admittedly, the prosecution had not adduced any evidence as to the presence of any motive on the part of the accused to commit this crime. However, the contents of the above paragraph shows that the learned Judge of the Court of Appeal had proceeded to form the view that there was evidence of motive which the prosecution should have led against the accused. It is clearly a conclusion arrived at using Information Book Extracts without any evidence being adduced in that regard. However, I have to note that the learned Judge of the Court of Appeal had stated that merely to highlight a lapse on the part of the prosecutor and not to conclude on that statement that there was a motive established by the prosecution. Be that as it may, in my view, the Court of Appeal should have been more careful when engaging in such exercises.

The learned Additional Solicitor General in the best interests / true spirit of the Attorney General's Department has conceded that the Court of Appeal should not have stated what it had stated in the above paragraph of their Lordships' judgment. However, she proceeded to argue that no prejudice has been caused to the 1st Accused Appellant in view of the presence of overwhelming evidence in the instant case against him. Let me now turn to that argument by reproducing below section 436 of the Code of Criminal Procedure Act No. 15 of 1979.

<u>Section 436 of the Code of Criminal Procedure Act</u>.

> (Finding or sentence when reversibly by reason of error or omission in charge or other proceedings.)

Subject to the provisions hereinbefore contained any judgement passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice.

As has already been stated before, the three witnesses namely, the wife of the deceased Ranwilage Ajantha Malkanthi, the daughter of the deceased Managamage Sudheera Himashi and the lady by the name Ramani Sandhya Kumari had been travelling along with the deceased when the unfortunate incident had happened. Their evidence clearly establishes guilt of the 1st Accused Appellant in the murder of the deceased Managamage Anura Wickramanayake. This evidence stands completely corroborated by the other witnesses called by the prosecution including the Assistant Judicial Medical Officer-Colombo. Thus, in any case, there is overwhelming evidence to affirm the conviction of the 1st Accused Appellant on the charge in the indictment. While the statement referred to above made by the Court of Appeal is undesirable, I am of the view that no prejudice has been caused to the rights of the 1st Accused Appellant.

I answer the questions of law in respect of which this Court has granted Special Leave to Appeal as follows.

1. Their Lordships the judges of the Court of Appeal have not erred in law by perusing the Information book extracts, non-summary proceedings.

2. No prejudice has been caused to the 1st Accused Appellant by mere reason that the Court of Appeal had perused the Information book extracts, non-summary proceedings.

I affirm the judgment dated 11.01.2008, pronounced by the learned High Court Judge which has convicted the 1st Accused Appellant for the charge in the indictment and also affirm the judgment dated 04th April 2014, pronounced by the Court of Appeal in so far as it has affirmed

the conviction and the sentence imposed on the 1st Accused Appellant by the High Court. I proceed to dismiss the instant appeal subject to the above observation.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena J

I agree,

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree,

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms on Article 105(3) of the Constitution read with Section 21 of the Human Rights Commission of Sri Lanka Act No. 21 of 1996.

SC / Contempt / 01 / 2023

Human Rights Commission of Sri Lanka,
No. 14, R A de Mel Mawatha,
Colombo 04,
Sri Lanka.

Complainant – Petitioner

-Vs-

1. M.P.D.U.K. Mapa Pathirana,
   Secretary,
   Ministry of Power and Energy,
   No. 437, Galle Road,
   Colombo 03.

2. N.S. Ilangakoon,
   Chairman.

3. K.G.R.F. Comestar,
   Additional General Manager.

4. T.K. Liyanage
   Finance Manager.

5. A.R.M.M.S. Karunasena,
   Deputy General Manager.

   All of
   Ceylon Electricity Board,
   6th Floor, No. 50,
   Sir Chittamapalam A.
   Gardiner Mawatha,
   Colombo 02.

6. Janaka Rathnayake,
   Chairman,
   Public Utilities Commission,
   No. 1200/9, Rajamalwaththa
   Road, Battaramulla.

7. Mohamed Uvais Mohamed,
   Managing Director/Chairman.

8. V.N. Weerasuriya,
   Deputy General Manager
   (Finance),

9. S.M.C.P. Samarakoon,
   Manager (Sales)

   All of Ceylon Petroleum
   Corporation,
   Dr. Danister De Silva
   Mawatha,
   Colombo 09.

10. Hon. Attorney-General
    Attorney General's
    Department,
    Colombo 12.

Contemnor - Respondents

Before : Hon. E.A.G.R. Amarasekara, J.

Hon. Kumudini Wickremasinghe, J.

Hon. A.L. Shiran Gooneratne, J.

Counsel : Mr. Upul Jayasooriya PC with Theekshana Pathirana, Sachira Andrahannadi and Sandamal Rajapaksha for the Complainant Petitioner.

Kanishka de Silva Balapatabendi, DSG with MS. I. Randeny for the 1st & 10th Contemnor Respondents.

Dr. Romesh de Silva, PC. With Uditha Egalahewa, PC, Nishan Anketell and N. K. Ashokbharan for 2nd and 5th Contemnor Respondents.

Argued on : 03.02. 2023 and 07.02.2023

Decided on : 10.02.2023

E. A. G. R. Amarasekara, J.

The Complainant Petitioner, The Human Right Commission of Sri Lanka (Hereinafter sometimes referred to as the HRCSL or the Petitioner) has invoked the jurisdiction of this Court by way of Petition and Affidavit tendered to this court on 30.01.2023 and has sought relief among others;

1. An interim order compelling the 1st and 2nd Respondents, and in particular the 2nd Respondent, to abide by the Directive marked P7 until the final determination of the case;
2. Issue summons in the first instance on the 1st to 9th Respondents;
3. Issue notice on the Attorney General and direct him to file draft charges on the accused Contemnors;
4. An Order nisi directing the Respondents, in particular the 2nd Respondent, to appear before the Supreme Court and to show cause as to why the 2nd Respondent should not be dealt with and punished for contempt of Court pursuant to Section 21 of the HRCSL Act read with Article 105(3) of the Constitution in respect of the following Rule;
   'That on or about 26/01/2023 within the Jurisdiction of this Court in Colombo that the 2nd Respondent by failing to abide by the Directive marked P7 issued by the Petitioner unduly interfered with the course of administering justice in this Republic and thereby committed the offence of Contempt of Court punishable under Article 105(3) of the Constitution read with section 21 of the Human Rights Commission of Sri Lanka Act no21 of 1996.'

At the top of the caption of the Petition, the Petitioner has referred to the application as an application made under and in terms of Article 105(3) of the Constitution read with Section 21 of the Human Rights of Commission of Sri Lanka act No.21 of 1996 (Herein after sometimes referred to as the HRCSL Act). Article 105 (3) of the Constitution confers on this Court the power to punish for Contempt of this Court. Section 21 (1) and (2) of the HRCSL Act make contemptuous acts against the HRCSL equivalent to Contemptuous acts done against this Court and authorize this court to try and punish such contemptuous acts.

Section 21 (3)(c) of the HRCSL Act reads as follows;

"21(3) If any person-[c] refuses or fails without cause which is the opinion of the Commission is reasonable to comply with the requirements of a notice, written order or direction issued or made by to him, by the commission……. Such person shall be guilty of the offence of contempt against or in disrespect of, the authority of the Commission." (Underlined by me).

In terms of section 24(4), where the Commission determines a person is guilty of an offence of contempt, it may transmit a certificate to this Court, setting out the determination and such certificate has to be signed by the Chairman of the HRCSL. Thus, section 21(4) of HRCSL Act provides for how the HRCSL may

invoke the Jurisdiction of this Court for Contempt. It is by transmitting the said Certificate. Since section 21(1) empowers this Court to try every such offence as an offence committed against this Court, it appears that the determination by the HRCSL is not conclusive as an act of contempt against this Court. Thus, this Court has to come to its own conclusions at the end, if this Court take cognizance of the certificate and proceed to try the offence. Once the Certificate is transmitted to this Court, as per section 21(5), this Court need not proceed further unless this Court thinks it fit to take cognizance of the certificate transmitted by the HRCSL.

In relation to a Similar Provision in the Commission to Investigate Allegations of Bribery or Corruption Act No 15 of 1994, K. Sripavan C.J., held that if the Court take cognizance of the certificate, it tantamounts to initiation / instituting of the proceedings. Therefore, there is no necessity to file a Petition and Affidavit- vide **MRS. Dilrkshi Dias Wickramasinghe,P.C, V Hon. Lakshman Namal Rajapaksha, M.P, SC Contempt 04/2016** decided on 15.09,2016. However, what is important is that this Court should think it fit to take cognizance of the Certificate.

The Procedure adopted by the Petitioner in this matter invoking Jurisdiction of this Court

The Petitioner invoking the Jurisdiction of this Court in terms of section 21 of the HRCSL Act has filed a petition and an affidavit along with documents marked P1 to P15 which includes the certificate. Further among other reliefs, it has prayed for an interim relief to compel the 1st and 2nd Contemnor Respondents to abide by the directive marked P7 until the final determination of this case. It is trite law that if someone asks for interim relief, he must disclose all material facts to show *uberima fides* and has to show the existence of a prima facie case. As such, it can be understood why this application was made by way of a petition and affidavit along with several documents. Nevertheless, it must be noted what has been attempted through an interim relief was to enforce a directive issued by the HRCSL when there is no such provision to enforce a directive in that manner in terms of section 21 of the HRCSL Act, in terms of which the jurisdiction of this court was invoked to take cognizance of the certificate.

Whether the interim relief could have been given or can be given

When this matter was taken up on 02.02.2023, 2nd to 5th Contemnor Respondents (hereinafter 2nd to 5the Respondents) have given an undertaking to provide uninterrupted electricity supply in the course of the day and until the case is supported. The learned Counsel for the Petitioner contends in his submissions that an undertaking is equivalent to an interim order. It may be so as far as it is in force, but it is not an order made by a Court but an undertaking a party voluntarily gives. Thus, once it is withdrawn the party moved for interim relief must satisfy Court that he has a prima facie case and the existence of other requirements needed to issue interim relief. Thus, when the undertaking was withdrawn on 03 .02 2023, this court declined to grant interim relief at that moment and stated that it will be considered if the order nisi is issued as prayed for. However, for the following reasons an interim relief could not have been given by this court.

- To issue an interim relief it should have direct relevance to the main relief prayed for. The main relief prayed for in the petition seems to be the Order nisi mentioned above. Non issuance of the interim relief to abide by the directive has nothing to do with the safeguarding of the final relief prayed for or the punishment of contempt. Non issuance will not render the final relief nugatory.

- The final relief in the petition itself is an order nisi which is temporary in nature and there is no order prayed for an order absolute in the petition.
- As it was informed to this court that the Petitioner does not intend to punish the other Respondents for contempt and only wants to frame charges against the 2nd Respondent, no interim relief can be issued against the 1st Respondent as there is no imaginable final relief against the 1st Respondent.
- The 2nd Respondent is only the chairman of the Board of the CEB and other members of the Board have not been made parties to this application and even the General Manager who is entrusted with the executive powers and is charged with the business of the board, the organization and execution of the powers, functions and duties of the board and administrative control of the Board as per the Electricity Board is not a party to the action. No interim relief has been prayed for against them. Hence, issuing of an interim relief against the chairman has no force on the other members of the board and the general manager. Such an interim relief may become useless as they are not bound to abide by it.
- As Counsel for the 2nd Respondent correctly pointed out, Contempt proceedings are quasi criminal in nature, inviting to reply to an application for interim relief may affect his right to remain silent.
- This court cannot consider an interim relief on the basis of maintaining the status quo, since undertaking given indicates that the status quo at the time of institution of proceedings was the interruption of power supply.
- This application was made under section 21 of the HRCSL Act. It provides for contempt proceedings but not for the enforcement of the directives of the HRCSL. The highest Court of this country cannot act as a 'cat's paw' to enforce orders other than in the manner provided by law. If this court rubber-stamp and enforce directives or decisions of other institutions when such enforcement is not provided by law, this court will have to be responsible for the illegalities, errors and defects etc. in such orders.

As per the reasons given later in this order, this court would not take cognizance of the certificate and as such there is no prima facie a case where this court can grant such interim relief.

<u>Whether the Certificate marked P14 should be taken cognizance of and whether the Order Nisi as prayed for in the petition be issued</u>

The Counsel for the Petitioner later argued that the mere certificate alone could have qualified the Petitioner and the Court should proceed and issue summons in relation to the contempt proceedings purely on the strength of the certificate. In other words, he invites this Court to turn a blind eye to the Petition and affidavit and the accompanying documents other than the certificate. However, he referred to some of these other documents in his oral submission even after taking up such argument. Even in his synopsis of submissions tendered after the oral submissions he has referred to some of the documents other than the certificate. A party cannot be allowed to blow hot and cold. It is not proper for a party to use documents he tendered for his benefit and ask others to ignore them. If so, he should have taken up this position at the beginning withdrawing the interim relief. Due to the fact that the Petitioner has prayed for interim relief and issued notices to the parties, Parties are before Court and it is the Petitioner who filed these documents before Court. It is against the conscience of this Court to ignore such documents when such documents contain glaring evidence with regard to the process that took place in

issuing the certificate, and legality and or regularity of such certificate. On the other hand, it is not the task of this Apex Court to rubber-stamp the certificate and commence contempt proceedings. The legislature in its wisdom has used the words "which the supreme Court may think fit to take cognizance". As per the decision in **SC Contempt 04/2016** referred to above, the expression 'take cognizance' means taking judicial application of the mind of the Court to the facts mentioned in the certificate. It is the view of this Court that the words 'thinks fit' add more scope to the words 'take cognizance'. If the documents tendered by the Petitioner itself indicate that it is improper to proceed for contempt and it is unlikely to reach a conclusion that will end in punishing the purported contemnor, it is not fit to take cognizance of the certificate. It would only be a waste of valuable time, energy and resources of this Court as well as of the Parties involved. Afterall, all these documents are documents tendered by the Petitioner. It must be noted that as per section 21(6), it is not possible to summon commissioners to get clarifications on any issue relating to the documents tendered with the Petition unless they themselves decide to come and give evidence.

As said before, the Counsel for the Petitioner informed Court that he intends to proceed for contempt only against the 2nd Respondent, first this Court will consider the certificate alone and see whether it is fit to proceed against the 2nd Respondent.

As per the last paragraph of the certificate, HRCSL has determined that CEB and/or its officials have acted in contempt of the HRCSL. To frame charges against a person or many of them it must be clear who is or are liable to answer the charges. As per the said last paragraph it is not clear whether it is CEB alone or CEB and its officials together or its officials alone are liable. On the other hand, when it says 'its officials', without naming them, it may contain large group of persons that this Court could not recognize without further clarifications. Only named person is the CEB (Ceylon Electricity Board), a legal person. As mentioned before due to the words used "and/or", it is not clear whether it is CEB or its officials are liable. On the other hand, CEB is a body corporate which consists of many members (section 3 of the CEB Act). It is the General manager, subject to the general instructions of the Board on matters of policy, is charged with the business of the Board, organization and execution of the powers, functions and duties of the Board etc. If the CEB is the Contemnor, there is no material in the certificate to single out the chairperson of the Board of CEB to frame charges against him. What is mentioned above is sufficient to refuse to take cognizance of the certificate against the 2nd Respondent on the strength of the certificate.

Furthermore, as per section 21 (3) (c) of the HRCSL Act, offence of contempt of the HRCSL constitute only when one refuses or fails without a reasonable cause to comply with request of a notice, written order or direction issued or made to that person by the HRCSL. The certificate does not indicate that the 2nd Respondent, chairman of the CEB refused to act in accordance with the purported directive. Further, the certificate does not reveal that an opportunity was given to him to show cause to the HRCSL to assess whether the show cause was reasonable or not. Hence another reason emanating from the certificate not take cognizance of the certificate. Even the affidavit tendered with the petition does not indicate such opportunity was given to show cause prior to the issuance of the certificate.

Now it is time to consider the background facts that has come to light through the application along with the documents tendered by the Petitioner.

The certificate attempts to highlight a noncompliance by CEB in contravention of a directive(P7) issued by HRCSL despite a clear undertaking given by the CEB. The learned DSG submitted that HRCSL has no

authority to issue this type of directives, and Directives and Directions are distinct to each other having different meanings.

In section 10(c) of the English version of HRCSL Act the word directive is found but in a different context. The word 'Direction' is found in sections 21(3) (c) and in section 16 (6) of the Act. However, it appears that the Sinhala version of the Act use the word "Vidanaya" for both the words, directive and direction. Even if it is considered that the word used as directive is used for a direction contemplated in the Act, direction is issued only after a conciliation or mediation process referred to in section 16 of the Act. Neither the certificate nor the affidavit indicates that there was a conciliation or mediation process as contemplated by section 16 of the Act. Since an interim relief was prayed in the first instance, it can be assumed that all the material facts were revealed by the Petitioner. Since nothing relating to a conciliation or mediation process has been divulged there may be a truth in the argument that this type of direction/directive cannot be issued by the Petitioner.

It was undisputed and the counsel for the petitioner in his oral submissions admitted that the process ended in issuing the certificate was after an investigation by the HRCSL on its own motion in terms of section 14 of the Act. Unless the Commission decided to refer it to conciliation or mediation under section 15(2), only recommendations can be issued in term of the other provisions of section 15 of the HRCSL Act. This make the directive marked P7 questionable as to the fact whether it was issued as per the law. P7 directive is the base for the issuance of the certificate that has to be taken cognizance of at the first instance to commence contempt proceedings. The P7 directive/direction indicate that it was issued on the basis of the settlement arrived. The purported settlement is found in P6 and P5. In P6 the purported settlement has been entered as a recommendation of the HRCSL- vide last paragraph of P6. As per the documents, both P5 and P6 were made at 4.00 pm on 25.01.2023. The settlement part that indicates the terms seems to be identical in both P6 and P5. If a recommendation is issued, there seems to be no provision to convert such recommendation to a directive/ direction. If a recommendation is issued, procedure contemplated in the Act requires the HRCSL to give a time limit to report back to the HRCSL with regard to the implementation of the recommendation. If the relevant person fails to report or the actions taken by that person is inadequate, the HRCSL must make full report and place it before the President of the Country who shall cause it to be placed before the Parliament. This may be to provide administrative relief but there is no provision to convert a recommendation to a direction and proceed to initiate contempt proceedings. Though, the learned Counsel for the Petitioner later attempts to indicate that P6 is not a recommendation as contemplated by the HRCSL act but a mutual settlement, both the Petition and the affidavit tendered by the chairperson of the HRCSL have referred to this document marked as P6 also as a recommendation. This creates doubts as to the legality of the procedure followed by the HRCSL.

P1 and P2 marked with the Petition are addressed to the 1st and the 6th Respondent only and P2 informs them to take part in an inquiry to be held at 10.30 Am. Even though P2a attendance sheet indicates that some of the officers of the CEB were present, the purpose of their attendance is not clear since the invitation letters sent to them are not marked. P2a does not indicate the authority they had from CEB or any other person. Thus, P1 to P2a does not indicate any involvement of the 2nd Respondent, the chairman of CEB. Even though P3 is addressed to the 2nd Respondent requesting him to take part in a discussion in relation the power interruptions during the Advanced Level examinations, it does not indicate that it is intended to enter in to an agreement. Nevertheless the 2nd Respondent has not participated in the discussions as evinced by P3a, and P4 indicates that representatives were authorized to represent the CEB

but not the Chairman, the 2nd Respondent. Thus P3, P3a or P4 do not provide sufficient material to impose a separate liability on the chairman, the 2nd Respondent with regard to any agreement entered into, if there is any valid agreement on behalf of the CEB.

P5 clearly indicates that the Representatives of the CEB signed it subject to a condition which states that it was signed on behalf of the Chairman and subject to the approval of the Director Board. It must be noted P4 does not authorize them to represent the Chairman. Thus, the paragraph 10 of the petition and the corresponding paragraph in the affidavit contains incorrect facts. Perhaps, the representative of the CEB would have used the term 'on behalf of 'since the place for signature was allocated to the Chairman Of CEB. The condition they entered when signing P5 clearly indicates that they did not have authority to enter into an agreement on behalf of the CEB and they needed the approval of the CEB. (These facts indicate that paragraph 11 of the petition and corresponding paragraph of the affidavit of the Chairperson of the HRCSL is questionable). It is also questionable whether without the approval of the Board the Chairman, could bind CEB since it is a statutory body governed by the provisions of the statute that established it. It appears the representatives of the CEB by inserting the condition did the correct thing to indicate that they lacked the authority to bind the CEB. Thus, P5 does not indicate a clear agreement. P6 also contains the same conditions and it bears the same time as P5. There is nothing to indicate that at the same moment of time the representatives of the CEB got the approval of the Board. Hence, these documents create a serious doubt as to whether there was a clear agreement as stated in the certificate, for which CEB or the 2nd Respondent consented. It must be noted that the time for discussions to commence was 4.00 pm. Even the purported agreements seem to have reached by 4PM. The learned Counsel for the Petitioner tried to explain this in oral submissions by stating that it is a typographical error which fact is not supported by the averments in the affidavit of the Chairperson of the HRCSL. The said affidavit states that, since there was a condition entered accompanying the signature, the Petitioner inquired as to the rationale behind this condition and after a recess of nearly 30 minutes parties agreed to sign the agreement. Her affidavit as aforesaid does not indicate how both the documents marked P5 and P6 contains the same time which is the time the discussions was to be commenced. Her affidavit does not explain, when there is a serious doubt as to the approval of the CEB was lacking due to the condition placed by the signature in P5, how such approval was taken for P6. HRCSL should have considered that CEB is a statutory body which is governed in accordance with the statute that established it, and it may need time to give approval for an agreement through its regular procedure. Time gaps between P4 to P6 questions whether there was sufficient time for a Statutory Body to meet and take decisions. However, the facts revealed through the Petitioners own documents create serious doubts as to the validity of the agreement entered which is the base for the purported directive and the certificate. This Court does not see that there was clear agreement as stated in the Certificate.

One may argue that advance level examinations had already started and there was an urgency to find solutions. Advance level examinations would have been scheduled many weeks ago when power interruptions were already in force. These problems could have been foreseen by the relevant authorities including some of the other Respondents. Even the affidavit of the chairperson of the Petitioner refers to P9 where His Excellency the President made some remarks regarding the gravity of the situation some months ago. However, delay in taking steps to find solution cannot be an excuse to do it in an incorrect manner. The last moment dramas to find solutions which lacks legal validity and propriety only allow some to capitalize on the public emotions for their personal gains while causing harm to the faith the people have on the institutions they respect.

As per the reasons given above;

A. The certificate itself does not contain sufficient material to form charges against the 2nd Respondent
B. The documents tendered by the Petitioner itself questions the legality of the settlement and the process culminating in issuing a directive and a certificate.

Thus, this Court does not think that it is fit to take cognizance of the certificate and proceed further to commence contempt proceedings against the 2nd Respondent or to issue an order nisi as prayed for.

Accordingly, the application is dismissed without costs.

……..

Judge of the Supreme Court

Kumudini Wickremasinghe., J.

I agree.

……

Judge of the Supreme Court

A.L. Shiran Goonneratne, J.

I agree.

……

Judge of the Supreme Court

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

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

Union Bank of Colombo Limited,
64, Galle Road,
Colombo 03.

Plaintiff

SC Appeal No: 98/2017
DC Colombo Case No. DR/1147
WP/HCCA/COL 226/09(F)
SC/HCCA/LA/ 494/2014

Vs.

1. David Pedurupillai Dominique,
   Kings Court,
   No. 4/5, Havelock Road,
   Colombo 05.

2. Nallathambi Naguleswaran,
   No. 5/1, "F" Block,
   Government Flats,
   Colombo 04.

3. Jagathlal Abeysinghe Gunawardene,
   No. 3, Sarasavi Road,
   Nugegoda.

4. Surendra Nadan Ravindran,
   No. 24, Circular Road,
   Mabole, Wattala.

Defendants

AND

1. David Pedurupillai Dominique,
   Kings Court,
   No. 4/5, Havelock Road,
   Colombo 05.

2. Nallathambi Naguleswaran,
   No. 5/1, "F" Block,
   Government Flats,
   Colombo 04.

1st and 2nd Defendants-Appellants

Vs.

Union Bank of Colombo Limited,
64, Galle Road,
Colombo 03.

Plaintiff-Respondent

3. Jagathlal Abeysinghe Gunawardene,
   No. 3, Sarasavi Road,
   Nugegoda.

4. Surendra Nadan Ravindran,
   No. 24, Circular Road,
   Mabole, Wattala.

Defendants-Respondents

AND NOW BETWEEN

Union Bank of Colombo PLC,
64, Galle Road,
Colombo 03.
(Formerly Known as Union Bank of Colombo Limited)

Plaintiff-Respondent-Petitioner

Vs.

1. David Pedurupillai Dominique,
   Kings Court,
   No. 4/5, Havelock Road,
   Colombo 05.

2. Nallathambi Naguleswaran,
   No. 5/1, "F" Block,
   Government Flats,
   Colombo 04.

1st and 2nd Defendants-Appellants-Respondents

3. Jagathlal Abeysinghe Gunawardene,
   No. 3, Sarasavi Road,
   Nugegoda.

4. Surendra Nadan Ravindran,
   No. 24, Circular Road,
   Mabole, Wattala.

3rd and 4th Defendants-Respondents-Respondents

Before: **Justice Buwaneka Aluwihare, PC**

Justice Kumuduni Wickremasinghe

Justice A.L. Shiran Gooneratne

Counsel: Dr. Romesh de Silva, PC with Shanaka L. Cooray for the **Plaintiff-Respondent-Petitioners.**

Suren de Silva with Vinodh Wickremasooriya for the **1st and 2nd Defendants-Appellants-Respondents**.

Argued on: 28/10/2022

Decided on: **17/02/2023**

A.L. Shiran Gooneratne J.

By Plaint dated 31/05/2005, the Plaintiff-Respondent-Petitioner (hereinafter sometimes referred to as 'the Plaintiff Bank') filed this action No. D.C. Colombo DR/1147 against the 1st and 2nd Defendants-Appellant-Respondents ('the 1st and 2nd Defendants') and the 3rd and 4th Defendant-Respondent-Respondents ('the 3rd and 4th Defendants'), under the Debt Recovery (Special Provisions) Act No. 2 of 1990 and sought to recover a sum of Rs. 3,128,247.54 together with interest against the said four Defendants.

In paragraphs 3 and 4 of the Plaint, the Plaintiff stated that the Plaintiff Bank, at the request of Nu-Tech Engineering (Pvt) Ltd, (hereinafter sometimes referred to as 'the borrower Company'), by Agreement dated 02/09/1998, a copy of which is annexed to the Plaint marked 'P2', granted a banking facility in a sum of Rs. 2.5 million, to the borrower Company to finance working capital requirements and that at all times material to this action, the 1st and 2nd Defendants along with the 3rd and 4th Defendants were directors of the said company.

The relevant part of 'P2' is as follows:

"Banking Facilities

We, the Union Bank of Colombo, are pleased to offer the following banking facility on terms and conditions stipulated below:

Borrower: Nu-Tech Engineering (Pvt) Ltd.

1. Overdraft of Rs. 2,500,000/- (Rupees Two Million Five Hundred Thousand Only)

   Purpose: To finance working capital requirements.

   Interest rate: 20% p.a.

Security and other documentation

The following security documentation is required in connection with the facilities being offered and should be perfected prior to their use.

1. Personal Guarantee of Directors for Rs. 2,500,000/-
2. Demand Promissory Note for Rs. 2,500,000/-
3. Mortgage over motor vehicles for Rs. 2,500,000/- together with comprehensive insurance policies assigned to us covering the vehicles mortgaged and valuation reports issued by a reputed valuer.
4. Certified copy of resolution passed by your Board of Directors, authorizing the Company to borrow".

The borrower Company accepted the banking facility in 'P2' and at a meeting held on 03/09/1998 its Board of Directors passed a resolution authorizing such borrowing, and the 1st to 4th Defendants are said to have signed a Joint and Several Guarantee in respect of such banking facility, copies of which are annexed to the Plaint marked 'P2a' and 'P3' respectively. [The copy of the Guarantee (P3) does not show the signature of the 3rd Defendant, though an Attorney at Law has confirmed that the effects of renunciation in terms of Clause 16 was explained to all persons named in the Guarantee (P3)].

In paragraphs 8 and 9 of the Plaint, the Plaintiff Bank states that, on the request of the borrower Company, the Plaintiff Bank rescheduled the existing outstanding overdraft facility, in terms of document marked (P4) annexed to the Plaint, and that

the said Joint and Several Personal Guarantee (P3) signed by the Defendants securing the said facility remained valid and binding in law subject to and until the repayment of the outstanding monies due to the Plaintiff Bank by the said borrower Company.

The relevant part of 'P4' is as follows:

"Banking Facilities

We, the Union Bank of Colombo, are pleased to offer the following restructured banking facility on terms and conditions stipulated below:

Borrower: Nu-tec Engineering (Pvt) Ltd.

1. Facility: Term Loan

   Amount: Rupees Two Million Five Hundred Thousand Only. (Rs.2,500,000/-)

   Purpose: To reschedule the current overdraft outstanding.

   Repayment: Repayable in 35 monthly installments of 70,000/- and a final installment of Rs. 50,000/-. Interest should be serviced on a monthly basis.

   Rate: 20% p.a.

The following security documentation is required in connection with the facilities being offered and should be perfected prior to their use.

1. Mortgage for Rs. 1.6 million over machinery together with comprehensive insurance policies assigned to us, covering the machinery mortgaged. (**Already in place**).
2. Mortgage for Rs. 0.9 million over motor vehicles together with comprehensive insurance policies assigned to us, covering the vehicles mortgaged. (**Already in place**).
3. Personal guarantee of directors for Rs. 2.5 million.
4. On Demand Promissory note for Rs. 2.5 million."

(Emphasis is mine)

The borrower Company accepted the banking facility in 'P4' and at a meeting held on 12/05/2000 its Board of Directors passed a resolution authorizing such borrowing, a copy of which is annexed to the Plaint marked 'P4(a)'.

Claiming, in Paragraph 10 of the Plaint, that the borrower Company has made default in the repayment of the said banking facility, the Plaintiff Bank ("after giving credit for all payments made by the Debtor Company") has filed this action as aforesaid, for the recovery of the said sum of Rs. 3,128,247/54, together with interest at the rate of 32% p.a.

Being satisfied with the evidence placed before court, the learned District Judge issued decree nisi dated 27/07/2005 in favour of the Plaintiff Bank and required the Defendants to show cause as to why the said decree nisi should not be made absolute.

The 1st and 2nd Defendants filed their objections dated 06/10/2008 and stated *inter alia*, that Nu-Tech Engineering (Pvt) Ltd. obtained loan facilities in a sum of Rs. 2.5 million, subject to the terms and conditions set out in the document marked 'P2', and that the 1st and 2nd Defendants as Directors of the said borrower Company signed the said Guarantee marked 'P3'.

In paragraph 10 of the said objections, the Defendants state that the document marked 'P4' is a new agreement and, in terms and conditions set out in 'P4', the Plaintiff Bank *inter alia*, required the borrower Company to furnish a new Personal Guarantee of the Directors of the borrower Company, prior to the use of the said facility, as documentation required in connection with the new facility offered. The said Defendants further contended that by its own conduct the Plaintiff Bank is now estopped from stating that 'P3' covers the rescheduled agreement marked 'P4' and prayed for the dismissal of the Plaint.

Having considered the pleadings and the written submissions tendered by the respective parties, the learned Additional District Judge by order dated 25/09/2009, made the said decree *nisi* absolute.

Being aggrieved by the said order, the 1st and 2nd Defendants by their Petition of Appeal dated 11/11/2009 appealed to the High Court of the Western Province exercising civil appellate jurisdiction holden in Colombo ("the Appellate Court").

The Appellate Court by Judgment dated 22/08/2014, set aside the said order made by the learned Additional District Judge dated 25/09/2009 and *inter alia*, declared that the restructuring or rescheduling of the overdraft facility by converting it to a term loan (P4) comes within the interpretation of novation and that the Guarantee Bond marked 'P3' came to an end with the novation, therefore, a cause of action cannot be said to have accrued to the Plaintiff to sue the Defendants.

The Plaintiff Bank, by its Petition dated 03/10/2014, is before this Court, to set aside the said Judgment dated 22/08/2014, delivered by the Appellate Court.

By Order dated 22/05/2017, this Court granted leave to appeal on the following questions of law.

1. Has the learned High Court Judges failed to see that the 'principle of novation' is not applicable at all to the facts and circumstances of this case and thereby grossly misdirected themselves in facts and in law in deciding this matter?
2. Did the Judges of High Court failed to consider that the learned District Judge has correctly considered the fact that it is the same "facility" that was rescheduled and/or restructured at the request of the Defendants and there was no new grant of a facility to the said Company?

The learned Counsel for the 1st and 2nd Defendant-Appellant-Respondents raised the following consequential questions of law.

3. By the reason of the failure on the part of the Plaintiff to obtain a fresh guarantee in terms of the document 'P4', is the Plaintiff entitled to pray for judgment against the 1st and 2nd Defendants?
4. Is the judgment of this Court in the case of **Hatton National Bank Vs. Rumeco Industries Limited in SC. Appeal No. 99A/ 2009** applicable to the facts of the present case?

In this action, the main issue to be decided by this Court is, whether there is a novation of the overdraft facility granted to the borrower Company (P2), by the rescheduled facility (P4), and the applicability or the non-applicability of the Joint and Several Personal Guarantee (P3) to the rescheduled facility in 'P4'.

The 1st and 2nd Defendant's position is, that P4 was not a mere variation of the existing terms and conditions of repayment of the existing overdraft facility, but a completely different banking facility, which created new obligations, and which amounts to a novation of P2. And as such, the Defendants contend that P4 is a new agreement, a novation of the banking facilities already provided to the borrower Company in terms of P2. P4 offered the borrower Company a 'term loan' which was repayable through monthly installments.

The Plaintiff Bank takes up the position, that there was no novation and the parties intended to continue the same relationship with the same terms and obligations subject to the concession given to the Defendants to pay in installments and that a restructuring or a rescheduling does not amount to a change that is so fundamental that P4 stands independently to P2. It is also contended that, even if there was novation, the relevant guarantee together with the obligation to pay remained in force and applicable until the totality of what is due has been settled.

It is not in dispute that the Board of Directors of the borrower company resolved by its resolution (P2(a)), to obtain an overdraft facility up to a limit of Rs. 2.5 million from the Plaintiff Bank and, prior to the use of the overdraft facility a Joint and Several Personal Guarantee (P3) was signed by the Defendants securing the said facility. It is also not in dispute that due to financial difficulties, the borrower Company defaulted to settle the said facility as agreed, and that a term loan facility was granted to the borrower Company to be repaid within the time period, at the rate of interest, on the security and upon terms and conditions, as set out in the offer letter (P4) and the requirement to tender the security documentation prior to the use of the said facility, as also mentioned previously.

In regard to Novation, both the Plaintiff Bank, on the one hand, and the 1st and 2nd Defendants, on the other, have quoted extensively in the written submissions filed by them, in the Appellate Court and in this Court, and annexed pages from "The Law of Contracts" Volume 11, pages 718 to 720, (Sections 751 to 753) by C. G. Weeramantry, and therefore only the following quotations briefly, from "The Law of Contracts" are included herein –

(i) *"In its (Novation) wider sense it means the creation of a fresh contract by the extinction of a pre-existing one in whose room it stands,"*

(ii) "Novation in its wider sense is of four varieties –

(a) The substitution of a new debt for an existing debt.
This is known as "novation proper"

(iii) "Where there is a novation of a contract, there comes into existence in the eye of the law a new and independent contract,"

(iv) "A new obligation must be created which contains some element not found in the earlier obligation……. The grant by the creditor of an extended time to the debtor for payment thus does not constitute a novation, nor does the grant of an additional security or the mere conformation of an original agreement",

(v) "A novation discharges not only the original obligation but all obligations accessory to it. Interest, penal charges, suretyships and pledges, accessory to the original contract, are thus all discharged", (The Privy Council case of Palaniappa Vs. Saminathan 17 NLR 56, is cited in support of this contention; which judgement states at page58 that, "No matter what were the respective rights of the parties, inter se, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is, that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure and the rights of all the parties are fully represented by it"),

(vi) "Novation is never presumed, for the law considers that a contract once established retains its binding force, and that a creditor does not intend to surrender the rights he has acquired under the earlier contract. It follows that the law will incline to the view that a later contract co-exists with, rather than supersedes, a former contract, unless the court is satisfied of an intention on the part of the parties to supersede and extinguish the earlier contract."

In making the said Order, dated 25/09/2009, in D.C. Colombo case No. DR/1147, *inter alia*, holding that there was no Novation in the instant case, the learned Additional District Judge relied on the Court of Appeal Case of **Ran Banda and Others Vs. the People's Bank, (2004) 2 SLR 31** which held as follows.

"The first defendant- petitioner obtained a loan of Rs.20 million from the People's Bank. As the payments were not regular, the loan was rescheduled and the first

defendant-petitioner accepted the rescheduled programme. When the first defendant-petitioner failed to settle the loan in terms of the rescheduled arrangement, the bank filed action under and in terms of the provisions of the Debt Recovery (Special Provisions) Act. It was contended that the bank had no right to seek to recover any sum of money upon the rescheduled agreement and the guarantors (2nd and 3rd defendants) were not liable, as the original contract had become invalid".

The District Court granted the Defendant-Petitioners leave to defend on the Petitioners depositing Rs.10 million as security.

On leave being granted the Court of Appeal –

Held:

(i) Novation proper takes place if a new contract to take the place of the old is established between the same parties without the intervention of a 3rd party; When this happens the latter obligation extinguishes the former.

(ii) The rescheduled arrangement was made at the request of the debtor, the 1st defendant-petitioner, it merely gives him extended time for payment and a concessionary rate of interest in respect of the balance of the loan remaining unpaid.

Per Amaratunga, J

(i) This did not bring into existence anything unfavourable to the guarantors, in fact concessions granted to the debtor were beneficial to the guarantors as well.

(ii) Condition No.4 in the rescheduled agreement preserved the Bank's rights to have recourse to the conditions of the original agreement in the event of the failure of the debtor to act in accordance with the conditions of the rescheduled agreement.

(iii) This is not a new obligation extinguishing the existing contract".

Upon a comparison of the facts, referred to in the judgment in the case of **Ran Banda Vs. the People's Bank**, with those in the instant case, it would be observed that -

(a) The rescheduled arrangement in the case of Ran Banda Vs. the People's Bank is said to have granted the borrowing company (the 1st defendant-petitioner) an extended time to repay the money mentioned in the rescheduled arrangement. In the instant case, P2 dated 2/09/1998 referred to an overdraft facility, which was repayable on demand, which "facility will expire and be subject to review on 31/08/99" (that is, a period of about 12 months from the date of P2), and P4 dated 20/04/2000, in the instant case, referred to a term loan repayable in 35 monthly instalments of Rs.75,000/- and a final instalment of Rs.50,000/- (that is, a period of 36 months) but such "Facility" is subject to review on 30/09/2000", (that is, a period of about only 5 months from the date of P4). The Clause relating to "Repayment," in P4, states that "in the normal course, you may rely upon the facility being available until 30/09/2000 but we are sure you will appreciate that in accordance with normal banking practice, that the above facility is repayable on demand and that we reserve the right to ask for repayment if circumstances arise, which in our opinion justify our doing so". Consequently, P4 itself creates, at least, a doubt as to the period of repayment thereunder.

(b) The rescheduled arrangement in the case of Ran Banda Vs. the People's Bank is said to have granted the borrowing company a concessionary rate of interest. In the instant case, both P2 and P4 refer to the rate of interest as "20% p.a.," but the Plaintiff-Bank has reserved "the right to effect any changes in the rates of ….. or interest quoted herein if circumstances arise, which in our opinion justify our doing so".

It would be observed that the said Plaint dated 31/05/2005, filed by the Plaintiff Bank, in D.C. Colombo DR/1147, "(after giving credit for all payments made by the debtor company)", prayed for the recovery of a sum of Rs.3,128,247/54, together with interest at 32% p.a.

The Plaintiff Bank annexed to its Plaint, a Statement dated 08/04/2005, marked P9, which only stated that "The total amount due to the Union Bank of Colombo Ltd. as at 05th March 2005 is Rs.3,128,247/54 together with further interest thereon, all legal and other charges and expenses upto the date of settlement in full."

Such Statement, marked 'P9', does not contain other details, such as the payments made by the borrower company, the rates and amounts of interest levied by the Plaintiff Bank from time to time etc.

In the instant case, there does not appear to be "a concessionary rate of interest" levied by the Plaintiff Bank, as in the case of Ran Banda Vs. the People's Bank.

(c) The rescheduled arrangement in the case of Ran Banda Vs. the People's Bank is said to have, as Condition 4, provisions which preserved "the Bank's rights to have recourse to the conditions of the original agreement in the event of the failure of the debtor to act in accordance with the conditions of the rescheduled arrangement" and this, in the opinion of the Court, "completely negatives any intention on the part of the Bank to make the rescheduled arrangement to take the place of a new contract – a new obligation extinguishing the existing contract",

'P4', in the instant case, does not contain any similar provision.

Accordingly, it is clear that the facts in the case of Ran Banda Vs. the People's Bank can be differentiated from the facts of the instant case and that the learned Additional District Judge has erred in applying, in D.C. Colombo Case No. DR/1147, the decision in the case of Ran Banda Vs. the People's Bank, which is not applicable in the instant case.

In its Judgement dated 22/08/2014, the Appellate Court has considered the provisions in P2 and P4 (some of which have also been referred to earlier, in regard to the discussion relating to the case of Ran Banda Vs. the People's Bank) and come to the conclusion that *"On the face of these two agreements (that is, P2 and P4) it can in no sense be interpreted as a continuation of the earlier agreement" and, accepting the view of the learned Counsel for the 1st and 2nd defendants, agreed that "there is a novation of the earlier overdraft facility granted to Nu -Tec Engineering (Pvt) Ltd".*

The Appellate Court also referred to the agreement of the Plaintiff Bank to restructure the overdraft facility by converting it into a term loan on the terms stated in P4, quoted the relevant part of P4 (which has also been quoted earlier in this Judgment), regarding the relevant security documentation required in connection

with the facilities being offered (by P4), which should be perfected prior to their use, and referred to the use of the words "(Already in place)", in regard to the mortgage for Rs.1.6 M over machinery and the mortgage for Rs.0.9M over motor vehicles; and the non-use of the said words "(Already in place)" in regard to the "Personal guarantees of directors for Rs. 2.5M," and stated that, *"The Plaintiff has however agreed to continue with the existing two mortgages. Their intention is very clearly reflected on the document P4, because the plaintiff has at the end of the 1st and 2nd conditions stated the words "Already in place". For reasons best known to the Plaintiff Bank it has not included these words in the 3rd clause (relating to the personal guarantee of the directors). In the circumstances the only conclusion one could arrive at is that the plaintiff Bank expected the defendants to enter into a new guarantee bond before making use of the facility granted to the company of which they were directors". (In paragraph K of their further written submissions dated 14/07/2014, filed in the Appellate Court, the 1st and 2nd Defendants have also submitted that "The Plaintiff in their further submissions (as well as in the initial written submissions) have continued to avoid explaining to Court as to why the Bank did not place the words 'already in place' as done in items i and ii)".*

The Appellate Court for the reasons mentioned therein, held that *"the guarantee bond (P3) also came to an end with the novation of the overdraft facility and therefore a cause of action cannot be said to have been accrued to the plaintiff to sue the defendants. The appeal of the 1st and 2nd defendants-appellants is accordingly allowed and the action of the plaintiff is dismissed",*

In the case of **Hatton National Bank Limited Vs. Rumeco Industries Limited and two others, SC Appeal No. 99A/2009**, Hatton National Bank Limited (the Plaintiff-Appellant) granted a Term Loan, in 1992, to Rumeco Industries Limited (the 1st Defendant-Respondent), which was guaranteed by the 2nd and 3rd Defendants-Respondents. Thereafter, the said loan was rescheduled on 28/05/1995 and was secured by two mortgage bonds. The Plaintiff-Appellant filed action against the Defendants claiming the sum of money in default and also sued the 2nd and 3rd Defendants-Respondents as guarantors. (The 1st and 2nd Defendants-Respondents failed to appear before court and an ex parte judgement was delivered against them. The 3rd Defendant-Respondent filed answer).

The 3rd Defendant-Respondent took up the position that he had guaranteed the repayment of the term loan granted in 1992 and did not guarantee the repayment of the rescheduled loan of 1995 and therefore, was not liable to be sued on the guarantee.

The Plaintiff-Appellant tried to show that the guarantee given by the 3rd Defendant-Appellant, in 1992, was a continuing guarantee, which covered all facilities granted to the 1st Defendant-Respondent.

The learned District Judge dismissed the case of the Plaintiff-Appellant against the 3rd Defendant-Respondent on the basis that the transaction sued upon was the term loan granted in 1995 and that it had not been guaranteed by the 3rd Defendant-Respondent. The Plaintiff-Appellant appealed against the said judgment to the Provincial High Court. The Provincial High Court examined the law relating to novation of contract and arrived at the conclusion that there was a novation of the earlier loan granted by the Plaintiff-Appellant and that term loan was a new contract.

The Provincial High Court cited the Law of Contracts – by CG Weeramantry at page 719, which is quoted earlier in this Judgment, and also referred to the decision in **Palaniappa Vs. Saminathan (17 NLR 58)** which is also referred to in this Judgment. The Provincial High Court by its judgment dated 16/12/2008, dismissed the said Appeal.

Upon appeal to this Court, Suresh Chandra J. held that,

"On a consideration of the evidence, the documents, the proceedings and the judgments of the District Court and the High Court, it is quite clear that the action brought to court by the plaintiff specially against the 3rd defendant was based on the term loan granted in 1995 and that the guarantee given by the 3rd defendant in 1992 cannot be considered as a continuing guarantee. In view of this position, the grounds on which leave was granted by this Court have to be answered in the negative".

Accordingly, the Appeal to this Court was dismissed and the said Judgment of the High Court and that of the District Court were affirmed.

Referring to paragraph 6 of the Guarantee (P3), in its written submissions dated 16/11/2022 filed in this Court, the Plaintiff Bank claimed that the Guarantee (P3)

was a continuing guarantee and remained as security against the 1st and 2nd Defendants until the moneys borrowed by the borrower Company from the Plaintiff Bank remains unsettled.

Paragraph 6 of the Guarantee (P3) states as follows –

"This guarantee shall be binding on and remain in force and be enforceable at all times against and shall continue to be a security against each of us and the estate of each of us notwithstanding the death or disability of any of us until the whole of the moneys aforesaid shall have been fully liquidated and paid to you and shall be irrevocable by us or any of us or any of our heirs executors or administrators".

The Plaintiff Bank further states that –

(1) "The Plaintiff did not at any time, either by in writing or by act or deed, express any intention to relinquish their rights or discharge the Defendants from their obligation,"

(2) "The fact remains that the borrowed sum is still unsettled, and the Defendants are attempting to avoid this responsibility by hiding behind P4".

(3) "It is submitted that in the circumstances, even if there had been a "novation," this does not affect the Defendants obligation to pay the plaintiff", and

(4) "Therefore, it is submitted that the Civil Appellate High Court erred in law as it failed to consider this most vital fact, which is that even if there was a novation, the relevant guarantees together with the obligation to pay, remained in force and applicable up until the totality of what is due has been settled."

In this regard, it is observed that –

The first recital of the Guarantee (P3), which is addressed to the Plaintiff Bank, refers to the agreement by the Plaintiff Bank to grant to the borrower Company, a loan of Rs.2,500,000/-, "subject to the terms and conditions contained in your letter dated [the date of the letter is left blank in the copy of the Guarantee (P3)] addressed to the Obligor (the borrower Company) (hereinafter referred to as "the said Loan") and that the Guarantors therein, (that is, 1st to 4th Defendants, who are the directors of the borrower Company), "do hereby agree to furnish to you an undertaking for the payment of the said loan". (The undated letter, referred to in the above-

mentioned Guarantee dated 07/09/1998, is obviously the letter dated 02/09/1998 (P2), and cannot be a reference to the subsequent letter dated 20/04/2000 (P4).

Paragraph (6) of the Guarantee (P3), which is referred to by the Plaintiff Bank, and which is quoted above, states clearly that the liability of the first and second Defendants, thereunder remained until the whole of "the moneys aforesaid" shall "have been fully liquidated and paid to you ……".

The term "moneys aforesaid" has been defined in paragraph 1 of the Guarantee (P3), to mean "the said Loan together with interest thereon at such rate or rates as may be charged by you and all legal and other charges and expenses whether taxable or not occasioned by or incidental to the enforcement of this or any other security for the said Loan or the recovery thereof";

Therefore, it is clear that the liability of the 1st and 2nd Defendants, under the Guarantee (P3), related only to "the said Loan "which is defined, as above-mentioned;

Further, the 1st and 2nd Defendants were not parties to P4. The 1st and 2nd Defendants have not, in anyway, consented to be personally liable to the banking facility, referred to in P4. The significance of the absence of the words "Already in place", in P4, in respect of the "Personal guarantee of directors for Rs.2.5 M", [whilst such words "Already in place" have been included, in respect of the mortgages over the machinery and the motor vehicles, in (P4)], has already been commented upon earlier in this Judgment. P4 does not mention any liability of the 1st and 2nd Defendants, in respect of the banking facility referred to in P4.

The effect of a Novation, in regard to security documents executed in respect of the previous banking facilities, has also been discussed earlier in this Judgment. Therefore, the claims of the Plaintiff Bank that the Guarantee (P3) is binding on the 1st and 2nd Defendants until what is due from the borrower Company to the Plaintiff Bank has been settled, and that "even if there had been a 'novation', this does not affect the Defendants' obligation to pay the Plaintiff Bank, cannot be accepted.

Accordingly, I answer the 1st, 2nd and 3rd questions of law on which leave to appeal has been granted in the negative and the 4th question of law in the affirmative.

For these reasons, this Appeal of the Plaintiff Bank is dismissed; the Judgement of the Appellate Court is affirmed; and that of the District Court is set aside. No order for costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J

I agree

Judge of the Supreme Court

Kumuduni Wickremasinghe, J

I agree

Judge of the Supreme Court

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

In the matter of an application in terms of Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka for punishment for Contempt of Court.

SC Case No. SC Appeal 29/2022
with
SC Case No. SC Appeal 29A/2022
CA Case No. COC 08/2021

A. P. Dilrukshi Dias Wickramasinghe,
No. 377/2, Thalawathugoda Road,
Hokandara South.
PETITIONER

Vs.
1. Jagath Balapatabendi,
Chairman - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla.

2. Indrani Sugathadasa,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

3.V. Sivagnanasothi,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

4. C.R.C. Ruberu,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,

Battaramulla

5. A.L.M. Saleem,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

6. Leelasena Liyanagama,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

7. Dian Gomes,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

8. Dilith Jayaweera,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

9 W.H. Piyadasa,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

10. M.A.B. Daya Senarath,
Secretary - Public Service Commission,
No.177, Nawala Road, Narahenpita,
Colombo 05.

11. Secretary to the Ministry of Justice,
Ministry of Justice,
Colombo 12.

12. Sanjaya Rajaratnam Esq.,
Hon. Attorney General,
No.14/11, Auburn Side,
Dehiwala.

RESPONDENTS

AND NOW BETWEEN

1. Jagath Balapatabendi,
Chairman - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla.

8. Dilith Jayaweera
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

1ST & 8TH RESPONDENT-APPELLANTS

11. Secretary to the Ministry of Justice,
Ministry of Justice,
Colombo 12.

12. Sanjaya Rajaratnam Esqr,
Hon. Attorney General,
No.14/11, Auburn Side,
Dehiwala.

11TH & 12TH RESPONDENT-APPELLANTS

Vs

A. P. Dilrukshi Dias Wickramasinghe
No.377/2, Thalawathugoda Road,
Hokandara South

PETITIONER-RESPONDENT

1. Indrani Sugathadasa,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
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2. V. Sivagnanasothi,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

3. C.R.C. Ruberu,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

4. A.L.M. Saleem,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

5. Leelasena Liyanagama,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
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6. Dian Gomes,
Member - Public Service Commission,
No.1200/9, Rajamalwatta Road,
Battaramulla

7. W.H. Piyadasa,
Member - Public Service Commission,

No.1200/9, Rajamalwatta Road,
Battaramulla

8. M.A.. Daya Senarath,
Secretary - Public Service Commission,
No.177, Nawala Road, Narahenpita,
Colombo 05
RESPONDENT- RESPONDENTS

Before: **VIJITH K. MALALGODA PC J**
P. PADMAN SURASENA J
ACHALA WENGAPPULI J

Counsel: Faiszer Musthapha PC with Siara Amarasiri for the 1st & 8th Respondent-Appellants in SC Appeal No. 29A/22.
Nerin Pulle PC. ASG with Medhaka Fernando, SC for the 11th & 12th Respondent-Appellants in SC Appeal No. 29/22.
M.A. Sumanthiran PC with Divya Mascrange for the Petitioner-Respondent.
Uditha Egalahewa PC with N.K. Ashokbharan instructed by Mr. Chandrakumar de Silva for the 1st 3rd-8th Respondent-Respondents in both cases.

Argued on: 17.10.2022

Decided on: 23.02.2023

P Padman Surasena J

The instant matter was instituted before the Court of Appeal by the Petitioner-Respondent by petition dated 5th November 2021. That is a matter filed under Article 105(3) of the Constitution against persons named as Respondents in the Court of Appeal (they will be hereinafter referred to as the Respondents in the Court of Appeal) claiming that the Respondents in the Court of Appeal have defied and blatantly flouted

an order of the Administrative Appeal's Tribunal (AAT) thus praying *inter alia* a determination that the Respondents in the Court of Appeal are guilty of acting in contempt of the Administrative Appeals Tribunal and an order to punish the Respondents in the Court of Appeal for being in contempt of the AAT's order due to their alleged failure to give effect to and/or comply with the said order.

When the matter was taken up before the Court of Appeal, the Respondents in the Court of Appeal raised several preliminary objections urging the application to be dismissed *in limine.* Subsequently the Court of Appeal had heard the learned counsel for all the parties, and then, by order dated 04th April 2022 has overruled the said preliminary objections and has fixed the matter for support.

On the same day, the learned President's Counsel appearing for the 2nd, 4th-7th , 9th and 10th Respondents in the Court of Appeal and the Additional Solicitor General appearing for the 11th and 12th Respondent in the Court of Appeal had sought to make an application under Rule 22 (1) (ii) of the Supreme Court Rules seeking Leave to Appeal to the Supreme Court against the said order of the Court of Appeal.

Accordingly, on 7th April 2022 the learned judges of the Court of Appeal had granted Leave to Appeal to the Supreme Court under Rule 22 of the Supreme Court Rules. This is despite the learned counsel who appeared for the Petitioner at that time itself bringing to the notice of the Court of Appeal of the fact that the order dated 04th April 2022, against which the Court of Appeal was to consider granting Leave to Appeal to the Supreme Court is not a final order. It is on record that the learned counsel who appeared for the Petitioner at that time itself had brought to the notice of Court and relied on The Maharaja Organization Limited vs. Viacom International Inc and Another[1] and Chettiar vs. Chettiar[2] in support of that argument. The Court of Appeal having recorded this submission, had nevertheless proceeded to grant Leave to Appeal to the Supreme Court against its own order dated 04th April 2022 on the following questions of law holding that *'the order made has flavor of finality'*.

[1] SC CHC Appeal 03/2006 decided on 30th June 2021.
[2] [2011] 2 SLR 70.

01. Did the Court of Appeal, by its order dated 4th April 2022, in the guise or application, in fact, interpreted the Constitution, thereby exceeding its jurisdiction, and encroached into the sole and exclusive jurisdiction vested on the Supreme Court by Article 125 of the Constitution, to interpret the Constitution, and thereby erred in law?

02. Did the Court of Appeal, by its order dated 4th April 2022, misconstrue the scope of the Contempt of Court jurisdiction vested on the Court of Appeal by the provisions contained in the Constitution, and thereby erred in law?

03. Did the Court of Appeal, by its order dated 4th April 2022, misconstrue the provisions pertaining to Contempt of Court jurisdiction by holding that provisions contained in Article 105(2) not relevant, and thereby erred in law?

04. Did the Court of Appeal, by its order dated 4th April 2022, misconstrue the Administrative Appeals Tribunal as a "tribunal" referred to in Article 105(1)(c) of the Constitution, and thereby erred in law?

05. Did the Court of Appeal, in its order dated 4th April 2022, ignore the fact that the Supreme Court has not interpreted the Administrative Appeals Tribunal to fall within scope of Article 105 of the Constitution, and thereby erred in law?

06. Did the Court of Appeal, in its order dated 4' April 2022, in arriving at its decision, fail/neglect/ignore to consider the submissions of the Respondents pertaining to the placement of Article 59 of the Constitution, within the Constitution, and thereby erred in law?

07. Did the Court of Appeal, in its order dated 4th April 2022, took irrelevant matters into consideration, in arriving at its decision, and thereby erred in law?

As there were two applications before the Court of Appeal for Leave to Appeal to the Supreme Court, one from the learned President's Counsel appearing for the 2nd, 4th-7th , 9th and 10th Respondents in the Court of Appeal and the other from the Additional Solicitor General appearing for the 11th and 12th Respondents in the Court of Appeal seeking Leave to Appeal to the Supreme Court, two numbers i.e., S C. Appeal No. 29A/2022 and S C. Appeal No. 29/2022 have been assigned by the Registry. The

learned counsel for all parties concur that this Court can amalgamate both these matters as the issue to be decided is the same and therefore both matters can be heard together and that it would suffice for this Court to pronounce one judgment in respect of both appeals.

When the matter was taken up for argument before this Court, the learned President's Counsel for the Petitioner-Respondent raised a preliminary objection to the maintainability of this appeal on the basis that there is no lawful appeal before this Court. He relied on Article 128 of the Constitution to show that the Court of Appeal could not have lawfully granted Leave to Appeal to the Supreme Court in this instance.

Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka is as follows.

> "*127 (1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*
>
> *(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance."*

Article 127 (2) sets out what this Court can do in the exercise of its appellate jurisdiction and therefore the said Article comes into operation only when it considers an appeal lawfully filed before it.

Article 127 (1) has specifically subjected itself to the other provisions of the Constitution. This is clear from the wording *"The Supreme Court shall, subject to the Constitution,.."*, found in that Article.

Thus, Article 127 (1) must be read with Article 128 of the Constitution. This is because Article 128 is another provision in the Constitution which has specified several channels through which any appeal can reach this Court. Article 128 of the Constitution as it was then as follows.[3]

> *"128 (1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings;*
>
> *(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:*
>
> *Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.*
>
> *(3) Any appeal from an order or judgement of the Court of Appeal, made or given in the exercise of its jurisdiction under Article 139, 140, 141, 142 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.*
>
> *(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament."*

[3] A new sub paragraph was added as Article 128 (5) by the Twentieth Amendment to the Constitution which was certified on 29th October 2020.

In the instance at hand, it is the Court of Appeal which has granted leave to appeal to the Supreme Court. The Court of Appeal has been conferred with jurisdiction to make orders granting leave to appeal to the Supreme Court only under Article 128 (1) of the Constitution and no other.

Article 128 (2) of the Constitution has also conferred jurisdiction on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. Closer comparison of Article 128 (1) with Article 128 (2) of the Constitution clearly reveals that the jurisdiction conferred by the Constitution on the Court of Appeal to grant leave to appeal to the Supreme Court is a restricted jurisdiction than that conferred on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. This is manifest from the sections themselves. Article 128 (1) has only conferred Court of Appeal with jurisdiction to grant leave to appeal to the Supreme Court only from any final order of the Court of Appeal whereas Article 128 (2) has conferred on the Supreme Court much wider jurisdiction to grant Special Leave to Appeal both from any final or interlocutory order of the Court of Appeal. The fact that Article 128 (2) has included *'from any final or interlocutory order'* and the fact that Article 128 (1) has included only *'any final order'* and had dropped *'or interlocutory order'* is significant. This means that the Court of Appeal has jurisdiction to grant leave to appeal to the Supreme Court only in respect of any final order it has made as per Article 128 (2). This also means that the Court of Appeal has no jurisdiction to grant leave to appeal to the Supreme Court from any interlocutory order it has made. It is only the Supreme Court which has jurisdiction to grant Special Leave to Appeal from any interlocutory order made by the Court of Appeal.

The next question I must decide is whether the order dated 04th April 2022 pronounced by the Court of Appeal is a final or interlocutory order.

the said question was considered by this Court by a bench comprising of 5 judges in the case of Chettiar vs. Chettiar.[4] In that case Dr. Shirani A. Bandaranayake, J. observed the following.

> *Therefore to ascertain the nature of the decision made by a civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the*

[4] [2011] 2 SLR 70.

Civil Procedure Code, it would be necessary to follow the test defined by Lord Esher MR in Standard Discount Co. v La Grange (supra) and as stated in Salaman v Warner (supra) which reads as follows:

"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

The question was again re visited by a bench constituting 7 judges of this Court in Priyanthi Senanayake vs. Chamika Jayantha[5] where Priyasath Dep PC J observed the following and arrived at the same conclusion as that of Chettiar vs. Chettiar.[6] Observations of the Priyasath Dep PC J are as follows.

According to this interpretation section, appeals could be filed in respect of judgments or orders which are final judgements. In respect of other orders which are not final and considered as interlocutory orders leave to appeal applications have to be filed. In view of this definition it appears that judgements fall into two categories.

Similarly, orders also fall into two categories.

(A) Judgements which are final judgements

(B) Judgements which are not final

(C) Orders which are final judgements

(D) Orders which are interlocutory orders

Therefore appeal could be filed in respect of judgements or orders which are final. In respect of other orders leave has to be first obtained. Therefore it appears that finality of the judgement or order that matters and not the name given as judgement or order.

…

[5] [2017] BLR 74.

[6][2011] 2 SLR 70.

In order to decide whether a order is a final judgment or not. It is my considered view that the proper approach is the approach adopted by lord Esher in Salaman vs Warner (Supra) which was cited with approval by Lord Denning in Salter Rex vs Gosh (supra). It stated:

> *"If their decision, whichever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."*

As has already been mentioned above, the learned counsel who appeared for the Petitioner in the Court of Appeal, in addition to the case of and Chettiar vs. Chettiar,[7] also brought to the attention of the Court of Appeal in resisting the application for Leave to Appeal by the Court of Appeal, the case of Maharaja Organization Limited Vs. Viacom International Inc and Another.[8]

In that case (Maharaja Organization Limited case), His Lordship Samayawardhena J having considered two previous approaches used by our Courts namely the Order Approach and the Application Approach to ascertain the nature of orders given by a court to decide whether an appeal or a leave to appeal lies in a given situation, stated as follows.

> *"The order approach contemplates only the nature of the order. When taken in isolation, if the order finally disposes of the matter and the parties' rights in litigation without leaving the suit alive, the order is final and a direct/final appeal is the proper remedy against such order.*
>
> *The application approach contemplates only the nature of the application made to Court, not the order delivered per se. In accordance with this approach, if the order given in one way will finally dispose of the matter in litigation, but if given in the other way will allow the action to continue, the order is not final but interlocutory, in which event, leave to appeal is the proper remedy. In other*

[7] [2011] 2 SLR 70.

[8] SC CHC Appeal 03/2006 decided on 30th June 2021.

words, according to the application approach, if the order, whichever way it is given, will, if it stands, finally determine the matter in litigation, the order is final. "

Thus, having regard to the nature of the order the Court of Appeal has made in relation to the application made before it requesting it to grant Leave to Appeal in the instant case, shows clearly that the Court of Appeal had failed to appreciate the contents of the judgment in Maharaja Organization Limited case.

Turning to the instant case, the decision dated 4th April 2022 given by the Court of Appeal was merely a decision on the preliminary objections raised by the Respondents. While upholding the objections would have finally dispose the matter in litigation, overruling the objections would have allowed the action to continue. Thus, applying the above test it is clear that the order dated 4th April 2022 given by the Court of Appeal in the instant case is not final but an interlocutory order.

I have already mentioned above that the Court of Appeal has no jurisdiction to grant leave to appeal to the Supreme Court from any interlocutory order it has made and it is only the Supreme Court which has jurisdiction to grant Special Leave to Appeal from any interlocutory order made by the Court of Appeal.

In Martin Vs Wijewardena.[9] Jameel J (with Ranasinghe CJ and Amerasinghe J agreeing) stated that the right of appeal is a statutory right and must be expressly created and granted by statute. This Court has not granted Special Leave to Appeal from the impugned order (Appellants in the instant case have not applied to this Court for Special Leave to Appeal). The Court of Appeal has acted without any jurisdiction when it had granted Leave to Appeal to the Supreme Court from any interlocutory order. The Court of Appeal in the instant case has exercised a non-existent power. Such exercise of power has no force or avail in law. In the case of Jeyaraj Fernandopulle Vs. Premachandra De Silva and Others,[10] Amerasinghe J stated that "*the Supreme Court is a creature of statute and its powers are statutory.*" Thus, this Court has no power/ jurisdiction to entertain the purported appeals in the instant case.

[9] [1989] 2 SLR 409.
[10] [1996] 1 SLR 70.

For the above reasons, I have no hesitation in upholding the preliminary objection to the maintainability of this appeal raised by the learned President's Counsel for the Petitioner-Respondent. I hold that there is no lawful appeal before this Court to enable this Court to exercise its jurisdiction conferred on it by Article 127 (2) of the Constitution. These 'appeals' should therefore stand rejected.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC. J.

I agree,

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.

I agree,

JUDGE OF THE SUPREME COURT

MARCH

2023

JUDGMENTS

MARCH INDEX

1.	SC/FR/460/2017	804
2.	SC/FR/236/2008 SC/FR/237/2008	839
3.	SC/APPEAL/114/2021	874
4.	SC/RULE/14/2000	880
5.	SC/APPEAL/220/2012	898
6.	SC/RULE/03/2021	922
7.	SC/APPEAL/46/2018	928
8.	SC/APPEAL/218/2016	970
9.	SC/APPEAL/01/2019	980

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution

1. N. B. Krishantha Kumara
   Assistant Director,
   Ministry of Health of the North Central Province,
   Dharmapala Mawatha, Anuradhapura.

2. Somasiri Ekanayake
   Assistant Director,
   Office for National Unity and Reconciliation,
   21, 6th Floor, Janadhipathi Mawatha, Colombo 01.

3. B. H. M. D. Herath,
   Assistant Director,
   Ministry of Development Strategies and Internal Trade, West Tower, No. 30, World Trade Centre, Colombo 01.

4. Planning Service Association,
   Ministry of Health of the North Central Province, Dharmapala Mawatha, Anuradhapura.

Petitioners

SC /FR/ Application No. 460/2017

Vs,

1. Dharmasena Dissanayaka,
   Former Chairman,
   Public Service Commission

1A. Hon. Justice Jagath Balapatabendi
   Chairperson,
   Public Service Commission.

2. Prof. Hussain Ismail,
   Former Member

2A. Mr. Indrani Sugathadasa,
Member

3. Mrs. Dhara Wijethilaka,
Former Member

3A. Sudharma Karunaratne,
Former Member

3B. Mr. Shivagnanasothy,
Member

4. Dr. Prathap Ramanujam,
Former Member

4A. Dr. T.R. C. Ruberu,
Member

5. Mrs. V. Jegarasasingham,
Former Member

5A. Mr. Ahamed Lebbe Mohamed Saleem,
Member

6. Nihal Seneviratne,
Former Member

6A. G. S. A. De Silva,
Former Member

6B. Mr. Leelasena Liyanagama,
Member

7. S. Ranugge,
Former Member

7A. Mr. Dian Gomes,
Member

8. Laksiri Memdis,
Former Member

8A. Mr. Dilith Jayaweera,
Member

9. Sarath Jayathilaka,
Former Member

9A. Mr. W. H. Piyadasa,
Member

All of the Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

10. J. J. Rathnasiri
Former Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

10A. S. Hettiarachchi
Former Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

10B. Mr. J. J. Rathnasiri
Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

11. Hon. Mahinda Rajapakse
Former Minister of Finance and Planning,
No. 177, Wijerama Mawatha, Colombo 07.

11A. Mahinda Rajapakse
Prime Minister,
Minister of Finance, Economy and Policy Development, Buddhasasana, Cultural and Religious Affairs, Urban Development, Water Supply and Residential Facilities,
Ministry of Finance, Economy and Policy

Development, Buddhasasana, Cultural and Religious Affairs, Urban Development, Water Supply and Residential Facilities,

Now:

Prime Minister's Office,
No. 58, Sir Ernest De. Silva Mawatha, Colombo 07

Minister of Finance,
Minister of Buddhasasana, Religious and Cultural Affairs, Minister of Urban Development and Housing,
Prime Minister's Office,
No. 58, Sir Ernest De. Silva Mawatha, Colombo 07

12. Hon. Mahinda Yapa Abeywardana
Former Minister of Agriculture,
0/5 A, Roberts Road, Kalubowila, Dehiwala

12A. Nimal Siripala de Silva
Minister of Justice, Human Rights and Le Reforms,
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Now,

Minister of Labour,
Kirula Road, Colombo.

13. Hon. Dullas Allahapperuma
Former Minister of Youth Affairs and Skills Development,
No. 352/G7, Embuldeniya Road,
Madiwela, Kotte.

13A. Mahinda Amaraweera
Minister of Passenger Transport Management, Power and Energy, Ministry of Passenger Transport Management,

Power and Energy, No. 72, Ananda Mawatha, Colombo 07.

Now:

Minister of Environment,
Sobasam Piyasa, No. 416/C/1, Robert Gunawardana Mawatha, Battaramulla.

14. Hon. A. L.M. Athaullah
Former Minister of Local Government and Provincial Councils,
"Kilakku Vasal"
Kathiriya Beach Road, Akkaraipattu-0.

14A. S. M. Chandrasena,
Minister of Environment and Wildlife Resources, Ministry of Environment and Wildlife Resources, No. 1090,
Sri Jayawardenapura Mawatha, Rajagiriya.

Now:

Minister of Lands,
"Mihikatha Madura"
Land Secretariat, No. 1200/6,
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15. Hon. Risad Badhurutheen
Former Minister of Industry and Commerce,
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15A. Ramesh Pathirana
Minister of Plantation Industries and Export Agriculture, Ministry of Plantation Industries and Export Agriculture,
11th Floor, Sethsiripaya,
2nd Stage, Battaramulla.

Now:

Minister of Plantation, 11th Floor,
Sethsiripaya, 2nd Stage, Battaramulla.

16. Hon. Chandrasena
Former Minister of Agrarian Services and Wildlife, Marale Road, Kurudankulama, Anuradhapura.

16A. Prasanna Ranatunga
Minister of Industrial Export and Investment Promotion Tourism and Civil Aviation, Ministry of Industrial Export and Investment Promotion Tourism and Civil Aviation, 7th Floor,
Sethsiripaya, Battaramulla.

Now:
Minister of Tourism
25th Floor, West Tower,
World Trade Centre, Colombo 01

17. Hon. P. Dayarathna
Former Minister of State Resources and Enterprise Development,
Deegagamini Mawatha, Ampara.

17A. Wimal Weerawansa
Minister of Small and Medium Business and Enterprise Development, Industries and Supply Chain Management,
Ministry of Small and Medium Business and Enterprise Development, Industries and Supply Chain Management,
No. 73/1, Galle Road Colombo 03.

Now:
Minister of Industries,
3, 73/1, Galle Road, Colombo 03.

18. Hon. Nimal Siripala de. Silva
Former Minister of Irrigation and Water Resources Management, No. 93/20, Elvitigala Mawatha Colombo 08.

18A**.** Arumugam Thondaman
Former Minister of Community Empowerment and Estate Infrastructure Development, Ministry of Community Empowerment and Estate Infrastructure Development, No. 45, St. Michaels Road, Colombo 03.

19. Hon. Doglas Devananda
Former Minister of Traditional Industries and Small Enterprise Development, No. 04, New Athiyady Road Jaffna.

19A. Dinesh Gunawardena
Minister of Foreign Relations, Skills Development, Employment and Labour Relations, Ministry of Foreign Relations, Skills Development, Employment and Labour Labour Relations, 354/2, "Nipunatha Piyasa," Elvitigala Mawatha, Narahenpita, Colombo 05.

Now
Minister of Foreign,
Republic Building, 1 Sir Baron Jayatilaka Mawatha, Colombo 01.

20. Hon. S. B. Dissananaye
Former Minister of Higher Education,
1070/2, Denzil Kobbekaduwa Mawatha, Battaramulla.

20A.Douglas Devananda
Minister of Fisheries and Aquatic Resources, Ministry of Fisheries and Aquatic Resources, New Secretariat, Maligawatta, Colombo 10.

Now

Minister of Fisheries,
Maligawatta, Colombo 10.

21. Hon. Johnston Fernando
Former Minister of Co-Operative and Internal Trade, Rosewood Garden, Rathkarawwua, Maspotha.

21A. Pavithra Devi Wanniarachchi
Minister of Women and Child Affair and Social Security, Healthcare and Indigenous Medical Service, Ministry of Women and Child Affair and Social Security, Healthcare and Indigenous Medical Service, 3rd and 5th Floor, Sethsiripaya Stage II, Battaramulla.

Now

Minister of Health,
Ministry of Health, 385, Ven. Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

22. Hon. Milroy Fernando
Former Minister of Resettlement New Road, Wennappuwa.

22A. Bandula Gunawardena
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23. Hon. A.H.M. Fowzie
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No. 78, School Lane, Colombo 03.

23A. Janaka Bandara Tennakoon
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Now
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24. Hon. Piyasena Gamage
Former Minister of Indigenous Medicine, No. 30, Jayanpathipura Main Road, Battaramulla.

24A. Chamal Rajapaksa
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Now
Minister of Irrigation,
230, Bauddhaloka Mawatha, Colombo 07.

25. Hon. D. E. W. Gunasekara
Former Minister of Rehabilitation and Prison Reform, No. 91, Dr. N.M. Perera Mawath, Colombo 08.

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Now

Minister of Power,
72, Ananda Coomaraswamy Mawatha, Colombo 07

26. Hon. Bandula Gunawardena

Former Minister of Education,
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26A.Johnston Fernando

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27. Hon. Dinesh Gunawardena

Former Minister of Water Supply and Drainage, No. 84, Kirillapona Avenue, Colombo 05.

28. Hon. D.M. Jayarathna

Former Minister of Buddhasasana and Religious Affairs, Doluwa, Gampola.

29. Hon. Sumedha G. Jayasena

Former Minister of Parliament Affairs, 6/2, No. 10, Loris Avenue, Colombo 04.

30. Hon. Thissa Karalliyadde
    Former Minister of Child Development and Women Affairs, Secretary, Sri Lanka Parliament, Sri Jayawardenapura, Kotte.

31. Hon. Jeewan Kumaranathunga
    Former Minister of Posts and Telecommunication, No. 26, Nandimithra Place, Colombo 06.

32. Hon. Gamini Lokuge
    Former minister of Labour and Labour Relation, 157/10A, Mawittara, Piliyandala.

    Now
    Minister of Transport,
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33. Hon. S.B. Navinna
    Former Minister of National Languages and Social Inteegration, C-D-89, Hector Kobbekaduwa Mawatha, Colombo 07.

34. Hon. G.L. Peiris
    Former Minister of External Affairs, No. 1316, Podujana Peramuna, Jayanthipura, Nelum Mawatha, Battaramulla.

    Now
    Minister of Education, Isurupaya, Battaramulla.

35. Hon. Felix Perera
    Former Minister of Social Services, No. 125, Negombo Road, Tudella, Ja-Ela.

36. Hon. Susil Premajayantha
    Former Minister of Petroleum Industries No. 123/1, Station Road, Gangodawila, Nugegoda.

37. Hon. Basil Rajapaksha
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38. Hon. Keheliya Rambukwella
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    Now
    Minister of Mass Media,
    Elvitigala Mawatha, Colombo 05.

39. Hon. C. B. Rathnayake
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40. Hon. Mahinda Samarasinghe
    Former Minister of Plantation Industries, No. 53/2, Torrington Mawatha, Colombo 07.

40A. Mahindananda Aluthgamage
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    288, Sri Jayawardenapura Mawatha,
    Sri Jayawardenepura Kotte.

41. Hon. Rajitha Senarathne
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41A.Wasudeva Nanayakkara
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42. Hon. Athauda Senevirathne
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42A.Udaya Prabath Gammanpila
Minister of Energy, No.72, Ananda Coomaraswamy Mawatha, Colombo 07.

43. Hon. Jhon Senevirathne
Former Minister of Public Administration and Home Affairs, Sabarahamuwa Development Coordinating Office, Moragahayata, Rathnapura.

43A.Hon. Rohitha Abegunawardene
Minister of Ports and Shipping, 19, 1 Chaithya Road, Colombo

44. Hon. Maithripala Sirisena
Former Minister of Health, Presidential Secretariat, Galle Face, Colombo 01.

44A.Namal Rajapakse
Minister of Youth and Sports, No. 09, Phillip Gunawardana Mawatha, Colombo 07.

45. Hon. Janaka Bandara Tennakoon
Former Minister of Land and Land Development, No. 25/2, 'Rangiri,' sama Uyana, Boralesgamuwa.

45A. Ali Sabry
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46. Hon. Arumugam Thondaman
    Former Minister of Livestock and Rural Community Development, No.72, Ananda Coomaraswamy Mawatha, Colombo 07.

46A. Sarath Weerasekara
    Minister of Public Security, 15/5, Baladaksha Mawatha, Colombo 03.

47. Hon. Tissa Vitharana
    Former Minister of Technology and Research, 457, Union Place, Colombo 02.

48. Hon Pavithra Devi Wanniarachchi
    Former Minister of National Heritage and Cultural Affairs, No. 18/228A, 3rd Cross Avenue, Evergreen Park, E.D. Dabare Mawatha, Narahenpita, Colombo 05.

49. Hon. W.A.Wiswa Warnapala
    Former Minister of Higher Education

50. Hon. Wimal Weerawansha
    Former Minister of Construction, Engineering Services, Housing and Common Amenities, No. 342/1/4, E.W. Perera Mawatha, Kotte Road, Pitakotte.

51. Hon. Kumara Welgama,
    Former Minister of Transport, No. 101A, Manning Place, Colombo 06.
    Deniston Estate, Horawala, Welipenna.

52. Hon. Rathnasiri Wickramanayake
    Former Minister of Public Management Reforms

53. Hon. Anura Priyadarshana Yapa
Former Minister of Environment, Minister Office, Ministry of Disaster Management, Vidhya Mawatha, Colombo 07.

Respondents

54. U.L.Samaratunga
Development Officer,
No.222/1, Wijerama Road, Gampaha.

55. S.M. Bandu
Development Officer, No. 61/18, Ingiriya Road, Padukka.

56. R.M.N.S. Gunetilake,
Development Officer, No. 142, Baseline Road, Colombo 09.

Intervenient-Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Murdu N. B. Fernando PC
Justice Yasantha Kodagoda PC

Counsel: Manohara de. Silva PC with Hirosha Munasinghe for the Petitioners

Ms. Chamantha Weerakoon Unamboowe with Ms. Tersha Abeyratne instructed by Ms. Chitra Jayasinghe for the 54th, 55th and 56th added Respondents

Shaheeda Barrie, Senior SC, with Ms. Navodi De. Zoysa, SC for the 1st to 53rd Respondents

Argued on: 19.01.2021

Judgment on: 01.03.2023

Vijith K. Malalgoda PC J

The three Petitioners namely N.B. Krishantha Kumara, Somasiri Ekanayake, and B.H.M.D. Herath who are members of the Sir Lanka Planning Service and the 4th Petitioner Planning Service Association had filed the instant application before this Court challenging the decision of the 1st to the 9th Respondents contained in the letter dated 08.11.2017 which is produced marked P-10-B, to implement the Cabinet decision dated 23.06.2010 which is also produced marked as P-12, alleging that both P-10-B and P-12 are in violation of the Fundamental Rights guaranteed to them under Article 12 (1) of the Constitution.

The matter was supported before this Court on 28.09.2018 and the Court granted leave to proceed for the alleged violation of the Fundamental Rights guaranteed under Article 12 (1) of the Petitioners. After considering an application made by three Intervenient Petitioners namely U.L. Samaratunga, S.M. Banu, and R.M.N.S. Gunathilake representing the Development Officers', the court granted permission for the said party to intervene in the instant application as 54th, 55th, and 56th Respondents.

During the Argument before us, the Respondents raised two preliminary objections, one with regard to the *locus standi* of the Petitioner before the Court and the other with regard to the jurisdiction of this Court in deciding an application filed before this Court under Article 17 read with article 126 for allegedly violating the Fundamental Rights of the Petitioners by a policy decision taken by the Executive.

The second objection referred to above needs to go into the facts of this matter and in the said circumstances the said objection will be considered, having considered the merits of this application

towards the later part of this judgment. However, the first objection raised will be considered by me now.

The first and the second Petitioners hold the positions of the Secretary and Assistant Secretary of the 4th Petitioner Association and the third Petitioner who also belongs to the Sri Lanka Planning Service is a committee member of the 4th Petitioner Association. The 4th Petitioner, the Planning Service Association is a trade union registered under section 10 of the Trade Union Ordinance.

Whilst referring to Article 126 (2) of the Constitution the Respondents relied on the decision in ***Ceylon Electricity Board Accountants' Association V. Patali Champika Ranawaka and Others SC FR 18/2015*** SC Minute dated 11.03.2016 where Sripawan CJ had held

> "….. in the absence of a specific provision permitting a Trade Union to institute action on behalf of its members, the Petitioner Union cannot have and maintain this application on behalf of its members in terms of Article 17 read with Article 126 (2) of the Constitution."

Article 126 (2) of the Constitution reads thus;

> Where any *person* alleged that any such Fundamental Rights or Language Right relating to *such person* has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney at Law on his behalf, within one month thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.

It was the argument of the learned Senior State Counsel who represented the Respondents before us, that the Supreme Court had declined to make a broader definition to the term "person" referred to in Article 126 by extending it to unincorporated bodies such as Trade Unions.

The impugned decisions, before this Court, the Cabinet decision (P-12), and the letter by the 1st to the 9th Respondents (P-10-B) refer to the absorption of a certain category of officers into the Sri Lanka Planning Service (hereinafter referred to as SLPS) on supernumerary basis without making them eligible for certain benefits in the said service, but the main complaint before this court is that the said Cabinet decision and the subsequent letter by the 1st to 9th Respondents are in clear violation of the service minute of the SLPS which affects not only to the 1st to 3rd Respondents before Court but also to the entire cadre of the Sri Lanka Planning Service and therefore the 4th Respondent being the Trade Union which represents the entire cadre of the said service is entitled, to prosecute the instant application in the interest of its membership.

When a similar matter had arisen with the Nurses working in Government Hospitals, the Cabinet of Ministers approved additional salary increments to the non-striking staff on the recommendation of the Health Minister, the Pubic Services United Nurses Union, in which the majority of nurses in the Government Hospitals are members, challenged the said decision before this Court.

In the case of the ***Public Services United Nurses Union V. Montague Jayawickrema Minister of Public Administration and Others, 1988 1 Sri LR 229*** this Court held that the said decision violates equality provisions contained in Article 12 since the said decision had granted an *ad hoc* increment to a very limited class of officers.

However, in the case of ***Ceylon Electricity Board Accountants' Association V. Patali Champika Ranawaka and Others*** *(Supra),* the Supreme Court upheld an objection raised by the Respondents with regard to the maintainability of the said application on the ground that the Petitioner being a Trade Union has no *locus standi* to institute an application in terms Article 126 of the Constitution.

When deciding the above, Chief Justice Sripawan was mindful of the instances where this Court had permitted unincorporated bodies or persons to institute and maintain applications under Article 17

read with 126 (2) of the Constitution including the case of ***Public Services United Nurses Union V. Montague Jayawickrama and Others*** *(supra).*

Whilst referring to the Nurses Union case referred above Sripawan CJ observed;

> "I do not find myself able to accede to the argument advanced by Mr. ……for two reasons. Firstly, no objection was taken by the Respondents in the said application that the Public Services United Nurses Union had no *locus standi* to institute an application under Article 126 of the Constitution and the Court did not have the benefit of any argument of the learned counsel on that issue. Secondly, in any event, the second Petitioner was a Nurse and the Secretary of the First Petitioner Union, whose Fundamental Right of equality guaranteed under Article 12 had been violated. Furthermore, the Second Petitioner is a "Person" within the meaning of Article 126 (2) of the Constitution. Thus, the case could have proceeded even if the First Petitioner, namely Public Services United Nurses Union was struck down"

With regard to an Incorporated body, a similar objection was raised by the Respondents in the case of ***Environmental Foundation Ltd. V. Urban Development Authority (2009) 1 Sri LR 123*** and S. N Silva CJ considered the said objection as follows;

> "An objection has been raised that the Petitioner cannot have and maintain this application, since it is an incorporated company and that the Fundamental Rights guaranteed by Article 12 (1) and 14 (1) (a) can be invoked only by persons and in the case of Article 14 (1)(a) by a citizen. In my view, the word "persons" as appearing in Article 12 (1) should not be restricted to "natural" persons but extended to all entities having legal personality. In several cases, this Court has given relief to incorporated bodies that have a legal personality recognized by law…….. Although counsel contended that Article 14 (1) should be read differently in view of the reference to a "citizen" I am of the view that this distinction does not carry with it a

> difference that would enable a company incorporated in Sri Lanka, to vindicate an infringement under Article 12 (1) and disqualify it from doing so in respect of an infringement under Article 14 (1).
>
> .....
>
> In several cases, the Petitioner has assisted this Court in important matters with regard to the preservation of the environment. In this instance too the Petitioner has acted in the public interest…."

However, Sripawan CJ whilst referring to the decision in Environmental Foundation Ltd. (supra) and made a distinction between the two cases in the case of Ceylon Electricity Board Accountants' Association (supra) as follows;

> "His Lordship further noted that in several cases this Court has given relief to incorporated bodies that have a legal personality recognized by law…… In any event, Environment Foundation Ltd. (supra) case was filed in the public interest in order to preserve, safeguard and protect the public interest. Hence incorporated bodies recognized by law were permitted to file action in terms of Article 126 (2) of the Constitution.

The learned President's Counsel who represented the Petitioner in the case of Ceylon Electricity Board Accountants' Association (supra) made an attempt at a later stage to add one of its office bearers as an added Petitioner, but the said application was objected to by the Respondents. The said move by the Petitioner in Ceylon Electricity Board Accountants' Association (supra) is a clear admission by the Petitioner himself with regard to the *locus standi* of the Petitioner in the said case.

In these circumstances it is clear that the *locus standi* of an unincorporated body that comes before the Supreme Court in an application filed under Article 17 read with Article 126 (2) is now settled

and the Court has permitted the members of the unincorporated body to pursue the application in the instances when their rights guaranteed under the constitution has been violated by the conduct of the Respondents. Therefore, I see no merit in the first objection raised by the Respondents before this Court.

With regard to the impugned Cabinet decision produced mark P-12 and the subsequent decision taken by the Public Service Commission which is contained in the letter produced P-10 B, the Petitioners have submitted as follows;

a) That according to the service minute of the SLPS which was operative until the Public Administration Circular 6/2006 was published in Government Gazette 1134/5 on 30.05.2000, the said service consisted of Class II Grade II, Class II Grade I, and Class I officers.
b) That a new service minute was introduced to the SLPS in terms of Public Administration Circular 6/2006 by Government Gazette 1670/32, which was published on 10.09.2010. According to this service minute the said service consists of four grades namely, Grade III, Grade II, Grade I, and Special Grade.
c) That the recruitment Grade under the previous service minute was Class II Grade II of Sri Lanka Planning Service and under the new service minute it is Grade III.
d) That under both these schemes, provisions had been made to recruit officers under two main streams, namely open and limited and there was a minimum requirement of obtaining 40% of the total mark from a written examination, in order to get through the examination under both schemes.
e) That according to Clause 6.4 of the service minute which was operative until 2010, 75% of the vacancies in Class II Grade II of the SLPS were to be filled on the results of the Open Competitive Examination, and the balance 25% by the Limited Competitive Examination.

f) That the Cabinet of Ministers had arrived at a decision on 24.10.2007 to allow a group of officers to sit for a special examination instead of the examination identified in Clause 6.5 in the service minute in order to absorb them to Class II Grade II of the SLPS on Supernumerary basis.

g) That the said Cabinet decision and the Instructions issued by the Public Service Commission in order to implement the said Cabinet decision were challenged before the Supreme Court by two parties and those matters namely SC FR 236/2008 and 237/2008 were pending before the Supreme Court for determination even at the time the instant application was taken up for hearing before the present bench.

h) That by Government Gazette 1565 dated 29.08.2008 which was amended by Government Gazette 1587 dated 30.01.2009 applications were called from the eligible candidates to sit for the said examination.

i) That the minimum requirement to get through the said examination was unchanged and under paragraph 13 of the Government Gazette 1565 dated 29.08.2008 it was stated that;

"B. තෝරා ගැනීම් ක්‍රමය;

ප්‍රශ්න පත්‍ර සඳහා නියමිත ලකුණු වලින් යටත් පිරිසෙන් 40% ක් වත් ලබා නොගන්නා අපේක්ෂකයන් කැඳවනු ලැබීමට නුසුදුසු වනු ඇත. එක් කරනු ලැබීම සඳහා අපේක්ෂකයන් තෝරා ගනු ලබන්නේ විභාගයේ 40% වඩා ලකුණු ලබාගත් අයවළුන් අතරිනි.

j) That the said examination to appoint officers to Class II Grade II of the Sri Lanka Planning Service on a supernumerary basis was held in April 2009 and steps were taken to recruit those who got through the said examination by obtaining the minimum requirement of 40% of the total mark.

k) That, a Cabinet Memorandum dated 10.06.2009 was submitted by the then Minister of Finance and Planning seeking approval to reduce the pass marks from 40% to 30% for the reasons contained in paragraph 3 of the said memorandum, which reads as follows;

> "3. විභාග ප්‍රශ්න පත්‍රය සම්බන්ධයෙන් විභාග අපේක්ෂකයන් විසින් ඉදිරිපත් කරන ලද නියෝජනයන් තුලින් සහනයක් සලසාදෙන ලෙස කරන ලද ඉල්ලීම සලකා බලා, සම්පූර්ණ විභාගය අවලංගු කොට යලි පැවැත්වීම වෙනුවට විකල්ප ක්‍රියා මාර්ගයක් ලෙස රාජ්‍ය සේවා කොමිෂන් සභාව විසින් අනුමත කරන ලද සමත් වීමේ අවම ලකුණු ප්‍රමාණය වන 40% සිට 30% දක්වා සංශෝධනය කිරීම තුලින් අගතියට පත් අපේක්ෂකයන්ට සහනයක් සැලසීම සුදුසුයයි යෝජනා කරමි. මෙසේ ලකුණු දීමෙන් සමාර්ථය ලබන අපේක්ෂකයන් සංඛ්‍යාව 451 වී ඇති හෙයින් රාජ්‍ය සේවා කොමිෂන් සභාව විසින් බඳවා ගැනීමට අනුමැතිය දී ඇති 526 ප්‍රමාණය ඉක්මවා නොයන බවද සඳහන් කරමි. ….. (P-5)

l) That the said Cabinet Memorandum was approved by the Cabinet of Ministers and conveyed to the Secretary to the Ministry of Finance and Planning by P-6.

m) That the above decision to deviate from the original scheme approved by the Cabinet of Ministers was never challenged, and steps were taken to implement the said decision.

n) That subsequent to the introduction of the new scheme of recruitment in 2010, two rounds of recruitment to Grade III of the SLPS were taken place in 2012 and 2017 based on the new scheme of recruitment.

o) That when the second round of the recruitment process was in progress the Petitioners were informed of an attempt to recruit another batch of officers to the Sri Lanka Planning Service from those who faced the special examination in the year 2009 and had not succeeded in obtaining 30% as required by the Cabinet decision dated 10.06.2009.

p) That the Petitioners made requests from the Public Service Commission and the office of the Cabinet of Ministers under the provisions of the Right to Information Act No. 12 of 2016 in order to obtain information with regard to any decision reached in that regard and the

decision of the Public Service Commission dated 17.11.2017 (P10-B) was communicated to the 1st Petitioner by the Public Service Commission by letter dated 04.12.2017 (P-10-A)

q) That, it was revealed from the information gathered, that there was another Cabinet Memorandum dated 17.06.2010 and a Cabinet Decision (P-11 and P-12) to recruit all candidates who faced the examination which was held in the year 2009 irrespective of any marks they received but fulfill the other requirements according to the relevant Gazette notification. However, the said decision was not implemented until 2017, but by letter dated 17.11.2017 (P-10-B), Public Service Commission had instructed the Secretary Public Administration Ministry to implement the said decision.

In these circumstances the Petitioners have further submitted before this Court, that;

i. The said Cabinet decision dated 23.06.2010 (P-12) and the recent decision taken by the Public Service Commission to implement the said Cabinet decision as evinced in the letter dated 17.11.2017 (P10-B) are in gross violation of the service minute of the SLPS and the Government policy on recruiting officers to the SLPS.

ii. The Petitioners have a legitimate expectation that all requirements and provisions in the Sri Lanka Planning Service will adhere in strict compliance with the approved service minute

iii. The service minute clearly specifies that the pass mark for both the Limited and Competitive Examination is 40

iv. When making the recruitments in 2009, the pass mark was lowered to 30, which is also in violation of the Service Minute

v. The impugned decision of the Public Service Commission has the effect of recruiting to the Sri Lanka Planning Service, those who failed to score even 30 marks and thereby failed the examination

vi. Two rounds of recruitment have taken place since 2010 under the new service minute

vii. Grave anomalies would be caused within the SLPS if the impugned decision is implemented

On behalf of the Respondents, the 1st and the 10th Respondents, the Chairman Public Service Commission and the Secretary to the Ministry of Public Administration had tendered affidavits responding to the allegations made against them by the Petitioners and had denied any violation of the service minute of the SLPS. The Respondents have also taken up the position, that the recruitments referred to by the Petitioners had neither violated the legitimate expectations of the Petitioners nor it created any anomalies in the Sri Lanka Planning Service violating the Fundamental Rights of the Petitioners guaranteed under Article 12 (1) of the Constitution.

In this regard, the 1st and the 10th Respondents have taken up the position that;

a) The secretary to the Ministry of Plan Implementation in consultation with some authorities decided to absorb the Development Officers who had completed 05 years of satisfactory service to SLPS Class II Grade II considering the provisions in the scheme of recruitment of the Development Officers

b) The said decision was challenged before the Court of Appeal in CA 329/2007 and in the meantime Secretary to the Ministry of Plan Implementation wrote to the Public Service Commission seeking approval for the absorption of 349 Development officers to Class II Grade II of SLPS

c) However, by letter dated 4th June 2007, the Public Service Commission refused to consent to the above request and also informed its decision to the Court of Appeal

d) A Cabinet Memorandum titled "strengthening the Sri Lanka Planning Service with special emphasis to plan implementation" dated 14th August 2007 was submitted to the Cabinet by the predecessor in office to the 11th Respondent

e) In the said Cabinet of Memorandum, it was recommended that,

    a) a special examination be conducted (by the Sri Lanka Institute of Development Administration) for these officers to assess their suitability for absorption;

    b) the examination focuses primarily on an assessment of applying knowledge relating to field-level experience in planning and plan implementation.

    c) those who are successful at the examination be absorbed into supernumerary Class II Grade II posts in the SLPS with effect from a prospective date, provided they have completed five years of continuous active service, been confirmed in the post, and have passed the first Efficiency Bar examination specified in the scheme of recruitment;

    d) those who are successful at the examination but have not passed the first Efficiency Bar examination at that time, but complete that examination subsequently, be absorbed as set out above, with effect from a prospective date after they pass the First Efficiency Bar Examination;

    e) such number of supernumerary posts as are equivalent to the number of successful candidates be specially created at Class II Grade II level to enable these appointments to be made and that simultaneously the posts currently held by those officers are suppressed;

f) The Cabinet of Ministers had approved the said recommendation and the said decision was communicated to the Public Service Commission in order to grant relief as proposed in the Cabinet Memorandum

g) By letter dated 28th September 2007 the Public Service Commission had voiced its disagreement with the implementation of the said Cabinet Decision

h) The Cabinet of Ministers by its decision dated 10.10.2007, rescinded the earlier decision and appointed an official committee to formulate a promotional scheme to the development officers in order to address the grievances of the development officers.

i) On the recommendations of the said Committee the Cabinet of Ministers by its decision dated 24.10.2007 granted approval to conduct a special examination and appoint successful candidates to the Sri Lanka Planning Service on a supernumerary basis.

j) Applications were called from those who were eligible to sit for the special examination referred to above by Government Gazette dated 29.08.2008 and those who were eligible to sit for the examination were identified in the notice itself.

k) According to the said notice;

    i. The post advertised (Class II Grade II of SLPS) is permanent and pensionable but is on a supernumerary basis and personal to the successful candidate who obtains more than 40 marks from the special examination

    ii. If the candidates intend obtaining other benefits and promotions in the SLPS, he/she will have to face the competitive examination held under the provisions of the service minute of the SLPS.

l) The special examination referred to above was held and steps were taken to give appointments to the successful candidates. However, by Cabinet Memorandum dated

10.06.2009, approval was sought to reduce the pass mark to 30% to grant further relief to the candidates. Cabinet has approved the said memorandum.

m) By another Cabinet Memorandum submitted to the Cabinet on 23.06.2010 by the Minister of Finance and Planning, approval was sought from the Cabinet to absorb the balance of candidates who sat for the special examination into the SLPS.

The Cabinet approval granted to the said memorandum is as follows;

> "අමාත්‍ය මණ්ඩල පත්‍රිකා අංක 10/1317/404/046 වූ ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II පන්තියේ II ශ්‍රේණියට (අධි සේවක පදනම මත) පත් කිරීම යන මැයෙන් මුදල් හා ක්‍රමසම්පාදන ඇමතිතුමා ඉදිරිපත් කල 2010. 06.17 දිනැති සංදේශය (..... 2009.06.10 දිනැති අමාත්‍ය මණ්ඩල තීරණයට අදාල) ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II පංතියේ II ශ්‍රේණියට (අධි සේවක පදනම මත) බඳවා ගැනීම සලකා බැලීම සඳහා 2009.04.19 දින පවත්වන ලද විභාගයට පෙනී සිටි ඉතිරී නිලධාරීන්ද, අදාල ගැසට් නිවේදනය ප්‍රකාරව, සුදුසුකම් සපුරා ඇත්ද යන්න සම්මුඛ පරීක්ෂණ මණ්ඩලයක් විසින් පරීක්ෂාකර බලා, ඔවුන්ට පෞද්ගලික වනසේ, ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II පන්තියේ II ශ්‍රේණියට (අධි සේවක පදනම මත) පත් කිරීම සඳහා අනුමැතිය දෙන ලදී."

n) Subsequent to the above approval, the qualifications of all the candidates who were not eligible under the two previous Cabinet decisions were also checked by an interview panel, and out of 242 candidates interviewed, 146 were shortlisted and another Cabinet Memorandum was submitted on 23.03.2011 recommending that they may be given appointments based on the previous Cabinet approval.

o) However due to reasons not revealed before this court, the Cabinet of Ministers at their meeting on 26.04.2011 sought the views of the Minister of Public Administration and Home Affairs, without approving the Cabinet Paper submitted before the Cabinet.

p) The Public Service Commission which was defunct during this period was reconstituted on 19.05.2011 and the appointments to the Public Service were since then vested with the Public Service Commission and no steps were taken by the Public Service Commission to make those appointments until P-10-B was issued by the Public Service Commission in November 2017 directing those appointments be made with effect from 23.06. 2010 without back wages.

As further observed by this Court, the incumbent Chairman of the Public Service Commission, the 1st Respondent before this court when submitting an affidavit before this court had justified its decision contained in P-10-B stating that the decision of the Cabinet of Ministers dated 23.06.2010 (P-12) has not yet been canceled and it is a policy decision and the Public Service Commission has now decided to implement the said Cabinet decision.

In addition to the Respondents who were represented before this court by the learned Senior State Counsel, this Court had permitted three Intervenient Parties, i.e., 54th, 55th, and 56th Respondents to make a submission through their counsel before this Court.

On behalf of the 54th to the 56th Intervenient Respondents, several objections were raised and they objected to the granting of any relief to the Petitioners.

It was submitted on behalf of them that the Cabinet of Ministers has acknowledged the grievance of the Development Officers who were represented before this Court by the 54th to 56th Intervenient Respondents. As submitted by them the only promotional prospect according to their service minute was referred to in note 3 to the scheme of Recruitment as, “provisions will be made for the recruitment of Department Officers to the Planning Service after 5 years of satisfactory Service.”

By 2007 majority of the Development Officers attached to the Ministry of Planning had completed 5 years of service without any promotional opportunity. Even though the service minute of the SLPS introduced in the year 2000 had included the post of Development Officer to its schedule 'E' and under clause 6.5 provisions were made to hold a Limited Competitive Examination to recruit 25% of its vacancies, no such examination was held for 07 years depriving promotional opportunities to Development Officers.

According to the 54th to 56th Respondents, several services other than Development Officers were included in schedule 'E' and those services were also eligible to sit for the said examination along with the Development officers and therefore the only promotional opportunity available to the Development Officers could not be resolved effectively even by conducting the Limited Competitive Examination in the year 2008 to fill 100 vacancies. In the said circumstances the Respondents argue that conducting the Special Examination as provided by the Cabinet decision dated 24.10.2007 to recruit Development Officers to the SLPS Grade II Class II on a supernumerary basis was not in violation of the Fundamental Rights of the officers in SLPS.

On behalf of the Intervenient Respondents, it was further submitted that there were several issues with regard to the question paper in the Special Examination and therefore the Cabinet of Ministers had first reduced the pass mark to 30 by Cabinet decision dated 10.06.2009 and thereafter decided to recruit all Development Officers who fulfill the other requirement to the Post of Grade II Class II officer in SLPS by the impugned Cabinet decision dated 23.06.2010. It was further submitted on behalf of the Intervenient Respondents that both Cabinet decisions referred to above are policy decisions taken by the Cabinet of Ministers in resolving the promotional prospects of the Development Officers in the Planning Ministry.

At the time this case was taken up for argument, the court was unaware of the two applications that were pending before this court, where several parties have challenged the Decision of the Cabinet of Ministers arrived on 24.10.2007 with regard to the appointments made to Class II Grade II of the SLPS on supernumerary basis. However, after the arguments were concluded and the judgment was reserved, His Lordship the Chief Justice nominated this bench to hear the two cases which were pending before this Court for determination at that time. At that stage, this Court notified all parties, including the Petitioners, Respondents, and the Intervenient Parties in all three applications i.e., SC FR 460/2017, SC FR 236/2008, SC FR 237/2008, and with the consent of all parties, decided to conclude arguments in SC FR 236/2008 and SC FR 237/2008 before the delivery of the judgment in the instant case. 54th,55th, and 56th Respondents in SC FR 460/2017 were also represented at the argument of those two cases and the parties finally agreed for this Court to deliver a separate judgment in SC FR 460/2017 and to deliver a combined judgment in SC FR 236/2008 and SC FR 237/2008.

The argument in SC FR 236/2008 and SC FR 237/2008 had enlightened this Court, of the background to the Cabinet decision dated 24th October 2007, and the Respondents in those proceedings had also taken up the objection, "that the decision challenged in those applications' was a policy decision of the Cabinet of Ministers and therefore it was not amenable to the Fundamental Rights Jurisdiction of this Court.

The extent to which a Cabinet decision could be challenged before the Supreme Court was discussed in the case of ***Samastha Lanka Nidahas Grama Niladhari Sangamaya and Others V. D. Dissanayake, Secretary, Public Administration and Ministry of Home Affairs, and Others SC Appeal 158/2010*** SC minute 14.06.2013 as follows;

> "The first substantive question that has to be determined on appeal, in this case, is purely one of the *vires* and arises in the context of certain constitutional provisions which seek to distinguish between two categories of decisions that can be made by the executive arm of Government. The first of these are decisions relating to "the appointment, transfer, dismissal and disciplinary control" of public officers, which was vested in the Public Service Commission by Article 55 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka") as amended by the Seventeenth Amendment thereto, which was in force at the time of the pronouncement of the impugned judgment of the Court of Appeal. The second of these categories are decisions pertaining to policy, which in the context of the public service are exclusively vested in the Cabinet of Ministers by Article 55 (4) of the Constitution of Sri Lanka, as amended by the Seventeenth Amendment."

In the case of ***Jathika Sevaka Sangamaya V. Sri Lanka Hadabima Authority SC Appeal 15/2013*** Supreme Court minute 16.12.2015 this court further observed that;

> "As pointed out earlier under Articles 42 and 55 of the Constitution, the Cabinet of Ministers are performing executive functions under the Constitution and their decisions can be either policy decisions or administrative decisions or both. Accordingly, the decisions of the Cabinet of Ministers other than the policy decisions are amenable to judicial review."

Therefore, it is clear that every decision taken by the Cabinet of Ministers cannot be excluded from it being challenged under Article 126 of the Constitution unless there is proof that the decision challenged before the Court is a Policy decision of the Cabinet of Ministers.

As observed by this Court, the Cabinet decision challenged in SC FR 236/2008 and SC SF 237/2008. i.e., the Cabinet decision dated 24. 10.2007 and the impugned Cabinet decision in the instant case,

i.e., the decision dated 23.06.2010 both referred to the appointment of Development Officers to the SLPS Class II Grade II on a supernumerary basis based on a Special Examination held for the selection of those officers. However, we observe a significant difference between the two decisions for the reason that, the 1st Cabinet decision refers to a selection criterion based on the recommendations of the Committee of officials appointed by the Cabinet, to the effect,

a) A Special Examination be held at which their **suitability will be tested.**
b) The **successful candidates** be recruited to the SLPS on a supernumerary basis. (emphasis by me)

but the impugned cabinet decision recommends absorbing the balance candidates (who were not successful under the above criterion) who sat for the Special Examination, if they have fulfilled the other requirement, to be absorbed to Class II Grade II of SLPS on a supernumerary basis. In other words, it recommends absorbing those who had failed the Special Examination held under the 1st Cabinet decision to SLPS Class II Grade II on the supernumerary basis, whereas the 1st decision was specific to absorbing only those who were successful in the said examination.

The argument of the 54th to the 56th Respondents, that the two Cabinet decisions arrived subsequently, was to resolve the administrative lapses in conducting the Special Examination, is a clear indication that the impugned Cabinet decision was not a policy decision by the Cabinet of Ministers but was an administrative decision by the Cabinet of Ministers.

After analyzing the material placed before this Court in those cases, i.e., SC FR 236/2008 and SC FR 237/2008 this Court has now concluded, that the decision challenged in those cases, i.e., the decision by the Cabinet of Ministers taken on 24.10.2007 was a policy decision and therefore the said decision was not amenable to the Fundamental Rights Jurisdiction of this Court. It was further held in those

proceedings that, the Cabinet of Ministers by the Cabinet decision dated 24.10.2007 had resolved and decided the policy on the absorption of Development Officers to Class II Grade II of SLPS.

As already observed in those proceedings the Cabinet of Ministers when reaching the decision to absorb Development Officers to the SLPS Class II Grade II on a Supernumerary basis based on the results of the Special Examination held, had first appointed an officials committee comprising of several very senior public servants and had implemented the recommendations of the said committee, by way of the Cabinet decision dated 24.10.2007. However, the impugned Cabinet decision dated 23.06.2010 which is arbitrary in nature had cut across the policy already adopted by the decision dated 24.10.2007 and approved the appointment of Development Officers who were not successful and could not obtain the pass mark to become eligible to be absorbed to the SLPS Class II Grade II on supernumerary basis.

As further revealed before this Court, the Cabinet of Ministers themselves were not impressed with their own decision and put off the absorption of 146 candidates who were selected after an interview, based on the Cabinet decision dated 23.06.2010 and sought the view of the Minister of Public Administration and Home Affairs to implement the recommendations but no progress made for more than six years.

In the case of ***Public Services United Nurses Union V. Montague Jayawickrema 1988 1 SLR 229*** Wanasundara J had rejected a similar argument when the court observed that the Cabinet Decision to grant an Ad hoc increment to a group of public servants was in violation of the Fundermental Rights guaranteed under article 12(1) of the Constitution.

When considering the material discussed above, it is clear that the impugned Cabinet decision dated 23.06.2010 was an arbitrary decision that was contradictory to its own Cabinet decision dated

24.10.2007 by which the Government Policy on absorption of Development Officers to the SLPS was decided.

In the said circumstances, I am of the view that the Petitioners before this Court were successful in establishing that P-12 and P10B had violated their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

Therefore, I hold that the Fundamental Rights of the Petitioners enshrined under Article 12 (1) have been violated. Accordingly, I quash the Cabinet decision No 10/1317/404/046 dated 23.06.2010 produced marked P-12 and the subsequent decision of the Public Service Commission dated 07.11.2017 marked P-10B.

I make no order with regard to costs.

Application allowed.

Judge of the Supreme Court

Justice Murdu N. B. Fernando, PC

I agree,

Judge of the Supreme Court

Justice Yasantha Kodagoda, PC

I agree,

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution

SC /FR/ Application 236-237/2008

SC FR 236/2008

1. **C. Chethiyawardena,**
   No. 195/7, 2nd Lane, Egodawatte Road, Boralesgamuwa.
2. **Sanjaya Mudakige,**
   No.05, Wijesekera Road, Dehiwala.
3. **D. D. Mataraarachchi,**
   No. 255/1, Pelanwatte, Pannipitiya.
4. **Ajith Abeysekere,**
   Pashionwatte, Wellavilmulla, Kal-Eliya.
5. **Anjalika Gunasekera,**
   No. 19-J, Bandarawatte, Kadawatha.
6. **D.C.W. Hapugoda,**
   Thalwate Estate, Kundasale.
7. **L.V.N. Preethika Kumudini,**
   105 D, Millagahadeniya, Ankokkawala, Galle.
8. **S.G.Vidura Prassanna,**
   48/1, Paramulla Road, Matara.
9. **M. Gangadharan,**
   No. 9/16A, Fernando Gardens, Off Bhatiya Mawatha, Kalubovila, Dehiwala.
10. **M. Ramamurthi,**
    No. 33/3/1, Sangabo Mawatha, Hunupitiya, Wattala.
11. **S.H. Vijitha Kumara,**
    No. 52/8, Walawatte, Ibbagamuwa.

12. **R.M. Wijesinghe Banda,**
    No. 47/A, Kamburuadeniya, Hndessa.

13. **P.M.K. Hettiarachchi,**
    "Sri Kirula", Dampella Road, Kadduwa, Thelijjavila.

14. **Sir Lanka Planning Service Association,**
    9th Floor, "Sethsiripaya", Battaramulla.

Petitioners

Vs,

1. Ranil Wickramasinghe
   Minister of National Policies and Economic Affairs, "Miloda" (Old Times Building), 1st Floor, British Street, Colombo 01.

2. Gamini Jayawickrema Perera
   Minister of Buddha Sasana,
   Ministry of Buddha Sasana, No. 135, Sirimath Anagarika Dharmapala Mawatha, Colombo 07.
   And Minister of Sustainable Development and Wildlife Department of Wildlife Conservation, No. 811A, Jayanthipura, Battaramulla.

3. Nimal Siripala de. Silva
   Minister of Transport, No. 01, Dr. Wijewardena Mawatha, Colombo 10.

4. S.B. Dissanayake
   Minister of Social Empowerment and Welfare and Kandyan Heritage, 1st Floor, Second State, Sethsiripaya, Battaramulla.

5. W.D.J. Seneviratne
   Minister of Labour and Trade Union Relations and Sabaragamuwa Development. 2nd Floor, Labour Secretariat, Colombo 05.

6. A. Ibathul Rauff Hakeem
   Minister of City Planning and Water Supply, “Lakdiya Medura” 35, Pelawatta, Battaramulla.

7. Anura Piyadarshana Yapa
   Minister of Disaster Management, Vidyala Mawatha, Colombo 07.

8. Susil Premajayantha
   Minister of Technology, Technical Education and Employment, No. 408, Galle Road, Colombo 03.

9. Jhon Anthony Emmanuel Amarathunga
   Minister of Tourism Development and Christian Religious Affairs, 13th Floor, “Sethsiripaya” Stage II, Battaramulla.

10. Rajitha Senarathne
    Minister of Health, Nutrition and Indigenous Medicine 385, “Suwasiripaya” Ven. Wimalarathna Thero Mawatha, Colombo 10.

11. Thilak Marapana P.C.
    Minister of Foreign Affairs, Republic Building, Colombo 01.

12. Mahinda Samarasinghe
    Minister of Ports and Shipping, No. 19, Chaithiya Road, Colombo 01.

13. Vajira Abeywardena
    Minister of Home Affairs, Independence Square, Colombo 07.

14. S.B. Nawinna
    Minister of International Affairs, Wayamba Development and Cultural Affairs, 8th Floor, “Sethsiripaya”, Battaramulla.

15. Abdul Rishad Bathiudeen
    Minister of Industry and Commerce, No. 73/1, Galle Road, Colombo 03.

16. Achchige Patali Champika Ranawaka
    Minister of Mega Polis and Western Development, 3rd Floor, “Sethsiripaya” Battaramulla.

17. Mahinda Amaraweera
    Minister of Fisheries and Aquatic Resources Development and State Minister of Mahaweli Development, New Secretariat, Maligawatte, Colombo 10.

18. Navin Dissanayake
    Minister of Plantation Industries, 8th, 10th and 11th floors, “Sethsiripaya II’’ Battaramulla.

19. Ranjith Siyambalapitiya
    Minister of Power and Renewable Energy, No. 72, Ananda Coomaraswamy Mawatha, Colombo 07.

20. Duminda Dissanayake
    Minister of Agriculture, “Govijana Mandeeraya” 80/5, Rajamalwatte Lane, Battaramulla.

21. Thalatha Athukorala
    Minister of Justice, Superior Court Complex, Colombo 12.

22. Pelisge Harison.
    Minister of Rural Economy, 780, Maradana Road, Colombo 10.

23. Mohamed Hashim Mohamed Kabir
    Minister of Public Enterprise Development, 13th Floor, Western Tower, World Trade Center, Colombo 01.

24. Ranjith Madduma Bandara
    Minister of Public Administration and Management, Independence Square, Colombo 07.

25. Gayantha Karunathilake
    Minister of Parliamentary Reforms and Lands, No. 163, Kirulapana Mawatha, Polhengoda, Colombo 05.

26. Sajith Premadasa
    Minister of Housing and Construction, 2nd Floor, "Sethsiripaya" Battaramulla.

27. Arjuna Ranatunga
    Minister of Petroleum Resources Development, No. 80, Sri Earnest de Silva Mawatha, Colombo 07.

28. Thilak Janaka Marapana
    Minister of Development Assignments, Miloda (Old times Building) 5th Floor, Bristol Street, Colombo 01.

29. Udeiappan Palani Thigambaram
    Minister of Hill Country New Villages, Infrastructure and Community Development No. 45, St. Michael's Road, Colombo 03.

30. Chandrani Bandara
    Minister of Women and Child Affairs, 3rd Floor, Stage II, "Sethsiripaya" Battaramulla.

31. Thalatha Athukorala
    Minister of Foreign Employment, 12th Floor, Central Bank Building, Colombo 01.

32. Akila Viraj Kariyawasam
    Minister of Education, "Isurupaya" Pelawatte, Battaramulla.

33. Abdul Haleem Mohomed Hasheem
    Minister of Post, Postal Services and Muslim Affairs, 7th Floor, Postal Headquarters Building, 310, Dr, Wijewardena Mawatha, Colombo 10.

34. Chandima Weerakkodi
    Minister of Skills Development and Vocational Training, No. 354/2, Elvitigala Mawatha, Colombo 05.

35. Dayasiri Jayasekara
    Minister of Sports, No. 09, Gunawardena Mawatha, Colombo 07.

36. Sagala Gajendra Rathnayake
    Minister of Law and Oder Minister of Southern Development, No. 25, White Way Building, Sri Baron Jayathilaka Mawatha. Colombo 01.

37. Harin Fernando
    Minister of Telecommunication and Digital Infrastructure, 5th Lane, Colombo 03.

38. Mano Ganeshan
    Minister of National Dialogue, No. 40, Buthgamwa Road, Rajagiriya.

39. Daya Gamage
    Minister of Primary Industries, No. 19/6A, Hospital Terrance, Sunandarama Road, Kalubowila.

40. Gamini Vijith Vijayamuni Zoysa
    Minister of Irrigation and Water Resources Management, "Govijana Mandeeraya" 80/5, Rajamalwatte Lane, Battaramulla.

41. Faiszer Musthapha, PC
    Minister of Provincial Councils and Local Government, 330, Union Place, Colombo 02.

42. Malik Samarawickrama
    Minister of Development Strategies and International Trade, No. 76, Wester Tower, World Trade Center, Colombo 01.

43. Mangala Pinsiri Samaraweera
    Minister of Finance and Mass Media, The Secretariat, Colombo 01.

44. D.M. Swaminathan
    Minister of Rehabilitation and Resettlement, No. 302, Galle Road, Colombo 04.

45. Minister of Defence,
    No. 15/5, Baladaksha Mawatha, Colombo 03.

46. Minister of Mahaweli Development and Environment, No. 500, T.B. Jaya Mawatha, Colombo 10.

47. Minister of Environment, No. 82, Rajamalwatta Road, "Sampathpaya" Battaramulla.

48. Minster of National Integration and Reconciliation, No. 21, 3rd Floor, Standard Chartered Bank Building, Janadhipathi Mawatha, Colombo 01.

49. Dharmasena Dissanayake
    Chairman,

49A. Jagath Balapatabendi- Chiarman

50. A. Salam Abdul Waid, Member
50A. Indrani Sugthadasa, Member

51. Ms. D. Shirantha Wijeyathilaka, Member
51A. C.R.C. Ruberu, Member

52. Dr. Pradeep Ramanugam, Member
52A. A.I.M. Saleem, Member

53. Mrs. V. Jegarasasingham, Member
53A. Leelasena Liyanagama, Member

54. Santi Nihal Seneviratne, Member
54A. Dian Gomes, Member

55. S. Ranugge, Member
55A. Dilith Jayaweera, Member

56. D.C. Mendis, Member
56A. W.H. Piyadasa, Member

57. Sarath Jayathilake, Member
57A. Suntharam Arumallnayaham, Member

58. H.M.B. Seneviratne, Secretary
58A. M.A.S. Daya Senarath, Secretary

49A to 58A Respondents: All of Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.

59. M.I.M. Rafeek, Secretary to the Ministry of National Policies and Economic Affairs, "Miloda" (Old Times Building), 1st Floor, British Street, Colombo 01.
59A. Thanuja Fernando
Secretary to the Ministry of National Police Commission

60. Dr. R.H.S. Samarathunga,
Secretary, Treasury, Ministry of Finance, Colombo 01.
60A. Mr. Attygalle, Secretary, Treasury,
Ministry of Finance, Colombo 01.

61. Development Officers Association,
Level 15, Tower 5, Central Bank Building,
No. 30, Janadhipathi Mawatha,
Colombo 01.

62. Mr. W.M.N.J. Pushpakumara
Commissioner General of Examination, Department of Examination, Battaramulla.
62A. L.M.D. Dharmasena,
Commissioner General of Examination, Department of Examination, Battaramulla.

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

64. Mahinda Rajapaksa
Minster of Buddhasasana, Cultural and Religious Affairs, Minister of Urban Development and Housing, Minister of Economic Policies and Plan Implementation.

65. Nimal Siripala de Silva
    Minister of Labour, Ministry of Labour, Kirula Road, Colombo 05.

66. G.L. Peiris
    Minister of Foreign Affairs,

67. Dinesh Gunawardena
    Minister of Education, Ministry of Education, “Isurupaya” Battaramulla.

68. Dilum Amunugama
    Minister of Transport

69. Keheliya Rambukwella
    Minister of Health, Ministry of Health, 385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

70. Douglas Devananda
    Minister of Fisheries, Ministry of Fisheries, Maligawatte Road, Colombo 10.

71. Pavithra Devi Wanniarachchi
    Minister of Power

72. Bandula Gunawardena
    Minister of Trade, Ministry of Trade, No. 73/1, Galle Road, Colombo 03

73. C.B. Rathnayake
    Minister of Wildlife and Forest Conservation, Ministry of Wildlife and Forest Conservation, No. 1090, Sri Jayawardenapura Mawatha, Rajagiriya.

74. Janaka Bandara Tennakoon
    Minister of Public Services, Provincial Councils and Local Government, Ministry of Public Services, Provincial Councils and Local Government, Union Place, Colombo 02. No. 330, Dr. Colvin R. de. Silva Mawatha Colombo.

75. Dullas Alahapperuma
    Minister of Mass Media, Ministry of Mass Media, Elvitigala Mawatha Colombo 05.

76. Chamal Rajapakse
    Minister of Irrigation, Ministry of Irrigation, 11, Jawatta Road, Colombo 05.

77. Johnston Fernando
    Minister of Highways, Ministry of Highways, No. 216, Kobbekaduwa Mawatha, Kowatte, Battaramulla.

78. S.B. Dissanayake
    Minister of Industries, Ministry of Industries, 3, 73/1, Galle Road, Colombo 03.

79. Basil Rajapaksa
    Minister of Finance, Ministry of Finance, Lotus Road, Colombo.

80. Mahinda Amaraweera
    Minister of Environment, Ministry of Environment, “Sobadam Piyasa” No. 416/C/1, Robert Gunawardana Mawatha, Battaramulla.

81. S.M. Chandrasen
    Minister of Lands, Ministry of Lands, “Mahikatha Madura” Land Secretariat, No. 1200/6, Rajamalwatta Road, Battaramulla.

82. Mahindananda Aluthgamage
    Minister of Agriculture, Ministry of Agriculture, 80/5, “Govijana Mandiraya” Rajamalwatta Lane, Battaramulla.

83. Vasudeva Nanayakkara
    Minister of Water Supply, Ministry of Water Supply, Lakdiya Medura, 35, New Parliament Road, Sri Jayawardenapura Kotte.

84. Gamini Lokuge
    Minister of Energy, Ministry of Energy, No. 84, Sir Ernest de Silva Mawatha, Colombo 07.

85. Ramesh Pathirana
    Minister of Plantation, Ministry of Plantation, 11th Floor, Sethsiripaya, 2nd Stage, Battaramulla.

86. Prasanna Ranatunga
    Minister of Tourism, Ministry of Tourism, 2nd Floor, Asset Arcade (Pvt) Ltd, No. 51-E, York Street, Colombo 01.

87. Rohitha Abeygunawadhana,
    Minister of Ports and Shipping, Ministry of Ports and Shipping, 19,1 Chaithya Road, Colombo.

88. Namal Rahapaksa
    Minister of Youth and Sports Minister of Co-ordination, No. 09, Philip Gunawadhana Mawatha, Colombo 07.

89. Ali Sabry
    Minister of Justice, Ministry of Justice, Superior Courts Complex, Colombo 12.

90. Sarath Weerasekara
    Minister of Public Security,
    Ministry of Public Security, 14th Floor, "Suhurupaya" Battaramulla.

Respondents

SC FR 237/2008

1. **Dimuthu Pradeep Kumara Ranasinghe,**
   No. 40, Pepolgahadeniya, Yakkala.

2. **Godage Sumeda Chandrajith,**
   No. 361/1, Lewduwa Meetiyagoda.

3. **Edippuli Arachchige Verangi Manulika Abeykoon,**
   570, Narangodapaluwa, Batuwatta.

4. **Rajapakse Karunanayake Mudiyanselage Niranga Nalin Palipana,**
   No. 154/1, Weerangula, Yakkala.

5. **Piyadi Gamage Asanka Rohana de. Silva,**
   "Samaya", Haldummala.

6. **Kathrithanthrihewage Ajantha Ranjani Peiris,**
   No. 178, Pahan Maligaduwa Road, Galtude, Panadura.

7. **Yakgaha Hewage Nirmala Dhamayanthi Banduprema,**
   No. 17/6, Shalawa Road, Mirihana, Nugegoda.

8. **Weerasinghe Kankanamage Inoka Priyadarshanie,**
   No.18 A, Lady Evlyn De Soysa Road, Idama, Moratuwa.

9. **Witharanage Renuka Mala Malkanthi Perera,**
   No. 74, Gonagaha, Makawita, Ja ela.

10. **Samantha Senanayake,**
    No. 220/4B, Dimuthu Mawatha, Gampaha Road, Yakkala.

11. **Kiriwattuwage Dona Sumeda Priadashanie Perera,**
    No. 248/A, Botanic Watta, Weligoda, Kaluthara North.

12. **Kandambige Nishantha Pushpakumara,**
    Opposite School, Kithsiripura, Radawela, Matara.

13. **Sudath Kumara Jayasinghe,**
    No. 208/B/2. Alothiya Watta Road, 1st Lane, Walimilla, Bandaragama.

14. **Renuka Manju Sri Athurusinghe,**
    No. 235, Asgiriwalpola, Udugampola.

15. **Mapitiyage Kuloja Gamindi Peiris,**
    No. 657, Athurugiriya Road, Kottawa, Pannipitiya.

16. **Thalahitiye Withanage Shanika Iranthi,**
    No. 210, Ranala Road, Habarakada, Homagama.

17. **Dona Harshanee Ranawake Darmasiri Wijayawardhana,**
    Jayanthi, Yatawatura, Padukka.

18. **Kaluthunga Mudiyanselage Pushpanjalee Kumari Kulatunga,**
    Ihalagoda Watta, Kewitiyagala, Polgampala.

19. **Ranjith Gurusinghe,**
    No. 27/50, Bangalawatta, Marapola, Veyangoda.

Petitioners

VS,

1. Ratnasiri Wickramanayake
   Former Prime Minister and Minister of Internal Administration.

2. D.M. Dayaratne
   Former Minister of Plantation Industries.

3. Nimal Siripala De Silva
   Former Minister of Healthcare and Nutrition.

4. A.H.M. Fawzy
   Former Minister of Petroleum and Petroleum Resources.

5. Maithripala Sirisena
   Former Minister of Agricultural Development
   and Agrarian Services Development.

6. Susil Premajayantha
   Former Minister of Education.

7. Karu Jayasuriya
   Former Minister of Public Administration and Home Affairs.

8. Arumugam Tondaman
   Former Minister of Youth Empowerment and Scio-economic Development.

9. Dinesh Gunawardene
   Former Minister of Urban Development and Sacred Area Development.

10. Douglas Devananda
    Former Minister of Social Services and Social Welfare.
11. Ferial Ashraff
    Former Minister of Housing and Common Amenities.

12. P. Chandrasekeran
    Former Minister of Community Development
    and Social Inequity Eradication.

13. A.L.M. Athaulla
    Former Minister of Water Supply and Drainage.

14. Tissa Vitharana
    Former Minister of Science and Technology.

15. D.E.W. Gunasekera
    Former Minister of Constitutional Affairs and National Integration.

16. Abdul Risath Bathiyudeen
    Former Minister of Re-settlement and Disaster Relief Services.

17. P. Dayaratne
    Former Minister of Plan Implementation.

18. R.M. Dharmadasa Banda
    Former Minister of Supplementary Crops Development.

19. M.M. Mohamed
    Former Minister of Parliamentary Affairs.

20. G.L. Peiris
    Former Minister of Export Development and International Trade.

21. John Seneviratne
    Former Minister of Power and Energy.

22. Sumedha Jayasena
    Former Minister of Child Development and Women's Affairs.

23. Sarath Amunugama
    Former Minister of Enterprise Development
    and Investment Promotion.

24. Milroy Fernando
    Former Minister of Public Estate Management and Development.

25. Jeewan Kumarathunga
    Former Minister of Land and Land Development.

26. Pavithra Vanniarachchi
    Former Minister of Youth Affairs.

27. Anura Priyadharshana Yapa
    Former Minister of Mass Media and Information.

28. Tissa Karaliyadda
    Former Minister of Indigenous Medicine.

29. Athauda Seneviratne
    Former Minister of Labour Relations and Manpower.

30. Gamini Lokuge
    Former Minister of Sports and Public Recreation.

31. Bandula Gunawardene
    Former Minister of Trade, Marketing Development, Cooperatives and Consumer Development.

32. Mahinda Samarasinghe
    Former Minister of Disaster Management and Human Rights.

33. Rajitha Senaratne
    Former Minister of Construction and Engineering Services.

34. Mahinda Wijesekera
    Former Minister of Posts and Telecommunication.

35. Milinda Moragoda
    Former Minister of Tourism.

36. Keheliya Rambukwella
    Former Minister of Foreign Employment Promotion and Welfare.

37. Piyasena Gamage
    Former Minister of Vocational and Technical Training.

38. R.M.S.B. Navinne
    Former Minister of Rural Industries and Self-employment promotion.

39. Janaka Bandara Tennakoon
    Former Minister of Local Government and Provincial Council.

40. Felix Perera
    Former Minister of Fisheries and Aquatic Resources.

41. R.M.C.B. Rathnayake
    Former Minister of Livestock Development.

42. Rohitha Bogollagama
    Former Minister of Foreign Affairs.

43. Mahinda Yapa Abeywardene
    Former Minister of Cultural Affairs.

44. Wisva Warnapala
    Former Minister of Higher Education.

45. Chamal Rajapakse
    Former Minister of Irrigation and Water Management.

46. Kumara Welgama
    Former Minister of Industrial Development.

47. Dallas Alahapperuma
    Former Minister of Transport.

48. Amarasiri Dodangoda
Former Minister of Justice.

49. Champika Ranawake
Former Minister of Environment and Natural Resources.

50. P.R.T. Perera
Former Chairman Public Service Commission.

50A. Jagath Balapatabendi – Chairman

51. Dayasiri Fernando
Former Member Public Service Commission.

51A. Indrani Sugathadasa, Member
Public Service Commission.

52. W.P.S. Jayawardena
Former Member, Public Service Commission.

52A. C.R.C. Ruberu, Member
Public Service Commission.

53. Palitha Kumarasinghe P.C.
Former Member,
Public Service Commission.

53A. A.I.M. Saleem, Member
Public Service Commission.

54. M.S. Mookiah
Former Member, Public Service Commission.

54A. Leelasena Liyanagama
Member, Public Service Commission.

55. Mendis Rohandhira
Former Member, Public Service Commission.

55A. Dian Gomes
Member, Public Service Commission.

56. Bernard Soysa
Former Member, Public Service Commission.

56A. Dilith Jayaweera
Member, Public Service Commission.

57. Gunapala Wickremaratne
Former Member, Public Service Commission.

57A. W.H. Piyadasa
Member, Public Service Commission.

58. Sirimavo Atigala Wijeratne
Former Member, Public Service Commission.

58A. Suntharam Arumallnayaham,
Member, Public Service Commission.

59. H.D.L. Gunawardena
Former Secretary, Public Service Commission.

59A. M.A.B. Daya Senarath – Secretary
Public Service Commission,

All of No. 177, Nawala Road,
Narahenpita, Colombo 05.

60. Former Secretary,
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Now:
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Provincial Councils and Local Government,
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Mawatha, Colombo 02.

61. Former Secretary,
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The Secretariat, Colombo 01.
Now:
Secretary- Treasury, Ministry of Finance,
The Secretariat, Lotus Road, Colombo 01.

62. Attorney General,
    Attorney General's Department, Colombo 12.

63. Mahinda Rajapakse
    Minister of Buddhasasana, Cultural and Religious Affairs, Minister of Urban Development and Housing, Minister of Economic Policies and Plan Implementation.

64. Nimal Siripala de Silva
    Minister of Labour, Ministry of Labour, Kirula Road, Colombo 05.

65. Prof. G.L. Peiris
    Minister of Foreign Affairs.

66. Dinesh Gunawardena
    Minister of Education, Ministry of Education,
    "Isurupaya" Battaramulla - Pannipitiya Road,
    Battaramulla.

67. Dilum Amunugama
    Minister of Transport.

68. Keheliya Rambukwella
    Minister of Health, Ministry of Health, 385, Ven. Baddegama Wimalawansa Thero Mawatha, Colombo 10.

69. Douglas Devananda
    Minister of Fisheries, Ministry of Fisheries, Maligawatte Road, Colombo 10.

70. (Mrs.) Pavithra Devi Wanniarachchi
    Minister of Power.

71. Bandula Gunawardena
    Minister of Trade, Ministry of Trade, No. 73/1, Galle Road, Colombo 03.

72. C.B. Rathnayake
    Minister of Wildlife and Forest Conservation,
    Ministry of Wildlife and Forest Conservation,

No. 1090, Sri Jayawardenapura Mawatha, Rajagiriya.

73. Janaka Bandara Tennakoon
Minister of Public Services, Provincial Councils and Local Government, Ministry of Public Services, Provincial Councils and Local Government, Union Place, Colombo 02, 330 Dr. Colvin R De Silva Mawatha, Colombo.

74. Dullas Alahapperuma
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75. Chamal Rajapakse
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76. Johnston Fernando
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77. S.B. Dissanayake
Minister of Industries, Ministry of Industries,
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78. Basil Rajapakse
Minister of Finance, Ministry of Finance, Lotus Road, Colombo.

79. Mahinda Amaraweera
Minister of Environment, Ministry of Environment, “Sobadam Piyasa” No. 416/C/1, Robert Gunawardana Mawatha, Battaramulla.

80. S.M. Chandrasena
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81. Mahindananda Aluthgamage
Minister of Agriculture, Ministry of

Agriculture,
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82. Vasudewa Nanayakkara
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83. Gamini Lokuge
Minister of Energy, Ministry of Energy, No. 84, Sir Ernest de Silva Mawatha, Colombo 07.

84. Ramesh Pathirana
Minister of Plantation, Ministry of Plantation,
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85. Prasanna Ranatunga
Minister of Tourism, Ministry of Tourism, 2nd Floor, Asset Arcade (Pvt) Ltd., No. 51-E, York Street, Colombo 01.

86. Rohitha Abeygunawardhana,
Minister of Ports and Shipping, Ministry of Ports and Shipping, 19, 1 Chaithya Road, Colombo.

87. Namal Rajapakse
Minister of Youth and Sports, Minister of Development Co-ordination, No. 9, Philp Gunawardhana Mawatha,Colombo 07.

88. Ali Sabry
Minister of Justice, Ministry of Justice, Superior Courts Complex, Adhikarana Mawatha,Colombo 12.

89. Sarath Weerasekara
Minister of Public Security, Ministry of Public Security, 14th Floor, “Suhurupaya”, Battaramulla.

Respondents

Before: **Justice Vijith K. Malalgoda, PC**
Justice Murdu N. B. Fernando, PC
Justice Yasantha Kodagoda, PC

Counsel: Manohara de Silva, PC with Harithriya Kumarage and Sasiri Chandrasiri for the Petitioners in SC FR 236/2008 and SC FR 237/2008

Chamantha Weerakoon Unamboowa with Tersha Abeyratne for the 54th, 55th and 56th Intervenient Respondents in SC FR 460/2017

Sanjeewa Jayawardena, PC with Milhan Mohamed for the 61st Respondent in SC FR 236/2008

Shaheeda Barrie, DSG with Rajitha Perera, SSC for the Respondents other than the 54th to 56th Respondents in SC FR 460/2017 and 61st Respondent in SC FR 236/2008 in all three matters

Argued on : 01.04.2022, 17.05.2022

Judgment on : 01.03.2023

Vijith K. Malalgoda PC J

Out of the two Fundamental Rights Applications argued before us, in SC FR 236/2008 the Petitioners were the then President, Vice President, Secretary and Several Members of the Sri Lanka Planning Service Association and in SC FR 237/2008 the Petitioners were 19 successful candidates who got through the open competitive examination to be recruited to Class II Grade II of the Sri Lanka Planning Service (hereinafter referred to as SLPS).

Petitioners in both applications in common had challenged a decision of the Public Service Commission dated 28th May 2008, communicated to the Secretary Finance and Planning (P-10 and P-6 respectively) In addition to the above, guide lines attached to the above letter (P-11) was also challenged in SC FR 236/2008 and a Cabinet Decision (P-5) dated 24.10.2007 was challenged in SC FR 237.

Since the Petitioners in both applications had challenged the appointments made to Class II Grade II of the SLPS on supernumerary basis, based on the above documents, parties agreed to argue both matters together and to abide by one judgment.

As submitted by the Petitioners, SLPS was established by Government Gazette Extraordinary No. 345/40 of 19.04.1985 with effect from 01.01.1985. The service minute for the said service was amended a few times and the service minute that was relevant to the instant case was published in the Government Gazette Extraordinary 1134/5 dated 30th May 2000. According to the said service minute, SLPS is an all-Island service and its structure consists of Class II Grade II (recruitment Grade) Class II Grade I, and Class I officers. Recruitments to SLPS are made to Class II Grade II and it can only be made except as provided in the service minute consequent to the Relevant Competitive Examinations.

According to Clause 6.4, not more than 75% of the recruitment made to Class II Grade II of SLPS will be made on the results of an Open Competitive Examination conducted by the Commissioner of Examination, and Clause 6.5 provides for appointment not more than 25% of the vacancies in Class II Grade II be made by the results of a Limited Competitive Examination.

In addition to the above, Clause 9 of the service minute provided certain categories of officers to be absorbed into the SLPS at a different level. Clause 9.1 provides the absorption as follows;

9.1 Officers holding non-combined service posts of planning officer, Assistant Director, Deputy Director, Advisor, Additional Director, and Director and incomparable grades engaged in planning functions in Ministries where the Planning Service is effective will be absorbed into Class 1, Class II Grade I and Class II Grade II of the Planning Service in the following manner

9.1.1. Into Class I of the Planning Service will be absorbed officers in the categories referred to in paragraph 9.1 appointments on the salary scale Rs. 72,000-10x3600-108,000 per annum.

9.1.2. Into Class II Grade I of the Planning Service Will be absorbed officers in the categories referred to in paragraph 9.1. above who on the prescribed date hold appointments on the salary scale Rs. 48,000-4x1,800-7x2,400-72,000 per annum.

9.1.3. (i) Officer in categories referred to in paragraph 9.1 above who hold appointments on the salary scale Rs. 40,800-11x1,200- Rs. 54,000 per

annum. (Such officers will be allowed to retain the same salary scale as personal to them on absorption into the Planning Service).

(ii) Officers in the categories referred to in paragraph 9.1 above, who hold appointments on the salary scale Rs. 36,000-15x1,200-54,000 per annum (Such officers will rant lower in seniority to those officers who are absorbed into Class II Grade II under subparagraph 9 (1) above).

However, officers referred to in Appendix 'E' to the service minute including the Development officers are not entitled to the absorption referred to in Clause 9 above but are entitled to sit for the Limited Competitive Examination of the SLPS.

The 60th Respondent, Secretary to the Ministry of Plan Implementation by letter dated 23.02.2007 called for applications from officers who are eligible for absorption under Clause 9.1 of the service minute of the SLPS but, the heading of the said letter referred to as "Absorption of Development Officers attached to the Ministry of Plan Implementation to the Sri Lanka Planning Service."

Even though Clause 9.1 of the service minute had provided for the absorption of certain categories of officers into the SLPS as referred to above, the service minute had not provided for the absorption of the Development Officer as referred to in the above letter. Some of the Petitioners before this court had challenged the vires of the said decision before the Court of Appeal in CA Writ 329/2007 and the proceedings of the said application were terminated on certain undertakings given to courts by the Respondents. Proceeding before the Court of Appeal on 16.06.2007 reads thus;

> "Learned Senior State Counsel appearing for the 1st, 2nd and 4th Respondents informs the court that according to the instructions received from the Public Service Commission, the Commission will not make any appointments based on the document marked P-8 and decides to follow the procedure laid down in the service minute. In view of the said undertaking given by the learned Senior State Counsel, Counsel for the Petitioner states that no purpose would be served in proceeding with this application. Proceedings are therefore terminated."

However, a Cabinet Memorandum dated 14th August 2007 was submitted to the Cabinet of Ministers by the then Minister of Plan Implementation recommending that,

> "A special examination be conducted by SLIDA to the Development Officers who were eligible under the service minute of the SLPS to sit for the competitive examination, in

> order to assess their suitability for absorption of those officers into SLPS and to absorb those who were successful at the said examination to Class II Grade II of SLPS on the supernumerary basis,"

and the said memorandum was approved by the Cabinet of Ministers at the Cabinet meeting held on 15.08.2007.

Since the said Cabinet Decision was contrary to the undertaking given before the Court of Appeal, that, "steps would only be made under the service minute of SLPS to recruit Development Officers," the said Cabinet Decision was challenged before the Supreme Court under SC FR 317/2007 by some of the Petitioners'. The proceedings before the Supreme Court in the said application were also terminated since the learned Deputy Solicitor General who represented the Respondents before the court informed that "on the basis of the representation made, a note had been submitted to the Cabinet of Ministers to reconsider the decision made on the memorandum P-6. Thus, no firm decision has been made in regard to the special examination that is complained in the application."

As submitted by the Petitioners in 237/2008, while the above process to absorb Development Officers was pending, 75% of the remaining vacancies in the SLPS (i.e., 300 vacancies out of 400 vacancies) were to be filed under Clause 6.4 of the service minute by an Open Competitive Examination and the said examination was held on 05.05.2007. Applications were also called from those who were eligible under the service minute of SLPS, by Government Gazette 1513 dated 31.08.2007 to sit for the Limited Competitive Examination to fill the balance vacancies and the said examination was held in 08.03,2008.

Whilst the results of the said examination were pending, the Petitioners (in both applications) came to know of a decision by the Public Service Commission communicated to the Secretary to the Ministry of Finance and Plan implementation by letter dated 23rd May 2008 directing him to absorb the category of officers who are eligible to sit for the Limited Competitive Examination as at 01.01.2007 under the schedule to the service minute of SLPS, to the post of planning officer Class II Grade II on the supernumerary basis on the results of a special examination held by the Commissioner of Examination.

The letter and guidelines issued by the Public Service Commission were marked as P-6 to the Petition in SC FR 237/2008. As per the said guidelines;

> "All the officers referred to in Schedule "E" to the service minute of the SLPS who are eligible to sit for the Limited Competitive Examination as at 01.01.2007 were eligible to

sit for a paper on "plan implementation and assessment of projects" at an examination conducted by the Commissioner of Examination and obtain 40 marks, for the said candidate to be appointed to the Post of Planning Officer Class II Grade II on the supernumerary basis personal to the officer.

An officer who is appointed to the above post is only entitled to the salary of the Class II Grade II officer but not entitled to any other privileges or promotions and to obtain such privileges or promotions the officer should follow the service minute and sit for the Open or Limited Competitive Examination.

The number of posts available for the above scheme is 526."

The Petitioners in SC FR 237/2008 were able to find the Cabinet Decision with regard to the above direction by the Public Service Commission and produced marked P-5. As observed by this court the said decision has arrived at the meeting of the Cabinet of Ministers held on 24.10.2007 based on a note to Cabinet dated 23.10.2007 and the said decision reads thus;

"Cabinet having considered the report of the Committee of officials appointed by the Cabinet decision of 10.10.2007 decided to grant approval to the following promotional scheme recommended by the officials' committee, to be implemented through Public Service Commission."

a) These officers be granted the opportunity which they have been deprived of, i.e., to be recruited to Class II Grade II of the SLPS, and for this purpose, a special examination be held at which their suitability will be tested;
b) This opportunity be made available to officers who qualified to sit the Competitive Limited Examination referred to in the SLPS minute, as of January 1st, 2007; and,
c) The successful candidates be recruited to the SLPS on a supernumerary basis.

The Petitioners before this court, including the members of the Sri Lanka Planning Service Association and a group of candidates selected through the Competitive Examination to Class II Grade II of the SLPS who were dissatisfied and aggrieved by the said Cabinet Decision to which they had no access until the directive of the Public Service Commission in implementing the said decision was communicated by its letter dated 23rd May 2008, had invoked the jurisdiction of this court challenging the Cabinet Decision dated 10.10.2007 and the Directive issued by the Public Service Commission on 23rd May 2008, had further submitted that;

As per the service minute of the SLPS, 25% of the vacancies are to be filled by a Limited Competitive Examination which is open to the category of officers identified in Appendix 'E' to

the service minute, and an examination was held on 08.03.2007 to fill 100 vacancies which is 25% of the remaining vacancies and therefore conducting a special examination after conducting the Limited Competitive Examination had provided for,

i) An opportunity for those who failed the Limited Examination to enter the SLPS in violation of the service minute of the SLPS

ii) To conduct an examination in violation of the provisions of the service minute of the SLPS when the service minute had identified the areas under which the Competitive Examination should conduct, but the guidelines provided by the Public Service Commission had only provided to conduct the special examination with one subject on "Plan implementation and assessment of projects" in contravention of the provisions of the service minute.

iii) To create an imbalance in the service by allowing 526 Class II Grade II officers to be recruited to the SLPS when in fact only 100 vacancies were available for those who come within Appendix 'E' of the service minute and a Competitive Examination had already being conducted to fill those 100 vacancies.

iv) To create an excess of Class II Grade II officers when the cadre for Class II Grade II is only 553 officers island-wide.

v) An opportunity that would result in a parallel group of officers outside the approved cadre carrying out the same functions as the officers holding substantive cadre positions, which will have an adverse impact on the functioning of SLPS.

and argued that it would violate and continue to violate the Fundamental Rights of the Petitioners guaranteed under Article 12 (1) of the Constitution.

Petitioners in both applications had moved for interim relief to suspend the implementation of the Cabinet Decision/ directive by the Public Service Commission pending the applications before this court but when both matters were supported for leave to proceed on 02.09.2008, leave to proceed for alleged violation of the Fundamental Rights guaranteed under Article 12 (1) was granted by this court without granting any interim relief as prayed for.

On behalf of the Respondents, the 17th and 50th Respondents in SC FR 237/2008, the Minister of Plan Implementation and the Chairman Public Service Commission respectively had submitted the following before this Court.

a) Post of Project Officer was created in the year 1996 with a Cabinet approval granted on 20th November 1996 in order to recruit unemployed graduates. In the year 1997, and in

1998, the Post of Development Assistant was created and two batches were recruited under the Graduate Scheme Officers.

b) The designation of the Development Assistant was changed to Development Officer in the year 2000 on a Cabinet Decision that was taken based on a Cabinet Memorandum dated 15.09.2000.

c) Subsequent to the said decision, a scheme of recruitment was also approved for the Post of Development Officer and in the said Scheme of recruitment, Efficiency Bar and Promotional aspects had been identified under Clause 6 and under note (iii) to the said clause, promotional aspects had been referred to as follows;

> iii. වසර 05 ක සතුටුදායක සේවා කාලයකින් පසුව ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II/II තනතුරු සඳහා ඉල්ලීම් කිරීමට හැකිවන පරිදි කටයුතු කරනු ලැබේ

d) In the meantime, the minute on the Sri Lanka Planning Service was approved and published in the Government Gazette Extraordinary 1134/5 dated 30.05.2000, and Clause 6.5.1 of the said minute had provided for the appointment of not more than 25% of the vacancies in Class II Grade II of SLPS by way of a Limited Competitive Examination conducted among the officers identified in Appendix 'E' to the minute and as already noted in this judgment, Post of Development Officer is included to Appendix 'E'

e) Even though the service minute for the SLPS had provided for the Limited Competitive Examination as referred to above, the said examination was not conducted for several years and the Development Officers who completed 05 years of service were agitating for their promotions by the year 2007

f) The secretary to the Ministry of Plan Implementation in consultation with some authorities decide to absorb Development Officers who had completed 05 years satisfactory service to SLPS Class II Grade II considering the provisions in the scheme of recruitment of the Development Officers (P-7)

g) The said decision was challenged before the Court of Appeal in CA 329/2007 and in the meantime Secretary to the Ministry of Plan Implementation wrote to the Public Service Commission seeking approval for the absorption 349 Development officers to Class II Grade II of SLPS

h) However, by letter dated 4th June 2007, the Public Service Commission refused to consent the above request and also informed its decision to the Court of Appeal

i) A Cabinet Memorandum titled "strengthening the Sri Lanka Planning Service with special emphasis to plan implementation" dated 14th August 2007 was submitted to the Cabinet by the 17th Respondent

j) In the said Cabinet Memorandum, it was recommended that,

   a) a special examination be conducted (by the Sri Lanka Institute of Development Administration) for these officers to assess their suitability for absorption;

   b) the examination focuses primarily on an assessment of applying knowledge relating to field-level experience in planning and plan implementation.

   c) those who are successful at the examination be absorbed into supernumerary Class II Grade II posts in the SLPS with effect from a prospective date, provided they have completed five years of continuous active service, been confirmed in the post, and have passed the first Efficiency Bar examination specified in the scheme of recruitment;

   d) those who are successful at the examination but have not passed the first Efficiency Bar examination at that time, but complete that examination subsequently, be absorbed as set out above, with effect from a prospective date after they pass the First Efficiency Bar Examination;

   e) such number of supernumerary posts as are equivalent to the number of successful candidates be specially created at Class II Grade II level to enable these appointments to be made and that simultaneously the posts currently held by those officers are suppressed;

k) The Cabinet of Ministers had approved the said recommendation and the said decision was communicated to the Public Service Commission in order to grant relief as proposed in the Cabinet Memorandum

l) By letter dated 28th September 2007 the Public Service Commission had voiced its disagreement to the implementation of the said Cabinet Decision

m) On 10th October 2007 the Cabinet of Ministers rescinded its earlier decision and appointed an official committee comprised of the Secretary to the Ministry of Finance, Secretary to the Ministry of Plan Implementation, Secretary to the Ministry of Urban Development, Director General Management Services, Director General Department of Establishment and Director General (Administration) Ministry of Finance and Planning to formulate a common promotional scheme and the report of the said committee recommending;

a) that these officers be granted the opportunity which they have been deprived of, i.e., to be recruited to Class II Grade II of the SLPS, and that, for this purpose, a special examination be held at which their suitability will be tested.

b) that this opportunity is made available to officers who qualified to sit the Limited Competitive Examination referred to in SLPS minute as of January 1, 2007.

c) that the successful candidates be recruited to the SLPS on a supernumerary basis.

was submitted to the cabinet on 23.10. 2007 along with a note to Cabinet by the 17th Respondent.

n) The said note to Cabinet and the recommendation of the official committee, were once again considered by the Cabinet of Ministers on 24.10.2007 and approved the said recommendations (P-5) and referred to the Public Service Commission for its implementation.

o) Public Service Commission having considered the said decision, had issued necessary instructions to the Secretary to the Ministry of Finance and Plan Implementation to implement the said Cabinet Decision (P-10 and P-5) along with guidelines from the Public Service Commission (P-11 and P-6) which is challenged before this court

p) The Public Service Commission, has emphasized the fact that appointments to the Public Service are vested with the Public Service Commission, had taken up the position that it is for the Cabinet of Ministers to decide the policy behind recruitment to the Public Service and therefore its decision to implement the Cabinet Decision dated 24.10.2007 was not in violation of Article 55 (1) of the Constitution.

As further submitted by the Respondents, Article 55(4) of the Constitution which reads as, "subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to the public officers" had provided for the Cabinet of Ministers to decide the polity relating to public officers.

However, with regard to the Cabinet Decision dated 24.10.2007 which was carried out by the Public Service Commission by its letter dated 28th May 2008 the Petitioners argued that, in the absence of an amendment to the service minute the Cabinet of Ministers cannot take a policy decision contrary to the provisions in a service minute, that has been properly adopted and in force at a given time.

In this regard the Petitioners relied on the observation of Prasanna Jayawardena J in the case of ***K.W.S.P. Jayawardena V. Gotabhaya Jayarathne and Others SC FR 338/2012*** SC minute dated 30.01.2018 to the effect that "…… the Cabinet of Ministers would be expected to act in terms of the existing service minute marked P-2 other than in instances where a lacuna in P-2 is detected that and the Cabinet of Ministers act specifically for the purposes of addressing that lacuna…."

However, it is observed, that the said observation was made by His Lordship in obiter, since His Lordship had made the following observation prior to his conclusion referred to above.

> "Therefore, the aforesaid question of whether the Public Service Commission and the Ministry of Education are entitled to implement the aforesaid proposal and act outside the scheme set out in the service minute marked 'P-2' on the basis of giving effect to a 'policy decision' taken by the Cabinet of Ministers, does not arise for consideration."

Whilst referring to Article 55 (1) of the Constitution his Lordship had further observed in the said Judgment that;

> "Authorize the Cabinet of Ministers to direct that a Service Minute be amended or scrapped altogether and replace with another or <u>to direct that a specific procedure be adopted to meet the needs of specific circumstances, which are outside the compass of a service minute or are not met by the provisions of a Service Minute</u>. In ***Hettiarachchi V. Senevirathne [1994 3 SLR 290]*** Fernando J in a very brief judgment, expressed the view that the Cabinet of Ministers is not necessarily bound to act in terms of Service Minutes such as "P2" (emphasis added)

Petitioners further relied on the judgment in ***Public Services United Nurses Union V. Montague Jayawickrema 1988 1 SLR 229*** and argued that the Cabinet Decision granting an *ad hoc* promotion to a limited class of officers violates the equality provisions contained in Article 12 of the Constitution.

Since a Cabinet Decision to grant an addition salary increment to a class of officers was declared as violation of the Fundamental Rights of the Petitioners in the said case it is my duty to consider the relevancy of the said Judgment to the instant case.

In the said case a proposal was made to the Cabinet of Ministers to pay a group of non-striking workers;

a) Two increments to all nursing personal who worked during the full period of the strike

b) One increment to those nursing personal who reported for duty at various stages before 16.04.1986

The said proposal was approval by the Cabinet of Ministers but was challenged before the Supreme Court.

When considering the matter before the Supreme Court, Wanasundera J whilst referring to the decision by Sharvananda CJ in the case of ***Abeywickrema V. Pathirana (1986) 1 Sri LR 120*** had observed the following,

> "Although one cannot altogether rule out a few matters in which, *ad ho*c determinations may be made by the Cabinet, it is however essential, as Sharvananda, C.J, states, that "provisions as to salary increments, leave, gratuity, pension and of super annuity, promotion and every termination of employment and removal from service" should be in the form of rules "which are general in operation though they may be applied to a particular class of public officers." Further, when existing general rules are sought to be altered, this too must be done in the same manner and following the identical procedure as for their formulation, namely, by enacting an amending rule. Could one say that this procedure has been followed in the present case?
>
> When the proposal for the payment of the increments came up for consideration, two Ministers- the Minister of Finance and the Minister of Public Administration (the two Ministers most connected with this subject)- were against it. Their views are informative. The Minister of Public Administration observed:
>
> i) While some recognition may be called for, for reporting for duty and doing their normal quote of work, it would not be justifiable to pay extra increments with its continuing cumulative benefit.
> ii) An ex-gratia payment of an extra day's wage to each, in respect of each such day could be more "appropriate."
>
> The Minister of Finance was of the view that the proposal was wrong in principle. He stated;
>
> "The payment of additional increments, as proposed would set a precedent which would have to be followed in future by all Government Departments and Corporations. The payment of increments would also involve additional remuneration to the officers concerned for many years until they reach the *maxima* of their salary scales. I would suggest that instead of paying additional increments, these nurses should be paid a once-

> and-for-all honorarium. The quantum of the honorarium should be determined in consultation with the Ministry of Public Administration, and the honorarium should be paid from savings in the votes of the Ministry of Health."
>
> These perceptive comments point to the basic objections that lie in the way of such a proposal. When Article 55 of the Constitution vests authority over public affairs in the Cabinet and makes it mandatory for the Cabinet to formulate schemes of recruitment, and codes of conduct for public officers, the principles to be followed in making promotions and transfers etc., The Constitution contemplates fair, and uniform provisions in the nature of general rules and regulations and not an action that is arbitrary or *ad hoc* or savoring of bias discrimination."

As observed by this court the basis for the above decision was the arbitrary nature, the Cabinet had decided to grant an *ad hoc* increment to a group of public servants when the proposal was objected to by the most important Ministers, the Minister of Finance and Minister of Public Administration.

However, the circumstance under which the Cabinet of Ministers reached a decision to conduct the special examination for those officers who are qualified to sit for the Limited Competitive Examination and to make the appointments to those who got through the special examination on a supernumerary basis was different to the decision referred to in the said case. In this regard, the court is further mindful of Article 55 (4) of the Constitution (the text that was operative at the time the Cabinet of Ministers took the decision) which I have already referred to in this judgment.

As already referred to in this judgment, the Public Service Commission had initially turned down the recommendation to recruit the Development Officers to the SLPS Class II Grade II by the Secretary to the Ministry of Plan Implementation and once again voiced its disagreement with the Cabinet of Ministers when the Cabinet of Ministers approved a Cabinet Paper to recruit Development Officers to Class II Grade II of SLPS based on the results of a special examination on supernumerary basis. The Cabinet of Ministers considered the matter further on 10th October 2007 and appointed an "official committee," comprising three Ministry Secretaries and the Director General of Management Services to reconsider the recommendation already before the Cabinet and thereafter gave the approval to the recommendations made by the official committee. In these circumstances, it is clear that the decision of the Cabinet of Ministers reached on 24.10.2007 was a well-considered decision by the Cabinet of Ministers and the said decision comes well within Sub-Article 4 to Article 55 of the Constitution. Therefore, the policy

on the absorption of Development officers to Class II Grade II of SLPS was resolved by the Cabinet Decision dated 24.10.2007. (P-10)

In the case of ***Samastha Lanka Nidahas Grama Niladhari Sangamaya and Others V. D. Dissanayake, Secretary, Public Administration and Ministry of Home Affairs, and Others SC Appeal 158/2010*** SC minute 14.06.2013 this court observed;

> "The first substantive question that has to be determined on appeal, in this case, is purely one of the *vires* and arises in the context of certain constitutional provisions which seek to distinguish between two categories of decisions that can be made by the executive arm of Government. The first of these are decisions relating to "the appointment, transfer, dismissal and disciplinary control" of public officers, which was vested in the Public Service Commission by Article 55 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka") as amended by the Seventeenth Amendment thereto, which was in force at the time of the pronouncement of the impugned judgment of the Court of Appeal the second of these categories are decisions pertaining to policy, which in the context of the public service are exclusively vested in the Cabinet of Ministers by Article 55 (4) of the Constitution of Sri Lanka, as amended by the Seventeenth Amendment."

In the case of ***Jathika Sevaka Sangamaya V. Sri Lanka Hadabima Authority SC Appeal 15/2013*** Supreme Court minute 16.12.2015 this court further observed that;

> "As pointed out earlier under Article 42 and 55 of the Constitution, the Cabinet of Ministers are performing executive functions under the Constitution and their decisions can be either policy decisions or administrative decisions or both. Accordingly, the decisions of the Cabinet of Ministers other than the policy decisions are amenable to judicial review."

In ***Deawoo Engineering and Construction Co. Ltd V. Amarasekera (2006) 2 Sri LR 232*** it was observed that;

> "Equally, the court is ill equipped to pronounce that the decision of the cabinet is Arbitrary, illegal or unreasonable unless there is concrete evidence to establish that the cabinet in taking such a decision has violated and acted contrary to the laws of the land."

When considering the material that has already discussed in my judgment and the decisions referred to above, I see no merit in the two applications considered by me in this judgment. The

Petitioners in both applications have failed to establish the violation of their Fundamental Rights guaranteed under Article 12 (1) of the Constitution.

Both Applications are accordingly dismissed. I make no order with regard to costs.

Applications are dismissed.

Judge of the Supreme Court

Justice Murdu N. B. Fernando, PC

I agree,

Judge of the Supreme Court

Justice Ysantha Kodagoda, PC

I agree,

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal under the Provisions Article 128 (2) of the Constitution of Democratic Socialist Republic of Sri Lanka

D.M.Karunarathne,

Acting Deputy Commissioner of Labour,

Legal Section,

Colombo 05.

Complainant

SC Appeal 114/2021

SC. Special L.A. No. 292/2019

CA (PHC) Application No. 25/2015

Provincial H.C. of North Western Province sitting in Chilaw

Case No. HCRA 3/2015

MC Chilaw Case No. 59666

Vs,

Bhuwelka Steel Industries (Sri Lanka) Ltd.

No. 65/2, Sir Chittampalan A. Gardiner Mawatha,

Colombo 02.

Presently at,

No. 5/5, -10, East Tower,

5th Floor, WTC, Echelon Square, Colombo 01.

Respondent

And Between

Bhuwelka Steel Industries (Sri Lanka) Ltd.

No. 65/2, Sir Chittampalan A. Gardiner Mawatha,

Colombo 02.

Presently at,

No. 5/5, -10, East Tower,

5th Floor, WTC, Echelon Square, Colombo 01.

Respondent -Petitioner

Vs.

D.M.Karunarathne,

Acting Deputy Commissioner of Labour,

Legal Section,

Colombo 05.

Complainant-Respondent

And Between

Bhuwelka Steel Industries (Sri Lanka) Ltd.

No. 65/2, Sir Chittampalan A. Gardiner Mawatha,

Colombo 02.

Presently at,

No. 5/5, -10, East Tower,

5th Floor, WTC, Echelon Square, Colombo 01.

Respondent -Petitioner-Appellant

Vs.

D.M.Karunarathne,

Acting Deputy Commissioner of Labour,

Legal Section,

Colombo 05.

Complainant-Respondent-Respondent

And now between

Yapa Appuhamilage Mithila Madavi Yapa

Acting Deputy Commissioner of Labour,

Legal Section,

Colombo 05.

Complainant-Respondent-Respondent-Appellant

Vs,

Bhuwelka Steel Industries (Sri Lanka) Ltd.

No. 65/2, Sir Chittampalan A. Gardiner Mawatha,

Colombo 02.

Presently at,

No. 5/5, -10, East Tower,

5th Floor, WTC, Echelon Square, Colombo 01.

Respondent -Petitioner-Appellant-Respondent

Before: **Hon. Vijith K. Malalgoda, PC J**
Hon. S. Thurairaja, PC J
Hon. Janak de Silva, J

Counsel: N. Wigneshwaran, DSG, for the Complainant-Respondent-Respondent-Appellant.

Dr. Sunil Coorey for the Respondent-Petitioner-Appellant-Respondent.

Argued on: 09.11.2022

Decided on: 01.03.2023

Vijith K. Malalgoda PC J

The Complainant – Respondent – Respondent – Appellant (hereinafter referred to as "the Appellant") instituted proceedings by filing a Certificate under Section 3 (D) (2) read with Section 53 and 63 of the Wages Board Ordinance No. 27 of 1941, as amended (hereinafter referred to as the Ordinance) before the Magistrate's Court of Chilaw, against the Respondent – Petitioner – Appellant – Respondent (hereinafter referred to as "the Respondent") in order to recover a sum of Rs. 300,000.51, as unpaid salaries of two workmen for the period from 01/06/2009 to 31/08/2011. After an inquiry, by permitting

the Respondent to file objections as well as written submissions the learned Magistrate delivered the Order dated 18/12/2004 directing to recover the said amount from the Respondent as a fine.

Being aggrieved by the said Order, the Respondent made a revision application before the High Court of North Western Province, holden at Chilaw. The learned High Court Judge delivered his order dated 11.03.2015 refusing to issue Notices on the Respondent and affirming the order of the learned Magistrate of Chilaw.

The Respondent appealed against the said order to the Court of Appeal seeking to set aside the said High Court Order. In this particular application made to the Court of Appeal, the main argument of the Appellant was that the certificate filed by the Respondent is not a valid certificate within the meaning of the Section 3D (2) of the Ordinance, as it does not contain necessary details of the workmen and does not identify the type of work done by the workmen which is an imperative requirement of the law. Based on this argument and upon the perusal of the certificate filed in terms of Section 3D (2) of the Ordinance, the Court of Appeal held that the alleged certificate which is in the appeal brief at page 463 does not provide particulars as required under the Ordinance. Accordingly, the court observed that the said certificate cannot be considered as a certificate valid in law. Thus, the court allowed the appeal and set aside the Order of the learned High Court Judge and the Order of the learned Magistrate.

Being aggrieve by the said Judgment of the Court of Appeal, the Appellant made this application to the Supreme Court on 02/08/2019, seeking special leave from this Court.

When this matter was supported on 15/12/2021 for granting of special leave, this Court was inclined to grant Special Leave on the questions of law appeared in Paragraph 13 (a), (b) and (f) of the Petition dated 02/08/2019, which states as follows:

(a) Has the Court of Appeal erred in law when referring to a Certificate at page 7 of the Judgment, filed under Section3D (2) of the Wages Boards Ordinance in another case bearing No. 49888 in the Magistrate's Court of Chilaw, to the facts of this case where the certificate was filed in case No. 59666 in Magistrate's Court of Chilaw?

(b) Has the Court of Appeal failed to consider and/or completely overlooked that the certificate and the Notice filed in terms of Section 3D (2) and 46 (2) of the Wages Boards Ordinance in the Magistrates Court bearing No. 59666 in the Appeal brief at pages 54, 55, 56, 36, 37 and 38 which set out the particulars as required by law?

(f) Has the Court of Appeal failed to consider and/or completely overlooked the fact that the Respondent never raised any objection before the learned Magistrate or the Honourable High Court Judge that the certificate contains no particulars/ or insufficient particulars of the sum claimed allegedly due?

As observed by this Court, the Court of Appeal Judgement was solely based on the Certificate filed against the Respondent. In their order the Court of Appeal held;

"The Certificate filed in terms of Section 3D (2) in the appeal brief at page 463 does not give particulars as required, constitutes sufficient reason to prevent the execution of the certificate. Therefore, the said certificate cannot be considered as a certificate valid in law" (Volume 1, Page 95-97).

However, in the present case, the main argument of the Appellant is that, although the Court of Appeal relied on the certificate at Page 463 of the brief, the said certificate is in respect of another case which is No. 49888 filed in Magistrate's Court of Chilaw. The learned Counsel for the Appellant argued that this is not the correct certificate, since the correct certificates are at pages 36, 37 and 38 as well as 54, 55 and 56 of the brief. On perusal of those documents filed relating to the Magistrate's Court of Chilaw Case No. 59666, which is the number allocated to the main case, it is revealed that the correct documents have been filed accordingly and it provides all the necessary details including the number of employees as well as the individual amounts due and the basis therefor.

It is clear that, the learned Judges of the Court of Appeal has arrived at its decision by oversight. Therefore, it can be concluded that the certificate referred to in the Court of Appeal Judgment at page 7 does not relate to the present case, as it was in another case bearing No 49888 in the Magistrate's Court of Chilaw. It is also observed that the learned Judges in the Court of Appeal has failed to consider the correct Certificate and the Notice filed in terms of Section 3D (2) and 46 (2) of the Wages Board Ordinance in the Magistrate's Court Case bearing No. 59666 which is available in the Appeal brief which set out the particulars as required by law.

On the other hand, when scrutinizing the issues raised before the lower Courts, it is also revealed that the Respondent did not even raise the question of inadequacy of details in the certificate before the Magistrate's Courts or even before the High Court. This is because the main objection of the Respondent was totally based on the non-existence of a Wages Board for the steel industry. It is clear that this question on the necessary details of the said certificate was raised for the first time before

the Court of Appeal and the learned Judges in the Court of Appeal have overlooked the fact that the Respondent never raised the said objection before the Magistrate's Court or the High Court.

I therefore answer all three questions of law raised in the instant case in the affirmative. For the reasons given in this Judgment we allow the appeal and set aside the Order made by the learned Judges of the Court of Appeal. We affirm the Order made by the learned Magistrate and the learned Judge of the High Court of the North Western Province holden in Chilaw.

Appeal allowed.

Judge of the Supreme Court

Justice S. Thurairaja, PC

I agree,

Judge of the Supreme Court

Justice Janak de Silva,

I agree,

Judge of the Supreme Court

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

In the matter of a Rule in terms of Section 42 (2) of the Judicature Act, No 2 of 1978

Dr. Lakshman Lucian de Silva Weerasena
No. 372, Galle Road, Colombo 03.

Complainant

SC Rule 14/2000

Vs,

1. Jayantha Attanayake
   Attorney at Law
2. Mrs. Ratnamalie Maitipe Attanayake
   Attorney at Law

Both of
No. 65, Stork Place, Colombo 10

Respondent

Before: **Hon. Vijith K. Malalgoda, PC J**
Hon. Murdu N.B. Fernando, PC J
Hon. S. Thurairaja, PC J

Counsel: Sumedha Mahawanniarachchi with Ms. Kaumadi Galagedara instructed by A.C. Latheef for the 1st Respondent.

Rohan Sahabandu, PC with Ms. Hasitha Amarasinghe for the BASL.

Ms. Viveka Siriwardena de Silva, DSG for the Hon. Attorney General.

Inquiry on: 02.05.2012, 12.06.2012, 04.09.2012, 16.01.2013, 22.07.2014, 29.09.2014, 10.12.2014, 20.06.2017, 02.08.2019, 07.11.2019, 27.01.2020, 28.01.2020, 31.03.2022, 05.05.2022

Decided on: **10.03.2023**

Vijith K. Malalgoda PC J

The Complainant Dr. Lakshman Lucian de Silva Weerasena a Medical Practitioner by profession had complained to the Registrar of the Supreme Court by way of an affidavit dated 24th February 1999 against two Attorneys at Law namely Jayantha Attanayake and Ratnamalie Maitipe Attanayake regarding a series of transactions, that had taken place between 05.10.1992 and 01.08.1996 with regard to a property situated at No 90, Lauries Road, Colombo 04.

The inquiry into the said complaint was commenced before the Supreme Court after issuing the rule for the alleged misconduct specified in paragraphs (a)- (h) against both Attorneys at Law on 16.01.2001. An amended rule dated 17.09.2001 was served on the two Respondents on 18.10.2001. Of the misconduct alleged against the two Respondents, misconduct specified in paragraphs (a) -(e) and (h) relates to the 2nd Respondent, and paragraphs (a), (f), and (g) relate to the misconduct alleged against the 1st Respondent.

The 2nd Respondent passed away during the pendency of the proceedings before this Court and the inquiry against the 1st Respondent continued until its conclusion. Since the inquiry against the 2nd Respondent did not continue after the death of the said Respondent was reported, (a copy of her death certificate was tendered before the Court by the 1st Respondent who is also the husband of the 2nd Respondent) this Court will not consider the material led against the 2nd Respondent unless the said evidence is linked to the conduct of the 1st Respondent.

The allegations of misconduct under which the inquiry proceeded against the 1st Respondent are as follows;

a) You the 1st and 2nd Respondents above named, being Attorneys at Law, did conspire to fraudulently draw, attest and authenticate or cause the drawing, attestation, and authentication of the Deeds bearing Nos. 705,706,707,726 and 2428 in respect of the property described in the schedules to the said deeds with the intention of depriving the lawful heirs of the Estate of the late Agnes Georgiana Fonseka, the owner of the said property who died intestate.

f) You the 1st Respondent above named being an Attorney at Law, knowingly was a party to a fraudulent Deed of Transfer bearing No. 726 attested by your wife, the 2nd Respondent above named, by which deed Ulpagoda Pathira Arachchige Dona Gunaseeli Karunanayake purportedly

sought to unlawfully transfer the title to the property described in the schedule to the said deed to you the 1st Respondent above named, being the property in respect of which the Deed of Declaration No. 706 fraudulently drawn, attested and authenticated by the 2nd Respondent above named.

g) You the 1st Respondent above named being an Attorney at Law, fraudulently caused Deed bearing No. 2428 to be drawn, attested, and authenticated by Mervin Samaraweera, Notary Public in favour of Niroshan Company (Pvt) Limited for consideration in a sum of Rs. 225,000/=, by which deed you the 1st Respondent above named purportedly sought to unlawfully transfer the property purportedly transferred to you by the Deed of Transfer No. 726 fraudulently drawn, attested, and authenticated by your wife, the 2nd Respondent above named.

Based on the above misconduct it was alleged that the 1st Respondent had committed;

a) Deceit and/or malpractice within the ambit of section 42 (2) of the Judicature Act No 2 of 1978 which renders, unfit to remain as Attorney at Law
b) Acted in breach of Rules 60 and 61 of the Supreme Court (Conduct and Etiquette for Attorneys at Law) Rules 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka and thereby conducted in a manner which would be reasonably be regarded as disgraceful and dishonorable by Attorney at Law of good repute and competence, and which renders, unfit to remain as Attorney at Law.

An opportunity was given to both the Respondents including the deceased 2nd Respondent to show cause why they should not be suspended from practice or removed from the office of Attorney at Law under section 42 (3) of the Judicature Act No 2 of 1978 and the Respondents availed themselves of the opportunity given to show cause and filed an affidavit on their behalf.

As observed by me, the inquiry into the rule issued against the 1st Respondent (and the 2nd Respondent) was not taken up since two actions were pending before the District Court of Mount Lavinia to set aside several deeds attested by the 2nd Respondent.

After the lapse of several years, on 27.04.2011 the rule dated 17.09.2001 was read out to the Respondents and an opportunity was once again given to the Respondents to show cause as to why they should not be suspended from practice or removed from the office of Attorney at Law under the provisions of the Judicature Act No 2 of 1978.

The Rule was subsequently taken up before this Court on 02.05.2012 and the inquiry proceeded before this Court for several dates.

The Registrar of the Supreme Court Duminda Prabath Mudunkotuwa and the Complainant Dr. Lakshman Lucian de Silva Weerasena were summoned to give evidence at the inquiry in order to establish the allegation against the Respondents. Both witnesses were subjected to lengthy cross-examination by the learned counsel who represented the two Respondents including the deceased 2nd Respondent. The 2nd Respondent died on 16.07.2016 when the 2nd witness Dr. Weerasena was under further cross-examination. During the said cross-examination several documents were shown and marked by the Respondents which include documents marked from 2R7 to 2R49 on behalf of the deceased 2nd Respondent.

As already referred in this judgment, the Rule matter against the two Attorneys at Law including the deceased Attorney at Law the 2nd Respondent, was on a complaint made by Dr. Lakshman Lucian de Silva Weerasena to the Registrar Supreme Court by way of an affidavit dated 24.02.1999. When Dr. Lakshman Lucian de Silva Weerasena was summoned to give evidence, whilst confirming the affidavit submitted to this Court the witness had submitted the following;

The witness was a Doctor of Medicine and was working as the Chairman of the Civil Aviation Examination Board and practiced in his clinic at the time he gave evidence before Court. He was the President of the Medico-Legal Association in 2003. His mother's maiden name was Adeline Winifred Perera and after marriage Adeline Winifred Weerasena. His mother was a housewife, and she had 2 siblings; her brother was H.I.C Perera (Attorney-at-Law) who passed away and her elder sister was Agnes Georgiana Fonseka (hereinafter referred to as A.G. Fonseka) married to Richard Clement Fonseka (Barrister and worked as a legal consultant- hereinafter referred to as R.C. Fonseka). Dr. Weerasena had two siblings: Kanishka Lakshman Weerasena (Doctor) and Tharangani Shamalee Anthoney.

His father passed away in 1989 and his mother passed away in 1993. At the time of the death, they were residing at their own house at No 368, Galle Road, Colombo 03. His mother's sister, A.G. Fonseka resided at No. 90, Lauries Road, Bambalapitiya, with her husband, but they did not have children. A.G. Fonseka continued to occupy this house even after the death of her husband with servants until her death. R.C. Fonseka died on 18.03.1982 and A.G Fonseka died on 08.11.1987.

As a nephew of A.G. Fonseka, Dr. Weerasena cared about his mother's sister until the time of her death since she was ill and had no children. She had no financial problems because she was quite stable financially. A.G. Fonseka was in good mental health until her death. There were several domestic aids at her house and most of them were for a long time, due to her ill health.

After the death of R.C. Fonseka, she had a joint account with one Cyril de Silva who was working at her house. Cyril was an educated boy, and he did all the accounts for A.G. Fonseka. Gunaseeli Karunanayake was A.G. Fonseka's domestic servant, but she was never an adopted child. Gunaseeli's father was the caretaker of the garden. The driver of A.G. Fonseka was Thissa. The Gardner was Martin. Cyril used to be in and out of her house to attend to her financial matters and Mercy attended to A.G Fonseka's other matters like payment of wages. Most of them lived in the house of A.G. Fonseka, but there were no adopted children in that house.

In the latter stage of A.G. Fonseka's life, Gunaseeli got married to Nobel Ranasinghe and they lived in the same house. Gunaseeli and Nobel had two children from their marriage and they were Thushari Ranasinghe (elder daughter) and Manori Ranasinghe (younger daughter).

A.G. Fonseka had 13 houses in Colombo. She gave some properties to the people who helped her. The 10th Lane property was given to Thushari (Gunaseeli's eldest daughter). The car and property were given to the Driver.

When R.C. Fonseka passed away, he had a last will, but no testamentary case was filed by Dr. Weerasena until the death of A.G. Fonseka. The witness was not aware of a testamentary proceeding, but he said that A.G. Fonseka enjoyed whatever she got from the last will of R.C. Fonseka because all the properties of R. C. Fonseka had been devolved to A.G. Fonseka.

Nobel Ranasinghe also died after A.G. Fonseka's death. A.G. Fonseka died in 1987 and subsequent to A.G. Fonseka's death, witness's mother also passed away. Although that time period was so critical, before the expiry of 10 years, he filed a testamentary case for A.G. Fonseka. It was entrusted to his elder brother at the beginning, but he too was feeble and did not take any trouble over this. Witness intervened in the testamentary proceedings with the help of Mrs. Pushpa Narendran (AAL).

The testamentary action was filed in 1997 in DC Colombo. Witness's mother as a sibling of A.G. Fonseka would have been the sole inheritor of A.G. Fonseka's estate. In the meantime, his mother died

without making a last will. Some of the events that took place during this period were narrated by the witness as follows;

- Two testamentary cases had been filed in respect of the estates of Agnes Georgiana Fonseka (Aunt) i.e., DC Colombo Case No. 33935/T, and Adeline Winifred Weerasena (Mother) i.e., DC Colombo Case No. 34383/T; and witness had obtained the letter of Administration for both cases.
- The domestic helper to late A.G. Fonseka namely Gunaseeli Karunanayake made an attempt to intervene and falsely claim title to the property bearing assessment No. 90 Lauries Road, Bambalapitiya;
- Also, an Attorney at Law Jayantha Attanayake (1st Respondent) had claimed ownership of an undivided portion of the property situated at No. 90 Lauries Road, Bambalapitiya;
- Upon making inquiries it had been revealed that the 1st and 2nd Respondents together with the aforesaid domestic helper Gunaseeli Karunanayake had prepared fraudulent Deeds and purportedly transferred the ownership to the said property to Thushari Ranasinghe (daughter of Gunaseeli Karunanayake) and to the said Jayantha Attanayake.

As submitted by the witness the extent of the land belonging to late A.G. Fonseka was 44 perches and a Deed of Declaration in respect of undivided 37 perches was registered by Gunaseeli Karunanayake the domestic helper of late A.G. Fonseka under Deed of Declaration No. 705 and a Deed of Declaration in respect of the balance 7 perches was also registered by the same person namely Gunaseeli Karunanayake under Deed of Declaration No. 706. The portion of land referred to in Deed No. 705 had been gifted by the declarant to her daughter Thushari Ranasinghe by Deed No.707. All three Deeds referred to above had been attested by the same Notary Public namely Ratnamali Maitipe Attanayake (2nd Respondent) on the same day i.e., on 05.10.1992.

- In the Deed of Declaration No. 705 attested by the 2nd Respondent, the Declarant Gunaseeli Karunanayake had declared that she, by long and undisturbed and uninterrupted possession for over a period of thirty (30) years, is the sole and absolute owner of the land described in the schedule thereto bearing assessment No. 90 Lauries Road, Bambalapitiya (Extent of 37 perches). She had also made a declaration therein that Richard Clement Fonseka and Agnes Georgiana Fonseka are her stepfather and stepmother respectively and

that she is the sole heir being their adopted child and that she had inherited the said property;

- The Deed of Declaration No. 706 had been attested on the same day as the aforesaid Deed No. 705, i.e., on 05.10.1992 by the 2nd Respondent, where the same Declarant Gunaseeli Karunanayake had declared that she, by long and undisturbed and uninterrupted possession for over a period of thirty (30) years, is the sole and absolute owner of the land described in the schedule thereto bearing assessment No.90 (part) Lauries Road, Bambalapitiya (Extent of 7 perches). She had also made a declaration therein that Richard Clement Fonseka and Agnes Georgiana Fonseka are her stepfather and stepmother respectively and that she is the sole heir being their adopted child and that she had inherited the said property;

According to the witness, in addition to the three deeds referred to above, details of two more deeds bearing Nos. 726 and 2428 had transpired during the Testamentary proceeding referred to above.

- The Deed of Transfer No. 726 had been attested on 03.02.1993 by the 2nd Respondent whereby the said Declarant Gunaseeli Karunanayake had sold the property in the schedule thereto bearing assessment No. 90 (part) Lauries Road, Bambalapitiya (7 perches) to the 1st Respondent for a consideration of Rs. 200,000/-;
- The Deed of Transfer No. 2428 had been attested on 01.08.1996 by Mervin Samaraweera Notary Public whereby the 1st Respondent had transferred the property he had purportedly purchased from Gunaseeli Karunanayake by Deed No. 726, to Niroshan Company (Pvt) Ltd. in which the two directors at that time were Jayantha Attanayake and Ratnamali Maitipe Attanayake (1st and 2nd Respondents) for a consideration of Rs. 225,000/-;

Since the three deeds bearing Nos. 705, 706, and 707 referred to the property belonging to late A.G. Fonseka, the witness had instituted proceedings before the District Court of Mt. Lavinia seeking a declaration to nullify those deeds.

The judgment in both cases (947/97/L and 882/97/L) filed before the District Court of Mt. Lavinia were entered in favour of the Plaintiff in the year 2006. As already referred to by me in this Judgment, the delay in commencing the proceeding in the instant rule matter was the interest shown by the parties with regard to the outcome of the said proceedings.

The Judgment of the District Court of Mt. Lavinia case No. 947/97/L was delivered on 23.01.2006. (P-7) The Decree dated 05/05/2006 obtained from the District Court of Mt. Lavinia in the said case was marked as P-7A and the Eviction Order as P-7B was carried out to evict Gunaseeli and her daughter Thushari.

In an affidavit submitted by Gunaseeli Karunanayake at the time the three deeds were attested, she had declared that R.C Fonseka and A.G. Fonseka were her stepfather and stepmother, and she was adopted by them and therefore, she had inherited the said property. But witness Dr. Weerasena rejected the above and stated that his aunt A.G. Fonseka was alive till 1987 and therefore Gunaseeli Karunanayake could not claim undisturbed and uninterrupted possession for a longer period since she was the domestic aid of Late A.G. Fonseka until her death in 1987.

According to the witness, the decision of the District Court of Mt Lavinia case No. 947/97/L was challenged before the Civil Appellate Court but was withdrawn by the Appellants and there was no proceeding before any Court challenging the decision in the case No. 947/97/L at the time he gave evidence before the Supreme Court.

Witness Dr.Weerasena further stated that, when A.G. Fonseka died, Gunaseeli was in occupation of the property in question and he granted her permission to stay until they need the property. Further, he accepted that A.G. Fonseka and R.C Fonseka gifted properties to their servants since they have no children, and those servants helped a lot for them. Although they gifted properties in the 9th and 10th lane, in Colpity to Gunaseeli and her daughter, she fraudulently made an attempt to get ownership of the land in question.

Witness Duminda Prabath Mudunkotuwa was the Registrar of the Supreme Court when the Complaint against the two Respondents was received in the Supreme Court Registry on 24.02.1999. (P-1)

On receipt of the said complaint, by letter dated 28.05.1999 (P-2), he had called observations from the two Respondents. (At the time he gave evidence both Respondents were present before Court and were represented by Counsel) Several Communications between the Registrar of the Supreme Court and the two Respondents were marked as P-2 to P-5 during his evidence.

Documents from P-1 to P-17 were marked during the inquiry and that includes the District Court Judgment dated 23.01.2006 in the District Court, Mount Lavinia case No. 947/97/L (P-7), the four Deeds bearing Nos. 705,706,707 and 726 (P-8, P-9, P-10, and P-11), the order dated 05.05.2010

delivered by the Civil Appellate High Court of the Western Province P-12 and Deed Number 2428 attested by Mervin Samaraweera N.P dated 01.08.1996 (P-17)

At the time the case for the prosecution was closed, the 2nd Respondent was not among the living and the inquiry was proceeding only against the 1st Respondent. The 1st Respondent opted to give evidence and according to his testimony, he was called to the Bar in the Year 1982. Since then, he had a civil practice and was having his office at No. 135/5/1 St. Sebastian Hill, Colombo 12 until 1994. He is a graduate of the University of Colombo since 1974 and his graduate certificate was produced marked 1R3. During his carrier as an Attorney at Law, he served as the Chairman Rent Board for a few years since 1984, and also served as a Director of the Sri Lanka State Trading Corporation for a period of 5 ½ years. He was the Managing Director of Niroshan Company (Pvt) Ltd. which was incorporated in the year 1983 and his wife, the 2nd Respondent in the instant inquiry, namely Ratnamali Maitipe Attanayake was the other Director of the said Company. They lived at No. 65, Stork Place, Colombo 10. His wife too had practiced law, mainly handled conveyancing work, and had her office at their residence, No. 65, Stork Place, Colombo 10.

As submitted by the 1st Respondent, parties to Deeds 705, 706, and 707 attested by his wife, the 2nd Respondent, were unknown to him at the time the said Deeds were attested. Later he got to know that the declarant in Deeds 705 and 706 namely Gunaseeli Karunanayake was interested in selling a portion of the land, namely the subject matter to Deed 706, and therefore studied the history of the land and the declarant. He got to know Gunaseeli Karunanayake as the occupant of the house bearing assessment No. 90, Lauries Road, Bambalapitiya. According to the 1st Respondent Gunaseeli was not a domestic servant of A.G. Fonseka. He was informed by Gunaseeli that she was the adopted child, of A.G. Fonseka. He further stated that Gunaseeli has tendered an affidavit to this effect to the case which was pending in DC Mt. Lavinia. Gunaseeli was married to Nobel Ranasinghe.

After her marriage, she lived in the house at No. 90, Lauries Road, Colombo 04. The marriage Certificate No. 6797 dated 25/02/1972 of Gunaseeli and Nobel Ranasinghe was marked as '2R7'. It was mentioned in the said certificate that the place of the marriage as 'මනාලියගේ නිවසේ සිදුවුණා'. The '2R8' was the marriage certificate issued by the Parish Priest of St. Mary's Church Bambalapitiya on 25/02/1972. After the marriage, Gunaseeli and Nobel had two children Thushari Ranasinghe (the birth certificate was marked as '2R9') and Manori Ranasinghe (the birth certificate was marked as '2R10'). Gunaseeli and Nobel lived in No. 90, Lauries Road, Bambalapitiya, and selected it as their matrimonial

house. The 1st Respondent further stated that Gunaseeli and Nobel lived in that house, even after the death of R.C Fonseka and A.G. Fonseka.

The 1st Respondent knew about the two Deeds of Declaration. The 1st one is 'P8' – the Deed No. 705 attested by R.M. Attanayake dated 05.10.1992 regarding the land No. 90, Lauries Road, Bambalapitiya – Lot 1A and 1B (as one lot) – Plan No. 1905 made by A.S.P Gunawardena Licensed Surveyor – 37 purchases. The other Deed was marked as 'P9' – the Deed of Declaration No. 706 attested by R.M. Attanayake dated 05.10.1992. –the Plan No. 1905 made by A.S.P Gunawardena Licensed Surveyor – for the Lot 1A, 1B 7 purchase - regarding the land No. 90/1/A, Lauries Road, Bambalapitiya. However, he stated that he does not know about drafting those Deeds, since all the deeds were drafted by his Wife (the 2nd Respondent) without his knowledge.

The 1st Respondent further stated that Gunaseeli has given an affidavit to his wife. Based on the said affidavit, his wife (the 2nd Respondent) has drafted Deeds 705 and 706. The affidavit given by Gunaseeli dated 1992.09.01 was marked as '1R4'.

The Original Deed of Transfer No. 726 was also marked as '1R5'. The transferor was Ulpagoda Pathiraarachchige Dona Gunaseeli Karunanayaka, and her address was No. 90, Lauries Road, Bambalapitiya. The transferee of this deed was Jayantha Attanayake (the 1st Respondent) and his address was No. 65, Stork Place, Colombo 10. The value of the Deed was 2 lakhs.

As stated by the 1st Respondent, the main reason for him to buy the land in question was the relationship he had with Nobel Ranasinghe, husband of Gunaseeli Karunanayake. 1st Respondent wanted to help the Ranasinghe family since they had financial difficulties. Therefore, he agreed to buy a 7 Perch block for Rs. 700000/- from the wife of Nobel Ranasinghe. However, the 1st Respondent had taken up the position that he was unaware of any Deeds attested by his wife including Deed No 706 at the time those Deeds were attested by his wife.

In the first instance, the 1st Respondent paid Rs. 30,000/- and then Rs. 320,000/-. Later he paid another Rs. 350,000/-. However, the 1st Respondent had admitted that the value entered in the Deed was only 200000/-. The 1st Respondent had admitted inspecting the folios at the Land Registry and the documents at Colombo Municipal Council before purchasing the Land.

On the other hand, he could not find any legal document as proof of the adoption of Gunaseeli by A.G. Fonseka and R.C Fonseka. However, the 1st Respondent did not accept the fact that Gunaseeli has not

acquired prescriptive rights. At the inquiry, it was revealed that Gunaseeli has not acquired prescriptive rights since the deed was attested 5 years after the death of A.G. Fonseka.

After purchasing the land, he used it as a car park for Niroshan Company (Pvt) Ltd which is a driving institute. 1st and 2nd Respondents were the directors of the said company. He transferred the said land on 01.08.1996 by Deed No. 2428 (P17) to Niroshan Company (Pvt) Ltd. The Deed was attested by Mervin Samaraweera Notary Public. During the cross-examination, it was revealed that notary Mervin Samaraweera used the residential address of the 1st Respondent as notary's address.

The 1st Respondent resigned from Niroshan Company (Pvt) Ltd as Director in 2005 and informed the Company Registrar. Thereafter the Directors of the said Company were his wife the 2nd Respondent and his children namely: Ratnamali Maitipe Attanayake, Dilakshi Kaushalya Attanayake, Mulasi Attanayake, and Yasas Attanayake.

When considering the material already discussed, it appears that the Complainant was unaware of any transaction regarding the house and property at No. 90, Lauries Road, Bambalapitiya when he decided to institute testamentary proceedings with regard to late A.G. Fonseka's estate. As already discussed, A.G. Fonseka and R.C. Fonseka had several servants working for them and after the death of R. C. Fonseka the house was managed by those employees who worked for the family for a long period of time. Since the old couple did not have children, most of their properties were gifted to the domestic employees including Gunaseeli Karunanayake and her children but the house and property at No. 90, Lauries Road where A.G. Fonseka lived at the time of her death were not given to anybody and there was no problem for her to gift the said property if she was interested in doing so.

In the said circumstances it is clear that Gunaseeli Karunanayake never had uninterrupted possession of the house occupied by A.G. Fonseka after her death in 1987 for a long period since the time gap between the death of A.G. Fonseka and making the deed in question is only 05 years.

In his evidence at the inquiry before us, the 1st Respondent took up the position that the main reason for him to buy the land in question was to help Nobel Ranasinghe, the husband of Gunaseeli Karunanayake but he was unaware of any deeds attested by his wife the 2nd Respondent when he agreed to help his relation Nobel Ranasinghe by purchasing a land belonging to his wife at Lauries Road Bambalapitiya. However, this court is mindful of the following facts when analyzing the evidence given by the 1st Respondent at the Inquiry before us.

1. Gunaseeli Karuanayake had made two Deeds of declaration, one for the extent of 37 perches and the other for the remaining 7 perches (deeds 705 and 706) of the same land on 05.10.1992.
2. The land referred to in Deed 705 in the extent of 37 perches was gifted to her daughter by the declarant on the same day by Deed of Gift No. 707.
3. No steps were taken with regard to the land referred to in Deed No. 706 on that day.
4. The land referred to in Deed of Declaration 706 was transferred to the 1st Respondent by Gunaseeli Karunanayake for Rs. 200000/-. The said deed was also attested by the 2nd Respondent (Deed No. 726) on 03.02.1993.
5. The said transaction was done to help Ranasinghe's family since Nobel Ranasinghe the husband of Gunaseeli Karunanayake was a relation of the 1st Respondent.

If the declarant Gunaseeli Karunanayake was interested in claiming the title to the entire land and property within No. 90, Lauries Road, Bambalapitiya in the extent of 44 perches she could have easily included the entire extent to deed No. 705 and gifted it to her daughter but making a declaration separately to a seven perch block and disposing the said portion to the 1st Respondent who is known to her husband on a subsequent day, shows the involvement of the 1st Respondent even at the time the Deeds 705 and706 were attested by the wife of the 1st Respondent. The same notary (i.e., the 2nd Respondent) had attested the Deed of Transfer for the portion of Land referred to in Deed No. 706 after she attested the original Deed of Declaration.

Whilst giving evidence before us, the 1st Respondent took up the position that the 1st and the 2nd Respondents were the Directors of Niroshan Company (Pvt) Ltd during the time he purchased the land in question in the year 1993. On 01.08.1996 the property which was in the name of the 1st Respondent was transferred to Niroshan Company (Pvt) Ltd by Deed No. 2428 attested by Mervin Samaraweera Notary Public. The address given in the Deed by the Notary is No. 65, Stork Place Colombo 10, which is also the residential address of the 1st and 2nd Respondents at that time.

Even at the time the amended Rule was read over to the two Respondents (the 2nd Respondent was alive at that time) the property in question was in the name of Niroshan Company (Pvt) Ltd. where the two Directors were the 1st and the 2nd Respondents. However, as submitted by the 1st Respondent he resigned from the Director Board in the year 2005 and then the Board of Directors of Niroshan Company (Pvt) Ltd. consisted of his wife (the 2nd Respondent) and his three children. As the Company is

no longer functioning the land in question has now been divided into two blocks and transferred in the names of two directors (two children of the 1st Respondent) (proceeding dated 28.01.2020. page 11)

As revealed before Court, the Deed Nos. 705,706, and 707 have been declared null and void by the Learned District Judge of Mt. Lavinia in the District Court Mount Lavinia Case No. 947/L/97. The Appeal against the said judgment was withdrawn and the judgment in the District Court stands valid to date. Therefore, it was submitted that the title could not pass to anyone based on the said Deeds. The 1st Respondent's claim to the property in question is based on Deed No. 706 which has been declared null and void.

However, the 1st Respondent was not prepared to accept this position, and the conduct referred to above shows several transactions taking place with regard to the said property within the family of the 1st Respondent even after the decision in District Court Mt. Lavinia Case No. 947/L/97 is pronounced.

As further revealed before this Court the two Defendants before the District Court Mt. Lavinia had appealed against the DC Judgment and while the aforesaid Appeal was pending, an application for the execution of decree pending Appeal had been made on behalf of the Plaintiff in terms of Section 761 of the Civil Procedure Code. The learned District Judge who inquired the said matter by order dated 27.04.2007, had granted a writ pending appeal to evict any person from the property in question and to hand over peaceful possession to the Plaintiff (Dr. Weerasena).

The Eviction Decree dated 30.04.2007 had been issued as per the order dated 27.04.2007. Immediately thereafter, Niroshan Company (Pvt) Ltd made an application dated 08.05.2007 under Section 328 of the Civil Procedure Code to be restored back in possession. However, the learned District Judge found no merit in the application made under section 328 by Niroshan Company (Pvt) Ltd. and dismissed the same.

At the inquiry into the section 328 application, evidence of Mervin Samaraweera Notary Public, and the 1st Respondent had been led. The 1st Respondent had given evidence on three dates i.e., 19.11.2007, 13.02.2008, and 09.05.2008 at the said inquiry. The order on the Section 328 application had been delivered on 21.10.2008 by the learned District Judge rejecting the application and refusing to place the Petitioner (Niroshan Company (Pvt) Ltd) back in possession. In the order of the learned District Judge it has been categorically stated that if the Petitioner Niroshan Company(Pvt) Ltd has any claim to the property in question, a separate action should be instituted.

However, the 1st Respondent has admitted before this Court that no separate action has been instituted for a declaration of title on his behalf or on behalf of Niroshan Company(Pvt) Ltd. (Proceedings dated 28.01 2020 at page 25)

Whilst giving evidence before Court the 1st Respondent had taken up positions which are contradictory to each other. It was his position at one stage, that he transferred the property in question to Niroshan Company (Pvt) Ltd. in which the directors were himself and his wife the 2nd respondent. (Proceedings dated 27.01.2020 on page 03)

Once again, he took up the position that he resigned from the Director Board of the said Company in the year 2005 and it was his wife and three children who were the Directors of Niroshan Company (Pvt) Ltd. since then.

However, he admitted giving evidence before the District Court in 2007 and 2008 even after his resignation from the Director Board when Niroshan Company(Pvt) Ltd made an application under Section 328 of the Civil Procedure Code to restore back in possession. He was the sole witness who gave evidence on behalf of Niroshan Company (Pvt) Ltd. other than Mervin Samaraweera Notary Public who attested the Deed.

It is also important to note at this stage, that the 1st Respondent had given this evidence before the District Court, while the instant Rule matter was pending before the Supreme Court.

In view of the foregoing, it is very much clear that the conduct of the 1st Respondent establishes his involvement in the three deeds including Deed No. 706 attested by his wife, the 2nd Respondent. Ultimately, he had become the beneficiary of the said declaration made by Gunaseeli Karunanayake. 1st Respondent had admitted before this Court that the husband of Gunaseeli Karunanayake was known to him during this period.

Since then, every attempt he had made either, with the help of his late wife or on his own initiative was to retain the property he acquired within his family circle.

From the above material, it is clear that there is ample evidence before this Court to conclude that the 1st Respondent had conspired to fraudulently draw, attest and authenticate or cause the drawing, attestation, and authentication of Deed Nos. 705,706,707,726 and 2428 with regard to the property in question and that he was a party to the preparation of fraudulent Deed Nos. 726 and 2428 where the title had been passed based on Deed No. 706 which was declared null and void by the District Court of

Mt. Lavinia. Even though the 1St respondent made an attempt to convince the court that the two deeds 726 and 2428 were attested much prior to the decision of the District Court of Mt. Lavinia, the involvement of the 1St Respondent in the preparation of the three deeds that were declared null and void by the District Court was established before us.

As already referred, the 1st Respondent was issued with a Rule under the hand of the Registrar of the Supreme Court,

a) For committing Deceit and/or Malpractice within the ambit of Section 42 (2) of the Judicature Act No 2 of 1978
b) For Acting in breach of Rules 60 and 61 of the Supreme Court Rules (conduct and Etiquette for Attorneys at Law) Rules 1988

The relevant provision as referred to above under the Judicature Act No. 2 of 1978 and Supreme Court Rules (conduct and Etiquette for Attorneys at Law) 1988 are as follows,

Section 42 (2) Every person admitted and enrolled as an Attorney-at-Law who shall be guilty of any deceit, malpractice, crime, or offence may be suspended from practice or removed from office by any three Judges of the Supreme Court sitting together.

Rule 60 An Attorney-at-Law must not conduct himself in any manner which would be reasonably regarded as disgraceful or dishonorable by Attorneys-at-Law of good repute and competency or which would render him unfit to remain an Attorney-at-Law or which is inexcusable and such as to be regarded as deplorable by his fellows in the profession.

Rule 61 An Attorney-at-Law shall not conduct himself in any manner unworthy of an Attorney-at-Law.

The standard of proof in an inquiry relating to a Rule issued under Rule 42 (2) of the Judicature Act No. 2 of 1978 was discussed in ***Daniel V. Chandradeva [1994] 2 Sri LR 1*** by *Amarasinghe J* as follows;

> "Where the conduct of an attorney is in question in disciplinary proceedings, it requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that a just and correct decision has been reached. The importance and gravity of asking an attorney to show cause make it impossible for the Court to be

> satisfied with the truth of an allegation without the exercise of caution and unless the proofs survive careful scrutiny. Proof beyond a reasonable doubt is not necessary, but something more than a balancing of the scales is necessary to enable the Court to have the desired feeling of comfortable satisfaction**.** A very high standard of proof is required where there are allegations involving a suggestion of criminality, deceit or moral turpitude."

When considering whether the 1st Respondent was guilty of deceit and/or malpractice, it appears that, as already observed, in this Judgement, the 1st Respondent who is the beneficiary of the Deed No 726, was well aware of the preparation of the 3 Deeds, 705, 706 and 707 attested by the 2nd Respondent, his wife. The husband of the declarant who is only the domestic servant of the late A.G. Fonseka was known to the 1st Respondent during this time. A separate declaration was made by the declarant with regard to a 7 perch block by Deed No 706 and later transferred to the 1st Respondent by Deed No 726 attested by the 2nd Respondent. The next transaction with regard to the same plot of land was done before Notary Mervin Samaraweera at the residence of the 1st and the 2nd Respondents, where the Notary Samaraweera had indicated the same address as his office address in the Deed attested by him. This clearly shows as to how secretly these transactions had taken place between the parties.

Even though the 1st Respondent transferred the property by Deed No. 2428 to Niroshan Company (Pvt) Ltd. he and his wife who attested Deed Nos. 726 and 706 had become the beneficiaries of the said transaction since they were the only Directors of Niroshan Company (Pvt) Ltd. at that time. Several other incidents that took place thereafter (as discussed in this Judgment) clearly show the interest the 1st Respondent displayed even after the proceedings in the instant Rule matter was commenced. The 1st Respondent while giving evidence before this Court admitted that he had a civil practice for several years and therefore it is evident that the 1st Respondent had a clear understanding with regard to the transactions that were referred to in this judgment.

On a careful examination of the contention of the 1st Respondent (along with the Deceased 2nd Respondent) as revealed from the evidence of the Complainant, the 1st Respondent, and the documents tendered before us, it is well founded that the allegation of misconduct referred to under paragraphs (a) (f) and (g) of the amended Rule had been established and the 1st Respondent is guilty of deceit and malpractice within the ambit of section 42 (2) of the Judicature Act No. 2 of 1978.

When considering the nature of malpractice and deceit committed by the 1st Respondent, I am reminded of the following passage by Mookerjee J in ***Emperor Vs. Rajani Kanta Bose and Others (AIR 1922 Calcutta 515)*** to the effect;

> "The practice of the law is not a business open to all who wish to engage in it; it is a personal right or privilege limited to selected persons of good character with special qualifications duly ascertained and certified; it is in the nature of a franchise from the state conferred only for merit may be revoked whenever misconduct renders the pleader holding the license unfit to be entrusted with the powers and duties of his office"

There is no doubt that the above conduct of the 1st Respondent has brought the legal profession into disrepute and it is plainly dishonourable, disgraceful, and unworthy of an Attorney-at-Law. Hence it is clear that the 1st Respondent has also breached Rules 60 and 61 of the Supreme Court (Conduct and Etiquette for Attorney-at-Law) Rules 1988.

This Court in the case of ***In Re: D.S. Bodhinagoda SC Rule 01/2010 (SC minute 20.02.2013)*** considered how the Court should decide as to what cause of action should be taken against an Attorney-at-Law who is found guilty for similar Conduct as follows;

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

The sentence that should be considered against an Attorney-at-Law, when the Attorney-at-Law was found guilty of professional misconduct was discussed by Basnayake CJ in the case of ***In Re Fernando (1959) 63 NLR 233 at Page 234*** as follows;

> "The power to remove or suspend a proctor from his office is one that is meant to be exercised for the protection of the profession and the public and for the purpose of maintaining a high code of conduct among those whom this court holds out as its officers to whom the public may entrust their affairs with confidence."

Considering the conclusion this Court has already made, the Rule issued on the 1st Respondent is made absolute. I order that the 1st Respondent Jayantha Attanayake Attorney-at-Law be removed from the office of an Attorney-at-Law of this Court and that his name be struck off the Roll of Attorney-at-Law.

Registrar of this Court is to take steps accordingly.

Rule made absolute and the 1st Respondent struck off the Roll of Attorney-at-Law.

Judge of the Supreme Court

Justice Murdu N.B. Fernando, PC

I agree,

Judge of the Supreme Court

Justice S. Thurairaja, PC

I agree,

Judge of the Supreme Court

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

In the matter of an Appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

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

S.C. Appeal No.220/2012
SC (SPL) LA No. .49/2012
C. A. No. C.A.97/2004
H.C. Kalutara No.38/2000

Vs.

Dekum Ambakotuwa Prageeth Nishantha Bandara,
Godella Watta, Andawela,
Meegama.
Accused

And

Dekum Ambakotuwa Prageeth Nishantha Bandara,
Godella Watta, Andawela,
Meegama.
Accused-Appellant

Vs.

Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

AND NOW BETWEEN

Attorney General,
Attorney General's Department,

Colombo 12.
Complainant-Respondent-Appellant

Vs.

Dekum Ambakotuwa Prageeth Nishantha Bandara,
Godella Watta, Andawela,
Meegama.
Accused-Appellant-Respondent

****

BEFORE : **MURDU N.B. FERNANDO, PC, J.**
KUMUDINI WICKREMASINGHE, J.
ACHALA WENGAPPULI, J.

COUNSEL : Rohantha Abeysuriya, PC, ASG, for the Complainant-Respondent-Appellant
Anil Silva, PC, for the Accused-Appellant-Respondent.

ARGUED ON : 07th March, 2022

ORDER ON : 10th March, 2023

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ACHALA WENGAPPULI, J.

The Complainant-Respondent-Appellant (hereinafter referred to as the Appellant), sought special leave to appeal from this Court over several questions of law arising out of a Judgment pronounced by the Court of Appeal on 02.02.2012 in relation to the criminal appeal No. CA 97/2004.

Perusal of the proceedings before the appellate Court indicate that one *Dekum Ambakotuwa Prageeth Nishantha Bandara* was indicted by the Hon. Attorney General on 19.10.1997, alleging that he committed rape, an offence punishable under Section 364(2) of the Penal Code, as amended by Act No. 22 of 1995. The trial against said *Dekum Ambakotuwa Prageeth Nishantha Bandara* proceeded before a Judge without a Jury and, at the conclusion of which, the Court found him guilty as charged. The High Court thereupon imposed a 10-year term of imprisonment and a fine of Rs. 5000.00 on him, coupled with a default sentence. In addition, he was to compensate the victim with a payment of Rs. 15,000.00. Being aggrieved by the said conviction and sentence, said *Dekum Ambakotuwa Prageeth Nishantha Bandara* had preferred an appeal to the Court of Appeal under CA Appeal No. 97/2004. In the caption to his petition of appeal, he had described himself as the Accused-Appellant. The Court of Appeal, by its Judgment dated 26.10.2004, pronounced after hearing of the said appeal, had set aside the conviction entered against the Accused-Appellant by the *Kalutara* High Court in case No. 38/2000 HC, along with the sentences of imprisonment and compensation. It is against the said Judgment of the Court of Appeal that the Appellant had sought special leave to appeal from this Court.

However, in the operative part of the caption to the said application, i.e., the part demarcated by the section titled " AND NOW BETWEEN", which indicates the names of the parties to the application before this Court, the Appellant had named one *Imbulana Liyanage Dharmawardhana* of No. 145/53, *Walaw-watta, Weliweriya*, (hereinafter referred to as the original Respondent) as the Accused-Appellant-Respondent and not the actual Accused-Appellant before the Court of

Appeal, namely *Dekum Ambakotuwa Prageeth Nishantha Bandara* of *Godella Watta, Andawela, Meegama,* (hereinafter referred to as the present Respondent) in whose favour the impugned Judgment of the Court of Appeal was pronounced.

Application of the Appellant listed to be supported on 28.05.2012 and notice on the said original Respondent was dispatched by the Registry on 21.03.2012. When the application was taken up on 28.05.2012 for support, the original Respondent was absent and unrepresented. Thereupon, Court made order that the matter is re-fixed for support once again on 05.07.2012, "*with notice to the Respondent*". The notice issued on the original Respondent was returned to the Registry on 31.05.2012 with the endorsement that its intended recipient had "*rejected the notice*". This fact was brought to the notice of the Appellant on 11.06.2012 by the Registry. Consequent to the said intimation, a motion was tendered to Court by the Appellant on 25.06.2012. The Appellant thereby sought to "*amend the caption by substituting the name and address of the Accused-Appellant-Respondent*" but did not indicate as to the status of the already named *Imbulana Liyanage Dharmawardhana* of No. 145/53, *Walaw-watta, Weliweriya* upon the said "*substitution*". This motion was supported by the Appellant on 05.07.2012 and the Court allowed his application to amend the caption.

Consequent to the said order of Court, the Appellant had, in order to reflect the present Respondent, *Dekum Ambakotuwa Prageeth Nishantha Bandara* of *Godella Watta, Andawela, Meegama* is named as the "Accused-Appellant-Respondent", tendered an amended caption. Only then the present Respondent was noticed to appear before Court on 11.09.2012, being the next date of support. Notice of the said application was dispatched on the present Respondent only on 31.07.2012, who had

then tendered his proxy and caveat along with a motion dated 08.08.2012.

When the application of the Appellant for special leave to appeal was eventually supported before this Court on 07.12.2012, learned President's Counsel, who represented the present Respondent, moved Court to consider the question whether the application of the Appellant is time-barred inasmuch as a wrong party had been originally named and the present Respondent was brought in as a party to that application by substituting his name at a subsequent stage and that too after a period of over ten months. This Court, however, after hearing parties granted special leave to appeal to several questions of law, as set out in sub paragraphs (a) to (d) of paragraph 14 of the petition of the Appellant dated 14.03.2012 and the appeal was fixed for hearing.

When the instant appeal was taken up for hearing on 07.03.2022, learned President's Counsel for the present Respondent reagitated his contention already presented before this Court on 07.12.2012 and raised it formally as a preliminary objection. It was also his contention that the rules of procedure that had been laid down in the Supreme Court Rules of 1990, which sets out the manner in which a party could invoke the final appellate jurisdiction of this Court, are mandatory in nature and therefore, in view of the failure of the Appellant to comply with same, his appeal should be rejected *in limine.*

Since the objection of the present Respondent concerns a threshold issue as to the proper invocation of jurisdiction, the Court decided to hear parties on the said preliminary objection.

The preliminary objection raised by the present Respondent, in the manner in which the Appellant had invoked the jurisdiction of this Court, is founded upon his alleged failure to adhere to a procedural requirement, which he contends as mandatory in nature. In support of his objection, learned President's Counsel had strongly relied on the applicable rules of procedure contained in the Rules of the Supreme Court 1990, which specifically lay down the manner of lodging applications seeking special leave to appeal from a Judgment of the Court of Appeal. In the circumstances, it is very relevant to consider at the very outset of the applicable procedural requirements which must be fulfilled by an applicant, in seeking special leave to appeal, as laid down by the Supreme Court Rules 1990, along with the judicial precedents which had indicated the degree of importance this Court had attached to adherence to these procedural requirements and the consequences that may follow upon non-compliance of these Rules.

Article 118(c) of the Constitution states that subject to the provisions of the Constitution, the Supreme Court shall exercise "*final appellate jurisdiction*". Article 127(1) and 127(2) defines the scope of the said jurisdiction conferred on this Court while Article 128(1) provides that an appeal shall lie to the Supreme Court from any final order, Judgment, decree or sentence of the Court of Appeal, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal granted leave to appeal to the Supreme Court. Article 128(2) states that the Supreme Court may, in its discretion, grant special leave to appeal from any final or interlocutory order, Judgment, decree or sentence of the Court of Appeal, whether civil or criminal. Special leave to appeal could also be granted by this Court, where the Court of

Appeal has refused to grant leave to appeal or in the instances where this Court is of the opinion that the case or matter is fit for review.

The boundaries within which the right to invoke an appellate jurisdiction were considered in ***Martin v Wijewardena*** (1989) 2 Sri L.R. 409, where this Court held (at p. 419) that "*an Appeal is a Statutory Right and must be expressly created and granted by Statute. It cannot be implied*" and therefore "… *the right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from the regular Courts, in the Judicature Act, and the Procedural Laws pertaining to those Courts*". Hence, the preliminary objection of the present Respondent, founded on the premise of non-compliance of a mandatory procedural requirement.

In the Judgment of ***Nestle Lanka PLC v Gamini Rajapakshe*** (SC Appeal No. SC HC LA/54/18 – decided on 30.09.2020) *Jayasuriya* CJ, having observed that the "… *Constitution that establishes the Supreme Court and makes provision relating to its jurisdiction have not made provisions relating to the practice and procedure of the Court and had left it to the Supreme Court to make provision on such matters by way of Rules under Article 136 subject to the provisions of the Constitution and any law*". His Lordship further observed that the "… *Constitution empowers to make such Rules regulating the practice and procedure including matters pertaining to appeals such as the terms under which appeals to the Supreme Court to be entertained and for provision for the dismissal of such appeals for non-compliance with such Rules.*" In this context, it is pertinent to refer to another observation on the same lines, made by *Bandaranayake* CJ, in the Judgment of ***Sudath Rohana and Another v Mohamed Zeena and Another*** (2011) 2 Sri L.R. 134 (at p. 144) where it is stated that "*whilst the*

substantive law lays down the rights, duties, powers and liberties; the procedural law refers to the enforcement of such rights and duties. In other words, the procedural law breathes life into substantive law, sets it in motion, and functions side by side with the substantive law."

Thereupon, her Ladyship added that the "*Rules of the Supreme Court are made in terms of Article 136 of the Constitution, to regulate the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure which guides the Courts of civil jurisdiction, the Supreme Court Rules thus regulates the practice and procedure of the Supreme Court*".

Turning to the question at hand; it is to be noted that the caption to the application of the Appellant describes its nature as an application for special leave to appeal from an "order" of the Court of Appeal, in terms of Article 128 of the Constitution. Since the Appellant had sought special leave to appeal from this Court over a final Judgment of the Court of Appeal, it is clear that, in doing so, he had moved this Court by invoking its jurisdiction conferred under Article 128(2).

Learned President's Counsel strongly contended that for all purposes the application by which the Appellant sought special leave to appeal against the present Respondent was made only on 07.12.2012 and that too with the insertion of his name and thereby substituting him in the place of the original Respondent, whereas the impugned Judgment of the Court of Appeal had been delivered in favour of the present Respondent on 02.02.2012. Since the Appellant had moved this Court seeking special leave to appeal against the said Judgment after a period of well over ten months, the Appellant had acted in violation of the specific time period, as laid down by Rule 7, which restricted the

time within which such an application should be made to six weeks reckoned from the date of the order, Judgment decree or sentence of the Court of Appeal. Therefore, the present Respondent contended that the appeal of the Appellant is clearly time barred and should be rejected.

There is no dispute to the factual position of naming the present Respondent was made, as the sole respondent in the special leave to appeal application of the Appellant, only after the applicable six-weeks' time period reckoned from the date of the Judgment of the Court of Appeal had lapsed. The Appellant, by a motion dated 25.06.2012, moved this Court to "*amend the caption by substituting the name and address of the Accused-Appellant-Respondent as Dekum Ambakotuwa Prageeth Nishantha Bandara, Godella Watta, Andawela, Meegama for the name and address Imbulana Liyanage Dharmawardana, No. 145/53, Walawvatta, Weliweriya in the caption thereof*". This motion was supported by a Deputy Solicitor General on 05.07.2012 and, in the absence of the present Respondent, this Court allowed the amendment of the caption and made order to notify the present Respondent.

Thus, the present Respondent was named as a respondent to the application of the Appellant only on the 05.07.2012 and that too was made without serving notice on him. The Judgment of the Court of Appeal, against which the application to seek special leave to appeal was lodged, was pronounced on 02.02.2012. Obviously, the time interval between these two points well exceeds the six-weeks limitation as per Rule 7.

Defending his motion to "*substitute*" the present Respondent, in place of the original respondent, the Appellant had contended that the application for special leave to appeal against the impugned Judgment

of the Court of Appeal had in fact been lodged within the stipulated time period as prescribed by Rule 7 and therefore the jurisdiction of this Court had properly been invoked as far as this appeal is concerned.

In view of the conflicting positions presented by the learned Counsel as to the validity of the application, the pivotal question that should be decided by this Court in respect of the preliminary objection raised on behalf of the Respondent could be identified as whether, in terms of the Supreme Court Rules 1990, the Appellant could validly invoke the final appellate jurisdiction of this Court by "*substituting*" the present Respondent, after the expiration of the time period of six weeks reckoned from the date of the pronouncement of the Judgment of the Court of Appeal, to an application that had already been lodged within time but naming a wrong party?

In this regard, I must therefore consider the procedure that had been laid down in the said Rules, in setting out the manner in which a party could make an application for special leave to appeal against a Judgment or an order of the Court of Appeal and thereby properly invoke the final appellate jurisdiction of this Court.

Sub part A of Part I of the Supreme Court Rules 1990, which consists of a total number of 17 Rules (from Rule 2 to 18), sets out the procedure an applicant must follow and should comply with, when making an application for special leave to appeal. Rules 2 and 3 deals primarily with the content and the format of such an application should be drafted and presented with and, in addition, also impose the requirements of setting out the questions of law on which special leave to appeal is sought. The Rules further require such an applicant to set

out in that application as to the circumstances which renders the case or matter fit for review by the Supreme Court.

The provisions that are directly applicable to find an answer to the question referred to in the preceding segment could be found in Rule 4. Hence, for the convenience of treatment, it is important to reproduce the said Rule below in its original form;

Rule 4, in reference to an application under Rule 2, states as follows;

> *"In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether the plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter) in whose favour the judgment or order complaint against was delivered, or adversely to who whom such application is preferred, or whose interest may be adversely affected by the success of the appeal, and the names and the present addresses of all such respondents shall be set out in full."*

The instant matter before this Court, the impugned Judgment is a final Judgment of the Court of Appeal, which determined an appeal preferred to that Court upon a conviction entered against the present Respondent following a criminal prosecution conducted before a High Court. In the circumstances, I once again reproduce the said Rule 4 below, but after leaving out the irrelevant parts. Thus, the edited-out Rule 4 now reads thus;

In every such application, there shall be named as respondent,

i. the accused in whose favour the judgment complaint against was delivered, or

ii. adversely to who whom such application is preferred, or

iii. whose interest may be adversely affected by the success of the appeal,

and the names and the present addresses of all such respondents shall be set out in full.

The indictment presented before the High Court of *Kalutara* contained only one name as the person against whom the accusation of rape was made and it is the name of the present Respondent that appears therein as the accused. The caption to the petition of appeal that had been preferred to the Court of Appeal by the present Respondent after his conviction described him as the only Accused-Appellant named therein. The present Respondent succeeded in his appeal. In these circumstances, the present Respondent should have been named as the Accused-Appellant-Respondent at the time of lodgment of the application seeking special leave to appeal. This is because only he is qualified to be treated as either "*the accused in whose favour the Judgment complaint against was delivered"* or "*whose interest may be adversely affected by the success of the appeal*". The original Respondent, who had been named by the Appellant would only fit into the category of a person "*adversely to who whom such application is preferred*." Obviously, the original Respondent had nothing to do with the application of the Appellant seeking special leave to appeal against a Judgment of the Court of Appeal to which he is not a party and perhaps that could be the reason as to why he had refused to accept the notice sent by the Registry of this Court. The identity of the present Respondent is already known to the Appellant as the indictment and the petition of appeal of the present Respondent clearly indicate the

names of the relevant parties to the prosecution as well as to the appeal preferred to the Court of Appeal.

But what is important to note here is when the Appellant had only named a person *"adversely to who whom such application is preferred"*, and thereby leaving out "*the accused in whose favour the Judgment complaint against was delivered"* and "*whose interest may be adversely affected by the success of the appeal*", whether this Court could accept the contention of the Appellant that he had complied with the procedure as set out in Rule.

In view of the nature of the preliminary objection, the only way the Appellant could negate the contention of the present Respondent is that he must satisfy this Court there was a valid application pending before this Court to which the present Respondent was subsequently named as the Accused-Appellant-Respondent.

If the Appellant had named either "*the accused in whose favour the Judgment complaint against was delivered"* or "*whose interest may be adversely affected by the success of the appeal*", at the time of the lodgement of his application that would automatically satisfy the requirement of naming the person *"adversely to who whom such application is preferred"*. But the Appellant did not name either "*the accused in whose favour the Judgment complaint against was delivered"* or the person "*whose interest may be adversely affected by the success of the appeal*". Instead only the person *"adversely to who whom such application is preferred"* was named as the Accused- Appellant-Respondent. In such an instance, the course of action adopted by the Appellant would lead to the question, whether there was a valid application for special leave to appeal for the Appellant to "*substitute*" the present Respondent with.

The requirement of correctly identifying and naming the parties in an application invoking appellate jurisdiction of this Court was raised before this Court and considered in the appeal of ***Ibrahim v Nadarajah*** (1991) 1 Sri L.R. 131. This was an instance where the appellant had failed to name a particular party to the proceedings before the original Court as a respondent in the appellate proceedings before this Court, despite naming several others. Court had then considered the question whether there was non-compliance of Rule 4 and 28(5) and if so, the consequences that would follow upon such non-compliance. Delivering the Judgment of Court, *Amarasinghe* J stated that the consideration of Rule 28(5) in relation to Rule 4 was necessary due to the reason that "*although ordinarily in terms of Rule 27 all appeals to the Supreme Court must be upon a petition in that behalf lodged by the appellant, where leave to appeal is granted, Rule 12 makes it unnecessary for the appellant to file a fresh petition of appeal. The application for leave to appeal is deemed to be the petition of appeal. A petition of appeal, whether actual or deemed, however, must in terms of Rule 28 name as respondents all parties in whose favour the judgment appealed against has been delivered and all parties whose interests may be adversely affected by the success of the appeal together with their full addresses*".

His Lordship then determined the consequences of such a failure would follow by holding that "*It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected*."

The principle of law enunciated by the said pronouncement of *Amerasinghe* J was re-affirmed in ***Senanayake v Attorney General &***

Another (2010) 1 Sri L.R. 149, as it was stated by *Bandaranayake J* (as she then was) that *"In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties."* In stating thus, this Court had considered the preliminary objection of the learned Senior State Counsel, who contended that since the Director-General of the Commission to Investigate Allegations of Bribery or Corruption, a necessary party to that application, had not been named a respondent, the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules 1990. On that premise, he moved for the dismissal of the said appeal *in limine*. Having referred to Rules 4, 28(1) and 28(5), her Ladyship held that "*The totality of the aforementioned Rules indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal"*. This Court thereupon proceeded to dismiss the appeal for non-compliance of the Supreme Court Rules.

In view of the above, it is clear that this Court had consistently held that naming "*all parties who may be adversely affected by the result of the appeal should be made parties"* as a mandatory requirement that an applicant must comply in seeking special leave to appeal against a Judgement or an order of the Court of Appeal and also for proper invocation of its appellate jurisdiction. In the circumstances, such an applicant must, in addition to naming "*… all parties, who may be adversely affected by the result of the appeal"* must also name the parties "*adversely to who whom such application is preferred"* if the circumstances so demand.

In addition to laying emphasis on the aspect of naming the proper parties who may be adversely affected by the success of appeal in view of the applicable rules of procedure, there is yet another aspect that had been emphasised by this Court, which needs to be referred to in this context. In the Judgment of ***The Ceylon Electricity Board & 9 others V. Ranjith Fonseka*** (2008) 1 SLR 337 this Court dealt with a situation where the petitioner, in filing a Special Leave to Appeal Application in the Supreme Court regarding an Order made by the Court of Appeal, included an incorrect title and a statement in the caption where the jurisdiction of this Court was pleaded incorrectly.

In pronouncing the Judgment, this Court was of the view that "*… the application for Special leave to Appeal filed by the Petitioners before the apex Court of the Republic, should have been drafted with 'care and due diligence' in order to maintain the stature and dignity of this Court. An application such as the present application, which is teeming with irregularities and mistakes cannot, not only be tolerated, but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application. Even if the objections may be technical in nature, such irregularities clearly demonstrate the fact that the application made by the petitioners has not complied with the Supreme Court Rules of 1990.*"

This particular aspect had become relevant in relation to the instant appeal as well. Perusal of the caption to the application seeking special leave to appeal lodged by the Appellant reveals that the name of the present Respondent is already mentioned in the part of the caption which describes the parties to the proceedings before the High Court and also before the Court of Appeal. However, in the operative part of

the caption in which the parties to the proceedings before this Court are named, the Appellant had inserted the name of the original Respondent, instead of the present Respondent, who would undoubtedly be adversely affected by the success of the appeal.

In view of the pronouncements of this Court quoted above, there arises the question as to why this Court insisted on strict compliance of Rule as a mandatory requirement and therefore held its non-compliance is fatal to the maintenance of an application seeking special leave to appeal. The answer to this question could be found in ***Ibrahim v Nadarajah*** (supra) as it had been held that (at p.133) "*… a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court is necessarily fatal. Those Rules are meant to ensure that all parties who may be prejudicially affected by the result of an appeal should be made parties. How else could justice between the parties be ensured? It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected.*" The Court arrived at the said conclusion after considering the principles of law that had been laid down and followed in the Judgments of ***Ibrahim v. Beebee et al*** (1916) 19 NLR 289, ***Ammal et al v. Mohideen et al*** (1933) 34 NLR 442, ***Wickremasooriya v. Rajalias de Silva*** (1937) 8 CLW 29, ***Seelananda v. Rajapakse*** (1938) 11 CLW 36, ***Sinnan Chettiar and Others v. Mohideen*** and ***Swarishamy v. Thelenis et al*** (1916) 19 NLR 289.

It was also decided in ***Ibrahim v Nadarajah*** (supra, at p. 132) that the mere act of granting leave by this Court, as in the case of the instant appeal, would not confer any validity to a defective application for the

reason that granting of leave would only determines the question of access to Court and it does not confer any advantages or exemptions on the appellant other than to make it unnecessary for the appellant to file a fresh petition of appeal.

It is already noted that by the motion dated 25.06.2012, the Appellant moved Court to "*amend the caption by substituting the name and address of the Accused-Appellant-Respondent as Dekum Ambakotuwa Prageeth Nishantha Bandara, Godella Watta, Andawela, Meegama for the name and address Imbulana Liyanage Dharmawardana, No. 145/53, Walawvatta, Weliweriya in the caption thereof*". The purpose of the motion, according to the Appellant, is to "*substitute*" the name of the original Respondent by the present Respondents, cited in the operative part of the caption to the said application.

In these circumstances, it is pertinent at this juncture to consider to the question whether such a step is even provided for in the Supreme Court Rules 1990.

Rule 38 of Part II of the Supreme Court Rules, which lay down general provisions regarding appeals and applications, indicate the circumstances under which the Court would allow a substitution of a party already named in an application or an appeal. The Rule 38 states that where at any time after lodging of an application for special lave to appeal "… *the record becomes defective by reason of death or change of status of a party to the proceedings*" this Court may make order substituting or adding a person "*who appears to the Court to be the proper person*" upon consideration of the material to establish that fact. Hence, the word '*substitute*', irrespective of the purpose in which it was used in the said motion of the Appellant, should only be considered in the context of the

scope, as envisaged in Rule 38. Therefore, the proposed "*substitution*" of one respondent in the place and room of another created by the act of mere deletion of his name from the amended caption and making the insertion of the name of another cannot be considered as a situation where the record had become defective owing to the reason of the death of a party or to a change of status of a party to the proceedings as provided for in Rule 38. In view of the above considerations, it is my view that, in terms of Rule 38 there cannot be a '*substitution*' of a party who had wrongly been named at the time of lodgement of the application seeking special leave to appeal with the insertion of the name of the correct party at a subsequent stage. If that error is detected within the stipulated time period of six weeks, during which an applicant could lodge an application seeking special leave to appeal, such an applicant could lodge a fresh application naming the correct party.

An application for special leave to appeal, after its lodgement, could not be corrected subsequently to cure any defects in naming of parties, perhaps except to any obvious typographical errors. This is because, unlike in section 332 of the Code of Criminal Procedure Act No. 15 of 1979 as amended, Rules of the Supreme Court does not contain any similar provisions that provide for making such amendments to an application for special leave to appeal after its lodgement, in order to facilitate an applicant to rectify a defect in naming parties by moving to "*substitute*" the correct party later. If an applicant had named a wrong party at the time of lodgement of his application, instead of a party who is adversely affected if the appeal succeeds, that party could not thereafter be "*substituted*" to that application at a later point of time and thereby enabling such an

applicant to bring his application in conformity with the procedure of invoking the final appellate jurisdiction of this Court under Article 128(2), as laid down in Rules 1 to 7.

Section 332 of the Code of Criminal Procedure Act specifically provide for an amendment of an appeal after its lodgement on the basis that is not in conformity with the manner prescribed therein, particularly by section 331 of that Code. The section 332 had empowered the original Court either to return the petition of appeal to the appellant to make the necessary amendment or to permit such amendment to be made then and there in satisfying the provisions of section 331. The failure of an appellant to comply with a direction of Court on such an amendment that should be made under section 332, would make such a petition liable to be rejected by that Court. In relation to civil litigation, Civil Procedure Code too, in section 759 also, provide for amendment of the petition of appeal that had already been lodged.

However, no comparable provision could be found in the Supreme Court Rules to these statutory provisions contained in section 332 of the Code of Criminal Procedure Code and section 759 of the Civil Procedure Code. In fact, said Rules indicate a contrary provision to sections 332 and 759. Rule 10(1) provided several reasons enabling a single Judge of this Court, sitting in chambers, to refuse to entertain an application for special leave to appeal. One such reason is if "*such application does not comply with these rules*". Thus, the defect of the application of the Appellant owing to the failure to name the party adversely affected if the appeal succeeds to the application at the time of its lodgement cannot subsequently be cured merely by '*substituting*'

that party after the mandatory six weeks period had elapsed. If there was compliance of Rule 8(4) by the Appellant, that initial defect in the application could have been easily detected for that particular Rule expected an applicant to attend the registry in the third week since the lodgement of the application for special leave to appeal and to verify whether the notices of the respondents were returned undelivered. If this was done by the Appellant, there would have been a window of opportunity to rectify the defect in the application, provided the remedial action is taken within the stipulated six-weeks period, as provided for by Rule 7.

This is not a situation where the often-quoted reasoning of *Fernando* J in ***Kiriwantha and Another v Navaratne and Another*** (1990) 2 Sri L.R. 393 could be applied. In that instance his Lordship had considered the nature of the consequences that would follow upon the failure to comply with Rule 46 of the Supreme Court Rules 1978. Setting aside the order of the Court of Appeal, in which such a failure had been considered as a ground for an automatic rejection, his Lordship preferred to adopt a " *a more liberal view*" as in the Judgment of ***Rasheed Ali v Mohammed Ali*** (1981) 1 Sri L.R. 262 and stated that " … *the Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction ; dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter*". In arriving at this conclusion, his Lordship cited and relied on the following quotation from Maxwell (Interpretation of Statutes, 12th ed. pp. 314-5);

> *"When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases, the conditions or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. 'An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially".*

Unlike the Rule 46 of the Supreme Court Rules 1978, Rule 10(1) of the Supreme Court Rules 1990, in fact had spelt out the consequences that would follow upon any failure to comply with the procedure that had been laid down for moving this Court seeking special leave to appeal, as set out in the Rules 1 to 7. That particular Rule made specific provision that such an application is liable to be refused or to be entertained.

In this context, it must be noted that this Court only allowed the Appellant to "*amend the caption*" on 05.07.2012, and clearly desisted itself in making a positive order of substitution, despite the motion requesting the Court to do so and thereby to accept the proposed "*substitution*" of the present Respondent as a party whose interest may be adversely affected by the success of the appeal. The Appellant only deleted the

name of the original respondent from the amended caption and replaced him with the insertion of the present Respondent's name, under the nomenclature "Accused-Appellant-Respondent". The amended caption that was filed by the Appellant had no indication to the "substitution" of original Respondent, who was named and described in the original caption as the Accused-Appellant-Respondent, with the name of the present Respondent. The Court, at any point of time, neither made any order either discharging the original Respondent from these proceedings nor made order to "*substitute*" the present Respondent in the former's place, as already noted. However, with the replacement of the name of the present Respondent as the Accused-Appellant-Respondent, the original Respondent had totally disappeared from the caption. The amendment made to the caption by the Appellant replacing the already named original respondent with the present Respondent, after a period of six weeks from the pronouncement of the final Judgment, cannot cure the fundamental defect created by the failure to name the proper party at the time of Judgment of that application for special leave to appeal against the Judgment of the Court of Appeal in Appeal No. 97/2004.

In view of the above considerations, the appeal of the Appellant should firstly be rejected due the failure of the Appellant to name the present Respondent a party at the time of the lodgement of the instant application, as it was imperative on the Appellant to name him due to the reason that only he is qualified to be considered as "*the accused in whose favour the Judgment complaint against was delivered*" or "*whose interest may be adversely affected by the success of the appeal*" and not the original Respondent. Secondly, the appeal of the Appellant should be rejected for the reason that he cannot confer validity to a defective

application by tacking on to the same with naming of the present Respondent and that too after the expiration of the mandatory period of six weeks.

The appeal of the Appellant is accordingly rejected. Parties will bear their costs.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Alwapillai Gangatharan, Attorney-at-Law

SC/Rule/03/2021

Edward Megarry
2nd Secretary-Migration
British High Commission
389, Bauddhaloka Mawatha
Colombo 7

Complainant

Alwapillai Gangatharan
No.361, Dam Streem,
Colombo -12.

Respondent

Before: Buwaneka Aluwihare, PC J
S. Thurairaja PC J
E.A.G. R Amarasekara J

Counsel: Anura Gunaratne for the Respondent.
Rohan Sahabandu PC with Chathurika Elvitigala Ms. Sachini Senanayake and Ms. Nathasha Fernando for the BASL.
M. Gopallawa, SDSG for the Attorney General

Inquiry on: 02.06.22 and 26.01.2023

Decided on: 23 03. 2023

ALUWIHARE PC, J

A Rule was issued against the Respondent Attorney-at-Law, Alwapillai Gangatharan, (hereinafter referred to as the Respondent) for the breach of Rule Nos. 60 and 61 of the Supreme Court [Conduct and Etiquette of Attorneys-at-Law] Rules of 1998, alleging that the Respondent, by the said breach, had committed deceit or malpractice in terms of Section 42(2) of the Judicature Act, No. 02 of 1978.

The Rule was read out and a copy of the same was handed over to the Respondent on 23.05.2022, however no plea was recorded on that day and the matter was fixed for the 02-06-2022. On the said date the Rule being read over for the second time, the Respondent, at the first given opportunity, pleaded guilty to the same.

When the matter was taken up for further inquiry on 05-07-2022, the learned counsel for the Respondent made submissions in mitigation on his behalf.

Before considering the matters pleaded in mitigation, we wish to place the facts germane to the Rule.

A written complaint dated 12th February 2016 was made to the President of the Bar Association of Sri Lanka by Edward Megarry, Second Secretary (Migration) of the British High Commission in Sri Lanka (hereinafter referred to as the Complainant) alleging deceit and malpractice on the part of the Respondent for furnishing a letter dated 5th June 2015 falsely affirming the existence of a case bearing No.28223/5/2008 in the Magistrate's Court of Colombo, along with documents purporting to be Summons to be served and a warrant of arrest issued by the Kotahena Police station against one Machado, in order to mount support for a claim for asylum in the United Kingdom for the said person. Upon receipt of this complaint, the Administrative Secretary of the Bar Association, directed by the Chairman of the Disciplinary Inquiry panel "11" of the Bar Association, by way of letter dated 26th November 2016, required the Respondent to forward his observations regarding the complaint, by way of an Affidavit. The Bar Association also informed the Respondent that the inquiry into the matter would be held *in camera.*, requesting his presence along with witnesses (if any). On 6th December 2016, the Respondent filed an Affidavit declaring *inter alia,* that he had not sent the fictitious documents so alleged and that he had no knowledge of the 'Kotahena Police Matter'.

Upon conclusion of the inquiry, the Report of the Special Panel of Inquiry of the Bar Association on the matter was communicated to the Registrar of this Court by letter

dated 26th September 2018 by the Bar Association. The report detailed the following:

a. That the Respondent had admitted to issuing the letter dated 5th June 2015 regarding one Mr. Machado, who was unknown to him, affirming that Mr. Machado was held at the Kotahena Police Station on suspicion of being involved in the murder of Mr. Lakshman Kadirgamar, that the suspect was produced in court and subsequently provided bail, that the matter was then still under investigation, that there was a warrant of arrest issued on 17th October 2008 against the suspect in Case No.28223/5/2008 in the Chief Magistrate's Court of Colombo.

b. That although the Respondent did not know the suspect, he had known the suspect's uncle, one Joe Fernando, both as a client and as a friend, and claimed to have acted in the trust placed on Joe Fernando and one Raju (a private secretary to former Minister Douglas Devananda) when issuing the said letter.

c. That a Law Firm, operating under the name and offices of 'Nag law Associates' based in the United Kingdom, operated by one Sakunthala, who was a cousin of the Respondent and her husband one Naguleswaran, Attorney-at-law had requested that he provide such details in a letter.

d. That an inquiring officer of the British High Commission had recorded a statement from the Respondent on the matter, whereupon he had confirmed that he issued such letter.

e. That upon inquiry by the officer of the British High Commission, the Respondent had himself inquired into the matter and verified from the Kotahena Police that there was no case registered under the number and no warrant of arrest as mentioned was issued against Machado.

f. That the Respondent had not sent a letter of apology to the Complainant British High Commission even after realizing that the representations he made on behalf of Machado were false.

The Respondent had also admitted to the violation of the Oath of allegiance to the

Republic of Sri Lanka and the Oath he had undertaken as an Attorney-at-Law and expressed his regret to the panel.

Proceedings were initiated against the Respondent before this court for the suspension from practice or removal from the office of Attorney-at-law under Section 42(2) of the Judicature Act, No. 02 of 1978 read with Supreme Court Rules (part VII) of 1978 made under Article 136 of the Constitution.

The learned counsel for the Respondent, making submissions in mitigation, drew the attention of the court to the following matters:

a. That the Respondent had not previously been involved in any matter related to discipline or professional misconduct.
b. That the incident would not have occurred if not for the trust the Respondent placed in the Respondent's cousin and his friends.
c. That the Respondent is 70 years of age, of good character, and has been in practice since 1985.
d. That the Respondent now expresses regret and remorse over the matter and offers an unqualified apology to the Court over his conduct.

The learned Deputy Solicitor General in his submissions invited the court to consider, that the present complaint had been by the British High Commission, and had cast a reflection on the legal profession. The learned Deputy Solicitor General also submitted however that the Respondent had, from the onset, accepted responsibility for his actions.

The Court observes that the representations made by the Respondent to the British High Commission are matters of a serious nature and he would have known that the material submitted by him, would in all probability be considered in deciding the application for asylum by Machado and that the Respondent had the full knowledge that the material supplied by him was likely to mislead the officials entrusted with the task of processing the application for asylum referred to.

It is apt to recall the words of Justice Dr. A.R.B. Amerasinghe regarding the non-exhaustive nature of the Supreme Court Rules, found in his book 'Professional Ethics and Responsibilities of Lawyers'

"*The Sri Lankan Rules do not exhaust the legal, moral and ethical considerations that should inform an attorney. No code of ethics is or is meant to be exhaustive. This is*

generally accepted." [Professional Ethics and Responsibilities of Lawyers, 2018, Stamford Lake (Pvt) Ltd., Fifth Edition, p. 7]

Supreme Court Rules 60 and 61 of 1998 do not expressly address the situation relating to the facts of the present case. They do, however, call attention to the severity of the consequences when Attorneys-at-law do not accept personal responsibility for their work or conduct. This court is entitled to examine and finds instructive aid from the Codes of Conduct for Attorneys-at-law in comparative common law jurisdictions. I have found that 'Rule C20' of the prescribed Code of Conduct for Barristers in the United Kingdom, as it appears presently in Version 4.6 of the Bar Standards Board Handbook, comprehensively elucidates the parameters of personal responsibility lawyers must exercise over their work. The Bar Standards Board is the regulatory arm of the Bar Council of the United Kingdom, which is the Approved Regulator under the Legal Services Act of 2007 in the United Kingdom. Rule C20 of the Bar Standards Board Handbook states:

"*…you are personally responsible for your own conduct and for your professional work. You must use your own professional judgment in relation to those matters on which you are instructed and be able to justify your decisions and actions. You must do this notwithstanding the views of your client, professional client, employer or any other person*."

As evident from the facts, the Respondent did not exercise personal responsibility over his conduct and professional work. In fact, even after realising the grave error and falsification he had been party to, he did not promptly notify the High Commission. An Attorney-at-law cannot be excused from his duties and responsibilities upon the mere trust and confidence that *he had chosen to place upon his acquaintances* over *his* professional work, nor can he be excused for negligence in not bringing it the notice of the British High Commission upon discovering subsequently, that the letter he submitted was false in content.

The manner in which the Respondent has conducted himself in the instant case cannot be treated lightly nor condoned. The only saving grace as far as the Respondent is concerned is the fact that at the first given opportunity, he admitted his errant conduct and expressed regret and remorse.

On his plea of guilt, the Rule issued against the Respondent, is affirmed.
Taking the totality of the facts and circumstances referred to above, this court is of the view that the Respondent should be suspended from the practice as an Attorney-at-Law and accordingly the Respondent is suspended from the practice as an Attorney-at-law for a period of six months, commencing from today.

Rule affirmed in terms of Section 42(2) of the Judicature Act No2 of 1978

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC
I agree

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R AMARASEKARA
I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal to the Supreme Court against a Judgement delivered on 01.06.2016 in appeal bearing number SP/HCCA/GA/0054/2009 (F) in appeal from DC Galle Case No. P 10014.

Walakada Gamage Munidasa,
No. 17/1,
Pepiliyana Mawatha,
Nugegoda.

Plaintiff

SC APPEAL No. 46/2018
SC/HCCA/LA No. 338/2016
SP/HCCA/GA/54/2009 (F)
DC GALLE NO: P/10014

Vs.

1. Amarasena Amarasiri Jayasinghe,
   Rukattanagahawatte, Nagoda.

2. Wimalawathie Wijeratne,
   Rukattanagahawatte, Nagoda.

3. Tissa Amarasiri Jayasinghe,
   Mulana, Keppettiyagoda, Nagoda.

4. Dasan Amarasiri Jayasinghe, (Deceased)
   Vando Street, Fort, Galle.

4A. Gotabhaya Amarasiri Jayasinghe,
Vando Street, Fort, Galle.

5. Theodora Grace Jayasinghe,(Deceased)
Godewatte Walauwa, Nagoda.

5A. Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.

6. Walakada Gamage Sirisena,
Kanahenkanda, Kurupanawa, Nagoda.

7. Walakada Gamage Wimalasiri, (Deceased)
Nagoda.

7A. Walakada Gamage Pathmasiri,
Kurupanawa, Nagoda.

8. Walakada Gamage Isak alias Issac,
(Deceased)
"Aruna", Nagoda.

8A. Walakada Gamage Aruna Deepal,
"Aruna", Nagoda.

9. Walakada Gamage Gunawathie,
Uhanowita, Mattaka, Pitigala.

10. Walakada Gamage Karunawathie,
Kurupanawa, Nagoda.

11. Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.

12. H.G. Sirisena,
Kurupanawa, Nagoda.

13. Victor Amarasiri Jayasinghe,

Mulanagoda, Keppittiyagoda,
Nagoda.

14. Kumarasiri Amarasiri Jayasinghe,
No. 44, Peralanda Road, Ragama.
Defendants

AND THEN BETWEEN

Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.
5A/11th Defendant-Appellant

Vs.

Walakada Gamage Munidasa,
No. 17/1,
Pepiliyana Mawatha,
Nugegoda.
Plaintiff-Respondent

1. Amarasena Amarasiri Jayasinghe,
Rukattanagahawatte, Nagoda.

2. Wimalawathie Wijeratne,
Rukattanagahawatte, Nagoda.

3. Tissa Amarasiri Jayasinghe, (Deceased)
Mulana, Keppettiyagoda, Nagoda.

3A. Victor Amarasiri Jayasinghe,
Mulanagoda, Keppettiyagoda, Nagoda.

4A. Gotabhaya Amarasiri Jayasinghe,
Vando Street, Fort, Galle.

6. Walakada Gamage Sirisena,
Kanahenkanda, Kurupanawa,
Nagoda.

7A. Walakada Gamage Pathmasiri,
Kurupanawa, Nagoda.

8A. Walakada Gamage Aruna Deepal,
"Aruna", Nagoda.

9. Walakada Gamage Gunawathie,
(Deceased)
Uhanowita, Mattaka,
Pitigala.

9A. Janaka Athukorala,
No. 19, Sawsiripaya,
Heenatiyangala Road,
Kalutara South.

10. Walakada Gamage Karunawathie,
Kurupanawa, Nagoda.

12. H.G. Sirisena, (Deceased)
Kurupanawa,
Nagoda.

12A. Bovitantiri Nandawathie,
Kurupanawa,
Nagoda.

13. Victor Amarasiri Jayasinghe,
Mulanagoda, Keppittiyagoda,
Nagoda.

14. Kumarasiri Amarasiri Jayasinghe,
No. 44, Peralanda Road,
Ragama.

Defendant-Respondents

AND NOW BETWEEN

Sujatha Jayasinghe,
Godewatte Walauwa, Nagoda.
5A/11th Defendant-Appellant-Appellant

Vs.

Walakada Gamage Munidasa,
No. 17/1, Pepiliyana Mawatha,
Nugegoda.
Plaintiff-Respondent-Respondent

1. Amarasena Amarasiri Jayasinghe,
   Rukattanagahawatte, Nagoda.

2. Wimalawathie Wijeratne,
   Rukattanagahawatte, Nagoda.

3A. Victor Amarasiri Jayasinghe,
   Mulanagoda, Keppettiyagoda, Nagoda.

4A. Gotabhaya Amarasiri Jayasinghe,
   Vando Street, Fort, Galle.

6. Walakada Gamage Sirisena,
   Kanahenkanda, Kurupanawa,
   Nagoda.

7A. Walakada Gamage Pathmasiri,
   Kurupanawa, Nagoda.

8A. Walakada Gamage Aruna Deepal,
   "Aruna", Nagoda.

9A. Janaka Athukorala,
   No. 19, Sawsiripaya,
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12A. Bovitantiri Nandawathie,
Kurupanawa, Nagoda.

13. Victor Amarasiri Jayasinghe,
Mulanagoda, Keppittiyagoda,
Nagoda.

14. Kumarasiri Amarasiri Jayasinghe,
No. 44,
Peralanda Road,
Ragama.
Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray for the 5A/11th Defendant-Appellant-Appellant.
Anura Gunaratne for the Plaintiff-Respondent-Respondent.

Written submissions: 5A/11th Defendant-Appellant-Appellant -on,
17.01.2019 and 19.05.2021.

Plaintiff-Respondent-Respondent - on 12.03.2020.

Argued on : 17.08.2021

Decided on: 23 .03.2023

ALUWIHARE PC, J

I had the benefit of reading the judgements written by my brother judges, His Lordship Justice Amarasekara and His Lordship Justice Samayawardhena. I would like, however, to express my own view on this matter. As their Lordships have succinctly dealt with the factual background to the case, I shall be referring to the facts to the extent necessary to address the legal issues involved.

The contesting defendants in this partition action were the 5th and the 11th Defendants [mother and daughter respectively]. They sought a dismissal of the Plaintiff's action. The learned District Judge, however, accepted the pedigree of the Plaintiff and rejected the pedigree put forward by the aforesaid Defendants. Although the 5th and the 11th Defendants canvassed the legality of the District Judge's findings before the High Court of Civil Appeals, they were not successful in their endeavour. The 5th Defendant passed away at a point in the course of the proceedings and 11th Defendant was substituted in her place as the '5a' Defendant. As the learned District Judge had considered the claim of the 5th Defendant in her judgment, for the purpose of clarity I shall continue to refer to the 5th Defendant in this judgement.

It is the Appeal of the said Defendant's [5th and the 11th] that this court considered on the following questions of law.

1. *Has the High Court and the District Court erred in law by failing to appreciate that the pedigree of title put forward by the 5th and the 11th defendants proved that they were the sole owners of the corpus for partition?*
2. *In any event, whether the 5th and the 11th defendants and their predecessors have acquired prescriptive title to the land sought to be partitioned by long possession?*

Although it may not be directly relevant to the issues at hand, it would be pertinent to refer to the following facts;

The Plaint described the corpus a *'Kahatagaha addara owita, alias Kahatagaha liyadda also known as Bakmadala watte alias Bakmadala owita'* in extent of 8 *Kurunis*. The Preliminary Plan No.120 dated 01.01.1990 was prepared by surveyor G.B.S Bandula De Silva, which was marked and produced as X. In 1996, the Plaintiff by an amended plaint changed the name of the land *as "bakmadala owita alias, Kahatagahaliyadda alias Kahatagaha addara Owita which is a part of Bakmadala watte".* The boundaries, however, remained the same.

I do not see any significance in changing the description of the corpus referred to above, as the learned Counsel representing the 5th and the 11th defendants had taken up the position that the question of the identity of the corpus will not be challenged. Thus, the only issue that remains to be addressed is the devolution of title.

Subsequent to the survey carried out by Surveyor Bandula De Silva on which the Preliminary Plan No.120 [X] was prepared, another plan [No. 4131] was also prepared on a commission [moved by the 5th and the 11th Defendants] by licensed Surveyor Garvin De Silva, which was marked and produced as "Y".

I wish to stress the fact that the District Courts should desist from the practice of issuing an alternative commission to survey the corpus after the issuance of a commission to survey the corpus for the purpose of preparing the Preliminary plan. There are series of decisions by the appellate courts to the effect that, after the preliminary survey is carried out, any further commissions in terms of Section 16(2) of the Partition Law should be issued to the **same surveyor who did the original Commission** in terms of Section 16(1) of the said Law. There appears to be a misapprehension that in certain local jurisdictions that such a *cursus curiae* has been established. This belief

is contrary to the settled law. This is certainly not the case, and I am of the view that it would be prudent on the part of the district judges to desist from this practice unless the District Judge takes a considered view that such a step is essential for the adjudication of the matter before the court. The exceptions to the rule in my view would be in an instance where, either the Surveyor who carried out the Preliminary Survey is dead or under the circumstances, his services can no longer be obtained.

This principle is articulated in the case of **Hettige Don Tudor and others v. Hettige Don Ananda Chandrasiri** SC Appeal 134 of 2016 [SC minutes of 19.02.2018] and also by Justice Salam in the case of **Sumanasena v. Premaratne** CA/1336 and 1337 CA minutes 06.03.2014. In recent times, Justice Laffar in the case of **Premalal Vidana Arachchi v. T.A. Annie Nona Siriwardena and others**, CA /DFC/768/99 CA minutes 26.07.2021, had made the same observation.

Coming back to the issues at hand, it should be noted that the case before the District Court was prosecuted, not by the Plaintiff, but by the 6th and the 8th Defendants. The 6th to the 10th Defendants happen to be the siblings of the Plaintiff. The Plaintiff, however, gave evidence in the case.

The case for the 5th and the 11th Respondents

It was contended on behalf of the 5th and the 11th Defendants that both the learned District Judge as well as the Hon. Judges of the Civil Appellate Court failed to appreciate the pedigree of title put forward by the 5th and the 11th defendants. Hence, it would be necessary to consider this aspect in order to determine whether in fact, the District Court and/or the High Court of Civil Appeals erred when considering this matter.

According to the 5th and the 11th Defendants, the original owner of the land in question was Don Elias Amarasiri Jayasinghe [hereinafter Elias Jayasinghe].

Both, said Elias Jayasinghe and his wife Dona Francinahamy executed a joint last will dated 06-02-1890. An English translation of the said will was marked and produced as 5V14 and the inventory filed in the testamentary case was filed as 5V13.

It is the position of the 5th and the 11th Defendant's that the entire land in question is item no. 27 in the inventory and the sole ownership of the land was bequeathed to Munidasa Amrasiri Jayasinghe and he in turn by deed No. 32 dated 18-07-1912 [5V3] conveyed the land to Dharmadasa Amarasiri Jayasinghe. After the demise of Dhrmadasa Amrasiri Jayasinghe, his intestate estate was administered in DC Galle case No. T/7769 and the letters of administration were issued to Mahaweera Jayasinghe [5V11] and it was the position of the 5th and the 11th Defendants that the land in question was item No 18 in the inventory [5V12] filed in that case. It was also the position of the said Defendants that all the siblings of Mahaweera Jayasinghe, by deed No. 411 on 16-01-1941 [5V2] conveyed all their interest in the said land to Mahaweera Jayasinghe, and he became the sole owner of the corpus.

Finally, the 5th and 11th Defendants take up the position that in the year 1941, by deed No. 1045 [5V1] Mahaweera Jayasinghe conveyed the corpus to the 5th Defendant, and she became the sole owner of the land which was to be partitioned.

From the foregoing it is clear that the 5th and the 11th Defendant's pedigree pivots on the joint last will purported to have been executed by Elias Jayasinghe and his wife Francinahamy. As referred to by His Lordship Justice Samayawardena, the 5th and 11th Defendant's position was that, the joint last will of the couple, dated 02.06.1980 was proved in the testamentary action 2970/T in the District Court of Galle, which was, however, not admitted by the Plaintiff. Furthermore, the paragraph 1 of original last will which was in

Sinhala, [5V15] states that "the joint last will dated 06.02.1890 is hereby revoked."

One of the grounds for dismissing the appeal of the 5th and the 11th Defendants by the High Court of civil Appeals was; that the last will in Sinhala [5V15] and the English translation of the purported last will [5V14] contain contradictory contents. It should be noted that the 5th and the 11th Defendants in their original statement of claim, refer to a last will dated 02.10.1891 as the last will by which Elias Jayasinghe and his wife Francinahamy devised the property in question to one of their sons; Munidasa. The said Defendants, however, when tendering the amended statement of claim [17.12.1996] had relied on the testamentary case No. DC2970 but no reference was made to the date of the last will they were relying on.

The learned district judge in considering the devolution of title put forward by the 5th and the 11th Defendants had referred to the fact that the said defendants had based their entitlement on the strength of the transfer deed executed by Mahaweera Jayasinghe who had claimed that he derived title to the corpus consequent to his father Dharmadasa Amarasinghe getting title from the testamentary case No2970. The learned District Judge had observed that, although it was claimed that Dharmadasa Amerasinghe derived title to the impugned property consequent to the last will of Elias Amarasiri Jayasinghe, no material had been placed [by the 5th and the 11th Defendants] to establish that fact.[Pages 21 and 22 of the DC judgement].

Considering the material placed before the trial court and the applicable legal principles, I cannot fault the learned District Judge regarding the observation referred to above. The success of the claim of the 5th and the 11th Defendants pivots on the last will of Elias Amarasiri Jayasinghe. What was produced is an English translation of the will executed in 1890 and further, paragraph 1 of

the original will which was in Sinhala states that the joint last will executed in 1890 is revoked.

It is trite law that, testamentary proceedings in the District Court do not consider title to the property and only consider whether the testator has executed the last will on his own free will and a suitable person has been appointed to be granted letters of administration. The Indian Supreme Court observed in the case of **Krishna Kumar Birla v. Vijaya C. Gurshaney** [2008] 4 SCC 300; " a testamentary court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a probate or letters of administration does not confer title to property. They merely enable administration of the estate of the diseased". Justice H.N.G. Fernando, in the case of **Rosalin Nona v. Herat,** 65 C.L.W 55 observed that; "the court does not in the Testamentary proceedings, have jurisdiction to determine the dispute as to title in respect of such property between the administrator and the third party".

As far as the title to the corpus is concerned, the positions of the respective parties can be summarised as follows; the 5th and the 11th Defendants, claim that the entirety of the corpus at one point was owned by Don Elias Amarasiri Jayasinghe and on the strength of his and his wife's joint last will, subsequent testamentary proceedings and Notarial conveyance, the title to the entire land passed to Mahaweera Jayasinghe from whom the 5th Defendant asserts she purchased the land. whereas the position of the Plaintiff is that Elias Amarasiri Jayasinghe was entitled to only 2/3rd of the corpus, based on the two title deeds produced as 8V1 and 8V2.

The learned District Judge having considered the evidence placed before court, had come to a firm finding of fact that, both the Plaintiff as well as the 5th and the 11th Defendants have established that Elias Jayasinghe had title to

2/3 of the corpus, but the 5th and the 11th Defendants have failed to establish that Elias Jayasinghe possessed the balance 1/3 of the corpus and had derived title by prescription to the balance portion [page 22 of the judgement]. This is a finding of fact by the trial judge and I do not think this finding can be upset unless there is clear material indicative of the fact learned District Judge having misdirected herself. I do not find any such material and in the circumstance, I answer both questions of law on which leave was granted in the negative.

For the reasons set out above, I am of the view, the appeal should be dismissed.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I had the privilege of reading the judgment written by my brother Judge Honourable Justice Samayawardhena in its draft form. With all due respect to the views expressed by His Lordship in coming to the conclusions he made, I would prefer to dissent and express my views as elaborated below in this separate judgment.

The Plaintiff – Respondent – Respondent (hereinafter referred to as the Plaintiff) instituted this action in the District Court of Galle by plaint dated 18.11.1986 seeking to partition the land described in paragraph 2 thereof as Kahata Addara Owita alias Kahawe Liyadda alias Bathmadala Watte alias Bathmadala Owita in extent of about 8 kurunis of paddy sowing among the Plaintiff and the 1st – 10th Defendants named therein the plaint. Thereafter, the Plaintiff filed an amended plaint dated 14.08.1996 amending the original plaint on the pretext that the devolution of the 3rd Defendant's share had not been properly pleaded – vide proceedings dated 13.05.1996. The 6th and 8th

Defendants filed their joint statement of claim dated 30.08.1995 and finally amended it by joint amended statement of claim dated 01.10.1997. They agreed with the amended plaint as to how the shares should be allocated for partition. At the trial 6th and 8th Defendants prosecuted this action instead of the Plaintiffs.

The 5th and 11th Defendants (mother and daughter respectively) filed their joint statement of claim dated 11.01.1995 and thereafter filed an amended joint statement of claim dated 17.12.1996. The 5th and 11th Defendants by their statement of claim contested the identity of the land to be partitioned as well as the pedigree of title set out by the Plaintiff. Accordingly, the 5th and 11th Defendants prayed for the dismissal of this action and for a declaration that the corpus for partition belonged to the 5th Defendant and for the recovery of damages caused by obtaining an enjoining order and an injunction. During the course of the trial the 5th defendant died and the 11th defendant was substituted in her place.

Subsequent to the trial Learned District Judge delivered the judgment dated 18.05.2009 and by the said judgment points of contest were answered in favor of the 6th and 8th Defendants and against the 5A/11th Defendant. The Learned District Judge decided to partition the subject matter of the action as per the shares allocated in the judgment. Followings are among the reasons given by the Learned District Judge in arriving at her conclusions.

- The 8th Defendant has given clear evidence as to the pedigree they relied on and the original Plaintiff also has given evidence to corroborate that without contradictions and thus have proved their pedigree.

- 5A Defendant failed in proving that the last will was a last will of Don Elias Amarasiri Jayasinghe and that he further failed in proving

that the whole land was possessed by the said Elias Amarasiri Jayasinghe along with his wife Francina, even though the Plaintiff has confirmed at one time that 2/3 was owned by the said Elias Amarasiri Jayasinghe.

- There is no proof to indicate that the said Elias Amarasiri Jayasinghe became the owner of balance 1/3 by prescription but it was proved that the said 1/3 was in the possession of one Abraham who was the father of the original Plaintiff, and the 8th Defendant. One Hemasara, a retired officer of the Agrarian Department had given evidence in support of the said possession and as per the said evidence, the 8th Defendant and the Original Plaintiff had come to the possession after the demise of said Abraham. According to the evidence given by the said witness, nothing was revealed as to the possession of the 5th Defendant. Even though the said witness Hemasara is a relative of the original Plaintiff and the 8th Defendant, he came on summons and his evidence can be relied upon.

- Even though the original Plaintiff and the 8th Defendant admitted in evidence that the aforesaid Elias Amarasiri Jayasinghe had daughters other than the sons disclosed in their pedigree, and Mahasena, one of the sons of said Elias, had 8 children where only 3 have been revealed in their pedigree, since no one has come forward to intervene in the partition action, it cannot be decided that there are parties not revealed by the Plaintiff. Contesting 5th Defendant has not taken any attempt to add them if there are other heirs.

- 5A and 11th Defendant failed in proving that the title to the whole corpus devolved on the 5th Defendant.

Being aggrieved by the said judgment the 5A/11th Defendant appealed to the Civil Appellate High Court of Galle. Subsequent to the arguments made by both the parties learned Civil Appellate High Court Judges delivered its judgment dated 01.06.2016 and by the said judgment learned High Court Judges dismissed the appeal with costs. Among other things following reasons have been expounded by the learned High Court Judges.

a) 5V 15 and 5V14, namely Sinhala copy of the last will and English translation of the last will are two documents containing contradictory contents.
b) 5th and 11th Defendants' position is that said Elias and his wife devised the subject matter to Munidasa by last will dated 06.02.1890 but item 1 of 5V 15 indicates that the last will dated 06.02.1890 was cancelled.
c) The 5th and 11th defendants failed to produce letters of probate of T2970 as evidence at the trial.
d) Munidasa by executing 5V3, had transferred only what he has inherited and not what he has got through a Last Will. As such, it defeats the stance taken up by the 5th and 11th Defendants.

The 5A/11th Defendant sought leave to appeal from this court against the said Judgment of the Civil Appellate High Court, and this court was inclined to grant leave on the following questions of law as formulated by learned counsel for the appellant at the stage of supporting for leave: (-Vide Journal Entry dated 09.03.2018)

1. Have the High Court and the District Court erred in law by failing to appreciate that the pedigree of title put forward by the 5th and the 11th defendants proved that they were the sole owners of the corpus for partition?

2. In any event, whether the 5th and the 11th defendants and their predecessors have acquired prescriptive title to the land sought to be partitioned by long possession?

Before the original court there had been a pedigree dispute as well as a dispute relating to the identification of the corpus between the contesting parties.

The original plaintiff Walakadagamage Munidasa filed the partition action in the District Court of Galle to get the land described in the original plaint which was named as Kahataaddara Owita alias Bathmadalawaththa alias Bathmadala Owita alias Kahaweliyadde partitioned. However, it can be observed that some of the deeds found in original plaintiff's pedigree that describe the corpus also as Bathmadalawatta alias Bathmadala Owita were executed very close to the filing of the partition action in the District Court on 18/11/1986- vide deeds no. 2276 and 2267 and 376. However, on 13.05.1996, on a request made by the plaintiff to amend the pedigree to show the devolution of title downwards from one Tissa Jayasinghe named in the Plaintiff's pedigree, the District Court has granted permission to tender an amended plaint but, it appears that the amended plaint dated 14.08.1996 tendered on this permission has changed the description of the land to indicate that it is not Bathmadalawaththa or Bathmadala Owita but only as a portion of said Bathmadalawaththa or Bathmadala Owita which is not even in accordance with the description found in the aforesaid deeds executed close to the filing of the partition action. Perhaps this might have happened due to an afterthought since the plans made and available at the time of filing the original plaint, old deeds as well as relevant old entries in the land registry do not describe this land as Bathmadalawaththa or Bathmadalaowita.

Even though, the original Plaintiff did not prosecute the partition action, the 6th and 8th defendants who prosecuted the partition action have relied on the same description of the land as per their statement of claim and the amended statement of claim. The 5th and the 11th Defendants, who contested the

position taken by the original plaintiff as well as the position of the 6th and 8th defendants who prosecuted the partition action, in their statement of claim as well as in the amended statement of claim have described the corpus only as Kahataliyadde alias Kahataaddra Owita. Accuracy of such description is confirmed by the old deeds, plans and old entries in the land registry, some of which were marked or even relied on by the original Plaintiff and the 6th and the 8th Defendants- vide 8v1,8v2,5v1,5v2,5v3,5v5,5v6,5v10.

Although the learned District Judge has expressed in her judgment that the 5A and 11th Defendant in her evidence in cross examination had admitted that the land is also described as part of Bathmadala Owita, it appears that the said Defendant in her evidence had not made such an admission but had clearly said that there are no other names to this land other than Kahatagaha Liyadde and Kahatagahaaddara Owita. What she had admitted in her evidence is that in the plaint, the Plaintiff has described it as Bathmadalawatta and Bathmadala Owita. She has clearly denied these additional names used by the Plaintiff- vide pages 415,416,418. The Counsel for the 5A and 11th Defendant Appellant has indicated in his written submissions that the Appellant does not intend to pursue the question of the identity of the corpus in this appeal anymore. If the corpus is identified as per the boundaries, it does not matter even if some of the parties use additional names to describe the land, but what is stated above indicates that the original Plaintiff as well as the 6th and 8th defendants were not even conversant with the name of the land. Other than the names used by the 5th and 11th Defendants, they have, in aforesaid recent deeds, used two other names, namely Bathmadalawatta and Bathmadalaowita and during the pendency of the action have changed the position to describe the corpus as part of Bathmadalawatta or Bathmadalaowita. It also poses the question, if it is a part of a bigger land as per their stance, whether one can maintain a partition action without establishing that it became a separate land from the bigger land.

As far as the pedigree dispute is concerned, the Original Plaintiff and the 6th and 8th Defendants in their amended pleadings relied on the same pedigree, and the 13th and the 14th Defendants in their statement of claim have stated that the share given to the 3rd Defendant as per the pedigree shown by the 6th and the 8th Defendants should devolve on them indicating that they also rely on the pedigree shown by the 6th and the 8th Defendants. As per the said pedigree, Corpus was originally owned by Karolis (1/3 of the corpus), K.G. Punchihamy, W. Elias, W. Seetu, W. John, W. Dingo, W. Nero (1/3 of the corpus) and Walakadagamage Abraham (1/3 of the Corpus). The said pedigree further indicates that 1/3 of the aforesaid Walakadagamage Abraham was devolved on the Plaintiff and the 6th to 10th Defendants and the other 2/3 was sold to Don Elias Amarasiri Jayasinghe by the aforementioned original owners by deeds no. 3565 and 2530 marked as 8v1 and 8v2 at the trial. It must be noted here that said Don Elias Amarasiri Jayasinghe is one of the original owners referred to by the 5th and 11th Defendants in their Pedigree. As per the pedigree relied by the Original Plaintiff and 6th and 8th Defendants, 2/3 of said Don Elias Amarasiri Jayasinghe had devolved on his sons Jinadasa, Mahasena, and Munidasa. According to the position taken by the original Plaintiff and the 6th and 8th Defendants in their pedigree, at the end, Jinadasa's share has passed to 1st,2nd, 13th ,14th Defendants and the original Plaintiff; Mahasena's share has passed to the original Plaintiff and the 4th Defendant while Munidasa's share has passed to the 5th Defendant through the deeds No. 32, 411 and 1045 executed in the years 1912,1941 and 1941 respectively. It appears, as mentioned before, the deeds written in favour of the original Plaintiff by the descendants of Jinadasa and Mahasena were executed very close to the date of filing the partition action, namely within 3 months prior to the filing of the action.

The 5th and 11th Defendants claimed title to the whole land and their position was that the land originally belonged to said Don Elias Amarasiri Jayasinghe

and his wife Nagoda Gamage Francinahamy, and as per the joint last will proved in the case No. 2970 in the Galle District Court, it devolved on one of the sons of the testators, namely Munidasa and further, through aforesaid deeds No. 32,411 and 1045, 5th Defendant became the owner of the entire land. Thus, they prayed for a dismissal of the partition action.

The learned District Judge has accepted the version of the original Plaintiff and the 6th and the 8th Defendants with regard to the pedigree dispute, and the learned High Court Judges in appeal have confirmed the findings of the learned District Judge.

It appears, with regard to the pedigree dispute even the learned High Court Judges have held that the 5th and 11th defendants failed to prove their position with regard to the proof of the last will in DC case no. T 2970.

However, it appears that the learned High Court Judges failed to see whether there was sufficient evidence to prove the pedigree relied on by the Plaintiff and others. As per the evidence led, it is clear that there was no dispute that at one time 2/3 was with the said Elias Amarasiri Jayasinghe. As such, one dispute as to the pedigree would be whether the balance 1/3 was with Abraham, the father of the original Plaintiff and of the 8th Defendant, or whether that was also subject to the alleged testamentary case as one of the properties included in the Last Will of said Elias and his wife. The other dispute as to the pedigree was whether the said 2/3 owned by said Elias was devolved upon the parties as per the pedigree of the original Plaintiff and the 6th and 8th Defendants or whether it along with balance 1/3 was subject to the testamentary action no. DC2970 as one of the properties of said Elias and his wife, and whether it devolved on the 5th Defendant as per the pedigree of the 5th and 11th Defendants. In other words, whether the whole corpus was subject to the testamentary case or whether the pedigree of the original Plaintiff is fully or partly relevant to the corpus.

Now I would prefer to see whether the findings with regard to the alleged Last will and the Testamentary Action DC 2970 by the courts below were satisfactory.

In the original statement of claim filed by the 5th and 11th Defendants, they have mentioned the Last Will dated 02.10.1891 as the relevant Last Will by which said Elias and his wife devised the property in question to one of their sons, namely Munidasa- vide paragraph 5 of the said statement of claim. However, when they tendered an amended statement of claim dated 17.12.1996 they have not referred to the date of the Last Will in the body of the statement of claim but have referred to the testamentary case no. DC 2970- vide paragraph no.7 of the amended statement of claim of the 5th and 11th Defendants. However, in the pedigree attached to the said amended statement of claim, the date of the Last Will is mentioned as 06.02.1890. Anyhow, through the evidence led at the trial, the 5A and the 11th Defendant have marked the purported last will proved in Testamentary case No. DC 2970 as 5V14 (see pages 406 and 407of the brief) and again it has been referred to as the certified translation of the Last Will proved in Testamentary case no. DC 2970 -vide page 413 of the brief. 5V15 has been marked as the document in Sinhala relevant to 5V14 and further it has been referred as the Sinhala copy of the original Last Will- vide page 413 of the brief. Neither of these documents were objected or marked subject to proof when they were marked in evidence, and no such objection was reiterated when the 5th and 11th defendants closed their case. Thus, they became evidence for all purposes of the case. Once documentary evidence is tendered, even if a lay witness introduces and gives it a name as he understands it, it is the duty of the court to see what it is and what it contains as evidence. The secretary of the District Court of Galle has issued 5V14 on 10.04.48 certifying it as a true copy of the translation of the Last Will in D.C.2970- vide 5V14A. It appears that up to item 5 of the original document was considerably torn even at the time of it was issued. 5V15 is also a certified copy issued by the secretary of District

Court of Galle and it appears to have been issued on 12.04.48 just two days after the date of issue of 5V14. The secretary has certified 5V15 as a true extract of the Last Will in D C 2970 indicating that it is not the complete document but an extract. It contains only the introductory part and items 1 to 4 of the document. As up to item 5 was considerably torn as per the English translation marked 5V14, 5v 15 might have been taken to complement the missing parts in the 5V14. 5v14 as well as 5v15 have been issued in the middle part of the 20th century, many years prior to the institution of the partition action and filing of the statement of claims by the 5th and 11th Defendants. These are certified copies issued by a court and they were not marked subject to any objection and as said before, they are evidence for all purposes of the case. Thus, no one can assume that they are fraudulent documents prepared for the present case. Further, when section 61, 63,64,65(5),74(i)(ii),76 and 77 of the Evidence Ordinance read together, it can be considered that 5V14 and 5 V15 were proved as part of the case record in Testamentary case D C 2970. Under such circumstances a court cannot just ignore such evidence. Following observations also indicate that these two documents are not contradictory but complementary.

As per 5V15, it is a joint Last Will of Galaboda Liyanage Don Elias Amarasiri Jayasinghe Mudiyanse and his wife Dona Francina Hamina. By that, it appears,

1. They have revoked their previous Joint Will dated 06.02.1890

2. Have appointed the survivor (if one dies) as the executor of the Will.

3. Have given life interest to the survivor on the immovable and movable property (It appears this is so given if there is no other direction in the will)

4. After the said life interest, certain properties were to be devolved on the named 5 sons as explained in the item no. 4, namely the properties described

in items 5,6, -, -,9,10,11 and 20 (rest of the Sinhala copy is not available and as explained above this is only an extract of the Last Will).

6. In the said 5v 14 purported translations of the Last Will, as said before, from the introduction to item 1 to 4 seems to be considerably torn but what remains corresponds with the Sinhala copy. For example,

a. In the introductory part, the words "Galaboda", "Jayasinghe", "wife", "Nagoda", "Hamine" can be found in both copies.
b. Under item 1 "we do hereby" may relate to the revocation of previous Will in Sinhala copy.
c. Under item 2, "we do hereby…… the survivor …… of our estate" can relate to the appointment of the survivor as the executor in the Sinhala copy.
d. Under item 3, "the survivor…. Life time all" may relate to the granting of life time interest to the survivor in the Sinhala copy.
e. Item 4 cannot be separately identified in the English copy. Maybe it was torn when the certified copy of the translation was issued, but parts of the names of the 5 sons are found in the English copy along with the reference to item 11 and 20 of the Last Will which correspond with the item 4 of the Sinhala copy.
f. Items 5,6,7,8,9,10,11 and 20 found in the English copy which is not available in the Sinhala copy bequeath properties to the 5 sons in accordance with the item 4 of the Sinhala copy.

Thus, my view is that there was evidence before the learned District Judge to indicate that,

- There was a joint last will of aforesaid Elias Amarasiri Jayasinghe and his wife Francina which was the subject matter of D C Galle 2970.

- 5V15 is an extract of the Will which contained up to item 5 and 5v14 was the English translation of the said Last Will, of which up to item 5 was considerably torn and 5v15 and 5v 14 are complementary and not contradictory.

Now it is necessary to see whether this Will was proved in DC No. 2970 and probate was issued,

i. Inventory marked 5V13 is a certified copy of the inventory in the said case DC 2970, tendered to Court on 16.06.1892 by the surviving testator who was the executor named in the joint Will; it has been explained to the executor by the interpreter and countersigned by the District Judge. It has been issued as a certified copy on 03.05.1949. Since the District Judge has counter-signed, it cannot be an inventory tendered with the Petition but the inventory that had to be filed by the executor after his appointment. Nowhere in the document it is mentioned that it had been submitted by a temporary executor. Executor is appointed when the Will is proved. Thus, 5V13 contains secondary evidence to show that the Will was proved and probate was issued.

ii. 5V14, certified copy of the English translation of the Will, contains a heading to say that it was a translation tendered for the purposes of accounting. Accounting starts with the proof of Will and the issuance of probate. So, this is also secondary evidence to show that the Will was proved and the probate was issued in DC 2970.

I agree that the best proof of probate was the letters issued in that regard after the proof of Will but the document marked 5V14 indicates that the case record was in dilapidated condition even in 1948/1949. I think if the original Court record is destroyed, one can prove the proof of Will and the probate through secondary evidence. I would like to bring to the attention the meaning of probate as per K.D.P. Wickremesinghe in 'Civil Procedure in Ceylon' at page 354 and 355.

""probate" is an English term signifying the proof of the Will of a deceased person in a competent Court as required by Law. The term probate in its strictest sense signifies the copy of the Will which is given to the executor, together with a certificate granted under seal of the Court, and signed by the secretary of the Court certifying that the Will has been proved, and this probate constitutes the executor's title to act. In a wider sense, the word indicates the process and results of proving a Will."

If we take the strict interpretation, there is only secondary evidence to say that in DC 2970, the Will was proved, the executors were appointed and the letters of probate were issued. On the other hand, if we take it in its wider sense, in my view, there is material to show that a joint Will was proved in that case (of course not the one executed on 06.02.1890 but the one dated 02.10.1891). It must be kept in mind the original documents were made in the 19th century and the certified copies were issued in the middle part of the 20th century, many years prior to the institution of the partition action in the latter part of the 20th Century. As pointed out above, certified copies can be used to prove the contents of the case record DC 2970 Galle, and as mentioned before, these documents were not objected or marked subject to proof. As per the items marked as 5V 14 B and 5V14 C on the document marked 5V 14, the relevant property had been bequeathed to Munidasa, one of the sons of said Don Elias Amarasiri Jayasinghe.

As per the deed No.32 marked 5V3 and land registry extracts marked 5V6, said Munidasa had transferred 8 Kuruni land known as Kahateliyadde to Dharmadasa Amarasiri Jayasinghe. The said Munidasa in the said deed has stated the property had been held, enjoyed and possessed by him by right of inheritance. In my view, merely because he had used the term 'by right of inheritance', one cannot come to the conclusion it was not his entitlement gained through the last will as succession can be testate or intestate. If he had only an undivided share coming through intestate succession, he could have

indicated a transfer of an undivided share in the schedule to the said deed but he had mentioned transfer of whole 8 Kuruni Land in the schedule in the said deed written in 1912. Said 5V3 supports the stance taken by the 5th and 11th Defendants. Further, documents marked 5V11 and 5 V12 are the letters of administration and the inventory respectively in the testamentary case No.7769, filed with regard to the intestate estate of the said Dharmadasa Amarasiri Jayasinghe vendee of said 5V3. Item No.18 of 5V12 has been marked as 5V12A. 5V12A also indicates that even the administrator of said Dharmadasa Amarasiri Jayasinghe included the whole land in the inventory of the said Testamentary case as part of said Daramadasa Amarasiri Jayasinghe's estate. Thus, documents marked with regard to the testamentary case relating to the joint last will of Elias Amarasiri Jayasinghe and Francinahamy, 5V3 and documents relating to the testamentary case of Dharamadasa Amarasiri Jayasinghe show that people belonging to 3 generations in the 5th and 11th Defendants' pedigree from latter part of the 19th century to the middle part of the 20th century considered the whole property as their property only.

I would also like to refer to page 460 of Laws of Ceylon, Walter Pereira to indicate that with the death of the testator, property specifically devised vest in the devisee immediately. But the title is imperfect as it is subject to administration by the executor. In the case at hand, after the testamentary case relating to the joint last will of Elias Amarasiri Jayasinghe and Francina, the devisee named in the last will (see 5V14B and 5V14C) has dealt with the property indicating that it was not sold otherwise for the administration of that estate but it came to the hands of the named devisee.

A joint Will generally is considered as a separate Will of the relevant testators, but if the Will disposes the property on the death of the survivor, or, as it is sometimes expressed, that the property is consolidated into one mass for the purpose of joint disposition or the survivor adiates what was given by the co-

testator, the survivor has to abide by the joint Last Will – see Walter Pereira's Laws of Ceylon page 401 and 405. In the case at hand it appears, after the death of Francinahamy, the testamentary case was filed with regard to the estate covered by the joint last will and the said Elias Amarasiri Jayasinghe, the survivor accepted the executorship created by their joint last will and further the devisee who was named for the subject matter had later dealt with the subject matter by 5V3. This indicates that the said Elias abided by the joint last will. Further, as indicated above life interest has been given to the survivor indicating that the property was to be disposed to the named devisee only after the death of the survivor.

No one has taken a position that, for the purpose of administration of the intestate estate of the Vendee of 5V3 Dharmadasa Amarasiri Jayasinghe, the subject matter was sold to other parties. 5A and 11th Defendant has stated in evidence that after the demise of Dharmadasa Amarasiri Jayasinghe, subject matter was devolved upon Alfred, Biatris, Chandrawathie, Victor, Cyril and Mahaweera Amarasiri Jayasinghe. Said Alfred, Biatris, Chandrawathie, Victor and Cyril by executing deed no.411 have conveyed the property to aforesaid Amarasiri Jayasinghe who by executing deed no.1045, again conveyed it to the 5th Defendant. Thus, there appears to be considerable evidence supporting the version of 5th and 11th Defendants to indicate that;

- There was a joint last will by Elias Amarasiri Jayasinghe and his Wife, Francina which was admitted to probate in the Testamentary Case No. DC 2970, Galle District Court.

- 5v15 was a certified extract of the Sinhala copy of the said Last Will which contained up to item 5 of the Will, and 5V14 is the certified copy of the English translation of the said Will, of which up to item 5 was considerably torn.

- The corpus in the present action was included in the said Joint last will and the devisee was one Munidasa Amarasiri Jayasinghe.

- Said Munidasa Amarasiri Jayasinghe transferred the corpus to Dharmadasa Amarasiri Jayasinghe by executing 5V3.

- After Dharmadasa Amarasiri Jayasinghe, the corpus devolved upon Alfred, Biatris, Chandrawathie, Victor, Cyril and Mahaweera Amarasiri Jayasinghe, and due to the execution of deeds No. 411 (5V2) and 1045(5V1) the corpus became the property of the 5th Defendant.

Only defect in the 5th and 11th Defendants' position is that, though they mentioned the date of the joint last will admitted to probate in D C 2970 as 06.02.1890 in their pedigree annexed to the amended statement of claim, in fact, Last Will dated 06.02.1890 is the one cancelled by the joint last will dated 02.10.1891 which was admitted to probate in D C 2970. The stance of the 5th and 11th defendants was that the corpus was originally owned by aforesaid Elias Amarasiri Jayasinghe and his wife, Francina and they executed a joint last will which was admitted to probate in DC 2970 and then it came to the ownership of the 5th Defendant as per the pedigree shown in her statement of claim. When there is evidence to establish that stance, merely because there is an error in mentioning the date of relevant joint last will, in my view, a judge cannot ignore the rights of the party who made an error or a mistake in mentioning the date of the last will. On the other hand, for the sake of argument, even if one goes to the extreme and argues that change in the date of the joint last will is a change of stance and the 5th and 11th defendants cannot take up the position that their entitlement flows from the last will marked in evidence, in my view, learned District Judge still could not have approved the pedigree of the original Plaintiff or of the 6th and 8th Defendants which does not flow from the said joint last will which as per the evidence led was admitted to probate in DC 2970, as such evidence indicates that there is a different pedigree involved as to the rights in the corpus, at least in respect of the undisputed 2/3 share of Elias Amarasiri Jayasinghe, who was one of the testators in the said joint last will. (Evidence with regard to the

balance 1/3 will be discussed later in this judgment). In this regard, I would like to stress that, this is a partition action and the investigation of title is the duty of the District Judge – vide **Kularatne v Ariyasena (2001) B L R 6, Chandrasena V Piyasena (1999) 3 Sri L R 201**. By this I do not mean that the judge should go on a voyage of discovery in investigating title. The judge may have to do it within the limits of pleadings, admissions, points of contests, evidence both oral and documentary – vide **Thilagaratnam V Athpunathan (1996) 2 Sri L R 66**. It must also be noted that in **Golagoda V Mohideen 40 N L R 92** it was held that the court should not enter decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. If the Learned Judges of the courts below were vigilant enough, they could have observed the available evidence in favour of the 5th and 11th defendants that I referred to above. In a partition action, even if the pedigree or part of the pedigree proposed by a party is wrong, if the evidence/documents led at the trial proves title through a different pedigree, the judge has to consider the pedigree proved through evidence. In my view, in a partition action, what is more important is not the pedigree of which party is more acceptable on balance of probability, but as per the evidence/documents led at the trial what is the acceptable pedigree on balance of probability. Thus, in a partition action sometimes pedigree of any of the party may not be totally correct, but the evidence and documents tendered by all parties may establish a more probable pedigree when compared to the pedigrees tendered by individual parties. This is further established by certain decisions of the superior courts which indicate that in investigating title, judge is not bound even by the points of contests raised by the parties. Basically, the points of contests reflect the stances taken by parties in contesting the case. The said cases are **Peris V Perera 1 N L R 362, Nona Baba V Namohamy 3 N L R 12, Weerappa Chettiar V Rambukpotha Kumarihamy 45 N L R 332**

As said before, it is apparent that the judges in the courts below failed to appreciate the evidence available for the benefit of the 5th and 11th Defendants or against the stance of the original Plaintiff and the 6th and the 8th Defendants in evaluating evidence.

The learned District Judge in holding in favour of the original Plaintiff's pedigree has indicated that there is clear evidence to establish that pedigree as per the evidence given by the original Plaintiff and the 8th defendant. In my view, the fallacy of this finding is evinced by what is mentioned below;

• Firstly, as explained before, the learned District Judge failed to appreciate that undisputed 2/3 of Elias Amarasiri Jayasinghe could not have devolved upon as per the pedigree of the Plaintiff due to the evidenced placed before the District Court, since Elias Amarasiri Jayasinghe was one of the testators of the joint will which was admitted to probate in DC 2970. Even if the date of the Last Will was not 06.02.1890 but 02.10.1891, there was evidence to show that the latter was admitted to probate in D C 2970 and for a pedigree to be accepted it should have a link to those testamentary proceedings and the said Last Will.

• Secondly, the 8th Defendant while giving evidence, in cross examination, has admitted certain facts indicating that the pedigree presented by them including the original Plaintiff is not correct. In relation to that he has admitted that Elias Amarasiri Jayasinghe had daughters other than the sons revealed in their pedigree and they should also inherit. This was done only after denying that there were daughters, and later he admits that he knew about the said daughters even at the time of the institution of the action -vide pages 228 to 231 of the brief. Further, he has admitted that Mahasena Amarasiri Jayasinghe who appears in their pedigree had eight children even though they have shown only 3 children in their pedigree. He has even revealed the names of some of the children not shown in their pedigree when questioned in cross examination. However, again, in re-examination tries to

deny that he had any knowledge about the daughters of Elias. At one point, it appears that he had the knowledge with regard to the testamentary proceedings that existed at the time of the death of Elias Amarasiri Jayasinghe- vide page 239 of the brief. If so, it appears that this witness has evaded revealing such testamentary proceedings in their pedigree. Further, it can be observed that he had evaded in answering some of the questions relating to the pedigree. The learned District Judge should have observed the incoherent and unreliable nature of the evidence given by this witness, namely the 8th Defendant in relation to the pedigree they rely on. However, after observing the said admissions made by the 8th defendant while giving evidence, the learned District Judge has come to the conclusion that there cannot be other parties who have not been revealed as no other party has intervened. Said conclusion cannot be condoned since some of the names have been revealed by the 8th defendant in his evidence. If what has been revealed by the 8th defendant in cross examination is correct, share allocation could not have been done according to the pedigree relied by the original Plaintiff and the 8th Defendant. Further, the Learned District Judge says, if there are others, the 5th and 11th Defendants could have taken steps to add them. 5th and 11th Defendants' position was that this action should be dismissed since the subject matter belongs to them, I cannot understand this reasoning as to why the learned District Judge find fault with parties, who do not seek to partition the land but claim the land as a whole, for not taking steps to add others. They need not even reveal any parties as per their stance.

- Thirdly, the original Plaintiff in his evidence has revealed certain facts which are inimical to his as well as the 6th and 8th defendants' stance, which are highlighted below; Such statements also stand against the findings in their favour by the learned District Judge.

    - The original Plaintiff states that from 1960 he came to know that his father Abraham had 1/3 of the corpus-vide page 313 of the brief.

However, in 1986 he has bought from one Gunasena Amarasiri Jayasinghe 1/2 of the corpus or what belongs to said Gunasena Amarasiri Jayasinghe- vide deed no. 2267 marked 8V4. If their version of pedigree in the plaint is correct Gunasena Amarasiri Jayasinghe could not have 1/2 of the corpus but only 2/27 since they admit that only 2/3 was with Elias Amarasiri Jayasinghe. Further, if Mahasena Amarasiri Jayasinghe had more than 3 children as stated by the 8th Defendant, Gunasena Amarasiri Jayasinghe's share has to be further reduced. The Plaintiff tries to explain that it was so bought as 1/2 of the corpus, as per his knowledge at the time 8V4 was executed. If 1/3 was with Abraham and 2/3 was with said Elias, and he knew their pedigree was correct, he should have known that said Gunasena Amarasiri Jayasinghe could not have 1/2 of the corpus. This indicates that his statement that Abraham had 1/3 and he came to know it in 1960 cannot be relied upon. To buy 1/2 of the corpus from said Gunasena, he appears to have believed in 1986 that Gunasena's predecessors had more than he had shown in his pedigree in his plaint. At least this shows he was not aware of the correct pedigree when he bought from Gunasena Amarasiri Jayasinghe. Then his evidence in courts relating to pedigree must be false or based on some knowledge he gained from some unexplained sources after the execution of 8V4 which may amount to hearsay.

- The original Plaintiff at page 343 and 345 of the brief attempts to state that aforesaid Elias got his entitlement to the lands in the village through his marriage and his wife Francina had 1/9 of the corpus. As per their pedigree Elias has bought 2/3 from others. Thus, this reference to entitlements of Elias through his marriage and Francina's entitlement for 1/9 is more in favour of the stance taken by the 5th and 11th defendants since, as per their version Elias and his wife Francina were the original owners and as per the 6th,8th Defendants' and the

original Plaintiff's stances Francina did not have any rights to this land. However, after referring to the entitlements of Elias that he got through his marriage and Francina's 1/9 share in the corpus, original Plaintiff has expressed that his reference to Francina's entitlement was a mistake due to old age- vide pages 345,346 and 347. Anyhow, due to such contradictory statements, his evidence cannot be considered as reliable, since he might have tried to explain his reference to Francina's entitlement for 1/9 as a mistake as he suddenly realized such statement is inimical to their stance. In fact, it appears that he himself has referred 2/9 entitlement that came from Francina to Elias prior to that. If there were entitlements that came to Elias through his marriage or if 1/9 of the corpus was with Francina, original Plaintiff's or 6th and 8th Defendants' stance that Abraham had 1/3 of the corpus cannot be correct as there was no dispute that Elias got 2/3 from other sources through deeds marked 8V1 and 8V2. Further, this original Plaintiff has stated that Abraham got his 1/3 from his father Walakada Gamage Appune and Appune had another child, a daughter named Wilisina – vide pages 348. If Appune had 1/3 and he had two children, Abraham cannot have entitlement to 1/3 of the corpus, as Appune's entitlement should devolve on both of them. As per his evidence, he first has denied his knowledge with regard to the children of Wilisina but later states that she had 3 or 4 children and admits that if Appune had rights, it should also devolve on Wilisina.

- Fourthly, the 8th Defendant in his evidence has tried to convince the court that his father Walakadagamage Abraham was the owner of 1/3 of the corpus and he possessed and cultivated sugar cane during his time and after his demise his children are possessing the land and 1/2 of the extent is in their possession – vide page 239 of the brief. No documentary evidence was produced to show any dealing relating to cultivation of sugar cane. On the other hand, if they are in possession of the land, the natural response during

the preliminary survey would be the showing of the area in their possession to the surveyor to include that in the plan and the report. However, preliminary plan and report marked X and X1 do not show any area in the possession of the children of Abraham except for a cross claim made by the original Plaintiff to 9 trees against the claim made by the 11th Defendant on behalf of the 5th Defendant for all the trees and a tomb on the land. Anyhow, as per the superimposition plan and report marked Y and Y1, no one has claimed the trees other than the 5th and 11th defendants even though some of the children of Abraham, namely the Plaintiff, 6th ,7th, 8th, and the10th Defendants were present at that survey. Thus, the cross claim made on the first instance of the survey is questionable since they did not claim when the claim was made on behalf of the 5th Defendant while they were present when it was surveyed again for the superimposition. Even though, as mentioned before, it was said that after demise of Abraham they are in possession, no area has been shown in the preliminary plan or in the superimposition plan where they were in possession.

- Fifthly, it appears that the Learned District Judge heavily relied on the evidence given by one of the witnesses for the original Plaintiff and the 6th and 8th defendants, namely Walakada Gamage Hemasiri. It does not seem that he has given evidence using official records as an ex-officer. The Learned District Judge has accepted his evidence stating even though he is a relative of the original Plaintiff and the 6th and 8th Defendants, he came to give evidence on summons. The Learned District Judge has further stated that nothing has come to light from this witness about the possession of the 5th Defendant, but this witness had revealed that after Abraham, his children including original Plaintiff and the 6th and 8th Defendants, came to the possession of the land. However, when one goes through his evidence it can be observed that he is not an impartial witness but one who tried to hide the possession of the 5th and 11th Defendants at the early part of his evidence. In this regard following would be relevant.

- As per his evidence, he resides close to the subject matter of this case and it was Abraham who cultivated sugar cane and other crops in this corpus who died about 25 years ago to the date he gave evidence. He had never seen that 5th and 11th Defendants were in the possession of the corpus-– vide evidence in chief of the said witness. He admits that 6th and 8th Defendants are his close relatives-vide cross examination at page 265 of the brief. He has seen Abraham was in possession when he was passing through the nearby road- vide page 268 of the brief. No one other than Abraham and his sons possessed this corpus and 5th Defendant never had the possession of this land – vide page 271 of the brief. It is Abraham's children who possess this corpus – vide re-examination at page 270. However, this witness admits that he does not know whether Abraham had any title to the corpus- vide page 270. When questioned about the tea plants claimed on behalf of the 5th Defendant as per the survey report, this witness first says that he did not see such plants and changed his evidence to say that Abraham possessed only a separated portion – vide pages 273 to 275. No such separated portion in the possession of Abraham's children is shown in the preliminary survey.
- If this witness is a truthful witness, the portion enjoyed by Abraham or his children must have been revealed in the preliminary plan. As said before, survey reports marked at the trial clearly indicates that on behalf of the 5th Defendant there was a claim to the whole plantation and with a cross claim to some trees by the original Plaintiff which cross claim was not made in the survey report for the superimposition plan. Further, the original Plaintiff admits that he prayed for an injunction when the 5th and 11th Defendants took steps to build for weekly fair arranged by the Gramodaya Mandalaya. Moreover, the 5A and the 11th Defendant in her evidence has revealed that she removed the plantation including the tea plants. In the circumstances, it is clear that,

being a person living close to the corpus, the said Hemasara had attempted to hide the possession of the 5th and the 11th Defendants and was a witness partial to the original Plaintiff and the 6th and the 8th Defendants. Whatever it is, his evidence at most can be considered as evidence that speaks of cultivation of crops and sugar cane by Abraham in the corpus but by his evidence it is clear that he cannot vouch for that such cultivation was done as a co-owner who was entitled to 1/3 of the corpus. The 5A and the 11th Defendant has clearly stated in her evidence about her and her predecessor's possession of the corpus. The Learned District Judge has refused to accept that the balance 1/3 was owned by Francina when, as mentioned before, from the latter part of the 19th century 3 generations have dealt with the corpus as their own as per the pedigree of the 5th and 11th Defendants, but the Learned District Judge has accepted that 1/3 was owned by Abraham when the evidence given on behalf of the original Plaintiff and the 6th and the 8th Defendants lacks integrity and was not reliable in that regard as indicated above. On the other hand, mere possession or enjoyment of a portion of unknown extent of the land which is not depicted on a plan cannot establish that Abraham was entitled to 1/3 of the corpus.

- Sixthly, the 8th Defendant has admitted that he was prosecuting the action as per the amended Plaint tendered by his brother, the original Plaintiff – vide page 197 of the brief. However, the original Plaintiff, when further probed in cross-examination with regard to the contradictory facts revealed through his evidence as to the pedigree, has stated that as per the advice given by lawyers, he filed the action and the lawyers makes the case in a manner feasible to prosecute.

Thus, as per the evidence led, I wonder how the Learned District Judge allocated shares as per the shares allocated in the plaint. In my view the Learned District Judge failed in properly appreciating the evidence placed

before the District Court. Since there was a testamentary case where a Last Will was proved, 2/3 belonged to Elias could not have devolved as per the pedigree relied upon by the original Plaintiff and the 6th and the 8th Defendants. There was no clear evidence to show that 1/3 was owned by the Abraham. In fact, the evidence placed by the party who prosecuted the plaint and the original Plaintiff indicates that the pedigree they relied on was incomplete. Further, certain statements made by the original Plaintiff support the stance of the 5th and 11th Defendants that the other 1/3 also was with Francina, the wife of Elias and also that, in any case, Abraham could not have 1/3 of the corpus. Hence, the original Plaintiff and the 6th and 11th defendants failed in proving their case to get the corpus partitioned.

The Learned District Judge who wrote the Judgment heard only the latter part of the evidence of 5A Defendant. Thus, she was not in a better position to evaluate the rest of the evidence than a judge sitting in appeal as she also had to rely on what was recorded and submitted as evidence.

As per the reasons given above, it is my view that on balance of probability, the answer to question of law no.1 and 2 should be in the affirmative, and in any event, even if the sole ownership of Elias and his wife is considered as not proved, the original Plaintiff and or the 6th and the 8th Defendants who prosecuted the partition case have failed to prove a reliable pedigree to get the land partitioned. Thus, in my view, the partition action should have been dismissed.

Thus, I allow the appeal with costs.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

The plaintiff filed this action in the District Court of Galle to partition the land depicted in the Preliminary Plan, among the plaintiff and the 1st-10th defendants. The only contesting defendants were the 5th and 11th defendants, mother and daughter respectively, who sought dismissal of the plaintiff's action on the basis that the 5th defendant was the sole owner of the land. During the course of the trial the 5th defendant died and the 11th defendant was substituted in her place. After trial the District Court accepted the pedigree of the plaintiff and rejected the 5th and 11th defendants' pedigree and entered judgment accordingly. The appeal filed against this judgment by the 5A/11th defendant (appellant) was dismissed by the High Court of Civil Appeal. Hence this appeal to this court. This court granted leave to appeal on the following two questions of law as formulated by learned counsel for the appellant at the stage of supporting for leave:

(i) *Has the High Court and the District Court erred in law by failing to appreciate that the pedigree of title put forward by the 5th and the 11th defendants proved that they were the sole owners of the corpus for partition?*

(ii) *In any event, whether the 5th and the 11th defendants and their predecessors have acquired prescriptive title to the land sought to be partitioned by long possession?*

What is the pedigree unfolded by the appellant? The acceptance or refusal of the appellant's pedigree depends on the acceptance or refusal of the alleged joint last will executed by Elias Amarasiri Jayasinghe and his wife Francina Hamine. In the pedigree attached to the statement of claim dated 17.12.1996 (submitted to the District Court) and paragraphs 9 (i)-(ii) of the written submissions dated 17.01.2019 and paragraphs 10(i)-(ii) of the written submissions dated 19.05.2021 (submitted to this court), the appellant states

that Elias Amarasiri Jayasinghe and his wife by their joint last will dated 06.02.1890 which was proved in DC Galle case No. 2970/T bequeathed the entire land which is the subject matter of this partition action to their son Munidasa Amarasiri Jayasinghe; and he by deed marked 5V3 of 1912 transferred it to Dharmadasa Amarasiri Jayasinghe; and after his death, Mahaweera Amarasiri Jayasinghe became entitled to the land by deed marked 5V2 of 1941; and he transferred it to the appellant by deed marked 5V1 of 1941.

The plaintiff does not admit that there was a joint last will as alleged by the appellant which was admitted to probate. According to the appellant the original last will which is in Sinhala was marked 5V15 and the English translation of it was marked 5V14.

However, as the High Court has observed, paragraph 1 of the original last will states that the joint last will dated 06.02.1890 (which the appellant says was admitted to probate) is thereby revoked. If the last will dated 06.02.1890 was revoked, the appellant's pedigree based on the said last will shall fail.

Having realised this predicament, the appellant in paragraph 36 of the written submissions dated 19.05.2021 states "*In the original Sinhala last will marked 5V15 paragraph 1 states that a previous last will of 06.02.1890 is being revoked. Paragraph 1 in 5V15 appears to have revoked a last will of 1890 and not the last will which was proved in the testamentary action 2970/T and which is dated 02.10.1891.*" This is contradictory to the earlier position taken up by the appellant from the District Court up to the Supreme Court that what was proved in case 2970/T was the last will dated 06.02.1890. The appellant cannot take up a new position before the Supreme Court for the first time on a question of fact which goes to the root of the case. A partition case is no exception.

There is no date of execution of the original last will 5V15. 5V14 dated 02.10.1891 is undoubtedly not the English translation of the original last will 5V15. Having realised this, the appellant in paragraph 35 of the written submissions dated 19.05.2021 takes up the position that "*Documents 5V14 and 5V15 complement each other and they must be read together*." I am unable to agree. The original and its translation cannot complement each other. The translation is not intended to supplement the original. There is no last will acceptable to court. There is no probate before court. The appellant argues that the inventory marked 5V13 proves that the last will was admitted to probate. Which last will? On the other hand, an inventory tendered in a testamentary case is not conclusive proof that the deceased testator was the absolute owner of all the properties stated therein.

It is also relevant to note that after the above-mentioned testamentary proceedings were over, when Munidasa Amarasiri Jayasinghe transferred the land to Dharmadasa Amarasiri Jayasinghe by 5V3, he traces his title to the property to "right of inheritance". He makes no reference to the last will or any executor conveyance. The appellant argues that the recital in 5V3 is entirely correct. I have my reservations. When someone acquires property by a last will admitted to probate, there is no reason for him not to refer to the last will or the executor conveyance executed in terms of the last will as the source of title in the recital of the subsequent deed.

The appellant then argues that whether it is by inheritance or last will, nothing flows from it to the benefit of the plaintiff. This is not correct. Munidasa Amarasiri Jayasinghe is also in the plaintiff's pedigree. According to the plaintiff's pedigree, Munidasa Amarasiri Jayasinghe being one of the three children of Eliyas Amarasiri Jayasinghe is only entitled to 2/3 x 1/3 = 2/9 or 24/108 share. But according to the appellant, Munidasa Amarasiri Jayasinghe was entitled to the entire land on the strength of the last will.

The appellant admits in evidence that by deed 8V1 of 1865 and 8V2 of 1878 produced by the plaintiff, Elias Amarasiri Jayasinghe became entitled to only 2/3 of the land, not the entirety. This is prior to the alleged last will. How he became entitled to the balance 1/3, the appellant does not know. She thinks by prescription.

I am not satisfied, as the learned District Judge and the learned Judges of the High Court were, that there was a last will admitted to probate by which Elias Amarasiri Jayasinghe and his wife, being the lawful owners of the entire land subject to partition, bequeathed it to Munidasa Amarasiri Jayasinghe. If this is not proved, the subsequent deeds tendered on that assumption need not be scrutinised since what could have been transferred by those deeds was only what was entitled to the transferors and nothing more.

I answer the 1st question of law in the negative.

The next question relates to prescriptive possession. I do not think the appellant vigorously pursued such claim in the District Court, the High Court or before this court. In the District Court an incomplete issue (issue No.16) has been raised on prescription. In the High Court, the appeal has not been argued on prescription but only on identification of the corpus and devolution of title based on the aforesaid last will. In that backdrop it is my considered view that the appellant cannot try to establish a prescriptive claim as a main ground of appeal in the Supreme Court because it is a mixed question of fact and law if not a pure question of fact.

If there was no last will the appellant also becomes a co-owner of the land. Proof of prescriptive title is difficult. Proof of prescriptive title among co-owners is more difficult. Long possession of the co-owned land by one co-owner does not establish prescriptive possession unless it is established by cogent evidence that adverse possession commenced by way of an overt act continued for over 10 years. In this case evidence has been led that, apart

from the appellant, others who come under the plaintiff's pedigree also possessed the land. There are no buildings or valuable plantation on the land. No cogent evidence has been led to prove that the appellant is entitled to the entire land by prescription based on adverse possession against the other co-owners. This maybe because the appellant claimed the entire land on deed 5V1 based on the aforesaid last will. If a person claims title to a property as the absolute owner on paper title, in my view, he cannot in the same breath make a prescriptive claim to the same property because a prescriptive claim is based upon adverse possession against the true owner of the property.

I answer the 2nd question of law also in the negative.

The appeal is dismissed but without costs.

JUDGE OF THE SUPREME COURT

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

Sunnadeniyage Jayadasa,
Dehigahalanda,
Ambalantota.
Plaintiff

SC APPEAL NO: SC/APPEAL 218/2016
SC LA NO: SC/HCCA/LA/37/2016
CA NO: SP/HCCA/TA/24/2012 (F)
DC TISSAMAHARAMA NO: 175/2002/L

Vs.

1. Sudusinghage John Singho
(Deceased),
1A. Wimaladasa Sudusinghe,
Gemunupura, Tissamaharama.
Substituted 1st Defendant

2. Ramasundara Hettige Misinona
(Deceased)
2A. Wimaladasa Sudusinghe,
Gemunupura, Tissamaharama.
Substituted 2nd Defendant

3. Jasenthu Hewage Dharmadasa,
No. 1046, Nandimithra Mawatha,
Gemunupura, Tissamaharama.

4. Chaminda Sudusinghe,
"Chaminda", Gemunupura,
Tissamaharama.
3rd and 4th Defendants

AND BETWEEN

Sunnadeniyage Jayadasa,
Dehigahalanda,
Ambalantota.
Plaintiff-Appellant

Vs.

1. Sudusinghage John Singho (Deceased),
1A. Wimaladasa Sudusinghe,
Gemunupura, Tissamaharama.
Substituted 1st Defendant-Respondent

2. Ramasundara Hettige Misinona
(Deceased),
2A. Wimaladasa Sudusinghe,
Gemunupura, Tissamaharama.
Substituted 2nd Defendant-Respondent

3. Jasenthu Hewage Dharmadasa,
No. 1046, Nandimithra Mawatha,
Gemunupura, Tissamaharama.

4. Chaminda Sudusinghe,
"Chaminda", Gemunupura,
Tissamaharama.
3rd and 4th Defendant-Respondents

AND NOW BETWEEN

Sunnadeniyage Jayadasa,
Dehigahalanda,
Ambalantota.
Plaintiff-Appellant-Appellant

Vs.

1. Sudusinghage John Singho (Deceased),
1A. Wimaladasa Sudusinghe,
Gemunupura, Tissamaharama.
Substituted 1st Defendant-Respondent-Respondent

2. Ramasundara Hettige Misinona
(Deceased),
2A. Wimaladasa Sudusinghe,
Gemunupura, Tissamaharama.
Substituted 2nd Defendant-Respondent-Respondent

3. Jasenthu Hewage Dharmadasa,
No. 1046, Nandimithra Mawatha,
Gemunupura, Tissamaharama.

4. Chaminda Sudusinghe,
"Chaminda", Gemunupura,
Tissamaharama.
3rd and 4th Defendant-Respondent-Respondents

Before: S. Thurairaja, P.C., J.
Kumuduni Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: W. Dayaratne P.C. with R. Jayawardena for the Plaintiff-Appellant-Appellant.
Prabath de Silva with Madushani Kulerathna with Salome de Silva for the Defendant-Respondent-Respondents.

Argued on: 26.09.2022

Written submissions:
by the Plaintiff-Appellant-Appellant on 27.04.2017 and 21.11.2022.
by the Defendant-Respondent-Respondents on 09.05.2017 and 26.10.2022.

Decided on: 27.03.2023

Samayawardhena, J.

The plaintiff filed this action in the District Court of Tissamaharama against the defendants seeking a declaration of title to the land described in the schedule to the plaint on deed No. 1907 marked P5, ejectment of the defendants therefrom and damages. The 1st and 2nd defendants filed answer seeking a dismissal of the plaintiff's action, a declaration that they are entitled to the property on prescriptive possession through Geetha

Chandanee Sudusinghe (මෙම උත්තරයේ උපලේඛනයේ සඳහන් දේපල 1,2 විත්තිකරුවන්ට ගීතා චාන්දනී සුදුසිංහ යන අයගෙන් කාලාවරෝධී භුක්තියට උරුම වී ඇති බව ප්‍රකාශ කරන ලෙස) and a declaration that deed P5 is a nullity.

After trial, the District Judge dismissed the plaintiff's action and entered judgment for the defendants. On appeal, the High Court of Civil Appeal in Tangalle affirmed the judgment of the District Court and dismissed the appeal. The plaintiff appealed to this Court against the judgment of the High Court and this Court granted leave to appeal mainly on two questions of law:

(a) Did the High Court of Civil Appeal err in law in affirming the judgment of the District Court which decided that P5 is a forgery relying entirely upon the report of the Examiner of Questioned Documents?
(b) Did the High Court of Civil Appeal err in law in affirming the judgment of the District Court which decided that upon the death of Geetha Sudusinghe, the property devolves upon the 1st and 2nd defendants being her natural parents?

At the trial, by way of formal admissions, it was *inter alia* accepted by the defendants that:

(a) David Silva became the owner of the property by a partition decree marked P1 and P2.
(b) David Silva gifted that property to his wife Podinona and Geetha Sudusinghe by deed No. 1227 marked P3.
(c) Podinona gifted her share to Geetha Sudusinghe by deed No. 33 marked P4 (thereby Geetha Sudusinghe becoming the sole owner of the property).
(d) Geetha Sudusinghe is the adopted child of David Silva and his wife, Podinona.

(e) The 1st and 2nd defendants are the biological parents of Geetha Sudusinghe.

The plaintiff's case was that Geetha Sudusinghe gifted the property to the plaintiff by deed P5. This was challenged by the defendants on the basis that P5 is a forgery and the District Court accepted the defendants' position. The contention of learned President's Counsel for the plaintiff is that the District Court came to this conclusion solely on the evidence of the Examiner of Questioned Documents (EQD) and on no other evidence and this is against the well-established law.

The EQD gave evidence at the trial. He is an officer of the Government Analyst's Department. The report was marked V3. His evidence is that the signature of Geetha Sudusinghe appearing on deed P5 is a forged one. According to his evidence, Geetha Sudusinghe's purported signature has been created by tracing out her genuine signature on deed P5.

> 03. පැ1 හි වූ පැ 1අ අත්සන පරික්ෂා කොට අදාළ ආදර්ශ සමග ඉල්ලා ඇති පරිදි සැසඳුවෙමි. මා හට පෙනී ගියේ පැ1 හි පැ1අ ප්‍රශ්නගත අත්සන නිර්මාණය කර ඇත්තේ නිර්ව්‍යාජ අත්සනක් ආකෘතියක් ලෙස භාවිතා කර ඇද ගන්නා ලද කාවැද්දීම් මත බෝල්පොයින්ට් තීන්තෙන් ඇඳිමෙන් බවයි.
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> 04. මාගේ නිගමනය වනුයේ පැ1හි පැ1අ අත්සන් කෙටුම්පත් කරන ලද ව්‍යාජ අත්සනක් බවයි.

The expert witness is very confident on that finding as he says that he used the latest advanced technology known as Video Spectral Comparator (VSC) technology in this regard. This technology with advanced characteristics for examination, comparison and authentication is a complete digital imaging system used by (among many others) Examiners of Questioned Documents for detecting variations on altered and counterfeit documents. At the invitation of the defendants' counsel the expert witness produced his investigation results marked V5. The District

Judge accepted his evidence. The complaint of learned President's Counsel for the plaintiff is based on the sentence found in the judgment of the District Court where the learned District Judge says that to come to the conclusion that deed P5 is a forgery, the evidence of the EQD itself is sufficient. I accept that the District Judge cannot decide the genuineness of P5 on the EQD report alone. The expert only expresses his opinion on the matter. It is not conclusive. The Court will take the expert's opinion into careful consideration to form its independent opinion, which shall ultimately prevail. The Court cannot blindly accept such evidence. *Vide Gratiaen Perera v. The Queen* (1960) 61 NLR 522, *Charles Perera v. Motha* (1961) 65 NLR 294, *Fernando v. The State* (1972) 75 NLR 315.

However I cannot accept the argument of learned President's Counsel for the plaintiff that the District Judge entirely depended on the evidence of the EQD to conclude that deed P5 is a forgery. The District Judge in the judgment *inter alia* refers to the evidence of Seetin, an attesting witness to the deed. His evidence is fragile and not convincing at all. Geetha Sudusinghe was sick at that time but she is said to have gone to Ambalantota by bus to execute the deed. Seetin also says that she died about one week after the execution of the deed but according to P5 it was executed on 10.01.2002. Geetha Sudusinghe died on 07.02.2002. He did not know that he was signing as a witness to a deed but later came to know that it was a deed. When suggested that they prepared a forged deed his answer was that he does not know. *Vide* pages 419-420 of the brief. The plaintiff did not call Sunil, the other attesting witness and/or the notary to give evidence.

On the available evidence I do not think the District Judge was wrong to have come to the conclusion that the due execution of the deed was not proved and the signature of the donor is a forgery.

The next question is whether the District Judge was correct when he came to the conclusion that Geetha Sudusinghe was brought up by David Silva and Podinona but there is no evidence of adoption of her by David Silva and Podinona (මෙම නඩුවේ ඉදිරිපත් වූ තවත් කරුණක් වන්නේ ගීතා චාන්දනි සුදුසිංහ කුඩාකළ සිටම නැසිගිය ඩේවිඩ් සිල්වා හා පොඩිනෝනා විසින් හදාවඩාගත් බවයි. එහෙත් කුලවද්දා ගැනීමක් පිලිබඳ කරුනු ඉදිරිපත්ව නැත), and therefore after the death of Geetha Sudusinghe, her propery shall devolve on her natural parents and siblings. This is a wrong finding. At the commencement of the trial, it was recorded as an admission of the defendants (පිලිගැනිම් විත්තිය වෙනුවෙන්) that Geetha Sudusinghe was adopted by David Silva and Podinona. (සුන්නා දෙනියගේ ඩේවිඩ් සිල්වා සහ ඔහුගේ භාර්යාව වන පොඩිනෝනා විසින් ගීතා චාන්දනී සුදුසිංහ යන අය දරුකමට හදාවඩාගත් බව පිළිගනී)

According to section 58 of the Evidence Ordinance such formal admissions recorded at the trial need no further proof unless the Court wants them to be proved.

> *58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:*
>
> *Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*

Section 31 of the Evidence Ordinance which enacts "*Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained*" relates to informal admissions mostly made out of Court.

Because of this formal admission, no issue was raised by either party whether Geetha Sudusinghe was adopted by David Silva and Podinona

and rightly so. Nor did the Court want that fact to be proved by calling witnesses. If it was the position of the defendants that Geetha Sudusinghe was not legally adopted but only brought up by David Silva and Podinona, there was no necessity for the defendants to record such admission at the trial but instead it ought to have been raised as an issue at the trial. This was not done.

In jurisdictions where adversarial system of justice is adopted such as Sri Lanka, it is a rudimentary principle of law that the case shall be decided by the judge as it is presented before him by the competing parties and not in the way the judge thinks the case ought to have been presented before him. Therefore the finding of the District Judge on that matter cannot allowed to stand. The Court has to proceed on the basis that Geetha Sudusinghe is the adopted child of David Silva and Podinona.

By way of further admissions quoted above, the 1st and 2nd defendants have accepted that Geetha Sudusinghe became the owner of this land by the two deeds of gifts marked P3 and P4 executed by David Silva and Podinona. However in the answer and by way of issues the 1st and 2nd defendants say that Geetha Sudusinghe became entitled to the land by prescription. Issue 16 reads as follows: එකී සුන්නාදෙනියගේ ඩේවිඩ් සිල්වා මියයාමෙන් පසු, එකී ඩේවිඩ් සිල්වා අයිතිය දැරූ, උත්තරයේ උපලේඛණයේ ඇතුලත් දේපොල සහ ඔහුට අයිති සියළු දේපොල ගීතා චාන්දනි සුදුසිංහ යන අයට කාලාවරෝධී නීතිය යටතේ අයිති වේ ද?

The District Judge has answered this issue also in the affirmative. This is meaningless. I cannot understand how and why and against whom Geetha Sudusinghe had adverse possession to acquire the property by prescription when she had the paper title by deeds P3 and P4 about which there is no contest.

In any event, the plaintiff filed this action for declaration of title and ejectment of the defendants from the land. That means the defendants are in possession of the land. Merely because this Court sets aside the finding of the District Court on the question of adoption, the plaintiff cannot enter into possession of the land. This Court cannot express any legal opinion as to what the parties should do to vindicate their rights, if they think they have such rights.

The plaintiff's action in the District Court and the cross-claim of the defendants shall stand dismissed. The appeal is formally dismissed subject to the above findings. No costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

Kumuduni Wickremasinghe, J.
I agree.

Judge of the Supreme Court

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

Welikala Vithanalage Beatrice Rodrigo,
No. 106, "Rodrigo Villa",
Kandy Road,
Yakkala.
Plaintiff

SC APPEAL NO: SC/APPEAL/01/2019
SC LA NO: SC/HCCA/LA/499/2016
HCCA GAMPAHA NO: WP/HCCA/GPH/186/2010 (F)
DC GAMPAHA NO: 41199/L

Vs.

1. Pradeep Kumara Dissanayaka,
2. Lokuketagodage Gunaseeli Chandralatha,
   Both of No. 92, 42/04,
   4th Lane, Aluthgamawatte,
   Yakkala.
   Defendants

AND

Welikala Vithanalage Beatrice Rodrigo,
No. 106, "Rodrigo Villa",
Kandy Road,
Yakkala.
Plaintiff-Appellant

Vs.

1. Pradeep Kumara Dissanayaka,
2. Lokuketagodage Gunaseeli.
   Chandralatha,
   Both of No. 92, 42/04,
   4th Lane, Aluthgamawatte,
   Yakkala.
   Defendant-Respondents

AND NOW BETWEEN

Welikala Vithanalage Beatrice Rodrigo,
No. 106, "Rodrigo Villa",
Kandy Road,
Yakkala.
Plaintiff- Appellant- Appellant

Vs.

1. Pradeep Kumara Dissanayake,
2. Lokuketagodage Gunaseeli Chandralatha,
   Both of No.92, 42/04,
   4th Lane, Aluthgamawatte,
   Yakkala.
   Defendant-Respondent-Respondents

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: S.N. Vijithsingh for the Plaintiff-Appellant-Appellant.
Mohan Walpita for the Defendant-Respondent-Respondents.

Argued on: 16.12.2021

Written submissions:
by the Plaintiff-Appellant-Appellant on 08.03.2019 and 19.01.2022.
by the Defendant-Respondent-Respondents on 22.11.2021 and 20.01.2022.

Decided on: 27.03.2023

Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Gampaha seeking a declaration of title to the land described in the schedules to the plaint and a permanent injunction preventing the defendants from constructing buildings on the land described in the third schedule to the plaint. The defendants are the owners of Lots 65 and 66 of plan 860 marked V1 and the plaintiff is the owner of land on the western boundary of the defendants' land – *vide* plan 279 at page 295 of the Brief. The dispute between the two parties ultimately boils down to a boundary dispute. The defendants filed answer seeking to demarcate the boundary between the two lands as per the plan 279 marked V3.

After trial, the District Court entered judgment for the defendants. On appeal, this was affirmed by the High Court. This Court granted leave to appeal against the judgment of the High Court on the question whether the High Court erred in affirming the judgment of the District Court where relief was granted in favour of the defendants as prayed for in the prayer to the answer by demarcating the boundary as per plan 279 whilst

stating in the body of the judgment that the boundary should be demarcated as per plan 860.

Learned counsel for the plaintiff states before this Court that the plaintiff is willing to demarcate the boundary between the two lands according to plan 860 but not according to plan 279.

What is plan 279? Is it different from plan 860? Plan 279 was prepared on a commission issued by Court. This plan and the report were marked V3 and V3A through the surveyor who prepared this plan. He was called as a witness by the defendants. His evidence-in-chief was led on 26.01.2009 and he was not cross-examined on the same date but on 05.05.2009. It is significant to note that his cross-examination was confined to two pages and the plaintiff did not really challenge his evidence at all. According to his evidence (*vide* report V3A), plan 279 was prepared by the superimposition of plan 860 on the existing boundaries. In other words, plan 279 depicts both the existing boundaries (with darker markings) and the superimposed boundaries as shown in plan 860 (with lighter markings). I repeat that this evidence was not challenged in cross-examination. Therefore, the argument of learned counsel for the plaintiff that the plaintiff is prepared to demarcate the boundary according to plan 860 but not according to plan 279 as they are two different plans is unsustainable. Both plans address the same issue – the latter in clearer terms. According to the report, the survey had been carried out with the participation of both parties and the correct boundary had been shown on the ground and marked by the surveyor in front of both parties.

I see no reason to take a different position than that taken by the two Courts below. The question of law has to be answered against the plaintiff. The appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court

APRIL

2023

JUDGMENTS

APRIL INDEX

1.	SC/APPEAL/53/2014	986
2.	SC/APPEAL/40/2016	999
3.	SC/APPEAL/29/2014	1005
4.	SC/APPEAL/219/2014	1024
5.	SC/APPEAL/148/2018	1047

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

In the matter of an appeal to the Supreme Court under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 53/2014
SC/ SPL/LA/No. 70/2012
CA Case No: 2/2008 (Tax)
BRA/ BTT - 27

Ceylon Paper Sacks Limited,
47, Maligawa Road,
Etulkotte.
APPELLANT

Vs

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A Gardiner Mawatha,
Colombo-2.
RESPONDENT

And now between

Ceylon Paper Sacks Limited,
47, Maligawa Road,
Etulkotte.
APPELLANT-APPELLANT

Vs

Commissioner General of Inland Revenue,

Department of Inland Revenue,
Sir Chittampalam A Gardner Mawatha,
Colombo-2.
RESPONDENT-RESPONDENT

Before : **P. PADMAN SURASENA J**

KUMUDINI WICKREMASINGHE J

MAHINDA SAMAYAWARDHENA J

Counsel : Romesh De Silva PC with Shanaka Cooray for the Appellant instructed by Santhoshi S. Herath Associates and Deepika Herath for the Appellant-Appellant.

Farzana Jameel PC, ASG with Indumini Radeny for the Respondent-Respondent.

Argued on : 06.06.2022

Decided on : 04.04.2023

P. Padman Surasena J

The Appellant-Appellant (hereinafter referred to as the 'Appellant') is a limited liability company, incorporated under the laws of Sri Lanka, engaged *inter alia*, in the business of manufacturing multi-walled kraft paper sacks for the bulk packing of tea. The Appellant then sells these paper sacks to regional plantation companies in Sri Lanka. The Appellant claimed exemption from Turnover Tax on the sale of these paper sacks to the aforesaid companies claiming that the said companies export bulk tea packed in these paper sacks.

The dispute arose when the Appellant had submitted its Tax returns for certain taxable periods claiming exemption from payment of Turnover Tax under section 4 of the Turnover Tax Act No. 69 1981. To facilitate the easy reference and comprehension by the reader, I would at this initial stage itself reproduce below, section 4 of the Turnover Tax Act No. 69 1981.

Section 4 of the Turnover Tax Act No. 69 of 1981.

> "*(1).The Minister may, if he is of opinion that it is essential for the economic progress of Sri Lanka, exempt by Order published in the Gazette any business or such business as may be specified, which is carried on by any person, from the turnover tax.*
>
> *(2). Every Order under subsection (1) shall come into force on the date of its publication in the Gazette or on such later date as may be specified in such Order and shall be brought before Parliament within a period of three months from the date of the publication of such Order in the Gazette or, if no meeting of Parliament is held within such period, at the first meeting of Parliament held after the expiry of such period, by a motion that such Order shall be approved.*
>
> *(3). Any Order which Parliament refuses to approve shall, with effect from the date of such refusal, be deemed to be revoked but without prejudice to the validity of such Order until the date of such refusal, and the notification of the date on which such Order is deemed to be revoked shall be published in the Gazette."*

The Minister acting under the powers vested in him under the above section then published the Gazette (Extraordinary) No 432/03 dated 16.12.1986. The part of the said Gazette notification relevant to the questions of law in the instant case reads as follows.

> *"By virtue of powers vested in me under Section 4 of the Turnover Tax Act, No. 69 f 1981, I Ronal Joseph Godfrey de Mel, minister of Finance and Planning, being of opinion that it is essential for the economic*

progress of Sri Lanka, do by this Order, with effect from midnight of 31 December 1986/ 1 January, 1987 exempt the following from Turnover Tax:—

1) ….
2) ….
3) ….
4) "any business for the export of any manufactured or processed article;"
5) ….
….
24) ….

Relying on the item (4) [above mentioned clause], the Appellant had claimed that the paper sacks it manufactured are exclusively for export of tea, and therefore it was entitled to an exemption under item (4) of the above Gazette read with section 4 of the Turnover Tax Act. The Assessor had rejected the Appellant's claim for exemption on the basis that the local supply of such paper sacks to plantation companies does not constitute 'export' as contemplated under the Gazette notification No. 432/03 dated 16.12.1986, which was relied upon by the Appellant. The Assessor had taken the view that any exemption under Section 4 of the Turnover Tax Act No. 69 of 1981, is only available to a business which exports its products, and as the Appellant company does not export paper sacks, and only sells the paper sacks locally to plantation companies, the sales of the Appellant company will not qualify for an exemption under Section 4 of the Turnover Tax Act.

Being aggrieved by the aforesaid decision of the assessor, the Appellant appealed to the Commissioner General of Inland Revenue (hereinafter sometimes referred to as the Commissioner General). The Commissioner General, by the Determination dated 03.09.2001 (produced marked **X1**) had dismissed the said appeal.

Being aggrieved by the aforesaid Determination of the Commissioner General, the Appellant appealed to the Board of Review under Section 119 of the Inland Revenue Act No. 28 of 1979, as provided for, by Section 18 of the Turnover Tax Act No. 69 of 1981. The said appeal was presented on the basis that, the Appellant was either an

exporter or an indirect exporter-supplier, and therefore was entitled for an exemption from Turnover Tax under Section 4 of the Turnover Tax Act No.69 of 1981. The Board of Review having heard the submissions of the parties, by its Determination dated 31.03.2008 (produced marked **X3**) had confirmed the assessment issued by the Assessor and dismissed the said appeal of the Appellant.

Being dissatisfied with the Determination of the Board of Review, the Appellant then appealed to the Court of Appeal by stating a case for the opinion of the Court of Appeal.

The question of law formulated for the opinion of the Court of Appeal by the Board of Review is as follows,

> *"Is the Assessee an exporter and/or an indirect exporter-supplier to claim tax exemption under the Turnover Tax Act No. 69 of 1981 when it did not export but supplied its paper sacks to companies inter alia exporting bulk tea".*

The Court of Appeal by its judgment dated 23.02.2012 (produced marked **X5**), upheld the order of the Board of Review which had concluded that 'the Appellant is neither a direct nor indirect exporter and was not in an activity that was exempted form turnover tax'.

Being dissatisfied with the opinion of the Court of Appeal, the Appellant sought Special Leave to Appeal from this Court. This Court, upon hearing the learned counsel for the Appellant and the learned Deputy Solicitor General, by its order dated 01.04.2014, had granted Special Leave to Appeal only on the following question of law:

> *"Is the Appellant exempt from turnover tax in terms of Section 4 of the Turnover Tax Act No. 69 of 1981 as reflected in the Gazette No. 432/ 3 dated 16.12.1986?"*

I will now move on to discuss the question whether the business of the Appellant will classify as "any business for the export of any manufactured or processed article" in order for that business to fall under the exemption set out in clause 4 of the above mentioned Gazette.

The Appellant claims that he is entitled to the above exemption claiming that it is an exporter of a manufactured article on the following basis: the paper sacks

manufactured by the Appellant is not sold for local consumption and is solely used for the export of tea; the paper sacks manufactured by the Appellant are an integral part of the export process of the tea; and therefore, the paper sacks manufactured by the Appellant are an integral part of the export itself.

The Gazette notification (Extraordinary) No. 432/03 dated 16.12.1986 exempts "*any business for the export of any manufactured or processed article"*. When taken the literal meaning, it is evident that the Gazette explicitly intends to cover a 'business for the export of any manufactured article', and therefore is imperative that to come under this exemption, the relevant business must be capable of being classified entirely as a business for the export of the article it manufactures.

Let me next consider whether the Appellant's business is a business for export. The Appellant in order to qualify itself as an exporter must satisfy all the characteristics of an exporter, i.e., being engaged in international trade, the existence of an overseas buyer, the relevant shipping documents as well as standard payment methods involved in international trade transaction. Furthermore, the presence of the earned foreign exchange which is the price for the goods exported would be an integral characteristic of an exporter. The Appellant if indeed is carrying on with a business of export, can easily provide proof of at least one of the followings: an international sales arrangement; invoice or an export order; any letter of credit opened; any shipping/air freight document etc., presence of any such evidence would have indicated at least some confirmation of the fact that the Appellant is engaged in exporting of the items it manufactures. However, the Appellant has not provided any such evidence and hence has not established any of the above characteristics of an exporter.

The multi-walled kraft paper sacks manufactured by the Appellant are simply sold to the regional plantation companies. The regional plantation companies do not export the multi-walled kraft paper sacks manufactured by the Appellant, but merely use them for packing the article they endeavour to export, which is tea. Thus, neither the regional plantation companies nor the Appellant is engaged in any business for the export of the multi walled kraft paper sacks manufactured by the Appellant. The

Appellant also does not carry on its business of manufacturing paper sacks either to be exported or for the export market. The Appellant manufactures their paper sacks to be sold to local plantation companies to bulk pack tea. What may be gleaned from the available material is that this tea is then sent to Colombo tea auctions where the tea may or may not be exported. Therefore, the paper sacks sold to the regional plantation companies are not the articles being exported. Thus, I am not satisfied that the Appellant is engaged in exporting of the items it manufactures.

Moreover, as has been already mentioned above, in order to be eligible for an exemption under this section it is imperative that the relevant business must be a 'business of manufacturing or processing articles for export'. I can observe that there are two limbs present in Clause 4 of the relevant Gazette notification. The Clause states: "*any business for the export of any manufactured or processed article*". This means firstly, that the business from which the relevant turnover is derived must be a business for export. That is the first limb. The second part of the Clause 4 sets out clearly as to what kind of goods should be exported by such business. The goods exported must be manufactured or processed articles. That is the second limb.

The next question is, as to who should have manufactured the articles referred to in Clause 4. The first observation I make is that any article must have been manufactured by somebody at some point of time for articles cannot fall from the sky. If this aspect of Clause 4 is forgotten, export of anything would attract the exemption granted under that provision. That is the reason as to why the law has only empowered the Minister to exempt by Order published in the Gazette any business from turnover tax only if he is of opinion that the exemption of such business would be essential for the economic progress of Sri Lanka. In the instant situation, what the Minister has exempted is "*any business for the export of any manufactured or processed article*". This must be understood as a business which exports any manufactured or processed article. In the instant case, a business which exports any manufactured article. The Appellant is not engaged in any such business.

The Appellant referring to both 'direct export' as well as 'indirect export' in its written submissions[1], has sought to argue that the Court of Appeal had failed to consider the definition of both direct and indirect export. Let me now consider this aspect.

When the Appellant sells the paper sacks to the Plantation Companies, the sale transaction between them has been completed as the property in the goods stand transferred to the Plantation Companies. Therefore, at that point itself the relevant transaction is completed between the Appellant and the plantation companies. The Appellant thereafter is not entitled to monitor or to know the use to which the plantation companies would put the paper sacks they had purchased. In any case, the argument of the Appellant is not that the plantation companies export the paper sacks they had purchased but that the plantation companies export tea packed in the paper sacks they had purchased.

The paper sacks are manufactured by the Appellant and then sold to local plantation companies to bulk pack tea which is then sent to Colombo tea auctions where the tea may or may not be exported. Indeed, the Appellant has not adduced any evidence to establish as to what really happens to the multi-walled kraft paper sacks after they are sold to the regional plantation companies. Be that as it may, one thing is clear; the Appellant cannot be regarded as either a direct or indirect exporter of the multi-walled kraft paper sacks it manufactures. The Appellant plays no part in the part of any transaction involving any export. The Appellant was only the manufacturer who supplied their finished product to the local plantation companies, who then use these paper sacks for packing their tea and therefore, the Appellant cannot be classified as an 'indirect exporter'.

Therefore, I am unable to accept the argument of the Appellant that they do not sell any of the manufactured paper sacks for local consumption itself and all of the manufactured paper sacks are used for the export of tea and hence the paper sacks manufactured by the Appellant form an integral part of the export process of the tea. It must be stressed that the relevant exporters, export tea and not paper sacks. On

[1] Written submissions Dated 02.10.2015 filed before this Court by Ceylon Paper Sacks Limited.

this basis, I am unable to conclude that the Appellant's business is a 'business for the export of any manufactured article within the meaning of the Gazette (Extraordinary) No 432/03 dated 16.12.1986.

Before I part with this judgment, let me also refer to the case of Perera & Silva Ltd. Vs. Commissioner General of Inland Revenue,[2] which had considered the question whether a business for supplying material for the packaging of export goods will also classify as a 'business for export'.

Although the question of law in this case was based on a subsequent statute, the basis for argument for the exemption of turnover tax by the Appellant in the case of Perera & Silva, was similar to the argument advanced by the Appellant in the instant case.

Perera & Silva Ltd. was a firm manufacturing wooden boxes and shooks (a component part used in assembling wooden boxes). A part of its production was on orders by persons who exported goods such as tea, batteries, and spices from Sri Lanka. The dispute in that case was whether the turnover relating to the sale of wooden boxes and shooks by Perera & Silva Ltd., which were subsequently used by buyers for the export trade, should be excluded from the liability of turnover tax of Perera & Silva Ltd. The Commissioner General of Inland Revenue had held that those transactions of Perera & Silva Ltd. are liable to business turnover tax and confirmed the tax charged by the Assessor.

The Board of Review on Appeal held that: the wooden boxes and shooks though manufactured in Ceylon were not exported by the assessee; the assessee became liable to pay tax on the proceeds of sale, immediately after the sale was concluded, whether the proceeds of sale, were actually received or only became receivable; the proceeds of sale which are liable to tax at the time the turnover is made cannot by a process of interpretation be converted into proceeds of sale which would be exempted from tax.

[2] 79 NLR (Volume II) page 164.

At the time of the case of Perera & Silva Ltd. the turnover tax was payable in respect of the completed transactions, unless those transactions came within one of the exceptions provided under section 121 (1) of the Finance Act No. 11 of 1963. For easy reference for the reader, I would set out below, Section 121 (1) of the Finance Act.

> "*(1) The Minister may by order published in the Gazette declare any article specified in such Order to be an excepted article for the purposes of this Part of the Act. Different articles may be declared to be excepted articles in respect of different classes or descriptions of businesses.*
>
> *(2) Where an article is, under subsection (1), declared to be an excepted article in respect of any class or description of business, the sum realized from the sale of such article shall not be taken into account for the purpose of ascertaining the turnover from such class or description of business."*

Just like in the instant case, in Perera & Silva's case also the then Minister acting under Section 121 (2) had declared by the Schedule to the Gazette notification No. 14,864/9 of 02.08.1969 that "articles manufactured in Ceylon and exported" be excluded from the liability of turnover tax.

Upon the application of Perera & Silva Ltd. The Board of Review had stated a case for the opinion of the Supreme Court under section 138A (1) of the Finance Act, No. 11 of 1963. The questions of law stated for the opinion of the Supreme Court in that case are,

i. *Does "articles manufactured in Ceylon and exported " in the order published in Gazette No. 14,864/9 of 2.8.69, mean articles manufactured in Ceylon and exported in a single business.*
ii. *Is the turnover arising from wooden boxes and shooks, sold by the assessee during the quarters 31.12.69, 31.3.70, 30.6.70 and exported by others exempt from business turnover tax under the order made under 121 (1) published in the Gazette Extraordinary 14,864/9 of 2.8.69.*

Thamotheram J giving the opinion of the Supreme Court in Perera and Silva's case, stated as follows.

> *"In our opinion the business carried on by Perera and Silva Ltd. was only one of manufacture. It is only when the business in question includes both manufacture and export that the exception to liability can arise; the turnover tax is in respect of the turnover made by that person (Perera & Silva Ltd.) from that business (manufacture of wooden boxes). The exception is when that business— includes both manufacture and export.*
>
> *Our opinion therefore is as follows :*
>
> *(1) " Articles manufactured in Ceylon and exported " in the order published in Gazette No. 14,864/9 of 2.8.69 means articles manufactured in Ceylon and exported in a single business;*
>
> *(2) The turnover arising from wooden boxes and shooks sold by the assessee during the quarters 31.12.64, 31.3.70 and 30.6.70 and exported by others are not exempted from business turnover tax under the order made under 121 (1) published in the Gazette Extraordinary No. 14,864/9 of 2.8.69.*
>
> *I may also add that in our view when an article, e.g., tea, is exported in wooden boxes, it is wrong to say that the boxes in which tea is exported are themselves exported— it is true the literal meaning of ' export' is 'sending out'— but export connotes a business transaction between some person in Sri Lanka with a person outside. If a Sri Lankan firm exports tea to a firm abroad, I think, it does violence to the English language to say that the firm also exported wooden boxes in which the tea was sent. It is not any part of the particular export business.*
>
> *The order made by the Minister on 2.8.69 had been amended by an order published in Gazette No. 83/8 of 1.11.73. One of the excepted articles*

mentioned in the latter order is "articles manufactured in Sri Lanka and exported by the manufacturer."

This amendment was no doubt due to the point taken in the present case being taken by many an assessee. We however do not think that the statute was not express or that it was ambiguous."

It was on the above basis that this Court in that case held that the words "manufactured in Ceylon" and "exported" should be read conjunctively and accordingly the exemption is available only in respect of articles manufactured in Ceylon and exported in the course of the same business.

In the instant case too, undoubtedly when the Appellants sell these paper sacks they manufacture to local plantation companies, there is no element of 'export' involved in that business transaction. This could be further illustrated by referring to Section 5 of the Turnover Tax Act No. 69 of 1981 which stipulates the meaning of "turnover" as being, *"the total amount received or receivable from transactions entered into in respect of that business or for services performed in carrying on that business"*. The transaction in relation to the Appellant's business namely the sale of the multi-walled kraft paper sacks to the plantation companies for the packaging of tea was a completed transaction entered into, in respect of that business. It is at that point that the Appellant becomes liable for the payment of turnover tax.

For the foregoing reasons, I am of the view that the Appellant is not entitled for the relevant exemption under Section 4 of the Turnover Tax Act No. 69 of 1981. Therefore, I hold that the Board of Review has correctly concluded that the Appellant is not entitled to any exemption under Section 4 of the Turnover Tax Act No. 69 of 1981. I also hold that the Court of Appeal too has correctly taken the same view.

Accordingly, I answer the question of law in respect of which this Court has granted Special Leave to Appeal as follows:

"The Appellant is not entitled for an exemption from turnover tax in terms of Section 4 of the Turnover Tax Act No. 69 of 1981 read with the Gazette No. 432/ 3 dated 16.12.1986."

I affirm the judgment dated 23.02.2012 of the Court of Appeal and dismiss this Appeal with costs.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree,

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree,

JUDGE OF THE SUPREME COURT

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

D.M.D. Ananda Jayaratne,
No. 209, Thalawathugoda Road,
Mirihana, Pitakotte.
Plaintiff

SC APPEAL NO: SC/APPEAL/40/2016
SC LA NO: SC/HCCA/LA/345/2014
HCCA MT LAVINIA NO: WP/HCCA/MT/07/2011 (F)
DC NUGEGODA NO: 076/08/SPL

Vs.

M.D.R.M. Perera,
No. 138/35, Thalahena,
Malabe.
Defendant

AND BETWEEN

M.D.R.M. Perera,
No. 138/35, Thalahena,
Malabe.
Defendant-Appellant

Vs.

D.M.D. Ananda Jayaratne,
No. 209, Thalawathugoda Road,
Mirihana, Pitakotte.
Plaintiff-Respondent

AND NOW BETWEEN

M.D.R.M. Perera,
No. 138/35, Thalahena,
Malabe.
Defendant-Appellant-Appellant

Vs.

D.M.D. Ananda Jayaratne,
No. 209, Thalawathugoda Road,
Mirihana, Pitakotte. (Deceased)
Plaintiff-Respondent-Respondent

D.M.D. Dhanushka Buddhika Jayaratne,
House/Assessment No. 431/2,
Kattakaduwa Janapada Kotasa,
Grama Niladari Division of Wadugama,
(No. 71), Galgamuwa.
Substituted Plaintiff-Respondent-
Respondent

Before: E.A.G.R. Amarasekara, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Anuruddha Dharmaratne for the Defendant-Appellant-Appellant.
Substituted Plaintiff-Respondent-Respondent absent and unrepresented.

Argued on: 03.06.2022

Written submissions:
Written Submissions by the Defendant-Appellant-Appellant on 24.06.2022

Decided on: 06.04.2023

Samayawardhena, J.

The deed No. 2943 is a deed of transfer where the transferor is the plaintiff and the transferee is the defendant. The plaintiff filed this action against the defendant seeking a declaration that the defendant is holding the property described in the deed in trust for the plaintiff. The plaintiff also sought a declaration that the deed is a nullity on the ground of *laesio enormis* – *vide* paragraph 13 of the plaint. The defendant filed answer seeking only dismissal of the plaintiff's action. After trial, the District Court entered judgment for the plaintiff granting both reliefs. On appeal, this was affirmed by the High Court. This appeal by the defendant is against the judgment of the High Court. Although notices were served on the plaintiff when he was alive and, after his death, on the substituted plaintiff, they did not come before this Court to contest the defendant's appeal.

It is admitted that a partition case was filed in the District Court of Mount Lavinia (Case No. 54/94/P) in respect of the larger land including the subject matter of this action around the time of the institution of this case in the District Court. The defendant in his post argument written

submissions states "*on the plaintiff's evidence and on a balance of probability, it is clear that the said deed No. 2943 (P1) has been executed before the said partition case was registered a lis pendens*." The plaintiff is said to be the 14th defendant in the partition action and the defendant is not a party to that action. It is not clear what happened in the partition case.

The plaintiff's evidence that this deed was executed only to be valid until he paid money (Rs. 125,000) for the development of the land by the defendant and that he did not want to part with the property is hard to believe. The defendant says he was not involved in developing this land or constructing a road across the land. The defendant says he withdrew the purchase price stated on the deed (Rs. 200,000) from the bank on the date the deed was executed (*vide* V6) and paid the same at the notary's office to the brother of the plaintiff who accompanied the plaintiff. In the attestation of the deed, the notary says that money was not paid before him. In any event, failure to pay consideration does not make the deed invalid although it might give rise to a different cause of action to recover the money (*Jayawardena v. Amarasekera* (1912) 15 NLR 280, *Nona Kumara v. Abdul Cader* (1946) 47 NLR 457, *Pingamage v. Pingamage* [2005] 2 Sri LR 370).

In the Kaduwela Magistrate's Court Case No. 21946 (*vide* V2 and V3) filed regarding the same transaction, the plaintiff did not take up the position that the deed is subject to a trust. In the Magistrate's Court case the plaintiff has promised to transfer the portion of land sold to the defendant by V6 after entering the final decree in the partition case. In my view, the plaintiff did not prove that the deed was subject to a trust.

As seen from the prayer to the plaint, the plaintiff filed this action claiming on the one hand that the deed is valid but subject to a trust in his favour and on the other hand that the deed is invalid on the ground of *laesio*

enormis. These are not pleaded as alternative reliefs. The District Court granted both. These two reliefs cannot co-exist.

The plaintiff cannot succeed in this action. The plaintiff's action in the District Court shall stand dismissed.

The questions of law on which leave was granted and the answers thereto are as follows:

1. Have the learned judges of the High Court of Civil Appeal erred in law in failing to appreciate that the plaint of the plaintiff as presently constituted is not maintainable in law?
   Yes.
2. Have the learned judges of the High Court of Civil Appeals erred in law in holding that the defendant is holding the property in suit subject to a constructive trust in favour of the plaintiff and at the same time ordering a rescission of the sale of the said property to the defendant by the plaintiff?
   Yes.
3. In any event have the learned trial judge and the judges of the High Court of Civil Appeals erred in considering that the evidence placed before Court warrants a finding that the property in suit is held by the defendant subject to a constructive trust in favour of the plaintiff?
   Yes.
4. Have the learned trial judge and the learned judges of the High Court of Civil Appeals erred in law in failing to appreciate that on the evidence before Court, there are no grounds to order a rescission of the sale of the said property in suit to the defendant by the plaintiff?
   Yes.

I set aside the judgments of the District Court and the High Court and allow the appeal. No costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

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

Bulanawewe Gedera Loku Banda
Dharmasena,
Pelwehera, Madipola, Udasiya Pattuwa,
Udugoda, Matale.
Plaintiff

SC APPEAL NO: SC/APPEAL/29/2014
SC LA NO: SC/HCCA/LA/75/2013
HCCA KANDY NO: CP/HCCA/KANDY/62/2009 (F)
DC MATALE NO: P/2433

Vs.

1. Bulanawewe Gedera Abeyratne Banda
   Karunathilake,
   Pelwehera, Madipola, Matale.
2. Bulanawewe Gedera Tikiri Banda
   Dhanapala Bulanawewa,
   Bambaragaswewa (Deceased).

2(a). Sunil Dharmasiri Bandara,
Bulanawewa, Bambaragaswewa,
Galewela.

3. Bulanawewe Gedera Heen Banda,
   Meditation Institute, Polpithi
   Mukalana, Ja-ela (Deceased).

3(a). Lalitha Bulanawewa,
"Sandhasiri", Ganankete, Uhumeeya,
Kurunegala.

4. Ekanayake Mudiyanselage Somaratne,
   Pelwehera, Madipola, Matale.
5. Ekanayake Mudiyanselage
   Bulanawewe Gedadera Lalitha Kumari
   Herath,
   Kurunegala Road, Dombawela,
   Mahawela, Matale.
6. Ekanayake Mudiyanselage
   Bulanawewe Gedadera
   Narendrasinghe Karunathilake,
   No. 126 Road, Mahawehera, Madipola,
   Matale.
7. Ekanayake Mudiyanselage
   Bulanawewe Gedadera Abeywansa
   Amanodana,
   Bulanawewe, No. 126 Road,
   Mahawehera, Madipola, Matale.
8. Ekanayake Mudiyanselage
   Bulanawewe Gedadera Anurudhdhika
   Jinadharee Indrani Bulanawewe,
   C/o Indrani Caldera, Dabagolla Road,
   Galewela, Matale.

   Defendants

AND BETWEEN

Ekanayake Mudiyanselage Somaratne,
Pelwehera, Madipola, Matale.
4th Defendant-Appellant

Vs.

Bulanawewe Gedera Loku Banda
Dharmasena,
Pelwehera, Madipola, Udasiya
Pattuwa, Udugoda, Matale.
Plaintiff-Respondent

AND NOW BETWEEN

Ekanayake Mudiyanselage Somaratne,
Pelwehera, Madipola, Matale.
4th Defendant-Appellant-Appellant

Vs.

Bulanawewe Gedera Loku Banda
Dharmasena,
Pelwehera, Madipola, Udasiya
Pattuwa, Udugoda, Matale.
Plaintiff-Respondent-Respondent

1. Bulanawewe Gedera Abeyratne Banda
Karunathilake, Pelwehera, Madipola,
Matale.
2. Bulanawewe Gedera Tikiri Banda
Dhanapala Bulanawewa,
Bambaragaswewa (Deceased).

2(a). Sunil Dharmasiri Bandara
Bulanawewa,
Bambaragaswewa, Galewela.

3. Bulanawewe Gedera Heen Banda,
Meditation Institute, Polpithi
Mukalana, Ja-ela (Deceased).

3(a). Lalitha Bulanawewa,
"Sandhasiri", Ganankete, Uhumeeya,
Kurunegala.

5. Ekanayake Mudiyanselage
Bulanawewe Gedadera Lalitha Kumari
Herath,
Kurunegala Road, Dombawela,
Mahawela, Matale.

6. Ekanayake Mudiyanselage
Bulanawewe Gedadera
Narendrasinghe Karunathilake,
No. 126 Road, Mahawehera, Madipola,
Matale.

7. Ekanayake Mudiyanselage
Bulanawewe Gedadera Abeywansa
Amanodana,
Bulanawewe, No. 126 Road,
Mahawehera, Madipola, Matale.

8. Ekanayake Mudiyanselage
Bulanawewe Gedadera Anurudhdhika
Jinadharee Indrani Bulanawewe,
C/o Indrani Caldera, Dabagolla Road,
Galewela, Matale.

Defendant-Added Respondents

Before: Murdu N.B. Fernando, P.C., J.
S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Kushan De Alwis, P.C., with Anuruddha Dharmaratne and Shashindra Mudannayake for the 4th Defendant-Appellant-Appellant.
Dulindra Weerasuriya, P.C., with H.K.M. Pasan Malinda for Plaintiff-Respondent-Respondent.

Argued on : 15.11.2022

Written submissions:
by the 4th Defendant-Appellant-Appellant on 16.04.2014.
by the Plaintiff-Respondent-Respondent on 05.06.2014.

Decided on: 06.04.2023

Samayawardhena, J.

This is a partition action. At the time of the trial, in addition to the plaintiff, there were eight defendants. The only contesting defendant was the 4th defendant. The others were sailing with the plaintiff. Those defendants (except the 4th) did not raise issues, cross-examine the plaintiff's witnesses or lead evidence. After trial, the District Judge of Kandy entered judgment as prayed for by the plaintiff allotting undivided shares to all the parties. Being dissatisfied with the judgment, the 4th defendant appealed to the High Court of Civil Appeal of Kandy. At the argument before the High Court, counsel for the plaintiff-respondent moved that the appeal be dismissed *in limine* since the other defendants had not been made parties and hence there was no properly constituted appeal.

The High Court upheld this preliminary objection and dismissed the appeal. This appeal by the 4th respondent is against the judgment of the High Court.

In terms of section 755(1)(c) and (d), and section 758(1)(b) and (c) of the Civil Procedure Code, the notice of appeal and the petition of appeal shall contain *inter alia* the names and addresses of the parties to the action and the names of the appellants and the respondents. The failure to name the 1st-3rd and 5th-8th defendants as parties to the appeal violates these sections.

In *Talayaratne v. Talayaratne* (1957) 61 NLR 112 the Supreme Court held "*The Civil Procedure Code does not require a party appellant to name as respondent to an appeal every party to the proceedings in the lower Court. A party against whom no order is sought by the appellant need not be named as a respondent.*"

It was held in *Ibrahim v. Beebee* (1916) 19 NLR 289 at 293 that for the proper constitution of an appeal, all parties to an action who may be prejudicially affected by the result of the appeal should be made parties.

This means, not all the parties, but all the necessary parties shall be made parties to the appeal. Necessary parties to the appeal are the parties who will be prejudicially or adversely affected by the result of the appeal.

The Civil Procedure Code provides for the rectification of such defects in appropriate cases.

Section 759(2) of the Civil Procedure Code reads as follows:

> *In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections (other than a provision specifying the period within which any act or thing is to be done), the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.*

In terms of this section, any mistake, omission or defect on the part of any appellant in complying with the provisions of chapter 58, which deals with appeals, may be remedied if it has not caused material prejudice to the respondent. As noted in cases such as *Martin v. Suduhamy* [1991] 2 Sri LR 279 and *Keerthisiri v. Weerasena* [1997] 1 Sri LR 70, what is contemplated in section 759(2) is not mere prejudice but material prejudice.

In the Supreme Court case of *Nanayakkara v. Warnakulasuriya* [1993] 2 Sri LR 289 at 290, Kulatunga J. stated:

> *The power of the Court to grant relief under section 759(2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.*

Drawing the attention of the Court to section 759(2) of the Civil Procedure Code, learned President's Counsel for the 4th defendant-appellant contends that the failure to name the 1st-3rd and 5th-8th defendants as parties to this appeal caused no material prejudice to those defendants, as they did not actively participate in the trial because they were sailing with the plaintiff. I am unable to agree with this submission for the reason that, after trial, the District Judge in his judgment allotted undivided shares to all the defendants, and in the event the 4th defendant's appeal was allowed, those defendants would have been materially prejudiced as the 4th defendant seeks dismissal of the plaintiff's action. Undoubtedly, those defendants are necessary parties to the appeal.

In my view, section 759(2) is inapplicable to cater to a situation such as the present one where the issue is failure to name necessary parties as respondents. A careful reading of section 759(2) reveals that it caters to a situation where the Court can grant relief to an appellant despite mistake, omission or defect "if it should be of opinion that the respondent has not been materially prejudiced". When a necessary party has not been made a respondent, this section has no applicability.

I am aware that relief has been granted for failure to make necessary parties as parties to the appeal under section 759(2) on the basis that no material prejudice has been caused by such failure. This seems to me not to be correct. The question is not whether prejudice has been caused to the named respondents by not naming necessary parties as respondents, which, to my mind, is meaningless. If that interpretation is given, the appellant can name only parties who support him as respondents and say no prejudice has been caused to them by the failure to name other parties as respondents.

Apart from naming the correct parties as respondents, there are several other requirements to be fulfilled for the constitution of a proper appeal. *Vide*, for instance, sections 755(1)(a), (b) and (e), 756, 758(a), (d) to (f). Section 759(2) refers to those requirements.

In a situation such as in the instant appeal, the applicable section is section 770 of the Civil Procedure Code, which reads as follows:

> *If, at the hearing of the appeal, the respondent is not present and the court is not satisfied upon the material in the record or upon other evidence that the notice of appeal was duly served upon him or his registered attorney as hereinbefore provided, or if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, but who has*

not been made a party to the appeal, the court may issue the requisite notice of appeal for service.

If at the hearing of the appeal, it is brought to the notice of Court or the Court *ex mero motu* realises that a necessary party has not been named as a respondent to the appeal or, having made a respondent, notice has not been served on him, the Court need not dismiss the appeal *in limine* on the ground that the appeal is not properly constituted. The Court has the discretion to rectify such defects under section 770.

The invocation of section 770 is not a right of the appellant but is at the discretion of the Court, which the Court shall exercise judicially and not arbitrarily or capriciously.

I am conscious of the fact that it was the view of the Supreme Court especially in the past that failure to make necessary parties respondents to the appeal was a fatal irregularity which could not be cured by the application of section 770 – *vide Seelananda Thero v. Rajapakse* (1938) 39 NLR 361.

Nevertheless, the Full Bench decision of the Supreme Court in the case of *Ibrahim v. Beebee* (1916) 19 NLR 289 considered the application of section 770 somewhat favourably in instances where necessary parties are not made parties. The Full Bench held that where an appeal has not been properly constituted by the necessary parties being made respondents, the appeal should be dismissed "*unless the defect is not one of an obvious character which could not reasonably have been foreseen and avoided*." The discretion was considerably limited by this qualification. In the circumstances of that case, however, the Full Bench was inclined to act under section 770 to cure the defect where necessary parties were not made parties to the appeal.

More often than not, *Ibrahim v. Beebee* was followed in later cases, not to grant but to deny relief under section 770.

In *Suwarishamy v. Thelenis* (1952) 54 NLR 282 the 1st plaintiff respondent took up the objection that the appeal was not properly constituted in that the 3rd plaintiff, who is a necessary party, had not been made a respondent. The appellant accepted that the 3rd plaintiff was a necessary party but moved to act under section 770.

Following *Ibrahim v. Beebee*, the Supreme Court was not inclined to grant relief under section 770. Gunasekara J. stated: "*In the present case, which is an action for partition of land, the order that is appealed from was made upon an intervention by the appellants, who claimed to have succeeded to certain interests that at one time belonged to one Eliashamy. The learned District Judge after inquiry held that Eliashamy's interests have now devolved on the 1st plaintiff and the 3rd plaintiff. In these circumstances it is not possible to say that it was not obvious that the 3rd plaintiff was a necessary party or that the defect was not one that could not reasonably have been foreseen and avoided.*" Accordingly, the appeal was dismissed *in limine*.

In cases such as *Gunasekera v. Perera* (1971) 74 NLR 163, *Wijeratne v. Wijeratne* (1971) 74 NLR 193, H.N.G. Fernando C.J. followed *Ibrahim v. Beebee* to refuse relief under section 770.

The oft-quoted judgment of the Court of Appeal in *Wimalasiri v. Premasiri* [2003] 3 Sri LR 330, which held *"default of citing a person not living as the respondent in the notice of appeal and the petition of appeal which resulted from the negligence of the defendant-appellant and the registered Attorney-at-Law would render notice and the petition of appeal void ab initio. The defect being incurable the defendant-appellants cannot seek relief under section 759(2)*" cannot be treated as good law in view of the

Supreme Court judgment in *Nanayakkara v. Warnakulasuriya* [1993] 2 Sri LR 289 at 293, where Kulatunga J. held "*In an application for relief under section 759(2), the rule that the negligence of the Attorney-at-Law is the negligence of the client does not apply as in the cases of default curable under Sections 86(2), 87(3) and 771. Such negligence may be relevant but it does not fetter the discretion of the Court to grant relief where it is just and fair to do so.*" In any event, in *Wimalasiri v. Premasiri* the Court of Appeal did not consider the applicability of section 770 at all.

In *Kiri Mudiyanse v. Bandara Menika* (1972) 76 NLR 371, the Supreme Court did not find favour with the restrictive approach adopted by the Full Bench of the Supreme Court in *Ibrahim v. Beebee* in interpreting section 770. In *Kiri Mudiyanse*, the plaintiff-respondent relying on *Ibrahim v. Beebee* raised a preliminary objection that the appeal was not properly constituted as some of the defendants who had been granted shares in the judgment had not been made party respondents to the appeal and that only the plaintiff-respondent had been made a party respondent. Pathirana J. with the agreement of Rajaratnam J. at pages 375-377 stated:

> *With all due respects to the decisions that have been followed regarding the principles on which the discretion had been exercised in respect of section 770, while admitting that there may be much to be said for the principles enunciated in these cases, I am of opinion that the Court cannot be fettered in exercising a discretionary power which is given so widely by section 770 by being bound to exercise the discretion only in conformity with the principles laid down in those cases.*
>
> *To emphasise my point that the principle laid down in Ibrahim v. Beebee is not the sole criterion for exercising the discretion under section 770, I would refer to the case of Dias v. Arnolis (1913) 17*

NLR 200 which is a full bench decision. …. The case of Dias v. Arnolis had not laid down the principle which formed the decision in Ibrahim v. Beebee, namely, that the power of dismissal should be exercised unless the defect is not one of an obvious character which could not have been reasonably foreseen and avoided. On the other hand, the question whether or not the respondent ought to be added in a particular case is a question for decision of the judge who hears the appeal was laid down in the full bench case. Much the same flexible language was used by Shaw J. in Ibrahim v. Beebee when he stated as the second reason for the exercise of the discretion, namely, unless some good cause is given for non-joinder.

With all respects to the decisions which followed Ibrahim v. Beebee and while we are conscious of the commendation attached to it that it had been consistently followed, I would rather on the facts and circumstances in this case prefer to follow the principles laid down in the full bench case of Dias v. Arnolis and also the second reason given by Shaw J. in Ibrahim v. Beebee by stating that the exercise of the discretion is a matter for the decision of the judge who hears the appeal in the particular case and also that it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously.

Rajaratnam J. added at page 378:

Section 770 of the Civil Procedure Code has survived intact all the authorities referred to above to give us still an unfettered discretion to adjourn the hearing of the appeal to a future date and to direct that the 1st to the 3rd and 6th to the 8th defendants be made respondents and the requisite notices of appeal be issued to the Fiscal for service. We have done so in the interests of a just hearing

> *of the appeal while being most respectfully mindful of the guiding principles laid down by this Court. The plain meaning of this section, however, shines with a clear and constant simplicity in the midst of all the wise observations made round it during the last half of a century.*

In my view, *Kiri Mudiyanse v. Bandara Menika* was the watershed in the progressive development of the law in respect of defective appeals. The current trend of authority in the Supreme Court endorses this approach. Accordingly, mistakes, omissions, defects or lapses such as the failure to make necessary parties as respondents, naming deceased parties (without substitution) in the caption, naming parties incorrectly in the caption, failure to give notice to all named parties etc. are curable defects under sections 759(2) and 770 of the Civil Procedure Code.

Whilst appreciating that the discretion of the Court shall not be circumscribed by self-imposed fetters, I must add that the Court shall not however allow defects or lapses to be cured on the application of either section 759(2) or 770 as a matter of course or as a matter of routine unless the appellant gives a good reason to the satisfaction of the Court for such defect or lapse, as otherwise the express provisions of the Civil Procedure Code under chapter 58, which lay down the procedure for the proper constitution of an appeal, will be rendered nugatory.

In the Supreme Court case of *Jayasekera v. Lakmini* [2010] 1 Sri LR 41 both the notice of appeal and the petition of appeal were not in conformity with the provisions of sections 755(1) and 758(1) of the Civil Procedure Code. On the preliminary objection taken for non-joinder of necessary parties, Ekanayake J. (with Asoka de Silva C.J. and Marsoof J. agreeing) held that those lapses can be rectified in terms of section 759(2) of the Civil Procedure Code since it has not caused material prejudice to the other parties. Ekanayake J. further held that section 770 of the Civil

Procedure Code can also be made use of by the appellate Court when granting such relief to a defaulting appellant. When it was pointed out by counsel for the respondent that no such application invoking the provisions of section 759 had been made for the appellate Court to grant such relief, the Supreme Court went so far as to say at page 51 "*it is undoubtedly incumbent upon the court to utilize the statutory provisions and grant the relief embodied therein if it appears to court that it is just and fair to do so.*"

In the Supreme Court case of *Wilson v. Kusumawathi* [2015] BLR 49 Sisira de Abrew J. with the concurrence of Marsoof J. and Sarath de Abrew J. took the same view.

In *Premaratna v. Sunil Pathirana* (SC/APPEAL/49/2012, SC Minutes of 27.03.2015), when a preliminary objection to the maintainability of the appeal was raised *inter alia* on the ground that a deceased party had been named as a respondent, Wanasundara J. with Aluwihare J. and Abeyratne J. agreeing stated:

> *The parties to the action in the District Court are the parties to the action in the appellate court, in this instance the High Court of Civil Appeals. The petition of appeal had not contained in the caption, the names of the substituted parties. I feel that, the mere fact that only the name of the dead person was mentioned in the caption, cannot be held against the party seeking relief from Court. It is a lapse on the part of the petitioner's Attorney-at-Law. The litigant who has come before Court for relief should not be deprived of his right to seek relief due to a lapse on the part of the lawyers preparing and filing the papers. In the case in hand, the dead person had been substituted promptly in the District Court and named as 1A and 1B defendants. It is only a lapse of not writing down the caption properly. I am of the view that this is a matter which should have*

> *been corrected by the High Court Judges as provided for in section 759(1) and (2). It is not an incorrigible defect, good enough for rejecting the petition of appeal.*

In a similar case where a deceased party was named as a respondent, Dep J. (later C.J.) in *Heenmenike v. Mangalika* (SC/APPEAL/41/2012, SC Minutes of 01.04.2016) held:

> *I hold that failure to comply with section 755(1) by not citing the 2nd substituted plaintiff as a respondent in the notice of appeal and in the petition of appeal is a curable defect under sections 759(2) and section 770 of the Civil Procedure Code. I set aside the judgment in the High Court (Civil Appeal), Kegalle in case No. 639/2009. I direct the learned judges of the High Court (Civil Appeal) Kegalle to delete the name of the deceased 2nd plaintiff-respondent and add the 2nd substituted-plaintiff as the 2nd substituted-plaintiff-respondent and proceed to hear the appeal on merits and deliver judgment according to law.*

However, it may be mentioned that if the appeal has been filed out of time, it cannot be cured by invocation of section 759(2) of the Civil Procedure Code because relief can be granted under that section for non-compliance with the provisions relating to the appellate procedure "*other than a provision specifying the period within which any act or thing is to be done*" as stated in the section itself. The time limits within which steps are to be taken, such as filing the notice of appeal and petition of appeal, are mandatory and imperative.

In the Supreme Court case of *Raninkumar v. Union Assurance Limited* [2003] 2 Sri LR 92 at 96, Edussuriya J. held "*no relief whatsoever can be granted where there is any mistake, omission or defect in complying with*

a provision specifying the period within which any act or thing is to be done, even if the respondent is not materially prejudiced."

Mark Fernando J. in *The Ceylon Brewery Ltd v. Jax Fernando* [2001] 1 Sri LR 270 emphasised "*It is settled law that provisions which go to jurisdiction must be strictly complied with*."

After section 759(2) was amended by the Civil Procedure Code (Amendment) Act, No. 79 of 1988, the judgment of the Supreme Court in *Vithana v. Weerasinghe* [1981] 1 Sri LR 52 (and the judgments that followed it), which held that the provisions of section 759(2) of the Civil Procedure Code are wide enough to accommodate appeals filed out of time provided good cause is shown, cannot be regarded as binding. Let me quote the legislative history.

Prior to the Administration of Justice Law, No. 44 of 1973, the corresponding section to the present section 759(2) of the Civil Procedure Code was section 756(3), which read as follows:

> *In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just.*

Section 353(2) of the Administration of Justice Law, No. 44 of 1973, read as follows:

> *Subject to the provisions of section 330, the Supreme Court shall not exercise the powers vested in such court by this Law to reject or dismiss an appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions*

of this Law, unless material prejudice has been caused thereby to the respondent to such appeal.

Section 759 was amended by the Civil Procedure Code (Amendment) Law, No. 20 of 1977, by introducing the following as section 759(2):

In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Supreme Court may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.

Section 759(2) was repealed and the following section was substituted by the Civil Procedure Code (Amendment) Act, No. 79 of 1988:

In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done) the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.

In the instant case, the 4th defendant-appellant has named only the plaintiff as the respondent in the notice of appeal as well as in the petition of appeal. However I find that a copy of the notice of appeal has been sent to the registered attorney of the said defendants by registered post although those defendants were not named as respondents in the notice of appeal. The original registered postal article receipt has been tendered to the District Court with the notice of appeal.

As I stated at the outset, as against the plaintiff's case, the only contesting defendant at the trial was the 4th defendant-appellant. The other defendants did not raise issues, cross-examine the plaintiff's witnesses,

or lead any evidence. The 4th defendant-appellant made the plaintiff the only respondent in the notice of appeal and the petition of appeal.

On the facts and circumstances of this case, I take the view that the High Court ought to have exercised its discretion in terms of section 770 in favour of the 4th defendant-appellant and rectified the error in the interest of justice.

The questions of law upon which leave to appeal was granted by this Court and the answers to them are as follows:

> Q. Have the learned Judges of the High Court erred in law by failing to appreciate and consider that in the circumstances aforesaid, no material prejudice has been caused to the 1, 2(A), 3(A) and 5 to 8th defendants by not naming them as respondents in the notice of appeal and the petition of appeal?
>
> A. No.
>
> Q. Have the learned Judges of the High Court erred in law by failing to appreciate and consider that in the circumstances of this case, failure to name the defendants as respondents is a curable defect under and in terms of Section 759(2) Civil Procedure Code and the High Court of Civil Appeal has the power to grant such relief?
>
> A. It is a curable defect but not under section 759(2).
>
> Q. Have the learned Judges of the High Court erred in law by failing to appreciate and consider that under and in terms of Section 770 of the Civil Procedure Code, the Court can issue the requisite notice of appeal for service on a person who was a party to the action in the court against whose decree the appeal is made but also who has not been made a party to the appeal?

A. Yes.

I set aside the judgment of the High Court and allow the appeal but without costs. The 4th defendant will amend the caption of the petition of appeal and take steps to serve notice on the 1st-3rd and the 5th-8th defendant-respondents. The High Court will hear the appeal on the merits.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

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

Sabaragamuwa Development Bank,
No. 28, Bandaranaike Mawatha,
Ratnapura.
Petitioner

SC APPEAL NO: SC/APPEAL/219/2014
SC LA NO: SC/HCCA/LA/197/2013
HCCA NO: SP/HCCA/RAT/12/2011 (RA)
DC EMBILIPITIYA NO: 9364/SPL

Vs.

1. Ranjith Lionel Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
2. Ranjula Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
3. N.A. Abedeera,
   Ratnapura – Hambantota Road,
   Padalangala.
4. Manoja Srimathi Abeysinghe,
   Ratnapura – Hambantota Road,
   Padalangala.

5. Bulathsinhalage Nadeera Thushari
   Bulathsinhala,
   No. 189, Pothgul Vihara Mawatha,
   Ratnapura.
   Respondents

AND BETWEEN

Sabaragamuwa Development Bank,
No. 28, Bandaranaike Mawatha,
Ratnapura.
Petitioner-Petitioner

Vs.

1. Ranjith Lionel Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
2. Ranjula Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
3. N.A. Abedeera,
   Ratnapura – Hambantota Road,
   Padalangala.
4. Manoja Srimathi Abeysinghe,
   Ratnapura – Hambantota Road,
   Padalangala.

5. Bulathsinhalage Nadeera Thushari
   Bulathsinhala,
   No. 189, Pothgul Vihara Mawatha,
   Ratnapura.
   Respondent-Respondents

AND NOW BETWEEN

Sabaragamuwa Development Bank,
No. 28, Bandaranaike Mawatha,
Ratnapura.
Petitioner-Petitioner-Appellant

Vs.

1. Ranjith Lionel Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
2. Ranjula Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
3. N.A. Abedeera,
   Ratnapura – Hambantota Road,
   Padalangala.
4. Manoja Srimathi Abeysinghe,
   Ratnapura – Hambantota Road,
   Padalangala.

5. Bulathsinhalage Nadeera Thushari
Bulathsinhala,
No. 189, Pothgul Vihara Mawatha,
Ratnapura.
Respondent-Respondent-Respondents

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Manohara de Silva, P.C., with Harithriya Kumarage and Sasiri Chandrasiri for Petitioner-Petitioner-Appellant.
Chathura Galhena for the 1st-4th Respondent-Respondent-Respondents.

Argued on: 11.02.2022

Written submissions:
by the Petitioner-Petitioner-Appellant on 30.01.2015.
by the 1st-4th Respondent-Respondent-Respondents on 03.05.2016.

Further Written submissions:
by the 1st-4th Respondent-Respondent-Respondents on 10.03.2022.

Decided on: 06.04.2023

Samayawardhena, J.

Introduction

The appellant, Sabaragamuwa Development Bank, as the judgment-creditor, made an application to the District Court of Embilipitiya seeking delivery of possession of the property described in the Certificate of Sale

marked P12 issued in terms of section 16 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. The Court allowed the application. The fiscal executed the writ on 05.10.2006. The fiscal's report insofar as relevant for the present purposes reads as follows:

> මෙම දේපල තුල දකුණු මායිමේ ප්‍රධාන පාරට මුහුණලා මහල්දෙකක් වනසේ තැනු ගොඩනැගිල්ලක් මෑතදී ඉදි කර ඇත. එකී ගොඩනැගිල්ලේ ප්‍රධාන පාර මට්ටමට ඇති උඩ කොටසේ එක් කාමරයක් වශයෙන් තිබුන අතර එහි රංජුල මෝටර්ස් නමින් යතුරුපැදි සේවා කරනවායැයි කියන ව්‍යාපාර ස්ථානයක් පවත්වාගෙනයයි. මෙම ගොඩනැගිල්ල රංජුල කුරුනේරු නමැති තම පුතාට අයිති බවත් 2004 වසරේ මෙම ඉඩම් කොටස එන්.ජී. අබේධීර නැමති අයගෙන් මිලදී ගත් බවත් මා සමග පවසනලදී.
>
> මෙම ඉඩමේ බස්නාහිර පැත්තේ අයිතිය තමන් සතු බවත් එන්.ඒ. අබේවීර නැමැති අයට අයත් බව ඔහුගේ බිරිඳ යයි කියන මනෝජා ශ්‍රීමනී අබේසිංහ නමැති අය පවසනලදී.
>
> බලයලත් මිනින්දෝරු එච්.එච්.ඩී.එස්. ශාන්ත මහතා විසින් මෙම අධිකරණ ආඥාවේ උපලේඛණයේ සඳහන් අංක 1058 පිඹුරේ සඳහන් මායිම් පොලවේ ලකුණු කරවා එම දේපල පෙත්සම්කාර සබරගමුව සංවර්ධන කළමණාකාර පී.ජී. දයාවංශ මහතාට පෙන්වාදුනිමි. ඉන්පසු ඉහත කී රංජුල මෝටර්ස් නැමති ගොඩනැගිල්ලේ සිටි රංජිත් ලයනල් කුරුනේරු නැමැති අයටද, එන්. ඒ. අබේධීර නමැති අයගේ නිවසේ සිටි මනෝජා ශ්‍රීමනි අබේසිංහ යන අයද පැමිණි සිටි අනෙකුත් සියලු දෙනා ද ඉදිරියේ අධිකරණ ආඥාව කියවා තේරුම් කර දී මෙම ඉඩමේ භුක්තිය පෙත්සම්කාර බැංකුවේ කළමණාකාර පී. ජී. දයාවංශ මහතාට භාරදුනිමි. රංජුල කුරුනේරු නැමති අය දේපලේ නොසිටි බැවින්ද ඔහු මෙම නඩුවේ පාර්ශවකරුවෙකු කර නොතිබූ බැවින්ද සුදුසු නියෝගයක් ලබාදෙන ලෙස ගරු අධිකරණයෙන් අයැද සිටිමි. මේ සම්බන්ධයෙන් ගරු අධිකරණයට ඉදිරිපත් වී සහන අයදින ලෙස පෙත්සම්කාර බැංකුවේ කළමණාකාර මහතාටත්, ඉඩමට අයිතිවාසිකම් කියූ දෙදෙනාටත් දැනුම් දුනිමි.

The 2nd and 3rd respondents made an application dated 11.10.2006 in terms of section 328 of the Civil Procedure Code seeking restoration to possession. However, this application was not pursued.

The appellant judgment-creditor made an application dated 18.10.2006 in terms of sections 325 and 326 of the Civil Procedure Code, stating that although the fiscal had delivered possession to the appellant on 05.10.2006, such possession was not properly delivered as the 1st-4th respondents namely, (1) Ranjith Lionel Kuruneru, (2) Ranjula Kuruneru, (3) N.A. Abeydheera, (4) Srimathi Abeysinghe had obstructed the fiscal from ejecting them from the property. The appellant sought effective delivery of possession by removing the buildings and ejecting the respondents from the property.

> 15. 2006.10.05 වන දින පැමිණිලිකාර ආයතනය වෙත භුක්තිය භාරදීමට පිස්කල් නිලධාරී තැන කටයුතු කර ඇතත් 1,2,3,4 වගඋත්තරකරුවන් බාධා කිරීම නිසා එය නිසි පරිදි භාරදී ඔවුන් දේපලින් ඉවත් කිරීමට කටයුතු කර නොමැත.
>
> 16. එසේ හෙයින් 2,3,4 වගඋත්තරකරුවන් සහ/හෝ වෙනත් කිසිවෙක් මෙම දේපල සම්බන්ධයෙන් හිමිකම් ඉදිරිපත් කරන්නේ නම් ඒ අයත් මෙම වගඋත්තරකරුවන්ද මෙම දේපලේ තනන ලද නිවාස ගොඩනැගිලි සහ වෙනත් ඉදිකිරීම් ඉවත්කර පැමිණිලිකාර ආයතනයට නැවත භුක්තිය භාර ගැනීමේ ආඥාවක් ලබා ගැනීමට කරුණු යෙදී ඇති බව ගරු අධිකරණය සැලකර සිටී.

Then the 1st-4th respondents made an application dated 12.11.2006 in terms of sections 325 and 326 of the Civil Procedure Code seeking restoration to possession.

According to the journal entry No. 6 dated 15.11.2006, the appellant's Attorney-at-Law made an application to the District Court to amend the petition dated 18.10.2006 by adding the judgment-debtor as the 5th respondent. The respondents did not object to that application and the Court allowed it. Accordingly, the amended petition dated 06.12.2006 was filed reflecting only that amendment. The 5th respondent did not come forward to contest the writ of execution.

The inquiry was held before the learned District Judge and several witnesses gave evidence. The 1st, 3rd and 4th respondents also gave evidence. At the time of the execution of the writ, the 1st and 4th respondents were present. In paragraph 2 of the petition dated 12.11.2006, the 1st and 4th respondents admit that they resisted the fiscal in the execution of the writ. This is also stated in the fiscal's report and by the 4th respondent in her evidence. There is no dispute that they resisted but the fiscal executed the writ nonetheless.

After the inquiry, the learned District Judge dismissed the application of the appellant on two grounds:

(a) The application of the appellant is unclear due to failure to establish which of the two limbs in section 325(1) of the Civil Procedure Code the appellant was relying on.
(b) The application of the appellant is time-barred.

On appeal, the High Court of Civil Appeal of Ratnapura, affirmed the order of the District Court. Hence this appeal by the judgment-creditor.

Let me now consider the legitimacy of the above two grounds relied on by the Courts below to dismiss the appellant's application.

Was the application of the appellant unclear?

Section 325 of the Civil Procedure Code reads as follows:

> *325. (1) Where in the execution of a decree for the possession of movable or immovable property the Fiscal is resisted or obstructed by the judgment-debtor or any other person, or where after the officer has delivered possession, the judgment-creditor is hindered or ousted by the judgment-debtor or any other person in taking complete and effectual possession thereof, and in the case of immovable property, where the judgment-creditor has been so*

hindered or ousted within a period of one year and one day, the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster, complain thereof to the court by a petition in which the judgment-debtor and the person, if any, resisting or obstructing or hindering or ousting shall be named respondents. The court shall thereupon serve a copy of such petition on the parties named therein as respondents and require such respondents to file objections, if any, within such time as they may be directed by court.

(2) When a petition under subsection (1) is presented, the court may, upon the application of the judgment-creditor made by motion ex parte, direct the Fiscal to publish a notice announcing that the Fiscal has been resisted or obstructed in delivering possession of such property, or that the judgment-creditor has been hindered in taking complete and effectual possession thereof or ousted therefrom, as the case may be, by the judgment-debtor or other person, and calling upon all persons claiming to be in possession of the whole or any part of such property by virtue of any right or interest and who object to possession being delivered to the judgment-creditor to notify their claims to court within fifteen days of the publication of the notice.

(3) The Fiscal shall make publication by affixing a copy of the notice in the language of the court, and, where the language of the court is also Tamil, in that language, in some conspicuous place on the property and proclaiming in the customary mode or in such manner as the court may direct, the contents of the notice. A copy of such notice shall be affixed to the court-house and if the court so orders shall also be published in any daily newspaper as the court may direct.

(4) Any person claiming to be in possession of the whole of the property or part thereof as against the judgment-creditor may file a written statement of his claim within fifteen days of the publication of the notice on such property, setting out his right or interest entitling him to the present possession of the whole property or part thereof and shall serve a copy of such statement on the judgment-creditor. The investigation into such claim shall be taken up along with the inquiry into the petition in respect of the resistance, obstruction, hindrance or ouster complained of, after due notice of the date of such investigation and inquiry has been given to all persons concerned. Every such investigation and inquiry shall be concluded within sixty days of the publication of the notice referred to in subsection (2).

Section 325(1) has two main limbs.

According to section 325(1)

(a) where in the execution of a decree for the possession of immovable or movable property the fiscal is resisted or obstructed by the judgment-debtor or any other person, or
(b) where after the fiscal has delivered possession of immovable or movable property the judgment-creditor is hindered or ousted in taking complete and effectual possession by the judgment-debtor or any other person,

the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster complain to the District Court by way of a petition.

Section 325(1) imposes a further restriction in respect of immovable property, in that, in addition to the one month restriction from the date of hindrance or ouster, it is required that such hindrance or ouster shall

also fall within one year and one day from the date of delivery of possession. This additional condition is inapplicable to movable property.

The learned District Judge held that the appellant judgment-creditor failed to make clear which of the said two limbs apply to the appellant's application and therefore the appellant did not establish its claim. Is this conclusion correct and reasonable?

The learned District Judge says that according to the appellant's petition, possession was not delivered but according to the fiscal's report, possession was delivered, and these contradictory positions remain in obscurity. I beg to differ. The appellant in his petition does not say that possession was not delivered–*vide* what I quoted above. The appellant's complaint is that he could not take complete possession of the property.

The first limb of section 325(1) contemplates a situation where the fiscal is totally prevented from delivering possession to the judgment-creditor due to resistance or obstruction by the judgment-debtor or any other person.

Even if there is no resistance, obstruction, hindrance or opposition, if the property comprises, for instance, a large land with several buildings, the fiscal cannot traverse the entirety of the land and buildings and completely and effectually deliver every part of the land and buildings and every grain of sand to the judgment-creditor. The fiscal can only effect constructive or symbolic delivery of possession.

The second limb of section 325(1) contemplates two situations after the fiscal has delivered possession of the property:

(a) where the judgment-creditor has been hindered in taking complete and effectual possession of the property; or
(b) where the judgment-creditor has been ousted from the property.

The difference between constructive or symbolic delivery of possession by the fiscal and hindrance to the judgment-creditor taking complete and effectual possession after the delivery of possession needs to be clearly understood.

These two things need not happen at the same time. The District Court and the High Court failed to appreciate this difference and, hence, fell into error.

On the facts and circumstances of the instant case, the appellant satisfactorily established the following before Court:

(a) resistance to the fiscal in the execution of the decree, and
(b) hindrance to the appellant taking complete and effectual possession.

According to the fiscal's report, the fiscal could not give complete and effectual possession of the property to the judgment-creditor. The respondents continue to be in possession despite delivery of possession. The 2nd respondent is carrying on a garage business in a building constructed on the land.

In my view, on the facts and circumstances of this case, the appellant is eminently qualified to seek relief under the second limb of section 325(1), i.e. hindrance by the respondents to the appellant taking complete and effectual possession of the property after the delivery of possession.

For the aforesaid reasons, the first ground upon which the learned District Judge rejected the application of the appellant is faulty.

Time bar objection

The next question is whether the application made by the appellant is time-barred? According to section 325(1), the application has to be filed

within one month from the date of such resistance or obstruction or hindrance or ouster. As I stated before, this has a further restriction. That is, if the application is for the delivery of possession of immovable property, the application shall be filed by the judgment-creditor within one year and one day from the date of delivery of possession of the immovable property.

The learned District Judge says the application was filed by the appellant in the District Court on 06.12.2006 because the inquiry was held based on that application. The fiscal executed the writ on 05.10.2006 and the appellant filed the application on 18.10.2006. There is no dispute that the original application was filed within one month from the date of delivery of possession. Thereafter, with the agreement of the respondents and the permission of Court, an amended petition was filed on 06.12.2006 only to add the name of the judgment-debtor as a party. The learned District Judge says the amended petition is not within time and therefore the application is time-barred. I regret my inability to agree. When pleadings (plaint, answer, petition, statement of objections etc.) are amended, it is considered for all purposes as relating back to the original pleadings. *Vide Morris v. Dias* (1892) 2 CLR 185, *Endoris v. Hamine* (1895) 3 NLR 97, *Lucihamy v. Hamidu* (1923) 26 NLR 41, *Ordiris Silva & Sons Ltd v. Jayawardena* (1953) 55 NLR 335, *Nations Trust Bank PLC v. Piyathilake* (SC/APPEAL/146/2014, SC Minutes of 05.10.2016). The application shall be taken to have been filed on 18.10.2006.

Hence, the second ground upon which the learned District Judge rejected the application of the appellant is also unacceptable.

Complexity of execution proceedings

I admit that the provisions pertaining to execution proceedings contained in the Civil Procedure Code are complex and complicated and the

judgment-debtors exploit this complexity to deny or at least delay the decree holder from enjoying the fruits of his victory. These provisions are mainly found in Chapter XXII of the Civil Procedure Code spanning sections 217-354. In addition, there are several other sections scattered across the Code dealing with the execution of decrees. The fact that more than 150 sections are dedicated to the subject of execution of writ itself underscores the complexity of the issue. The statutory provisions in this regard have undergone radical changes over the years. Therefore, the present provisions of the law cannot be understood solely by relying on past decisions. With this in mind, in (SC/APPEAL/135/2017, SC Minutes of 31.03.2023) I dealt with the law relating to delivery of immovable property in the execution of decrees under section 217(c) in some detail. Hence I do not wish to repeat the discussion here.

Section 325 inquiry

Inquiries on execution proceedings held in terms of section 325 are not full-blown trials but summary inquiries to provide speedy and inexpensive remedies. Such inquiries shall be concluded within 60 days of the publication of notice on the land allowing any claimants to intervene.

In the instant case, after the execution of writ, the 2nd and 3rd respondents first made an application in terms of section 328 of the Civil Procedure Code and then, together with the 2nd respondent's father (the 1st respondent) and the 3rd respondent's wife (the 4th respondent), filed another application in terms of sections 325 and 326 of the Civil Procedure Code. It was not the appellant decree holder but the respondents who were uncertain in their applications. In those applications the respondents pray that they be restored to possession whilst they are in possession. This is because the fiscal had delivered constructive possession to the appellant.

In terms of section 325(1), a copy of the judgment-creditor's petition shall be served on the respondents requiring them to file objections, if any, within the given time. In terms of section 325(2), upon the application of the judgment-creditor, the Court can also publish notice on the property, the Court-house and in a newspaper calling upon all persons to give notice of their claims and file their statements of claim, if any, to Court within 15 days of the publication of the notice on the land. The appellant in this case served notice on the respondents and published notice on the land and the Court-house. It is in response to such notice that the respondents filed the written statement of claim dated 12.11.2006. This is different from filing objections in terms of section 325(1).

Both parties claim to have made their applications under sections 325 and 326. Then it can safely be concluded that the appellant made the application under section 325(1) and the respondents submitted their claims under section 325(4).

Section 326 spells out the orders the Court can make after the section 325 inquiry.

> *326. (1) On the hearing of the matter of the petition and the claim made, if any, the court, if satisfied-*
>
> > *(a) that the resistance, obstruction, hindrance or ouster complained of was occasioned by the judgment-debtor or by some person at his instigation or on his behalf;*
> > *(b) that the resistance, obstruction, hindrance or ouster complained of was occasioned by a person other than the judgment-debtor, and that the claim of such person to be in possession of the property, whether on his own account or on account of some person other than the judgment-debtor, is not in good faith; or*

(c) that the claim made, if any, has not been established,

shall direct the judgment-creditor to be put into or restored to the possession of the property and may, in the case specified in paragraph (a), in addition sentence the judgment-debtor or such other person to imprisonment for a period not exceeding thirty days.

(3) The court may make such order as to the costs of the application, the charges and expenses incurred in publishing the notice and the hearing and the reissue of writ as the court shall deem meet.

After the inquiry, the Court shall, if satisfied, direct the judgment-creditor to be put into or restored to (as the case may be) possession of the property.

Who shall prove what at the inquiry?

In general, what is required to be investigated at the inquiry in terms of section 325 are the claims of persons other than the judgment-debtor purportedly in possession of the land. The decree holder's right to have the decree executed arises from his decree and the burden is on the claimant to support his claim as against that decree. Although the right to commence the section 325 inquiry lies with the judgment-creditor as the petitioner, he cannot be expected to prove the negative.

In terms of section 327, if the resistance, obstruction, hindrance or ouster is by a person in possession in good faith independent of the judgment-debtor by virtue of any right or interest which has been established, the Court shall dismiss the petition of the judgment-creditor.

Section 327 is connected to section 326. Section 326 deals with how the judgment-creditor's application can be allowed whereas section 327 deals with how his application can be dismissed confirming the possession of the claimant. Section 327 reads as follows:

327. Where the resistance, obstruction, hindrance or ouster is found by court to have been occasioned by any person other than the judgment-debtor, claiming in good faith to be in possession of the whole of such property on his own account or on account of some person other than the judgment-debtor by virtue of any right or interest, or where the claim notified is found by the court to have been made by a person claiming to be in possession of the whole of such property on his own account or on account of some person other than the judgment-debtor, by virtue of any right or interest, the court shall make order dismissing the petition, if it finds that such right or interest has been established.

When sections 325, 326 and 327 are read together it is clear that the judgment-debtor has no defence (subject to exceptions such as that he has already satisfied the decree), and the person other than the judgment-debtor shall prove to the satisfaction of the Court that, firstly, he is in possession and, secondly, he is in such possession in good faith and on his own account or on account of some person other than the judgment-debtor by virtue of any right or interest. This is more than mere proof of possession but less than proof of title. Since the inquiry shall be concluded within 60 days of the publication of notice on the property in terms of section 325(4), full investigation of title is neither required nor possible. However the Court should know the standing of such persons in order to make a suitable order in terms of section 326, also allowing the dissatisfied party to institute action to establish his right or title to such property in terms of section 329.

If the resistance, obstruction, hindrance or ouster was occasioned by the judgment-debtor or by another at his instigation, the Court may sentence the judgment-debtor or such other person for a period not exceeding thirty days. This is different from a contempt of court charge

contemplated in section 330 of the Civil Procedure Code in terms of chapter 65 of the Civil Procedure Code.

Hence the view of both the District Court and the High Court that there is no burden cast upon the respondents to prove their claim until the initial burden is discharged by the appellant judgment-creditor by proving his application made under section 325(1), is misconceived in law.

Judgment-creditor should not be unnecessarily harassed

In my view, the District Court and the High Court placed an unnecessarily heavy burden on the appellant.

It must be understood that the petitioner is the decree holder or the judgment-creditor and, by virtue of the decree in his favour, he has every right to have it executed. Execution proceedings shall not be converted to a second trial. The Court shall not discourage the judgment-creditor from having the decree executed by imposing unnecessary fetters. Instead, the Court shall facilitate the judgment-creditor reaping the fruits of his hard-earned victory. What is necessary is not the mere execution of the decree but the enforcement of the decree. What is the use of having a decree on a piece of paper if the decree holder cannot translate it into reality? Justice should be real, not illusory.

No technical objections

In execution proceedings, there is no room for technical objections. In such proceedings the Court shall look at substance over form. The Court shall interfere with the execution only if substantial or material prejudice has been caused to a party or a claimant by any lapse on the part of the Court or the judgment-creditor resulting in a grave miscarriage of justice.

In *Brooke Bond (Ceylon) Ltd v. Gunasekara* [1990] 1 Sri LR 71 at 81, it was observed that the provisions relating to execution proceedings should not be construed in such a way as to lightly interfere with the decree-holder's right to reap the fruits of his victory as expeditiously as possible.

In *Ekanayake v. Ekanayake* [2003] 2 Sri LR 221 at 227, Amaratunga J. held:

> *Execution is a process for the enforcement of a decreed right, mere technicalities shall not be allowed to impede the enforcement of such rights in the absence of any prejudice to the judgment debtor.*

In *Nanayakkara v. Sulaiman* (1926) 28 NLR 314 at 315 Dalton J. stated:

> *As observed by the Privy Council in Bissesur Lall Sahoo v. Maharajah Luckmessur Singh (6 Indian Appeals 233) in execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right.*

This view was emphatically endorsed in an array of decisions including *Wijewardene v. Raymond* (1937) 39 NLR 179 at 181 per Soertsz J., *Latiff v. Seneviratne* (1938) 40 NLR 141 at 142 per Hearne J., *Wijetunga v. Singham Bros. & Co.* (1964) 69 NLR 545 at 546 per Sri Skanda Rajah J.

In *Samad v. Zain* (1977) 79(2) NLR 557, the plaintiff made five applications for the execution of writ. He died while the fifth was pending. The substituted judgment-creditor filed the sixth application for writ, which was refused on the ground that the plaintiff had failed to exercise "due diligence" to procure execution in the previous attempts ("due diligence" was a requirement under section 377 before the amendment

introduced by Civil Procedure Code (Amendment) Act No. 53 of 1980). Whilst setting aside the order of the District Court on the basis that section 337 should not be construed too strictly against the judgment-creditor, Wanasundera J. with the concurrence of Tennekoon C.J. and Rajaratnam J. stated at 563:

> *The Supreme Court has always been disposed to overlook technicalities in dealing with execution proceedings. Hearne, J. in Latiff vs. Seneviratne quoted the words of the Privy Council to the effect that-*
>
> *"In execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right."*
>
> *We would be interpreting the relevant provisions unduly harshly if we were to deny the appellant relief in the circumstances of this case. I would, therefore, allow the appeal with costs both here and below. The petitioner would be entitled to take out writ of execution with a view to obtaining satisfaction of the decree of which he is the assignee.*

In *Dharmawansa v. People's Bank and Another* [2006] 3 Sri LR 45, the Court of Appeal quoted *Samad v. Zain* to interpret the provisions pertaining to execution proceedings broadly.

In *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd.* [1981] 2 Sri LR 373 it was held "*It is the Fiscal who must sign the prohibitory notice but even if the Registrar signs it the validity of the notice will not be affected where the Registrar and the Fiscal are one and the same person. Nor will the notice be bad because it was addressed to the Chairman, Land Reform Commission when it should have been addressed to the Land Reform*

Commission because no prejudice was caused and the objection was not taken at the earliest opportunity." Soza J. declared at page 380:

> *In the case of Nanayakkara v. Sulaiman (1926) 28 NLR 314 it was held that in execution proceedings the Court will look at the substance of the transaction and will not be disposed to interfere on technical grounds. Especially where no objection has been taken at the earliest possible opportunity technicalities will be allowed only very exceptionally to prevail in execution proceedings. Accordingly all preliminary steps up to the stage of the garnishee proceedings under section 230 of the Civil Procedure Code must be held to have been duly complied with.*

Vide also the judgment of De Sampayo J. in *Suppramanium Chetty v. Jayawardene* (1922) 24 NLR 50 and the separate judgments of Sirimane J. and Alles J. in *Perera v. Thillairajah* (1966) 69 NLR 237.

Respondents' claim not proved

The next question is whether the respondents established their claim to the satisfaction of the Court. In my judgment, they did not.

The 3rd and 4th respondents (husband and wife) gave evidence at the inquiry and attempted to prove that they have title to the land. They do not have any title deed or permit or grant to this land. Their evidence was that the 3rd respondent had a deed of declaration marked 4V7 prepared on 06.04.2004 based on their possession. The 1st respondent in his evidence states at one point that he is in possession on behalf of the 3rd respondent and at another point that he is in possession with the permission of the 3rd respondent. He also did not produce any title deed executed in his name. However, he has transferred a portion of the land by deed No. 7147 to his son (the 2nd respondent) on 02.11.2005.

The land was sold by *parate* auction on 03.12.2005. Before the sale took place, notice was served on the 5th respondent judgment-debtor and publicity of the sale was given by various means, as required by the Recovery of Loans by Banks (Special Provisions) Act. The *modus operandi* of the respondents is clear: they have no right or title or interest known to law to the land and have created a fake title to the land preventing the judgment-creditor from taking possession.

Conclusion

The questions of law upon which leave to appeal was granted and the answers thereto are as follows:

> Q: Did the High Court misdirect itself in not taking into consideration the failure of the District Court to make an order in respect of the claim made by the respondents under section 325(4) of the Civil Procedure Code when section 325(4) requires the Court to take both applications made by the judgment creditor and the respondents together?
>
> A: Yes.
>
> Q: Did the High Court err in failing to take into consideration the failure of the District Court to make an order under section 326(1)(c), when undisputedly the respondents failed to establish their claim made under section 325(4) of the Civil Procedure Code?
>
> A: Yes.
>
> Q: Did the High Court misdirect itself by its failure to consider that the learned District Judge has not properly considered the evidence before Court that the Fiscal was hindered in taking complete and effectual possession thereof within the meaning of section 325(2) of the Civil Procedure Code to deliver possession of the property to

the judgement creditor due to the obstructions made by the judgement debtor and/or the representatives?

A: It was not the fiscal who was hindered in taking complete and effectual possession but the judgment-creditor.

Q: Did the High Court misdirect itself by not observing that the learned District Judge has not properly considered the evidence given by witness Ananda Thogadeniya, Manager Loans of the petitioner Bank which shows that the petitioner Bank has not been able to obtain possession due to the obstruction and resistance of the respondents?

A: Yes.

Q: Did the High Court err in failing to consider the error made by the learned District Judge to the effect that the petitioner failed to establish its claim when the evidence and the conduct of the respondent demonstrate that the petitioner has established its case?

A: Yes.

I set aside the impugned judgment of the High Court dated 04.04.2013 and the order of the District Court dated 15.12.2010 and allow the appeal. The District Court shall direct the fiscal to deliver to the appellant complete and effectual possession of the property described in the schedule to the amended petition dated 06.12.2006. The appellant is entitled to recover costs in all three Courts from the 1st-4th respondents jointly and severally.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Appeal under Section 5(C)1 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No.54 of 2006.

1. Iyathurai Kulenthiran
5252 Rue L'armoise Pierrefonds
QC H8Z 0A6 Montreal, Canada
through his power of attorney
holder Kumunthan Vijitha
of Markandu Road, Mulangavil.

2. Rathinam Kumunthan

3. wife Vijitha

Both of Markandu Road,
Mulangavil

Plaintiffs

Vs.

S.C. Appeal No.148/2018
S.C./HCCA/ LA No. .567/2016
H.C. Northern Province,Jaffna
(Civil Appellate) No.Rev. 65/2016
D.C.Mallakam No.Mis/164/2012

Iyathurai Perinpanayagam
Moolai South, Chulipuram
Presently of Chettier Eating
House, Pillaiyar Kovilady,
Mulangavil.

Defendant

AND

Iyathurai Perinpanayagam
Moolai South, Chulipuram

Presently of Chettier Eating
House,Pillaiyar Kovilady,
Mulangavil.

Defendant-Petitioner

Vs.

1. Iyathurai Kulenthiran
5252 Rue L'armoise Pierrefonds
QC H8Z 0A6 Montreal, Canada
through his power of attorney
holder Kumunthan Vijitha
of Markandu Road, Mulangavil.

2. Rathinam Kumunthan

3. Wife Vijitha
Both of Markandu Road,
Mulangavil

Plaintiff-Respondents

AND NOW BETWEEN

1. Iyathurai Kulenthiran
5252 Rue L'armoise Pierrefonds
QC H8Z 0A6 Montreal, Canada
through his power of attorney
holder Kumunthan Vijitha
of Markandu Road, Mulangavil.

2. Rathinam Kumunthan

3. wife Vijitha
Both of Markandu Road,
Mulangavil

Plaintiff-Respondent-

Appellants

Vs.

1. Iyathurai Perinpanaagam
Moolai South, Chulipuram

Presently of Chettier Eating
House, Pillaiyar Kovilady,
Mulangavil.

Defendant-Petitioner-

Respondent

2. Selvarasa Selvarooban
No.31, Kuruban Road,
Mulankavil,
Killinochchi

Added-Respondent

BEFORE : **E.A.G.R. AMARASEKARA, J.**
A.H.M.D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Ms. Shakthiyaraji K. for the Plaintiff-Respondent-Appellant
K.V.S. Ganesharajan with S. Rague & K. Nasikethan for the Defendant-Petitioner-Respondent.
V. Puvitharan P.C. for the Added-Respondent

ARGUED ON : 22nd February, 2022

ORDER ON : 06th April, 2023

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ACHALA WENGAPPULI, J.

The Added-Respondent, one *Selvarasa Selvarooban*, was named and added as a party to the instant appeal by the Plaintiff-Respondent-Appellants by way of an amended petition tendered to this Court, supported by an affidavit along with an amended caption. This

amendment was made by the Plaintiff-Respondent-Appellants only after this Court had granted leave on their original petition. Upon being noticed by this Court, the Added -Respondent was represented by the learned President's Counsel, who then moved his client be discharged from these proceedings. In his submissions, learned President's Counsel took up the position that the Added-Respondent was neither a party to the action before the original Court instituted by the Plaintiff-Respondent-Appellants, nor to the proceedings before the Civil Appellate High Court holden in *Jaffna*, initiated by the Defendant-Petitioner-Respondent, in invoking its revisionary jurisdiction. In these circumstances, it was contended by the Counsel that the Added-Respondent is not bound by either of the two Judgments referred to in the instant appeal. The Plaintiff-Respondent-Appellants have resisted the said application.

The three Plaintiff-Respondent-Appellants have instituted the instant action in 2012, before the District Court of *Mallakam*, regarding a dispute over the ownership of a passenger bus bearing number NPNA 0226. In their prayer to the Plaint, the Plaintiff-Respondent-Appellants have sought a declaration against the Defendant-Petitioner-Respondent, who was the registered owner of the said passenger bus at that point of time, that the said passenger bus is held by him "*in trust and benefit*" of the Plaintiff-Respondent-Appellants. They also sought the following reliefs in their prayer to the Plaint: -

i. an order of Court on the Defendant-Petitioner-Respondent to "*consent the Route Permit*" in favour of the 2nd Plaintiff-Respondent-Appellant,

ii. an order of Court to handover the said passenger bus immediately to the Plaintiff-Respondent-Appellants, and also

iii. an order restraining him from "*selling, transferring, mortgaging the bus*".

It was averred in the plaint of the Plaintiff-Respondent-Appellants that the said passenger bus was purchased from the funds supplied by the 1st Plaintiff-Respondent- Appellant. The 2nd and 3rd Plaintiff-Respondent-Appellants are husband and wife respectively. The Defendant-Petitioner-Respondent is the father of the 3rd Plaintiff-Respondent-Appellant and a sibling of the 1st Plaintiff-Respondent-Appellant. On the request of the 2nd and 3rd Plaintiff-Respondent-Appellants, the 1st Plaintiff-Respondent-Appellant, who now resides in *Canada*, had provided a sum of Rs. 3.5 Million on 18.03.2010, to proceed with the purchase of the disputed passenger bus. After the purchase, it was registered in the name of the Defendant-Petitioner-Respondent allegedly *"in trust"*. He had obtained a route permit in his name from the National Transport Commission to transport passengers between *Kilinochchi* and *Mulangavil* in that bus, while the 2nd Plaintiff-Respondent-Appellant functioned as its driver.

When the 1st Plaintiff-Respondent-Appellant demanded a sum of Rs. 2 Million from the capital he had provided to purchase the said passenger bus at a subsequent point of time, it is claimed by the 2nd and 3rd Plaintiff-Respondent-Appellants that they have secured a loan from the Commercial Leasing Company, in January 2011 with a view to pay back to the 1st Plaintiff-Respondent-Appellant. They also claimed that since then, they themselves paid the monthly instalment of Rs. 60,000.00

to the said Leasing Company. In June 2011, a dispute arose between the 2nd and 3rd Plaintiff-Respondent-Appellants and the Defendant-Petitioner-Respondent over a payment and the route permit of the passenger bus was cancelled by the authorities. The Plaintiff-Respondent-Appellants also alleged that the said cancellation was done by the authorities on the instigation of the Defendant-Petitioner-Respondent, and the said cancellation had resulted in depriving them of any income from plying passengers, on which they relied on to service the said loan instalment. After making a complaint to *Kilinochchi* Police in this regard, the disputing parties were directed to the Mediation Board. Since there was no settlement of the dispute, the instant action was instituted by the Plaintiff-Respondent-Appellants as the Defendant-Petitioner-Respondent had kept the bus at an undisclosed location and they feared that the latter might transfer the ownership of the disputed passenger bus to a third party.

In his answer, the Defendant-Petitioner-Respondent had denied the claim of a trust and averred that it was on his request that the 1st Plaintiff-Respondent-Appellant sent a sum of Rs. 3 Million to a relative in *Puttlam* as a loan to purchase the passenger bus. He further alleged that it is upon the failure of the 2nd and 3rd Plaintiff-Respondent-Appellants to repay the loan from the income derived from the bus, the 1st Plaintiff-Respondent-Appellant requested him to take possession of same and sell it, in order to recover the capital. The Defendant-Petitioner-Respondent had thereupon pledged the vehicle to the Commercial Leasing Company and obtained a sum of Rs. 2 Million, which he deposited in the account of a relative, who was named by the 1st Plaintiff-Respondent-Appellant, by way of a part settlement of the said loan of Rs. 3 Million and he himself had paid several instalments.

The Defendant-Petitioner-Respondent further alleged that the disputed passenger bus had been kept at an undisclosed location by the 2nd Plaintiff-Respondent-Appellant and a police complaint was lodged. The bus was later recovered by the Police, concealed in a remote area bordering a forest in *Achchipuram, Vavunia*.

The parties proceeded to trial and presented evidence with no trial issues settled between them. At the conclusion of the trial, the learned District Judge, after fixing the date for the Judgment, noted that there were no issues settled between the parties. The trial Court had thereafter delivered its Judgment on 10.03.2016, after parties have agreed on the trial issues at that late stage. The Judgment was delivered in favour of the Plaintiff-Respondent-Appellants and the Court granted the declaration that the said passenger bus is held by the Defendant-Petitioner-Respondent in trust and directed him to consent for the transfer of Route Permit. The Court also ordered the Defendant-Petitioner-Respondent to hand over the disputed passenger bus to the Plaintiff-Respondent-Appellants.

The Defendant-Petitioner-Respondent did not prefer an appeal against the said Judgment, instead he had opted to invoke revisionary jurisdiction of the Civil Appellate High Court in *Jaffna*, by filing application No. Revision/65/2016, on 23.05.2016. The Plaintiff-Respondent-Appellants have resisted the said revision application, and the appellate Court, after an inquiry had delivered its order on 12.10.2016 setting aside the Judgment of the District Court. The interference to the Judgment of the trial Court by the appellate Court was made on the basis that the Plaintiff-Respondent-Appellants have averred in their Plaint of a repayment of Rs. 2 Million made by the

Defendant-Petitioner-Respondent to the 1st Plaintiff-Respondent-Appellant and therefore the disputed vehicle is not a trust property. The appellate Court also ruled that since the Defendant-Petitioner-Respondent had mortgaged the passenger bus to the Commercial Leasing Company, the Plaintiff-Respondent-Appellants should have added that Company as a necessary party to their action. However, there was no attempt made by the Plaintiff-Respondent-Appellants to name that party to the proceedings before this Court.

The Plaintiff-Respondent-Appellants have thereafter sought Leave to Appeal from this Court against the said order of the Civil Appellate High Court, by way of a petition and affidavit tendered to the Registry on 24.11.2016. This Court, having heard the Plaintiff-Respondent-Appellants as well as the Defendant-Petitioner-Respondent on 05.10.2018, had decided to grant Leave to Appeal to the questions of Law, as set out in paragraphs 39(i), (ii), (iii) and (iv) of the said Petition, which have been formulated mainly on the existence of a trust. The determination on these several questions of Law will have to be made only after hearing the parties on them at a subsequent stage and at this point of time, this Court concerns itself only with the application of the Added-Respondent.

The reason attributed by the Plaintiff-Respondent-Appellants, in adding the Added-Respondent to these proceedings, was provided by way of a motion tendered to this Court for the first time on 11.10.2017. It was stated therein that the Added-Respondent, being the "*current owner of the bus*", should be added as a party. They sought permission to amend the petition and as well as its caption and also moved to bring the "*fraudulent*" act committed by the Defendant-Petitioner-Respondent

to the notice of this Court, in transferring his ownership to the Added-Respondent, pending appeal. They also claimed in the said motion that if the present owner is not added as a Respondent, an "*irremediable loss*" would be caused to them, as instituting a fresh action against the said Added-Respondent is not feasible.

It is only on 11.10.2017, the Plaintiff-Respondent-Appellants have brought the fact of transferring the ownership of the disputed passenger bus by the Defendant-Petitioner-Respondent to the Added-Respondent to the notice of this Court for the first time, and that too by way of a motion. In the said motion, the Plaintiff-Respondent-Appellants alleged that the ownership of the passenger bus had been transferred in favour of *Selvarasa Selvarooban* by the Defendant-Petitioner-Respondent on 25.11.2016 and therefore sought permission of Court to add him as a "*necessary party*" to the appeal, in order to "*effectually and completely adjudicate the dispute*". The application of the Plaintiff-Respondent-Appellants was repeated in the 2nd motion filed on 03.05.2018, filing of which apparently was necessitated as the 1st motion was misplaced. The 3rd motion by the Plaintiff-Respondent-Appellants was also on the same lines. It had been tendered to Court on 10.10.2018. The Plaintiff-Respondent-Appellants, for the fourth time filed a similar motion dated 26.11.2018, and this time, in addition to the motion, they have tendered an amended petition and an affidavit, along with an amended caption with the said *Selvarasa Selvarooban* named therein as an Added-Respondent, in relation to their appeal.

This Court, having heard submissions of the learned Counsel for the Plaintiff- Respondent-Appellants in support of her said 4th motion and, in the absence of any objections by the Defendant-Petitioner-

Respondent, had issued notice on the Added-Respondent, upon acceptance of the said amended petition and caption. The Added-Respondent was represented by his Counsel on the notice returnable date i.e. 22.05.2019. He resisted being added as a party to the instant appeal and sought to discharge him from the proceedings. The inquiry on the application of the Added-Respondent seeking to discharge himself was taken up by this Court on 22.02.2022.

It was contended on behalf of the Added-Respondent by the learned President's Counsel that *Selvarasa Selvarooban* is not a party to the action before the District Court or to the proceedings before the Civil Appellate High Court and hence he had not been heard by any of the Courts below. It was also contended that, in the absence of a provision enabling an addition of a party during pendency of an appeal, the Plaintiff-Respondent-Appellants have no legal basis to add the Added-Respondent as a party at this late stage of the proceedings. The Learned President's Counsel relied on the reasoning of the Judgment of ***Fernando v De Silva & Others*** (2000) 3 Sri L.R. 29, in support of his contention that even at the stage of execution of a decree of the original Court, an application to add a party would not be entertained.

In her reply, learned Counsel for the Plaintiff-Respondent-Appellants had submitted that her clients have lost their only source of income derived by plying passengers for the last five years, primarily due to fraudulent act of the Defendant-Petitioner-Respondent and therefore if the Added-Respondent is not made a party to the instant appeal, the purpose of seeking a determination of their appeal by this Court would be rendered futile. She alleged that the Defendant-

Petitioner-Respondent did not execute decree in the original Court and did not even make an application to this Court for writ pending appeal in his failure to deposit of cost. As such, it was contended that the Defendant-Petitioner-Respondent is in clear violation of the applicable procedural Laws and guilty of abuse of process to the extent of committing contempt of Court. She had cited a long string of judicial precedents as found in ***Sarkar* on *Code of Civil Procedure***, 12th Ed, which dealt with judicial decisions that were pronounced in relation to addition of parties in that jurisdiction and particularly invited our attention to the following text, which states (at p. 306):

> *" Where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the later circumstances in order to shorten litigation or to do complete justice between the parties , it is incumbent on the Court to take notice of events which have happened since the institution of the suit and to mold its decree according to the circumstances as they stand at the time the decree is made."*

She also invited this Court to exercise its inherent powers, citing ***Sarkar***, where it is stated (at p. 900) "*section 151 of the Civil Procedure Code is an enabling provision by virtue of which inherent powers have been vested with the Court not to feel helpless in such circumstances. But to administer substantial justice, Court can use its own inherent power to fill up the lacunae left by the legislature while enacting law or where the Legislature is unable to foresee any circumstances which may arise in a particular case*."

In view of the above contentions, I shall now proceed to consider the application of the learned President's Counsel for the Added-Respondent.

Admittedly the Added-Respondent is named as a party for the first-time pending determination of the appeal of the Plaintiff-Respondent-Appellants and after leave was granted. He was not a party to the litigation before the District Court nor to the proceedings held before the Civil Appellate High Court, as correctly highlighted by the learned President's Counsel.

The submissions of the learned Counsel for the Plaintiff-Respondent-Appellants, in resisting the application of the Added-Respondent, was primarily presented on the principles that are embodied in the statutory provisions contained in section 18 of the Civil Procedure Code. Of the several local judicial precedents that were referred to in her submissions, I find that all of them have been decided on the principles of Law that contain in the said statutory provision. The long list of quotations cited from *Sarkar* too relates to a similar statutory provision that govern the procedure of addition of parties before the original Courts, in the neighbouring jurisdiction of *India*.

Of course, the relevant statutory provision that provided for addition of a party to a civil dispute, pending adjudication before the District Court, is found in section 18 of our Civil Procedure Code. Purpose of such an addition of a party, as stated in the section, is to enable the Court to effectually and completely adjudicate upon all the questions involved in that action. A considerable body of judicial precedents that is available on this topic indicate that the superior Courts have considered the statutory provisions contained in the said

section in a multitude of factual situations and had laid down applicable principles that govern the discretion of a Court, when such an application is made. The oft quoted Judgment of this Court, ***Arumugam Coomaraswamy v Andiris Appuhamy and Others*** (1985) 2 Sri L.R. 219, where *Ranasinghe* J (as he was then) favoured the wider construction of the statutory provisions of the applicable Law, in addition of parties. But the application of these principles is limited to addition of parties in the original Courts and that too before the Judgment is pronounced.

The Judgment of ***Fernando v De Silva & Others*** (2000) 3 Sri L.R. 29 considered the objection raised by an added respondent Company, when it was named as a party to the appeal by the Plaintiff. The appeal was preferred by the plaintiff in seeking to challenge the trial Court's decision, by which it had refused to add the said respondent Company as an added party at the stage of execution of writ. In delivering the judgment, *de Z Gunawardene J* stated (at p. 32) that *"… no one can be added as a party to the action after Judgment had been entered, one way or the other. Nothing more need be said in regard to this question as it is so well known."* A similar view was taken in the Judgment of ***Ameen v Salahudeen & Others*** (1998) 3 Sri L.R. 185, where *Wigneswaran J* had determined the validity of an order made under section 18 by the District Court, in which an outsider was admitted as an intervenient party, after the said Court had entered its decree. His Lordship, following the ratio of the judgments of ***Cooray v Gaffar*** – (CA 92/80 DC *Panadura* (552) CAM 18.2.1983), ***Pitisinghe v. Ratnaweera*** 62 NLR 572, ***Norris v. Charles*** 63 NLR 510 and ***Richford Trading Company v. The Miyanawita Estates Co., Ltd. and another*** (CA 790/84 DC Colombo 47303RE - CAM 13.9.1985) stated (at p. 190) *"… allowing the*

addition of the petitioner-respondent as a necessary party after decree was entered, was ex facie bad in law and therefore set it aside and declare void all steps taken by Court based on that order as from the time of such order."

It is relevant to note that the Added-Respondent was added as a party by the Plaintiff-Respondent-Appellants not at the time filing of the application in this Court seeking Leave to Appeal, but at the hearing stage of the appeal of the Plaintiff-Respondent-Appellants, and even after the question of granting of leave was decided. The Plaintiff-Respondent-Appellants, in seeking Leave to Appeal against the Judgment of the Civil Appellate High Court, have invoked the provisions of section 5C (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, which enables a party to appeal to this Court directly against any Judgment, decree or order pronounced or entered by a High Court, in the exercise of its jurisdiction granted by section 5A of the said Act.

Once its jurisdiction is invoked, proceedings before this Court are governed by the procedure as set out in the Rules of the Supreme Court 1990. In setting out the procedure in which a party could seek Special Leave as well as Leave to Appeal from this Court, both Rules 4 and 25(8) impose a mandatory requirement by insisting on the requirement that "*all parties in whose favour the Judgment or order complained against was delivered, or adversely to whom such appeal is preferred*" shall be named as respondents.

It appears from the wording of both these Rules that naming of respondents should be made at the time of lodgment of such an application, notice of appeal or the petition of appeal, as the case may be. Rule 4 refers to "*every such application*", indicating that it relates to

applications seeking Special Leave to Appeal as contemplated by Rule No. 2, while Rule 28(5) also indicates that "*every such petition of appeal and notice of appeal*" and thus relates to the appeals and notices of appeal as referred to in Rule 28(2). In my view, both these Rules, in addition to imposing a requirement of naming of "*all parties in whose favour the Judgment or order complained against was delivered, or adversely to whom such appeal is preferred*" as respondents at the time of invocation of appellate jurisdiction of this Court, have also included another description of respondents, when it stated that such appeal or application shall also name parties "*whose interest may be adversely affected by the success of the appeal*".

This Court in the Judgment of ***Ibrahim v Nadarajah*** (1991) 1 Sri L.R. 131, held that "*It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected.*" This was an instance where the appellant had failed to name a party to the proceedings before lower Court as a respondent in the appellate proceedings before this Court. It should be noted that *Amerasinghe* J had used the description "*all parties who may be adversely affected by the result of the appeal*" whereas the Rules refer to the description of such a party "*whose interest may be adversely affected by the success of the appeal.*" In view of this description, it is doubtful whether the Added-Respondent could be termed as such a party.

The said pronouncement by *Amerasinghe* J was re-affirmed in ***Senanayake v Attorney General & Another*** (2010) 1 Sri L.R. 149 as it was stated by *Bandaranayake J* (as she then was) that "*In terms of the*

Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties." Thus, the said pronouncement implies that the party who may be adversely affected by the result of the appeal, should be named as a party to the proceedings before this Court, at the stage of invocation of its appellate jurisdiction. In ***Senanayake v Attorney General & Another*** (ibid), this Court held that the Appellant had failed to name the Director-General of the Commission to Investigate Allegations of Bribery and Corruption, who is a necessary party to the appeal, since it was he who had instituted proceedings in the original Court as the complainant. The Court then proceeded to dismiss the said appeal for non-compliance of the Supreme Court Rules.

In the instant appeal, as already noted, the addition was made by the Plaintiff-Respondent-Appellants while their appeal was pending before this Court, and after a determination of their rights was made by the High Court of Civil Appeal in the exercise of its revisionary jurisdiction. It is also noted that there is no express provision of Law or a Rule which enables an applicant or an appellant to name a total stranger as a party, particularly in mid-stream of the appellate proceedings that are already instituted and continuing before this Court. The Plaintiff-Respondent-Appellants have sought to justify their action of naming a party in mid-stream by advancing the contention that, in the absence of a specific provision of Law that prohibits addition of parties pending appeal before this Court, it should not refuse to make the proposed addition of a party necessary in order to facilitate a complete adjudication of the dispute presented before the District Court.

A similar contention was advanced before this Court by Counsel in ***Ramasamy v Soundarajan & Others*** (SC Appeal No. 199/17 – decided on 24.02.2022) to defend the decision of the Civil Appellate High Court in *Kandy,* allowing an intervention of a party during appellate proceedings before that Court. Rejecting the said contention, *Amarasekera* J stated in view of the statutory provisions contained in section 18 of the Civil Procedure Code, "*it must be stated here that what is expressly stated excluded others*".

In relation to the instant appeal, it is relevant to note that in the absence of a direct appeal that had been preferred by the Defendant-Petitioner-Respondent there was no continuation of the litigation process that had proceeded before the District Court beyond the delivery of the Judgment by that Court in favour of the Plaintiff-Respondent-Appellants. Instead, he had opted to invoke supervisory jurisdiction conferred on the High Court of Civil Appeal seeking its intervention to set aside that Judgment. In these circumstances, the continuality of the process of litigation was interrupted. Thereupon, with the invocation of revisionary jurisdiction, it had assumed the character of different process of litigation between the parties named therein. The revisionary jurisdiction of the High Court of Civil Appeal is a discretionary remedy as opposed to a right to appeal and there must be exceptional circumstances, in order to trigger in the process of supervisory jurisdiction of the High Court of Civil Appeal. Thus, in such circumstances the question of addition of parties to the original action does not arise and the statutory provisions, namely section 18 of the Civil Procedure Code, as referred to by the learned Counsel for the Plaintiff-Respondent-Appellants on that point does not provide any

assistance to the determination of the contentious issue raised before this Court.

Even the question is whether the added party as a necessary party to the revision application filed before the High Court of Civil Appeal, the outcome of which is now being challenged in the instant appeal should be answered in the negative since the complaint of the illegality and the irregularity of the Judgment of the original Court by the Defendant-Petitioner-Respondent had nothing to do with the Added-Respondent and therefore he is not a necessary party to be named in the said revision application. This is because as far as the Judgment of this Court (which will have to be pronounced only after hearing the appeal) is concerned the Added -Respondent cannot be considered as a party in whose favour the Judgment or order complained against was delivered, or adversely to whom such appeal is preferred.

The Plaintiff-Respondent-Appellants, in fact made no endeavour to justify their naming of the Added-Respondent in mid-stream in the instant appeal by referring to any statutory provision of Law or a Rule. They also made no endeavour to impress this Court that the addition of the Added-Respondent was necessary because he qualifies to be treated as a party "*whose interest may be adversely affected by the success of the appeal*". Instead, the learned Counsel for the Plaintiff-Respondent-Appellants had chosen to harp on the complaint that if the Added-Respondent is not added, even if their appeal ended up in success, it is their interests that would be adversely affected and not that of the Added-Respondent.

It was already noted that the learned President's Counsel's contention is that the Added-Respondent was not a party to the proceedings before the District Court and the Civil Appellate High Court. The Added-Respondent had acquired ownership to the disputed passenger bus from its duly registered owner, the Defendant-Petitioner-Respondent, who had a Judgment of an appellate Court in his favour at that point of time. There was no prohibition, lien, caveat, or stay order preventing the Defendant-Petitioner-Respondent to transfer ownership of that bus, he held in his name. This particular transaction had taken place on 25.11.2016. The delivery of the Judgment of the Civil Appellate High Court was made on 12.10.2016. The Plaintiff-Respondent-Appellants have sought leave from this Court against the said Judgment by their petition dated 21.11.2016 and this Court issued notice on the Defendant-Petitioner-Respondent, that the said application is listed for support on 13.02.2017.

The said Notice was dispatched to the Defendant-Petitioner-Respondent on 28.11.2016 informing that the matter is listed for support on 13.02.2017. By then, the said transfer of the ownership of the disputed passenger bus in favour of the Added-Respondent had already been completed. Since, this transfer had taken place on 25.11.2016, it is doubtful whether the Defendant-Petitioner-Respondent was aware of the fact that the instant application was pending before this Court before making the said transfer. Thus, I am unable to accept the claim that there had been an abuse of process by the Defendant-Petitioner-Respondent. It also must be noted that the previous owner of the said passenger bus, as per the Certificate of Registration ("X"), was Commercial Leasing and Finance PLC and not the Defendant-Petitioner-Respondent. There was no explanation as to this change of

ownership from the Defendant-Petitioner-Respondent to that Company. However, the explanation for the delayed inclusion of the said Added-Respondent to the instant proceedings by the Plaintiff-Respondent-Appellants is that they learnt about this transfer only around June 2017 and therefore have not "*reasonably foreseen*" such a turn of events. This claim cannot be accepted. In their Plaint filed before the District Court, the Plaintiff-Respondent-Appellants averred that "… *there are possibilities of transferring the bus to another person*" by the Defendant-Petitioner- Respondent. This averment clearly indicates that the Plaintiff- Respondent-Appellants had already foreseen the adoption of such a course of action by the Defendant-Petitioner-Respondent when they instituted the original action and in fact they prayed for, in the interim, an order of Court to prevent such a transfer taking place.

This is not a situation in which the Plaintiff-Respondent-Appellants had failed to name a necessary party to the action they instituted against the Defendant-Petitioner-Respondent or to have failed to add the Added-Respondent as a party, in compliance of section 18 of the Civil Procedure Code, before the trial Court pronounced its Judgment. The inclusion of Added-Respondent as a party in mid-stream of the appeal proceedings in this Court is a direct consequence of him acquiring ownership of the passenger bus, over which the Plaintiff-Respondent-Appellants and the Defendant-Petitioner- Respondent are currently engaged in a process of litigation that had reached its final phase. It is settled Law that the rights of the parties are decided as at the date of action. When the Plaintiff-Respondent-Appellants instituted action, the registered owner was the Defendant-Petitioner-Respondent and he is bound by the Judgment delivered against him by the trial Court, until it was set aside by the

Civil Appellate High Court. The entitlement of the Plaintiff-Respondent-Appellants will finally be decided by this Court after hearing of their appeal, where the Defendant-Petitioner-Respondent is a party.

The inherent powers of a Court should not be used to deny the Added Respondent's right to defend against allegation of fraud made by the Plaintiff-Respondent-Appellants before an original Court, as the allegation of fraud is based on facts and the former had no opportunity to challenge such allegations and to place his side of the narration. If the actions of the Added-Respondent are violative of the Plaintiff-Respondent-Appellant's rights, they could sue the former on that cause of action.

In the absence of any specific Rule in the Supreme Court Rules as to make an addition of a party in mid-stream of appellate proceedings before this Court, a question necessarily arises whether cannot this Court hear a party, who is not originally a party to the proceedings, under any circumstances, even if it is of the view that such a party should be afforded an opportunity to be heard.

The judgment of ***Bandaranaike v Jagathsena & Others*** (1984) 2 Sri L.R. 397, is an instance where this Court, in addition to dealing with several other important areas of Law, also dealt with a situation where a party, who was originally not a party to the appellate proceedings before the Court of Appeal but was subsequently allowed to intervene into and had sought leave to appeal from this Court against the Judgment of that Court. A preliminary objection was raised before this Court challenging the petitioner's *locus standi* to seek review of the Judgment of the Court of Appeal on the basis that she was neither an

appellant nor a respondent to the appellate proceedings. *Colin-Thome* J, rejecting the said preliminary objection stated thus (at p. 406);

> "*Under Article 128 (2) the Supreme Court has a wide discretion to grant special leave to appeal to the Supreme Court from a judgment of the Court of Appeal where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court. Under Article 128 (2) you do not have to be a party in the original case.*"

His Lordship further stated that his view is strengthened on an examination of Article 134 (2) and (3) of the Constitution, as Article 134(2) provides that "*The Supreme Court may in its discretion grant to any other person or his legal representative such hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under this Chapter.*" Thus, a discretion is conferred upon this Court by Article 134(3), enabling it to hear any party if it "*appear to the Court to be necessary in the exercise of its jurisdiction under this Chapter.*" But in relation to the instant matter, I am not inclined use that discretion to prejudice the rights of the Added-Respondent by adding him as a party at this stage of the proceedings and thereby denying him of an opportunity to place evidence before the original Court and also to cross-examine the opposite party in relation to his defenses that could be taken by him, as contemplated in sections 65, 66, 68 and 98 of the Trusts Ordinance.

Admittedly the primary reason for the addition of the Added-Respondent was due to the fact of him becoming the registered owner of the disputed passenger bus. At first glance, the reason to add the Added-Respondent could be justified since the Plaintiff-Respondent-Appellants had no hand in the said transfer and it was done without

their knowledge. They also claim that such a transfer was not foreseen by them.

But if one were to inquire into the relevant attendant circumstances, one cannot help but to note that it is the lackadaisical approach of the Plaintiff-Respondent-Appellants that had mainly contributed to the present state of affairs, in which the addition of the Added-Respondent was moved for, in order to have the current owner of the passenger bus added as a party. I have already referred to the fact that this eventuality had already been foreseen by the Plaintiff-Respondent-Appellants at the time of institution of their action but did nothing to secure their rights after the trial Court pronounced its Judgment in their favour.

In their Plaint, they have averred their apprehension of the Defendant-Petitioner-Respondent transferring ownership of the disputed passenger bus to a third party. Perhaps, it is in view of this apprehension, the Plaintiff-Respondent-Appellants have sought for an order of Court on the Defendant-Petitioner-Respondent to immediately hand over the said vehicle to them. After trial, the District Court of *Mallakam*, by its judgment dated 10.03.2016, had granted that very relief.

The Defendant-Petitioner-Respondent had moved the Civil Appellate High Court holden in *Jaffna* seeking to set aside the said Judgment not by invoking its appellate jurisdiction but by invoking revisionary jurisdiction and tendered his petition to the appellate Court on 23.05.2016. The application was supported on 14.06.2016 and only on that day the appellate Court had made order staying further proceedings before the trial Court. In the absence of a Notice of Appeal that had been tendered within the stipulated time period, there was

sufficient time for the Plaintiff-Respondent-Appellants to seek execution of the Judgment, which granted them the substantial relief and particularly the custody of the passenger bus. If there was realistic threat of transferring the "*trust property*" to a third party, it is reasonable to expect the Judgment Creditor to move Court for the issuance of Writ of Execution. But the Plaintiff-Respondent-Appellants, having had a Judgment in their favour in an action in which they themselves specifically sought delivery of property, did not take any steps to execute Decree, even in the absence of any indication to appellate jurisdiction being invoked by the Defendant-Petitioner-Respondent.

Strangely, the learned Counsel who represented the Plaintiff-Respondent-Appellants before this Court alleged that it was the Defendant-Petitioner-Respondent who had failed to execute the Writ. She did not elaborate as to how the Defendant-Petitioner-Respondent could move Court to execute the Writ, that had been issued under the Judgment and Decree against him.

The order of the Civil Appellate High Court was delivered on 12.10.2016, on the said revision application by the Defendant-Petitioner-Respondent, and thereby the appellate Court had set aside the Judgment of the trial Court. The Plaintiff-Respondent-Appellants in addition to seeking Leave to Appeal from this Court, also sought interim relief by way of staying all proceedings relating to the decree in terms of the Judgment of the Civil Appellate High Court. After the relevant proceedings were translated into English, the Plaintiff-Respondent-Appellants supported their application on 05.10.2018 and this Court had granted Leave on four questions of Law. But the Plaintiff-Respondent-Appellants have not pursued with their

application for interim relief at that point of time and appears to have abandoned their claim on interim relief.

In relation to the instant appeal, it must be observed that this is not a situation where the Added-Respondent sought intervention into the appellate proceedings before this Court as a party for the first time under provisions of Article 134(3) seeking to exercise discretion of Court that he be heard. In fact, he resists the Plaintiff-Respondent-Appellants' act of naming him as an Added-Respondent to the proceedings before this Court.

Thus, it would appear from the considerations referred to in the preceding paragraphs that the Plaintiff-Respondent-Appellants, despite entertaining an apprehension that the Defendant-Petitioner-Respondent would transfer ownership of the disputed passenger bus to a third party, they did not diligently pursue available legal remedies to prevent such a transfer taking place. The Added-Respondent clearly is not a party to the action before the District Court or to the proceedings before the Civil Appellate High Court and therefore not bound by any of the two Judgments. In the circumstances, I am of the view that the Added-Respondent is not a party "*whose interests may be adversely affected by the success of the appeal*" as he himself asserts and therefore need not be heard in determining the instant appeal. In the circumstances, having asked the question whether it is necessary to hear the Added-Respondent, as *Samarakoon CJ* did in ***Bandaranaike v Jagathsena & Others*** (supra), I would answer same in the negative.

In view of the reasoning enumerated above, the application of the learned President's Counsel for the Added-Respondent seeking to discharge him from these proceedings should succeed. Therefore, the

Added-Respondent is discharged forthwith from these proceedings and, if they so whish, the Plaintiff-Respondent-Appellants may prosecute their appeal, on the Questions of Law that had already been formulated by this Court.

The application of the Added-Respondent is accordingly allowed, and he is discharged forthwith from these proceedings. The Plaintiff-Respondent-Appellants are directed to tender an amended caption in terms of this order along with necessary amendments to the amended petition dated 26.11.2018 within a period of four weeks from the pronouncement of this order.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

MAY

2023

JUDGMENTS

MAY INDEX

1.	SC/FR/399/2022	1074
2.	SC/APPEAL/140/2017	1087
3.	SC/APPEAL/89/2011	1094
4.	SC/APPEAL/125/2014	1107
5.	SC/FR/363/2008	1114
6.	SC/CHC/APPEAL/60/2013	1141
7.	SC/MISC/03/2019	1167
8.	SC/MISC/03/2019	1181
9.	SC/APPEAL/201/2016	1195
10.	SC/APPEAL/193/2014	1203
11.	SC/APPEAL/171/2019	1211
12.	SC/APPEAL/32/2019	1258
13.	SC/FR/191/2009	1264
14.	SC/APPEAL/16/2018	1270
15.	SC/FR/191/2009	1279
16.	SC/FR/371/2022	1285
17.	SC/FR/398/2016	1298
18.	SC/APPEAL/115/2017	1308

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

In the matter of an application under and in terms of Article 17 and 126 (2) of the Constitution of the Republic of Sri Lanka.

Ms. Kayleigh Frazer,
972/4, Kekunagahawatta Road,
Akuregoda,
Battaramulla.

Petitioner

SC/FR/399/2022

Vs

1. Priyantha Jayawardena,
   Judge in the Supreme Court,
   Colombo 12.

2. Controller General of Immigration,
   Department of Immigration and Emigration,
   Suhurupaya,
   Sri Subhuthipura,
   Battaramulla.

3. Attorney General,
   Attorney General's Office,
   Colombo 12

Respondents

Before: Murdu N.B. Fernando, PC J.,
S. Thurairaja, PC J. and
Achala Wengappuli, J.

Counsel: Nagananda Kodituwakku for the Petitioner
Kanishka de Silva Balapatabendi, DSG for the 2nd and 3rd Respondents.

Argued on: 27-01-2023 and 07-03-2023

Decided on: 11-05-2023

Murdu N.B. Fernando, PC J.

The Petitioner a British national, filed this fundamental rights application dated 27th December, 2022 and moved this Court for leave to proceed *inter-alia* and specifically prayed to quash the decision made by the 2nd Respondent, the Controller General of Immigration on 10th August 2022 (X 4), to cancel the visa issued to the Petitioner and advising the Petitioner to leave this country on or before 15th August, 2022 and further moved for interim relief preventing the Petitioner being deported from Sri Lanka, until the hearing of this application.

The Petitioner also moved for relief against the 1st Respondent a Judge of this Court, for a declaration that the 1st Respondent has violated the fundamental rights of the Petitioner enshrined in Articles 10, 11, 12 and 13 of the Constitution. The Petitioner further pleaded for compensation to be paid to the Petitioner in a sum Rs. 10 million by the 1st and the 2nd Respondents in their personal capacity.

When this matter was taken up for support before us, the Deputy Solicitor General appearing for the 2nd and 3rd Respondents moved that this application be dismissed *in limine* as it is misconceived and cannot be maintained before this Court, for the following reasons;

- the application does not fall within the ambit of executive or administrative action;
- the petitioner has suppressed material facts and misrepresented facts to court;
- there is no proper affidavit before court; and
- application is vexatious and designed to embarrass court.

We heard the submissions of the learned Deputy Solicitor General and of the learned counsel for the Petitioner in response. We now proceed to consider the said preliminary objections raised before us.

To look at this matter in its correct perspective, it is best to begin by alluding to certain litigation (detailed below) that transpired in the submissions made before Court wherein the Petitioner has invoked the jurisdiction of this Court previously, against the 2nd Respondent regarding the core issue, i.e., the cancellation of the visa issued to the Petitioner (X 4) by the Controller General of Immigration, the 2nd Respondent.

The said litigation is as follows: -

CA/WRIT/299/2022 - *Case (1)*

- By this writ application filed before the Court of Appeal, the Petitioner challenged the decision of the 2nd Respondent regarding the cancellation of the visa granted to the Petitioner dated 25-02-2022 valid till 08-03-2023.
- The Court of Appeal refused to issue notice and the application was dismissed on 16-08-2022.

SC/SPL/LA/ 218/2022 - *Case (2)*

- The Petitioner filed a special leave to appeal application against the aforesaid Court of Appeal Order.
- This application was dismissed by this Court for non-compliance of the Supreme Court Rules on 02-09-2022.

SC/SPL/LA/ 246/2022 - *Case (3)*

- The Petitioner filed a fresh special leave to appeal application dated 08-09-2022 against the very same Court of Appeal Order.
- This matter was taken up before this Court on 08-12-2022 and *re-fixed for 07-06-2023* for support for granting of special leave to appeal and is presently pending before this Court.

SC/FR/ 299/2022 - *Case (4)*

- The Petitioner filed a fundamental rights application dated 05-09-2022 against the 2nd Respondent Controller General of Immigration *et al* for violation of the fundamental rights guaranteed under Article 12(1), 13(1) and 13(2) of the Constitution. The Petitioner also sought an interim order not to arrest, detain or deport the Petitioner until the fundamental rights application was concluded.
- This Court was not inclined to grant leave to proceed and on 14-09-2022 the application was dismissed, subject to costs fixed at Rs. 100,000/=

SC/FR/399/2022 - *Case (5)*

- The Petitioner filed the instant fundamental rights application wherein the relief sought is specifically against the 1st and 2nd Respondents as referred to earlier. No relief is sought against the 3rd Respondent, the Hon. Attorney General.

From the foregoing it is clearly seen that the core issue i.e., the matter pertaining to cancellation of the medical visa granted to the Petitioner is still pending before this Court and is now scheduled for granting of special leave on 07-06-2023.

It is pertinent to observe that in the instant fundamental rights application, though the Petitioner is seeking to quash the decision made by the Controller General of Immigration X 4, no violation of a fundamental right is alleged against the 2nd Respondent.

Hence, by this instant fundamental rights application, the Petitioner is seeking from this Court, a declaration that the Petitioner's fundamental rights enshrined in Article 10, 11 ,12 and 13 of the Constitution have been violated specifically by the 1st Respondent, a Judge of this Court.

The case presented by the Petitioner is that the alleged infringement or the violation took place when the 1st Respondent on *08-12-2022* made order *in SC/SPLA/246/2022* (the 3rd case referred to above) to re-fix the said special leave application for a further date. The said order was annexed to the petition marked as ''X 17".

It reads as follows: -

> "*Before: Priyantha Jayawardena PC, J.*
>
> *Kumudini Wickramasinghe, J.*
>
> *A.L Shiran Gooneratne, J."*
>
> "*Mr. Nagananda Kodituwakku informs Court that the Petitioner does not want him to support this application before Justice Priyantha Jayawardena, PC as His Lordship has delivered a Judgement in this matter on a previous occasion.*
>
> *However, Mr. Kodituwakku does not produce any written document from the Petitioner.*
>
> *He submits that he has received a text message from the Petitioner through her boyfriend's telephone, i.e., 0771897562.*
>
> *As there is no written instructions from the Petitioner, the Court does not accept the alleged text message.*
>
> *In view of the submissions made by Mr. Kodituwakku, the Petitioner is directed to appear in Court in person on the next date.*
>
> *If the Petitioner does not appear in Court in person, an appropriate order will be made in this matter.*
>
> *Since, SC.CHC.APPEAL NO 11/2006 is in progress this application cannot be taken up for support today.*
>
> *In view of the above, application is re-fixed for support.*
>
> *Of consent, support this application on 07.06.2023.*
>
> *Registrar is directed not to entertain any motions in respect of this application.*
>
> *This application should not be called tomorrow or any other dates prior to 07.06.2023."*

Thus, it is apparent that the pivotal matter in this fundamental rights application revolves around the afore said direction made by this Court in *SC/SPL/LA 246/2022* on *08-12-2022*.

At the outset, it is observed that the said direction is an 'Order of Court' made by a bench of three judges of this Court and not by a single judge, i.e., the 1st Respondent sitting alone or in chambers. Hence, the rationale of the petitioner bringing only the 1st Respondent as a party to the instant application is a threshold matter that begs an answer. No explanation or reason whatsoever, had been given by the Petitioner in the petition or subsequently tendered to Court

by way of a motion or even relied upon by the learned counsel in the submissions made on behalf of the Petitioner.

Thus, the Petitioner in my view has failed to pass the threshold or give one good reason for singling out one judge of a bench of three to allege wrongful conduct and has failed to justify or rational the grounds for invocation of the jurisdiction of this Court, only against a single judge.

Having referred to the *'Order of Court' X 17*, let me now advert to the objections raised by the learned Deputy Solicitor General for the State.

Firstly,

The maintainability of this case since the instant application does not come within the ambit of *'executive or administrative action'.* It was strenuously argued by the State that the impugned Order (X 17), is a **'judicial act'** correctly made by a division of this Court.

It would be opportune at this juncture to refer to the submissions of the learned counsel for the Petitioner, i.e., the aforesaid X 17 Order, is an *'executive or administrative act' and* it does falls within the scope of Article 126 of the Constitution and not a 'judicial act' as contended by the State. The counsel repeatedly emphasized that it '*tantamount to pure abuse of office for improper purposes by the 1st Respondent'*, and the direction to the Registrar of the Court is *'immoral'* and *'not expected from a judge in the Supreme Court'*. (vide. paragraphs 20 and 22 of the petition) This Court however observes that the reference in paragraph 22 of the petition to an *order dated 28-11-2022* appears to be an obvious error since the record does not bear out such a date. Nevertheless, the allegation of the Petitioner against the 1st Respondent does not appear to be diminished by such error.

In order to buttress its argument, the learned Deputy Solicitor General relied upon the judgement of Canonsa Investments Limited v. Earnest Perera and others [1991] 2 Sri LR 214 whereas, the learned counsel for the Petitioner relied upon the judgements of Maharaja v. Trinidad and Tobago (No 2) [1979] A.C. 385 (PC) ; Peter Leo Fernando v. AG [1985] 2 Sri LR 341, Joseph Perera v. AG and two others [1992] 1 Sri LR 191 and Weerawansa v. AG and others [2000] 1 Sri LR 387 to present a case that the actions of the 1st Respondent falls within the ambit of Article 126 of the Constitution.

The question of what constitutes an 'executive or administrative action' in the context of Article 17 and 126 of the Constitution have been exhaustively dealt by this Court in a string of cases from the time the fundamental rights applications entered the judicial arena and especially so in respect of orders made by Magistrates, regarding remand orders and issue of search warrants, i.e., personal liberty matters. In this judgement, I do not wish to repeat or restate the voluminous views and expressions of this Court made in reference to 'executive or administrative action', suffice is to refer to the oft-quoted case Cannosa Investments Ltd. v. Earnest Perera (supra), wherein H.A.G. de Silva, J., having analyzed a long line of judgements observed as follows;

> "[....] On a consideration of the above cases, it would appear to be well established that where an action complained of is in consequence of the

wrongful exercise of a judicial discretion, even on false material furnished to a judge maliciously, such action will *not attract the provisions of Article 126 of the Constitution*" (page 219).

In the aforesaid Canonsa case the issuance of a search warrant for the purposes of entering a premises was the matter in issue and no mala fides or impropriety whatsoever was imputed to the Magistrate and this Court categorically held, *even in an instance of wrongful excise of judicial discretion*, resorting to the provisions of Article 126 of the Constitution for infringement or imminent infringement of a fundamental right declared and recognized by chapter III of the Constitution will not arise.

In the matter before us, the impugned X 17 Order has been made by a 'bench of three judges' of the Supreme Court in pursuance of the judicial process. Furthermore, it is observed that such direction to re-schedule the matter was made by the Court, upon the application of the Petitioner, as the Petitioner was not willing to present its case before the particular bench. In our view the impugned Order X17 is a 'judicial act' performed by a bench of this Court. It is not in the nature of 'executive or administrative action'. It is an act done in the exercise of judicial discretion and will not attract the provisions of Article 17 and 126 of the Constitution. Thus, we see merit in the submissions made by the State, that the impugned Order X 17 does not constitute an 'executive or administrative action' within the meaning of Article 126 of our Constitution and it will not give rise to an infringement of a fundamental right of the Petitioner enshrined and guaranteed by our Constitution, as alleged to by the Petitioner before us.

The learned counsel for the Petitioner on the other hand quoted and relied upon the judgements of Maharaja v. Trinidad and Tobago; Peter Leo Fernando ; Joseph Perera and Weerawansa referred to earlier, wherein the order of the Magistrate was the matter impugned to present and establish a case of a violation of a fundamental right in relation to personal liberty and to claim compensation. However, the learned Counsel failed to draw a parallel with the instant case and more so, failed to place any material before Court to justify a specific *'abuse of office for improper purposes'* by the 1st Respondent as alleged to in the petition filed before this Court. Neither did the learned Counsel prove '*immoral conduct'* as alleged or establish '*wrongful exercise of judicial discretion'* of the 1st Respondent acting in the capacity of the presiding judge of a bench of three judges of the Supreme Court.

The cases relied upon by the counsel for the Petitioner are distinct and distinguishable from the instant application before this Court and we see no reason to term the Order X 17, as an 'executive or administrative act' as contented by the Petitioner.

Coming back to the Order 'X17' made by this Court on 08-12-2022, there is no ambiguity or doubt that it was a direction by Court to re-schedule a special leave to appeal matter upon the application of the counsel for the Petitioner on the ground that the Petitioner does not wish the matter to be supported before the presiding judge i.e., the 1st Respondent, who had delivered Order regarding the core issue in an earlier occasion. However, the Petitioner was not present before Court and there was no written document or instructions to such effect from the

Petitioner to the Counsel *per se* before Court and it appears, for the said reason and the said reason only the special leave to application had to be re-scheduled.

In any event, it is not necessary to examine the merits of this case at this stage. We are only considering the preliminary objection raised by the counsel for the State, that the Order X17 is a 'judicial act' and does not come within the realms of an 'executive or administrative action' to invoke the jurisdiction of this Court in terms of Article 126 of the Constitution coupled with the further submission that the *course of action initiated by the Petitioner is vexatious and is designed to embarrass this Court,* i.e., the Supreme Court.

In terms of Article 118 of the Constitution, the Supreme Court is the highest and the final Superior Court of record in the Republic and subject to the provisions of the Constitution exercise the matters referred to therein and especially, the exclusive jurisdiction for the protection of fundamental rights.

Hence, the submission of the State, that the matter in issue is vexatious litigation and filed to embarrass this Court must be considered in the said light. This is especially so since the allegation of the Petitioner is that the Order X17, '*tantamount to pure abuse of office for improper purposes by the 1st Respondent'*, and the direction in X17 to the Registrar of the Court is *'immoral'* and '*not expected from a judge in the Supreme Court'*. This Court has already held that the impugned Order X 17 is a 'judicial act' performed by a bench of three judges in its judicial discretion and does not amount to 'executive or administrative action'. As emphasized earlier, the Supreme Court is the highest and final Superior Court in Sri Lanka and the Order X17 is made by a bench of three judges of the Supreme Court in the administration of justice.

However, only the 1st Respondent has been made a party to the instant application. No justifiable reason is given in singling out the 1st Respondent except to plead that in making the X17 Order the 1st Respondent completely ignored the request of the counsel for the Petitioner to refer the matter to the Hon. Chief Justice, to appoint an impartial bench to hear the case of the Petitioner *'a young foreign girl forced to live in hiding*', as specifically stated in the petition and that the 1st Respondent, i.e., a judge of this Court, patently abused public office as a judge of the Supreme Court to deny Petitioner's legitimate right to justice and alleged deliberate acts of violation of the Petitioner's fundamental rights which the Petitioner claims is guaranteed under Article 10, 11, 12 and 13 of the Constitution. Furthermore, the Petitioner also prayed for compensation in a sum of Rs 10 million, to be paid to the Petitioner by the 1st Respondent in his personal capacity. Thus, the submission of the State, that this application is vexatious and has been designed to embarrass the Supreme Court has merit, given the fact that the Order X17 is a 'judicial act' done within jurisdiction, in its discretion, in the judicial process of administering justice.

I would pause for a moment to reflect on the observations made by Lord Denning MR in the Court of Appeal in England, in the celebrated case, Sirrors v. Moore [1974] 3 A11 ER 776 at page 785;

> "Every judge of the courts of this land -from the highest to the lowest- should be protected to the same degree, and liable to the same degree if the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgement' it applies to every judge whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'if I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable [..] Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

Under the old common law, as we are aware, the immunity regarding judges of the superior courts was absolute and universal. However, regarding judges of the inferior courts (a synonym for the minor judiciary) the immunity was only while the said judges acted within jurisdiction. Nevertheless, in the aforesaid English case it was held that in England, this dichotomy has now been abolished and under the changed judicial system, all judges are immune and protected from liability to damages when the judge is acting judicially. Hence, Lord Denning MR, after a careful examination of the liability of a judge who acts within and outside of its jurisdiction uttered the famous words 'nothing will make a judge whatever his rank liable, except when it be shown that he was not acting judicially knowing that he had no jurisdiction to do it'.

The afore quoted observations of Lord Denning, MR has been echoed and re-echoed by our courts in the Peter Leo Fernando case and Weerawansa's case referred to earlier.

In the Sirrors case, the English case referred to above, a judge of the crown court dismissed an appeal against a recommendation for deportation and after giving judgment ordered the appellant to be arrested and detained which the judge had no jurisdiction to do. The detainee was later released by habeas corpus. The action brought by the detainee against the judge of the crown court and the police officers who executed the arrest order was dismissed. The court concluded that although the judge had no jurisdiction to detain the said Sirros in custody, since the judge was acting judicially in good faith, albeit mistakenly, no action will lie against him and he was entitled to immunity.

In my view, the above observations of Lord Denning MR are equally applicable to the matter before us. I have no hesitation in repeating the words "nothing will make a judge liable except it be shown that he was not acting judicially knowing that he had no jurisdiction to do it". The reason for such immunity is not because the judge has any privilege to make mistakes or to do wrong but because he should be able to do his duty with complete independence and free from fear. Thus, when a judge is hauled-up before court for every trivial order made, the freedom

of suit is given by the law to the judge not so much for the judge's own sake but for the sake of the public and for the advancement of justice.

In the said light, I see merit in the submissions made by the State that the petition is vexatious and brought to embarrass the court.

In the matter before us for determination, not only the 1st Respondent has been singled out and made a party to the instant case, but is also sued for compensation in a sum of Rs One million to be paid in his personal capacity. The above factor in my view, sheds more light to the objection raised by the State, that the instant petition is vexatious and designed to embarrass this court, *albeit* the Supreme Court- the apex court of the land- the highest and the final court of record in Sri Lanka.

The *next objection* raised by the counsel for the State pertaining to the maintainability of this application is that *there is no proper affidavit before court as required by the Supreme Court Rules.*

The learned DSG contended that the hand written note (marked X26) purported to be a letter of authority must be considered upon the background of the Petitioner living in hiding to avoid execution of a 'removal order' and that the Petitioner by this application is attempting to perpetuate an illegality. It was further submitted that illegality and equity do not go hand in hand. In response, the counsel for the Petitioner relied on Rule 44(2) of the Supreme Court Rules and submitted that the Petitioner was living *incommunicado* and thus cannot appear in person before court or even sign a proxy authorizing a counsel to appear and plead a case before a court of law.

The Petitioner before court is Ms. Kayleigh Frazer a foreign national. The affidavit filed before court supporting the petition is not of Ms. Kayleigh Frazer.

The *affidavit* filed of record, which refers to many matters of a very personal nature, ranging during a period of 3 years, from December 2019 to December 2022 has been deposed to by one Nagananda Kodituwakku of No.99, Subadrarama Road, Nugegoda. Its observed that he has affirmed to the facts stated in the affidavit, on behalf of the Petitioner, supposedly 'from his personal knowledge and from documents made available' to the said Nagananda Kodituwakku. Similarly, the *petition* dated 27-12-2022 filed before court has also been signed by the very same Nagananda Kodituwakku, as the Attorney-at-Law for the Petitioner. Admittedly, there is no *proxy* filed of record by the Petitioner Ms. Frazer. The proxy tendered to court has also been signed by Nagananda Kodituwakku. Whilst the Petitioner has not subscribed to the affidavit, the petition, and the proxy, all three documents have been deposed to and executed by Nagananda Kodituwakku. Incidentally, the learned counsel who is representing the Petitioner before this Court is also Nagananda Kodituwakku, Attorney-at-Law.

We have carefully considered the above facts, in relation to the provisions of Rule 44 of the Supreme Court Rules and specifically the provisions relating to Rule 44(2) and 44(3) of the Supreme Court Rules pertaining to applications under Article 126 of the Constitution and its applicability pertaining to persons who are unable to sign a proxy. We are also mindful of the case law regarding the aforesaid Supreme Court Rule 44.

Further, we have considered the plethora of judgements of this Court pertaining to the validity of an affidavit filed of record and especially the significance of the below mentioned dicta of Sharvananda J., (as he then was) in Kobbekaduwa v. Jayawardena and others [1983] 1 Sri L R 416:

> ''The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes *prima facie* evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmation Ordinance (Cap17) furnishes the sanction against a false affidavit. In an affidavit person can depose only to facts which he is able of his own knowledge and observation to testify." (emphasis added)

An affidavit of a Petitioner deposed to by his own knowledge and observations, amounts to *prima facie* evidence and is an important document upon which much reliance is placed in a fundamental rights application. It supports the petition and assist the court in its pursuit in ascertaining the truth. As observed by Mark Fernando, J. in Sooriya Enterprises (International) Limited v. Michael White & Company Limited [2002] 3 Sri L R 371 "the fundamental obligation of a witness or deponent is to tell the truth (section 10), and the purpose of the oath or affirmation is to reinforce that obligation''.

Hence, when an affidavit to support a petition is tendered by a person, who is not the Petitioner and a person who cannot vouch to the veracity of facts and depose to the matters and circumstances from his own personal knowledge and observations, court will take cognizance of such fact in arriving at its decision. Thus, on this view of the matter, we see substance in the objection raised by the State that there is no proper affidavit before court in terms of the Supreme Court Rules.

The *final objection* raised by the State regarding the instant application is that the *Petitioner has suppressed facts and misrepresented material facts to court*.

In order to justify the above preliminary objection, the learned DSG drew our attention to the following material which the counsel alleged, the Petitioner suppressed from court and grossly misrepresented to court, *viz* that the Petitioner was granted a medical visa to travel to Sri Lanka; the Petitioner's visa was cancelled as the visa conditions were violated; and the cancellation took place consequent to holding of an inquiry in terms of the Immigration and Emigration Act No 20 of 1948 as amended.

Further, it was asserted in addition to challenging the said decision (X4) to cancel the visa by way of a writ application (1st ,2nd and 3rd case referred to earlier) and the instant fundamental rights application (5th case referred to earlier), the Petitioner filed another fundamental rights application bearing number *SC/FR/299/2022* against the 2nd Respondent and others (4th case referred to earlier) which fact the Petitioner has completely suppressed from this Court. A copy of the said petition and the Order of this Court was filed of record by the counsel for the State. Upon perusal of the said order, it is patently and manifestly clear that the said fundamental rights application filed by the very same Petitioner, has been dismissed by this Court *in limine*, on 14-09-2022, with costs fixed at Rs 100,000/=. However, the Petitioner has

failed to disclose or refer to such fact in the instant application, i.e., the 5th case referred to above, filed on 27th December 2022.

We consider the failure to refer to the said case SC/FR/299/2022, in the instant application SC/FR/399/2022 as a relevant and a material factor, that should be foremost in our minds, when deciding on this important objection of misrepresentation and suppression of material facts.

Furthermore, the Petitioner has categorically pleaded in the petition and deposed to in the supporting affidavit that the Petitioner has not invoked the fundamental rights jurisdiction of this Court previously against the 1st Respondent, but has failed to assert that the Petitioner had in fact invoked the fundamental rights jurisdiction in respect of the core issue earlier and also moved for interim relief against the decision of the 2nd Respondent contained in **X4.** Thus, in the said context the statement pertaining to invocation of jurisdiction in the petition and the supporting affidavit too, is palpably wrong and erroneous.

The learned DSG contended that the failure to refer to the previous fundamental rights application filed by the Petitioner *i.e.,* SC/FR/299/2022 in the instant case was a serious suppression of fact and relied on the case of **Jayasinghe v. The National Institute of Fisheries and Nautical Engineering and others reported in [2002] 1 Sri L R 277** to substantiate its contention.

The learned counsel for the Petitioner did not respond to this allegation of suppression of material pertaining to SC/FR/299/2022 in his submissions before us. However, he was gracious enough to accept that the Petitioner was in Sri Lanka not on a resident visa as pleaded in the petition but on a medical visa which is clearly depicted in the visa document X5 filed together with the petition. Hence, we do not wish to examine the objection pertaining to suppression regarding the category of visa any further.

Nevertheless, in our view the suppression pertaining to the fundamental rights application SC/FR/299/2022 filed in September 2022 is grave and serious. Time and time again our courts have held that a litigant should come to court with clean hands and without any blemishes. A litigant should be honest to court and disclose all relevant material to court for the court to come to a finding after weighing and analyzing all material and evidence before court. Moreover, a Petitioner owes a bounden duty to court to be forthright. This is more so, in applications filed under Article 17 and 126 of the Constitution where the exclusive jurisdiction is with the Supreme Court and findings are made on affidavit evidence placed before court.

In **Jayasinghe's case** referred to above, the Supreme Court has emphatically held that "failure to disclose a fact that a Petitioner very well knew is a serious suppression of a material fact which indicate that the Petitioner has manifestly failed to carry out an imperative legal duty and obligation to court".

Similarly, in the case of **Blanka Diamonds (Pvt) Ltd. v. Wilfred Van Els and two others [1997]1 Sri L R 360** a judgement of the Court of Appeal, it was held "that the conduct of the Petitioner in withholding material facts from court shows a lack of *uberrima fides* on the part of the Petitioner and that when a litigant makes an application to court seeking relief he enters into

a contractual obligation to disclose all material facts correctly and frankly to court and that a party who misleads court and misrepresent facts to court or utters false hoods in court will not be able to obtain relief from the court".

Hence, a Petitioner has an imperative legal duty and obligation to court and comes to a contractual agreement with court to disclose all material facts correctly and accurately to court. This in my view, is a sacred duty, that should be preserved and protected at all costs. In fact, in "The Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules", under the heading 'Relationship with Court' it is stated as follows:

> *"51. An Attorney-at-Law shall not mislead or deceive or permit his client to mislead or deceive in any way the Court or Tribunal before which he appears."*

Thus, an Attorney-at-Law has a bounden duty not to permit his client to mislead or deceive court, in any manner whatsoever, either by suppression, misleading or misrepresenting facts to court to gain an advantage, which in my view is detrimental to the interests of justice.

In the aforesaid circumstances, we see merit in the submissions of the State regarding the afore said objection, that the Petitioner has suppressed material facts and misrepresented facts to this court.

Having considered the totality of the preliminary objections raised before us, and examined and assessed the material placed before court and the submissions of the learned counsel, we are convinced that there is much merit in the preliminary objections raised on behalf of the State*, namely,*

- the application does not fall within the ambit of executive or administrative action;
- this application is vexatious and designed to embarrass the court;
- there is no proper affidavit before court; and
- the Petitioner has suppressed material facts and misrepresented facts to court.

Hence, we uphold all four preliminary objections raised on behalf of the 2nd and 3rd Respondents and reject this application *in limine* and dismiss the instant case with costs fixed at Rs.500,000/= to be paid by the Petitioner forthwith.

Prior to parting with this Order, I wish to refer to another factor that shocked the conscious of court. Consequent to the conclusion of the hearing of this matter before us, the Attorney-at- Law and counsel for the Petitioner by a communique addressed to the Hon. Chief Justice dated 08-03-2023, together with many annextures has brought certain matters to the attention of the Hon. Chief Justice for necessary action. This communique was passed to us for information. However, in arriving at the aforesaid finding on the suppression of material facts, i.e., the objection lastly dealt by us, we have not examined or considered the matters stated in the communique forwarded as we did not wish to cloud or prejudice our minds by extraneous factors.

Nevertheless, in the interest of justice we wish to place on record the following factors elicited from the documents annexed to the said communique;

(i) the assertion made by the Attorney- at Law for the Petitioner in a motion dated 23-01-2023 filed in the instant case, that the Petitioner in a hand written communication dated 22-01-2023 has confirmed that SC/FR/299/2022 had not been initiated on her instructions and the affidavit annexed thereto is a forged document with the signature of the Petitioner interpolated by fraudulent means; and

(ii) the Petitioner has never seen the affidavit dated 04-10-2022 tendered to court in SC/SPL/LA/246/2022 wherein it is categorically stated: -

> "4. At the same time another lawyer […] advised me that I was entitled to initiate fundamental rights violation petition in the Supreme Court […] and he agreed to represent me.
>
> 5. I state that the said fundamental rights violation petition (SC/FR/299/2022) was taken up on 14th September 2022 and it was dismissed […]"

Having said that, we wish to re-iterate that in coming to the finding regarding the preliminary objections raised by the State, in respect of the maintainability of this application, we have not been swerved by the aforesaid assertions referred to in the communique forwarded to His Lordship the Chief Justice.

We have considered the preliminary objections raised by the State, referred to in this Order within the four corners and the parameters of the law and for reasons more fully adumbrated in this Order, we uphold all four preliminary objections and dismiss this application with costs fixed at Rs. 500,000/=

Judge of the Supreme Court

S Thurairaja, PC J.

I agree

Judge of the Supreme Court

Achala Wengappuli, J.

I agree

Judge of the Supreme Court

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

Mundigala Pathirage Jimonona Perera,
No. 164, Mawalgama, Waga.
Plaintiff

SC APPEAL NO: SC/APPEAL/140/2017
SC LA NO: SC/HCCA/LA/136/2016
CA NO: WP/HCCA/AV/1571/2015(F)
DC AVISSAWELLA NO: 25097/L

Vs.

Rupasinghe Arachchige Diana
Priyadarshani,
No. 162 A, Kelagahawatte,
Mawalgama, Waga.
Defendant

AND BETWEEN

Rupasinghe Arachchige Diana
Priyadarshani,
No. 162 A, Kelagahawatte,
Mawalgama, Waga.
Defendant-Appellant

Vs.

Mundigala Pathirage Jimonona Perera,
No. 164, Mawalgama, Waga.
Plaintiff-Respondent

AND NOW BETWEEN

Mundigala Pathirage Jimonona Perera,
No. 164, Mawalgama, Waga.
Plaintiff-Respondent-Appellant

Vs.

Rupasinghe Arachchige Diana Priyadarshani,
No. 162 A, Kelagahawatte,
Mawalgama, Waga.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Kumaran Aziz for the Plaintiff-Respondent-Appellant.
Defendant-Appellant-Respondent is absent and unrepresented.

Argued on : 03.12.2021

Written submissions:
by Plaintiff-Respondent-Appellant on 10.11.2021.

Decided on: 12.05.2023

Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Avissawella seeking to set aside the deed of gift marked P1 on gross ingratitude. The defendant is a relative of the plaintiff. By this deed the plaintiff donated the property to the defendant subject to her life interest. The defendant filed answer seeking dismissal of the plaintiff's action. After trial, the District Judge entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal of Avissawella reversed the judgment and dismissed the plaintiff's action on the ground that gross ingratitude had not been proved. Hence this appeal by the plaintiff.

The general rule is that a deed of gift is absolute and irrevocable. However, under the Roman Dutch law, which is our common law, such a deed of gift can be revoked with the intervention of Court *inter alia* on ingratitude on the part of the donee. The fact that the term "irrevocable donation" is used in the deed is not decisive.

This is now recognised by statute as well. In terms of sections 2 and 3 of the Revocation of Irrevocable Deeds of Gift on the Ground of Gross Ingratitude Act, No. 5 of 2017, an irrevocable deed of gift may be revoked on the ground of gross ingratitude, only on an order made by a competent court, in an action filed by the donor against the donee within a period of ten years from the date of the execution of the deed and within two years from the date on which the cause of action arose.

Slight ingratitude is not sufficient. There shall be gross ingratitude. No hard and fast rule can be laid down on what constitutes gross ingratitude. It is a question of fact, not of law. A single act or a series of acts can constitute gross ingratitude. An assault on the donor by the donee is a clear instance of gross ingratitude. Depending on the facts

and circumstances of each individual case, for instance, threats to cause bodily injury to the donor by the donee, continuous slander and insult, damage to the donor's property, ill-treatment of the donor can constitute gross ingratitude. The onus of proof is on the donor and the standard of proof is on a balance of probabilities. *Vide Sinnammah v. Nallanathar* (1946) 47 NLR 32, *Krishnaswamy v. Thillaiyampalam* (1957) 59 NLR 265, *Fernando v. Perera* (1959) 63 NLR 236, *Calendar v. Fernando* [2001] 2 Sri LR 355, *Ariyawathie Meemaduma v. Jeewani Budhdhika Meemaduma* [2011] 1 Si LR 124, *De Silva v. De Croos* [2002] 2 Sri LR 409, *Gunawathie v. Premawathi* (SC/APPEAL/31/2013, SC Minutes of 05.04.2019), *Wasantha Cooray v. Indrani Cooray* [2020] 1 Sri LR 150.

The failure to fulfil the conditions of the gift (such as that the donee shall provide succour and assistance to the donor) is a ground to revoke the gift. This is an incidence of gross ingratitude.

In the leading case of *Dona Podi Nona Ranaweera Menike v. Rohini Senanayake* [1992] 2 Sri LR 181 at 220, Amarasinghe J. states:

> *A donor is entitled to revoke a donation on account of ingratitude (1) if the donee lays manus impias on the donor; (2) if he does him an atrocious injury; (3) if he wilfully causes him great loss of property; (4) if he makes an attempt upon his life; (5) if he does not fulfil the conditions attached to the gift. In addition, a gift may be revoked for other, equally grave, causes.*

Has the plaintiff donor in the instant case proved gross ingratitude on the part of the defendant donee? Both gave evidence at the trial. The donor is a widow. She does not have children. Since the death of her husband, the donor has been living in the donated house all alone. The donee in her evidence admits that the donor is a sick lady. (page 81 of

the brief) At the time of giving evidence, the donor was 75 years of age and the donee 29 years of age. The donee's mother in her evidence stated that the donor was eating very little, about one spoonful for a meal. (page 87) This itself indicates that the donor was feeble and in need of care and protection. In my view, according to the evidence of the donee herself, she did not look after the donor.

The donor's husband died on 01.01.2003. The deed of gift was executed on 01.09.2003. According to the evidence of the donee, the donee left home for further studies in 2002 and continued to be away from her home till 2007. (pages 71-72) That means, she did not look after the plaintiff for about five years. The defendant got married in 2007.

The donor's evidence is that in April 2008, the donee and her father came to her house and, using abusive language, demanded vacant possession of the house. This was corroborated by the evidence of Dayawathie, a neighbour. The donor further says that the donee and her father told her that she could be sent to a home for elders.

The donor made a police complaint marked P2 dated 20.06.2008 stating that the donee does not look after her. The police have not acted on this complaint. This case has been filed on 17.11.2008.

The donee admits in evidence that the donor gifted this property, her dwelling house, expecting that the donee will look after her until her death but she could not look after the donor properly. (pages 77-78 of the brief)

The District Court held that the plaintiff proved gross ingratitude but the High Court held otherwise. The High Court gives undue prominence to the police complaint marked P2 and concludes that the

plaintiff's version is not supported by the police complaint. The High Court did not consider the evidence of the defendant. In my view, on the facts and circumstances of this case, the High Court should not have reversed the judgment of the District Court on the merits, as there is sufficient evidence to prove gross ingratitude on a balance of probabilities.

The questions of law on which leave to appeal was granted and the answers to them are as follows:

> Has the High Court misdirected itself when it failed to consider that the defendant herself admitted that she failed to look after the plaintiff?
>
> Yes.
>
> Has the High Court misdirected itself when it failed to consider that the defendant herself admitted that she knew that the condition of the deed of gift is that the defendant must take care of the defendant for the rest of her life and that such failure constitutes gross ingratitude?
>
> Yes.

I set aside the judgment of the High Court and restore the judgment of the District Court and allow the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

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

Jayalath Pedige Nimal Chandrasiri,
Doraeba, Heeruwalpola.
Plaintiff

SC APPEAL NO: SC/APPEAL/89/2011
SC LA NO: SC/HCCA/LA/73/2011
HCCA KURUNAGALA NO: NWP/HCCA/KUR/130/2003(F)
DC KULIYAPITIYA NO: 10347/L

Vs.

1. Karuna Pedige Seeti,
   Doraeba, Heeruwapola.
2. Jayalath Pedige Emalin,
   Thimbiriwewa, Bingiriya.
3. Jayalath Pedige Gnanawathie,
   Doraeba, Heeruwalpola.
4. Jayalath Pedige Karunawathie,
   Doraeba, Heerwalpola (Deceased).

4a. Jayalth Pedige Emalin,
   Thimbiriwewa, Bingiriya.

5. Jayalth Pedige Babynona,
   Doraeba, Heeruwalpola.
6. Karunapedige Dingiri alias Emalin,
   Temple Junction, Pahala, Kottaramulla,
   Kottaramulla.
7. Jayalath Pedige Hemalatha,
   Doraeba, Heeruwalpola.

8. Ranikiran Pedidurayalage Prasanna Piryashantha,
   Doraeba, Heeruwalpola.
9. Ranikiran Pedidurayalage Darshana Priyantha Ranjith,
   Doraeba, Heeruwalpola.
10. Rankiran Pedigedurayalage Simiyan Ranjith,
    Doraeba, Heeruwalpola.
11. Jayalath Pedidurayalage Hemalatha,
    Doraeba, Heeruwalpola.
12. Rankiran Pedidurayalage Jayasena,
    Doraeba, Heeruwalpola.
    Defendants
13. Land Reform Commission, No. C82,
    Gregory's Avenue, Colombo 07.
14. Divisional Secretary, Udubaddawa,
    Divisional Secretariat, Udubaddawa.
    Added-Defendants

AND BETWEEN

Land Reform Commission, No. C82,
Gregory's Avenue, Colombo 07.
13th Defendant-Appellant

Vs.

Jayalath Pedige Nimal Chandrasiri,
Doraeba, Heeruwalpola.
Plaintiff-Respondent

1. Karuna Pedige Seeti,
   Doraeba, Heeruwapola.
2. Jayalath Pedige Emalin,
   Thimbiriwewa, Bingiriya.
3. Jayalath Pedige Gnanawathie,
   Doraeba, Heeruwalpola.
4. Jayalath Pedige Karunawathie,
   Doraeba, Heerwalpola (Deceased).

4a. Jayalth Pedige Emalin,
   Thimbiriwewa, Bingiriya.

5. Jayalth Pedige Babynona,
   Doraeba, Heeruwalpola.
6. Karunapedige Dingiri alias Emalin,
   Temple Junction, Pahala, Kottaramulla,
   Kottaramulla.
7. Jayalath Pedige Hemalatha,
   Doraeba, Heeruwalpola.
8. Ranikiran Pedidurayalage Prasanna
   Piryashantha,
   Doraeba, Heeruwalpola.
9. Ranikiran Pedidurayalage Darshana
   Priyantha Ranjith,
   Doraeba, Heeruwalpola.
10. Rankiran Pedigedurayalage Simiyan
    Ranjith,
    Doraeba, Heeruwalpola.
11. Jayalath Pedidurayalage Hemalatha,
    Doraeba, Heeruwalpola.
12. Rankiran Pedidurayalage Jayasena,
    Doraeba, Heeruwalpola.

14. Divisional Secretary, Ududaddawa,
Divisional Secretariat, Ududaddawa.
Defendant-Respondents

AND NOW BETWEEN

Land Reform Commission, No. C82,
Gregory's Avenue, Colombo 07.
13th Defendant-Appellant-Appellant

Vs.

Jayalath Pedige Nimal Chandrasiri,
Doraeba, Heeruwalpola.
Plaintiff-Respondent-Respondent

1. Karuna Pedige Seeti,
Doraeba, Heeruwapola.
2. Jayalath Pedige Emalin,
Thimbiriwewa, Bingiriya.
3. Jayalath Pedige Gnanawathie,
Doraeba, Heeruwalpola.
4. Jayalath Pedige Karunawathie,
Doraeba, Heerwalpola (Deceased).
4a. Jayalth Pedige Emalin,
Thimbiriwewa, Bingiriya.
5. Jayalth Pedige Babynona,
Doraeba, Heeruwalpola.
6. Karunapedige Dingiri alias Emalin,
Temple Junction, Pahala,
Kottaramulla,
Kottaramulla.

7. Jayalath Pedige Hemalatha,
   Doraeba, Heeruwalpola.
8. Ranikiran Pedidurayalage Prasanna Piryashantha,
   Doraeba, Heeruwalpola.
9. Ranikiran Pedidurayalage Darshana Priyantha Ranjith,
   Doraeba, Heeruwalpola.
10. Rankiran Pedigedurayalage Simiyan Ranjith,
    Doraeba, Heeruwalpola.
11. Jayalath Pedidurayalage Hemalatha,
    Doraeba, Heeruwalpola.
12. Rankiran Pedidurayalage Jayasena,
    Doraeba, Heeruwalpola.
14. Divisional Secretary, Udubaddawa,
    Divisional Secretariat, Udubaddawa.

    Defendant-Respondent-Respondents

Before: Vijith K. Malalgoda, P.C., J.
P. Padman Surasena, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Coorey with Sudarshani Coorey and Rajeeka Perera for the 13th Defendant-Appellant-Appellant.

Ranil Samarasooriya with Shashiranga Sooriyapatabandi for the Plaintiff-Respondent-Respondent.

Nayomi Kahawila, S.C., for the 14th Respondent-Respondent.

Argued on : 11.11.2021

Written submissions:

by the 13th Defendant-Appellant-Appellant on 12.08.2011 and 09.11.2022.

by the Plaintiff-Respondent-Respondent on 01.11.2011.

Decided on: 12.05.2023

Samayawardhena, J.

The plaintiff filed this action in the District Court of Kuliyapitiya naming 10 defendants as parties to partition the land described in the schedule to the plaint among them. The 11th-14th defendants were added later. All the parties are members of the same family, except for the 13th defendant (Land Reform Commission) and the 14th defendant (Divisional Secretary of Ududbaddawa). The 13th defendant filed a statement of claim seeking dismissal of the action on the basis that the land had been vested in the Land Reform Commission by operation of law and was conveyed to the 14th defendant. What the 13th defendant meant by alleging such conveyance is not clear. There is no deed of transfer or other document before Court to that effect.

At the trial, the Preliminary Plan was marked X and the 13th defendant's Plan 13V1. Both Plans were prepared by the same Court Commissioner and both were tendered by the plaintiff (page 153 of the brief). Both Plans depict parts of Final Village Plan No. 2022. The Preliminary Plan depicts a part of Lot 75 in Final Village Plan No. 2022 and Plan 13V1 depicts parts of Lot 235 in the same Final Village Plan. Lot 1 in Preliminary Plan X is Lot 1 in Plan 13V1. The extracts of Lots 52 and 75 in Final Village Plan No. 2022 were marked 7V3. The Court Commissioner was not called to give evidence by the plaintiff or defendants or Court.

It seems that the land depicted in the Preliminary Plan is State land/Land Reform Commission land. This is made clear from the evidence of the plaintiff. The plaintiff's pedigree commences from his father, namely Pina. The Plaintiff says his father was the original owner of the land but he does not know how his father obtained title to the land (page 162 of the brief). He also says his father did not live on the land. The defendants are the wife and seven children of Pina. Can a partition action be maintained on such a pedigree? In my view, it cannot.

At the trial, two deeds were marked. Deed No. 4260 dated 16.01.1992 (P1) executed two weeks before the institution of the partition action whereby the plaintiff's mother has transferred 1/7 share to the plaintiff, and deed No. 1929 dated 01.07.1991 (7V1) executed about seven months before the institution of the partition action whereby a sister of the plaintiff has transferred 1/7 share to her two children. Title is claimed on inheritance, not by prescription. This is perhaps because a claim of prescription requires adverse possession and the plaintiff would be required to identify the owner against whom he and his siblings maintained adverse possession. The deeds P1 and 7V1 have not been produced to the District Court and were not available in the case record when the District Judge wrote the judgment. The learned District Judge, without calling for the marked documents prior to writing the judgment, makes a bare reference only to the deed 7V1 and disregards that deed stating it was executed shortly before the institution of the action. There is no mention of P1. I find that those deeds have been produced to the High Court for the first time. The learned District Judge says the right of inheritance to the land by Pina and upon his death by his heirs, has not been disproved by the 13th and 14th defendants by acceptable evidence. But there is no proof that Pina was the owner of the land by inheritance in the first place.

> කෙසේ වෙතත් පිනා නැමැත්තාට අයිතිය උරුමවීම සහ ඔහුගෙන් මෙම පාර්ශවකරුවන්ට අයිතිය මාරුවීම පිළිබඳව ඔප්පු කිසිවක් නොමැත. දැනට ඇති පැරණිම ඔප්පුව 7වි.1 ඔප්පුවයි. ඒ නඩුව ගොනු කිරීමට ඉතා සුළු කාලයකට පෙර ලියා සහතික කරන ලද්දකි. කෙසේ වෙතත් උරුමයෙන් පිනාට නඩුවට අදාළ දේපල උරුමවීමත්, පිනා මියයාමෙන් පසු ඔහුගේ උරුමකරුවන්ට දේපල උරුමවීමත්, 13 සහ 14 විත්තිකරුවන් පිළිගත හැකි සාක්ෂි මගින් බිඳ හෙලා නැත. (page 221 of the brief).

The District Judge has decided to partition the land on the basis that the 13th and 14th defendants did not lead evidence to contradict the evidence of the plaintiff. But counsel for the 13th defendant raised issues and cross-examined the witnesses.

On appeal, the High Court of Civil Appeal of Kurunagala dismissed the 13th defendant's appeal upholding the preliminary objection raised by counsel for the plaintiff and the 7th defendant that the 13th defendant has no *locus standi* to prefer an appeal against the judgment of the District Court in view the position taken by the 13th defendant in the statement of claim that the land subject to partition was vested in the 13th defendant and later transferred to the 14th defendant. The High Court did not consider the merits of the appeal.

The procedure adopted by the learned District Judge and the learned High Court Judge is completely obnoxious to the well-established principles of law governing partition actions. A partition trial is not an *inter partes* trial between the plaintiff on the one hand and the defendants on the other. It is an action *in rem*. The decree entered in a partition action binds not only parties to the action but also non-parties who may have had interests in the land. For practical purposes, there are no permanent plaintiffs and defendants in a partition case in that all parties play a dual role of plaintiff and defendant at different stages of the case. *Vide inter alia* sections 19(2) and 70 of the Partition Law, No. 21 of 1977.

The defendant today can be the plaintiff tomorrow to prosecute the partition action to a finality. The judgment in a partition action is the collective effort of the plaintiffs, the defendants and the District Judge. Hence there is a special sanctity attached to a partition decree.

However, this does not mean that in a partition action the burden is on the District Judge to successfully prosecute the case on behalf of the parties whilst the parties take no interest in the case. There is no such obligation. The District Judge need not go after the parties pleading with them in earnest for help to identify the land and then investigate title to the land. *Vide Priyanthi v. Gamage Uma* (SC/APPEAL/2/2019, SC Minutes of 15.10.2021). Having emphasised this in no uncertain terms, I must also underscore that the overall duty cast upon the District Judge in hearing a partition action is greater than in an ordinary civil action.

Section 25(1) of the Partition Law reads as follows:

> *On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.*

This section mandates a District Judge trying a partition action to examine the title of each party to the land to be partitioned. He must do this quite independently of what the parties may or may not say. This is the fundamental difference between the duty of a Judge trying a partition action and any other civil action. This is because of the binding nature of partition actions as actions *in rem*.

The duty of the Judge is not perfunctory. A District Judge trying a partition action cannot be found fault with for being overly cautious or jealous in investigating title to the land and looking beyond what has been presented before the Court by way of pleadings, evidence or otherwise, in order to be absolutely satisfied *inter alia* that all the necessary parties are before Court and there is no collusion among the parties. This paramount duty cast upon the District Judge in partition actions has been repeatedly stressed by the superior Courts from time immemorial.

In *Peris v. Perera* decided 123 years ago and reported in (1896) 1 NLR 362, the Full Bench of the Supreme Court presided over by Chief Justice Bonser held:

> *The Court should not regard a partition suit as one to be decided merely on issues raised by and between the parties, and it ought not to make a decree, unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned.*

The Full Bench of the Supreme Court presided over by Chief Justice Layard in the case of *Mather v. Tamotharam Pillai* 6 NLR 246, decided as far back as in 1908, held:

> *A partition suit is not a mere proceeding inter partes to be settled of consent, or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. It is a matter in which the Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed.*
>
> *In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself to ascertain who are the actual*

> *owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge*.

In *Juliana Hamine v. Don Thomas* (1957) 59 NLR 546 at 549, L.W de Silva A.J. observed:

> *A partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest inter se and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with* ***quite independently of what parties may or may not do***.

This has been consistently followed up to now. (*Vide* for instance: *Gooneratne v. Bishop of Colombo* (1931) 32 NLR 337, *Cooray v. Wijesuriya* (1958) 62 NLR 158, *Gunathillake v. Muriel Silva* (1974) 79(1) NLR 481, *Gnanapandithen v. Balanayagam* [1998] 1 Sri LR 391, *Piyaseeli v. Mendis* [2003] 3 Sri LR 273, *Sumanawathie v. Andreas* [2003] 3 Sri LR 324, *Somasiri v. Faleela* [2005] 2 Sri LR 121, *Basnayake v. Peter* [2005] 3 Sri LR 197, *Karunaratne Banda v. Dassanayake* [2006] 2 Sri LR 87, *Silva v. Dayaratne* [2008] BLR 284, *Abeysinghe v. Kumarasinghe* [2008] BLR 300, *Sopinona v. Pitipanaarachchi* [2010] 1 Sri LR 87.)

In *Cynthia de Alwis v. Marjorie D'Alwis* [1997] 3 Sri LR 113, F.N.D. Jayasuriya J. remarked:

> *A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the*

> *commencement of the trial. In the exercise of this sacred duty to investigate title a trial Judge cannot be found fault with for being too careful in his investigation.* ***He has every right even to call for evidence after the parties have closed their cases***.

In the case of *Godagampala v. Peter Fernando* [2016] BLR 139 at 140, Chithrasiri J. held:

> *It is trite law that the examination of such title of the parties in a partition action is the duty of the trial judge though we follow the adversarial system in this jurisdiction*.

In *Wijesundera v. Herath Appuhamy* (1964) 67 CLW 63 at 64, T.S. Fernando J. stated:

> *Presence or absence of Counsel makes no difference to the duty of the learned trial judge to examine both oral and documentary evidence in a partition case to satisfy himself on the question of title*.

In the instant case, it is manifest that both the District Court and the High Court failed to appreciate the special duty cast upon the District Judge in a partition case. If the plaintiff's pedigree is *ex facie* incomplete or unacceptable or doubtful, the District Judge shall not enter judgment merely because the supposed contesting parties did not vigorously challenge the evidence of the plaintiff. The general principle that uncontroverted evidence is regarded as admitted (*vide Edrick de Silva v. Chandradasa de Silva* (1967) 70 NLR 169 at 174) is inapplicable in partition actions.

In my considered view, the plaintiff has not unfolded a proper pedigree acceptable to Court in order for the Court to enter a partition decree. Although in a partition case the plaintiff need not and in fact cannot start the pedigree from the very first owner, as it is well-nigh impossible, the

plaintiff certainly cannot start the pedigree from his father as the original owner.

I hold that there is no proper investigation of title. The judgment of the District Court cannot be allowed to stand. I set aside the judgments of the District Court and the High Court and allow the appeal but without costs. The plaintiff's action shall stand dismissed.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

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

Distilleries Company of Sri Lanka Limited,
No.110, Norris Canal Road,
Colombo 10.
Plaintiff

SC APPEAL NO: SC/APPEAL 125/2014
SC LA NO: SC/HCCA/LA/406/2013
CA NO: WP/HCCA/COL 84/2003 (F)
WP/HCCA/COL 84/2003A (F)
DC COLOMBO NO: 19147/ MR

Vs.

P.D.A. Gunawardena,
No.31/4, Thalakotuwa Garden,
Colombo 05.
Defendant

AND BETWEEN

P.D.A. Gunawardena,
No.31/4, Thalakotuwa Garden,
Colombo 05.
Defendant-Appellant

Vs.

Distilleries Company of Sri Lanka Limited,
No.110, Norris Canal Road,
Colombo 10.
Plaintiff-Respondent

AND NOW BETWEEN

P.D.A. Gunawardena,
No.31/4, Thalakotuwa Garden,
Colombo 05.
Defendant-Appellant-Appellant

Vs.

Distilleries Company of Sri Lanka Limited,
Presently known as
Distilleries Company of Sri Lanka PLC,
No.110, Norris Canal Road,
Colombo 10.
Plaintiff-Respondent-Respondent

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: R. Chula Bandara with G. Kodagoda for the Defendant-Appellant-Appellant.
N.R. Sivendran with Renuka Udumulla for the Plaintiff-Respondent-Respondent.

Argued on : 07.02.2022

Written submissions:

by Defendant-Appellant-Appellant on 10.11.2014 and 24.02.2022.

by Plaintiff-Respondent-Respondent on 28.10.2014 and 23.02.2022.

Decided on: 12.05.2023

Samayawardhena, J.

The plaintiff company filed this action against the defendant employee in the District Court of Colombo seeking an order for the return of the share certificate for 11,606 bonus shares in the plaintiff company and the sum of Rs. 7,776.02 paid as dividends on those shares on the basis that the share certificate was delivered and the dividend payment made by mistake. The defendant filed answer denying the plaintiff's claim and made a claim in reconvention seeking an order against the plaintiff for delivery of the original share certificate and damages in a sum of Rs. 1 million for failure to allot bonus shares and dividends after 1993.

After trial, the District Court answered the issues raised by the plaintiff against the plaintiff and the issues raised by the defendant in favour of the defendant and dismissed the plaintiff's action. The District Judge states in several places of the judgment that the defendant is entitled to bonus shares and dividends.

The District Judge answered *inter alia* the following issues in favour of the defendant:

10) Has the plaintiff any legal right or status to

(I) refuse to allot the 11606 shares allotted to the defendant by the Secretary to the Treasury?

(II) recall the 11606 Bonus Share Certificate No. 035411 issued to the defendant?

(III) recall the dividend of Rs. 7776/02 paid to the defendant in 1992?

(IV) instruct the Central Depository System that the Bonus Share Certificate No. 03541 for 11606 shares had been lost or stolen?

11) If issue No.10 is answered in favour of the defendant, is the act of the plaintiff wrongful and illegal?

12) If issues 10 and 11 are answered in favour of the defendant is the defendant entitled to

(i) an order of Court directing the plaintiff to issue the original share certificate in respect of the 11606 shares issued by the Secretary to the Treasury?

(II) an order of Court directing the plaintiff to withdraw the instructions given to the Central Depository System that the 11606 Bonus Share Certificate issued to the defendant was lost or stolen?

(III) an order of Court directing the plaintiff to issue to the defendant all dividends, bonus shares and rights issued by the plaintiff after 1993?

Having answered the above issues in favour of the defendant, the District Judge, at last, states thus:

පැමිණිල්ල නිෂ්ප්‍රභා කරමි. විත්තිකරු පැමිණිලිකාර සමාගම විසින් නිකුත් කල කොටස් 11606 සහ ප්‍රසාද කොටස් 11606 ටද, නිකුත් කල ලාභාංශ රු.7776.02 ටද හිමිකම් ලබයි. නමුදු, මෙම අධිකරණය තවදුරටත් ප්‍රකාශ කරනුයේ එදින සිට අද දක්වා ලාභාංශ

එනම් මෙම තීන්දුව දෙන අද දක්වා ලාභාංශ ගෙවීමට පැමිණිලිකාර සමාගම නොබැදෙන බවටය. නිකුත් කල කොටස් 11606 සහ ඒ මත නිකුත් කල ප්‍රසාද කොටස් 11606 ට විත්තිකරු හිමිකම් ලබන අතර, සෙන්ට්‍රල් ඩිපොසිටරි සිස්ටම් හි පැමිණිලිකාර සමාගම විසින් ඉදිරිපත් කළ පැමිණිල්ල පැමිණිලිකාර සමාගම විසින් ඉල්ලා අස් කර ගත යුතු බවටද මෙම අධිකරණය නියෝග කරනු ලබයි.

පැ.6 මත විත්තිකරුට නිකුත් කළ ලාභාංශයන් නැවත ලබා ගැනීමට පැමිණිලිකරුට අයිතියක් නොමැති බවට මෙම අධිකරණය තීරණය කර ඇත. නමුදු හිඟ ලාභාංශ සඳහා විත්තිකරු හිමිකම් නොලබන අතර, නිකුත් කල කොටස් හෝ ඒ මත වර්තමාන අගය ලැබීමට විත්තිකරු හිමිකම් ලබන බවට මෙම අධිකරණය ප්‍රකාශ කරයි.

This means the plaintiff need not pay dividends on those shares from 1993 until the date of the judgment. The District Judge is silent on damages although she answered that issue (issue No. 12 quoted above) in favour of the defendant.

Both parties appealed to the High Court of Civil Appeal against the judgment.

In the petition of appeal, the defendant sought the following reliefs from the High Court:

(i) to vary that part of the judgment to entitle the defendant-appellant to obtain all rights and dividends from the inception of the action without limiting it to after the date of judgment,

(ii) to award damages in a sum of rupees one million (Rs.1,000,000) being damages suffered by him for not being able to sell or deal with his shares,

(iii) to award costs and such other reliefs as to the Court shall seem meet.

The High Court dismissed the appeal of the plaintiff. In respect of the appeal of the defendant, the High Court says counsel for the defendant informed Court at the argument that he does not pursue the claim for damages. Therefore the High Court has rightly not considered the claim for damages. I quoted above the reliefs sought by the defendant before the High Court. The claim for damages is the second relief sought by the defendant. That is the claim not pursued by the defendant at the argument. The High Court judgment is silent about the first relief – the dividend issue – which the District Court denied from 1993 till the date of the judgment.

The plaintiff did not appeal against the judgment of the High Court to this Court but the defendant did. Although this Court granted leave to appeal on all three questions of law stated in paragraph 17(a), (b) and (c), at the argument before this Court, learned counsel for the defendant informed Court that the defendant confines himself to the question of law stated in 17(b), which reads as follows:

> Have the Judges of Civil Appeal High Court erred in law in holding that the petitioner is entitled to all shares under the two share certificates but failing and or not giving a decision whether or not the petitioner is entitled to the declared dividends attached to the said shares?

The defendant claims that dividends were given to all other shareholders but denied to him, except for the year 1993. It is not the contention of the plaintiff at the trial or before this Court that dividends were not approved by the Board of Directors and shareholders at the annual general meetings and therefore the defendant is disentitled to them. The only submission made by learned counsel for the plaintiff at the argument was that the defendant in the prayer to the answer sought damages instead of dividends and the defendant withdrew that claim before the High Court and therefore

the defendant is not entitled to dividends. I am unable to agree with that line of argument.

A judgment has to be understood holistically, not piecemeal. The defendant sought dividends for his shares by way of issues and the Court answered those issues in the affirmative. Therefore the plaintiff cannot say that the defendant did not claim dividends but only damages. The District Court held that the defendant can retain paid dividends in a sum of Rs. 7776.02 until 1993 and that the defendant is entitled to dividends after the date of the judgment but not entitled to dividends from 1993 until the date of the judgment. No basis or reason whatsoever was given for this by the District Court. A Court cannot come to such a conclusion without giving reasons. The High Court failed to address that issue in the judgment possibly by oversight. I set aside the finding of the District Court which denies dividends for a specified period and answer the question of law above-quoted in the affirmative.

The District Court shall enter decree recognising the defendants' entitlement not only to shares but also to dividends on those shares, without limiting it to take effect from the date of the judgment. The defendant is not entitled to damages but entitled to costs in all three courts.

The judgments of the District Court and the High Court are varied to that extent. The appeal is allowed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 363/2008

1. W.S. Nissanka,
   Chief Inspector of Police,
   OIC Police Station, Valvettithurai.

2. K.K.D.W.P. Kumarasinghe,
   Chief Inspector of Police,
   Police in Service Training Centre,
   North Western Range, Kurunegala.

3. M.G. Podinilame,
   Chief Inspector of Police,
   Special Investigations Unit, Kegalle.

4. E.A.S. Kumarasinghe,
   Chief Inspector of Police,
   State Intelligence Service,
   Cambridge Place, Colombo 7.

5. A.M.K. Seneviratne,
   Chief Inspector of Police,
   Sabaragamuwa Range, Ratnapura.

6. K.H.A. Wimal Shantha,
   Personal Assistant, Officer of the Senior Superintendent, Mount Lavinia.

7. K.K. Karunasinhge,
   Chief Inspector of Police,
   Range Intelligence Unit, Kurunegala.

PETITIONERS

vs.

1. Inspector General of Police,
   Police Headquarters, Colombo 1.

2. Secretary,
   Ministry of Defence,
   15/5, Baladaksha Mawatha, Colombo 3.

2A. Nandana Mallawarachchi,
   Secretary,
   Ministry of Law and Order,
   13th Floor, Sethsiripaya,
   II Stage, Battaramulla.

3. Neville Piyadigama,
   Chairman,
   National Police Commission.

4. Ven. Elle Gunwansa Thero

5. Justice Chandradasa Nanayakkara

6. Nihal Jayamanne, PC

7. R. Sivaram

8. Charmaine Madurasinghe

9. M. Mowjood

   4th – 9th Respondents are members of the National Police Commission.

10. Secretary,
    National Police Commission.

    3rd – 10th Respondents are at

Rotunda Tower, Level 3,
No. 109, Galle Road, Colombo 3.

11. Commissioner General of Examinations,
Pelawatte, Battaramulla.

12. G.M. Somaratne,
Assistant Superintendent of Police,
Presently at UNPOL 2210,
Gonaives Region, Minustah, Haiti.

Power of Attorney Holder,
Hennedige Kumudinie Kanthi Soysa of
260/1, Andaragaha Road,
Kaludewala, Panadura.

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

14. Justice Priyantha Perera,
Chairman, Public Service Commission.

15. Gunapala Wickramaratne

16. M.L. Mookiah

17. Srima Wijeratne

18. W.P.S. Wijewardena

19. Mendis Rohanadheera

20. Bernard Soysa

21. Palitha Kumarasinghe, PC

22. Professor Dayasiri Fernando,

Chairman, Public Service Commission.

23. S.C. Manapperuma

24. Ananda Seneviratne

25. N.H. Pathirana

26. S. Thillanadarajah

27. M.D.W. Ariyawansa

28. A. Mohamed Nahiya

    15th – 21st and 23rd – 28th Respondents are members of the Public Service Commission.

    14th – 28th Respondents are at
    No. 177, Nawala Road, Narahenpita,
    Colombo 5.

29. Professor Siri Hettige,
    Chairman, National Police Commission.

30. P.H. Manatunga

31. Savithri Wijesekera

32. Y.L.M. Zawahir

33. Anton Jeyanandan

34. Thilak Collure

35. Frank de Silva

    30th – 35th Respondents are members of the National Police Commission.

36. N. Ariyadasa Cooray,
Secretary, National Police Commission.

29th – 36th Respondents are at Block No. 9,
B.M.I.C.H. Premises,
Bauddhaloka Mawatha, Colombo 7.

37. Justice Jagath Balapatabendi,
Chairman, Public Service Commission.

38. Indrani Sugathadasa

39. T.R.C. Ruberu

40. Ahamod Lebbe Mohamed Saleem

41. Leelasena Liyanagama

42. Dian Gomes

43. Dilith Jayaweera

44. W.H. Piyadasa

38th – 44th Respondents are members of
the Public Service Commission.

45. Secretary,
Public Service Commission.

37th – 45th Respondents are at
No. 1200/9, Rajamalwatta Road,
Battaramulla.

RESPONDENTS

Before: **P. Padman Surasena, J**
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Manohara De Silva, PC with Kaveesha Gamage for the Petitioners

Nirmalan Wigneswaran, Deputy Solicitor General for the Respondents

Argued on: 11th February 2022

Written Submissions: Tendered on behalf of the Petitioners on 2nd September 2013 and 30th May 2022

Tendered on behalf of the Respondents on 8th February 2022 and 26th April 2022

Decided on: 15th May 2023

Obeyesekere, J

The Petitioners filed this application on 8th September 2008, alleging that their fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed by the 1st – 9th and 11th Respondents as a result of the 12th Respondent, G.M. Somaratne, being promoted to the rank of Assistant Superintendent of Police [ASP] with effect from 29th March, 2007 and seeking a direction that the National Police Commission promote the Petitioners to the said rank of ASP with effect from 1st July 1999. On 18th November 2008, this Court granted the Petitioners leave to proceed in respect of the alleged infringement of Article 12(1). Although the Petitioners have thereafter filed an amended petition on 1st December 2008, the relief claimed from this Court has remained the same.

The events that culminated in this application go back to August 1998, and pervades across several fundamental rights and writ applications, to which I shall refer to in detail in order to place the issue that needs to be decided in this application in its proper perspective.

Scheme of Recruitment and Promotion as an Assistant Superintendent of Police

Pursuant to the approval granted by the Cabinet of Ministers on 5th August 1998, the Ministry of Defence submitted to the 1st Respondent, the Inspector General of Police, the schemes of recruitment and promotion of the Senior Gazetted Officers of the Police Department. Schedule 1 of the said scheme [P2] provided for the recruitment and/or promotion to the rank of ASP under three categories. The first category was recruitment through an open competitive examination where graduates of recognised universities who possessed the qualifications set out therein were eligible to apply for selection as ASPs. 25% of the vacancies in the ASP cadre were to be filled under this category. The second category was by way of merit promotion where 50% of the vacancies were to be filled from among Chief Inspectors of Police who had been confirmed in that rank. The third and final category by which selection to the rank of ASP was to be done was through the results of a limited competitive examination. The balance 25% of the vacancies were to be filled under this final category, and it is this category that is the subject matter of this application.

In order to be eligible to apply under the limited competitive category, a candidate was required to either be a Chief Inspector of Police, or an Inspector of Police with 10 years in service, and possess an unblemished record of service during the five-year period immediately before the closing date of applications. The selection procedure stipulated in Schedule 1 of the Scheme of Promotion required each candidate to sit for a written examination conducted by the Commissioner General of Examinations, for which 75% of the marks were allotted, and to face a *viva voce* interview before a Board of Interview appointed by the Public Service Commission, for which the balance 25% of the marks were allotted. Thus, the ratio between the marks for the written examination and the interview was 3:1.

Under this selection procedure, it had been noted that, "*The number of candidates summoned for the viva voce test will be equal to five times the number of vacancies to be filled, but the candidates to be so summoned will be limited to those who have obtained a minimum of 40% marks at the written examination*." The requirement to call 5 times the number of qualified candidates was applicable to all three categories referred to

above. Under the third category, a candidate had to satisfy two criteria in order to be eligible to be called for the interview. The first was to obtain a minimum of 40% marks at the written examination and the second was to be within 5 times the number of vacancies.

Calling for applications

By an internal Circular dated 3rd September 1998 [P3], the then Inspector General of Police called for applications to fill the vacancies that existed in the rank of ASP under the aforementioned third category.

The Petitioners, who at that time were either holding the rank of Chief Inspector of Police, or Inspector of Police with ten years in service, had applied and sat for the limited competitive examination held in November 1998. It is admitted that each candidate was required to sit for the following subjects, with the total number of marks for the examination being 600, and the marks being apportioned in the following manner:

Subject	Mark
Language Ability (essay and precis)	150
General Knowledge and Intelligence	150
Social, Political and Economic Development	100
Practical Police Methods	100
Police Administration	100

As the number of vacancies that existed at that time was 14, 70 candidates were entitled to be called for the interview. Accordingly, the then Secretary, Ministry of Defence, by a letter dated 26th February 1999 [P4a], had requested the Commissioner General of Examinations to submit a list containing the names of the 70 candidates who had obtained the highest marks at the examination, provided they had obtained the minimum 40% mark, but without specifying the marks obtained by each of the said candidates at the written examination. It is admitted that those placed at the 71st and 72nd positions at the said examination had obtained the same mark as the candidate placed at the 70th

position, and that the Commissioner General of Examinations had sent a list containing the names of 72 candidates, including the Petitioners – *vide* P4b – in the ascending order of the index numbers of the 72 candidates. It is also admitted that the Petitioners were thereafter called for the *viva voce* interview held in March 1999. Upon the conclusion of the interview, the marks allotted to each of the candidates at the interview had been sent to the Department of Examinations for the purpose of aggregating with the marks at the written examination, in order to determine the candidates who are eligible to fill the 14 vacancies that existed at that time.

Conversion of the marks

It must be noted that when submitting the marks, the Department of Examinations was required to submit the marks that each candidate had obtained out of (a) 600 at the written examination, and (b) 200 at the *viva voce* interview. However, in the final mark sheet [P5] submitted by the Department of Examinations, which I shall refer to as the '*converted mark sheet*,' it had converted the 150 marks allocated for the Language and General Knowledge question papers to 100 through a process of pro-rating the marks obtained for the said subjects, and marked each candidate by a total of 500 marks for the written examination. In other words, the Department of Examinations had allotted 100 marks for each of the five examination papers, contrary to the Circular issued by the Inspector General of Police which stipulated that the written examination will attract 600 marks. Consequently, it was contrary to the stipulation that the ratio between the written examination component and the *viva voce* interview shall be 3:1, since the ratio effectively was now 5:2.

The first application challenging the results

The above conversion of the marks does not appear to have drawn the attention of either the Inspector General of Police or the Public Service Commission, and the first 14 candidates in the converted mark sheet P5 were appointed to the post of ASP by the Public Service Commission with effect from 7th June 1999. It must be observed that while the candidate placed 1st had an aggregate of 375.4 marks, the candidate placed 14th had an aggregate of 329 marks.

Several unsuccessful candidates who were dissatisfied with the said appointments filed Fundamental Rights Application Nos. 607/1999, 609/1999, 641/1999, 646/1999 and 647/1999, alleging that their fundamental rights guaranteed by Article 12(1) have been infringed as a result of the said appointments. Unaware of the fact that the Department of Examinations had converted the marks in two subjects and that the total marks at the written examination had been calculated out of a mark of 500 as opposed to 600, these petitioners complained that some of the candidates appointed had not crossed the 40% threshold required in the written examination in order to be eligible to be called for the interview. It is at this point that the Department of Examinations disclosed that the raw marks out of 150 in respect of each of the two subjects (Language and General Knowledge) had been converted to a percentage of 100 in respect of all candidates, with the Department of Examinations claiming that this was in accordance with the practice prevailing at that time at the said Department.

By its judgment dated 12th January 2000, this Court dismissed the said applications while holding that, "*this practice adopted by the Commissioner of Examinations to convert the marks obtained by the candidates out of 150 for the first two subjects to a percentage to ensure uniformity has not caused any prejudice to any of the candidates as that was the practice that had prevailed in the Department of Examinations.*" Thus, for all intents and purposes, this Court had sanctioned the converted mark sheet, and the appointments made pursuant thereto.

The raw mark sheet

The mark sheet prior to the aforementioned conversion, where the marks given out of 600 are reflected, was produced together with the petition marked as P7. The said mark sheet which I shall refer to as the '*raw mark sheet*' is dated 16th February 2000 and has been prepared subsequent in time to the judgment of this Court in SC (FR) Application No. 609/1999. Although the circumstances under which P7 was prepared have not been explained to this Court either by the Petitioners or by the Respondents, it appears that P7 was prepared in order to arrive at a settlement in CA (Writ) Application No. 1164/1999 filed by an unsuccessful candidate, to which application I shall advert to, later.

According to P7, 13 of the 14 candidates who were promoted under the converted mark sheet were identical to the first 13 candidates in the raw mark sheet. Therefore, irrespective of whether the appointments had been done on the basis of the converted mark sheet or the raw mark sheet, the appointment of 13 of the 14 candidates was beyond challenge.

The issue arose, however, with the appointment of L.H.E. Cooray, who was placed 13th on the converted mark sheet, but only placed 17th on the raw mark sheet. Thus, had the raw mark sheet been adopted for the purpose of making the promotions instead of the converted mark sheet, someone other than Cooray would have been eligible for appointment.

Court of Appeal (Writ) Application No. 1164/1999

H.K.D.W.M.G.D. Ratnatilleke, who had been placed 14th in the raw mark sheet (but 20th on the converted mark sheet) and who therefore had obtained higher marks than L.H.E. Cooray under the raw mark sheet, complained to the Court of Appeal in CA (Writ) Application No. 1164/1999 that the practice of pro-rating of marks was arbitrary and in excess of the powers of the Commissioner General of Examinations. Even though this Court in SC (FR) Application No. 607/1999 did not find the preparation of the converted mark sheet obnoxious, the Public Service Commission, who by then had obtained the raw mark sheet dated 16th February 2000 [P7], had appointed Ratnatilleke, as well as M. Moses and V.D. Chandrasiri, who were placed 15th and 16th on the raw mark sheet, to the post of ASP with effect from 7th June 1999.

There are four observations that I must make at this stage. The first is that with the said appointments, the Public Service Commission opened the doors to cross-refer or zigzag between the two mark sheets. The second is that the Public Service Commission formally recognised the raw mark sheet and commenced making appointments based on the raw mark sheet, thus recognising the existence of two mark sheets and in the process creating two parallel streams of candidates, even though the source of both streams was the results of one examination. The third is that the appointment of Ratnatilleke, Moses and Chandrasiri were over and above the 14 vacancies that existed under the aforementioned

third category and were therefore outside the approved cadre of ASPs prevailing at that time for the said category. The fourth is that even though Ratnatilleke, Moses and Chandrasiri were placed 14th, 15th and 16th on the raw mark sheet, they were placed 20th, 39th and 29th respectively, in the converted mark sheet, which meant that more litigation was bound to follow from those who had scored more marks than Ratnatilleke, Moses and Chandrasiri on the converted mark sheet, demanding that the cross-referencing between the two mark sheets continue.

Further litigation before the Court of Appeal

As ought to have been expected, the said appointments of Ratnatilleke, Moses and Chandrasiri as ASPs spurred further litigation. The first was CA (Writ) Application No. 736/2000, filed by those candidates placed 15th – 19th, 22nd, 25th, 26th, 31st, 34th, 36th and 37th on the converted mark sheet. The second was CA (Writ) Application No. 907/2000, filed by W.M.R.M. Welikanna who was placed 24th on the converted mark sheet. The complaint of the petitioners in the above two applications (which were taken up together) was that as all of them were placed higher on the converted mark sheet than Moses and some of them higher than Ratnatilleke and Chandrasiri as well, the appointment of Moses was, and where applicable, that of Ratnatilleke and Chandrasiri were, arbitrary and illegal.

The fact that the Court of Appeal was puzzled by the necessity for the Public Service Commission to prepare and act on the raw mark sheet when this Court had accepted the converted mark sheet as not being violative of Article 12(1), is evident from the following passage of the judgment of Amaratunga, J in **Karavita and Others and Welikanna v Inspector General of Police and Others** [(2002) 2 Sri LR 287 at 294]:

> "*Several questions arise in view of the aforesaid averment. What was the necessity to amend the marks sheet tendered to the Supreme Court? Were there mistakes in P5 [converted mark sheet] and if so what were those mistakes and how did such mistakes occur? Who detected those mistakes and who requested or authorized the preparation of an amended marks sheet? I cannot find answers to any of the above questions in the affidavit of the 4th respondent. The Commissioner General of Examinations is a respondent to these applications but he has not filed an affidavit*

setting out the reasons for and the basis on which he prepared the amended mark sheet 4R1. In the absence of any explanation from the Commissioner General of Examinations, Chairman of the Public Service Commission or from the Inspector General of Police the reason for the preparation of the amended mark sheet remains a mystery as far as this Court and these applications are concerned."

The Court of Appeal issued a Writ of Mandamus to appoint all the petitioners in CA (Writ) Application Nos. 736/2000 and 907/2000 as ASPs with effect from 7th June 1999 as, "***The respondents have failed to establish the validity of the amended mark sheet*** *4R1 as against the original mark sheet accepted by the Supreme Court as the correct mark sheet (and also by the PSC by appointing 14 ASPP on the basis of P5) and as such* ***the respondent members of the PSC are under a duty to order promotions on the basis of the results reflected in P5****. By promoting a person who has obtained less marks than all petitioners in these two applications they have failed to perform their duty according to law and have failed to adhere to the results reflected in P5.*" [emphasis added].

A few weeks after the delivery of the above judgment, CA (Writ) Application No. 1016/2002 had been filed by those candidates who had been placed 21st, 23rd, 27th, 30th, 32nd, 33rd, 35th and 38th on the converted mark sheet. Udalagama, J, P/CA (as he then was), referring to the judgment of this Court in SC (FR) Application No. 607/1999 and the related cases held that while he is "*inclined to the view that the aforesaid Supreme Court decision … conferred legal sanctity to the results released by the Commissioner of Examinations and that the respondents to those applications were legally bound to give effect to same*," the Public Service Commission had "*flagrantly ignored the legal sanctity conferred on the results sheet*." It is in this background that the Court of Appeal held in Application No. 1016/2002 that the petitioners in that application, by virtue of the fact that they were placed higher on the converted mark sheet than Moses and some of them over Chandrasiri, are entitled to be promoted to the rank of ASP, with effect from 1st July 1999. With this judgment, the first 39 candidates on the converted mark sheet, except the 28th Respondent, had been promoted to the rank of ASP, even though the number of vacancies was only 14 at the time applications were called.

It will thus be seen that even after this Court found that the converted mark sheet was not illegal, the Public Service Commission acted on the raw mark sheet and made appointments in terms of the raw mark sheet, with the result that there was litigation whenever those on the converted mark sheet, who had more marks than those on the raw mark sheet, were appointed, or *vice versa*.

Litigation continued when another set of officers who were placed higher in the order of merit in the raw mark sheet than many others appointed on the basis of the converted mark sheet filed Writ Application No. 1484/2002 in the Court of Appeal. Although the said application had been dismissed, upon special leave to appeal being sought [SC Spl L/A Application Nos. 13/2005 and 14/2005], this Court had directed that administrative relief be sought from the National Police Commission. The National Police Commission had accordingly appointed the petitioners in those cases, namely K. Wedasinghe, K.K.A.P. Mapalagama, H.H. Chulasiri, C.A. Premashantha and G.W.W.B.R.M. Dambagalla, who were placed 44th, 47th, 48th, 49th and 54th respectively on the converted mark sheet, and 46th, 43rd, 44th, 38th and 33rd respectively on the raw mark sheet, as ASPs. These appointments, which had been conveyed to this Court on 9th November 2007, were with effect from 29th March 2007, and thus brought the number of appointments made outside the approved cadre to 30.

Appointment of the 12th Respondent as an ASP

The above five appointments saw five other candidates, namely L.A. Guneratne, M.A.D. Dhanasekara E.M.U.V. Guneratne, S.D.S.P. Sandanayake and the 12th Respondent, G.M. Somaratne, who were placed 40th, 42nd, 45th, 50th and 52nd respectively in the converted mark sheet, file Fundamental Rights Application No. 6/2008, claiming that under the converted mark sheet, some or all of the aforementioned five appointees had less marks than them, and that the appointments of the said five candidates were violative of their fundamental right to the equal protection of the law.

This application too had been settled by the National Police Commission. According to its decision dated 8th May 2008, the National Police Commission, having observed that all five petitioners had secured more marks than Dambagalla (i.e., more than 300 marks) in

the converted mark sheet, had appointed the aforementioned petitioners including the 12th Respondent to the rank of ASP with effect from 29th March 2007.

The complaint of the Petitioners

The 12th Respondent's promotion to the rank of ASP was based on his ranking in the converted mark sheet. However, **in terms of the raw mark sheet**, the 12th Respondent had identical marks as that of the 7th Petitioner in this application, but was otherwise placed below the other six Petitioners. This prompted the filing of this application, with the Petitioners alleging that their fundamental right to equality guaranteed by Article 12(1) of the Constitution had been infringed by the Respondents as a result of the 12th Respondent being promoted over and above them to the rank of ASP with effect from 29th March, 2007. It is on this basis that the Petitioners, who claim that they became aware of these appointments when it was communicated within the Police Department on 14th August 2008, filed this application soon thereafter, seeking a declaration that their fundamental right to the equal protection of the law guaranteed by Article 12(1) had been infringed and a direction that the National Police Commission promote the Petitioners to the rank of ASP with effect from 1st July 1999.

The learned President's Counsel for the Petitioners presented two arguments before us.

The conversion of the marks distort the promotion scheme

The first argument was that even though the Circular issued by the Inspector General of Police required 600 marks to be given for the written examination and 200 marks for the *viva voce* interview, and thereby maintain a ratio of 75% to 25% (i.e., 3:1) between the two, by adjusting the marks at the written examination to a total of 500, the percentage for the written examination had been brought down from 75% to 71.4%, thereby distorting the intended ratio as well as the scheme contemplated by the said Circular, and resulting in a deviation from the marking scheme set out therein. It is on this basis that the learned President's Counsel submitted that the converted mark sheet is contrary to the scheme embodied in P2, and that this Court must uphold the raw mark sheet as the only correct mark sheet.

Article 126(2) of the Constitution requires an infringement of a fundamental right to be challenged within one month of the said infringement. It has been held in **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [SC (FR) Application No. 206/2008; SC minutes of 9th December 2016] that, other than the limited exceptions which have been referred to therein, it is mandatory to comply with the provisions of Article 126(2). The fact that the Department of Examinations had converted the marks at the written examination to 500 and that the initial 14 appointments had been made on the results of the said converted mark sheet, should have been known to the Petitioners as far back as 1999 when the converted mark sheet and the appointments that were made on the basis of that mark sheet were made public in the pleadings tendered to this Court by the respondents in SC (FR) Application No. 607/1999, or, at the very least soon thereafter and definitely much earlier than 2008, given the number of promotions made pursuant to the aforementioned litigation. This application has been filed almost nine years after this Court delivered its judgment in SC (FR) Application No. 607/1999, where the converted mark sheet and the consequential appointments were disclosed for the first time. In the absence of any of the exceptions referred to in **Demuni Sriyani De Soyza**, I am of the view that the Petitioners cannot challenge the preparation of the converted mark sheet and the appointments made thereon in this application. Nor can they now claim that the raw mark sheet is the correct mark sheet, as such a challenge is not only contrary to the provisions of Article 126(2), but with the judgment of this Court in SC(FR) Application No. 607/1999.

The appointment of the 12th Respondent - revisited

The second argument of the learned President's Counsel for the Petitioners was that the appointment of the 12th Respondent, who had identical or less marks than the Petitioners on the raw mark sheet is in violation of the Petitioners' right to equality guaranteed by Article 12(1). In essence, the Petitioners are asking this Court to continue to cross refer between the two mark sheets, as has been done on previous occasions when promotions were granted, except for the first appointment of 14 candidates.

As this argument of the learned President's Counsel centres around the 12th Respondent's appointment as an ASP through the actions of the National Police Commission, it would be apt at this point to consider in detail the basis on which the said Commission effected the promotions, first in SC Spl L/A Application Nos. 13/2005 & 14/2005 and thereafter in SC (FR) Application No. 6/2008.

The learned Deputy Solicitor General submitted that pursuant to this Court directing the parties in SC Spl L/A Application Nos. 13/2005 and 14/2005 to make representations to the National Police Commission and seek administrative relief, the National Police Commission had appointed a sub-committee to consider the grievance of the petitioners in those two cases. It must be observed thar the petitioners in the above two cases, namely Wedasinghe, Mapalagama, Chulasiri, Premashantha and Dambagalla had obtained more marks than M.K. Dayananda and D.G.R.M. Ellepola on the raw mark sheet but the latter two officers had been appointed as ASPs as a result of them having been placed at the 34th and 36th positions (and higher than those petitioners) in the converted mark sheet [vide CA (Writ) Application No. 736/2000].

In its report [3R7], the Sub-Committee had observed as follows:

> "*The sub-committee in deference to the wish of the Supreme Court considered a way to resolve the problem with the view to granting administrative relief to those who secured more raw marks than Mr. Dayananda and Mr. Ellepola. In doing so, the Committee arrived at the following formula.*
>
> *Those who had obtained above 340 marks as raw marks, and above 284 marks as converted marks, and who possessed an unblemished record of service, as stipulated in the advertisement calling for applications for promotion, may be promoted to the rank of ASP*."

Although the Sub-Committee had not given a basis for determining the above cut-off mark, had the said cut-off mark proposed by the Sub-Committee been adopted, whether it be under the converted mark sheet or the raw mark sheet, 70 of the 72 candidates who had faced the interview would have been eligible for promotion. However, that was not

an issue in SC Spl L/A Application Nos. 13/2005 and 14/2005 as the petitioner who had scored the lowest mark on the converted mark sheet [Dambagalla] had 300 marks, and the petitioner who scored the lowest mark on the raw mark sheet [Wedasinghe] had scored 364.8 marks. Be that as it may, the above recommendation to have a cut off mark in respect of each mark sheet was acted upon and the petitioners in SC Spl L/A Application Nos. 13/2005 and 14/2005 were appointed as ASPs with effect from 8th August 2007.

As I have already stated, the above settlement was followed by the filing of SC (FR) Application No. 6/2008, with the petitioners in that application claiming that in terms of the converted mark sheet, one or more of them had more marks than those appointed as per the settlement in SC Spl L/A Application Nos. 13/2005 and 14/2005. The National Police Commission considered the position of the petitioners in the former application, and in their decision [3R10] concluded as follows:

> "*Notwithstanding the cut-off marks decided earlier, the Commission felt that 60% of the total marks for the five papers ought to be 360; and 60% of the converted marks for the five papers ought to be 300 marks. An officer who stands above either of the two marks could claim for promotion.*"

Thus, the National Police Commission gave equal importance to both mark sheets but in the process ensured that cross-referencing between each mark sheet shall not be done henceforth. As L.A Guneratne, Dhanasekara, E.M.U.V Guneratne, Sandanayake and Somaratne had all obtained over 300 marks in the converted mark sheet, they became eligible to be appointed as ASPs in accordance with the decision of the National Police Commission to promote any candidate who had obtained over 300 marks in the converted mark sheet. Accordingly, the petitioners in SC (FR) Application No. 6/2008 had been promoted to the rank of ASP with effect from 29th March 2007.

In order to capture the above in its proper context, the marks obtained by the Petitioners under each of the mark sheets vis-à-vis the 12th Respondent are produced below:

Name	Marks in the converted mark sheet	Rank in the converted mark sheet (P5)	Marks in the raw marks sheet	Rank in the raw mark sheet (P7)
1st Petitioner	297.4	56	362.4	49
2nd Petitioner	297.2	58	357.2	54
3rd Petitioner	291.6	62	355.6	56
4th Petitioner	285	66	354	57
5th Petitioner	289.8	63	351.8	60
6th Petitioner	297.6	55	351.6	61
7th Petitioner	284.8	68	350.8	64
12th Respondent	301.8	52	350.8	63

The disparity in the marks under the two mark sheets is amply demonstrated by the document marked P8 annexed to the petition, in which the Petitioners have set out the names of the 72 candidates and the marks obtained by each of them in terms of both the converted mark sheet and the raw mark sheet.

The resultant position of the above decision of the National Police Commission, as reflected in P8, can be summarised as follows:

(a) The 12th Respondent has obtained 301.8 marks in the converted mark sheet, and was therefore eligible to be appointed as an ASP;

(b) The last candidate from the converted mark sheet to have been promoted was Dambagalla, who had 300 marks;

(c) All seven Petitioners had marks less than 300 in the **converted mark sheet** and were therefore not eligible for promotion;

(d) Under the **raw mark sheet**, the 12th Respondent had only obtained 350.8 marks and was ineligible to be promoted. However, the 12th Respondent was not promoted on the results he had on the raw mark sheet;

(e) While the 1st Petitioner had scored 362.4 marks under the raw mark sheet and was eligible to be promoted as an ASP in terms of the said decision, the other Petitioners had scored less than 360 marks in the raw mark sheet and were therefore not eligible for promotion;

(f) Although the 7th Petitioner had identical marks to that of the 12th Respondent in terms of the raw mark sheet, all other Petitioners had scored more marks than the 12th Respondent. However, this was irrelevant as the 12th Respondent had not been promoted on the result he had obtained in terms of the raw mark sheet.

I shall now consider whether the decision to recognise two distinct mark sheets and the imposition of a cut off mark by way of a minimum percentage in respect of both mark sheets, is a violation of Article 12(1).

Article 12(1)

Article 12(1) of the Constitution provides that, "*All persons are equal before the law and are entitled to the equal protection of the law*."

In **Karunathilaka and Another vs Jayalath de Silva and Others** [2003 (1) Sri LR 35], Shirani Bandaranayake, J (as she then was) pointed out as follows:

> "*The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out.* ***Article 12(1) of the Constitution****, which governs the principles of equality,* ***approves actions which have a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions***." [emphasis added]

In **Wickremasinghe vs Ceylon Petroleum Corporation and Others** [2001 (2) Sri LR 409 at 416-417], Chief Justice Sarath Silva, having considered whether the decision of the Ceylon Petroleum Corporation to terminate the lease agreement that it had with the petitioner was arbitrary in the context of the said decision being unreasonable, stated as follows:

> *"The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.*
>
> *The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable.* ***The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary.*** *In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected.* ***But, the test once again is one of being reasonable and not arbitrary.*** *Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities.* ***It necessarily follows that reasonableness should be judged from an objective basis.***

When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority.

Therefore, ***when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds*** *that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority."* [emphasis added]

In **W.P.S. Wijerathna vs Sri Lanka Ports Authority and Others** [SC (FR) Application No. 256/2017; SC minutes of 11th December 2020], Kodagoda, PC, J, having referred to the long line of cases which had considered the application of the principle of equality enshrined in Article 12(1) in the context of appointments and promotions in the Public Service, observed that, "*… as pointed out repeatedly by numerous erudite judges, 'arbitrariness is the anathema of equality'. In India's former Chief Justice Bhagwati's words, 'equality and arbitrariness are sworn enemies'*."

The resultant position would then be that while the executive or administrative action in question must be reasonable and based on discernible grounds, reasonableness must be linked to the manifest object of the power that is vested with the particular authority and looked at in the context of the measure, consistent with that object, sought to be achieved.

Is the decision of the National Police Commission arbitrary?

I must state at the outset that the situation that has arisen is extremely unusual. Candidates who sit for the same written examination and face the same interview board must stand on the same level playing field and must be treated equally. There must be only one mark sheet and the successful candidates must be selected according to merit, based on the results of the examination and interview. The fact of the matter is that the preparation of the converted mark sheet by the Department of Examinations was accepted by this Court, and thereafter all appointments should have been made in terms of the converted mark sheet.

Wittingly or not, the decision of the Public Service Commission to promote Ratnatilleke, Moses and Chandrasiri on the basis of the marks obtained by them in the raw mark sheet has resulted in the Public Service Commission making appointments based on the results of one examination under two separate mark sheets. However, by cross-referring to both mark sheets in making appointments, and by comparing the marks obtained by one candidate in one mark sheet with the marks obtained by another candidate in the other mark sheet, the two mark sheets have been integrated into one another and effectively been considered as one.

Although 13 of the 14 candidates who were initially appointed featured in both sets of mark sheets, it was not so with regard to the other candidates, and switching between mark sheets was similar to a game of snakes and ladders. As is evident from the above narration, by cross-referring to the marks in the two separate mark sheets, whenever an appointment was made under the converted mark sheet, this gave rise to a situation of the appointee having less marks than another candidate in terms of the raw mark sheet, or *vice versa*. The end result was that an examination that was scheduled to select 14 candidates for appointment to the rank of ASP and for which 72 candidates had been interviewed, had resulted in the appointment of an additional 40 candidates, well above the cadre requirement of the Police Department.

As I have already stated, the problem arose when the Public Service Commission acted on the raw mark sheet despite this Court having sanctioned the converted mark sheet. The result was complete pandemonium as candidates who were otherwise not eligible for promotion by virtue of not being within the first 14 successful candidates suddenly found that they could claim inequal treatment, with the end result being that 54 Chief Inspectors of Police or Inspectors of Police were promoted to the rank of ASP, when the number of vacancies was only 14. In my view, a solution had to be found to the absurd situation that resulted from the ill-considered actions of the Public Service Commission.

By its aforesaid decision 3R10, the National Police Commission has:

(a) formally recognised the existence of two separate mark sheets; and

(b) created two distinct and parallel streams from which promotions could be made,

subject to the limitation that irrespective of the mark sheet from which a candidate is selected, in order to be promoted to the rank of ASP, a candidate must have scored a minimum mark.

None of the Petitioners have achieved the said cut off mark under either of the mark sheets, except the 1st Petitioner, who has scored 362.4 marks, as per the raw mark sheet, and who has since been promoted.

As this is the basis on which the promotion of the Petitioners has been denied, the question that must be answered is whether the said course of action adopted by the National Police Commission is arbitrary and therefore a violation of the provisions of Article 12(1).

In '**Fundamental Rights in Sri Lanka – A Commentary**' by Chief Justice S. Sharvananda (1993), he has stated as follows at page 81:

> "*Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the law … The guiding principle is that all persons and things similarly circumstanced shall be treated alike.*

'Equality before the law' means that among equals the law should be equal and should be equally administered and that the like should be treated alike. What it forbids is discrimination between persons who are substantially in similar circumstances or conditions… It is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same."

True enough, the Petitioners and those who have been promoted prior to that have all stood together at the starting point. But as submitted by the learned Deputy Solicitor General, as they went along, they have branched out into two separate and distinct streams, and thus, those in one stream ceased to be similarly circumstanced with those in the other stream. While candidates in each stream were placed in equal circumstances within that stream, they were not so equally circumstanced, vis-à-vis the other stream. In other words, cross-referencing between the two streams could not be done as the basis for their selection had changed and were distinct to one another. To that extent, I am of the opinion that the Public Service Commission, and later the National Police Commission had erred when they started comparing the marks of one mark sheet with that of the other.

It is in these circumstances that a solution had to be found, in order to put a stop to the absurdity that had arisen. The resulting solution [3R10] was to treat the candidates under two distinct mark sheets, and thereafter impose a cut off mark by way of a minimum percentage in respect of each mark sheet, thus bringing a semblance of uniformity and common sense to the issue before us.

I am of the view that the said decision is reasonable, when considered in the backdrop of the following factors:

(a) There existed only 14 vacancies, and thus, a candidate knew very well that in order to be promoted, he must be within the first 14;

(b) While the first 14 in the converted mark sheet had obtained a mark ranging from 375 – 329, the Petitioners had obtained between 284.8 – 297.6 marks;

(c) While the first 14 in the raw mark sheet had obtained a mark ranging from 444.6 – 390.6, the Petitioners had obtained between 350.8 – 362.4 marks;

(d) In terms of the converted mark sheet, none of the Petitioners had scored more marks than the 12th Respondent who was promoted by virtue of having scored 301.8 marks on the converted mark sheet;

(e) In view of the recognition of two distinct streams, and as the Petitioners were no longer similarly circumstanced as the 12th Respondent, comparing the marks of the 12th Respondent on the raw mark sheet with the marks obtained by the Petitioners on the raw mark sheet is both illegal and unwarranted;

(f) If, as has been done previously, the Petitioners are promoted by virtue of having either an identical or higher mark than the 12th Respondent on the raw mark sheet, that would result in a further seven candidates from the converted mark sheet who are placed higher than the Petitioners being promoted, with the result that 69 of the 72 candidates who faced the interview must be promoted. And, the cycle would continue;

(g) There is no proof of discriminatory intent or purpose, and nor has the National Police Commission acted with an evil eye and an unequal hand so as to discriminate between persons in similar circumstances.

In the above circumstances, I am of the view that:

(a) Other than the 1st Petitioner who has already been appointed as an ASP, the other Petitioners are not entitled to be promoted to the rank of ASP on the basis of the results obtained by them at the examination held in November 1998 and the interview that followed;

(b) The fundamental rights of the Petitioners guaranteed by Article 12(1) have not been infringed by the 1st – 9th and 11th Respondents.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree.

JUDGE OF THE SUPREME COURT

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

Dharma S.Samaranayake,
No.150/1,
Moraketiya, Pannipitiya.

SC (CHC) Appeal No.60/2013
HC (Civil) No. 27/2008/IP

Plaintiff

Vs.

Sarasavi Publishers (Pvt) Limited,
No 30,
Stanley Thilakaratna Mawatha,
Nugegoda.

Defendant

AND NOW BETWEEN

Sarasavi Publishers (Pvt) Limited,
No 30,
Stanley Thilakaratna Mawatha,
Nugegoda.

Defendant- Petitioner/Appellant

Vs.

Dharma S.Samaranayake,
No.150/1,
Moraketiya, Pannipitiya.

Plaintiff- Respondent

Before: **Murdu N.B. Fernando, PC J.**
P. Padman Surasena, J. and
A.H.M.D. Nawaz, J.

Counsel: K.G Jinasena with D.K.V Jayanath for the Defendant-Petitioner
Asoka Serasinghe with Akalanka Serasinghe for Defendant – Respondent

Argued on: 29.01.2021

Decided on: 17.05.2023

Murdu N.B. Fernando, PC. J.

The defendant-appellant ("the defendant"/ "the appellant") preferred this Appeal against the judgement dated 17th May, 2013 of the Commercial High Court ("the High Court").

The High Court by the said judgement recognized the plaintiff-respondent ("the plaintiff"/ "the respondent") as the author of the book titled "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and went onto hold that the plaintiff Dharma S Samaranayake has the copyright for the said book and that the defendant Sarasavi Publishers (Pvt) Limited has infringed the economic rights of the plaintiff and directed the defendant, Sarasavi Publishers to pay a sum of Rs. 837,500/= as damages to the plaintiff for infringement of her economic rights.

The case presented by the plaintiff, *albeit in brief* before the High Court was

- that the plaintiff, a well-known journalist and the editor of a weekly sinhala newspaper and interested in local culinary methods was instrumental in introducing Publis Silva, a Cook at Mount Lavinia Hotel, (ගල්කිස්ස හෝටලයෙහි අරක්කැමියෙකු) to the female newspaper readers;
- that in 2003 the plaintiff gathered material and information to publish a book on local culinary and that Publis Silva assisted (ව්‍යවහාරික සහයෝගය) and supported her by trying out recipes;
- that there was an understanding between the plaintiff and Publis Silva to title the book using the words "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වා" and hence it was titled "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්";
- that chapters one to eleven of the book were compiled with material personally gathered by her through interviews with Publis Silva and others; that for chapter twelve she received positive support (සාධනීය සහයෝගය) from Publis Silva by trying out recipes; that chapters 14,15 and 16 were written and created solely by her and therefore the plaintiff has the copy right of the said book;
- that she requested the Sarasavi Publishers to publish "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", but did not enter into a formal agreement with the publishing company; that the book was launched on 25th June, 2005 and she received a sum of Rs 25,000/= as an advance payment for the 1st edition of the book. A copy of the 6th edition of the book (not the 1st) was annexed to the plaint dated 30th July, 2008 as **P1;**
- that subsequently she became aware that the defendant had published six editions without her express or implied consent and was getting ready to publish the 7th edition; that in March, 2008 she demanded royalty for the six editions; the defendant failed to pay her royalty but indicated that the defendant had entered into an agreement with Publis Silva for publication of the said book;

- that Publis Silva cannot write and has not written a single word of the said book and that she is the author of the book; that the defendant publishing company has failed to pay her royalty and thus infringed her economic rights;
- therefore, plaint was filed against the defendant publishing company, *inter alia* for a declaration that the plaintiff is the author of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and she has the copyright of the said book. Further she moved court for injunctive relief, royalty and compensation under Section 170(10) of the Intellectual Property Act No 36 of 2003 ("the IP Act") and in the interim for an enjoining order and interim injunction against the publication, distribution and sale of the book.

The High Court did not grant the plaintiff the enjoining order prayed for in the plaint dated 03rd December 2008 but issued notice on the publishing company pertaining to the interim relief. The defendant publishing company, filed objections to the grant of interim injunction sought by the plaintiff and contended:

- that the creator of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" is Publis Silva and that the copyright of the book lies with Publis Silva;
- that the defendant has paid royalty to Publis Silva as expressly agreed between the parties and annexed a copy of the agreement (**V2**) and an affidavit from Publis Silva **V5** to the objections;
- that plaintiff was only the editor of the book and she has been paid editorial fees (සංස්කාරක ගාස්තු) for such services by Publis Silva; and
- that prior to the 1st publication of the said book, upon the request of Publis Silva a sum of Rs. 25,000/= was given to the plaintiff by the defendant but the said sum of money was not an advance nor royalty as contended by the plaintiff and moved that the application for interim injunction be rejected.

On 19th February, 2009 the High Court delivered order refusing the plaintiff's application for interim relief.

Thereafter the trial began, evidence led and the learned judge of the High Court delivered judgement in favour of the plaintiff and granted the below mentioned relief:-

(i) a declaration that the plaintiff has the copyright for the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and the defendant has violated the plaintiff's economic rights;
(ii) a direction for the defendant to submit a full report of books printed and sold and a further declaration for the defendant to pay royalty upon the sales to the plaintiff;
(iii) a declaration for the defendant to pay a sum of Rs. 837,500/= to the plaintiff in terms of Section 170(10) of the IP Act; and
(iv) a permanent injunction preventing the defendant from publishing, distributing, possessing and sale of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

Being aggrieved by the said judgement, Sarasavi Publishers came before this Court challenging the said judgement on many grounds based upon facts and law and that is the matter that this Court is now called upon to determine in this appeal.

Prior to examining the said judgement. I wish to consider the **copyright regime** in Sri Lanka with a brief overview of what is "copyright".

'Copyright' deals with the rights of intellectual creators in their creation and originated with the creation of paper and vastly grew as a right with the development of the printing industry. 'Copyright' or 'authors right' is respected world over and blossomed during the medieval time both in the common law and civil law countries. It gained statutory force with the Statute of Anne enacted in England. During the period this country was governed by the British, common law norms on intellectual property which encompassed copyright, entered our domestic legal system through English statutes. We also became parties to many international conventions.

In 1908, we enacted our own statute, Copyright Ordinance which was followed by the Code of Intellectual Property in 1979. In 2003, the present Intellectual Property Act based on the frame work of international treaties and modernized to cater to global trends and specifically to safeguard the interests of owners and users of 'copyright' as well as its 'related rights' [or neighboring rights as it was termed earlier] was enacted.

Copyright consists of multiple rights. It is a bundle of different rights that spring from the 'works'. These rights can be 'assigned' or 'licensed' either as a whole or separately and independently by the 'owner of the copyright'.

However, there is no copyright in 'ideas' and subsists only in the material form in which the ideas are expressed. This gave rise to the "idea-expression dichotomy". In order to secure copy protection, the author must bestow upon the 'work' sufficient 'judgement, skill and labour or capital' or 'sweat of the brow' as certain jurisdictions refers to the test. The precise amount of 'judgement/knowledge, or skill and labour' that is required in order to acquire copyright cannot be defined in explicit terms. It depends on the speciality and facts of each case and is very much a subjective test.

There is no doubt that 'copyright' subsists in the original 'work' but 'originality' does not mean that the work must be of original or inventive thought. Nevertheless, the 'work' must not be copied from another 'work' and it should originate from the author.

Section 6(1) of our IP Act enumerates the **'works'** protected in the literary, artistic or scientific domain ranging from books and speeches to illustrations and sketches. **Section 6(2)** specifies that the 'works' referred to in **Section 6(1)** is protected by the sole fact of its creation, irrespective of its mode or form of expression, as well as its content, quality and purpose.

Sections 9 and 10 of the IP Act bestows upon the 'owner of copyright' a series of exclusive rights to authorize certain acts termed **'economic rights'** which include reproduction, adaptation and distribution of the works as well as an independent '**moral right'.**

Section 13 gives the duration of copyright or the period upon which a work can be protected.

Section 14(1) indicates the 'original owner of economic rights' to be the 'author who created the work'. However, this is subject to certain restrictions more fully referred to in sub-sections (2), (3) and (4) of Section 14.

Section 15 clearly lays down the 'presumption of authorship' as the physical person whose name is indicated as the 'author' on a work. **Section 16** provides for assignment or licensing of authors rights by the 'owner of the copyright'.

Section 22 details the rights of the 'owner of copyright' to seek remedy in a court of law and or to seek the intervention of the Director-General of Intellectual Property for dispute resolution, in the event any person infringes or is about to infringe any of the rights protected under the IP Act. **Section 170** elaborates the infringement and the remedies in greater detail with regard to any of the recognized rights granted and safeguarded under the Intellectual Property Act which includes 'copyright'.

Having referred to the relevant provisions of the IP Act in a nutshell, let me now proceed to examine the 'work' which is in issue in this appeal. In my view, such an examination at the outset is crucial, in view of the nature of this 'work' and as the 'work' itself is a repository of material that answers many issues that crop up in this appeal.

The 'work' marked **P3** at the trial, is the book titled "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", a cookery book in Sinhala consisting of 279 pages. (A literal translation of the title would be Mount Lavinia Hotel Publis Silva's Local Cuisine) It has a coloured removable outer jacket. The front cover prominently depicts the face of Publis Silva. He is in a chef's hat and his image covers the right half of the front cover. The words 'Mount Lavinia Hotel' embedded in the iconic building is depicted on the top left of the front cover. The title of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" is in black printed at the bottom left, in four lines, top two lines in bold font and smaller.

The back cover of the book, on top indicate the title of the book, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". The following statement appears right below the title:

> "ශ්‍රී ලංකාවේ විශිෂ්ටතම සූපවේදියා කවුරුන්දැයි කවරෙකු හෝ ඇසුවහොත් බොහෝ දෙනෙකුට එකවර සිහිපත් වනු ඇත්තේ පබ්ලිස් සිල්වාගේ නමය. ගල්කිස්ස මහ හෝටලයේ ප්‍රධාන සූපවේදියා ලෙස ඔහු අද ශ්‍රී ලංකාව පුරාත්, ජාත්‍යන්තර ලෝකයේත් කීර්තියක් දිනූවෙකි. ගල්කිස්ස මහ හෝටලයේ අඟුරු ඇදීමේ රස්සාවට පැමිණ, එතැනින් අරක්කැමියෙකු ලෙස උසස් වී, කළමනාකාර ධූරයකට පත් වී, අවසානයේ නතරවූයේ එම හෝටලයේම අධ්‍යක්ෂවරයෙකු බවට පත්වීමෙනි. හතරවැනි පන්තියට ඉගෙන පහළම තලයකින් ආරම්භකොට ඉහළම තලයට ළඟා වූ ඔහු ධෛර්යමත් තනි මිනිසෙකු පිළිබඳ පූර්වාදර්ශයක් බදුය.
>
> පබ්ලිස් සිල්වා ශ්‍රී ලාංකික සූපවේදීන් අතර විශිෂ්ටත්වයට පත් වූයේ ඔහු මේ කලාව ඉතා මැනවින් ප්‍රගුණ කිරීම නිසා පමණක් නොවේ. ඔහු ශ්‍රී ලංකාවට ආවේණික ඉවුම් පිහිම් කලාවක් හඳුන්වා දීමට පුරෝගාමියා ද වූයේ ය....."

The bottom of the back cover depicts a picture of Publis Silva in chef kit cooking in front of a stove, holding a pan in one hand and a spoon in the other. The name of Sarasavi Publishers is depicted on to the right of the back cover.

The title of the book is repeated and depicted inside the book in the 1st page. It is conspicuously printed in black and standing alone in a very noticeable font. Similar to the front cover, the words "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ" is in slightly smaller font compared to the "හෙළ රටාවට ඉවුම් පිහුම්". The name "පබ්ලිස් සිල්වාගේ" is in bold type and clearly identifiable.

Whilst, the 2nd page is blank, the 3rd page also depicts the title of the book, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", in similar font as the cover and 1st page and is at the very top. The words "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ" is slightly smaller to "හෙළ රටාවට ඉවුම් පිහුම්" and the words "පබ්ලිස් සිල්වාගේ" is in black and eye catching.

The center of the 3rd page depicts in smaller lettering the name of the plaintiff, Dharma S Samaranayake as the editor (සංස්කරණය)and the bottom of the page depicts the name of the defendant, Sarasavi Publishers, its logo and the address.

The 4th page which is commonly referred to as the "title page" indicates in a clear and distinctive manner the following details: -

<u>At the top</u>

- The initial publication- March 2005
- ISBN No
- © **Publis Silva** [the holder of the copy right by the notation **"©"**]

<u>At the center</u>

- Computer page formatting and type setting by Pushpananda Ekanayake of 'The Font Master' and address
- Cover page by Sisira Wijetunga

<u>At the bottom</u>

- Printed by Tharanji Prints and the address

The **title page** is followed by the **'editors note'** (සංස්කාරකගේ සටහන). It runs into three pages, bearing page numbers 5, 6 and 7. (The numbering of the pages begins from page five).

In **page 7**, at the end of the 'editors note' the name of the plaintiff is indicated very clearly together with the address and contact details including the e-mail address.

At **page 9**, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වා" pronounces his heart felt gratitude (ඔබ සැමට මාගේ භක්ති ප්‍රණාමය) and acknowledges many including the management of Mount Lavinia Hotel, the plaintiff and the defendant. **Pages 8** and **10** are kept blank and at **page 11**, it signifies that the book is dedicated to the Chairman of Mount Lavinia Hotel, Sanath Ukwatta and all readers with an epicurean taste.

Page 12 depicts the **index** of the book, consisting of *14 chapters*. **Page 13** indexes the coloured photographs (in glossy finish) of 24 food styling, appearing in the book with the relevant page numbers. These food items range from *Waraka Pudding* to *Tibbatu Curry*.

Just below the heading 'Coloured Photographs' (වර්ණ ඡායාරූප පිටු), a statement acknowledging that the *photographs are published with the courtesy of Mount Lavinia Hotel and all rights of the photographs taken by Sisira Wijetunga are reserved with Mount Lavinia Hotel is depicted. It prohibits reproduction of the photographs in any form, without prior written permission of Mount Lavinia Hotel*.

Pages 14 to 16 is a ready reckoner to *378 recipes contained in Chapters 11,12 and 13* of the book. **Chapter 11** heading **'Publis Special- Recipes Invented by Publis Silva'** is followed by **Chapters 12 and 13** general recipes and reader's recipes. These recipes spanning from pages 73 to 274 (200 pages) consist of the major part of the cook book, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

Pages 14,15 and 16 of the 'work' *i.e.*, the afore discussed index to the recipes reflected in chapters 11,12 and 13 is followed by **Chapters 1 to 10**. Whilst chapters 1 and 2 depicts the life of Publis Silva, a short commentary on food is found in chapters 3 to 10.

Chapter one, heading *"මා ආ මාවන" is the auto biography of 'Publis Silva'* beginning at page 17 and consists of 16 pages. In this chapter Publis Silva narrates in 'first person', his life story, his village, his family, his education, first job, journey to Colombo, first assignment at Mount Lavinia Hotel as a helper of the hotel kitchen, initial duty to carry coal to light the kitchen hearth and his gradual rise to the top and includes his foreign tours sponsored by Mount Lavinia Hotel. His assignment to serve at the table of the chairman of Mount Lavinia Hotel as well as a cook at the official residence of the Governor General is highlighted in this chapter and concludes by his special interest in 'enhancers' and 'curry powders' pre-dominantly used in Sri Lanka, which interest he says was awaken when in India.

Chapter one ends with the following statements which demonstrates Publis Silva's mission in life with regard to Sri Lankan cuisine.

> "මම ඒ වෙනස හඳුන්වා දුනිමි. මේ ආදී වශයෙන් මේ ග්‍රන්ථයේ වෙන්ව ඉදිරියේදී හඳුන්වාදෙන සූප ක්‍රම එක්රැස්කොට අපේ සූප කලාවේ ප්‍රමිතියක් සකස් කිරීම මගේ අරමුණයි." (page 33)

Chapter two of the book consisting four pages (page 34 to 36) is a continuation of the autobiography and depicts Publis Silva's interest in the culinary field, representing Mount Lavinia Hotel at foreign symposiums, conducting exhibitions for chefs of lesser known hotels and gives pride of place to UK Edmund, Chairman of Mount Lavinia Hotel for his (Publis Silva's) success in life.

These two chapters are followed by chapter 3- the history of culinary; chapter 4- food prior to Vijaya era; chapter 5- food and nutrition; chapter 6- the traditions around partaking of food; chapter 7- preparation of food; chapter 8- quality of food; chapter 9- food enhancers; chapter 10- health guide lines in preparing food; and chapter 14- cooking hints. These chapters 3 to 10 and 14 span through only 37 pages of the 279 page cook book, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

The inner page of the front cover is a quotation from chapter 3 on history of food. The inner page of the back cover reads as follows:

"පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම් ශ්‍රී ලංකාවේ පළවන පළමු අංග සම්පූර්ණ සූප ශාස්ත්‍ර ග්‍රන්ථය යි. එය ඉවුම් පිහුම් කලාවේ ස්වදේශික ලකුණක් ඇති කළ, ශ්‍රී ලාංකික අනන්‍යතාවක් බිහි කළ **පබ්ලිස් සිල්වා සූපවේදියාගේ ප්‍රථම ග්‍රන්ථය යි.** මෙතෙක් විවිධ විද්‍යුත් හා මුද්‍රිත ජනමාධ්‍ය මගින් සූපවේදය පිළිබඳ පබ්ලිස් සිල්වාගේ විශේෂඥභාවය අනාවරණය කරගෙන ඇතත් එය ග්‍රන්ථයකට ගොණුවන ප්‍රථම අවස්ථාව මෙය යි..." (emphasis added)

From the foregoing and on a careful examination of the 'work' in dispute, and specifically the title page, it is demonstratively seen that the copyright of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" lies with Publis Silva. Title page clearly and unequivocally notes by the notation **"©" Publis Silva**, that the copyright of this book, first published in March 2005, is with Publis Silva.

There is also no ambiguity that the 'editor' of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" is the plaintiff, Dharma S Samaranayake. Page 3 of the book and the 'editor's note' at pages 5 to 7, clearly recognize and refer to the 'editor', Dharma S Samaranayake, the plaintiff in the instant case.

Thus, *prima facie*, the 'work' in issue, edited by Dharma S Samaranayake bestows the copyright of the book upon Publis Silva.

However, the finding of the learned High Court Judge was that the plaintiff is entitled to copyright of the book, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

In this appeal the crux of the issue to be determined by this Court is, *did the High Court Judge err when it came to the finding, that the owner of the 'copyright' of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" is the plaintiff, and if so, did the High Court err in granting relief to the plaintiff?*

Having referred to the factual matrix of the 'work' in dispute, let me now move over to the legal provisions governing the matter before us. i.e., Part II of the Intellectual Property Act, consisting of two chapters, chapter I- 'copy right' and chapter II- 'related rights'. Whilst **sections 5 to 16** discussed in this judgement falls within chapter I- copy right, **Section 22** pertaining to remedies is placed ironically in chapter II, the related rights chapter.

In terms of the interpretation section *i.e.*, **Section 5,** the word 'author' means the physical person who created the work and in terms of **Section 14(1)** of the IP Act, the 'original ownership' of the 'economic rights' in a work is with the 'author' who created the work. This presumption however, is subject to three exemptions referred to in sub-sections (2), (3) and (4) of the said section 14, *viz* joint ownership, collective work and in the course of another's employment, where the 'original authorship' will lie with the co-authors, or the physical person at the initiative and or under the direction of whom the work was created or the employer, subject to the provisions referred to in the said sub-sections respectively.

In terms of S**ection 15(1)** the physical person whose name is indicated as the 'author' on a work in the usual manner, is presumed to be the 'author' of the work, unless proved otherwise.

The above sections clearly denote that in a 'work' the 'author' indicated therein, is the 'holder of the copyright' and upon whom the economic rights are bestowed.

In "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" the work in dispute, there is no person indicated and identified as an 'author'. Thus, the question for determination is who owns the copyright of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්"?

Is it the copyright holder signified by the notation **"©"** or the editor or the compiler or a 3rd party?

In order to ascertain an answer to the said question, I wish to examine the 'work' in greater detail.

The title page (page 4) clearly identifies that the copyright of the book is bestowed upon Publis Silva by the notation **"©"**.

In page 3, the role of the plaintiff has been clearly and precisely recognized and acknowledged as the 'editor' (සංස්කරණය). The plaintiff has penned the editor's note (සංස්කාරකගේ සටහන) running into three pages and has categorically accepted that she is doing so as the 'editor'.

The editor's note begins at page 5 with the following words, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම් නමැති ග්‍රන්ථයේ **සංස්කරණය වෙනුවෙන්** සටහනක් තබනු පිණිස". At page 7, the editor Dharma S. Samaranayake profusely thanks Publis Silva whom she accepts as the 'true owner' of the book (මේ සත්ක්‍රියාවේදී පලමුවෙන්ම මාගේ ස්තුතිය පිරිනමන්නේ මේ **ග්‍රන්ථයේ සැබෑ හිමිකරුවා වන පබ්ලිස් සිල්වා මහතාටය**)

Publis Silva too, at page 9 in his appreciation and acknowledgement, (ඔබ සැමට මාගේ භක්ති ප්‍රණාමය) values the contribution made by the plaintiff in the following manner "මෙවන් ග්‍රන්ථයක් ඔබ අතට පත්කිරීමට මා යොමු කළ ධර්මා එස්. සමරනායක මාධ්‍යවේදිනිය"

The back cover and the inner back cover of the book (quoted earlier in this judgement), clearly acknowledge that this is the 1st book of Publis Silva, a renowned chef who has given a Sri Lankan identity to the culinary field and goes onto explain his vision to bring out this book. Publis Silva's vision and mission is more fully referred to in chapters one and two.

In my view, the information and the specific details narrated above, distilled and elicited from the 'work' itself, sheds sufficient light to establish and answer the principal question in issue in this appeal *viz,* who is the original 'owner of the copyright' of the work "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". It is non-other than Publis Silva himself.

Further, the 1st edition of this book was published in March 2005 and was launched at a ceremony held on 06th April, 2005 at the BMICH. The four page invitation for the event (in Sinhala and English) marked at the trial as **V3** (pages 425-428 of the brief) indicate thus;

> *"The internationally famous chef of Mount Lavinial Hotel,* ***Publis Silva launches his book*** *ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්"*

Upon perusal of the invitation it is observed that at the launch, an address by Dharma S Samaranayake, the 'compiler' (සම්පාදිකා) of the book was slotted in as the penultimate item.

The plaintiff filed this action on 30th July, 2008 praying for royalty and moving for enjoining order and interim injunction, three years after the launch and publication of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". By then the 6th edition was published and a copy of the 6th edition was annexed to the plaint by the plaintiff.

On 19th February, 2009 the High Court after hearing the parties rejected the plaintiff's prayer for interim relief. On 16th November, 2009 the trial began and admissions and issues based on specific and general grounds raised. Whilst the trial was proceeding on 01st April, 2010 the plaintiff filed the 1st edition of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" published in March 2005 in court (vide pages 132 - 136 of the brief)

It is observed, this 1st edition filed subsequently, is an autographed copy (page 135 of the brief) dated 06th April 2005 *i.e.* the date of launch of the 1st edition of the 'work'. It is an established practice, that at a book launch, the book is autographed by the author. The signature appearing in the autographed copy is difficult to decipher but resembles the signature that is appearing at pages 90 and 131 of the brief, *i.e.* of "ී. පබ්ලිස්", reflected in the affidavit (**V5**) tendered by Publis Silva to court dated 03rd September, 2008 and in the agreement (**V2**) executed between Publis Silva and the defendant Sarasavi Publishers dated 22nd October, 2003. In fact, the plaintiff in her cross-examination (which will be discussed later) admitted the signature of Publis Silva appearing in the agreement **V2,** executed between Publis Silva as the 'author' and the Sarasavi Publications as the 'publisher.'

Another significant factor that drew my attention in this appeal, is the assertion of the plaintiff at paragraphs 13 to 15 of the plaint, that chapters 1-11 and 14 - 16 of the book were compiled by her exclusively, whereas in compiling chapter 12 she received positive support from Publis Silva. However, upon perusal of the book "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" it appears, the said assertion is factually incorrect. The 'work' amply demonstrates that this book has only 14 chapters and not 16 as reflected in the plaint and chapter 1 and 2 is the life story of Publis Silva and chapter 11 is a compilation of recipes under the heading 'Publis Special' wherein Publis Silva has been acknowledged clearly and precisely as the inventor and creator (පබ්ලිස් සිල්වාගේ අත්හදා බැලීම්) of the said recipes. Further, the date of the launch of the 1st edition is erroneously stated in the plaint as 25th June, 2005.

The above factors clearly denote that the plaintiff filed the instant case, seeking ownership of copy right, three years after its 1st edition and even after the 6th edition was published, without annexing a copy of the 1st edition and alluding to facts which are demonstratively incorrect as seen from the 'work' itself which was led in evidence as **P3.**

At the trial, the plaintiff gave evidence and the main contention of the plaintiff was that the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" was written by her and that Publis Silva cannot write (ඔහුට රචනා ශෛලියක් නැහැ, ලියන්නත් බැහැ- page 627 of the brief) and that the script handed over to the publisher was in her hand writing and therefore the copyright of the 'work' should be hers.

In cross-examination the plaintiff admitted her role as the 'editor' in the following manner:

ප්‍ර- මම අහන්නේ මුළු පොතම?
උ- ලිව්වේ මම. එයා කිව්වම මම ගැලපෙන විදියට ලිව්වා.
ප්‍ර- ඒක සංස්කාරකගේ කාර්යභාරය?
උ- පිළිතුරක් නැත (page 683 of the brief)

Further, she admitted the signature of Publis Silva in the agreement (**V2**) executed between Publis Silva as 'author' and Sarasavi Publishers as the 'publisher', wherein the said two parties agreed to publish 'a compilation of recipes' in Sinhala titled 'ගල්කිස්ස මහ හෝටලයේ සිංහල සූප විධි' (the title of the book being subject to change to one of very similar title) dealing particularly with recipes of food prepared at the Mount Lavinia Hotel under T. Publis Silva's guidance. By the said agreement the parties *i.e.,* Publis Silva and Sarasavi Publishers, specifically agreed that the 'author' Publis Silva will be entitled to a payment of royalty of 15% of the sale price of the book.

In cross-examination, the plaintiff also admitted that many books authored by her had been published by Sarasavi Publishers. One such book was produced at the trial marked **V6** (vide pages 429 - 574 of the brief). It was titled "දහකාරයන්ගේ වික්‍රමය (12) - ගිනිමැලයෙන් ආ අමුත්තෝ" and was published in March 2008, prior to filling of the plaint in the instant case. It is clearly seen that in the said book in the title page, the holder of the copyright is signified by the notation "©" and is the plaintiff herself. The plaintiff in her cross-examination admitted that the defendant publishing company has paid royalty to her for the said publication.

On behalf of the plaintiff, a Sinhala scholar gave evidence. He stated that he provided source material to the plaintiff to compile chapter 4 and that he is identified and acknowledged by name at the end of chapter 4. The said chapter consists of four pages and is on history of food prior to Vijaya's period. He also gave expert opinion in relation to the meaning of the words 'author' (කර්තෘ) and 'editor' (සම්පාදක) and contended it was one and the same.

For the defendant, the Managing Director of Sarasavi Publishers gave evidence. His evidence pertained to discussions between the parties, namely Publis Silva, Management of Mount Lavinia Hotel, the plaintiff and the defendant, publishing company, in relation to the compilation and other matters connected thereto prior to publication of the 'work' **P3**.

In the affidavit tendered in evidence, at the trial, this witness referred to three other cook books published by Publis Silva and annexed copies of same to his affidavit. The High Court rejected the marking and production of the said cook books, upon the ground that though the said cook books were listed in an additional list of witnesses and documents, such list was not filed of record prior to the commencement of the trial. Court also made order that the said cook books could be produced only if Publis Silva gives evidence. However, this witness (the Managing Director) in his evidence contended that the said cook books are in the public domain and one such book titled "Authentic Sri Lankan Cuisine of Publis Silva", a cook book printed in English, edited by Piyasiri Nagahawatte was published by Sarasavi Publications in 2011. The holder of the copyright of the said book "Authentic Sri Lankan Cuisine of Publis Silva" is Publis Silva and it is clearly acknowledged by the notation "©" in the book itself, as per the practice of the printing trade, the witness contended.

The 2nd witness for the defendant was a former employee of Sarasavi Publishes. He was the Manager, Publications during the period "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ

රටාවට ඉවුම් පිහුම්" was published. This witness gave evidence in relation to the discussions that took place prior to the publication of the works between Management of Mount Lavinia Hotel, Publis Silva, the plaintiff and himself representing the defendant company; the reservations made by Mount Lavinia Hotel with regard to the photographs in food styling to be included in the 'work' and also referred to the agreement (**V2**) which was executed between Publis Silva and Sarasavi Publishers in 2003, wherein he signed as one of the witnesses and identified the signature of the other witness by name as the representative from Mount Lavinia Hotel who was instrumental in the aforesaid discussions. He also gave evidence with regard to the contents of the **(V2)** agreement, the change of title of the 'work' and royalty granted to Publis Silva considering his expertise regarding the said book. In cross-examination, although a valiant attempt was made on behalf of the plaintiff to discredit this witness alleging that the agreement was an after-thought, the witness was unwavering in his evidence and stood his ground. At the time of giving evidence this witness averred, he was not in the employment of the defendant company but at another leading publishing company.

Having referred to the evidence led at the trial, let me now move onto examine the impugned judgement.

The learned judge of the High Court came to the finding that the plaintiff is the copyright holder of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" mainly upon the ground that the defendant Sarasavi Publishers, failed to call Publis Silva as a witness to substantiate its contention that the reproduction rights of the 'work' was assigned to the defendant publishing company by Publis Silva.

The learned judge went onto hold that by not calling Publis Silva and leading his evidence, the defendant failed to rebutt the evidence given by the plaintiff that the 'work' was the plaintiff's own creation. The learned judge also held, the defendant company failed to establish that the plaintiff was employed as an 'editor' by Publis Silva; that plaintiff was paid editorial fees (සංස්කාරක ගාස්තු) for editing of the book by Publis Silva and especially the sum of Rs. 25,000/= (admittedly given to the plaintiff by the defendant) was editorial fees given on behalf of Publis Silva and upon Publis Silva's specific request and not *per se* by the defendant company.

The learned judge did not consider as relevant, the facts and assertions made by the plaintiff in the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" itself, especially the 'editor's note' penned by the plaintiff stating that the 'true owner of the book is Publis Silva' and that 'she (the plaintiff) is penning a few words only as the editor'.

In the judgement the learned judge re-iterated the failure of the defendant to call Publis Silva, as a material fact to establish that the plaintiff was paid to do a job as the 'editor' and specifically considered it as a significant factor in deciding this case for the plaintiff. The learned judge also accepted the contention of the plaintiff, that Publis Silva cannot write simply because Publis Silva did not rebutt the said position. (ඒ අනුව පබ්ලිස් සිල්වාට ලිවීමට නොහැකි බවට පැමිණිලිකාරිය පවසන විට පබ්ලිස් සිල්වා පැමිණ ඊට ප්‍රතිවිරුද්ධ කාරණා නොකියන විට, ඉහත කෘති ඔහු නමින් තිබීම තුලින්ම ඒවා ඔහු තම ලේඛන හැකියාවෙන් ලියූ ලෙස සැලකීම අසීරුය.)

The learned judge also glosses over the facts discussed earlier in this judgement pertaining to **chapters 1 and 2** of the 'work' *i.e.*, it is written in the 1st person and it is the autobiography of Publis Silva; the narration in the back cover page that this is Publis Silva's 1st complete book on culinary methods; and the wording in the invitation for the launch of the 'work', *'that internationally famous Chef of Mount Lavinia Hotel Publis Silva launches his book'* as factors that are irrelevant in coming to a finding regarding the 'holder of the copyright' of the 'work', ''ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්'', the matter in dispute.

Further, more, the learned judge rejects the affidavit filed by Publis Silva (**V5**), the agreement (**V2**) executed by Publis Silva and the defendant publishing company and the other cook books published by Publis Silva which are said to be in the public domain, upon the basis of Publis Silva not being present before court to substantiate such facts. The learned judge goes on to assert that the name of Publis Silva was used in the title of the 'work' with or without the knowledge of the plaintiff by the defendant, because of its 'brand name' and in order to increase the sales. (මෙම කෘතිය අලෙවි කිරීම සඳහා මෙය පබ්ලිස් සිල්වාගේ කෘතියක් ලෙස දැක්වීම සඳහා ප්‍රකාශකයා වන විත්තිකරු සමහර විට පැමිණිලිකාරියගේද අනුදැනුම හා සහයෝගය ඇතිව භාවිතා කළා වීමට බොහෝ ඉඩ කඩ ඇත). Thus, the learned judge asserts that the defendant publishing company has infringed the plaintiff's economic rights.

The learned judge concludes his findings referring to the use of the notation **"©"** and holding that the law does not require such a notation and goes on to hold that in any event the use of the notation **"©"** is not the work of the plaintiff but of the defendant Sarasavi Publishers. The learned judge makes no reference regarding the book authored by the plaintiff (**V6**) marked and produced at the trial, wherein admittedly the notation **"©"** is depicted and the plaintiff paid royalty as the copyright holder, by the very same publisher, the defendant Sarasavi Publications.

Thus, based upon the evidence of the plaintiff, which the learned judge re-iterates was not rebutted by Publis Silva, a finding is made firstly, that the 'work' ''ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්'' is the creation of the plaintiff and secondly, that the plaintiff is the 'author' of the publication and 'holder of the copy right' and thus, grants the following relief prayed for by the plaint to the plaintiff,

namely,

(i) prayer (a) and (b)

- a declaration that the plaintiff is the author of the 'work' and that the defendant publisher has infringed her economic rights;

(ii) prayer (c) and (d)

- a direction for the defendant to tender a report regarding the total sales and a declaration that the plaintiff is entitled to royalty payable by the defendant;

(iii) prayer (e)

- a sum of Rs. 837,500.00 to be paid by the defendant to the plaintiff as damages, computed on the basis of *10% royalty*, on books printed per edition x sale price x number of editions less advance paid; and

(iv) prayer (g)

- a permanent injunction preventing the defendant from printing, distributing, possessing and selling the 'works' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

The **computation of damages detailed in the judgement** is given below: -

- Total sale proceeds = [Number of books per edition x number of editions x sale price]

  = 2000 x 6x Rs 700/= = Rs 8,400,000/=

- Royalty = [10% of sales]

  = Rs. 8,400,000/= x 10% = Rs 840,000/=

- **Damages** = [Royalty – advance paid]

  = Rs 840,000/= - 25,000/= = **Rs 837,500/=**

At the hearing before this Court, the submissions of the counsel for the appellant publishing company was as follows:

- that the learned High Court judge failed to analyse the evidence adduced at the trial with regard to the plaintiffs' role as the 'editor' of the 'work';
- that the learned judge failed to consider the evidence *vis-a-vis* the provisions of **Section 14(3) and 14(4)** of the IP Act;
- the plaintiff failed to establish the authority she received and/or her relationship with Publis Silva to publish Publis Silva's 'ideas' in the 'work' and to use Publis Silva's picture and name in the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", by way of an express or implied contract or agreement or even as a 'common understanding' between the parties;
- that the learned judge failed to consider the delay and the silence of the plaintiff for more than two years, which creates a doubt regarding the genuineness of the cause of action; and
- that the plaintiff has failed to name Publis Silva as a party to the instant action.

Further the learned Counsel relied upon the judgements of **University of London Press Ltd v. University Tutorial Press Ltd [1916] 2 Ch 601; Macmillan and Co. Ltd v. Cooper (1924) 40 TLR 186;** and **JD Fernando v. Gamlath - S.C/CHC/04/2011- BASL LJ [2011] Vol XVII p.251-254** to substantiate its position.

Countering the said submissions, the counsel for the respondent took up the position,

- based upon **Section 5** of IP Act the plaintiff is the owner of the copyright;

- the defendant publishing company has failed to call Publis Silva to establish that the 'work' was a 'commissioned work'; and
- the compensation granted by the High Court based on six editions is insufficient as there were twelve editions of the 'work' published.

Having referred to the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", the impugned judgement, the submissions of the counsel for the appellant and the respondent, it is clear that Publis Silva plays a major role in the instant case. This brings me to the pivotal issue to be determined by this Court. Who is the 'copyright holder' of the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්"?

JAL Sterling in his renowned work, **"World Copyright Law"** [2nd ed] emphasizes as follows:

> *"The word 'copyright' means many things to many people. To some it signifies a component of the rights of man deriving from natural law and sustaining the work of the human mind by protecting authors in respect of all uses of their works. To others it represents a commercially inspired monopoly for the better regulation of the exploitation of the author's works in the market place. In between are other concepts, each with its own philosophical and juridical justifications."*

The law of copyright protects 'work' which are created as a result of an individual's creativity. Thus, it concerns the 'creators', literary and artistic creations and safe guards the legitimate interests of the 'users' of such creation. These concepts were originally embodied in the Berne Convention for the Protection of Literary and Artistic Works and are the main ingredients and the rationale underlying the protection of copyright, which have now entered domestic legal systems.

Granting of copyright therefore is in the nature of a privilege granted by law to certain types of creative works. Its primary purpose is to foster originality in literary, artistic and scientific productions and to afford legal protection to the authors. The goal of the provisions pertaining to copyright seems to be to encourage creation of and facilitate public access to works of intellectual interest to society. [See: **Vasantha Obeysekara v. A.C.Alles - CA No. 730/92F dated 22-03-2000**].

In **University of London Press Ltd v. University Tutorial Press Ltd** (supra) Peterson, J., at page 608 observed:

> *"The word 'originality' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas but with the expression of thought. [..] But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work, that it should originate from the author".*

In **Macmillan and Co. Ltd., v. Cooper** (supra) Lord Atkinson at page 190 observed:

> *"What is the precise amount of knowledge, labour, judgement or literary skill or taste which the author of any book or compilation must bestow*

upon its composition in order to acquire copyrights within the meaning of the Copyright Act of 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and in each case be very much a question of degree."

The above observations have been re-iterated by our appellate courts time and time again **[**See: **Wijesinghe Mahanamahewa and another v. Austin Canter [1986] 2 Sri LR 154; JD Fernando v. Gamlath [2011] 1 Sri LR 273** and **Director Department of Fisheries and Aquatic Resources and others v. Aloy Fernando and others SC/CHC/Appeal 30/2006 S.C.M. 10-09-2018]**

In order to establish 'creativity' and 'ownership of a copyright' which is distinctive from authorship, the factors to be proved and evidence to be led on skill, labour and knowledge would depend and vary on the special facts of each case and is very much a subjective test.

In **Fernando v. Gamlath** (supra) this Court clearly identified and recognized the reputation of a singer and went onto state that there has to be a way of safeguarding the rights of original artists, composers and singers especially when a singer has achieved a reputation which would be recognized from generation to generation.

In my view, such recognition could extend to a chef too, like in the instant case and his creations and copy right safeguarded for generations, regardless of him being able to read or write, educated or not so educated, a 'cook' (අරක්කැමියකු) rising up from humble beginnings or a chef (සූපවේදියකු) who has made an indelible mark in the culinary field here and overseas.

In a 'work', identification of the 'author' is paramount in deciding who the owner of the copyright is, since the author is entitled to not only 'economic rights' but 'moral rights' too, as guaranteed by **Sections 9** and **10** of the IP Act. To have the name of the author indicated in a work prominently is a 'moral right' and such right is not transmissible during the lifetime of the author. It is independent to the economic rights and will exist even after the author of the work has assigned the economic rights to another.

In the case before us, as discussed in detail earlier in this judgement, an 'author' is not identified in the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". However, in the title page, the holder of copyright is clearly and precisely identified by the notation **"©"**, namely as "Publis Silva".

The case presented by the plaintiff is that she is the author, whereas the 'work' itself only recognizes her as the 'editor'. The plaintiff is suing the defendant publishing company for royalty, and the contention of the publishing company is Publis Silva, the 'holder of the copyright', has assigned the re-production and publishing rights of the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" to the defendant publishing company.

The plaintiff did not name or bring Publis Silva with whom she alleges she had an understanding (පොදු එකඟතාව) to this case either as a party for notice only or as a necessary party to justify her contention that she is the 'author' of the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". Similarly, the plaintiff did not call or lead the evidence of Publis Silva as a witness, for the plaintiff to establish her contention or to challenge Publis

Silva for using the notation **"©"** in the 'work' in dispute, which she contends is her creation and upon which she claims she is entitled to royalty as the 'author' and 'holder of copyright'.

In my view, the plaintiff's failure to call or name Publis Silva who is a key player and literally adorns the 'work' cover to cover is a material fact that the learned judge has missed, ignored, and not considered in coming to its finding. It is more so and propound, since Publis Silva who was hitherto acknowledged and paid royalty as the holder of the copyright of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" for six editions, has now been deprived of that right and privilege without hearing him, which goes against the grundnome of the rule of law.

The gravity and importance in bringing the necessary parties before court, time and time again enunciated by this Court. In the said backdrop, I wish to look at the case law pertaining to the copyright regime in Sri Lanka (especially civil) to ascertain and identify the necessary parties that have been brought before our Courts, as defendants, in matters pertaining to infringement of copyrights.

In **Mahanama hewa v. Canter** (supra), the dispute related to two publications authored by the plaintiff and the 1st defendant on sinhala shorthand. The plaintiff alleged, that his copyright has been infringed by the 1st defendant and the question of originality of the work was the matter in issue and both parties were before Court and heard in determining the issue on 'originality'.

In **Fernando v. Gamlath** (supra) the dispute related to a musical composition of a renowned singer, plaintiff's late husband, which was alleged to be infringed by the defendant by distorting and using it in a teledrama without the permission of the plaintiff the holder of the copyright. In this case too, both parties were represented and heard prior to judgment being pronounced.

In **Ariyawathie Senadheera and another v. Shantha Senadheera and another SC/CH/Appeal 40/2010 S.C.M. 22-06-2017** the dispute revolved around a book titled "නූතන චිත්‍ර කලාවේ රසික සංකල්ප" authored by Kulanatha Senadheera an artist and scholar. Upon his death, a 2nd edition was published and the heirs of the author sued the alleged copyright holder the 1st defendant, [a relative who was signified by the notation "©" in the relevant publication *viz* the 2nd edition] and two others. The 1st defendant *i.e.* copyright holder, denied he was the copyright holder though cited by the notation "©" in the 2nd edition and acknowledged Kulanatha Senadheera as the copyright holder. The plaintiff thereafter did not pursue the case against the 1st defendant (whose name was signified by the notation "©") as well as the 3rd defendant, the publisher of the book and proceeded only against the 2nd defendant a nephew of the author, who was alleged to be directly responsible for the publication of the 2nd edition, without the express authority of the heirs of the deceased author. The High Court, having heard the evidence of the plaintiff and the 2nd defendant and taking into consideration the stand of the 1st and 3rd defendants, dismissed the application of the plaintiff pursued against the 2nd defendant. This decision was upheld by the Supreme Court. Thus, in this case too, the necessary parties were before court and heard prior to dismissal of the plaint.

In **Director, Department of Fisheries and Aquatic Resources and others v. Aloy Fernando** (supra), the Department of fisheries called tenders for a 'compilation of fishing crafts, gear and methods' for a UNDP project. The plaintiff and another person were hired for the said project by the Department of Fisheries and the said two persons submitted a report, 'a compilation' under their name. This report was published by the Department of Fisheries and in the 'published work', the plaintiff and the co-authors names were not included nor acknowledged, which ensued in the plaintiff filing this case against the defendant, Department of Fisheries, praying for a declaration that the plaintiff and the other, were the 'co-authors' of the 'published works'. Hereto, the court heard both parties who were before court prior to granting relief to the plaintiff.

From the foregoing it is apparent that all relevant and necessary parties have been brought before court as parties, represented and heard, prior to the trial court coming to a finding, regarding the ownership of the copyright and consequently the infringement of the copyright of the 'work' *per se*, in the cases referred to above.

In the instant case the main actor, the copyright holder, has not been brought before court as a party nor heard, prior to delivery of the judgement. Thus, an important link is missing in the equation. The learned High Court judge goes on the basis, that the defendant publishing company, did not bring Publis Silva to establish its defence. Is it the responsibility of the defendant or the plaintiff? Where does the burden lie?

The stand of the defendant publishing company is that the reproduction or the publishing rights were assigned to it by the 'creator' and the 'copyright holder' of the 'work' as evince by the agreement **(V2)** executed between Publis Silva and the defendant publishing company. Plaintiff is challenging the said position and states, she as the 'author' entered into an understanding with the defendant, to reproduce the 'work'. Then shouldn't the plaintiff first establish the said position. *i.e.,* that she is the author and she entered into an agreement to assign and/or license the defendant publishing company, to exploit her economic rights?

In my view, the plaintiff's real dispute appears to be not with the defendant publishing company but with Publis Silva himself who is recognized and identified by the notation **"©"** as the holder of the copyright of the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

In the impugned judgement, it is clearly seen that the 'work'"ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" *per se, i.e.,* the introductory pages, the title page, the front and back cover and its contents have not been examined by the learned judge. Nevertheless, based only on the evidence of the plaintiff and the assumption that the defendant failed to call Publis Silva to rebutt the evidence of the plaintiff and considering it to be the key element, the High Court judge gave judgement for the plaintiff accepting her as the 'author' and 'copyright holder' of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

Thus, the queries that need answer in the first instance or in other words, the threshold issues this Court should determine is, who is the creator? Who should call Publis Silva? Is it the plaintiff or the defendant? Who should establish the case in order to obtain the relief prayed

for? On whom does the burden of proof lie to substantiate the claim? Has the plaintiff proved the instant case on balance of probability or has the plaintiff failed to establish her contention?

In my view, Publis Silva is a necessary party to the instant matter, and the plaintiff has failed to name him as a party or call him as a witness to justify her contention that she is the author and the copyright holder, especially, since the 'work' prominently carry the notation **"©"** and bestows the copy right on Publis Silva. The defendant is only the publishing company and has no role to play in respect of the dispute pertaining to copyright between the plaintiff and Publis Silva. The significance in the plaintiff not bringing Publis Silva as a party or a witness to the instant case is greater, than the defendant calling him, as a witness to rebut the plaintiff's evidence as opined by the learned judge, since the burden lies on the plaintiff to establish her case. Moreover, the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", specifically acknowledges and identifies Publis Silva as the 'holder of copyright' by the notation **"©"** and that fact too, has to be negated by the plaintiff. Hence, my considered view is that the plaintiff has failed to discharge the burden of proof and thus, failed to establish the case for the plaintiff.

Regarding to the notation **"©"**, the learned High Court Judge determined, it is not relevant, since our IP Act does not mandate such a notation. There is no dispute that our IP Act does not recognize registration of a 'copyright' with a state authority or in a particular register. Our law based on the Berne Convention and common law concepts protects the 'works' from its creation as opposed to other jurisdictions where registration is mandatory. **Section 6(2)** of the IP Act provides that the 'specified works' referred to in **Section 6(1)** is protected by the sole fact of its creation and irrespective of its mode or form of expression, as well as its content, quality and purpose. Nevertheless, the publishing companies in Sri Lanka uses the notation **"©"**, to indicate the ownership of copyright following global trends.

In **Ariyawathie Senadheera v. Shantha Senadheera** (supra), the copyright acknowledged by the notation **"©"** was the matter in issue and this Court considered such notation in arriving at its determination. Hence, there is judicial precedence to rely on such notation and in my view the learned High Court judge erred in rejecting the notation **"©"** *in limine* and more so, what it symbolizes, namely, that the copyright holder of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" is Publis Silva.

Another factor that the counsel for the appellant drew the attention of this Court was the learned judge's failure to distinguish "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" with a book authored by the plaintiff herself titled, "දහකාරයන්ගේ විකුමය" **(V6)** and published by Sarasavi Publications. This Court observes, that the very same Dharma S. Samaranayake the plaintiff, has been acknowledged as the copyright holder by the notation **"©"** in the title page of the said book (**V6**) and paid royalty for her creation by Sarasavi Publishers, the very same defendant before this Court.

We also observe, that the learned judge has failed to appreciate the evidence of the 1st witness for the defendant, the Managing Director of Sarasavi Publishers, who referred to another cook book published by Sarasavi Publishes, titled "Authentic Sri Lanka Cuisine by Publis Silva" wherein too, the notation **"©"** is used, acknowledging that the copyright of the said book is with Publis Silva.

Hence, in my view, though the IP Act does not require any formality relating to 'copyright' it is evident in the publishing trade that the symbol **"©"** is vastly used to denote the holder of copyright and use of the said notation **"©"** has become a trade practice. Ironically, it has been used even in a book authored by the plaintiff (**V6**) herself, as discussed earlier.

DM Karunaratne, in his book **"An Introduction to the Law of Copyright and Related Rights in Sri Lanka"** at page 39 observes as follows:

> "The Indian Copyright Act for example, provides for registration of a copyright but it is not mandatory and is only *prima facie* evidence as it being entered in the Register of Copyright. In the United States of America, an action for infringement of copyright cannot be initiated unless the copyright is registered, subject to an exemption in respect of a work covered by the Berne Convention and work in question has been created in a country other than the United States of America".

I am also mindful that our IP Act by **Section 26**, has extended the scope of the application of our copyright and related rights law to non-nationals and to 'works' that are protected in accordance with any international convention or agreement to which Sri Lanka is a party.

Thus, a harmonized legal framework on copyright through increased legal certainty, while providing for a high level of protection of intellectual property will foster creativity. Hence, a consideration for trade practice, especially the use and significance of the notation **"©"**, without rejection in toto, in my view would auger well, for both the creators and the printing industry of this country.

In the said circumstances, especially when the 'work' itself acknowledges, by the notation **"©"** that the 'copy right holder' is Publis Silva, the failure of the plaintiff to name Publis Silva as a party to this case and more so, the failure of the plaintiff to call Publis Silva as a witness are relevant factors which should have been addressed by the learned judge, prior to coming to a finding on the question of copyright, since the paramount duty of a judge is to ascertain the truth at a trial.

In the instant case, the learned judge not only held that the plaintiff was the 'author' and 'copyright holder' and directed the publishing company to pay royalty to the plaintiff on the assumption that the ownership of the copyright of "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" is with the plaintiff but deprived Publis Silva, of his copyright without hearing him. The learned judge, came to such a conclusion, when Publis Silva is expressly acknowledged in the 'work' as the copyright holder by the notation **"©"** and moreover, when Publis Silva has been enjoying such right for the past nine years, flowing though many editions of the 'work'. The gravity of the finding of the learned judge, becomes significant since there is an express agreement (**V2**) before court implying that the rights of the copyright holder for publishing and reproduction of the 'work' had been assigned to the defendant publishing company by Publis Silva himself even prior to the publication of the 1st edition of the 'work'.

Thus, I see merit in the submissions of the appellant, that the High Court judge failed to analyse the evidence before court in determining the ownership of the copyright of the work "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". It is also observed that the learned judge failed to appreciate the role of the plaintiff *i.e.,* as the 'editor' of the work "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" *vis-a-vis* the copyright holder and more so, when the 'work' was a compilation and a compilation of recipes - a cook book. The mere fact of providing assistance in an abstract level as an editor or compiler, in my view will not entitle a person or a party to claim creativity of a 'work' and more so, the ownership of copyright of the said 'work'.

The learned counsel for the appellant as his next submission drew the attention of this court to **Section 14(3)** and **14(4)** of IP Act and contended that the learned judge has failed to analyse the provisions of the said sub-sections *vis-a-vis* the evidence led in arriving at the finding that the copyright of the work is with the plaintiff.

The said sub-sections read as follows:

> **Section 14(3) -** In respect of a collective work, the physical person [...]at the initiative and under the direction of whom or which the work has been created shall be the original owner of the economic rights.
>
> **Section 14(4) -** In respect of a work created by an author employed by a physical person [...] the original owner of the economic rights shall, unless provided otherwise by way of a contract, be the employer. If the work is created pursuant to a commission, the original owner of economic rights shall be, unless otherwise provided in a contract, the person who commissioned the work.

The learned judge in his findings, limits his observations to the sub-section pertaining to an 'author employed by a person' *i.e.,* **Section 14(4)** and determines, that the defendant cannot rely on this sub-section, since Publis Silva was not called by the defence, the publishing company.

Nevertheless, it is seen that the aforesaid sub-sections **14(3)** and **14(4)** clearly denotes that in the event the *'work' is done or created at the initiative and under the direction of another or in the course of employment or pursuant to a commission,* the person under whose direction or the employer or the person who commissioned the work shall be the original owner of the economic rights.

In the instant case, the plaintiff categorically admitted that the work was created under the direction of Publis Silva. (ලිව්වේ මම, එයා කිව්වම මම ගැලපෙන විදියට ලිව්වා).

Further, the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" clearly denotes that the content therein, is of *Sri Lanka Cuisine* by **chef Publis Silva of Mount Lavinia Hotel**. Moreover, the colour photographs included in the 'work' is published with the courtesy of Mount Lavinia Hotel and all rights of the photographs are reserved with Mount Lavinia Hotel. The 'work' itself is a compilation of 378 recipes. chapter eleven specifically refers to "Publis Special"- recipes invented by Publis Silva and chapters one and two is the autobiography of Publis Silva. The front and back cover pages feature Publis Silva and the

inner back cover page indicate the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්", is chef Publis Silva's 1st book. (පබ්ලිස් සිල්වා සූපවේදියාගේ ප්‍රථම ග්‍රන්ථයයි).

In the aforesaid, I find it difficult to fathom the rationale of the learned judge, when he shifts the burden of proof to the defendant and opines that the defendant publishing company should have called Publis Silva to rebut the evidence of the plaintiff. Similarly, the learned judge's finding that Publis Silva was not called by the defendant, because the defendant may with or without the knowledge of the plaintiff use the "brand name" or good will of Publis Silva as a marketing tool, and for that reason the original economic rights of the 'work' should vest with the plaintiff, to say the least is incomprehensive.

This is especially so, when the plaintiff herself pens, the 'editorial note' as 'editor' and not as the 'author'. The 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" as discussed herein admittedly acknowledges the plaintiff as the 'editor' and not as the 'author'. This leaves me with an unanswered query. Does the learned judge assume that the defendant has commercialized a celebrity's right or misappropriated an individual's personality? Is that the reason for the learned judge to determine, that the 'work' is the creation of the plaintiff? Moreover, is it the reason for the learned judge to hold that the defendant has infringed or violated the copy right of the plaintiff?

In my view, the aforesaid contention of the learned judge is illogical and not in accordance with the law. The evidence clearly indicate that the plaintiff has only edited the 'work', which was created under the direction and guidance of Publis Silva. Significantly, by the notation **"©"**, in the 1st edition of the 'work' itself, the 'copyright' was bestowed on Publis Silva and it continues to be with him even with the 6th edition. Thus, in terms of the law the economic rights too, should vest with the 'holder of the copyright', namely Publis Silva, until such rights are assigned or licensed to another, in accordance with the law.

Furthermore, the learned judge, as discussed earlier has not considered the 'work' as a whole nor looked into or referred to the contents therein and thus, failed to analyze the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" as a cook book, which has a separate copyright regime as a 'compilation', where the selection, arrangement and co-ordination of recipes are protected, if the recipes are creative in their own way and if accompanied by substantial literary expression in the form of an explanation or direction.

Hence, I see merit in the submission of the appellant, that the learned judge has failed to analyse the evidence adduced by the plaintiff with regard to her role as the 'editor' *vis-a-vis* the provisions of **Section 14(3) and 14(4)** of the IP Act.

Another factor that drew my attention is the finding of the learned judge, that the word 'author' and 'editor' are one and the same, based on the evidence of the plaintiff's only other witness, a Sinhala scholar of repute. However, the Court observes in the "මහා සිංහල ශබ්දකෝෂය" published by MD Gunasena and Co and edited by the same scholar, there is a marked difference between the definition of the word "කර්තෘ"- කිසියම් ක්‍රියාවක් කරන්නා- නිර්මාණය කරන්නා and "සම්පාදක"- සකස් කරන්නා- පිලියෙල කරන්නා- සපයන්නා.

Similarly, in the Sinhala-English Dictionary compiled and edited by Budhadasa Hewage and the Sinhala-English Dictionary compiled by Sompala Jayawardena, the words

‘author’ and ‘editor’ are defined and given separate meanings. Malalasekara’s English-Sinhala Dictionary also defines the words ‘author’ and ‘editor’ as two distinct words. Thus, it is very clear, that ‘author’ and ‘editor’ are definitely not one and the same as expressed by the learned judge. Corollary, Black’s Law Dictionary [11th ed] defines ‘author’ as the person who created an expressive work or the person or business that hires another to create an expressive ‘work’.

Hence, the words ‘author’ and ‘editor’ has to be considered not in a literal sense as propounded by the plaintiff’s witness and accepted by the learned judge but in the light of the copyright regime and the provisions of the IP Act, especially **Section 5** read together with **Section 14** and its sub-sections and the presumption in **Section 15.** Such consideration is necessary since this in turn would extend to the ‘author’ of a work or the ‘copyright holder’ to exploit or make profit of the ‘protected rights’ referred to in the IP Act, namely the ‘economic rights’, referred to in **Section 9**.

Independently, the ‘author’ of a ‘work’ is entitled to safeguard the ‘moral rights’ referred to in **Section 10**. This brings me to another matter that needs an answer. What is the moral right the plaintiff has in respect of the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” as against Publis Silva? To have the plaintiff’s name indicated prominently on the copies or to object to any distortion, modification or other derogatory action as stated in the section, in relation to “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” prejudicial to the plaintiff’s honour and reputation? In my view, acknowledging the plaintiff who was only the ‘editor’ of the ‘work’, to be put on a pedestal as the ‘author’ and ‘copyright holder’ goes against the pith and substance of the IP Act and would amount to absurdity, when the plaintiff is given a moral right for example, to protect her honour and reputation, which Publis Silva will not be entitled to, with regard to “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්”.

At this juncture, I wish to consider the submissions of the learned counsel for the respondent. His main submission was that the plaintiff is the ‘author’ of the work and based upon the definition clause in **Section 5** of the IP Act and, the plaintiff is the sole owner of the copyright and such position has not been rebutted by the defendant. For the reasons elucidated in detail earlier in this judgement, I find it difficult to accept the contention of the counsel for the respondent and limit myself to look at **Section 5** only, and permit the plaintiff to exploit the protected rights, when the ‘work’ “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” (**P3**), *prima facie*, showcase that the plaintiff was not the ‘author’ but was only the ‘editor’ of the ‘work’ in dispute “ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්” and the role of the ‘editor’ cannot be compared with the role of the ‘author’. Thus, I reject the contention of the respondent and look at the broader picture of the IP Act, to come to a determination of this appeal.

The next contention of the plaintiff that the script handed over to the defendant publisher was in the hand writing of the plaintiff in my view, cannot negate or over-ride the ‘work’ itself which clearly acknowledge the ‘copyright holder’ to be Publis Silva. In order to challenge what is embodied in the ‘work’ itself in black and white, the plaintiff should have named or called and led the evidence of Publis Silva. Then maybe, as transpired in the case of **Ariyawathie Senadheera v. Shantha Senadheera** (supra) where the dispute pertained to the book titled ‘නූතන චිත්‍ර කලාවේ රසික සංකල්ප’, the copyright holder denoted by the notation

"©", could have clearly indicated to court, whether such person was the owner of the copyright or not, which would have sealed the issue, *in limine*.

Further, this Court observes that the plaintiff has not only failed to establish her relationship with Publis Silva but also failed to prove the 'common understanding' and or the authority and or approval she obtained to use Publis Silva's name, his profile, his picture, his vision, the recipes invented and created by Publis Silva as well the permission to reproduce the food styling and coloured photographs depicted in the 'work'. Similarly, the plaintiff has also failed to establish under what authority the name of Mount Lavinia Hotel, is referred to in each and every page of the 'work' and the hotel itself is featured on the cover page of the book, "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

Having considered and examined the evidence led at the trial and the law pertaining to copyright, my considered view is that the plaintiff has failed to establish that she is the 'owner of the copyright' of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and therefore the action filed by the plaintiff cannot be substantiated.

The final submission of the counsel for the appellant at the hearing before us, was the delay and the long silence of the plaintiff in challenging the ownership of the copyright of the 'work', which he submitted tainted the impugned judgement. Therefore, the judgment cannot be left to stand, the learned counsel contended.

The work in dispute was first published in March 2005. The plaintiff demanded royalty from the defendant publishing company only three years after the publication and even after the 6th edition rolled out of the press. No reason has been offered for the delay and the failure to demand royalty from March 2005, until a letter of demand was sent in March 2008. Further, it is observed the plaintiff failed to annex even a copy of the 1st edition of the 'work' to the plaint when filing the instant case in July 2008 and did so only after the trial began.

Thus, this Court sees merit in the submission of the learned counsel for the appellant, that the delay in the plaintiff to espouse her claim and especially the long wait of three years to claim the balance sum due as adverted to by the plaintiff, on the ground that Rs 25,000/= was paid by the defendant publisher only as an advance payment, creates a doubt as to the veracity of the plaintiff's claim. Would a prudent person, wait for such a long time, without demanding royalty if it was justly due? In any event, it is an accepted legal maxim, that "delay defeats equity".

In the aforesaid circumstances, it is evident that the learned High Court judge has failed to analyse the evidence before court in respect of the plaintiff's role as the 'editor' of the disputed work and also failed to appreciate the difference and the precise nature of the 'author' and the 'owner' of the copyright of the 'work' in dispute "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

Furthermore, the learned judge has misdirected himself in applying the provisions of the copyright law in determining the original owner of the economic rights and the assignment and transfer of the economic rights pertaining to the disputed 'work'.

Moreover, the learned judge has erroneously determined the burden of proof in the instant case by shifting the responsibility to the defendant, when in fact the plaintiff should establish the case instituted.

The learned judge has also failed to appreciate the role of Publis Silva in the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and also not appreciated the distinction between originality and creativity in determining this matter in favour of the plaintiff and thus the judgment goes against the grain of basic principles of the rule of law.

Upon perusal of the impugned judgement, it is further observed that the relief granted by the learned judge is also imprecise and ambiguous. Consequent to granting prayer (a) and (b) of the plaint, *viz* the declarations more fully discussed earlier in the judgement, the plaintiff was also granted statutory damages, as per prayer (e) of the plaint in a sum of Rs. 837,500/= said to be computed as 'royalty less advance paid'. However, when the advance payment of Rs. 25,000/= is deducted from Rs. 840,000/= the royalty granted (calculated as per the learned judge's computation), the balance amount to be paid would be Rs. 815,000/= and not Rs. 837,500/= as stated in the judgment. Thus, the computation of damages by the learned judge is also patently erroneous.

Further it is observed, the learned judge also granted the plaintiff relief in terms of prayer (c) & (d) i.e., a direction to call for a full report of sales of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and a declaration for the defendant to pay royalty to the plaintiff upon the said sales but did not determine a rate or a percentage as a basis of calculating royalty.

In any event, no evidence was led by the plaintiff with regard to the computation of royalty. Is it 10% or 15% as agreed in the **V2** agreement or some other rate?

Corollary, is the aforesaid declaration in prayer (d) to pay royalty, independent to the payment of statuary damages in prayer (e)? If so, when should prayer (c) & (d) be implemented? These are also matters that have not been clearly and precisely stated and answered in the impugned judgement, which leads on to the assumption that the relief granted by the learned judge is ambiguous and uncertain.

The issue becomes more compounded by the respondent peddling a case before this Court that the damages granted is not sufficient and that the learned judge was in error when only royalty was calculated for six editions, when it ought to be for twelve editions of the 'work', "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්".

I observe that although the learned judge granted statutory damages in terms of **Section 170(10)** of the Intellectual Property Act, that the calculation of such sum *i.e.* damages, was based upon royalty calculated at 10% into six editions of the 'work' been published. Nevertheless, there was, no documentary evidence whatsoever to suggest that twelve editions have been published.

In the aforesaid circumstances, whilst I reject the submission of the respondent with regard to the enhancement of damages, I hold that the relief granted by the High Court is ambiguous, imprecise and erroneous.

Having considered the facts of this instant case and especially the 'work' in dispute "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්" and the law governing "copyrights" and for reasons more fully adumbrated in this judgement, I hold that the learned High Court judge was in error and misdirected himself in declaring that the plaintiff is the author, owner and copyright holder of the 'work' "ගල්කිස්ස හෝටලයේ පබ්ලිස් සිල්වාගේ හෙළ රටාවට ඉවුම් පිහුම්". Moreover, the relief granted to the plaintiff, is erroneous and not in accordance with the law.

In conclusion and for reasons more fully stated herein, the impugned judgement of the High Court dated 17th May, 2013 is set aside and the plaint dated 30th July, 2008 is dismissed with costs fixed at Rs. 25,000/=, payable by the Plaintiff-Respondent to the Defendant-Appellant.

The appeal is allowed with costs of Rs. 25,000/=.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree

Judge of the Supreme Court

A.H.M.D. Nawaz, J.
I agree

Judge of the Supreme Court

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

In the matter of an application for review of judgment delivered in SC/APPEAL/53/2012 dated 14th December 2018, under and in terms of Article 132(3)(iii) of the constitution of the Democratic Socialist Republic of Sri Lanka and/or in the exercise of inherent powers of the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC/MISC/03/2019

Suntel Limited,

No. 110. Sir James Peiris Mawatha,

Colombo 02.

Plaintiff

Vs.

Electroteks Network Services Private Limited,

No. 429 D, Galle Road,

Ratmalana.

Defendant.

AND BETWEEN

Dialog Broadband Network (Private) Limited,

No. 475, Union Place,

Colombo 02.

Plaintiff – Appellant.

Vs.

Electroteks Network Services Private Limited,

No. 429 D, Galle Road,

Ratmalana.

Defendant -Respondent.

AND NOW

Electroteks Network Services Private Limited,

No. 429 D, Galle Road,

Ratmalana.

Defendant – Respondent – Petitioner.

Vs.

Dialog Broadband Network (Private) Limited,

No. 475, Union Place,

Colombo 02.

Plaintiff – Appellant – Respondent.

Before: Jayantha Jayasuriya, PC, CJ

Murdu N.B. Fernando, PC, J

P. Padman Surasena J

S. Thurairaja, PC J

E.A.G.R. Amarasekara J

Counsel: The Defendant – Respondent – Petitioner appears through his authorized agent namely, B. A. C. Abeywardena, Managing Director.

Dr. K. Kanag Iswaran, PC with Lakshmanan Jeyakumar, Aruna De Silva and Sahshim Haran for the Plaintiff – Appellant – Respondent instructed by F.J. & G de Saram.

Argued On: 14.09.2020.

Decided On: 19.05.2023

E.A.G.R. Amarasekara, J.

As per the petition dated 30th January 2019, the Original Plaintiff Suntel Limited had instituted an action in the Commercial High Court of the Western Province on 20th November 2001, against the Defendant – Respondent – Petitioner (hereinafter referred to as the Defendant – Petitioner) to recover a sum of Rs. 68,765,407/91 allegedly due as unpaid outstanding as of 3rd October 2000 in terms of an agreement between them. The Defendant Petitioner had filed his answer on 30th May 2002 praying inter alia under its first claim in reconvention for a sum of Rs. 41,040,185/12 being an over payment made and under its second claim in reconvention for a sum of Rs. 4,180 million comprising;

1. Rs. 2,180 million estimated loss of profit for 5 years as a result of the wrongful and unlawful disconnection of the telephone service breaching the agreement, and,

2. Rs.2000 million loss as a result of the loss of good will on that action.

The said petition further states that while the trial was proceeding the Plaintiff withdrew the said case and the Plaintiff's case was dismissed. However, the Defendant Petitioner sought to proceed with its claims in reconvention and the matter proceeded to trial accordingly. Subsequently, on 9th March 2012 learned High Court Judge delivered her judgment granting the Defendant - Petitioner the reliefs as prayed in the claims in reconvention. Being aggrieved by the said judgment of the learned Commercial High Court Judge, Plaintiff preferred an appeal to the Supreme Court on or around 16th March 2012. The said petition further reveals that thereafter, the Plaintiff Company Suntel Limited was amalgamated with the Company named Dialog Broadband Networks Private Limited and all the assets and the liabilities of Suntel Limited became assets and liabilities of Dialog Broadband Networks Private Limited, the present Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff Respondent). The appeal was taken up by this court before a bench comprising of three judges and the judgment was pronounced on 14th December 2018 in open courts and by the said judgment learned Judges of the Supreme Court held in favor of the Plaintiff –Respondent and allowed the appeal by setting aside the judgment of the Commercial High Court.

Being dissatisfied with the said judgment delivered by this court, the apex court of the country, which exercises the final appellate jurisdiction, the Defendant – Petitioner has preferred this application by the said petition before this court inter alia praying for an order setting aside the judgment dated 14th December 2018 delivered in the Supreme Court case No. SC/Appeal/53/2012. The Defendant-Petitioner further requested for a bench comprising of five or more judges of the Supreme Court be appointed to hear this matter. At the top of the caption to the petition, this application has been described as an application to review the said judgment of this court under Article 132(3)(iii) of the Constitution and / or in the exercise of its inherent powers.

The Defendant - Petitioner preferred this application in this court alleging that the judgment demonstrates extreme bias of the judges towards the Plaintiff Respondent inter alia for the following reasons;

1. Son of the presiding judge, as a junior counsel, has associated the Counsel who appeared for the Plaintiff Respondent in the Commercial High Court and the said Counsel was the junior to the Counsel who appeared in this court for the appeal filed by the Plaintiff Respondent. Nowhere has the Defendant Petitioner said that the said son of the presiding judge had appeared as a junior counsel in the relevant action in the original court or in appeal but he refers only to a different case namely CHC /282/2001. The Defendant Petitioner's allegation is that the son of the presiding judge was in association with the said Counsel of the Plaintiff Respondent almost one year prior to the pronouncement of the judgment and it has created a conflict of interest for his father who had been writing the judgment in the case SC/Appeal/53/2012 during the said association causing a reasonable suspicion as to whether the said justice was impartial in delivering the judgment.
2. There is a serious irregularity of existence of two judgments for the case SC/Appeal/53/2012, one appeared as decided and delivered on 12th December 2018 and another as decided on and pronounced on 14th December 2018. (In this context, the petitioner at no stage claims that the contents of the two judgements are different. However, there is a difference on the date of pronouncement as recorded in the copy published in the Supreme Court web site. This Court notes that the soft copy of the unsigned judgement is published in the web site by the Registry and the valid official version is the hard copy signed by the judges filed of record. Therefore, it appears that a possible typographical error in the soft copy is now being used to form accusations against the judges who heard and delivered the judgment).
3. Although the matter was argued for 10 days, only 2 days of arguments i.e., 18th and 19th of October 2016 have been taken for consideration and that written submissions have not been considered by court. This allegation is made on the basis that just before the body of the judgment and after the caption it is mentioned that the matter was argued on 18th and 19th of October 2016. However, the Defendant Petitioner fails to specifically identify any particular submission or argument that had not been considered in the

judgement. On the other hand, the petition itself in paragraph 47 indicates that no party filed written submissions within the given time.

4. The judge who wrote the judgment has taken quotes from a deleted section of a document in pronouncing the judgment and other judges have consented to the judgment.
5. The said judges have overlooked an available and marked document in the appeal brief while stating that the said document does not form a part of the brief.

Items no.3,4 and 5 mentioned above, if they are true and have affected the final conclusion, might have been considered under the wider interpretation that may be given to per incuriam concept, which wider interpretation is referred to later in this order. With regard to item no.01 above, it must be noted that it is not uncommon for family members of judges or their colleagues in the University or Law College engaging in the legal profession and practicing in courts. They are independent adults who in their own right engage in the profession. The mere fact that such relationship exists between a family member of the judge and a junior counsel of the team of counsel representing one of the parties before the judge per se is not a ground to allege bias against the judge. Other than the presiding Judge's son's association with the Junior counsel for the Plaintiff- Appellant in the Appeal in a different case, no specific interest or a pecuniary interest of the presiding judge has been averred with regard to the subject matter in the instant application. In relation to item no.2 above, as observed above the difference in the date is found in the copy published in the Web and not in the official copy found in the case record. Even a typographical error in a judgement including an error relating to the date can be corrected using the inherent powers of the court. In that context, an error found in a web copy published by the Registry appears to be a far-fetched reason to blame the relevant Judges. Nonetheless, this court need not go into the merits of this allegations and make final conclusion over such allegations due to the preliminary objection taken by the opposite party which has to be upheld due to reasons given later in this order.

When this petition was to be mentioned on 12.06.2019 before the two judges who took part in the previous decision making in delivering the judgment (the other judge had gone on retirement by that time), the Defendant Petitioner has objected and has requested to appoint a bench comprising of 5 judges in terms of the Article 132(3)(iii) of the Constitution – vide minutes dated 17.05.2019 and 30.05.2019. Motions filed on 24.05.2019 by the Defendant Petitioner also indicate that the plea is to appoint a bench of five or more judges to hear the instant application. It is abundantly clear from the contents of the petition dated 30.01.2019 and the motions filed by the Petitioner, that the application of the Defendant Petitioner is not based on per incuriam concept. The Petition and said motions unambiguously indicate that the Defendant Petitioner based his application on bias of the judges, fabricating of false evidence by the judges and certain impugned criminality associated with the judgment on the part of the judges.

When this application was first filed, the learned listing judge had made a direction to support this application on 17th May 2019, and when on that day it was listed for support as usual, the

bench in terms of the decision in **Jayaraj Fernanadopulle V Premachandra de Silva and Others (1996) 1 S L R 70** has directed to list the matter before a bench where two of the learned judges who heard and delivered the impugned judgment would be members – vide minute dated 17.05.2019. It appears by this time the other learned judge who took part in hearing and delivering the said judgment had retired from service. Meanwhile on a motion filed by the Defendant Respondent Petitioner, His Lordship the Chief Justice has referred the present application to be considered and decided by three judges nominated by his lordship, two of them being the two learned judges who were in service after the delivering of the impugned Judgment by them. One of the learned judges who took part in the decision making has directed to support the application in open courts and later on he also went on retirement pending the consideration of this application. The learned Judge who wrote the judgment has recused from considering the application due to the contents of the application. The third judge who was nominated by His Lordship the Chief Justice had expressed the view that this court has no power to go into the allegations relating to the misconduct of the judges of this court. He has also declined from hearing this application due to the reasons recorded in the brief -vide Journal Entry dated 16.06.2020.

As per the brief, the Defendant Respondent Petitioner has filed further motions requesting for a suitably constituted bench and His Lordship the Chief Justice has made certain directives to support all the motions before a bench of 5 judges nominated by his lordship. At the end, this matter was taken up before a bench of 5 judges on 14.09.2020. On that date the Plaintiff Respondent made submissions through his counsel with regard to the preliminary objections raised and the Defendant Respondent Petitioner through his authorized agent, namely B A C Abeywardena addressed the court on the preliminary objections so raised by the Plaintiff Respondent.

It was argued by the learned President's Counsel for the Plaintiff Respondent, that the English principle of finality of a judgment of the final court of appeal in its judicial hierarchy was received into our legal system legislatively, first by the Administration of Justice Law No. 44 of 1973, section 14(5) and by the1978 constitution, through its Article 127(1). Accordingly, it was argued that the Supreme Court is the final appellate court of the country and a judgment of the Supreme Court is final and conclusive and it is the parliament that can intervene to correct a judgment which is alleged to be wrong. Accordingly, prayed for the dismissal of the application due to lack of jurisdiction of this court to hear and determine this matter.

It is worthy to see whether this Court lacks jurisdiction to entertain and hear this type of application. Attention shall first be drawn towards the relevant Articles in the Constitution.

The Article 118 of the Constitution of the Democratic Socialist Republic of Sri Lanka reads as follows;

"*118.The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise –*

(a) jurisdiction in respect of constitutional matters;

(b) jurisdiction for the protection of fundamental rights;

(c) final appellate jurisdiction;

(d) consultative jurisdiction;

(e) jurisdiction in election petitions;

(f) jurisdiction in respect of any breach of the privileges

of Parliament; and

(g) jurisdiction in respect of such other matters which

Parliament may by law vest or ordain".

This is an application to review the judgment made by this court over a final appeal already made to this court under (c) above and concluded after hearing. This application does not fall within the ambit of (a) to (f) mentioned above. The Defendant Petitioner failed to draw the attention of this court to any law passed by the Parliament that empowers this court to entertain and hear an appeal or review or revision over a decision of this court made in relation to a final appeal and this court is unaware of any such law that gives a right of appeal or revision or review over a judgment of a final appeal made by this court. Hence this application does not fall within the ambit of Article 118(g) mentioned above. As stated in **Jayaraj Fernanadopulle V Premachandra de Silva (1996) 1 S L R 70** our Supreme Court is a Creature of Statute and its powers are statutory. Thus, the scope of its power has to be limited to what is laid down by the Statutes but for the inherent powers any court has to meet the ends of justice and to prevent abuse of process. This court has no statutory jurisdiction conferred by the Constitution or by any other law to rehear, review, alter or vary its decision. Its decisions are final.

In some of the cases decided by this court it has been held that this court has inherent powers to correct its errors and mistakes which are demonstrably and manifestly wrong where it is necessary for the interest of justice. – See **Ganeshanatham V Vivienne Goonewardena and Three Others (1984) 1 Sri L R 321, All Ceylon Commercial & Industrial Workers Union V Ceylon Petroleum corporation and others (1995) 2 Sri L R 295**. Such circumstances may not fall within the restrictive interpretation given to per incuriam rule but may fall within the wider interpretation given to it as referred to later in this order. However, the present application does not refer to an error or mistake caused by this court but is based on the alleged wrongful conduct of the judges who heard the appeal.

The final appellate jurisdiction of the Supreme Court is further outlined by Article 127 of the constitution as follows;

"*127 (1) The Supreme Court shall, subject to the Constitution,* ***be the final Court*** *of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be* ***final and conclusive*** *in all such matters*". (Highlighted by me)

Reading of Article 118(c) and 127(1) clearly indicate that the decision made by this court in a final appeal is final and conclusive. The impugned judgment has been delivered by a bench comprising of three judges. The above quoted Articles do not create any Jurisdiction for a bench comprising of 5 or 7 or any higher number of judges to hear an appeal or a review or a revision over that judgment or decision made by a bench of three judges of this court.

The caption of the present application shows that the application was made under and in terms of Article 132(3)(iii) of the Constitution of and /or inherent powers of the Supreme Court. Article 132 does not empower this court to entertain or hear an appeal, revision or to review a judgment made by this court on a final appeal. Article 132(2) clearly states that this court can exercise its jurisdiction in different matters at the same time by several judges of the court sitting apart. Thus, it is obvious that a decision made by any division of this court is a judgment of this court.

It is worthy to refer to the decision in **Hettiarachchi V Seneviratne, Deputy Bribery Commissioner and Others (No.2) (1994) 3 S.L.R 293 at 296 and 297** at this juncture. The order of the Court made in that case states as follows.

> *"It is quite wrong to assume, as the petitioner does in his motion that the power of the Chief Justice under Article 132(3) to direct that an appeal, proceeding or matter be heard by a bench of five or more judges of, in his opinion, the question involved is one of general and public importance, makes any difference. That provision confers no right of appeal, revision or review." (At page 296)*

> *"It is well established rule that in general a court cannot rehear, review, alter or vary its own judgment once delivered. The rational of that rule is that there must be finality to litigation. Interest republicae ut sit finis litium. A court whose judgments are subject to appeal, cannot set aside or vary its judgment, even if plainly wrong in fact or in law: that can only be done in appeal. It may of course, have a limited power to clarify its judgment, and to correct accidental slips or omissions." (At page 197)*

Right to appeal against an order/ judgment by a court has to be given by law. No such right has been given against a judgment of this court over a final appeal. Further, in the above decision this court held that the decision given by a bench of three judges in that case was a judgment of the Supreme Court and they were not sitting as a fragmented part of the Supreme Court. In the said Order of Court, it was specifically stated that Article 132(3) confers no right of appeal, revision or review. No doubt that article 132(3) confers power on the Chief Justice to direct that an appeal, proceeding or matter be heard by a bench of five or more judges if, in his opinion, the question involved is one of general and public importance, but the said decision indicates that it

does not create a right of appeal to be considered by a higher number of judges of the same court. A similar approach was taken in the case of **Suren Wickramasinghe and others V Cornel Lionel Perera and others (1996) Vol VI Part II Bar Association Law Journal Reports 5**, and Fernando J, stated

> *"Article 132 shows, ex facie, that the power can only be exercised in respect of a pending appeal, proceeding or matter – but not in respect of a concluded matter…….Further, in terms of Article 132(2) a judgment or order delivered by a bench of three judges is the judgment or order of the Supreme Court, and not of "some a fragmented part of the Court"; it is final [of Article 127(1)], and is not subject to appeal to another bench of Court, even if it were to consist of five, or seven, or nine or even all the Judges……."*

The learned Justice further went on to say that using Article 132(3) in a way conferring right of appeal, revision or review would be to usurp legislative power, in order to create an additional right of appeal which the Constitution did not confer; and indeed, an effect to create a right of appeal with leave from the Chief Justice sitting alone. Even in **Jeyaraj Fernandopulle V Premachandra de Silva and Others (supra)** it was held that a decision of this Court is final; it is not subject to any appeal, revision review, re-argument or reconsideration. At page 98, with reference to Article 132 and 132 (3) it was plainly said *"..Article 132 does not confer any jurisdiction on the Court. Nor does Article 132(3) empower the Chief Justice to refer any matter of public or general importance to a Bench of five or more Judges. It empowers him to constitute a Bench of five or more Judges to hear an appeal, proceeding or matter which the court has jurisdiction to entertain and decide or determine. The court has no statutory Jurisdiction to rehear, reconsider, revise, review, vary or set aside its own orders. Consequently, the Chief Justice cannot refer a matter to a Bench of five or more Judges for the purpose of revising, reviewing, varying or setting aside a decision of the Court…*"

In **Ganeshanatham V Vivienne Goonawardene and Others (supra)** it was clearly stated that the Supreme Court has no jurisdiction to act in revision of cases decided by itself, and none of the provisions of the Constitution expressly confers such a jurisdiction on it, nor has the legislature conferred such a jurisdiction by law. It was further stated that the Supreme Court is a court of last resort in appeal and there is finality in its judgment whether it is right or wrong and that is the policy of the Law. I do not see that later amendments to the Constitution have brought any changes to the said policy.

What is discussed above confirms that Article 127 of our Constitution contains the principal of finality. Thus, this court has no jurisdiction to entertain or hear the present application under any statutory provision and as such the Defendant Petitioner's application made under and in terms of Article 132(3) cannot succeed.

Now this court must consider whether this application can be entertained and heard in exercising the inherent powers of this court as the Defendant Petitioner has referred to the inherent powers of this court in invoking the jurisdiction of this court. Inherent powers are to prevent abuse of

process and to meet the ends of justice. There may be very limited occasions where a court would exercise its powers in an already concluded matter or application. For clarification of its order or judgment or to correct any accidental omissions or slips or clerical or arithmetical mistakes, a court may revisit a concluded matter. In the same way courts, to meet the ends of justice may vacate its decisions made in *per incuriam*. In its restricted sense a decision made in *per incuriam* means a decision made in ignorance or forgetfulness of an existing statute or a binding decision. [for restricted interpretation of *per incuriam* concept, see **Huddersfield Police Authority V Watson (1947) 1 All E R 193, Alasupillai V Yavetpillai (1949) 39 C L W 107, Hettiarachchi V Seneviratne, Deputy Bribery Commissioner and Others (No.2) (1994) 3 Sri L R 293**.] However, the dictionary meaning of the Latin term *per incuriam* appears to connote something similar to ''through lack of care". [for a broader meaning of *per incuriam*, see **Gunasena V Bandaratilleke (2000) 1 Sri L R 292 at 301 and 302 and Kariawasam V Priyadharshani (2004) 1 Sri L R 189**]. Adopting the extreme wider meaning represented by the said dictionary meaning may become an obstacle to reach finality in litigation, since lack of care may even appear in evaluation of evidential material after every party is given a chance to present their stances and evidence. Anyway, our courts on certain occasions, where mistake was so obvious, have used the *per incuriam* concept in much wider meaning than Lord Goddard's interpretation in **Huddersfield Police Authority V Watson** above. [for such wider application see **King V Baron (1926) 4 Times of Ceylon Reports 3, The Police Officer of Mawalla V Galapatha (1915) 1 C W R 197, V.A. Ranmenika V B. A. S. Tissera 65 N L R 214, Kariawasam V Priyadharshani (supra) and Gunasena V Bandaratillake (supra**)]. However, it must be noted that this application does not allege any accidental omission or slip or any clerical or arithmetical errors. Neither it requires any clarification of the judgment made in the final appeal nor it alleges any unintentional obvious mistake and/or error. The Defendant Petitioner does not allege that the impugned judgment was made in *per incuriam* whether in its restricted or wider sense. Thus, this application does not fall under those categories to reconsider the order made. If the allegations fell under those categories, it could have been considered in a better way by the same judges who delivered the judgment. It is clear from the record that the Defendant Petitioner was objecting for the same judges who delivered the judgement considering this application. The allegation made in this application contemplates a sort of a new cause of action against the judges who heard and decided the final appeal for them being bias and /or being acted in a fraudulent manner and/or involved in fabricating false evidence etc. which allegedly represents an intentional wrongdoing by the said judges.

It is also worthy to refer to the decision made in **Jeyaraj Fernandopulle v Premachandra De Silva and Others (1996) (supra)** again, since there too was a decision made on an application to revisit the judgment made by a bench comprising of three judges by a higher number of judges. Even though, in the said decision it was clearly said that this court has no statutory jurisdiction to rehear, reconsider, revisit, review, vary or set aside its orders, it also recognized that there are certain circumstances under which a Court has the power to re consider judgments or order given by it using its inherent powers. Some of the circumstances discussed in the said case, where

inherent powers may be used to revisit a decision already made, is tabled below with a comparison to the present application before this court.

1. Orders made *Per incuriam* – In this regard several cases have been referred there in the **Jeyaraj Fernandopulle case**. Some have been referred to above.	Present application as explained above, has not been presented on the premise that it is made *per incuriam*
2. Presence of clerical mistake or error from an accidental slip or omission- Referring to **Marambe Kumarihamy v Perera (1919) VI C W R 325, Padma Fernando V T. S. Fernando (1956) 58 N L R 262 etc.**	Present application is not based on an accidental slip or omission.
3. Where a need arises to vary or clarify the order to carry out its own meaning and where the language used is doubtful to make it plain. Referring to **Lawree V Lees (1881) 7 App.Cas 19.34, Re Swire (1895) 30 CH. D 239, Paul E De Costa & Sons v S Gunaratne 71 N L R 214, Hatton V Harris (1892) A C 547 etc**	Present application is not made for such purposes.
4. Where a party has been wrongly named or described or where the judgment is a nullity owing to the fact that it was delivered against a person who is dead or a non-existing company- **Referring to Halsbury, Vol.26-page 26**	Present application does not relate to such circumstances.
5. Where the order or judgment has been delivered in default or *ex parte*.	Present application is not made on such grounds.
6. Where there is a serious irregularity in procedure that makes the judgment a nullity- for e.g., not serving summons or not following a mandatory provision of law.	Present application is not based on such grounds.

7. To repair an injury caused by an act of court done without jurisdiction (by an invalid order). - for e.g., executing a decree to evict a party without a decree for possession.	Present application is not similar to the said situation. In this occasion the judges were using the jurisdiction they had to hear and decide the matter. Allegation is that they were bias, acted fraudulently in creating new evidence and or ignoring available evidence and there is a criminality attached to such behavior. In a way a new cause of action that purportedly accrued while the case was being heard and decided.
8. Dismissal of an FR application on a misunderstanding of facts placed by the opposite party that the petitioner has been or due to be released from detention. – Referring to **Palitha v O I C Police Station, Polonnaruwa & Others (1993) 1 Sri L R 161**	Present application is not similar to this.
9. An order made on wrong facts given to the prejudice of the Petitioner – Referring to **Wijeysinghe et al V Uluwita (1933) 34 N L R 362**	Present application differs from this and is based on allegations made against the judges.
10. An action to rescind a judgment which has been obtained by fraud. - Referring to **Halsbury vol 26, paragraph 560, page 285** .	In the present application, the allegation is not that the Court was deceived by fraud and obtained the judgment but the court itself was bias, fraudulent and acted in a manner that attracts criminal liability. Thus, as alleged, it is a kind of new cause of action.
11. An action to rescind a judgment on the discovery of new evidence which were not available before. – Referring to **Halsbury vol 26 paragraph 561, Loku Banda V Assen 2 N L R 31**	Present application is not to rescind a judgment based on discovery of new evidence but on certain allegations against judges who heard the appeal.

In my view, most of the instances referred to above in the table under item 2 to 9 may fall within the wider definition of *per incuriam* or obvious mistakes since those instances relate to where the court make such decision in ignorance of certain situation due to lack of care or by being misled by the circumstances etc. On the other hand, the instances discussed in the said **Jeyaraj Fernandopulle case** may not be exhaustive since there may be many occasions that demands the use of inherent powers of the court depending on the circumstances of each case.

However, the situations discussed in the said **Jeyaraj Fernandopulle case** where inherent powers had been used are not similar to facts of the present application. It must be mentioned here that inherent powers are adjuncts to the existing jurisdiction to remedy injustice and cannot be made the source of a new jurisdiction to revise a judgment rendered by a court - vide **All Ceylon Commercial and Industrial Workers Union V Ceylon Petroleum Corporation and Another** (supra**), Ganeshanatham v Goonewardene** (supra). Thus, in my view, the inherent powers this court has are adjuncts to the statutorily given jurisdictions as contemplated by Article 118 of the constitution and do not extend to entertain an application such as one tendered by the Defendant-Respondent-Petitioner.

However, as said before, our Supreme Court is creature of statute. Thus, its powers have to be given by the statute. Our constitution does not give supervisory jurisdiction over its own decisions. As described above inherent powers are adjuncts to existing jurisdiction and cannot use to create new jurisdictions to review, revise or reconsider its own decision.

The Defendant Petitioner in one of the motions has referred to **Bandaranaike V De Alwis and Others (1982) 2 S L R 664** to indicate that this court can hear an application against another judge of this court on allegation of being bias. However, there the impugned decision was not a decision of the Supreme Court, but a decision made as a commissioner of a Presidential Commission. Thus, it has no relevance to the matter at hand.

As stated in **Mohamed V Annamalai Chettiar (1932) 12 C L Rec 228**, the first question that has to be asked is whether this application comes within the scope of inherent jurisdiction of this court and as per the reasons enumerated above answer would have to be in the negative.

For the foregoing reasons, it is my considered view that this application made by the Defendant Petitioner to revisit the judgment dated 14.12.2018 and the motions followed with various applications should not have been entertained by this court since this court has no supervisory jurisdiction to reconsider, review, amend or set aside its own orders on the alleged circumstances.

Hence, the application made by the petition dated 30.01.2019 and the motions that followed filed by the Defendant Petitioners are dismissed with costs.

…….

Judge of the Supreme Court.

Jayantha Jayasuriya, PC, CJ

I agree.

……..

The Chief Justice.

Murdu N.B. Fernando, PC, J

I agree.

……..
Judge of the Supreme Court.

P. Padman Surasena J

I agree.

……
Judge of the Supreme Court.

S. Thurairaja, PC J

I agree.

……..
Judge of the Supreme Court.

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

In the matter of an application for review of judgment delivered in SC/APPEAL/53/2012 dated 14th December 2018, under and in terms of Article 132(3)(iii) of the constitution of the Democratic Socialist Republic of Sri Lanka and/or in the exercise of inherent powers of the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC/MISC/03/2019

Suntel Limited,

No. 110. Sir James Peiris Mawatha,

Colombo 02.

Plaintiff

Vs.

Electroteks Network Services Private Limited,

No. 429 D, Galle Road,

Ratmalana.

Defendant.

AND BETWEEN

Dialog Broadband Network (Private) Limited,

No. 475, Union Place,

Colombo 02.

Plaintiff – Appellant.

Vs.

Electroteks Network Services Private Limited,

No. 429 D, Galle Road,

Ratmalana.

Defendant -Respondent.

AND NOW

Electroteks Network Services Private Limited,

No. 429 D, Galle Road,

Ratmalana.

Defendant – Respondent – Petitioner.

Vs.

Dialog Broadband Network (Private) Limited,

No. 475, Union Place,

Colombo 02.

Plaintiff – Appellant – Respondent.

Before: Jayantha Jayasuriya, PC, CJ

Murdu N.B. Fernando, PC, J

P. Padman Surasena J

S. Thurairaja, PC J

E.A.G.R. Amarasekara J

Counsel: The Defendant – Respondent – Petitioner appears through his authorized agent namely, B. A. C. Abeywardena, Managing Director.

Dr. K. Kanag Iswaran, PC with Lakshmanan Jeyakumar, Aruna De Silva and Sahshim Haran for the Plaintiff – Appellant – Respondent instructed by F.J. & G de Saram.

Argued On: 14.09.2020.

Decided On: 19.05.2023

E.A.G.R. Amarasekara, J.

As per the petition dated 30th January 2019, the Original Plaintiff Suntel Limited had instituted an action in the Commercial High Court of the Western Province on 20th November 2001, against the Defendant – Respondent – Petitioner (hereinafter referred to as the Defendant – Petitioner) to recover a sum of Rs. 68,765,407/91 allegedly due as unpaid outstanding as of 3rd October 2000 in terms of an agreement between them. The Defendant Petitioner had filed his answer on 30th May 2002 praying inter alia under its first claim in reconvention for a sum of Rs. 41,040,185/12 being an over payment made and under its second claim in reconvention for a sum of Rs. 4,180 million comprising;

1. Rs. 2,180 million estimated loss of profit for 5 years as a result of the wrongful and unlawful disconnection of the telephone service breaching the agreement, and,

2. Rs.2000 million loss as a result of the loss of good will on that action.

The said petition further states that while the trial was proceeding the Plaintiff withdrew the said case and the Plaintiff's case was dismissed. However, the Defendant Petitioner sought to proceed with its claims in reconvention and the matter proceeded to trial accordingly. Subsequently, on 9th March 2012 learned High Court Judge delivered her judgment granting the Defendant - Petitioner the reliefs as prayed in the claims in reconvention. Being aggrieved by the said judgment of the learned Commercial High Court Judge, Plaintiff preferred an appeal to the Supreme Court on or around 16th March 2012. The said petition further reveals that thereafter, the Plaintiff Company Suntel Limited was amalgamated with the Company named Dialog Broadband Networks Private Limited and all the assets and the liabilities of Suntel Limited became assets and liabilities of Dialog Broadband Networks Private Limited, the present Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff Respondent). The appeal was taken up by this court before a bench comprising of three judges and the judgment was pronounced on 14th December 2018 in open courts and by the said judgment learned Judges of the Supreme Court held in favor of the Plaintiff –Respondent and allowed the appeal by setting aside the judgment of the Commercial High Court.

Being dissatisfied with the said judgment delivered by this court, the apex court of the country, which exercises the final appellate jurisdiction, the Defendant – Petitioner has preferred this application by the said petition before this court inter alia praying for an order setting aside the judgment dated 14th December 2018 delivered in the Supreme Court case No. SC/Appeal/53/2012. The Defendant-Petitioner further requested for a bench comprising of five or more judges of the Supreme Court be appointed to hear this matter. At the top of the caption to the petition, this application has been described as an application to review the said judgment of this court under Article 132(3)(iii) of the Constitution and / or in the exercise of its inherent powers.

The Defendant - Petitioner preferred this application in this court alleging that the judgment demonstrates extreme bias of the judges towards the Plaintiff Respondent inter alia for the following reasons;

1. Son of the presiding judge, as a junior counsel, has associated the Counsel who appeared for the Plaintiff Respondent in the Commercial High Court and the said Counsel was the junior to the Counsel who appeared in this court for the appeal filed by the Plaintiff Respondent. Nowhere has the Defendant Petitioner said that the said son of the presiding judge had appeared as a junior counsel in the relevant action in the original court or in appeal but he refers only to a different case namely CHC /282/2001. The Defendant Petitioner's allegation is that the son of the presiding judge was in association with the said Counsel of the Plaintiff Respondent almost one year prior to the pronouncement of the judgment and it has created a conflict of interest for his father who had been writing the judgment in the case SC/Appeal/53/2012 during the said association causing a reasonable suspicion as to whether the said justice was impartial in delivering the judgment.
2. There is a serious irregularity of existence of two judgments for the case SC/Appeal/53/2012, one appeared as decided and delivered on 12th December 2018 and another as decided on and pronounced on 14th December 2018. (In this context, the petitioner at no stage claims that the contents of the two judgements are different. However, there is a difference on the date of pronouncement as recorded in the copy published in the Supreme Court web site. This Court notes that the soft copy of the unsigned judgement is published in the web site by the Registry and the valid official version is the hard copy signed by the judges filed of record. Therefore, it appears that a possible typographical error in the soft copy is now being used to form accusations against the judges who heard and delivered the judgment).
3. Although the matter was argued for 10 days, only 2 days of arguments i.e., 18th and 19th of October 2016 have been taken for consideration and that written submissions have not been considered by court. This allegation is made on the basis that just before the body of the judgment and after the caption it is mentioned that the matter was argued on 18th and 19th of October 2016. However, the Defendant Petitioner fails to specifically identify any particular submission or argument that had not been considered in the

judgement. On the other hand, the petition itself in paragraph 47 indicates that no party filed written submissions within the given time.

4. The judge who wrote the judgment has taken quotes from a deleted section of a document in pronouncing the judgment and other judges have consented to the judgment.
5. The said judges have overlooked an available and marked document in the appeal brief while stating that the said document does not form a part of the brief.

Items no.3,4 and 5 mentioned above, if they are true and have affected the final conclusion, might have been considered under the wider interpretation that may be given to per incuriam concept, which wider interpretation is referred to later in this order. With regard to item no.01 above, it must be noted that it is not uncommon for family members of judges or their colleagues in the University or Law College engaging in the legal profession and practicing in courts. They are independent adults who in their own right engage in the profession. The mere fact that such relationship exists between a family member of the judge and a junior counsel of the team of counsel representing one of the parties before the judge per se is not a ground to allege bias against the judge. Other than the presiding Judge's son's association with the Junior counsel for the Plaintiff- Appellant in the Appeal in a different case, no specific interest or a pecuniary interest of the presiding judge has been averred with regard to the subject matter in the instant application. In relation to item no.2 above, as observed above the difference in the date is found in the copy published in the Web and not in the official copy found in the case record. Even a typographical error in a judgement including an error relating to the date can be corrected using the inherent powers of the court. In that context, an error found in a web copy published by the Registry appears to be a far-fetched reason to blame the relevant Judges. Nonetheless, this court need not go into the merits of this allegations and make final conclusion over such allegations due to the preliminary objection taken by the opposite party which has to be upheld due to reasons given later in this order.

When this petition was to be mentioned on 12.06.2019 before the two judges who took part in the previous decision making in delivering the judgment (the other judge had gone on retirement by that time), the Defendant Petitioner has objected and has requested to appoint a bench comprising of 5 judges in terms of the Article 132(3)(iii) of the Constitution – vide minutes dated 17.05.2019 and 30.05.2019. Motions filed on 24.05.2019 by the Defendant Petitioner also indicate that the plea is to appoint a bench of five or more judges to hear the instant application. It is abundantly clear from the contents of the petition dated 30.01.2019 and the motions filed by the Petitioner, that the application of the Defendant Petitioner is not based on per incuriam concept. The Petition and said motions unambiguously indicate that the Defendant Petitioner based his application on bias of the judges, fabricating of false evidence by the judges and certain impugned criminality associated with the judgment on the part of the judges.

When this application was first filed, the learned listing judge had made a direction to support this application on 17th May 2019, and when on that day it was listed for support as usual, the

bench in terms of the decision in **Jayaraj Fernanadopulle V Premachandra de Silva and Others (1996) 1 S L R 70** has directed to list the matter before a bench where two of the learned judges who heard and delivered the impugned judgment would be members – vide minute dated 17.05.2019. It appears by this time the other learned judge who took part in hearing and delivering the said judgment had retired from service. Meanwhile on a motion filed by the Defendant Respondent Petitioner, His Lordship the Chief Justice has referred the present application to be considered and decided by three judges nominated by his lordship, two of them being the two learned judges who were in service after the delivering of the impugned Judgment by them. One of the learned judges who took part in the decision making has directed to support the application in open courts and later on he also went on retirement pending the consideration of this application. The learned Judge who wrote the judgment has recused from considering the application due to the contents of the application. The third judge who was nominated by His Lordship the Chief Justice had expressed the view that this court has no power to go into the allegations relating to the misconduct of the judges of this court. He has also declined from hearing this application due to the reasons recorded in the brief -vide Journal Entry dated 16.06.2020.

As per the brief, the Defendant Respondent Petitioner has filed further motions requesting for a suitably constituted bench and His Lordship the Chief Justice has made certain directives to support all the motions before a bench of 5 judges nominated by his lordship. At the end, this matter was taken up before a bench of 5 judges on 14.09.2020. On that date the Plaintiff Respondent made submissions through his counsel with regard to the preliminary objections raised and the Defendant Respondent Petitioner through his authorized agent, namely B A C Abeywardena addressed the court on the preliminary objections so raised by the Plaintiff Respondent.

It was argued by the learned President's Counsel for the Plaintiff Respondent, that the English principle of finality of a judgment of the final court of appeal in its judicial hierarchy was received into our legal system legislatively, first by the Administration of Justice Law No. 44 of 1973, section 14(5) and by the1978 constitution, through its Article 127(1). Accordingly, it was argued that the Supreme Court is the final appellate court of the country and a judgment of the Supreme Court is final and conclusive and it is the parliament that can intervene to correct a judgment which is alleged to be wrong. Accordingly, prayed for the dismissal of the application due to lack of jurisdiction of this court to hear and determine this matter.

It is worthy to see whether this Court lacks jurisdiction to entertain and hear this type of application. Attention shall first be drawn towards the relevant Articles in the Constitution.

The Article 118 of the Constitution of the Democratic Socialist Republic of Sri Lanka reads as follows;

"*118.The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise –*

(a) jurisdiction in respect of constitutional matters;

(b) jurisdiction for the protection of fundamental rights;

(c) final appellate jurisdiction;

(d) consultative jurisdiction;

(e) jurisdiction in election petitions;

(f) jurisdiction in respect of any breach of the privileges

of Parliament; and

(g) jurisdiction in respect of such other matters which

Parliament may by law vest or ordain".

This is an application to review the judgment made by this court over a final appeal already made to this court under (c) above and concluded after hearing. This application does not fall within the ambit of (a) to (f) mentioned above. The Defendant Petitioner failed to draw the attention of this court to any law passed by the Parliament that empowers this court to entertain and hear an appeal or review or revision over a decision of this court made in relation to a final appeal and this court is unaware of any such law that gives a right of appeal or revision or review over a judgment of a final appeal made by this court. Hence this application does not fall within the ambit of Article 118(g) mentioned above. As stated in **Jayaraj Fernanadopulle V Premachandra de Silva (1996) 1 S L R 70** our Supreme Court is a Creature of Statute and its powers are statutory. Thus, the scope of its power has to be limited to what is laid down by the Statutes but for the inherent powers any court has to meet the ends of justice and to prevent abuse of process. This court has no statutory jurisdiction conferred by the Constitution or by any other law to rehear, review, alter or vary its decision. Its decisions are final.

In some of the cases decided by this court it has been held that this court has inherent powers to correct its errors and mistakes which are demonstrably and manifestly wrong where it is necessary for the interest of justice. – See **Ganeshanatham V Vivienne Goonewardena and Three Others (1984) 1 Sri L R 321, All Ceylon Commercial & Industrial Workers Union V Ceylon Petroleum corporation and others (1995) 2 Sri L R 295**. Such circumstances may not fall within the restrictive interpretation given to per incuriam rule but may fall within the wider interpretation given to it as referred to later in this order. However, the present application does not refer to an error or mistake caused by this court but is based on the alleged wrongful conduct of the judges who heard the appeal.

The final appellate jurisdiction of the Supreme Court is further outlined by Article 127 of the constitution as follows;

"*127 (1) The Supreme Court shall, subject to the Constitution,* ***be the final Court*** *of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be* ***final and conclusive*** *in all such matters*". (Highlighted by me)

Reading of Article 118(c) and 127(1) clearly indicate that the decision made by this court in a final appeal is final and conclusive. The impugned judgment has been delivered by a bench comprising of three judges. The above quoted Articles do not create any Jurisdiction for a bench comprising of 5 or 7 or any higher number of judges to hear an appeal or a review or a revision over that judgment or decision made by a bench of three judges of this court.

The caption of the present application shows that the application was made under and in terms of Article 132(3)(iii) of the Constitution of and /or inherent powers of the Supreme Court. Article 132 does not empower this court to entertain or hear an appeal, revision or to review a judgment made by this court on a final appeal. Article 132(2) clearly states that this court can exercise its jurisdiction in different matters at the same time by several judges of the court sitting apart. Thus, it is obvious that a decision made by any division of this court is a judgment of this court.

It is worthy to refer to the decision in **Hettiarachchi V Seneviratne, Deputy Bribery Commissioner and Others (No.2) (1994) 3 S.L.R 293 at 296 and 297** at this juncture. The order of the Court made in that case states as follows.

> *"It is quite wrong to assume, as the petitioner does in his motion that the power of the Chief Justice under Article 132(3) to direct that an appeal, proceeding or matter be heard by a bench of five or more judges of, in his opinion, the question involved is one of general and public importance, makes any difference. That provision confers no right of appeal, revision or review." (At page 296)*

> *"It is well established rule that in general a court cannot rehear, review, alter or vary its own judgment once delivered. The rational of that rule is that there must be finality to litigation. Interest republicae ut sit finis litium. A court whose judgments are subject to appeal, cannot set aside or vary its judgment, even if plainly wrong in fact or in law: that can only be done in appeal. It may of course, have a limited power to clarify its judgment, and to correct accidental slips or omissions." (At page 197)*

Right to appeal against an order/ judgment by a court has to be given by law. No such right has been given against a judgment of this court over a final appeal. Further, in the above decision this court held that the decision given by a bench of three judges in that case was a judgment of the Supreme Court and they were not sitting as a fragmented part of the Supreme Court. In the said Order of Court, it was specifically stated that Article 132(3) confers no right of appeal, revision or review. No doubt that article 132(3) confers power on the Chief Justice to direct that an appeal, proceeding or matter be heard by a bench of five or more judges if, in his opinion, the question involved is one of general and public importance, but the said decision indicates that it

does not create a right of appeal to be considered by a higher number of judges of the same court. A similar approach was taken in the case of **Suren Wickramasinghe and others V Cornel Lionel Perera and others (1996) Vol VI Part II Bar Association Law Journal Reports 5**, and Fernando J, stated

> *"Article 132 shows, ex facie, that the power can only be exercised in respect of a pending appeal, proceeding or matter – but not in respect of a concluded matter…….Further, in terms of Article 132(2) a judgment or order delivered by a bench of three judges is the judgment or order of the Supreme Court, and not of "some a fragmented part of the Court"; it is final [of Article 127(1)], and is not subject to appeal to another bench of Court, even if it were to consist of five, or seven, or nine or even all the Judges……."*

The learned Justice further went on to say that using Article 132(3) in a way conferring right of appeal, revision or review would be to usurp legislative power, in order to create an additional right of appeal which the Constitution did not confer; and indeed, an effect to create a right of appeal with leave from the Chief Justice sitting alone. Even in **Jeyaraj Fernandopulle V Premachandra de Silva and Others (supra)** it was held that a decision of this Court is final; it is not subject to any appeal, revision review, re-argument or reconsideration. At page 98, with reference to Article 132 and 132 (3) it was plainly said *"..Article 132 does not confer any jurisdiction on the Court. Nor does Article 132(3) empower the Chief Justice to refer any matter of public or general importance to a Bench of five or more Judges. It empowers him to constitute a Bench of five or more Judges to hear an appeal, proceeding or matter which the court has jurisdiction to entertain and decide or determine. The court has no statutory Jurisdiction to rehear, reconsider, revise, review, vary or set aside its own orders. Consequently, the Chief Justice cannot refer a matter to a Bench of five or more Judges for the purpose of revising, reviewing, varying or setting aside a decision of the Court…*"

In **Ganeshanatham V Vivienne Goonawardene and Others (supra)** it was clearly stated that the Supreme Court has no jurisdiction to act in revision of cases decided by itself, and none of the provisions of the Constitution expressly confers such a jurisdiction on it, nor has the legislature conferred such a jurisdiction by law. It was further stated that the Supreme Court is a court of last resort in appeal and there is finality in its judgment whether it is right or wrong and that is the policy of the Law. I do not see that later amendments to the Constitution have brought any changes to the said policy.

What is discussed above confirms that Article 127 of our Constitution contains the principal of finality. Thus, this court has no jurisdiction to entertain or hear the present application under any statutory provision and as such the Defendant Petitioner's application made under and in terms of Article 132(3) cannot succeed.

Now this court must consider whether this application can be entertained and heard in exercising the inherent powers of this court as the Defendant Petitioner has referred to the inherent powers of this court in invoking the jurisdiction of this court. Inherent powers are to prevent abuse of

process and to meet the ends of justice. There may be very limited occasions where a court would exercise its powers in an already concluded matter or application. For clarification of its order or judgment or to correct any accidental omissions or slips or clerical or arithmetical mistakes, a court may revisit a concluded matter. In the same way courts, to meet the ends of justice may vacate its decisions made in *per incuriam*. In its restricted sense a decision made in *per incuriam* means a decision made in ignorance or forgetfulness of an existing statute or a binding decision. [for restricted interpretation of *per incuriam* concept, see **Huddersfield Police Authority V Watson (1947) 1 All E R 193, Alasupillai V Yavetpillai (1949) 39 C L W 107, Hettiarachchi V Seneviratne, Deputy Bribery Commissioner and Others (No.2) (1994) 3 Sri L R 293**.] However, the dictionary meaning of the Latin term *per incuriam* appears to connote something similar to ''through lack of care". [for a broader meaning of *per incuriam*, see **Gunasena V Bandaratilleke (2000) 1 Sri L R 292 at 301 and 302 and Kariawasam V Priyadharshani (2004) 1 Sri L R 189**]. Adopting the extreme wider meaning represented by the said dictionary meaning may become an obstacle to reach finality in litigation, since lack of care may even appear in evaluation of evidential material after every party is given a chance to present their stances and evidence. Anyway, our courts on certain occasions, where mistake was so obvious, have used the *per incuriam* concept in much wider meaning than Lord Goddard's interpretation in **Huddersfield Police Authority V Watson** above. [for such wider application see **King V Baron (1926) 4 Times of Ceylon Reports 3, The Police Officer of Mawalla V Galapatha (1915) 1 C W R 197, V.A. Ranmenika V B. A. S. Tissera 65 N L R 214, Kariawasam V Priyadharshani (supra) and Gunasena V Bandaratillake (supra**)]. However, it must be noted that this application does not allege any accidental omission or slip or any clerical or arithmetical errors. Neither it requires any clarification of the judgment made in the final appeal nor it alleges any unintentional obvious mistake and/or error. The Defendant Petitioner does not allege that the impugned judgment was made in *per incuriam* whether in its restricted or wider sense. Thus, this application does not fall under those categories to reconsider the order made. If the allegations fell under those categories, it could have been considered in a better way by the same judges who delivered the judgment. It is clear from the record that the Defendant Petitioner was objecting for the same judges who delivered the judgement considering this application. The allegation made in this application contemplates a sort of a new cause of action against the judges who heard and decided the final appeal for them being bias and /or being acted in a fraudulent manner and/or involved in fabricating false evidence etc. which allegedly represents an intentional wrongdoing by the said judges.

It is also worthy to refer to the decision made in **Jeyaraj Fernandopulle v Premachandra De Silva and Others (1996) (supra)** again, since there too was a decision made on an application to revisit the judgment made by a bench comprising of three judges by a higher number of judges. Even though, in the said decision it was clearly said that this court has no statutory jurisdiction to rehear, reconsider, revisit, review, vary or set aside its orders, it also recognized that there are certain circumstances under which a Court has the power to re consider judgments or order given by it using its inherent powers. Some of the circumstances discussed in the said case, where

inherent powers may be used to revisit a decision already made, is tabled below with a comparison to the present application before this court.

1. Orders made *Per incuriam* – In this regard several cases have been referred there in the **Jeyaraj Fernandopulle case**. Some have been referred to above.	Present application as explained above, has not been presented on the premise that it is made *per incuriam*
2. Presence of clerical mistake or error from an accidental slip or omission- Referring to **Marambe Kumarihamy v Perera (1919) VI C W R 325, Padma Fernando V T. S. Fernando (1956) 58 N L R 262 etc.**	Present application is not based on an accidental slip or omission.
3. Where a need arises to vary or clarify the order to carry out its own meaning and where the language used is doubtful to make it plain. Referring to **Lawree V Lees (1881) 7 App.Cas 19.34, Re Swire (1895) 30 CH. D 239, Paul E De Costa & Sons v S Gunaratne 71 N L R 214, Hatton V Harris (1892) A C 547 etc**	Present application is not made for such purposes.
4. Where a party has been wrongly named or described or where the judgment is a nullity owing to the fact that it was delivered against a person who is dead or a non-existing company- **Referring to Halsbury, Vol.26-page 26**	Present application does not relate to such circumstances.
5. Where the order or judgment has been delivered in default or *ex parte*.	Present application is not made on such grounds.
6. Where there is a serious irregularity in procedure that makes the judgment a nullity- for e.g., not serving summons or not following a mandatory provision of law.	Present application is not based on such grounds.

7. To repair an injury caused by an act of court done without jurisdiction (by an invalid order). - for e.g., executing a decree to evict a party without a decree for possession.	Present application is not similar to the said situation. In this occasion the judges were using the jurisdiction they had to hear and decide the matter. Allegation is that they were bias, acted fraudulently in creating new evidence and or ignoring available evidence and there is a criminality attached to such behavior. In a way a new cause of action that purportedly accrued while the case was being heard and decided.
8. Dismissal of an FR application on a misunderstanding of facts placed by the opposite party that the petitioner has been or due to be released from detention. – Referring to **Palitha v O I C Police Station, Polonnaruwa & Others (1993) 1 Sri L R 161**	Present application is not similar to this.
9. An order made on wrong facts given to the prejudice of the Petitioner – Referring to **Wijeysinghe et al V Uluwita (1933) 34 N L R 362**	Present application differs from this and is based on allegations made against the judges.
10. An action to rescind a judgment which has been obtained by fraud. - Referring to **Halsbury vol 26, paragraph 560, page 285** .	In the present application, the allegation is not that the Court was deceived by fraud and obtained the judgment but the court itself was bias, fraudulent and acted in a manner that attracts criminal liability. Thus, as alleged, it is a kind of new cause of action.
11. An action to rescind a judgment on the discovery of new evidence which were not available before. – Referring to **Halsbury vol 26 paragraph 561, Loku Banda V Assen 2 N L R 31**	Present application is not to rescind a judgment based on discovery of new evidence but on certain allegations against judges who heard the appeal.

In my view, most of the instances referred to above in the table under item 2 to 9 may fall within the wider definition of *per incuriam* or obvious mistakes since those instances relate to where the court make such decision in ignorance of certain situation due to lack of care or by being misled by the circumstances etc. On the other hand, the instances discussed in the said **Jeyaraj Fernandopulle case** may not be exhaustive since there may be many occasions that demands the use of inherent powers of the court depending on the circumstances of each case.

However, the situations discussed in the said **Jeyaraj Fernandopulle case** where inherent powers had been used are not similar to facts of the present application. It must be mentioned here that inherent powers are adjuncts to the existing jurisdiction to remedy injustice and cannot be made the source of a new jurisdiction to revise a judgment rendered by a court - vide **All Ceylon Commercial and Industrial Workers Union V Ceylon Petroleum Corporation and Another** (supra**), Ganeshanatham v Goonewardene** (supra). Thus, in my view, the inherent powers this court has are adjuncts to the statutorily given jurisdictions as contemplated by Article 118 of the constitution and do not extend to entertain an application such as one tendered by the Defendant-Respondent-Petitioner.

However, as said before, our Supreme Court is creature of statute. Thus, its powers have to be given by the statute. Our constitution does not give supervisory jurisdiction over its own decisions. As described above inherent powers are adjuncts to existing jurisdiction and cannot use to create new jurisdictions to review, revise or reconsider its own decision.

The Defendant Petitioner in one of the motions has referred to **Bandaranaike V De Alwis and Others (1982) 2 S L R 664** to indicate that this court can hear an application against another judge of this court on allegation of being bias. However, there the impugned decision was not a decision of the Supreme Court, but a decision made as a commissioner of a Presidential Commission. Thus, it has no relevance to the matter at hand.

As stated in **Mohamed V Annamalai Chettiar (1932) 12 C L Rec 228**, the first question that has to be asked is whether this application comes within the scope of inherent jurisdiction of this court and as per the reasons enumerated above answer would have to be in the negative.

For the foregoing reasons, it is my considered view that this application made by the Defendant Petitioner to revisit the judgment dated 14.12.2018 and the motions followed with various applications should not have been entertained by this court since this court has no supervisory jurisdiction to reconsider, review, amend or set aside its own orders on the alleged circumstances.

Hence, the application made by the petition dated 30.01.2019 and the motions that followed filed by the Defendant Petitioners are dismissed with costs.

…….

Judge of the Supreme Court.

Jayantha Jayasuriya, PC, CJ

I agree.

……..

The Chief Justice.

Murdu N.B. Fernando, PC, J

I agree.

……..
Judge of the Supreme Court.

P. Padman Surasena J

I agree.

……
Judge of the Supreme Court.

S. Thurairaja, PC J

I agree.

……..
Judge of the Supreme Court.

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

The Pentecostal Assembly of Sri Lanka,
No. 5, Jubily Road,
Katubedda,
Moratuwa.
Plaintiff

SC APPEAL NO: SC/APPEAL/201/2016
SC LA NO: SC/HCCA/LA/630/2014
HCCA BADULLA NO: UVA/HCCA/BDL/RA/17/2013
DC BANDARAWELA NO: L/1705

Vs.

David Ratnam,
No. 279, Badulla Road,
Bandarawela.
Defendant

AND BETWEEN

The Pentecostal Assembly of Sri Lanka,
No. 5, Jubily Road,
Katubedda,
Moratuwa.
Plaintiff-Appellant

Vs.

David Ratnam,
No. 279, Badulla Road,
Bandarawela.
Defendant-Respondent

AND NOW BETWEEN

David Ratnam,
No. 279, Badulla Road,
Bandarawela.
Defendant-Respondent-Appellant

Vs.

The Pentecostal Assembly of Sri Lanka,
No. 5, Jubily Road,
Katubedda,
Moratuwa.
Plaintiff-Appellant-Respondent

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Chathura Galhena with Dharani Weerasinghe for the Defendant-Respondent-Appellant.
S.A. Parathalingam, P.C., with Nishkan Parathalingam and Olivia Thomas for the Plaintiff-Appellant-Respondent.

Argued on : 16.12.2021

Written submissions:

by the Defendant-Respondent-Appellant on 12.05.2017 and 24.01.2022.

by the Plaintiff-Appellant-Respondent on 06.02.2017 and 20.01.2022.

Decided on: 22.05.2023

Samayawardhena, J.

The plaintiff, the Pentecostal Assembly of Sri Lanka, filed this action in the District Court of Bandarawela seeking a declaration of title to the premises described in the schedule to the plaint and ejectment of the defendant therefrom on the basis that the latter was the pastor of the church who has no title or entitlement to remain in possession. The defendant filed answer seeking dismissal of the plaintiff's action. At the trial, it was recorded as an admission that case No. L/1551 instituted previously in respect of the same premises had been dismissed. The only two issues the defendant raised at the trial were:

12. In view of the decision in case No. L/1551, has the Court jurisdiction to hear the case on the principle of *res judicata*?
13. If the answer to that question is in the negative, can the plaintiff maintain this action?

The defendant moved for only issue No. 12 to be tried as a preliminary question of law (මේ අවස්ථාවේදී විත්තිය වෙනුවෙන් නඟන ලද 12 වන විසඳිය යුතු ප්‍රශ්නය නීතිමය විසඳිය යුතු ප්‍රශ්නයක් ලෙස සලකා ලිඛිත සැලකිරීම් මගින් තීරණය කරන ලෙස දෙපාර්ශවය ඉල්ලා සිටී), not both 12 and 13. This is because issue No. 13 is a perfunctory question which has no independent survival. It is intrinsically interwoven with issue No. 12.

Both parties filed written submissions on this point before the District Court. The defendant in his written submissions made it very clear that his objection is based on *res judicata* as contemplated in section 207 of the Civil Procedure Code, saying "*Section 207 and the explanation thereof clearly bars action L/1705 [present action] on the principles of Res Judicata.*"

Section 207 of the Civil Procedure Code upon which the defendant objects to the maintainability of the present action reads as follows: "*All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties, and no plaintiff shall hereafter be non-suited.*" This section has no applicability to the facts of the present case where the plaintiff in case No. L/1551 moved to withdraw the action, which is governed by a different section, i.e. section 406 of the Civil Procedure Code. Section 406 deals with the withdrawal and adjustment of an action.

The learned District Judge rightly answered issue No. 12 against the defendant on the basis that case No. L/1551 was not dismissed on the merits but on the withdrawal of the case by the plaintiff due to the rejection of the lists of witnesses and documents of the plaintiff.

If the District Judge answered issue No.12 against the defendant, what he should have done was to fix the case for further trial. However, he did not stop at that. After answering issue No. 12 against the defendant, he *ex mero motu* proceeded to answer issue No. 13 in the negative and dismissed the action of the plaintiff. His position was that although the defendant cannot succeed on the objection of *res judicata*, the plaintiff's action cannot be maintained in view of section 406(2) of the Civil Procedure Code – a position not taken up by the defendant.

On appeal, the High Court of Civil Appeal of Badulla set aside the judgment of the District Court and directed the District Court to proceed with the trial. This appeal by the defendant is against the said judgment.

The finding of the District Judge in my view is unwarranted. We follow the adversarial system of justice and not the inquisitorial system of justice, where the judge is expected to resolve the dispute as it is presented before the judge and not in the way the judge thinks it ought to have been presented before him.

In the Supreme Court case of *Ariyawathie Meemaduma v. Jeewani Budhika Meemaduma* [2011] 1 Sri LR 124 at 134, Amaratunga J. held "*sections 164 and 165 of the Civil Procedure Code and section 165 of the Evidence Ordinance do not require a judge to step in to fill the gaps of a case presented by a party*."

In *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227, the defendant failed to hand over possession of the premises to the plaintiff who was the owner of the premises after the expiry of the lease. The defendant admitted the lease but pleaded that the premises were governed by the Rent Act and claimed to continue in occupation of the premises as a statutory tenant. The District Court held with the defendant. On appeal, the Court of Appeal accepted that the evidence produced in support of the defendant's claim was inadequate. The Court of Appeal found fault with the District Judge for being inactive at the trial to obtain relevant evidence and ordered retrial facilitating the defendant to lead more evidence. The Supreme Court found this approach of the Court of Appeal to be obnoxious to our system of justice and directed the District Court to enter judgment for the plaintiff. Chief Justice G.P.S. de Silva stated at 231:

In the present case, the burden was clearly on the defendant to establish that his possession of the premises was lawful. For this purpose the defendant relied largely on V1. The Court of Appeal correctly held that V1 was inadequate to establish the case for the defendant. The necessary consequence is that the defence set up at the trial has failed. The plaintiff having discharged the burden that lay upon her, was entitled to judgment. In this view of the matter, the Court of Appeal was in error in making an order for a trial de novo with all the attendant delay and expense. Already 10 years have passed since the institution of the action and, what is more, the defendant has failed to pay rent to the plaintiff since September, 1985.

Finally, I wish to refer to section 134 of the Civil Procedure Code and section 165 of the Evidence Ordinance. [Counsel] for the defendant-respondent relied on section 134 of the Civil Procedure Code in support of the view taken by the Court of Appeal. Section 134 of the Civil Procedure Code no doubt confers on the District Court the power of its own motion to summon any person as a witness to give evidence or to produce any document in his possession. Section 165 of the Evidence Ordinance confers inter alia the power on the Judge to order the production of any document or thing. These are enabling provisions intended to be cautiously and sparingly used in the interests of justice. Neither section 134 of the Civil Procedure Code nor section 165 of the Evidence Ordinance was meant to fill in the gaps in the presentation of its case by a party to the action. While these provisions confer a power upon the court, they do not place a burden upon the court; they do not detract from the adversarial nature of the proceedings before the court.

The District Judge states the term "same matter" in section 406(2) means "same property". This is also not correct. The term "same matter" in the said section means "same cause of action", not "same property". *Vide Gangulwitigama Pannaloka Thero v. Colombo Saranankara Thero and Others* [1983] 1 Sri LR 332 at 345.

On the facts and circumstances of this case, I set aside the finding of the District Judge on the applicability of section 406(2) of the Civil Procedure Code and affirm the finding on the applicability of section 207 of the Civil Procedure Code. I agree with the conclusion of the High Court of Civil Appeal.

The questions of law upon which leave to appeal was granted and the answers thereto are as follows:

Did the Civil Appellate High Court misdirect itself in deciding that the findings of the learned District Judge of Bandarawela and dismissing the action of the respondent by order dated 18.09.2007 is wrongful?

No.

Did the Civil Appellate High Court err in law in deciding that the respondent can maintain the action in terms of section 406(2) of the Civil Procedure Code?

Does not arise.

Did the Civil Appellate High Court misdirect itself in analysing the term "same matter" in section 406(2) of the Civil Procedure Code?

Does not arise.

I dismiss the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court

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

Weerasinghe Arachchige Sarath
Weerasinghe,
No. 11, Templars Road,
Mount Lavinia.
Plaintiff

SC APPEAL NO: SC/APPEAL/193/2014
SC LA NO: SC/HCCA/LA/246/14
HCCA COLOMBO NO: WP/HCCA/COL/315/2008(F)
DC COLOMBO NO: 20510/L

Vs.

H.D. Sarath Premaratne,
No. 184, Avissawella Road,
Wellampitiya.
Defendant

AND BETWEEN

H.D. Sarath Premaratne,
No. 184, Avissawella Road,
Wellampitiya.
Defendant-Appellant

Vs.

Weerasinghe Arachchige Sarath
Weerasinghe,
No.11, Templars Road,
Mount Lavinia.
Plaintiff -Respondent

AND NOW BETWEEN

Weerasinghe Arachchige Sarath
Weerasinghe,
No.11,
Templars Road,
Mount Lavinia.
Plaintiff -Respondent-Appellant

Vs.

H.D. Sarath Premaratne,
No. 184,
Avissawella Road,
Wellampitiya.
Defendant-Appellant-Respondent

Before: Murdu N.B. Fernando, P.C., J.
Kumuduni Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Chandana Wijesooriya with Wathsala Dulanjanie for the Plaintiff-Respondent-Appellant.
K.G. Jinasena with Pradeepa Ariyawansha for the Defendant-Appellant-Respondent.

Argued on: 23.11.2021

Written submissions:
by the Plaintiff-Respondent-Appellant on 04.12.2014 and 14.12.2021.
by the Defendant-Appellant-Respondent on 14.12.2021.

Decided on: 22.05.2023

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court of Colombo seeking ejectment of the defendant from Lot B in Plan No. 268 and damages. Plan No. 268 comprising Lots A and B was marked P3. The defendant filed answer seeking a declaration that he is the owner of Lots A and B. The trial before the District Court proceeded on 8 admissions and 14 issues.

The defendant in paragraph 11 of his answer and by admission No. 8 admitted that his father gifted Lot A in Plan No. 268 to him by the deed marked V1. The plaintiff does not dispute that Lot A belongs to the defendant.

The plaintiff in paragraph 7 of his plaint and by way of issue No. 3 claimed that his mother had gifted Lot B in Plan No. 268 to him by the deed marked P2. This was accepted by the defendant in his evidence-in-chief itself. However, by paragraph 12 of his answer and by issue No. 13, the defendant claims title to Lot B by prescription. The subject matter of this litigation is Lot B in Plan No. 268. After trial, the District Court held with the plaintiff. On appeal, the High Court of Civil Appeal in Colombo set aside the judgment of the District Court and dismissed the plaintiff's action. The plaintiff appealed to this Court from the judgment of the High Court.

At the trial, several witnesses gave evidence. The judgment of the District Court is comprehensive, running into 22 pages. The District Judge has analysed all the evidence led at the trial to consider the competing claims made by the two rival parties. In contrast, the judgment of the High Court is brief, running into 2 ½ pages, where the only question considered was whether the plaintiff proved that "the defendant came into occupation of these premises with his (the plaintiff's) leave and license." This is because the plaintiff in the plaint and by way of issues has stated that the plaintiff

came into occupation of Lot B as a licensee of the plaintiff's mother with the agreement of the plaintiff and thereafter this licence was terminated. In just one paragraph the High Court holds that this is not proved. The High Court judgment is silent about the other issues including the cross-claim of the defendant to Lot B on prescription.

In my view the High Court adopted a very mechanical approach to the whole case. When considering the admissions recorded and issues raised before the District Court, there is no dispute that, on deeds, Lot A of Plan P3 is owned by the defendant and Lot B is owned by the plaintiff. The defendant is now in occupation of both Lots and the plaintiff wants to eject the defendant from Lot B. As I have already stated, the defendant's position is that he has prescribed to Lot B. It is against this background that the Court needs to consider the claim of the plaintiff that the defendant had been in possession of Lot B together with Lot A, with the leave and licence of the plaintiff's mother since 1990 (*vide* issue No.7).

As seen from Plan P3, there is a large house on the land extending to both Lots. It is the position of the plaintiff that his mother occupied the portion of the house in Lot B until 1990. The defendant has admitted in evidence that until 1996 the name of the defendant's mother was included in the electoral registers marked V3-V24. The action was filed in 2004. If I were to assume that adverse possession began in 1996, there would still not be a period of prescriptive possession lasting at least ten years. Moreover, the plaintiff's mother and the defendant's father are close relatives, not strangers. Adverse possession in such circumstances cannot be by any secret intention in mind. It is my considered view that there is no room whatsoever for the defendant to claim prescriptive title to Lot B.

It is true that there is no document to say that the plaintiff's mother gave leave and license to the defendant to share Lot B together with Lot A. But on the facts and circumstances of the case, the District Court was correct

to have considered that the defendant was in occupation of Lot B with the leave and licence of the plaintiff's mother.

The High Court states that the plaintiff filed the action on the basis that the defendant came into occupation of the premises with the leave and licence of the plaintiff and since this has not been sufficiently proved, the plaintiff's action must fail. In respect of leave and licence, the High Court states that the plaintiff's evidence is inadequate.

The facts of the Supreme Court case of *Khan v. Jayman* [1994] 2 Sri LR 233 are similar to the instant case where the plaintiff sued the defendant for ejectment from the premises in suit and damages on the basis that the defendant was in forcible occupation of the premises after the termination of the leave and licence given to the defendant. The defendant claimed tenancy. The District Court dismissed the plaintiff's action on the basis that the plaintiff failed to establish that the defendant was a licensee and the Court of Appeal affirmed it. On appeal, the Supreme Court held that the plaintiff shall succeed since the defendant failed to establish a "better title" to the property after the plaintiff established his title and the defendant in his evidence admitted it. The Supreme Court directed to enter judgment for the plaintiff as prayed for in the plaint.

In the instant case, when the defendant does not dispute that the plaintiff is the paper title holder of Lot B, does it matter even if the defendant did not come into possession of Lot B with the leave and licence of the plaintiff? It does not. If the plaintiff is the owner of Lot B by the deed P2, by virtue of his ownership he is entitled to the right to possession of Lot B irrespective of whether he has specifically prayed for ejectment in the prayer to the plaint. The right to possession and the right to recover possession are essential attributes of ownership. In such circumstances, it is up to the defendant to prove on what right he is in possession of Lot B. *Vide Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222

per Sharvananda C.J. In *Leisa v. Simon* [2002] 1 Sri LR 148 at 151 it was held "*Once the paper title became undisputed the burden shifted to the defendants to show that they had independent rights in the form of prescription as claimed by them*." The defendant in the instant case claimed prescriptive title to Lot B in the District Court. This claim has rightly been held not to have been proved. The High Court has not interfered with that finding. If so, the defendant has no choice but to vacate Lot B.

Should the plaintiff's main relief that the defendant be ejected from Lot B be refused on the basis that the plaintiff is not seeking a declaration of title to Lot B in the prayer to the plaint? The answer is in the negative.

In the early case of *Wanigasekera v. Kirihamy* (1937) 7 CLW 134 it has been held that where a person obtains a declaration of title to land without an order for ejectment he is not entitled to a writ for delivery of possession. The same conclusion was reached in *Vangadasalem v. Chettiar* (1928) 29 NLR 446.

In *Sopi Nona v. Karunadasa* [2005] 3 Sri LR 237, the Court of Appeal held that without a specific prayer to that effect, the Court cannot order ejection of the defendant on the strength of the finding that the plaintiff is entitled to a declaration of title to the property.

In *Jane Nona v. Padmakumara* [2003] 2 Sri LR 118 there was no relief prayed for in the prayer to the plaint for ejectment of the defendant. But there was a paragraph in the plaint averring that a cause of action had accrued to the plaintiff to obtain an order for peaceful possession of the land and damages. In a prayer to the plaint the plaintiff had prayed for quantified damages until possession is restored to the plaintiff. The plaintiff also raised an issue as to whether the plaintiff would be entitled to the reliefs claimed in the plaint (not in the prayer to the plaint) if the

plaintiff's issues are answered in the affirmative. In this backdrop, the Court of Appeal held that a prayer for ejectment of the defendant is implicit in the issues.

The Supreme Court case of *Khan v. Jayman (supra)* provides a good authority for the proposition that there is no impediment for the Court to grant ejectment despite there is no prayer in the plaint seeking declaration of title.

The recent trend of authority in the Supreme Court favours the plaintiff. Accordingly, the Court can now allow an application for ejectment of the defendant in order to restore the plaintiff to possession on the strength of the finding that the plaintiff is the owner of the property notwithstanding that there is no prayer for ejectment in the plaint.

In *Weerasinghe v. Heling* [2020] 3 Sri LR 136 the question was whether the plaintiff could seek ejectment of the defendants from the land in suit without a specific prayer for declaration of title. This Court answered it in the affirmative. De Abrew J. citing with approval *Pathirana v. Jayasundara* (1955) 58 NLR169, *Jayasinghe v. Tikiri Banda* [1988] 2 CALR 24 and *Dharmasiri v. Wickramatunga* [2002] 2 Sri LR 218 held at 141 "*in an action for ejectment of the defendant from the property in dispute, once the plaintiff's title to the property is proved, he (the plaintiff) is entitled to ask for ejectment of the defendant from the property even though there is no prayer in the plaint for a declaration of title*."

In *Kamalawathie v. Premarathne* (SC/APPEAL/118/2018, SC Minutes of 2.6.2021) the Supreme Court reiterated this legal position.

In *Jayasinghe v. Tikiri Banda* [1988] 2 CALR 24 Viknaraja J. held "*Where title to the property has been proved, as in this case, the fact that one had failed to ask for a declaration of title to the property will not prevent one from claiming the relief of ejectment*."

A similar conclusion was reached in *Dharmasiri v. Wickramatunga* [2002] 2 Sri LR 218. The plaintiff sought ejectment of the defendant but there was no prayer for a declaration of title. However the Court held that the absence of a specific prayer for a declaration of title causes no prejudice if the title is pleaded in the body of the plaint and issues are framed and accepted by Court on the title so pleaded.

The question of law upon which leave to appeal was granted reads as follows: Did the High Court err in law in reversing the findings of fact of the District Court on the question of licence without adequate consideration of material analysed by the District Court? I answer this question in the affirmative.

I set aside the judgment of the High Court and restore the judgment of the District Court. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Kumuduni Wickremasinghe, J.
I agree.

Judge of the Supreme Court

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

M.M.M. Ashar,
No. 49/1A,
Kawdana Road,
Dehiwala.
Plaintiff

SC APPEAL NO: SC/APPEAL/171/2019
SC LA NO: SC/HCCA/LA/59/2018
HCCA MT. LAVINIA NO: WP/HCCA/MT. LAV/88/14/F
DC MT. LAVINIA NO: 2379/07/L

Vs.

T.H. Kareem,
No. 49/1B,
Kawdana Road,
Dehiwala.
Defendant

AND BETWEEN

T.H. Kareem,
No. 49/1B,
Kawdana Road,
Dehiwala.
Defendant-Appellant

Vs.

M.M.M. Ashar,
No. 49/1A,
Kawdana Road,
Dehiwala.
Plaintiff-Respondent

AND NOW BETWEEN

M.M.M. Ashar,
No. 49/1A,
Kawdana Road,
Dehiwala.
Plaintiff-Respondent-Appellant

Vs.

T.H. Kareem,
No. 49/1B,
Kawdana Road,
Dehiwala.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Lasitha Kanuwanaarachchi with Darshani Gampalage and Nipunika Rajakaruna for the Plaintiff-Respondent-Appellant.

H. Withanachchi with Shantha Karunadhara for the Defendant-Appellant-Respondent.

Argued on: 10.11.2022

Written submissions:

by the Plaintiff-Respondent-Appellant on 01.06.2020.
by the Defendant-Appellant-Respondent on 23.04.2021.

Decided on: 22.05.2023

Samayawardhena, J.

Introduction

As crystalised in the issues, the plaintiff filed this action in the District Court of Mount Lavinia seeking a declaration of title to, ejectment of the defendant from, the land described in the second schedule to the plaint (which is part of the land described in the first schedule to the plaint), and damages. The defendant claimed prescriptive title to the land described in the second schedule to the plaint. After trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal of Mount Lavinia set aside the judgment of the District Court purely on the basis that the plaintiff did not prove title to the entirety of the land but only to 11/12 shares of the land. This appeal by the plaintiff is against the judgment of the High Court.

This Court has granted leave to appeal to the plaintiff on the following two questions of law:

(a) Did the High Court fail to consider that the defendant having entered the premises as a licensee of the plaintiff's predecessor in title cannot deny the ownership of the plaintiff?

(b) Did the High Court err in law by failing to consider that the defendant being a trespasser could be ejected even by a co-owner?

Thereafter, the defendant has framed the following two questions of law:

(a) Is the plaintiff entitled to seek ejectment of the defendant from the land described in the second schedule to the plaint without establishing that the land described in the second schedule to the plaint is part of the land described in the first schedule to the plaint?
(b) If the plaintiff failed to establish it, has the plaintiff's action been correctly dismissed by the High Court?

The District Court arrived at the finding that the defendant came into occupation of the house standing on the land in suit as a licensee of the father of Sithi Nazmy, namely Anzar, and continued in that capacity under Sithi Nazmy as well. It is from Sithi Nazmy the plaintiff purchased the land by the deed marked at the trial P3. The defendant in several places in his evidence admitted that he came into occupation of the house standing on the land described in the second schedule to the plaint at the invitation of Anzar, until Anzar repaid the money owed to him, and thereafter he has continued to occupy the house until now. The defendant has come into occupation of the house in 1978. The District Court dismissed the defendant's claim of prescriptive title to the property. The High Court did not state that the finding of the District Court that the defendant did not succeed in his claim of prescriptive title was erroneous. The High Court did not interfere with that finding at all.

The defendant cannot dispute the title of the plaintiff to the land

A defendant who enters into a land in a subordinate character such as a tenant, lessee or licensee of the plaintiff is estopped from disputing the

title of the plaintiff to the land. Section 116 of the Evidence Ordinance enacts:

> *No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.*

One of the reasons for this fetter is that a person need not necessarily be the owner of the subject matter to enter into such agreements with another. Despite want of ownership, such agreements create valid legal relationships such as landlord and tenant, lessor and lessee, licensor and licensee between them although they are not binding on the real owner. *Vide Imbuldeniya v. De Silva* [1987] 1 Sri LR 367, *Gunasekera v. Jinadasa* [1996] 2 Sri LR 115 at 120, *Pinona v. Dewanarayana* [2004] 2 Sri LR 11.

In *Ruberu v. Wijesooriya* [1998] 1 Sri LR 58 at 60, Gunawardana J. held:

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings*

> *in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.*

As was held by the Supreme Court in *Reginald Fernando v. Pubilinahamy* [2005] 1 Sri LR 31:

> *Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land.*

Vide also *Gunasinghe v. Samarasundara* [2004] 3 Sri LR 28, *Dharmasiri v. Wickrematunga* [2002] 2 Sri LR 218.

In a declaration of title action which is not a *rei vindicatio* proper and which is filed against a defendant such as a licensee or a tenant to recover possession, the plaintiff need not prove title to the land against the defendant. In such actions, the title is presumed to be with the plaintiff. Put differently, the defendant in such actions cannot frustrate the plaintiff's action on the basis that the plaintiff is not the owner of the property.

The present action is not a *rei vindicatio* action proper but a declaration of title action. Hence, the High Court is clearly wrong to have set aside the judgment of the District Court on the basis that the plaintiff does not have title to the entirety of the land but only to 11/12 shares of the land.

Once the Court decides that the defendant is a licensee of the plaintiff, and his prescriptive title is unsustainable, whether the plaintiff is the owner of the entire land or part of it or has no title at all is irrelevant.

Can a defendant who enters into a land in a subordinate character claim title to the land?

According to the Roman Dutch Law principles, a defendant who enters into a land in a subordinate character such as a lessee, licensee, tenant, mortgagee etc. cannot claim title to the land; if he wants to do so, he must first quit the land and then fight for his rights.

Voet 19.2.32 (Voet's commentary on the Pandects as translated by Percival Gane, Butterworth & Co. (Africa) Ltd 1956, Vol. 3, at page 447) states:

> *Lessee cannot dispute lessor's title, tho' third party can. Nor can the setting up of an exception of ownership by the lessee stay this restoration of the property leased, even though perhaps the proof of ownership would be easy for the lessee. He ought in every event to give back the possession first, and then litigate about the proprietorship.*

Maasdorp's Institutes of South African Law, Vol. III, 8th Edition (1970), p. 185 states:

> *A lessee, as already stated, is not entitled to dispute his landlord's title, and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of it. His duty in such a case is first to restore the property to the lessor and then to bring an action for a declaration of rights.*

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173 Gratiaen J. stated:

> *The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.*

In *Alvar Pillai v. Karuppan* (1899) 4 NLR 321, the plaintiff sued the defendant to recover possession of the entire land on the basis that the term of lease had expired. The defendant refused to give up possession of the whole land on the basis that he was the tenant under the plaintiff only for a half of the said land. He set up a title under another person to the other half. Although the defendant was placed in possession by the plaintiff on the whole land, the District Judge entered judgment for the plaintiff only for his half share. On appeal, Bonser C.J. at page 322 stated:

> *Now, it appears that the plaintiff can only prove title to a half of the land. It is not necessary for the purposes of this case to state the devolution of the title, for even though the ownership of one-half of this land were in the defendant himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease. He must first give up possession, and then it*

> *will be open to him to litigate about the ownership (see Voet XIX. 2. 32).*

In *Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197 the Court took the same view.

In the Supreme Court case of *Wimala Perera v. Kalyani Sriyalatha* [2011] 1 Sri LR 182 it was held:

> *A lessee is not entitled to dispute his landlord's title by refusing to give up possession of the property at the termination of his lease on the ground that he acquired certain rights to the property subsequent to him becoming the lessee and during the period of tenancy. He must first give up possession and then litigate about the ownership he alleges.*

However, if an action is filed for ejectment against such defendant who originally entered into possession in a subordinate character claims prescriptive title to the property (which is an overly onerous task) by stating that he changed the character of possession from subordinate to adverse by explicit overt act (as the starting point of adverse possession) and continued such adverse possession for over 10 years as required by section 3 of the Prescription Ordinance, the rigidity of the said principle can be relaxed. In such a situation, the defendant cannot be directed to first surrender his possession in order for him to establish his prescriptive title.

Professor G.L. Peiris in his book *Law of Property in Sri Lanka*, Vol. I, 2nd Edition (1983), p.112, citing *inter alia Angohamy v. Appoo* (Morgan's Digest 281), *Government Agent, Western Province v. Perera* (1908) 11 NLR 337, *Alwis v. Perera* (1919) 21 NLR 321 states: "*The principle that an occupation which began in a dependent or subordinate capacity can be converted into "adverse possession" by an overt act or a series of acts*

indicative of a challenge to the owner's title, is clearly deducible from the decided cases."

The presumption is that a person who commences his possession in a subordinate character continues such possession in that character. In order to show change of the character of possession, cogent and affirmative evidence is required.

In *Ran Naide v. Punchi Banda* (1930) 31 NLR 478, Jayawardene A.J. observed:

> *Where a person who has obtained possession of a land of another in a subordinate character, as for example as a tenant or mortgagee, seeks to utilize that possession as the foundation of a title by prescription, he must show that by some overt act known to the person under whom he possesses he has got rid of that subordinate possession and commenced to use and occupy the property ut dominus (Government Agent v. Ismail Lebbe (1908) 2 Weer. 29). It is for him to show that his quasi-fiduciary position was changed by some overt act of possession. This view was adopted by the Privy Council in Naguda Marikar v. Mohamadu (1903) 7 N.L.R. 91) and also by the Supreme Court in Orloff v. Grebe (1907) 10 N.L.R. 183).*

In *Seeman v. David* [2000] 3 Sri LR 23 at 26, Weerasuriya J. stated:

> *It is well settled law that a person who entered property in a subordinate character cannot claim prescriptive rights till he changes his character by an overt act. He is not entitled to do so by forming a secret intention unaccompanied by an act of ouster. The proof of adverse possession is a condition precedent to the claim for prescriptive rights.*

Vide also *Thillekeratne v. Bastian* (1918) 21 NLR 12 at 19 and *Mitrapala v. Tikonis Singho* [2005] 1 Sri LR 206 at 211-212.

In the case of *De Soysa v. Fonseka* (1957) 58 NLR 501 at 502, Basnayake C.J. held:

> *There is no evidence that the user which commenced with the leave and licence of the owner of No. 18 was at any time converted to an adverse user. When a user commences with leave and licence the presumption is that its continuance rests on the permission originally granted. Clear and unmistakable evidence of the commencement of an adverse user thereafter for the prescribed period is necessary to entitle the claimant to a decree in his favour. There is no such evidence in the instant case.*

In the Privy Council case of *Siyaneris v. Jayasinghe Udenis de Silva* (1951) 52 NLR page 289, it was held:

> *If a person goes into possession of land as an agent for another, prescription does not begin to run until he has made it manifest that he is holding adversely to his principal.*

In *Naguda Marikar v. Mohammadu* (1898) 7 NLR 91, the Privy Council held that in the absence of any evidence to show that the plaintiff had got rid of his character of agent, he was not entitled to the benefit of section 3 of the Prescription Ordinance.

In the case of *Navaratne v. Jayatunge* (1943) 44 NLR 517, Howard C.J. remarked:

> *The defendant entered into possession of the lands in dispute with the consent and the permission of the owner. Being a licensee, she cannot get rid of this character unless she does some overt act showing an intention to possess adversely.*

In a more recent of *Ameen and Another v. Ammavasi Ramu* (SC/APPEAL/232/2017, SC Minutes of 22.01.2019), one of the questions to be decided was whether the defendant who was a licensee was entitled to put forward a plea of prescription. De Abrew A.C.J. (with M.N.B. Fernando J. and Amarasekera J. agreeing) stated:

> *When a person starts possessing an immovable property with leave and licence of the owner, the presumption is that he continues to possess the immovable property on the permission originally granted and such a person or his agents or heirs cannot claim prescriptive title against the owner or his heirs on the basis of the period he possessed the property.*

The defendant is a trespasser

Admittedly, the plaintiff in the instant action, having 11/12 shares in the land, is a co-owner of the land described in the first schedule to the plaint, whereas the defendant, having failed his prescriptive claim to a portion of the land, has no rights in the land. The defendant is a trespasser.

A co-owner can sue a trespasser

A co-owner can sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land.

In the leading case of *Hevawitarane v. Dangan Rubber Co. Ltd.* (1913) 17 NLR 49 at 53 Wood Renton A.C.J. declared:

> *Any co-owner, or party claiming under such a co-owner, is entitled to eject a trespasser from the whole of the common property. (Unus Lebbe v. Zayee (1893) 3 SCR 56, Greta v. Fernando (1905) 4 Bal. 100) Moreover, prima facie evidence of title is all that is required in such an action.*

It may be noted that, when it comes to a trespasser, Wood Renton A.C.J. remarked that "*prima facie evidence of title is all that is required in such an action.*" In the same case, Pereira J. stated at page 55:

> *As regards the rights of owners of undivided shares of land to sue trespassers, I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land (see section 12, Civil Procedure Code; Unus Lebbe v. Zayee (1893) 3 SCR 56; Greta v. Fernando (1905) 4 Bal. 100; Arnolisa v. Dissan 4 NLR 163).*

In *Hariette v. Pathmasiri* [1996] 1 Sri LR 358 at 362 and *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 at 403 the Supreme Court quoted the said principle of law with approval. This was reiterated in several decisions including *Rosalin Hami v. Hewage Hami and Others* (SC/APPEAL/15/2008, SC Minutes of 03.12.2010) and *Punchiappuhamy v. Dingiribanda* (SC/APPEAL/4/2010, SC Minutes of 02.11.2015).

The greater includes the less

In the impugned judgment of the High Court, the High Court refers to *Hevawitarane v. Dangan Rubber Co. Ltd. (supra)* to reiterate the well-settled law that a co-owner can sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land but refuses to apply this principle in this action stating that the plaintiff filed the action seeking a declaration of title to the entire land. This is a wrong approach.

Firstly, a careful reading of the prayer to the plaint will reveal that the plaintiff filed this action seeking a declaration of the plaintiff's title to the land and not seeking a declaration of title to the entire land. ("පහත 02 වන උපලේඛනයේ විස්තර වන ඉඩම සහ දේපළ තුළ පැමිනිලිකරුගේ අයිතිය ප්‍රකාශ කරන ලෙසත්")

Secondly, even if the plaintiff sought a declaration of title to the entire land, if the Court finds that the plaintiff is not entitled to the entire land but only to a portion of it, the Court need not dismiss the plaintiff's action *in toto*.

It is a recognised principle that when a plaintiff has asked for a greater relief than he is entitled to, it should not prevent him from getting the lesser relief which he is actually entitled to. *Non debet cui plus licet quod minus est non licere*, also known as, *Cui licet quod majus non debet quod minus est non licere*: the greater includes the less. This is a well-established principle in law and also in consonance with common sense. *Vide King v. Kalu Banda* (1912) 15 NLR 422 at 427, *Rodrigo v. Abdul Rahman* (1935) 37 NLR 298 at 299, *Police Sergeant, Hambantota v. Simon Silva* (1939) 40 NLR 534 at 538, *Ibealebbe v. The Queen* (1963) 65 NLR 433 at 435, *Abeynayake v. Lt. Gen. Rohan Daluwatte and Others* [1998] 2 Sri LR 47 at 55, *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 260-261, *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 at 409.

In *rei vindicatio* actions, defendants tend to rely on *Hariette v. Pathmasiri (supra)* to argue that when a plaintiff in a *rei vindicatio* action seeks a declaration of title to the entire land, his action must fail if he fails to prove that he is the sole owner of the entire land. This is a misinterpretation of the judgment. In *Hariette's* case the Supreme Court at pages 362-363 held as follows:

However, it has to be borne in mind that our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land. In the case of Hevawitarana v. Dangan Rubber Co. Ltd 17 NLR 44 at 55, Pereira, J. stated as follows:-

"I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land".

In this case the Plaintiff is not seeking a declaration of title to her undivided share in the land described in schedule 1 and for the ejectment of the Defendant from that land. She has pleaded that she possessed the land described in schedule 2 for and in lieu of her undivided share and seeks the ejectment of the Defendant from that land. Therefore the case for the Plaintiff cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2.

Since the prescriptive title to schedule 2 has not been proved by the plaintiff, the Supreme Court affirmed the judgment of the Court of Appeal and dismissed the appeal.

If I may repeat for emphasis, in *Hariette's* case the plaintiff sought to eject the defendant from the portion of land described in the second schedule to the plaint (which was part of the larger land described in the first

schedule to the plaint) on the basis that she possessed the portion of the land described in the second schedule to the plaint in lieu of her undivided shares described in the first schedule to the plaint. The Supreme Court held that the plaintiff failed to establish that she acquired prescriptive title to that portion of land by ouster and therefore the plaintiff's action cannot succeed.

Hariette's case was followed by the Supreme Court in *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 where facts were similar. The Supreme Court at page 403 summarised the issue in that case in the following manner:

> *It was agreed by both counsel at the hearing, that the only issue that has to be gone into is whether a co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action if he instituted action as the sole owner of the premises.*

This question was answered emphatically in the affirmative. Bandaranayake J. (later C.J.) stated at page 409:

> *I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for a lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief. However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence.*
>
> *In such circumstances the question raised by the counsel for the appellant is answered in the following terms. A co-owner of a land who*

> *sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to.*

However, as in *Attanayake's* case, the Supreme Court was not inclined to grant relief to the plaintiff-appellant because the plaintiff failed to prove that he was entitled to the land described in schedule B to the plaint. The reason was that the plaintiff sought a declaration of title and ejectment of the defendant from the land described in schedule B to the plaint.

> *The facts in the present case are very much similar to that of Harriette's case. As referred to earlier in the instant case the appellant (the original plaintiff) had instituted action in the District Court for a declaration of title and for ejectment from the land morefully described in the Schedule B to the plaint of the respondent therefrom. [page 406] However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence. [page 409]*

These two judgments (*Hariette v. Pathmasiri* and *Attanayake v. Ramyawathie*) unequivocally admit that a co-owner is entitled to:

(a) file an action seeking a declaration to his undivided rights of the land and ejectment of a trespasser from the whole land; and

(b) successfully sue a trespasser for a declaration of title and ejectment notwithstanding that he instituted the action as the sole owner of the premises. This latter entitlement is based on the common-sense principle that the greater includes the less.

If a co-owner of a land as the plaintiff can successfully sue a trespasser for ejectment from the whole land notwithstanding that he initially instituted the action as the sole owner of the land based on the common-sense principle that the greater includes the less, the plaintiff's action in my view cannot and should not be dismissed if he seeks to eject a trespasser from an identified portion of the whole land on the basis that he filed the action as the sole owner of the identified portion of the land but he is in fact a co-owner of that identified portion of the land. In such an event, the Court can declare that the plaintiff is a co-owner of the whole land or of that identified portion of the land and eject the trespasser on that basis.

Why reluctant to apply "the greater includes the less"?

Two main reasons why some judges and lawyers think that the general principle "the greater includes the less" is inapplicable in *rei vindicatio* actions seem to be:

(a) No Court can grant relief to a party what has not been prayed for in the prayer to the pleadings. In other words, the Court can grant reliefs only in the manner prayed for in the prayer to the pleadings (plaint/answer/replication etc) – neither more nor less.
(b) In a *rei vindicatio* action, the plaintiff must prove title of the property strictly in the exact manner pleaded in the plaint.

Can the Court grant relief not prayed for in the pleadings?

The popular view that no Court can grant relief what has not been prayed for in the prayer to the pleadings (*Surangi v. Rodrigo* [2003] 3 Sri LR 35, *Sopi Nona v. Karunadasa* [2005] 3 Sri LR 237) is not an absolute rule of law.

Even if a particular relief has not been prayed for in the prayer to the pleadings, if it has been raised as an issue that has been accepted by Court, the Court cannot refuse to grant the relief on the basis that it has not been prayed for in the prayer to the pleadings.

A case is not tried on the pleadings or on the reliefs as prayed for in the prayer to the pleadings but on issues raised and accepted by Court on which the right decision of the case appears to Court to depend. Once issues are raised and accepted by Court the pleadings (which include reliefs prayed) have no place; they recede to the background. Hence, what has been prayed for in the prayer to the pleadings is not decisive. *Vide Hanaffi v. Nallamma* [1998] 1 Sri LR 73 at 77, *Dharmasiri v. Wickrematunga* [2002] 2 Sri LR 218, *Gunasinghe v. Samarasundara* [2004] 3 Sri LR 28, *Kulatunga v. Ranaweera* [2005] 2 Sri LR 197, *Peiris v. Siripala* [2009] 1 Sri LR 75 at 78.

In *Begum Sabiha Sultan v. Nawab Mohd. Mansur Ali Khan & Ors* (Appeal Civil 1921 of 2007 decided on 12.04.2007), the Supreme Court of India stated:

> *There is no doubt that at the stage of consideration of the return of the plaint under Order VII Rule 10 of the Code, what is to be looked into is the plaint and the averments therein. At the same time, it is also necessary to read the plaint in a meaningful manner to find out the real intention behind the suit. In Messrs Moolji Jaitha & Co. Vs. The Khandesh Spinning & Weaving Mills Co. Ltd. [A.I.R. 1950 Federal Court 83], the Federal Court observed that: "The nature of the suit and its purpose have to be determined by reading the plaint as a whole."*
>
> *It was further observed:*

"The inclusion or absence of a prayer is not decisive of the true nature of the suit, nor is the order in which the prayers are arrayed in the plaint. The substance or object of the suit has to be gathered from the averments made in the plaint and on which the reliefs asked in the prayers are based."

It was further observed:

"It must be borne in mind that the function of a pleading is only to state material facts and it is for the court to determine the legal result of those facts and to mould the relief in accordance with that result."

This position was reiterated by this Court in T. Arivandandam Vs. T.V. Satyapal & Anr. (1978) 1 S.C.R. 742 by stating that what was called for was a meaningful – not formal – reading of the plaint and any illusion created by clever drafting of the plaint should be buried then and there.

In the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95 at 100, Kulatunga J. observed: "*The law does not require that the plaint should make out a prima facie case which is what the defendants-appellants appear to insist on, nor are the plaintiffs required to state their evidence by which the claim would be proved.*"

In *Jane Nona v. Padmakumara* [2003] 2 Sri LR 118 the question was whether the Court can grant relief for ejectment when there was no such specific relief prayed for in the prayer to the plaint. The Court answered this in the affirmative on the basis that when the plaintiff averred in the body of the plaint that a cause of action has accrued to him to obtain an order of peaceful possession of the land and damages, and prayed that he be granted damages until possession is restored to him, it is implicit that the plaintiff seeks ejectment as well.

In *Weerasinghe v. Heling and Others* (SC/APPEAL/91/2013, SC Minutes of 26.02.2020) the question was whether the plaintiff could seek ejectment of the defendants from the land in suit without a specific prayer for declaration of title. This Court answered it in the affirmative. De Abrew J. citing with approval *Jayasinghe v. Tikiri Banda* [1988] 2 CALR 24, *Dharmasiri v. Wickramatunga* [2002] 2 Sri LR 218 and *Pathirana v. Jayasundara* (1955) 58 NLR 169 held "*in an action for ejectment of the defendant from the property in dispute, once the plaintiff's title to the property is proved, he (the plaintiff) is entitled to ask for ejectment of the defendant from the property even though there is no prayer in the plaint for a declaration of title*."

In *Jayasinghe v. Tikiri Banda* [1988] 2 CALR 24 Viknaraja J. held "*where title to the property has been proved, as in this case the fact that one had failed to ask for a declaration of title to the property will not prevent one from claiming the relief of ejectment*."

What is important is whether the relief has been sought in the pleadings and not whether the relief has been sought in the prayer to the pleadings.

In *Dharmasiri v. Wickramatunga* [2002] 2 Sri LR 218 the plaintiff sought ejectment of the defendant but there was no prayer for a declaration of title. However the Court held that the absence of a specific prayer for a declaration of title causes no prejudice if the title is pleaded in the body of the plaint and issues are framed and accepted by Court on the title so pleaded.

In *Charlot Nona v. Kuruppu* (SC/APPEAL/54/2011, SC Minutes of 17.06.2015), the High Court had dismissed the application for leave to appeal on the basis that in the prayer to the petition there was no such relief sought. On appeal, the Supreme Court set aside the judgment of the High Court holding that the absence of a specific prayer for leave to

appeal cannot be considered as a ground for dismissal of an application for leave to appeal when such petition contains a statement in the body of the petition moving the Court to grant leave to appeal.

This position can also be defended from a different point of view. Maasdorp's Institutes of South African Law, Vol II, 8th Edition (1960), p. 27) states the rights of an owner are *"comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition".* He goes on to say that *"these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time".*

As stated in K.J. Aiyar's Judicial Dictionary, 11th Edition (1995), page 833, it is not possible to give a comprehensive definition to the rights of ownership. Traditionally, those rights include:

> *Jus utendi* – the right to use of the thing
> *Jus possidendi* – the right to possess a thing
> *Jus abutendi* – the right to consume or destroy a thing
> *Jus despondendi vei transferendi* – the right to dispose of a thing or to transfer it as by sale, gift, exchange etc.
> *Jus sibi habendi* – the right to hold a thing for oneself
> *Jus alteri non habendi* or *Jus prohibendi* – the right to exclude others from its use

In a *rei vindicatio* action, if the Court holds with the plaintiff, the Court accepts that he is the owner of the property. The owner of the property has the inherent right to possess the property. In other words, the right to possession is an essential attribute of ownership. Hence the plaintiff automatically gets the entitlement to the right to possession whether or not he has prayed for ejectment in the prayer to the plaint once the Court

decides that he is the owner of the property. *Vide Kamalawathie v. Premarathne* (SC/APPEAL/118/2018, SC Minutes of 2.6.2021).

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 172 Gratiaen J. held "*In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation*."

Let me also add that even if an issue or issues have not been raised using the real legal terms, if the issue or issues raised in fact cover the situation intended by the legal terms, the Court cannot be found fault with for granting the relief using the legal term. In *Pushpakumara v. Marmet* [2003] 2 Sri LR 244 the District Court *inter alia* granted divorce on the ground of malicious desertion despite there being no issue framed on malicious desertion. When this matter was raised on appeal, the finding was upheld on the basis that "*Despite the fact that the legal term malicious desertion is not referred to in the said issue however the issue raises the factual question as to whether the 1st defendant-respondent's conduct amounted to constructive malicious desertion*."

As has been stated by Suresh Chandra J. in the case of *Elias v. Gajasinghe* (SC/APPEAL/50/08, SC Minutes of 28.06.2011):

> *For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged*

> *from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law.*

Courts should not be swayed by high-flown technical objections in meting out substantive justice to litigants unless such objections shatter the very foundation of the case.

In a rei vindicatio action: Who has the onus of proof?
What is the standard of proof?
Is strict proof of title in the manner pleaded in the plaint necessary?

The High Court states that since this is a declaration of title action, the plaintiff must prove title to the land in the manner she has pleaded in the plaint.

As I have already adverted to, there is a distinction between a *rei vindicatio* action proper and a declaration of title action. The present action is not a *rei vindicatio* action proper but a declaration of title action. The distinction between the two was lucidly explained by Gratian J. in *Pathirana v. Jayasundara (supra)* at 172-173:

> *In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*
>
> *The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract*

(whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

Even if this is a *rei vindicatio* action proper, there is no necessity to prove the title of the plaintiff exactly in the same manner which the plaintiff has pleaded in the plaint. For instance, if the plaintiff in the plaint pleads title relying on one deed but at the trial marks several other deeds and documents (duly listed) to fortify his case, the Court should not disregard such deeds/documents and mechanically dismiss the plaintiff's action on the basis that the plaintiff in a *rei vindicatio* action must prove title strictly in the same manner which he has pleaded in the plaint.

Even in a criminal case or a partition case such stringent procedure is not adopted. This does not mean that a plaintiff in a *rei vindicatio* action can present a different case at the trial from what he has pleaded in his pleadings. Suffice it to say, even that is possible, if issues are raised in that direction and accepted by Court, for the case is tried not on pleadings but on issues.

The burden of proof and the standard of proof in *rei vindicatio* actions are overwhelmingly overshadowed by misinterpretations, misconstructions and misunderstandings. Let me elaborate on this as significant portion of the District Court work is on *rei vindicatio*/declaration of title actions.

In order to succeed in a *rei vindicatio* action, first and foremost, the plaintiff shall prove his ownership to the property. If he fails to prove it, his action shall fail. This principle is based on the Latin maxim "*onus probandi incumbit ei qui agit*", which means, the burden of proof lies with the person who brings the action. Section 101 of the Evidence Ordinance is also to a similar effect.

Macdonell C.J. in *De Silva v. Goonetilleke* (1960) 32 NLR 217 at 219 stated:

> *There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action rei vindicatio plaintiff must have ownership actually vested in him". (1 Nathan p. 362, s. 593.) ... The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.*

In *Pathirana v. Jayasundera* (1955) 58 NLR 169 at 172, Gratiaen J. declared:

> *"The plaintiff's ownership of the thing is of the very essence of the action." Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

In *Mansil v. Devaya* [1985] 2 Sri LR 46, G.P.S. De Silva J. (later C.J.) stated at 51:

> *In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership.*

In *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 352, Marsoof J. held:

> *An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title.*

Having said the above, it needs to be emphasised that the plaintiff in a *rei vindicatio* action has no heavier burden to discharge than a plaintiff in any other civil action. The standard of proof in a *rei vindicatio* action is on a balance of probabilities.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition (2007), states at page 539:

> *To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration.*

In *Preethi Anura v. William Silva* (SC/APPEAL/116/2014, SC Minutes of 05.06.2017), the plaintiff filed a *rei vindicatio* action against the defendant seeking a declaration of title to the land in suit and the ejectment of the defendant therefrom. The District Court held with the plaintiff but the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to prove title of the land. The plaintiff's title commenced with a statutory determination made under section 19 of the Land Reform Law in favour of his grandmother, who had bequeathed the land by way of a last will to the plaintiff, with the land being later conveyed to the plaintiff by way of an executor's conveyance. No documentary evidence was tendered to establish that the last will was proved in Court and admitted to probate in order to validate the said executor's conveyance. The District Court was satisfied that the said factors were proved by oral evidence but the High Court found the same insufficient to discharge the burden that rests upon a plaintiff in a *rei vindicatio* action, which the High Court considered to be very heavy. The Supreme Court reversed the judgment of the High Court and restored the judgment of the District Court, taking the view that the plaintiff had proved title to the land despite the purported shortcomings. In the course of the judgment, Dep C.J. (with De Abrew J. and Jayawardena J. agreeing) remarked:

> *In a rei vindicatio action, the plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the plaintiff discharged the burden on balance of probability.*

What is the degree of proof expected when the standard of proof is on a balance of probabilities? This is better understood when proof on a balance of probabilities is compared with proof on beyond a reasonable doubt.

On proof beyond a reasonable doubt, in *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning declared at 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.*

In relation to proof on a balance of probabilities, it was stated at 374:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.*

In consideration of the degree of proof in a *rei vindicatio* action, we invariably refer to the seminal judgment of *Pathirana v. Jayasundara* (1955) 58 NLR 169. In that case the plaintiff sued the defendant on the basis that the defendant was an overholding lessee. The defendant admitted the bare execution of the lease but stated that the lessors were unable to give him possession of the land. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The

plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment on the footing that his rights of ownership had been violated. The Supreme Court held:

> *A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action rei vindicatio if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title.*

In the course of the judgment the Court distinguished an action for declaration of title (based on the contractual relationship between the plaintiff and the defendant) from an action *rei vindicatio* proper. In general terms, in both actions, a declaration of title is sought – in the former, as a matter of course, without strict proof of title, but in the latter, as a peremptory requirement, with strict proof of title. H.N.G. Fernando J. (later C.J.) at page 171 explained the distinction between the two in this way:

> *There is however the further point that the plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration*

> *of title through the operation of a rule in estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a rei vindicatio. But this choice can I think be properly exercised only by clearly setting out the claim of title and sounding in delict.*

The term "strict proof of the plaintiff's title" used here does not mean that the plaintiff in a *rei vindicatio* action shall prove title beyond a reasonable doubt or a very high degree of proof. The term "strict proof of the plaintiff's title" was used here to distinguish the standard of proof between a declaration of title action based on a contractual relationship between the plaintiff and the defendant such as lessor and lessee, and a *rei vindicatio* action proper based on ownership of the property. In a *rei vindicatio* action, if the plaintiff proves on a balance of probabilities that he is the owner, he must succeed.

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, makes it clear at page 304:

> *It must be emphasized, however, that the observations in these cases to the effect that the plaintiff's title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition actions. … It is clear that a standard characterized by this degree of severity does not apply to the proof of a plaintiff's title in a rei vindicatory action.*

(Justice) Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", Vol 2, International Property Investment Journal 217 at pages 243-244:

> *In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant. See de Silva v. Gunathilleke, 32 N.L.R. 217 (1931); Abeykoon Hamine v. Appuhamy, 52 N.L.R. 49 (1951); Muthusamy v. Seneviratne, 31 C.L.W. 91 (1946). Once title is established, the burden shifts to the defendant to prove that by adverse possession for a period of 10 years he has acquired prescriptive title. Siyaneris v. Udenis de Silva, 52 N.L.R. 289 (1951). In rei vindicatory action once the plaintiff proves he was in possession but then he was evicted by the defendant, the burden of proving title will shift to the defendant. In Kathiramathamby v. Arumugam 38 C.L.W. 27 (1948) it was held that if the plaintiff alleges that he was forcibly ousted by the defendant the burden of proving ouster remains with the complainant. As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property.*

The view of Dr. Tambiah "*As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property*" shall be understood in the context of his view expressed at the outset that "*In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant.*"

The recent South African case of *Huawei Technologies South Africa (Pty) Limited v. Redefine Properties Limited and Another* [2018] ZAGPJHC 403 decided on 29.05.2018 reveals that the burden of proof of a plaintiff in a *rei vindicatio* action is not unusually onerous. In this case it was held that what the plaintiff in a *rei vindicatio* action needs to prove is that he is the owner of the property (which the Court stated could be done by producing his title deed) and that the defendant is holding or in

possession of the property. Once this is done, the onus shifts to the defendant to establish a right to continue to hold against the owner. Cele J. declared:

> *The rei vindicatio is the common law real action for the protection of ownership. C.P. Smith, Eviction and Rental Claims: A Practical Guide at p. 1-2; Graham v. Ridley 1931 TPD 476; Chetty v Naidoo 1974 (3) SA 13 (A). It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in possession of the res. The onus is on the Defendant to allege and establish a right to continue to hold against the owner. Chetty v. Naidoo (supra) at 20 A–E. A court does not have an equitable discretion to refuse an order for ejectment on the grounds of equity and fairness. Belmont House v. Gore NNO 2011 (6) SA 173 (WCC) at para [15]. In the case of eviction based on an owner's rei vindicatio, the owner has only to prove his ownership which can be done by producing his title deed indicating that the property is registered in his name. Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd [1999] ZASCA 208; 1993 (1) SA 77 (A) at 82 A–C.*

The requirement of proof of chain of title which is the norm in a partition action is not applicable in a *rei vindicatio* action.

This view was expressed by Professor Wille (op. cit. at page 539) when he stated that "*In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name*."

When the standard of proof is on a balance of probabilities, the Court is entitled to consider whose version – the plaintiff's or the defendant's – is more probable.

Banda v. Soyza [1998] 1 Sri LR 255 is a *rei vindicatio* action filed by a trustee of a temple seeking a declaration of title, the ejectment of the defendant and damages. The Court of Appeal set aside the judgment of the District Court and the plaintiff's action was dismissed on the ground that the plaintiff had failed to establish title to the subject matter of the action or even to identify the land in suit. But the Supreme Court set aside the judgment of the Court of Appeal and restored the judgment of the District Court on the basis that there was "*sufficient evidence led on behalf of the plaintiff to prove the title and the identity of the lots in dispute*." G.P.S. de Silva C.J. laid down at page 259 the criterion to be adopted in a *rei vindicatio* action in respect of the standard of proof in the following manner:

> *In a case such as this, the true question that a court has to consider on the question of title is,* ***who has the superior title?*** *The answer has to be reached upon a consideration of the totality of the evidence led in the case.*

Dr. H.W. Tambiah (op. cit. at p. 244) refers to proof of superior title by the defendant as a defence to a *rei vindicatio* action.

> *In a vindicatory action, the defendant has numerous defenses, which include: denial of the plaintiff's title; establishment of his own title, in the sense of establishing a title superior to that of the plaintiff; prescription; a plea of res judicata; right of tenure under the plaintiff – for example usufruct, pledge or lease of land; the right to retain possession subject to an indemnity from the plaintiff under peculiar conditions; a plea of exception rei venditae et traditae; and, ius tertii.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 adverted to **superior title** and **sufficient title** and held that the plaintiff in a *rei vindicatio* action shall prove that he has title to the disputed property and that such title is superior to the title, if any, put forward by the defendant, or that he has sufficient title which he can vindicate against the defendant.

The plaintiff in *Jinawathie*'s case filed a *rei vindicatio* action against the defendants relying upon a statutory determination made under section 19 of the Land Reform Law, No. 1 of 1972. The defendants sought the dismissal of the plaintiff's action on the basis that the alleged statutory determination did not convey any title on the plaintiff and that in the absence of the plaintiff demonstrating dominium over the land, the plaintiff's action shall fail. Both the District Court and the Court of Appeal held with the plaintiff and the Supreme Court affirmed it. Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J., Wanasundera J., Atukorale J., and Tambiah J., whilst emphasising that in a *rei vindicatio* action proper, the plaintiff's ownership of the land is of the very essence of the action, expressed the view of the Supreme Court in the following terms at page 142:

> *This principle was re-affirmed once again by Gratiaen J. in the case of Palisena v. Perera (1954) 56 NLR 407 where the plaintiff came into court to vindicate his title based upon a permit issued under the provisions of the Land Development Ordinance (Chap. 320). In giving judgment for the plaintiff, Gratiaen, J. said: "a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser had prevented him from entering upon the land does not afford a defence to the action."*

> *In a vindicatory action the plaintiff must himself have title to the property in dispute: the burden is on the plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the defendant in occupation. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence.*
>
> *On a consideration of the foregoing principles – relating to the legal concept of ownership, and to an action rei vindicatio – it seems to me that the plaintiff-respondent did, at the time of the institution of these proceedings, have, by virtue of P6 [statutory determination], "sufficient" title which she could have vindicated against the defendants-appellants in proceedings such as these.*

In the Supreme Court case of *Khan v. Jayman* [1994] 2 Sri LR 233 the plaintiff sued the defendant for ejectment from the premises in suit and damages on the basis that the defendant was in forcible occupation of the premises after the termination of the leave and licence given to the defendant. The defendant claimed tenancy. The District Court dismissed the plaintiff's action on the basis that the plaintiff failed to establish that the defendant was a licensee and the Court of Appeal affirmed it. On appeal, the Supreme Court held that the plaintiff shall succeed since the defendant failed to establish a "better title" to the property after the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title. Kulatunga J. with the agreement of G.P.S. De Silva C.J. and Wadugodapitiya J. stated at page 235:

> *The plaintiff did not pray for a declaration of title or raise an issue on ownership, presumably because no challenge to his ownership was anticipated. Indeed the defendant's answer did not deny the plaintiff's title. At the trial, the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title to the premises*

in suit. This action is, therefore, a vindicatory action i.e. an action founded on ownership. Maasdorp's Institutes of South African Law Vol. II Eighth Edition page 70 commenting on the right of an owner to recover possession of his property states –

"The plaintiff's ownership in the thing is the very essence of such an action and will have to be both alleged and proved …"

He also states –

"The ownership of a thing consists in the exclusive rights of possession … and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession from anyone who cannot set up a ***better title*** *to it and warn him off the property, and eject him from it".*

The argument of the defendant that he was prejudiced in his defence as the plaintiff did not sue the defendant as the owner of the premises was rejected by the Supreme Court. Kulatunga J. stated at 239:

Learned Counsel for the defendant-respondent also submitted that in view of the fact that this was not a case of the plaintiff suing as owner simpliciter and in the absence of an issue on ownership, the defendant would not have known the case he had to meet and was prejudiced in his defence. I cannot agree. As stated early in this judgment, the plaintiff pleaded his ownership and clearly set out his case, including the fact that the defendant was in occupation of a room of the premises in suit by leave and licence. The defendant too set out his case in unambiguous terms viz. that he was a protected tenant from 1971. In the end, the plaintiff proved his case whilst the defendant failed to establish a better title to the property. As such, the question of prejudice does not arise.

When the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property.

In *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289 the Privy Council held:

> *In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant.*

In *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222, Sharvananda C.J. stated:

> *In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession.*

This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227 at 229 and reiterated in *Candappa nee Bastian v. Ponnambalam Pillai* [1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah* [1999] 1 Sri LR 53, *Gunasekera v. Latiff* [1999] 1 Sri LR 365 at 370, *Jayasekera v. Bishop of Kandy* [2002] 2 Sri LR 406 and *Loku Menika v. Gunasekara* [1997] 2 Sri LR 281 at 282-283.

In general, in a *rei vindicatio* action the plaintiff's case is based on his paper title whereas the defendant's case is based on prescriptive title. Prescriptive title necessarily commences and continues with violence,

hostility, force and illegality. Court should not in my view encourage such illegal conduct. Court must resist converting illegality into legality unless there are cogent and compelling reasons to do so. As stated by Udalagama J. in the Supreme Court case of *Kiriamma v. Podibanda* [2005] BLR 9 at 11 "*considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action.*"

Can the defendant's evidence be considered in a *rei vindicatio* action?

Whilst emphasising that (a) the initial burden in a *rei vindicatio* action is on the plaintiff to prove ownership of the property in suit and (b) the burden of proof in a *rei vindicatio* action is proof on a balance of probabilities, if the plaintiff in such an action has "sufficient title" or "superior title" or "better title" than that of the defendant, the plaintiff shall succeed. No rule of thumb can be laid down on what circumstances the Court shall hold that the plaintiff has discharged his burden. Whether or not the plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.

In this process, the defendant's evidence need not be treated as illegal, inadmissible or forbidden. The oft-quoted dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167 that "*The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.*" shall not be misinterpreted to equate a defendant in a *rei vindicatio* action with an accused in a criminal case where *inter alia* his confession made to a police

officer is inadmissible and he can remain silent until the prosecution proves its case beyond reasonable doubt.

I must add that even in a criminal case, if a strong *prima facie* case has been made out against the accused by the prosecution, the accused owes an explanation, if it is within the power of him to offer such explanation. This is in consonance with the dictum of Lord Elenborough in *Rex v. Cochrane* (Garney's Reports 479) which is commonly known as Elenborough dictum. In reference to this dictum, Dep J. (later C.J.) in *Ranasinghe v. O.I.C. Police Station, Warakapola* (SC/APPEAL/39/2011, SC Minutes of 02.04.2014) states:

> *This dictum could be applied in cases where there is a strong prima facie case made out against the accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against him.*

The dicta of Herath J. in *Wanigaratne v. Juwanis Appuhamy (supra)* is eminently relevant to the facts of that particular case but has no universal application to all *rei vindicatio* actions. Since it is a one-page brief judgment, the facts are not very clear. However, as I understand, the plaintiffs in that case had filed a *rei vindicatio* action against the defendant on the basis that the defendant was a trespasser notwithstanding that he (the defendant) had been in occupation of some portions of the land for some considerable period of time. From the following sentence found in the judgment, "*In this case, the plaintiffs produced a recent deed in their favour and further stated in evidence that they could not take possession of the* ***shares purchased by them*** *because they were resisted by the 1st defendant"*, it is clear that the plaintiffs, if at all, had only undivided rights in the land. It is also clear from the judgment that whether or not the defendant also had undivided rights

was not clear to Court. It is in that context Herat J. states "*The learned District Judge, in his judgment expatiates on the weakness of the defence case; but unfortunately has failed to examine what title, if any, has been established by the plaintiffs.* ***No evidence of title has been established by the plaintiffs in our opinion***."

It may be noted that in *Wanigaratne's* case, the finding of the Supreme Court is that "*No evidence of title has been established by the plaintiffs*". The facts are totally different in the instant case. In the instant case, even the High Court accepts that the plaintiff is entitled to 11/12 shares of the land by deed of transfer No. 2411 marked at the trial P3. The defendant does not have paper title to the land. The prescriptive claim preferred by the defendant was rejected by Court.

As this Court held in *Wasantha v. Premaratne* (SC/APPEAL/176/2014, SC Minutes of 17.05.2021), the Court can in a *rei vindicatio* action consider the evidence of the defendant in arriving at the correct conclusion:

> *Notwithstanding that in a rei vindicatio action the burden is on the plaintiff to prove title to the land no matter how fragile the case of the defendant is, the Court is not debarred from taking into consideration the evidence of the defendant in deciding whether or not the plaintiff has proved his title. Not only is the Court not debarred from doing so, it is in fact the duty of the Court to give due regard to the defendant's case, for otherwise there is no purpose in a rei vindicatio action in allowing the defendant to lead evidence when all he seeks is for the dismissal of the plaintiff's action.*

Actio rei vindicatio* and action *in rem

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173 Gratiaen J. states:

> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*

The fact that a *rei vindicatio* action is identified as an action *in rem* has unmistakably contributed to expect a high degree of proof of title from a plaintiff in such an action. Is this thinking correct?

The phrase "*in rem*" requires an explanation rather than a definition. The Latin term "*in rem*" derives from the word "*res*", which means "*a thing or an object*" whether movable or immovable. Actions *in rem* were originally used as a means of protecting title to movables, especially slaves, because land was not at first the object of private ownership – Buckland and McNair, *Roman Law and Common Law Comparison* (Cambridge University Press, 1936) p. 6. Also, *in rem* jurisdiction is invoked in maritime cases where a party could bring an action *in rem* against a ship instead of the owner of the ship. It is the ship that suffers the consequences. The owner suffers the consequences if it is an action *in personam*.

Maasdorp's Institutes of South African Law, Vol II, 8th Edition (1960), p.70 states "*The form of action for the recovery of ownership was under the Roman law called vindicatio rei, which was an action in rem, that is, aimed at the recovery of the thing which is in the possession of another, whether such possession was rightfully or wrongfully acquired, together with all its accretions and fruits, and compensation in damages for any loss sustained by the owner through having been deprived of it.*"

Black's Law Dictionary, 11th edition, defines the term "*in rem*" as "*Latin 'against a thing' – Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing.*" It defines the term "*in personam*" as "*Latin 'against a person' – Involving or determining the personal rights and obligations of the parties. (Of a legal action) brought against a person rather than property*."

The following passage of Dr. H. W. Tambiah (op. cit. p. 242) explains why *rei vindicatio* is an action *in rem*.

> *The primary remedy granted to an owner against the person who disputes his ownership is rei vindicatio. This Roman-Dutch Law remedy has been adopted by the courts in Sri Lanka. Since the owner, as dominus, has a right of possession, occupation and use of the land, this action is in the nature of an action in rem. See Vulcan Rubber Ltd. v. South African Railways and Harbours, 3 S.A. 285 (1958); Hissaias v. Lehman, 4 S.A. 715 (1958). In this type of action, the owner of land whose title is disputed and who has been unlawfully ejected, may bring an action for a declaration of title and ejectment. If the owner has not been ejected but his title is disputed he is entitled to bring a declaratory action to dismiss any disputes to his title. Where an owner is unlawfully ejected he may bring an action for declaration of title for mesne profits, damages and ejectment.*

In the case of *Allis Appu v. Endris Hamy* (1894) 3 SCR 87, Withers J. categorised *rei vindicatio* both as an action *in rem* and action *in personam*:

> *Certain actions of an analogous nature apart, the action rei vindicatio is allowed to the owner and to him alone. Lesion to the right of property is of the very essence of the action and in that respect constitutes it an action in rem. Lesion to the personal right of*

the true proprietor properly constitutes a claim to compensation for the produce of which he has been deprived by the possessor and in that respect constitutes it an action in personam.

In classical Roman Law although *actio rei vindicatio* is classified as an action *in rem* as opposed to an action *in personam*, the term "action *in rem*" shall not be understood in the popular sense that we conceive in contemporary society. An action *in rem* means an action against a thing whereas an action *in personam* means an action against a person. A partition action is considered an action *in rem* in that the judgment in a partition action has a binding effect on all persons having interests in the property whether or not joined as parties to the action. It transcends the characteristic of an *inter partes* action and assumes the characteristic of an action *in rem* resulting in title good against the world. The scheme of the Partition Law is designed to serve that purpose. But the entire world is not bound by the judgment in a *rei vindicatio* action. The judgment in a *rei vindicatio* action binds only the parties to the action and their privies. In modern-day legal jargon, *rei vindicatio* is not an action *in rem* but an action *in personam*.

The fact that *rei vindicatio* is not an action *in rem* in the popular sense is reflected in the dicta of Dep C.J. in *Preethi Anura v. William Silva (supra)* where in reference to the standard of proof in a *rei vindicatio* action it was stated "*The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title.*"

In *Sithy Makeena v. Kuraisha* [2006] 2 Sri LR 341 at 344, Imam J. with Sriskandarajah J. in agreement stated "*It is well-settled law that only the parties to a rei vindicatio action are bound by the decision in such a case,*

as a rei vindicatio action is an action in personam and not an action in rem."

In the Supreme Court case of *Mojith Kumara v. Ariyaratne* (SC/APPEAL/123/2015, SC Minutes of 29.03.2016), the plaintiff filed action seeking declaration of title to the land in suit, ejectment of the defendants therefrom and damages. It was a *rei vindicatio* action proper. The defendants sought dismissal of the plaintiff's action. The plaintiff relied on a decree entered in his favour in a previous *rei vindicatio* action filed against a different party, but in respect of the same land. The District Court dismissed the plaintiff's action on the basis that the defendants before Court were not parties to the previous action and therefore they are not bound by that judgment. On appeal, the High Court set aside the judgment of the District Court and held that the plaintiff can claim ownership to the land on the strength of the previous decree apparently on the basis that *rei vindicatio* is an action *in rem*. The Supreme Court held that the previous action is an action *in personam* and not an action *in rem* and therefore third parties are not bound by that judgment. Chitrasiri J. with the agreement of Aluwihare J. and De Abrew J. held:

> *A decree in a case in which a declaration of title is sought binds only the parties in that action. Such a proposition is not applicable when it comes to a decree in rem which binds the whole world. Effects and consequences of actions in rem and actions in personam are quite different. Action in rem is a proceeding that determines the rights over a particular property that would become conclusive against the entire world such as the decisions in courts exercising admiralty jurisdictions and the decisions in partition actions under the partition law of this country. Procedure stipulated in Partition Law contains provisions enabling interested parties to come before courts and to join as parties to the action even though the plaintiff fails to make*

them as parties to it. Therefore there is a rationale to treat the decrees in partition cases as decrees in rem.

Actions in personam are a type of legal proceedings which can affect the personal rights and interests of the property claimed by the parties to the action. Such actions include an action for breach of contract, the commission of a tort or delict or the possession of property. Where an action in personam is successful, the judgment may be enforced only against the defendant's assets that include real and personal or movable and immovable properties. Therefore, a decree in a rei vindicatio action is considered as a decree that would bind only the parties to the action. In the circumstances, it is clear that the plaintiff cannot rely on the decree in 503/L to establish rights to the property in question as against the defendants in this case are concerned.

The defendant cannot raise questions of fact for the first time in the Supreme Court

After leave to appeal was granted to the plaintiff by this Court, the defendant has raised two purported questions of law which I quoted at the outset. By these purported questions of law the defendant seeks to argue that the plaintiff has not established that the land described in the second schedule to the plaint is part of the land described in the first schedule to the plaint. It is significant to note that this was not put in issue at the trial in the District Court. This is not a question of law but a question of fact. Any question which is not a pure question of law, but a question of fact or a mixed question of fact and law, cannot be raised for the first time in appeal. *Vide Hameed alias Abdul Rahman v. Weerasinghe* [1989] 1 Sri LR 217, *Leslin Jayasinghe v. Illangaratne* [2006] 2 Sri LR 39, *Simon Fernando v. Bernadette Fernando* [2003] 2 Sri LR 158, *Gunawardena v. Daraniyagala* [2010] 1 Sri LR 309, *Somawathie v.*

Wilmon [2010] 1 Sri LR 128, *Piyadasa v. Babanis* [2006] 2 Sri LR 17 at 24, *Leslin Jayasinghe v. Illangaratne* [2006] 2 Sri LR 39 at 47.

In any event, the defendant in his evidence has unequivocally admitted that the land described in the second schedule to the plaint is part of the land described in the first schedule to the plaint (*vide* page 242 of the brief) and therefore the matter should end there.

Conclusion

The two questions of law raised on behalf of the plaintiff are answered in the affirmative.

The two questions of law raised on behalf of the defendant are misleading questions: The first is answered "The land described in the second schedule to the plaint is admittedly part of the land described in the first schedule to the plaint." The second is answered "Does not arise."

I set aside the judgment of the High Court and restore the judgment of the District Court. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court

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

Irene Liyanage,
No. 48/21, Udahamulla Road,
Wijerama, Nugegoda.
Plaintiff

SC APPEAL NO: SC/APPEAL/32/2019
CA NO: WP/HCCA/AV/1663/2016 (F)
DC HOMAGAMA NO: 4904/99/L

Vs.

1. Maddumage Geetha Jayamali,
   No. 418/2,
   Gunanandaghana Mawatha,
   Moragahahena, Millawa.
2. Sirimewan Pathirana,
   No. 332/B, Makumbura,
   Pannipiya.

Defendants

AND BETWEEN

Irene Liyanage,
No. 48/21, Udahamulla Road,
Wijerama, Nugegoda.
Plaintiff-Appellant

Vs.

1. Maddumage Geetha Jayamali,
   No. 418/2,
   Gunanandaghana Mawatha,
   Moragahahena, Millawa.
2. Sirimewan Pathirana,
   No. 332/B, Makumbura,
   Pannipiya.

Defendant-Respondents

AND NOW BETWEEN

Sirimewan Pathirana,
No. 332/B, Makumbura,
Pannipiya.
2nd Defendant-Respondent -Appellant

Vs.

1. Irene Liyanage,
   No. 48/21,
   Udahamulla Road,
   Wijerama, Nugegoda.
   Plaintiff-Appellant-Respondent
2. Maddumage Geetha Jayamali,
   No. 418/2,
   Gunanandaghana Mawatha,
   Moragahahena,
   Millawa.
   1st Defendant-Respondent-Respondent

Before: S. Thurairaja, P.C., J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Manohara De Silva, P.C., with Harithriya Kumarage for the 2nd Defendant-Respondent-Appellant.

Hussain Ahamed for the Plaintiff-Appellant-Respondent.

Argued on: 10.10.2022

Written submissions:
by the 2nd Defendant-Respondent-Appellant on 22.10.2019 and 30.11.2022.
by the Plaintiff-Appellant-Respondent on 15.06.2020 and 09.01.2023.

Decided on: 24.05.2023

Samayawardhena, J.

According to the amended plaint, the plaintiff filed action in the District Court against the two defendants seeking declarations/orders that the 1st and/or the 2nd defendant are holding the property in trust for the plaintiff; and/or the 1st and/or the 2nd defendant are holding the property as security obtained for a loan in a sum of Rs. 500,000 (from the Dedigama Group); to retransfer the property in the name of the plaintiff; Deed No. 1096 marked P3 is a fraudulent Deed; and Deed No. 1387 marked P4 is a nullity. The defendants filed answer seeking dismissal of the plaintiff's action.

The case for the plaintiff is that she borrowed a sum of Rs. 500,000 from the Dedigama Group in May 1996 and the property in suit and another property were mortgaged as security for the loan. After payment of the money borrowed in August 1996, the Deed in relation to the other property

(Deed No. 17) was returned to her but not the Deed in relation to the property in suit (Deed No. 252 marked P1 whereby the plaintiff became the owner). The plaintiff has made a complaint to the police in this regard which has been marked P2.

The plaintiff in her evidence says that, after the discussion with Ranjan Dedigama and Podi Nilame of the Dedigama Group, she was taken to a notary's office and therein her signatures were obtained to blank papers after being told that the transaction was a mortgage and not a sale. This has happened before the money was lent to the plaintiff.

According to Deed No. 1096 marked P3 (the impugned Deed), the land in suit has purportedly been transferred by the plaintiff to the 1st defendant on 18.09.1997 for a sum of Rs. 150,000. The plaintiff categorically denies this. The 1st defendant was a female employee of the Dedigama Group at that time. According to the plaintiff, she has never spoken to her at any time let alone sold the land to the 1st defendant. Thereafter the 1st defendant has transferred this land to the 2nd defendant by Deed No. 1387 marked P4. The 2nd defendant at that time was a superintendent of police.

After trial, the learned District Judge, particularly by answering issues No. 2 and 12, had come to the findings that (a) the Deed of Transfer P3 had been executed in favour of the 1st defendant who was an employee of the Dedigama Group when the land was in fact mortgaged to the Dedigama Group as security to a loan (b) there were no dealings by the 1st defendant with the plaintiff prior to the execution of the purported Deed of Transfer P3, and P3 was not a Deed executed on valuable consideration. I read the evidence led at the trial before the District Court and I am fully convinced that the said findings are correct.

However the learned District Judge dismissed the plaintiff's action primarily on the basis that the plaintiff made a fundamental mistake by

tendering an amended plaint by removing the names of Ranjan Dadigama, his employee Podi Nilame and Notary Walisundara as parties to the case.

Being dissatisfied with the judgment of the District Court, only the plaintiff preferred an appeal to the High Court of Civil Appeal. The defendants did not appeal against the said adverse findings of the District Court. The High Court set aside the judgment of the District Court and directed the District Court to enter the judgment for the plaintiff. I take the view that the conclusion of the High Court is correct.

The 2nd defendant came before this Court against the judgment of the High Court. This Court has granted leave to appeal on several questions (Paragraphs (b) to (f) of the petition). The first question is whether the High Court misdirected itself in failing to consider that the plaintiff had failed to prove that Deed P3 was a forged Deed or executed on misrepresentation. As I have already stated, this is the finding of the District Judge, against which there was no appeal. The High Court only fortified or rather affirmed that finding. This question shall be answered in the negative. The third question is whether the High Court misdirected itself by placing the burden on payment of consideration on the defendants. The finding of the learned District Judge is that consideration on Deed P3 was not paid by the 1st defendant to the plaintiff. There was no appeal against this finding. The High Court merely affirmed it. The finding of the learned District Judge is correct.

I accept that the High Court further says that consideration on Deed P4 was also not paid by the 2nd defendant to the 1st defendant. I think that finding is unwarranted. Even the 1st defendant does not say so. The learned District Judge does not say that Deed P4 is a forgery. I set aside that finding of the High Court and affirm the finding of the District Court on Deed P4. However, whether or not Deed P4 is a forgery is immaterial. If Deed P3 is a forgery, Deed P4 executed based on P3 is a nullity. The 2nd

defendant-appellant may seek relief against the 1st defendant, if so advised.

In view of the above findings, there is no necessity to answer the other questions raised by the 2nd defendant-appellant.

I dismiss the appeal but without costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court

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

In the matter of an application in terms of Articles 17 and 126 of the Constitution of the Democratic Republic of Sri Lanka

SC (FR) No. 191/ 2009

1. Roshan Harindra Fernando
   No. 9/6, Suranimala Place,
   Pamankada
   Colombo 06

2. Ishani Shrimanthi Fernando
   No. 9/6, Suranimala Place,
   Pamankada
   Colombo 06

PETITIONERS

Vs.

1. Monetary Board of the Central Bank
   No. 30, Janadipathi Mawatha,
   Colombo 01

2. Hon. Mahinda Rajapakse
   President of the Socialist Republic of Sri Lanka,
   Minister of Finance,

The Ministry of Finance and
Planning, The Secretariat,
Colombo 01

3. Sumith Abeysinghe
Secretary to the Treasury,
The Ministry of Finance and
Planning, The Secretariat,
Colombo 01

4. Sumith Abeysinghe
Secretary to the Ministry of
Finance and Planning,
The Ministry of Finance and
Planning, The Secretariat,
Colombo 01

5. Ajith Nivad Cabraal
Governor of the Central Bank,
No. 30, Janadipathi Mawatha,
Colombo 01

6. Golden Key Credit card Company
Limited
Ceylino center No. 02,
R. A. De Mel Mawatha,
Colombo 04

7. Deshamanya Dr. Lalith
kothalawala
Ceylino center No. 02,
R. A. De Mel Mawatha,

Colombo 04

8. Khavan Perera
   Ceylino center No. 02,
   R. A. De Mel Mawatha,
   Colombo 04

9. Mrs.Sicille Kothalawala
   Ceylino center No. 02,
   R. A. De Mel Mawatha,
   Colombo 04

10. Daniel Jegasothy
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

11. Padmini Karunanayake
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

12. Suramya Karunarathna
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

13. Bandula Ranaweera
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

14. Niranjan Fernando
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

15. Saradha Sumanasekara
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

16. Ceylinco Consolidated Private
    Limited
    No. 13, Dickman's Lane,
    Colombo 04

17. Hon. Attorney General
    Attorney General's department,
    Colombo 12

RESPONDENTS

Before : **P. PADMAN SURASENA, J**
: **A. L. SHIRAN GOONERATNE, J**
: **MAHINDA SAMAYAWARDHENA, J**

Counsel : Faisz Musthapha PC with Faisza Marker and Thushani Machado for the 10th and 11th Respondents.

: Rajitha Perera DSG for the 1st and 17th Respondent

Decided on **:** 25.05.2023

Order

Perusal of the Journal Entry dated 25.10.2022 shows that, the bench comprising Hon. E. A. G. R. Amarasekara, Hon. A. H. M. D. Nawaz, Hon. Achala Wengappuli had taken up the application made by the 10th and 11th Respondent-Petitioners together and it can also be seen that one Counsel, Faisz Musthapha PC, had appeared for both 10th and 11th Respondent-Petitioners. The Court on 25.10.2022 had directed that the application of the 10th Respondent-Petitioner would be considered by that bench on the next date i.e., 09.11.2022. As that bench decided to consider the said application it had directed the Registrar to constitute that bench for the next date i.e., 09.11.2022. and the bench has taken the view therefore that the Application of 10th Respondent should also be considered by the same bench.

On 09.11.2022, the same bench had refixed the case to be taken up on 15.02.2023 as the Court did not have adequate time to consider the said Application of the 10th Respondent- Petitioner.

It was in that backdrop, that this case had been listed inadvertently before the bench comprising Hon. P. Padman Surasena J, Hon. Shiran Gooneratne J, Hon. Mahinda Samayawardhena J on 15.02.2023.

As we have detected the above inadvertence, we direct the Registrar to constitute the bench comprising of Hon. E. A. G. R. Amarasekara J, Hon. A. H. M. D. Nawaz J, Hon. Achala Wengappuli J, as directed by the said bench on 25.10.2022, to consider the Application made by the 10th Respondent.

In view of the above, the bench comprising of Hon. P. Padman Surasena, Hon. Shiran Gooneratne, Hon. Mahinda Samayawardhena, although heard submissions on 15.02.2023, would not make any order on the Application of the 10th Respondent-Petitioner.

Mention this case on 06.07.2023, before a bench comprising Hon. E. A. G. R. Amarasekara J, Hon. A. H. M. D. Nawaz J, Hon. Achala Wengappuli J, as directed by the said bench on 25.10.2022. The 10th Respondent-Petitioner is directed to take steps to have notices served on all parties. Requisite notices should be tendered to the Registry within two weeks.

P. Padman Surasena J

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J

I agree,

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal against the Judgment dated 26/10/2017 delivered in the Provincial High Court of Ampara Appeal No. HC/AMP/APP/437/2016 under the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge,
Police Station,
Padiyatalawa.

Complainant

SC Appeal No: 16/2018
SC (SPL) LA No. 268/2017
HC Ampara Case No.
HC/AMP/APP/437/2016
MC Dehiattakandiya No. 1780

Vs.

Gamini Harischandrage Nandana Sisira Kumara,
No. 28/A, Kekirihena,
Maha-Oya.

Accused

AND BETWEEN

Gamini Harischandrage Nandana Sisira Kumara,
No. 28/A, Kekirihena,
Maha-Oya.

Accused-Appellant

Vs.

1. Officer-in-Charge,
   Police Station,
   Padiyatalawa.

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

Respondents

AND NOW BETWEEN

Gamini Harischandrage Nandana Sisira Kumara,
No. 28/A, Kekirihena,
Maha-Oya.

Accused-Appellant-Petitioner

3. Officer-in-Charge,
   Police Station,
   Padiyatalawa.

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

Complainant-Respondents-Respondents

Before: **Justice Priyantha Jayawardena, PC**

Justice A.L. Shiran Gooneratne

Justice Mahinda Samayawardhena

Counsel: Malaka Herath instructed by Niroshi de Alwis for the **Accused-Appellant-Appellant.**

Induni Punchihewa, SC for the **Hon. Attorney General.**

Argued on: 14/11/2022

Decided on: 25/05/2023

A.L. Shiran Gooneratne J.

This is an appeal against the Judgment of the Provincial High Court of Ampara Case No. HC/AMP/APP/437/2016.

The Accused-Appellant-Appellant (hereinafter sometimes referred to as the Appellant) was convicted and sentenced in the Magistrates Court of Dehiattakandiya in Case No. 1780 for driving a bus bearing No. EP NA - 6856 in a rash or negligent manner, and causing the death of a person which is an offence punishable under Section 298 of the Penal Code, and four other counts under the Motor Traffic Act, which stated that the Appellant;

1. failed to avoid an accident, an offence punishable under Section 149(1) read with Sections 214(1)(a) and 224 of the Motor Traffic Act
2. driving the said bus negligently or without reasonable consideration for other persons using the highway, an offence punishable under Section 151(3) read with Section 214(1)(a) and 217(2) of the Motor Traffic Act

3. driving the said motor vehicle in a manner as to cause obstruction to other traffic, an offence punishable under Section 148(1) read with Section 214(1)(a) and 224 of the Motor Traffic Act, and
4. driving the said motor vehicle on a highway recklessly or in a dangerous manner or at a dangerous speed, an offence punishable under Section 151(2) read with Section 217(1) of the Motor Traffic Act.

At the conclusion of the trial the learned Magistrate by Judgment dated 08/03/2016 convicted and sentenced the Appellant on all five counts. Prior to the sentencing, the learned Magistrate observed that the Appellant had no previous convictions.

The sentence imposed on the Appellant is found in journal entry dated 23/03/2016. The learned Magistrate has dealt with each of the five counts as charged in the following manner;

Count 1 - 12 months Rigorous Imprisonment suspended for 12 months and Rs. 1500/- fine in default 06 months imprisonment.

Count 2 - fine of Rs. 3000/- in default 01 month imprisonment.

Count 3 - fine of Rs. 15000/-in default 06 months imprisonment.

Count 4 - fine of Rs. 3000/- in default 01 month imprisonment.

Count 5 - fine of Rs. 15000/- in default 06 months imprisonment.

Thereafter the Court having considered the mitigatory circumstances pleaded on behalf of the Appellant, proceeded to cancel his driving licence. The Appellant was also ordered to pay compensation in a sum of Rs. 100,000/-.

Being aggrieved by the said conviction and sentence the Appellant by Petition of Appeal dated 06/04/2016 appealed to the Provincial High Court of Ampara (the Appellate Court). The Appellate Court by Judgment dated 26/10/2017 dismissed the Appeal subject to a variation of the fine imposed on count 2 and 4. The Appellant sought

Special Leave to Appeal from this Court and was granted leave on the following questions of law.

1. Whether the prosecution has established a charge under Section 298 beyond reasonable doubt.
2. In the circumstances of this case, is the custodial sentence imposed is excessive.
3. Has the learned High Court Judge erred in law by cancelling the driving licence.

When this matter was taken up for argument, the learned Counsel for the Appellant submitted that he would not contest the conviction entered against the Appellant by Judgment dated 08/03/2016, but would confine this application only to the sentence dealing with the cancellation of the Appellant's driving licence. It was also brought to the notice of Court and as borne out by the case record, the prison sentence imposed on count 01 by the impugned Judgement dated 08/03/2016, had been suspended by the learned Magistrate. In the aforesaid circumstances, the only question of law before this Court is to investigate into the validity of the sentence dealing with the cancellation of the driving licence.

The position of the learned Senior State Counsel is that in terms of Section 136(1)(a) of the Motor Traffic Act, the learned Magistrate was acting within the law when the cancellation of the driving licence was imposed. The learned Counsel for the State relies on Section 136(1)(a) of the said Act to substantiate her claim.

Section 136(1)(a) of the Motor Traffic Act which deals with the suspension or cancellation of driving licences, reads as follows;

(1) Subject to the provisions of Subsection (2), any court before which a person is convicted of any offence under this Act, or of any offence under any other written law committed in connection with the driving of a motor vehicle, may in addition to any other punishment which it may lawfully impose for that offence-

(a) if the person convicted is the holder of a driving licence issued or deemed to be issued under this Act, suspend the licence for a specified period not exceeding two years, or cancel the licence; or

(b) if the person convicted is not the holder of a driving licence declare him to be disqualified for obtaining a driving licence for a specified period.

It is noted that the learned Magistrate when cancelling the driving licence has not referred to an offence to which such cancellation would apply, but has merely cancelled the licence, as observed in Journal Entry dated 23/03/2016.

Although the Senior State Counsel in her written submissions dated 03/07/2018 stated that, the learned Magistrate was acting within the law as defined in Section 136(1)(a) when enforcing the cancellation of the driving licence, such cancellation does not relate to any of the offences brought against the Appellant.

In terms of Subsection (2) and (3) of Section 136, a prior conviction endorsement of an offence which relates to Section 151 of the Motor Traffic Act, Section 298 of the Penal Code or correspond to the provisions of such offence/ offences is a prerequisite for a suspension or a cancellation of a driving licence to take effect.

Section 136 subsection (2) and (3) reads as follows;

(2) Where the driving licence of any person convicted of the offence of contravening any of the provisions **of Subsections (1) and (2) of Section 151,** or of any offence in connection with the driving of a motor vehicle punishable under **Section 272 or Section 328 of the Penal Code,** contains at the time of such conviction endorsements, made after the 1st day of January, 1941, under the Motor Car Ordinance, No. 45 of 1938, **or** made under this Act in respect of *not less than two and not more than four previous convictions* of any of those offences or of the offence of contravening any of the provisions of any such enactment corresponding to the provisions of **Subsections (1) and (2) of Section 151**, the court shall either

cancel the licence or suspend the licence for a stated period, which shall be not less than six months nor more than two years; and where the licence contains at the time of such conviction endorsements so made in respect of *five previous convictions* of any of the offences aforesaid, the Court shall cancel the licence.

(3) Where the driving licence of any person convicted of any offence in connection with the driving of a motor vehicle punishable under **Section 298 or Section 329 of the Penal Code** contains at the time of such conviction endorsements, made after the 1st day of January, 1941, under the Motor Car Ordinance, No. 45 of 1938, or made under this Act, in respect of *two previous convictions of any of those offences*, the Court shall cancel the licence.

(Emphasis is mine)

Section 136 Subsection (2), deals with the suspension or cancellation of a driving licence of any person convicted of the offence of contravening any of the provisions of Subsections (1) and (2) of Section 151 of the Motor Traffic Act or of any offences in connection with the driving of a motor vehicle punishable under Section 272 or Section 328 of the Penal Code. When previous convictions of an offence contravening any of the said provisions, which are not less than two and not more than four, the Court is mandated to either cancel the licence or suspend the licence for a stated period, which shall not be less than six months nor more than two years, and at the time of such conviction where the licence contain endorsements so made in respect of five previous convictions of any of the offences aforesaid, the Court shall cancel the licence.

Subsection (3) of the said Act deals with the driving licence of any person convicted of any offence in connection with the driving a motor vehicle punishable under Section 298 or Section 329 of the Penal Code. An endorsement of such conviction, in two previous convictions of any of the said offences, the Court is mandated to cancel the licence.

Accordingly, in terms of Section 136 Subsection (2) and (3) of the said Act, in addition to any other punishment which the court may lawfully impose, the Court may impose a suspension or a cancellation of a driving licence taking into consideration, the number of previous convictions of any of the offences of contravening the provisions of Subsections (1) and (2) of Section 151 or the offence of contravening any of the provisions of any such enactment corresponding to the provisions of those sections and also of a person convicted of any offence in connection with the driving of a motor vehicle punishable under Section 298 or Section 329 of the Penal Code.

Therefore, in the instant case a cancellation of the driving licence cannot be enforced under Section 151(2) of the Motor Traffic Act or Section 298 of the Penal Code as the Appellant has no prior conviction endorsements as defined in Subsection (2) or (3) of Section 136.

The sentences imposed by Court upon conviction for the aforesaid offences committed by the Appellant is lawful. However, prior to the said cancellation, the Court was aware that the Appellant had no previous conviction endorsements. Therefore, a cancellation of the diving licence in addition to the sentences imposed as charged, is not according to law. Furthermore, the learned Magistrate when imposing the cancellation of the driving licence gave no reasons justifying the said cancellation nor made any reference to the effect that the cancellation was in addition to the sentence imposed to a particular offence to which the said cancellation related to. In the circumstances, it is abundantly clear that the learned Magistrate was not acting within the law when imposing a cancellation of the driving licence of the Appellant.

In view of this position, the third ground on which leave was granted by this Court has to be answered in the affirmative. As mentioned earlier in this Judgment the Court was not called upon to answer the questions of law No. 1 and 2. In any event for the reasons stated earlier, the second ground on which leave was granted would not arise.

Accordingly, the Order dated 23/03/2016, cancelling the driving licence of the Appellant is set aside. The Registrar of the Magistrates Court of Dehiattakandiya is directed to inform the Commissioner of Motor Traffic of the order setting aside the cancellation of the Appellant's driving licence. The Appellant may apply to the Commissioner of Motor Traffic for a new driving licence in accordance with the provisions of the Motor Traffic Act.

Subject to the said variation in sentence, the Judgment dated 26/10/2017 of the Provincial High Court of Ampara, Case No. HC/AMP/APP/437/16 is affirmed.

Appeal partly allowed. No costs ordered.

Judge of the Supreme Court

Priyantha Jayawardena, PC. J

I agree

Judge of the Supreme Court

Mahinda Samayawardhena, J

I agree

Judge of the Supreme Court

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

In the matter of an application in terms of Articles 17 and 126 of the Constitution of the Democratic Republic of Sri Lanka

SC (FR) No. 191/ 2009

1. Roshan Harindra Fernando
   No. 9/6, Suranimala Place,
   Pamankada
   Colombo 06

2. Ishani Shrimanthi Fernando
   No. 9/6, Suranimala Place,
   Pamankada
   Colombo 06

PETITIONERS

Vs.

1. Monetary Board of the Central Bank
   No. 30, Janadipathi Mawatha,
   Colombo 01

2. Hon. Mahinda Rajapakse
   President of the Socialist Republic of Sri Lanka,
   Minister of Finance,

The Ministry of Finance and
Planning, The Secretariat,
Colombo 01

3. Sumith Abeysinghe
Secretary to the Treasury,
The Ministry of Finance and
Planning, The Secretariat,
Colombo 01

4. Sumith Abeysinghe
Secretary to the Ministry of
Finance and Planning,
The Ministry of Finance and
Planning, The Secretariat,
Colombo 01

5. Ajith Nivad Cabraal
Governor of the Central Bank,
No. 30, Janadipathi Mawatha,
Colombo 01

6. Golden Key Credit card Company
Limited
Ceylino center No. 02,
R. A. De Mel Mawatha,
Colombo 04

7. Deshamanya Dr. Lalith
kothalawala
Ceylino center No. 02,
R. A. De Mel Mawatha,

Colombo 04

8. Khavan Perera
   Ceylino center No. 02,
   R. A. De Mel Mawatha,
   Colombo 04

9. Mrs.Sicille Kothalawala
   Ceylino center No. 02,
   R. A. De Mel Mawatha,
   Colombo 04

10. Daniel Jegasothy
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

11. Padmini Karunanayake
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

12. Suramya Karunarathna
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

13. Bandula Ranaweera
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

14. Niranjan Fernando
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

15. Saradha Sumanasekara
    Ceylino center No. 02,
    R. A. De Mel Mawatha,
    Colombo 04

16. Ceylinco Consolidated Private
    Limited
    No. 13, Dickman's Lane,
    Colombo 04

17. Hon. Attorney General
    Attorney General's department,
    Colombo 12

RESPONDENTS

Before : **P. PADMAN SURASENA, J**
: **A. L. SHIRAN GOONERATNE, J**
: **MAHINDA SAMAYAWARDHENA, J**

Counsel : Faisz Musthapha PC with Faisza Marker and Thushani Machado for the 10th and 11th Respondents.

: Rajitha Perera DSG for the 1st and 17th Respondent

Decided on **:** 25.05.2023

Order

Perusal of the Journal Entry dated 25.10.2022 shows that, the bench comprising Hon. E. A. G. R. Amarasekara, Hon. A. H. M. D. Nawaz, Hon. Achala Wengappuli had taken up the application made by the 10th and 11th Respondent-Petitioners together and it can also be seen that one Counsel, Faisz Musthapha PC, had appeared for both 10th and 11th Respondent-Petitioners. The Court on 25.10.2022 had directed that the application of the 10th Respondent-Petitioner would be considered by that bench on the next date i.e., 09.11.2022. As that bench decided to consider the said application it had directed the Registrar to constitute that bench for the next date i.e., 09.11.2022. and the bench has taken the view therefore that the Application of 10th Respondent should also be considered by the same bench.

On 09.11.2022, the same bench had refixed the case to be taken up on 15.02.2023 as the Court did not have adequate time to consider the said Application of the 10th Respondent- Petitioner.

It was in that backdrop, that this case had been listed inadvertently before the bench comprising Hon. P. Padman Surasena J, Hon. Shiran Gooneratne J, Hon. Mahinda Samayawardhena J on 15.02.2023.

As we have detected the above inadvertence, we direct the Registrar to constitute the bench comprising of Hon. E. A. G. R. Amarasekara J, Hon. A. H. M. D. Nawaz J, Hon. Achala Wengappuli J, as directed by the said bench on 25.10.2022, to consider the Application made by the 10th Respondent.

In view of the above, the bench comprising of Hon. P. Padman Surasena, Hon. Shiran Gooneratne, Hon. Mahinda Samayawardhena, although heard submissions on 15.02.2023, would not make any order on the Application of the 10th Respondent-Petitioner.

Mention this case on 06.07.2023, before a bench comprising Hon. E. A. G. R. Amarasekara J, Hon. A. H. M. D. Nawaz J, Hon. Achala Wengappuli J, as directed by the said bench on 25.10.2022. The 10th Respondent-Petitioner is directed to take steps to have notices served on all parties. Requisite notices should be tendered to the Registry within two weeks.

P. Padman Surasena J

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J

I agree,

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Dr. Galmangoda Guruge Chamal Sanjeewa
No. 233,
Matara Road, Tangalle,
Sri Lanka

SC/FR Application No. 371/2022

Petitioner

Vs.

1. Hon. Dr. Keheliya Rambukwella
   Hon. Minister of Health

2. Mr. S. Janaka Sri Chandraguptha
   Secretary to the Ministry of Health

3. Dr. Sunil De Alwis
   Additional Secretary – Medical Services,
   Ministry of Health

4. Dr. Asela Gunawardena
   Director General of Health Services,
   Ministry of Health

5. Dr. Lal Panapitiya
   Deputy Director General (Medical Services 1),
   Ministry of Health

6. Ms. D. L. U. Peiris
   Additional Secretary (Admin 1),
   Ministry of Health

7. Mr. Sudath Rathnaweera
Senior Additional Secretary (Flying Squad),
Ministry of Health

8. Mr. D. A. W. Kulathileka
Preliminary Investigation Officer
Flying Squad,
Ministry of Health

(all of the above 1st to 8th Respondents are of; 'Suwasiripaya', No. 385, Rev. Baddegama Wimalawansa Thero Mawatha, Colombo 10.)

9. Mr. Janaka Sugathadasa
Chairman

10. Mr. L. A. Kalukapuarachchi
Secretary

11. Mrs. N. Godakanda
Member

12. Mr. D. Swarnapala
Member

(all of the above 9th to 12th Respondents are of; the Health Services Committee, Public Services Commission, No. 1200/9, Rajamalwatta Road, Battaramulla.)

13. Hon. Justice Jagath Balapatabendi
The Chairman,
Public Service Commission

14. Mrs. Indrani Sugathadasa
Member,
Public Service Commission

15. Dr. T. R. C. Ruberu
Member,
Public Service Commission

16. Mr. Ahamod Lebbe Mohamed Saleem
Member,
Public Service Commission

17. Mr. Leelasena Liyanagama
Member,
Public Service Commission

18. Mr. Dian Gomes
Member,
Public Service Commission

19. Mr. Dilith Jayaweera
Member,
Public Service Commission

20. Mr. W. H. Piyadasa
Member,
Public Service Commission

21. Mr. Suntharam Arumainayaham
Member,
Public Service Commission

22. Mr. M. A. B. Daya Senarath
Secretary,
Public Service Commission

(all of the above 13th to 22nd Respondents are of; the Public Service Commission, No. 1200/9, Rajamalwatta Road, Battaramulla.)

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

Respondents

Before : **Buwaneka Aluwihare, PC. J**
P. Padman Surasena, J
K. Priyantha Fernando, J

Counsel : Saliya Pieris, PC with Kaneel Maddumage instructed by Praveen Premathilake for the Petitioner.

V. Sirivardena, PC, ASG with

R. Goonerathne, SC for the 1st to 12th & 23rd Respondents.

Argued on : 07.03.2023

Written Submissions Tendered on : 06.04.2023 on behalf of the 01st – 12th and 23rd Respondents.

06.04.2023 on behalf of the Petitioner.

Decided on : 26.05.2023

****

K. PRIYANTHA FERNANDO, J

1. The petitioner who is a Grade I medical officer in the medical officer's service, complained of a violation of his fundamental rights guaranteed in terms of Articles 12(1), 14(1)(a) and 14(1)(g) of the Constitution due to the actions of the 1st to 22nd respondents, which led to his interdiction from services as a government medical officer. This court granted leave to proceed for the alleged violation of Articles 12(1) and 14(1)(g) of the Constitution.

2. The Facts

According to the petitioner, he has been the president of the 'Medical and Civil Rights Professional Association of Doctors' (MCPA). The petitioner has visited *Walsapugala*, *Koswagawa* village in *Suriyawewa* situated in the district of *Hambantota* on 19.09.2022 to conduct a medical clinic for children in order to check their nutrition level, health, etc. It is his position that, he received requests from the community organizations in that area as he has served there previously. He had collected about 20 clinic cards from children, out of which he observed about 6 children were at severe malnutrition levels and about 10 were at moderate malnutrition levels. He has also observed that the weight of around 50% - 80% of the children whose clinic cards were inspected by him were not appropriate for their age. The petitioner says that, the weight of a child is internationally

recognized as an important indicator of nutritional status and health of a child.

3. After conducting the survey, the petitioner being the president of the MCPA, has addressed the mothers who gathered with the clinic cards at the Medical Clinic to explain the process that was followed in conducting the survey. The transcript of the speech he made was marked and produced as [P-13(B)]. The petitioner has circulated the address he made to the mothers, on newspapers and social media platforms including the YouTube as well. Thereafter, on 25.09.2022 the 8th respondent has intimated to the petitioner that he is required to make a statement regarding the incident to the Ministry of Health. The petitioner has made a detailed statement to the Inquiring Unit of the Ministry of Health on 26.09.2022. Subsequently, on or about 01.11.2022 the petitioner has received a letter dated 25.10.2022 sent by the 10th respondent to the 2nd respondent, which was copied to the petitioner, giving approval to interdict the petitioner (document [P-8(A]). Thereafter, the petitioner has received the second letter dated 03.11.2022 (document [P-8(B)]) under the hand of the 2nd respondent, interdicting him from services with immediate effect.

4. It is the contention of the learned President's Counsel for the petitioner that, as per the letter of interdiction [P-8(B)], it refers to articles published in the newspapers "*Divaina*", "*Aruna*", and "*The Island*". However, the learned President's Counsel referring to the transcript of the speech [P-13(B)] submitted that the newspapers have clearly embellished the statement made by the petitioner in their respective newspapers and TV channels. It was further submitted that, as mentioned in the letter of interdiction [P-8(B)], in his address to the mothers of the children, he never stated that 80% of the children of *Suriyawewa* are suffering from malnutrition. Thus, it was the contention of the learned President's Counsel that, the basis of the interdiction is misconstrued.

5. It was further submitted on behalf of the petitioner that, as per the Medical Services Minute of Sri Lankan Health Service, published in the Extraordinary Gazette No.1883-17, dated 11th October 2014, medical officers who come under the Sri Lanka Health Service are also responsible for education, training and

supervision in relation to health care and research, apart from the patient care services.

6. The learned President's Counsel further submitted that, in terms of the '*Hippocratic Oath*', the petitioner is expected to use dietary regimens which will benefit the patients to the best of his ability and to ensure that no harm or injustice would be caused to them. It was further submitted that, as per chapter 31 of the Establishment Code, the petitioner is entitled to, and has a right to make statements objecting to or criticizing the government policy in respect of their terms of service.

7. It was further submitted that, the minister of health, who is the 1st respondent, has also made a statement on or around 12.10.2022 stating that the malnutrition in the country has increased.

8. Apart from the instant issue, similar occurrences have taken place on previous occasions as well. This was between the years 2016 and 2018 and also in the year 2020. Preliminary inquiries against the petitioner have been conducted regarding these allegations. It was submitted on behalf of the petitioner that those allegations were maliciously levelled against him. It was submitted by the learned Additional Solicitor General (ASG) that, the petitioner has been issued charge sheets on three previous occasions and formal disciplinary inquiries are pending against him. When disciplinary inquiries are pending with regard to an officer, and where a formal charge sheet has been issued, in order to go on foreign trips on scholarships the officer has to obtain permission from the Disciplinary Authority. Although the petitioner has pleaded that he could not attend his post graduate studies abroad, the petitioner has not filed seeking leave to travel abroad for those purposes. Therefore, it is the contention of the learned ASG that the fundamental rights of the petitioner have not been violated.

9. It is the contention of the learned ASG that, as the petitioner is primarily a medical officer, the provisions of the Establishment Code apply to him. Further, there is no material to prove that the petitioner conducted the so-called survey at the request made to him by a trade union or under the authorization of a trade union. According to the petitioner, he has collected the clinic cards of 20 children and made an assessment based on

it. The learned ASG contended that, one cannot come to a conclusion regarding the percentage of children suffering from malnutrition in an entire area merely by perusing 20 clinic cards as it is inadequate to come to such a finding. It violates medical ethics to come to such a conclusion based on 20 clinic cards. Admittedly, the petitioner has made a statement to the press [P-13(B)] which he was not permitted to make in terms of the Establishment Code, and therefore, it is sufficient to interdict the petitioner from his post as a medical officer.

10. Admittedly, the petitioner is a government medical officer who is subject to the provisions of the Establishment Code. The position taken up by the petitioner is that, the petitioner has been interdicted from his official duties in terms of chapter XLVIII, section 31:1:15 of the Establishment Code. The said section 31:1:15 reads, "*where it is considered that allowing an officer to perform his duties is harmful or imprudent so far as the public service is concerned*". The alleged acts of misconduct are mentioned in the above referred letter of interdiction [P-8(B)]. They are, first, the statements made by the petitioner without the authority or permission from the secretary to the Ministry of Health through a TV channel and various newspapers, stating that 80% of children from *Suriyawewa* are suffering from malnutrition. Second, by the statements made by him through the said media whereby, using media to criticize the government institutions and third, by making the above false statements through media trying to create a false impression and distrust in the eyes of the public.

11. In terms of chapter XLVII, section 6 of the Establishment Code, the release of official information to the mass media or the public may only be done by the secretary or the head of the department. Further, in terms of section 7:2 of the above chapter, "*an officer shall not publish any book or article or give broadcast, talks or express opinion in public on any manner which can be administrative, without prior approval of the secretary*." The petitioner has not obtained such approval.

12. It is the position of the petitioner that, in publishing his statement [P-13(B)], the media has embellished it. Although in paragraph 25 of the petition he states that he addressed the mothers who had gathered with the clinic cards explaining the process followed in the survey, and that it was the media

personnel who were present that have published this information in the newspapers and on social media including YouTube, upon a plain reading of his statement [P-13(B)] (transcript) it is abundantly clear that the statement has not been made to the mothers in the rural village explaining the process followed in the survey, but it was a statement made to the media. Further, the photographs published in newspapers alongside articles attached clearly show that the presence of the media personnel had been prearranged.

13. Alleged Violation of Article 14(1)(g)
The petitioner alleges that, the respondents by interdicting him from services, has violated the rights guaranteed to him under Article 14(1)(g) of the Constitution.

Article 14 (1)(g) of the Constitution provides that, "*every citizen is entitled to the freedom to engage by himself or in association of others in any lawful occupation, profession, trade, business or enterprise.*"

14. In case of ***Elmore Perera v. Major Montague Jayawickrama*, [1985] 1 Sri L.R. 285,** the petitioner who was the Deputy Survey-General was compulsorily retired. He complained, Inter alia, of violation of his fundamental right under Article 14(1)(g) of the Constitution. *Sharvananda* C.J. delivering the majority judgment rejected the complaint and said at page 323,

> *"The right of the petitioner to carry on the occupation of surveyor is not, in any manner affected by his compulsory retirement from government service. The right to pursue a profession or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the services of a worker are terminated wrongfully it will be open to him to pursue his rights and remedies in proper proceedings in a competent court or tribunal. But the discontinuance of his job or employment in which he is for the time being engaged does not by itself infringe his fundamental right to carry on an occupation or profession which is guaranteed by Art 14(1)(g) of the Constitution. It is not possible to say that the right of the petitioner to carry on an occupation has, in this case been violated. It would be open to him, though undoubtedly it will not be easy,*

to find other avenues of employment as a surveyor. Art 14(1)(g) recognizes a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice. The compulsory retirement complained of may, at the highest, affect his particular employment, but it does not affect his right to work as a surveyor. The case would have been different if he had been struck off the roll of his profession or occupation and thus disabled from practicing his profession."

15. In the instant case, the petitioner is not deprived of his freedom to engage in his profession as a medical officer. His interdiction which resulted due to a procedural step taken in an inquiry into the alleged misconduct in violation of the conditions stipulated in the Establishment Code, is simply in relation to preventing him from serving as a medical officer in the government health service. Hence, the fundamental rights enshrined in article 14(1)(g) of the Constitution have not been infringed.

16. Alleged Violation of Article 12(1)
The petitioner asserts that, the reasons upon which his interdiction was based on was false and inaccurate. He states that, he never made a statement that 80% of the children in *Suriyawewa* were suffering from malnutrition.

17. However, he states that there are children in the *Hambantota* area who are malnourished as well as children having a high risk of becoming malnourished and that when taken as a whole, it can be seen that there is a gradual decrease in the weight appropriate to age in about 50-80% children in the area as per the survey conducted by him.

18. The respondent asserts that, it is wrong of the petitioner to come to a conclusion and publish information regarding the overall percentages of malnutrition in a particular area merely on the basis of a survey based on 20 clinic cards of children. The respondent further states that, the petitioner has not denied that the sample he took into consideration in coming to the conclusion was in fact 20 clinic cards.

19. The petitioner asserts that, in terms of Chapter XLVIII Section 31:11 of the Establishment Code, the wages of a public officer who has been interdicted can be withheld only upon two clearly defined instances being fulfilled. He states that the case at hand does not fall within the purview of these instances and therefore, his wages cannot be withheld.

20. However, Chapter XLVIII Section 31:12 clearly states that, for instances not falling within the purview of Section 31:11, the decision to pay or withhold wages is within the discretion of the Disciplinary Authority, giving due regard to factors such as the seriousness of the charge, prior record of service of the officer, his financial needs, etc.

21. The petitioner states that the actions, inactions and decisions of the respondents are violative of his rights guaranteed under Article 12(1) of the Constitution which provides for equality before the law and equal protection of the law. In that, they are discriminatory, arbitrary, irrational, illegal and unreasonable and violative of equality and equal protection of law. The petitioner states that the actions, inactions and decisions of the respondents are a breach of legitimate expectations and the rules of natural justice.

22. Specific provisions are made on releasing of official information to the mass media or the public and publication of books, articles, broadcasts, talks etc in chapter XLVII section 6 and 7 of the Establishment Code respectively. Public officers are prohibited from giving media statements without prior approval from the authorities. As mentioned before, some of the statements he made appears to be inaccurate and were based on incomplete data which may cause embarrassment to the government and also could mislead the public.

23. Undoubtedly, the petitioner as a government servant is entitled to the fundamental rights enshrined in the Constitution. However, as per Article 55 of the Constitution, state preserves the right to regulate the conditions of public service, disciplinary control and their conduct.

24. The scope of Article 12(1) has expanded to a great extent in the recent past. It captures within its purview many violations affording extensive protection of fundamental rights.

25. In case of ***Ariyawansa and others v. The People's Bank and others*** **[2006] 2 Sri LR 145 at 152** *Bandaranayake* J. stated that,

> *"The concepts of negation of arbitrariness and unreasonableness are embodied in the right to equality as it has been decided that any action or law which is arbitrary or unreasonable violates equality."*

26. In ***Wijerathna v. Sri Lanka Ports Authority*** **[2020] SC (FR) Application No. 256/2017 - SC Minutes 11.12.2020** Justice *Kodagoda* explains the concept of equality as provided within Article 12(1) as follows:

> *"The concept of 'equality' was originally aimed at preventing discrimination based on or due to such immutable and acquired characteristics, which do not on their own make human being unequal. It is now well accepted that, the 'right to equality' covers a much wider area, aimed at preventing other 'injustices' too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement, and in the context of Sri Lanka a 'Fundamental Right', conferred on the people by the Constitution, for the SC F/R 231/2018 JUDGEMENT Page 8 of 17 purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law."*

27. Thus, it is obvious that arbitrary, unreasonable decisions do fall within the ambit of Article 12(1) of the Constitution.

28. However, in ***Jaisinghani v. Union of India and others*** **(1967 AIR 1427 at 1434)** *Ramaswami* J. observed:

> *"[T]he absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be*

predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken inaccordance with the rule of law. (See Dicey - "Law of the Constitution" - Tenth Edn., Introduction cx)."

29. The fact that a decision is not in one's favor does not make it arbitrary. In accordance with the rule of law, if a decision is predictable and in accordance with existing rules and principles, it cannot be arbitrary. In the instant case, the Establishment Code clearly lays down the conduct that should be followed by a public officer, and it could be predicted that a conduct in violation of such provisions would inevitably entail disciplinary action, as clearly set out in the Code.

30. The petitioner states that his interdiction was done maliciously and lacks uberrima fides.

31. In case of ***Sasanasiritissa Thero v. P. A. de Silva [1989] 2 Sri L.R. 356,*** *Kulatunga*, J explained that,

"while, in its narrow sense, mala fides means personal animosity, spite, vengeance, personal benefit to the authority itself or its relations or friends, the phrase is used by Courts in the broad sense of any improper exercise or abuse of power."

32. In the instant case, there is no allegation of personal animosity, spite or vengeance nor is there any personal benefit accrued by the authority by the interdiction of the petitioner. Thus, the actions, inactions and decisions of the respondents are not arbitrary and therefore, are not violative of his rights guaranteed under Article 12(1) of the Constitution.

33. Public officers are placed with a very important function in the society. However, the power that is conferred onto them is not absolute. They must essentially use such powers for the benefit of the public, to further the purposes for which they were entrusted with such power. When looking at the bigger picture, careless behavior of this nature involving the media should be restrained to preserve social order.

34. When considering the material that has already been discussed above, I am of the view that the petitioner has failed to establish the violation of his Fundamental Rights guaranteed under Article 14(1)(g) and 12(1) of the Constitution. The Application is dismissed. I make no order with regard to costs.

Application is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE BUWANEKA ALUWIHARE, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

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

The matter of an application under Article 126 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Ponsuge Sanjeewa Tisera
   189/03, Palagathure,
   Kochchikade.

2. Sebastian Jude Shakespeare
   21/10/A, Shramadana Road,
   Ethukala,
   Negombo.

SC/FR Application No. 368/2016

Petitioners

Vs.

1. Singappulige Deeptha Rajitha Jayantha
   Headquarters Inspector,
   Chief Inspector,
   Police Station – Marawila

2. Kamal (41246)
   Police Sergeant,
   Police Station – Marawila

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

Respondents

Before : **Vijith K. Malalgoda, PC. J**
A. L. Shiran Gooneratne, J
K. Priyantha Fernando, J

Counsel	:	Lakdev Unamboowa for the Petitioners. Maheshika Silva, DSG for the Respondents.
Argued on	:	10.03.2023
Decided on	:	30.05.2023

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K. PRIYANTHA FERNANDO, J

1. The two petitioners are employees of *Rodrigo Suppliers* which is a business engaged in exporting sea food, meat, vegetables and bakery products in whole sale. The first petitioner is the driver of the lorry bearing Registration No. WPLF 5769 and the second petitioner is the cleaner of the same lorry. The two petitioners complained of the alleged violation of their rights guaranteed under Articles 12(1) and 13(1) of the Constitution due to the actions of the respondents. This Court granted leave to proceed for both the alleged violations.

2. The Facts
According to the petitioners, on 15.09.2016 they set off in a lorry bearing Registration No. WPLF 5769 to go to *Haneefa* Farm in *Mihintale*. Upon reaching the farm, they purchased 300kg of mutton priced at Rs. 322,500 (receipt [P-1]). At around 4.00 p.m. on the same day, they loaded the mutton after getting it inspected and approved by the Public Health Inspector (PHI) of *Mihintale*. The petitioners left the farm at around 10.00 p.m. to come towards *Negombo*.

3. When they were on their way to *Negombo*, on the 16.09.2016 which was a *poya* day, the lorry was stopped in *Maha Weva* at about 2.30 am by the 2nd respondent who is a police sergeant and some other police officers. The police officers have asked them to show their permit for transporting meat. The petitioners have stated that, they have often been transporting meat and such permit was never required.

4. Thereafter, the 2nd respondent arrested the petitioners and took both the petitioners along with the vehicle containing mutton to police custody. The petitioners state that they were not informed the reason for the arrest. Thereafter, at about 6.30 a.m. they were locked up at *Marawila* police station and was produced before the Acting Magistrate of *Marawila* at 4.00 p.m. on the same day. According to the Magistrate Court record No. B/1137/16 [P-2] the petitioners were released on bail and the Magistrate ordered to continue to keep the mutton in the cooler of the lorry. The Magistrate further called for a veterinary surgeon's report and the case was called on 19.09.2016, on which the police informed Court that the report of the veterinary surgeon dated 17.09.2016 stated that the meat was not fit for human consumption.

5. On 21.09.2016, upon the request of Court, reports from the veterinary surgeon [P-2(a)] and the PHI [P-2(b)] were produced to Court, which stated that the mutton was not fit for consumption. Thereafter, the Court directed to destroy the meat and the lorry be released to the owner subject to a bond.

6. According to the B report filed by the 1st respondent [P-2(c)] the petitioners were said to have been arrested on the basis of transporting 300kg of mutton without permit, an offence said to be punishable under section 4(1) of the Butchers (Amendment) Act.

7. Later, on 19.09.2016, the police stated that the law set out in the B report was erroneous and on 21.09.2016 they stated that the relevant law under which the petitioners had committed an offence was section 20(a) read with 20(1) of Butchers' Ordinance 1957 and section 14 read with section 17 of the Holidays Act No. 29 of 1971.

8. The petitioners state that the law set out above has no application to them as it was purchased on 15.09.2016, and as they have not committed an offence there is no cause for their arrest and detainment by the 1st and the 2nd respondents which makes the arrest contrary to law.

9. On behalf of the respondents, it was submitted that, the petitioners were arrested while transporting a huge quantity of meat during the wee hours of a *Poya* day. It is the contention of the learned Deputy Solicitor General (DSG) for the respondents,

that in the circumstances, there existed a reasonable suspicion that animals have been slaughtered for sale on a *Poya* day. It was further submitted that, the petitioners were charged under the provisions of the Food Act for the possession and transporting of mutton which is unsuitable for human consumption, as per the report of the Veterinary Research Institute of *Gannoruwa*. It is the contention of the learned DSG that, the 1st and the 2nd respondents have always acted in good faith in conducting their duties.

10. Admittedly, the petitioners were arrested in the wee hours of 16.09.2016. The petitioners have been in possession of a receipt [P-1] for purchasing the 300kg of mutton from *Mihintale*. Admittedly, the petitioners were in possession of a certificate issued by the PHI of *Mihinatle*, which was taken by the police.

11. The petitioners were initially produced before the Magistrate Court of *Marawila* on 16.09.2016 with the B report which stated that the petitioners have committed an offence in terms of section 4(1) of the Butchers Act No. 13 of 2008. In the B report signed by the Headquarters Inspector of *Marawila* (1st respondent), he has moved the learned Magistrate to remand the petitioners till 23.09.2016, that is, until they obtain a report from the Government Veterinary Officer.

12. As per the report issued by the PHI of *Thoduwawa*, he has examined the meat (mutton) on 21.09.2016 at 2:30 p.m. on which he found that the temperature of the deep freezer truck was not up to the expected standard, and that the meat is not fit for human consumption and also that the official stamp was not visible on the meat.

13. Although the learned DSG for the respondents submitted that the official stamp was not visible on the meat, when the petitioners were arrested, no such thing was reported to the learned Magistrate in the first B report. It is observed that it may have been an afterthought when the police obtained the report form the PHI on 21.09.2016 which stated that the official stamp was not visible on the meat. It is pertinent to note that, the PHI of *Marawila* has inspected the meat on 21.09.2016, which is five days after the arrest of the petitioners.

14. Both the reports issued by the PHI of *Marawila* and the PHI of *Thoduwawa* [P-2(a)] and [P-2(b)] respectively, were issued on 21.09.2016, that is five days after the arrest. As per the petition, when the petitioners were arrested, they were in possession of a report from the PHI of *Mihintale* to the effect that the lorry was fit to transport meat and that the meat was fit for human consumption. The respondents in their objections/written submissions on their behalf, other than the general denial of the averments of the petition, has not specifically denied that the petitioners were in possession of the PHI report.

15. The learned DSG for the respondents submitted that, when the respondents stopped the lorry, the temperature of the freezer was shown to be not up to the expected standard. However, the respondents have failed to mention this in the first B report. Although it is mentioned in the notes of the police officers, those notes were pasted on the 25.09.2016, 6 days after the incident.

16. The learned DSG on behalf of the respondents heavily relied on the case of ***Joseph Perera alias Bruten Perera v. The Attorney-General and Others 1*** **Sri.L.R. [1992] 199** and submitted that, for an arrest, there need not be clear and sufficient proof regarding the commission of the alleged offence. A reasonable suspicion based on an objective standard would be sufficient to show that the respondents have acted in good faith if they had reasons to suspect that the petitioners have committed the alleged offence.

17. However, in *Joseph Perera (supra)* the provisions of the U.K. law which reflects the interpretation of the above position has been duly explained by citing what Lord *Scott L.*J stated in the case of ***Dumbell v. Roberts.***

> *"the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for convicting ... The duty of the police ... is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty ... The police are required to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or guilt. They may have to act on the spur of*

the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but ***where there is no danger of the person who has ex hypothesi aroused their suspicion*** *... (escaping) ... they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries. I am not suggesting a duty on the police to try to prove innocence; that is not their function; but* ***they should act on the assumption that their prima facie suspicion may be ill-founded****."*

[Emphasis Mine]

18. In light of the 'reasonable suspicion to arrest', I do concede that a certain degree of discretion must necessarily be awarded to the police for the due performance of their duties and maintenance of public order. However, allowing the police to arrest on suspicion where it is not reasonable would create room for violations of liberty to take place. Therefore, the discretion granted should not extend to the extent where it would amount to an arbitrary violation of liberty and should be strictly where there exist reasonable grounds for such arrest. Even in such a situation, the police must always be mindful that their assumptions may be incorrect.

19. In the instant case, the 2nd respondent arrested the petitioners while they were transporting meat in the wee hours of 16.09.2016 which was a *Poya* day.

20. Upon being questioned whether there was a permit to transport meat, the petitioners have asserted that it was never a requirement to carry a permit when transporting meat. However, they have produced the receipt in proof of purchasing the meat [P-1] and the certificate issued by the PHI of *Mihintale* to the respondents. This cannot be considered as falling within the purview of an 'arrest based on reasonable suspicion' simply due to the fact that, there was no basis for such a reasonable suspicion to arise. The petitioners were not butchers, they were employees of a wholesale transport service. Further, the respondents cannot rely on the fact that there was reasonable suspicion to suspect that animals have been slaughtered for sale on a *Poya* day, as the petitioners were arrested at about 2.00 a.m. on the *Poya* day itself (16.09.2016) in *Maha Weva*, a considerable distance from the place of purchase,

which is *Mihintale*. Further, the certificate issued by the PHI of *Mihintale* stating that the meat is fit for human consumption is dated 15.09.2016 which is conclusive on the fact that the animals were slaughtered on or before 15.09.2016. Thus, a logical application of mind and reason would have led to the reasonable conclusion that the animals were slaughtered the day before, that is, on 15.09.2016.

21. In ***Piyasiri & Others v. Nimal Fernando, A.S.P. & Others*** it was held that,

> *"The arrest of the petitioners was highly speculative and.. was for the purpose of ascertaining whether any of them could be detected to have committed an offence of bribery. No Police Officer has the right to arrest a person on a vague and general suspicion, not knowing the precise crime suspected but hoping' to obtain evidence of the commission of some crime by searching the petitioners after arresting them. The Law does not sanction such a course of action."*

22. In the case at hand, the petitioners were arrested on mere speculation, without any basis for reasonable suspicion.

23. Upon a careful perusal of the Magistrate Court record [X-1], it must be noted that the respondents initially failed to demonstrate the provisions of law under which they charged the petitioners. Later, the respondents attempted to carry on the case by introducing new offences on two occasions and continued to violate the rights of the petitioners. It is pertinent to note that, according to the affidavit of the 2nd respondent dated 01.03.2018, after investigating further, a plaint was filed on 07.11.2016 which was produced as [1R-2]. Three offences are mentioned on top of the document 1R-2 with the draft charges overleaf. The charges were, the transporting of mutton without a permit, having in possession of mutton for sale on a *Poya day*, transporting mutton that is unfit for human consumption respectively. The learned Magistrate eventually discharged the petitioners upon the finding that, by proceeding with the charges levelled against the petitioners, it would not be possible to punish the petitioners on the said charges. It is clear that the respondents have acted on afterthoughts when they found that there is no provision to charge the petitioners after they were arrested and brought to the police

station with the lorry that contained the meat. This course of events clearly portrays malice on the part of the respondents. Actions such as these should not be carried out.

24. The respondents arrested the petitioners without reasonable grounds on vague suspicion, intending to obtain evidence after the arrest. Further, malice on the part of the respondents also contributes to conclude that this course of action is strictly outside the authority afforded to police officers and therefore is a direct violation of Article 13(1) of the Constitution.

25. Alleged Violation of Article 12(1)
It is submitted on behalf of the petitioners that, the arrest carried out on a purported basis of a violation of the Butchers Ordinance and the Holidays Act, is without legal basis, arbitrary, illegal and is in violation of the fundamental rights of the petitioners guaranteed by Articles 12(1) and 13(1) of the Constitution.

26. Article 12(1) guarantees equality before the law and equal protection of the law.

27. In case of ***Ariyawansa and others v. The People's Bank and others*** **[2006] 2 Sri LR 145 at 152** *Bandaranayake* J. stated that,

> *"The concepts of negation of arbitrariness and unreasonableness are embodied in the right to equality as it has been decided that any action or law which is arbitrary or unreasonable violates equality."*

28. Thus, the arbitrariness of the arrest made without legal basis affects the equal protection guaranteed to the petitioners under section 12(1) of the constitution as well.

29. Article 126 – One Month Rule
Article 126(2) of the Constitution sets out that a fundamental rights petition must be presented to the Supreme Court within one month of such violation. In the case at hand, the petition has been presented to Court on 17.10.2016, and the arrest was made on 16.09.2016.

30. Although this issue was not taken up by the respondents at the initial stages, at the hearing of this application, the learned DSG for the respondents raised this objection stating that the

application was filed out of time. At the hearing of this application, both parties were permitted to file further written submissions, if necessary, within a period of four weeks from the date of the hearing. In his written submissions, the learned Counsel for the petitioners has brought to the notice of this Court that the petition was submitted to Court within the permitted time period, as 16.10.2016 was a Sunday and that the petition was filed on the following day which was a Monday.

31. In terms of Section 8(1) of the Interpretation Ordinance,

> *"Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open."*

32. In the instant case, the date in which the alleged illegal arrest took place was 16.09.2016 and the required one-month period would generally only extend up to 16.10.2016. This application was filed on 17.10.2016. However, as 16.10.2016 was a Sunday in which the Court office is closed, the next working day would be 17.10.2016. Thus, considering the provisions laid down in section 8(1) of the Interpretation Ordinance, this application would be considered as made in due time and should be allowed even though it was filed one day after the lapse of one month since the alleged illegal arrest. Therefore, the said objection has no merit.

33. In light of the observations made above, it is my view that the arrest of the petitioners was not made on reasonable suspicion as required by law, and therefore is illegal and unlawful and in violation of the fundamental rights that have been guaranteed to the petitioners under Articles 13(1) and 12(1) of the Constitution. Further, the objection raised on the issue of the application being time barred also cannot stand. Thus, this application should be allowed.

34. Declarations and Compensation.

In the above premise, I declare that the fundamental rights that have been guaranteed to the petitioners under Articles 13(1) and 12(1) of the Constitution has been violated.

As per Article 126(4) of the Constitution, the Supreme Court is empowered to grant such relief as it may deem just and equitable in the circumstances in respect of any petition referred to it under Article 126(2). Therefore, in the circumstances of this case, considering the discomfort and the losses that were suffered by the petitioners due to the arbitrary acts of the respondents, I order the 1st respondent to pay a sum of Rs. 25,000/- as compensation to each of the petitioners. I further order the 2nd respondent to pay Rs. 10,000/- as compensation to each of the petitioners. The respondents are ordered to pay the above compensation out of their personal funds.

Application Allowed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE A. L. SHIRAN GOONERATNE

I agree

JUDGE OF THE SUPREME COURT

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

In the Matter of an application for Special Leave to Appeal against the judgement of the High Court of the Western Province in Case No. WP/HCA//103/2013/LT, Under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and the Section 31DD of the Industrial Disputes (Amendment) Act, No. 32 of 1990 as amended.

SC Appeal 115/2017
SC SPL LA No. 219/2015
WP/HCA/103/2013/LT
Case No. LT 21/2545/2009

RSK LANKA PRIVATE LIMITED
Phase 11,
Export Processing Zone
Katunayake.

Employer-Respondent-Appellant

Vs.

P.M. NADIKA R. PATHIRAJA
SiriNiwasa
Wadumunnegedara.

Applicant-Appellant-Respondent

Before	:	Jayantha Jayasuriya, PC, CJ Buwaneka Aluwihare, PC, J. S. Thurairaja, PC, J.
Counsel	:	Kushan D' Alwis PC with Ayendra Wickremasekara and Sashendra Mudannayake for the Employer-Respondent-Appellant. Anura Gunaratne for the Applicant-Appellant-Respondent.
Written Submissions filed on	:	24.07.2017 and 17.03.2023 by the Employer-Respondent-Appellant. 12.05.2020 and 29.03.2023 by the Applicant-Appellant-Respondent.

Argued on : 09.12.2022

Decided on : 31.05.2023

Jayantha Jayasuriya, PC, CJ.

The applicant-appellant-respondent (hereinafter referred to as the respondent) filed an application in the labour tribunal alleging that the employer-respondent-appellant (hereinafter referred to as the appellant) constructively terminated her services. The respondent sought *inter alia* re-employment with back wages or reasonable compensation if re-employment is not granted. The appellant pleaded that no relief should be granted to the respondent as no termination of services had taken place. Therefore, it was further pleaded that the respondent is not entitled to any of the reliefs prayed for and moved that the application be dismissed.

The labour tribunal after an inquiry, by its order dated 15 January 2013 dismissed the application on the basis that the tribunal lacks jurisdiction as the respondent failed to establish termination of services. The president of the labour tribunal held that proof of termination, either actual or constructive is necessary for an application under section 31B (1)(a) of the Industrial Disputes Act (hereinafter referred to as the Act), to succeed. Being dissatisfied with the aforesaid order, the respondent invoked the appellate jurisdiction of the Provincial High Court under section 31D of the Act and the High Court pronounced its Order on 14 September 2015. The learned High Court judge in his order *interalia* held that the respondent should be accorded with an opportunity to report for work with half wages for the period of absence.

The appellant is impugning the aforesaid order of the High Court.

This Court granted special leave to appeal on the following two questions:

(a) Has the learned High Court judge erred and / or misdirected himself in law by proceeding to hold that the respondent be reinstated in the employment of the petitioner with half wages, after having correctly concluded that the employment of the respondent has not been terminated, and that the said Application of the respondent could not have been maintained due to a patent lack of jurisdiction?

(b) After having correctly arrived at the conclusion that there is no reason to interfere with the decision of the learned president of the labour tribunal, has the learned High Court judge erred and / or misdirected himself in law by proceeding to award the

respondent the relief of reinstatement with half wages, without dismissing and / or disallowing the aforesaid appeal filed by the respondent?

The learned High Court judge in his impugned judgment had initially reached the conclusion that the appellant has not terminated the services of the respondent and therefore the labour tribunal lacks patent jurisdiction. Accordingly, the learned High Court judge had further decided that there is no reason to interfere with the order of the labour tribunal.

Both the president of the labour tribunal as well as the learned High Court had examined in detail, all the evidence pertaining to the issue whether the initial suspension of work followed by interdiction of the respondent pending the disciplinary inquiry amounts to a 'constructive termination' in the given situation. Sequence of events commencing from 11 October 2008 up to the date on which the respondent made her application to the labour tribunal namely 29 January 2009 had been considered in the context of the evidence of the witnesses and correspondence between the appellant and the respondent. Such evidence reveal that the refusal of the respondent to comply with certain directions of the management had taken place on 11 October 2008 and the respondent has been placed on interdiction on 29 October 2008, initially being temporally suspended on 15 October 2008. There had been a series of correspondence between the two parties and the respondent made the application to the labour tribunal on 29 January 2009, while the disciplinary inquiry was scheduled for 10 February 2009. The respondent in her evidence at the labour tribunal in the cross-examination had admitted that failure to attend the disciplinary inquiry was a grave error on her part.

However, the learned High Court judge having concurred with the decision of the labour tribunal that no constructive termination had taken place and therefore there is no reason to interfere with the decision of the labour tribunal had thereafter proceeded to hold that the respondent should be accorded with an opportunity to report for work with half wages for the period of absence. In arriving at this decision the learned Judge had observed that the respondent would lose an opportunity to obtain any relief, as she is not reporting for work. The learned Judge had observed that such pronouncement is warranted when all surrounding facts and circumstances are examined in a just and equitable manner.

The learned President's Counsel for the appellant contended that there is no legal basis for the High Court to have made this order after holding that the labour tribunal lacks patent jurisdiction.

However, the learned counsel for the respondent contended that the impugned order of the High Court is within the purview of sections 31B(4) and 31C(1) of the Act.

Section 31B(4) reads:

"Any relief or redress may be granted by a labour tribunal to a workman upon an application made under subsection (1) notwithstanding anything to the contrary in any contract of service between him and his employer"

Section 31C reads:

"Where an application under section 31B is made to a labour tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as may appear to the tribunal to be just and equitable".

Examination of both these sections clearly reflect that the exercise of powers vested on the labour tribunal by those provisions are restricted to situations where its jurisdiction is invoked by an application made under section 31B of the Act. The three matters for which relief or redress from a labour tribunal can be sought on an application made to a labour tribunal are stipulated in section 31B(1). The instance which is relevant to this appeal namely that termination of services of a workman by the employer is set out in Section 31B(1)(a). Therefore, proof of 'termination of services by the employer' is a necessary pre-requisite for a labour tribunal to grant any relief or redress to a workman who has made an application made under section 31B(1)(a).

In the instant matter, the learned president of the labour tribunal after careful analysis of the evidence placed at the inquiry had arrived at a finding of fact that the respondent failed to establish termination of her services. The learned High Court judge had neither found fault with this finding nor has set aside it. To the contrary he concurred with the finding of the learned president of the labour tribunal. Thus, both the president of the labour tribunal and the learned High Court judge found that the services of the respondent were not terminated. Under these circumstances, the respondent is not entitled to invoke the jurisdiction of the labour tribunal, in terms of section 31B(1)(a) of the Industrial Disputes Act.

Therefore, the learned president of the labour tribunal had correctly proceeded to dismiss the application of the respondent after holding that the respondent failed to establish termination of employment. However, the learned judge of the High Court had erred when he proceeded to hold

that the respondent should be accorded with an opportunity to report for work with half wages for the period of absence, while holding that the respondent had no right to maintain the application and therefore there is no reason to interfere with the order of the learned president of the labour tribunal.

The Supreme Court in ***Arnolda v Gopalan*** 64 NLR 153, in reference to jurisdiction of labour tribunals under the Act, had observed that the "powers as well as its jurisdiction has to be looked for within the four corners of this statute…." (at 156-157). When a labour tribunal granting any relief or redress to a workman under section 31C of the Act, the just and equitable order must be fair to all parties (***People's Bank v Gilbert Weerasinghe*** [2008] BLR 133 at 135) and that the labour tribunal does not have 'the freedom of the wild ass' in exercising powers vested on it under section 31C of the Act (***Walker sons & Co Ltd v Fry***, 68 NLR 73 at 99). Furthermore court had agreed with the view that *"justice and equity can be measured not according to the urgings of a kind heart but only within the framework of the law"* (***Richard Peiris & Co Ltd v Wijesiriwardane***, 62 NLR 233 at 235).

Hence, I am of the view that the relief granted in the order of the learned High Court Judge while exercising appellate jurisdiction, exceeded the original jurisdiction of the Labour Tribunal.

In view of my findings above I proceed to answer both questions of law on which Special Leave to Appeal was granted in the affirmative and allow the appeal. The Order of the Labour Tribunal is affirmed and the Judgment of the High Court is accordingly set aside.

Chief Justice

Buwaneka Aluwihare, PC, J.
I agree.

Judge of the Supreme Court

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court

JUNE

2023

JUDGMENTS

JUNE INDEX

1.	SC/APPEAL/91/2014	1314
2.	SC/APPEAL/21/2017	1332
3.	SC/APPEAL/188/2014	1347
4.	SC/APPEAL/56/2013	1372
5.	SC/FR/90/2023, 139/2023	1396
6.	SC/APPEAL/104/2017	1420
7.	SC/FR/32/2018	1431
8.	SC/APPEAL/02/2014	1443

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

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

In the matter of the winding up of FA IMPEX (PRIVATE) LIMITED under Part IX of Companies Act No. 17 of 1982, having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at NO. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street Colombo 11.

Adani Exports Ltd
"Adani House", Near Mithakhali Circle,
Navrangpura,
Ahmedabad, 380 009,
India.

S.C. APPEAL NO. 91/2014
SC HCCA LA NO. 32/2014
WP/HCCA/COL/66/2009(F)
D.C. Colombo Case No. 119/CO

Petitioner

Vs.

1. Fa Impex (Pvt) Ltd having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at No. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street, Colombo 11.

1st Respondent

2. Seylan Bank Ltd,
   Ceylinco Seylan Tower,
   No. 90, Galle Road,
   Colombo 03.

Intervenient-Petitioner-2nd Respondent

3. Rahamatulla Abdul Rahuman,
   B/04, First Floor,
   St. James' Flats,
   Colombo 15.

Creditor-Petitioner-3rd Respondent

AND

Fa Impex (Pvt) Ltd having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at No. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street, Colombo 11.

1st Respondent-Appellant

Vs.

Adani Exports Ltd
"Adani House", Near Mithakhali Circle,
Navrangpura,
Ahmedabad, 380 009,
India.

Petitioner-1st Respondent

Seylan Bank Ltd,
Ceylinco Seylan Tower,
No. 90, Galle Road,
Colombo 03.

Intervenient-Petitioner-2nd Respondent

Rahamatulla Abdul Rahuman,
B/04, First Floor,
St. James' Flats,
Colombo 15.

Creditor-Petitioner-3rd Respondent

AND NOW BETWEEN

Fa Impex (Pvt) Ltd having its registered office at No. 46, Sri Mahindarama Road, Colombo 9 and also a place of business at No. 213/1, Main Street, Colombo 11 and presently at 23, Sea Street, Colombo 11.

1st Respondent-Appellant-Petitioner

Vs.

Adani Exports Ltd
"Adani House", Near Mithakhali Circle,
Navrangpura,
Ahmedabad, 380 009,
India.

Petitioner-1st Respondent-Respondent

Seylan Bank Ltd,
Ceylinco Seylan Tower,
No. 90, Galle Road,
Colombo 03.

Intervenient-Petitioner-2nd Respondent-Respondent

Rahamatulla Abdul Rahuman,
B/04, First Floor,
St. James' Flats,
Colombo 15.

Creditor-Petitioner-3rd Respondent-Respondent

Before: Buwaneka Aluwihare, P.C., J.
K.K. Wickremasinghe, J.
Janak De Silva, J.

Counsel:

Nilanga Perera for the 1st Respondent-Appellant-Petitioner

A.A.M. Illiyas, PC with Tharindu Rathnayake for the Petitioner-1st Respondent-Respondent

Palitha Kumarasinghe, PC with Chinthaka Mendis for the Intervenient Petitioner-2nd Respondent-Respondent

Written Submissions tendered on:

31.07.2014 and 13.01.2022 by the 1st Respondent-Appellant-Petitioner

22.09.2021 and 26.11.2021 by the Petitioner-1st Respondent-Respondent

13.11.2014 and 24.11.2021 by the Intervenient Petitioner-2nd Respondent-Respondent

Argued on: 27.10.2021

Decided on: 01.06.2023

Janak De Silva J.

The Petitioner-1st Respondent-Respondent (1st Respondent) filed this application in the District Court of Colombo to wind up the 1st Respondent-Appellant-Petitioner (Petitioner). This application was made on 19th March 2003 in terms of the Companies Act No. 17 of 1982 (Companies Act 1982).

By order dated 16th January 2009 the learned District Judge ordered the winding up of the Petitioner. The Petitioner preferred an appeal to the Provincial High Court of Civil Appeal of the Western Province (Holden in Colombo) (High Court). When this appeal was taken up for hearing, the Intervenient-Petitioner-2nd Respondent (2nd Respondent) raised a preliminary objection that no right of appeal has been given to the Petitioner by Companies Act No. 7 of 2007 (Companies Act 2007) to appeal against the winding up order.

The High Court ruled that the issue must be decided by reference to section 532(1) of the Companies Act 2007. It concluded that the provisions of the Companies Act 1982 were applicable to the present case only for the purposes of winding up and that section 307 of the Companies Act 1982, which conferred a right of appeal against any order or decision made up in winding up proceedings, was not open to the Petitioner. Accordingly, the High Court upheld the preliminary objection and dismissed the appeal. The Petitioner appealed.

Leave to appeal was granted on the following questions of law:

(1) Whether the impugned order is erroneous and incorrect in that, the conclusion that no appeal would lie against a winding up order in the particular circumstances of this case?

(2) Whether the impugned order is erroneous and incorrect in that, the conclusion that no appeal would lie against a winding up order in the particular circumstances of this case on the basis that the Company law is a special law?

During the hearing, a further question of law was raised, namely:

(3) Assuming that the winding up "order" dated 16th January 2009 is appealable, is the proper remedy a Leave to Appeal application?

Questions of Law No. 1 and 2

Learned counsel for the Petitioner submitted that section 532(1) of the Companies Act 2007 preserved the application of section 307 of the Companies Act 1982 to winding up proceedings commenced under the said Act. Therefore, any order or decision made in such winding up proceedings was subject to appeal.

In response, the learned counsel for the 1st Respondent and the Intervenient Petitioner-2nd Respondent-Respondent (2nd Respondent) submitted that an appeal is a statutory right and must be expressly created. Reliance was placed on the decisions in ***Martin v. Wijewardena*** **[(1989) 2 Sri.L.R. 409]**, ***Dassanayake v. Sampath Bank*** **[(2002) 3 Sri.L.R. 268]**, ***Sangarapillai v. Chairman, Municipal Council of Colombo*** **(32 NLR 92)**, ***Vanderpoorten et al. v. The Settlement Officer*** **(43 NLR 230)**, ***Kanagasunderam v. Podihamine*** **(42 NLR 97)**, ***Bakmeewewa, Authorized Officer of People's Bank v. Konarage Raja*** **[(1989) 1 Sri.L.R. 231]**,***Gunaratne v. Thambinayagam and Others*** **[(1993) 2 Sri.L.R. 355]**. It was further contended that the Companies Law is a special law and that any right of appeal should have been granted by the same law. In support of this proposition reliance was placed upon the decision in ***Sirisena Perera and another v. Vinson Perera*** **[(2005) 1 Sri.L.R. 270]**. It was contended that section 532(1) of the Companies Act 2007 did not keep alive all sections in the Companies Act 1982 and in particular did not provide for the application of section 307 therein to the present case.

There is no dispute that these winding up proceedings commenced in terms of the Companies Act 1982 which provided a right of appeal against any order or decision made in a winding up proceeding. The dispute is over the legal effect of the repeal of the Companies Act 1982 by the Companies Act 2007.

The analysis must first take into account paragraph 6(3)(c) of the Interpretation Ordinance, which reads as follows:

> "6(3)*Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected –*
>
> *…*
>
> *(c) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.*"

The interpretation of this section raises two questions. First, we have to determine what is meant by an action, procedure or thing, and whether winding up proceedings falls under these words.

There is a divergence of opinion in some jurisdictions on whether a winding up proceeding is an action in the context of the relevant legal provisions even though the same legal provision was the subject of interpretation.

Section 4(4) of the Limitation Ordinance, Cap. 347 of Hong Kong provided that:

> *"An action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due"*

"Action" is defined in section 2 of the said Ordinance as including "any proceeding in a court of law". In ***Re: Li Man Hoo*** **[2013] 4 HKLRD 247** the Hong Kong Court of Appeal held that a winding up petition falls within this definition. However, in England and Australia, which has similar provisions, a more restrictive meaning has been adopted and it has been held that the relevant limitation provision does not bar the presentation of a winding-up petition. **[See *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 1 WLR 2871, *Dennehy v Reasonable Endeavours Pty Ltd* (2003) 130 FCR 494, *O'Mara Constructions Pty Ltd v Avery* (2006) 230 ALR 581].**

In ***Collett v. Priest*** **[(1931) A. D. 290 at 298]** De Villers, C. J., held that that the essential feature of a 'suit or action' under section 50 of the Charter of Justice or under section 39 of Transvaal Proclamation 14 of 1902, or of a 'suit ' under section 24 of Cape Act 35 of 1896, is that it is a proceeding in which one party sues for or claims something from another, and that no proceeding which lacks this feature, such as sequestration proceedings, an application for winding up of a company etc., can be properly described as a 'suit or action' or as a 'suit' under any of these sections.

The Interpretation Ordinance does not define what constitutes an action. According to section 5 of the Civil Procedure Code, an action is a proceeding for the prevention or redress of a wrong. One may ask whether this definition should be used to define the word *action* in the Interpretation Ordinance.

However, I do not believe there are any such difficulties in interpreting the word *proceeding* in paragraph 6(3)(c) of the Interpretation Order, which is broader in scope. In ***Perumawasam Silva et al.*** ***v.*** ***Balasingham (A. G. A., Kalutara)*** **(53 NLR 421 at 423)** it was held that this section must be read in a wider sense. Hence, I hold that the present winding up application falls within the word *proceeding* in section 6(3)(c) of the Interpretation Ordinance.

The second issue is the meaning to be attributed to the words *may be carried on and completed as if there had been no such repeal.* We must examine whether these words are to be read, as meaning the culmination of the *action, proceeding or thing* in the original court or as encompassing appellate proceedings as well.

Here, it is important to examine whether an appeal and the original action, proceeding or thing are the same. An examination of the papers filed in this appeal reflects that as the action advanced through different forums, both original and appellate, the caption filed in the original court has been suitably adopted based on the respective petitioner or respondent. This indicates that it is accepted in practice that an appeal is a continuation of the initial action rather than a new proceeding or action.

Indeed, the common law position is that an appeal is not a fresh action but only a continuation of the original proceedings and a stage in that action itself [See ***Garikapati Veeraya v. Subbiah Choudhary and others*** **(AIR 1957 SC 540)**, ***Shiv Shakti Co-op. Housing Sociedty, Nagpur v. M/s Swaraj Developers and Others*** **[AIR 2003 SC 2434]**,***Malluru Mallappa (D) THR. LRS. v. Kuruvathappa & Ors.*** **(Civil Appeal 1485 of 2020)**]. This view has been adopted in ***Sudharman De Silva v Attorney General*** **[(1986) 1 Sri LR 9 at 13]**, ***W.L.M.N. De Alwis (Deceased) and others v. Malwatte Valley Plantations Ltd. and another*** **[SC/HCCA/LA 47/16, S.C.M. 21.06.2019].**

Accordingly, a reading of section 6(3)(c) of the Interpretation Ordinance in harmony with this position in common law means that any repeal of any existing law shall not, in the absence of any express provision to that effect, affect or be deemed to have affected any *action, proceeding or thing* pending or incompleted when the repealing written law comes into operation, and such *action* may be carried on and completed up to the conclusion of the appeal as provided in the repealed law.

Therefore, I hold that in the absence of any express provision to that effect in the Companies Act 2007, the repealing of the Companies Act 1982 by the Companies Act 2007 should not be interpreted to affect or be deemed to have affected the right of appeal granted under section 307 of the Companies Act 1982.

There is another reason to require the express removal by the Companies Act 2007 of the right of appeal provided by section 307 of the Companies Act 1982. The learned counsel for the 1st and 2nd Respondents submitted that such right of appeal is procedural in nature and not a vested right. Hence, it was contended that such a procedural right can be taken away retrospectively. The following extract from **Maxwell on "*The Interpretation of Statute*" (12th ed., page 222)** was cited in support:

> *"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode. Alteration in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."*

However, a statutory right of appeal is not a mere procedural right but is a vested right. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication. [***Messrs. Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and Others*** **(AIR 1953 SC 221),** ***Garikapati Veeraya v. Subbiah Choudhary and others*** **(supra),** ***Shiv Shakti Co-op. Housing Sociedty, Nagpur v. M/s Swaraj Developers and Others*** **(AIR 2003 SC 2434)**].

In ***Akilandanayaki v. Sothinagaratnam*** **(53 NLR 385 at 400)** where Rose, C. J. held:

> *"The combined effect of sections 6(3)(b) and 6(3)(c) of the Interpretation Ordinance is that if a party had already instituted proceedings to vindicate a vested right, the subsequent repeal of the enactment under which that right was acquired cannot be regarded as operating retrospectively unless there are express words satisfying both sub-sections."*

In summary, there are two reasons to require that the right of appeal under section 307 of the Companies Act 1982 be expressly removed. One is the requirement in section 6(3)(c) of the Interpretation Ordinance. Second, a right of appeal is a vested right, and therefore there must be explicit language to clearly express the intention to take away that right of appeal.

Let me now examine whether such express taking away is seen in the Companies Act 2007. Section 532(1) therein reads:

> *"Subject to the provisions of subsection (2), the provisions of this Act with respect to winding up shall not apply to any company of which the winding up has commenced before the appointed date. Every* ***such company shall be wound up in the same manner and with the same incidents****, as if this Act had not been enacted, and* ***for the purpose of the winding up****, the written law under which the winding up commenced shall be deemed to remain in full force."* (Emphasis added)

The learned counsel for the 1st and 2nd Respondents drew our attention to the words *for the purpose of the winding up* and submitted that all what has been kept alive are the provisions providing for the winding up in the Companies Act 1982. It was contended that the right of appeal in section 307 of the Companies Act 1982 is not part of such provisions and is not caught up within the words *for the purpose of the winding up*.

On the contrary, the learned counsel for the Petitioner submitted that such an interpretation would lead to grave and manifest injustice and absurdity as it would take away a right of appeal from a party.

In this context it is interesting to observe the same formulation in section 532(1) of the Companies Act 2007, section 452 of the Companies Act 1982 and section 366 of the Companies Ordinance No. 51 of 1938 as amended. All these three Acts repealed the previous applicable law. The words *and for the purpose of the winding up* are found in all three sections.

Nevertheless, section 307 of the Companies Act 1982 provided for a right of appeal. I am of the view that in these circumstances, those words cannot be used to interpret that they expressly exclude the right of appeal in section 307 of the Companies Act. Moreover, when an appeal is in law a continuation of the original proceedings as explained earlier, such an interpretation is not possible.

Accordingly, I hold that the right of appeal recognized in terms of section 307 of the Companies Act 1982 was not taken away in relation to the impugned winding up proceedings that were to be continued in terms of section 532(1) of the Companies Act 2007.

Questions of law Nos. 1 and 2 are answered in the affirmative.

Question of Law No. 3

Learned Counsel for the 1st and 2nd Respondent submitted that assuming a right of appeal is available against the winding up order issued in the present case, it is not a final order but only an interlocutory order. It was contended that section 307 of the Companies Act 1982 must be read with sections 754(1), (2) and (5) of the Civil Procedure Code and that the remedy available to the Petitioner was to make a leave to appeal application and not a final appeal. Reliance was placed on the decision in ***Chettiar v. Chettiar*** **[(2011) BLR 25]** and ***H.B. Ajith Ariyadasa v. Paranawithana and another*** **[C.A. (Rev.) 1695/06, C.A.M. 2.6.2009].**

Section 307 of the Companies Act 1982 reads:

> *"An appeal from any order or decision made or given in the winding up of a company by the court under this Act shall lie to the Court of Appeal in the same manner and subject to the same conditions, as an appeal from any order or decision of the court made or given in the exercise of its ordinary civil jurisdiction."*

The right of appeal is granted against *any* order or decision (if I may use that word generically) made in a winding up of a company. It does not refer to a winding up order per se. Nevertheless, the use of the word *any* therein makes it possible to give a wide interpretation to catch all orders or decisions including an order for the winding up of a company.

However, the learned counsel for the 1st and 2nd Respondents contended that the analysis does not stop there and must go on to consider the provisions in sections 754(1), (2) and (5) of the Civil Procedure Code. The words *in the same manner and subject to the same conditions* in section 307 of the Companies Act 1982 was contended to be a reference to the conditions specified in those sections. In particular, it was submitted that a right of

appeal is available only in relation to a *judgment* whereas if it is an *order*, a leave to appeal application is the only remedy.

I agree that section 307 of the Companies Act 1982 must be read with subsections 754(1), (2) and (5) of the Civil Procedure Code. Therefore, we must consider whether the impugned winding up order is a judgment or order within the meaning of these sections.

The 1st and 2nd Respondents cited the decision in ***H.B. Ajith Ariyadasa v. Paranawithana and another*** **(supra)** where it was held that the proper application to be made was a leave to appeal application in terms of section 754(2) of the Civil Procedure Code. However, the order impugned in that matter was not an order of winding up. It was an order directing the petitioner to hand over goods listed in the inventory submitted by the liquidator.

In ***Chettiar v. Chettiar*** **(supra. 31)** it was held:

> *"Therefore, to ascertain the nature of the decision made by a Civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test offered by Lord Esher MR in Standard Discount Co. v. La Grange (supra) and as stated in Salaman v. Warner (supra) which reads as follows:*
>
> > *"The question must depend on what would be the result of the decision of the Divisional Court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."*

The Court adopted the application test adopted by English courts in determining whether an order or decision is a final judgment. Therefore, the characterization of a winding up order by the English courts must be examined.

In ***Re Reliance Properties Ltd Waygood, Otis and Co Ltd v Reliance Properties Ltd*** **[(1951) 2 All ER 327]** Evershed MR in placing a winding up order in its proper perspective held (at 327):

> *"It would be difficult to think of any order made by the court which in substance or character was more final than a winding up order".*

Moreover, Halsbury's *The Laws of England*, 3rd edition (1954) Vol. 6 at 712, states:

> *"an appeal from a winding up order maybe brought without leave of the court, as the order is a final order and not a interlocutory judgment"*

This appears to have been the position in English common law even at the time the 4th edition of this work was published in 1974 [See Halsbury's *The Laws of England*, 4th edition (1974) Vol. 7 at 789. Nevertheless, Halsbury's *Laws of England*, 5th edition (2011) Vol (17) at 255, state:

> *"An appeal from a winding-up order made by a district judge or circuit judge of the High Court or a registrar of the High Court requires permission of the first instance judge or registrar or a High Court Judge, and permission is required from the judge or the Court of Appeal from appeals from a High Court judge; the Court of Appeal alone can grant permission where the decision of the High Court judge is itself made on appeal"*

The difference in approach appears to be based on the English rules of civil procedure, which explicitly state the circumstances in which an application for leave to appeal should be made. Therefore, the present position of English common law cannot be adopted here. A more detailed analysis of the effect of a winding up order in terms of the Companies Act 1982 should be undertaken.

Winding up proceedings are *sui generis* in nature. It is distinct and different from an ordinary action based on a cause of action. The impugned winding up proceedings have been instituted on the basis that the Petitioner is unable to pay its debts. The District Court decided to wind up the Petitioner. The appeal to the High Court was made by the Petitioner against the that winding up order.

With respect to section 265 of the Companies Act 1982, such an order to wind up works in favour of all of the Petitioner's creditors and contributors. It is thus clear that the impugned winding up proceedings are a remedy provided to all creditors and contributors. The substantive issue to be resolved in this winding up proceedings is whether the Petitioner is unable to pay its debts. The impugned winding up order was made by the Court after determining that central issue. In fact, it is an issue which goes to the jurisdiction of the Court.

Moreover, the effect of a winding up order cannot be overlooked in determining whether it is a final judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code. When a winding up order is made, the servants of the company are *ipso facto* dismissed [**Chapman's case (1886) L.R. 1 Eq. 346, *Measures Bros. Ltd. v. Measures* (1910) 2 Ch. 248, *Gosling v. Gaskell* (1897) AC 575**] and results in the dismissal of the directors and the cessation of their powers [***Re Union Accident Insurance Co Ltd* (1972) 1 All ER 1105, *Fowler v. Broad's Patent Night Light Co* (1893) 1 Ch 724**].

There is no doubt that significant steps need to be taken thereafter to complete the winding up proceedings, such as the appointment of liquidators. Nevertheless, as Williams LJ held in ***In Re Herbert Reeves & Co.*** **[(1902) 1 Ch. 29 at 31]**:

> *"…the mere fact that there may be inquiries to be carried out after the order or after the judgment has been delivered does not prevent the order or the judgment from being a final order or final judgment. After you have got an order for winding up a company, there are obviously an enormous quantity of questions which may be raised…"*

However, learned counsel for the Respondents drew our attention to several sections of the Companies Act 1982 and contended that a winding up order is not a final judgment. Section 287 grants power to the same court which issued the winding up order to stay the winding up proceedings altogether or for a limited time on such terms and conditions as the court thinks fit. Section 372 gives the Court the power to declare the dissolution of the company void. It was contended that the final judgment is when the Court dissolves a company consequent to an application made by the liquidator under section 304.

I am not convinced that any one of these sections negate a finding that the impugned winding up order is a final judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code. Section 287 empowers the Court only to stay the *winding up proceedings* in given circumstances. It does not grant power to the Court to vary a *winding up order*. In fact, in ***Re Intermain Properties Ltd.*** [**(1986) BCLC 265 Ch D.]** it was held that the Court has no jurisdiction to rescind a perfected winding up order.

No doubt, section 372 empowers the Court to declare the dissolution void. But there is a clear distinction between an order for winding up and an order for dissolution. A winding up order does not result in the extinction of the company [See ***Employers Liability Assurance and Corpn. v. Sedgwick Collins Co.*** **[(1927) AC 95**]. A company ceases to exist

only upon an order made for dissolution in terms of section 304(1) of the Companies Act 1982.

For the foregoing reasons, I hold that the impugned winding up order is a final judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code.

Question of law No. 3 is answered in the negative.

For avoidance of any doubt and to ensure clarity, I have only made a finding that a winding up order made by the Court in terms of the Companies Act 1982 in any winding up proceedings instituted against a company due to its failure to pay its debts is a judgment within the meaning of sections 754(1) and (5) of the Civil Procedure Code.

Accordingly, I set aside the judgment of the High Court dated 7th June 2011. I direct the High Court to hear and dispose of the Petitioner's appeal on the merits expeditiously. The High Court shall make every reasonable endeavour to conclude the appeal by the Petitioner within a reasonable time. The High Court shall give priority to this matter with a view to concluding it expeditiously.

The Petitioner is entitled to the costs of this appeal.

Appeal allowed.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

K.K. Wickremasinghe, J.

I agree.

Judge of the Supreme Court

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

Capital Printpack (Private) Limited,
No. 257, Grandpass Road,
Colombo 14.

S.C. Appeal No. 21/2017
High Court Kegalle
No. SP/HCCA/KAG/23/2013(F)
D.C. Mawanella No. 1348/M

Plaintiff

Vs.

Wijitha Group of Companies (Private) Limited,
No. 160, Main Street,
Mawanella.

Defendant

AND

In the matter of an Appeal in terms of Section 754[1] of the Civil Procedure Code read with Section 5 of the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Wijitha Group of Companies (Private) Limited,
No. 160, Main Street,
Mawanella.

Defendant -Appellant

Vs.

Capital Printpack (Private) Limited,
No. 257, Grandpass Road,
Colombo 14.

Plaintiff -Respondent

AND NOW BETWEEN

In the matter of an Application for Leave to Appeal to the Supreme Court in terms of Section 5(C) of the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Wijitha Group of Companies (Private) Limited,
No. 160, Main Street,
Mawanella.

Defendant - Appellant - Appellant

Capital Printpack (Private) Limited,
No. 257, Grandpass Road,
Colombo 14.

Plaintiff - Respondent - Respondent

Before: **Buwaneka Aluwihare, P.C., J.**
E.A.G.R. Amarasekara, J.
Janak De Silva, J.

Counsel:

Basheer Ahamaed with Lakshman Jeyakumar for the Defendant-Appellant-Appellant

Sumedha Mahawanniarachchi with Nishan Balasooriya for the Plaintiff-Respondent-Respondent

Written Submissions tendered on:

Appellant on 14.03.2017

Respondent on 20.07.2018

Argued on: 01.11.2021

Decided on: 09.06.2023

Janak De Silva, J.

The Plaintiff-Respondent-Respondent (Respondent) is a company that manufactures and provides packaging material used to package edibles. The Defendant-Appellant-Appellant (Appellant) is a company that manufactures, packages and distributes certain food products.

Towards the end of 2006, the Appellant requested quotes from suppliers for the provision of packaging materials. Following the Respondent's submission and after discussion, the parties entered into a contract, which is admittedly unwritten. In terms of this contract, the Respondent was to supply packaging materials on 45 days' credit. As a result, the Respondent provided the Appellant with packaging materials between March 2007 and October 2007 which were used by the Appellant to pack certain food they manufactured.

On 4.11.2008 the Respondent instituted the above styled action in the District Court of Mawanella against the Appellant for the recovery of the sum of Rs.2, 100,103.30 due to the packing material supplied.

The Appellant denied that any sum is due to the Respondent and made a claim in reconvention for damages suffered due to the packing material being defective and not suitable for the purpose of packing food.

The learned District Judge entered judgment as prayed for in the plaint and dismissed the cross-claim. On appeal, the judgment was affirmed by the High Court (Civil Appeal) of Sabaragamuwa Province holden in Kegalle (High Court).

This Court granted leave on the following questions of law:

Question of Law No. 1:

> "*13 (a)That the said Court has misdirected itself on the facts and erred on the law in concluding that the prescriptive period of 3 years in section 7 of the Prescription Ordinance for breach of an unwritten contract applied, whereas the Respondent's action was for monies due on goods sold and delivered by the Respondent to the Appellant to which the prescriptive period of one year in section 8 of the Prescription Ordinance applied.*

Question of Law No. 2:

> "*In view of the document marked "V3" is the plaintiff's claim in any event not prescribed in view of the provisions of section 12 of the Prescription Ordinance.*"

Question of Law No. 1

The Learned District Judge held that the action is not prescribed as this matter is governed by section 7 of the Prescription Ordinance No. 22 of 1871 (Prescription Ordinance). He went on the basis that the action was based on an unwritten contract. Moreover, he held that even if the issue is governed by section 8 of the Prescription Ordinance, the action was not prescribed as it was filed within a year of receiving a letter dated 28.02.2008 (V3) which he concluded as amounting to an acknowledgement of the debt by the Appellant.

The High Court applied the reasoning in ***Assen Cutty v. Brooke Bond Ltd.*** **(36 N.L.R. 169)** and held that the issue of prescription is governed by section 7 of the Prescription Ordinance. It declined to follow the reasoning in ***Dharmaratne v. Fernando*** **(56 N.L.R. 498)** and ***Ceylon Insurance Co. Ltd. v. Diesel and Motor Engineering Co. Ltd*** **[79 (II) N.L.R. 5]** as urged by the Appellant.

In ***Assen Cutty v. Brooke Bond Ltd.*** (supra. 179) Court concluded that as between section 8 (present section 7) dealing with unwritten contracts and section 9 (present section 8) dealing with goods sold and delivered, the latter section is the particular enactment and so "operative" while the former section is the general enactment and so *"must be taken to affect only the other parts of the statute to which it may properly apply"*. It was held that section 9 (present section 8) the particular enactment, operates in the case of contracts for and in respect of goods sold *"for which an action lies owing to the fact of delivery"* while section 8 (present section 7) operates in the case of unwritten contracts for or in respect of goods sold for which an action lies otherwise than owing to the fact of delivery. Accordingly, it was held that the claim in reconvention in that case was a claim for damages for breach of warranty of goods delivered upon an unwritten contract of sale and not an action *"for or in respect of goods sold and delivered"* within the meaning of section 9 (present section 8) and is not barred until after the lapse of three years in terms of section 8 (present section 7) after the cause of action shall have arisen.

It is observed that the learned Judge of the High Court had relied on the decision in **Assen *Cutty v. Brooke Bond Ltd*** **(supra)**, to hold that the claim in the present action does not fall within section 8. However, I am of the view that he did so on the wrong premise. This case arose out of three tea sales and purchase contracts in which the plaintiff was selling and delivering certain quantities of tea to the defendant. The plaintiff's claim was related to contracts for tea sold and delivered to the defendants and the defendant's claim in reconvention was for a sum of money the defendants paid to the plaintiff, for tea sold and delivered to them on the ground that the tea supplied were found to be of a lower quality. This was held to be a breach of warranty and it was this claim of the defendant for breach of warranty of the sale of goods contract that was held to not fall within the ambit of section 8.

On the contrary, the learned counsel for the Appellant submitted that the ratio of ***Dharmaratne v. Fernando*** (supra) and ***Ceylon Insurance Co. Ltd. v. Diesel and Motor Engineering Co. Ltd*** (supra) must govern the issue of prescription in the matter before us. It was submitted that based on the principle of statutory interpretation; *generalia specialibus non derogant* - general provisions do not derogate from special provisions, section 7 which is the general section must give away to section 8 which is the special provision applicable to transactions where goods are sold and delivered under an unwritten contract.

Section 7 of the Prescription Ordinance reads as follows: -

> "*No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be-commenced within three years from the time after the cause of action shall have arisen*"

This section clearly provides that actions in respect of "*any unwritten promise, contract, bargain, or agreement*" are prescribed only after three years from the time when the cause of action shall have arisen. In the instant case the fact that there was an unwritten contract between the parties in relation to supply of packaging materials by the Respondent to the Appellant is not disputed. If it is to be considered that this is an action in respect of the said unwritten contract, then the action would have been prescribed only after a period of three years from the time the money claimed for became due on the Respondents.

However, we have to take into consideration section 8 of the Prescription Ordinance, which reads as follows:-

> "*No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due*."

This section clearly sets out that if the action is for or in respect of inter alia "goods sold and delivered" the action will be prescribed after a lapse of one year from the time the cause of action arose.

Where a given cause of action appears to fall within the scope of more than one provision of a statute, our Courts have consistently held that specific provision must be operative while the general provision must be taken to affect only other parts of the Statute to which it may properly apply [***Campbell & Co. v. Wijesekere*** **(1920) 21 N.L.R. 431;** ***Ceylon Insurance Company Ltd., v. Diesel and Motor Engineering Company Ltd*****. (supra);** ***Brown & Co., Ltd v. G. S. Fernando*** **(1986) 2 Sri.L.R. 177**].

The question as to whether it is section 7 or section 8 of the Prescription Ordinance that may be considered as the specific section out of the two has been considered by Court on many an occasion.

In ***Walker, Sons & Co. Ltd. v. Kandyah*** **(1919) 21 N.L.R. 317** where the plaintiff, a motor firm, sued the defendant to recover a certain sum of money for repairs done to the defendant's motor car and for materials supplied in connection with that work. It was submitted on behalf of the defendant that that this was an action for work and labour done and goods sold and delivered which comes under section 9 (now section 8) of the Prescription Ordinance while it was pleaded on behalf of the Plaintiff that the action was based on an unwritten contract between the parties. De Sampayo J. (At p. 319) held:

> "*If the correspondence does not constitute a written contract, it must be conceded that there was an unwritten contract. But then comes section 9, which appears to provide specially for actions on certain classes of unwritten contracts, and I think that actions for work and labour done and goods sold and delivered, though these are unwritten contracts, come within section 9.*"

Similarly, Garvin, J. in the case ***Assen Cutty v. Brooke Bond Ltd*** **(supra. 190)** held:

> *"The actions for goods sold and delivered contemplated by section 9 in so far as they are not based on written contracts are embraced by the general words of section 8 "or upon any unwritten promise, contract, bargain or agreement". But if we read these two sections, as I think we must, so as to give a distinct interpretation to each of these sections we are driven to the conclusion that the object of the legislature was to exclude from section 8 the actions for which special provision is made by section 9.*"

In ***Dharmaratne v. Fernando*** **(supra)** the action was based on an unwritten promise to pay the balance purchase price for goods sold and delivered. It was held that in regard to the issue of prescription, the action was governed by section 8 and not section 7 of the Prescription Ordinance.

In ***Ceylon Insurance Co. Ltd. v. Diesel and Motor Engineering Co. Ltd.*** **(supra)** the Supreme Court made a comprehensive review of its decisions and concluded that in the case of written promises or contracts, section 6 being the particular enactment must in keeping with the rules of interpretation prevail over section 8 of the Prescription Ordinance which is the general section. It was further held that in the case of unwritten contracts, section

8 of the Prescription Ordinance would be the particular enactment to which the general section 7 must give way.

These authorities establish that section 8 of the Prescription Ordinance is the specific provision which will be operative where the cause of action of the case falls within the scope of both sections 7 and 8. An action "*for or in respect of any goods sold and* delivered" will be prescribed by a period of one year even if it is based on an unwritten contract between the parties to the action in relation to such "*goods sold and delivered*".

I am of the view that this is indeed the correct legal analysis of the interface between sections 7 and 8 of the Prescription Ordinance. A sale of goods transaction can be based on either a written or unwritten contract. A claim for the price of goods sold and delivered under a *written contract* is governed by section 6 of the Prescription Ordinance. If a claim for the price of goods sold and delivered under an *unwritten contract* is held to be governed by section 7 of the Prescription Ordinance, the words "*goods sold and delivered"* in section 8 become redundant. In interpreting any section of an Act, the Court cannot make any part of the Act superfluous. Accordingly, I hold that a claim for the price of goods sold and delivered on an unwritten contract, falls within section 8 of the Prescription Ordinance.

It must now be ascertained whether the claim in the instant action is based on the "*goods sold and delivered*" as contemplated by section 8 of the Prescription Ordinance. In the case of ***Markar v. Hassen*** **(2 N.L.R. 218)** it was held that the term "goods" in section 9 (now 8) of the Prescription Ordinance means "*movable property*,". Therefore, the packaging material supplied by the Respondent to the Appellant meets the definition of the term "goods" as defined in section 8 of the Prescription Ordinance. Further, in **Assen *Cutty v. Brook Bond Ltd*** **(supra. 190)** Garvin, S.P.J. held that, "*an action for goods sold and delivered*" under section 8 should be considered as meaning actions for the recovery of the price or value of goods sold and delivered.

In the instant case, the action was instituted to recover monies due to the Respondent from the Appellant, on a goods sold and delivered transaction, and hence the issue of prescription is governed by section 8 of the Prescription Ordinance. Hence, I answer question of law No. 1 in the affirmative.

Question of Law No. 2

The debt becomes due on the date on which the price was payable for the goods sold and delivered. Both the lower courts did not make any finding as to the date on which the cause of action arose.

The document marked P4 indicates that the amount claimed is payable on goods sold and delivered on six invoices. The goods were sold and delivered on the basis of a 45-day credit. These 6 invoices are dated from 14.05.2007, 14.05.2007, 15.06.2007, 30.06.2007, 30.06.2007, 30.07.2007, 31.07.2007, 07.08.2007 and 31.10.2007. The total amount due on the six invoices as claimed in the plaint is Rs. 2,100,103.30. This action was filed on 4.11.2008. Consequently, the action on all invoices, with the exception of the last invoice dated 31.10.2007, since goods were sold and delivered on the basis of a 45-day credit, for Rs. 190,874.10 was prescribed by the time this action was filed. Therefore, the action of the Respondent for a sum of Rs. 1,909,229.20 (2,100,103.30-190,874.10) is prescribed unless there is an acknowledgement within the meaning of section 12 of the Prescription Ordinance which reads as follows:

> "*In any forms of action referred to in sections 5,6,7,8,10 and 11 of this Ordinance, no acknowledgment or promise by words only shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments contained in the said sections, or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable ...*"

The effect of this section is that if there is an acknowledgment or promise made or contained in writing signed by the party chargeable, it shall be deemed evidence of a new or continuing contract and it would take the case out of the operation of the foregoing provisions of the Ordinance.

Hence the Court must determine whether the Appellant has made any acknowledgement of the debt which takes the action outside the operation of section 8 of the Prescription Ordinance.

In determining Question of Law No. 2, we must address two separate and distinct issues, namely:

(i) Is document marked V3 an acknowledgement within the meaning of section 12 of the Prescription Ordinance (Acknowledgment)?

(ii) If so, has this action being filed within the relevant period (Relevant Period)?

Acknowledgment

As we must interpret the contents of the letter marked V3, it is reproduced verbatim below:

28/02/2008

M.A.M. Siriwardana
Asst Sales Manager,
Capital Printpack (Pvt) Ltd
Colombo 14,

Dear Sir,

SUB RE –SETTLEMENT OF RS 2,100,103.30

Your correspondence of 17.09.2007, 06.02.2008, and our replies dated on the above subject matter of 11.10.2007 and 06.02.2008 refers.

Kindly peruse to the above dated correspondences where you can draw a very clear picture of the total loss incurred by us to wit.

(a) Total wrapper cost 1015806 x27025 = 2745215.715
(b) Total production cost 1015806 x12 = 12189672.00
Total loss = 14934887.72

We presume that you are not well aware of the pacts that when your own valuable and responsible officer Mr Malintha ,who had personally visited, checked and inspected
With his own sight of the defective materials lying at our stores premises at Mawanella and had failed to submit a comprehensive detail report of his inspection to your management.

But what We observed in your letter dated 06.02.2008, nothing whatsoever is mentioned about the inspection made by Mr Malintha of the defective materials

We wish to suggest that an responsible officer be sent to our factory to see the defective materials lying at this end without the other defects at Jaffna which could not be collected due to the present situation prevailing in the north.
Once this is one We can come to A very cordial and understanding settlement of
setting
The dues with a generous gesture for the defective materials amount on your part

Thanking you,
Yours Faithfully,
…….
A.A. Nawarathna
(Assi. Operations Manager)

In examining whether this letter is an acknowledgment within the meaning of section 12 of the Prescription Ordinance, I will, where appropriate, refer to English decisions as section 12 of Prescription Ordinance has been copied verbatim from Lord Tenterden's Act (Statute of Frauds Amendment Act, 1928) [Weeramantry, *The Law of Contracts*, Vol. II, 803].

In ***Hoare & Co. v. Rajaratnam*** **(34 NLR 219 at 223)** Drieberg J. cited with approval the dicta by Bankes, L.J. in ***Fettes v. Robertson*** **[(1921) 37 T.L.R. 581]** that it is important *"never to lose sight of the fact that what a plaintiff has to prove is a promise express or implied, to pay the debt, made within six years before action, and that any consideration of an acknowledgment is merely for the purpose of seeing whether the acknowledgment is expressed in such language that an unqualified promise to pay can be implied from it."*

The letter V3 forms part of the correspondence commencing with letters dated 17.09.2007 (P3) and 06.02.2008 (P4) sent by the Respondent. By P4, the Respondent specifically claimed an amount of Rs. 2,100,103.30 for goods sold and delivered. The Appellant in V3 does not contest that it received the goods at issue. Nor does it claim that the price of the said merchandise sold and received has been paid. Rather, the Appellant argues that the goods are defective and therefore it suffered damages that must be deducted from the amount claimed by the Respondent.

In ***Rodrigo v. Jinasena & Co.*** **(32 N.L.R. 322 at 324)** Maartensz A.J. cited with approval the decision of ***In Re River Steamer Company, Mitchell's Claim*** **[(1870-1871) 6 L.R.Ch. 822]** for the proposition that an acknowledgment coupled with an assertion that the debtor has a set off sufficient to countervail the debt is not sufficient to take the claim out of the Statute of Limitations. Nevertheless, an attentive reading of this decision shows that the Court found that no promise of payment could result from it because the set-off claimed left the debtor no debt to the other party.

The present case is distinguishable from the facts and circumstances of ***In Re River Steamer Company, Mitchell's Claim*** **(supra)**. There is no doubt that letter V3 claims a sum of damages higher than the amount claimed by the Respondent as the price due on the goods sold and delivered. Nevertheless, the writer of V3 ends the letter with the words "*Once this is one We can come to A very cordial and understanding settlement of setting The dues with a generous gesture for the defective materials amount on your part"*(emphasis added). Having waded through the grammatical and spelling mistakes in V3, the plain import of this statement to me is that upon an inspection of the alleged defective material supplied by the Respondent is done, the Appellant is willing to come to an understanding for the settlement of the dues with a generous gesture on the part of the Respondent for the defective materials. This is an acknowledgment that the sum that may actually be due to it as damages for defective goods is less than the sum claimed by the Respondent as the amount due for the goods supplied. Therein lies the acknowledgment of the debt on the part of the Appellant.

In ***Perera v. Wickremaratne*** **(43 NLR 141 at 142)** Soertsz J. held:

> *"'I wish to settle' is not merely an acknowledgment of the debt from which a promise to pay can be inferred but it is an acknowledgment with an express declaration of a desire to pay. It has frequently been laid down that when there is an acknowledgment of a debt without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred. Much more, then, must such a promise be inferred when the acknowledgment is coupled with an expression of desire to pay."* (emphasis added)

Moreover, the Appellant cross-claimed for the damages allegedly due in respect of defective goods. However, the learned trial judge concluded that the Appellant had failed to establish that the goods were defective. Hence, the claim by the Appellant for damages was not in any event proved.

It is important to acknowledge that the letter V3 makes no reference to the amount owed to the Respondent by the Appellant. Whether an acknowledgment of a debt must clearly identify the amount due arose for consideration in ***Dungate v. Dungate*** **[(1965) 1 WLR 1477 at 1487]** where Diplock LJ said that *"an acknowledgment under this Act need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence"*.

The amount payable by the Appellant to the Respondent is set out in letter P4. As noted earlier, the Appellant did not deny that the Respondent had supplied these products. Nor did it claim to have paid the price of the said merchandise. Moreover, the trial judge concluded that this amount is in fact payable by the Appellant for the goods sold and delivered by the Respondent. Therefore, there is extraneous evidence that establishes the amount of the debt.

In this context, the question arises as to whether an acknowledgment of the debt within the meaning of section 12 of the Prescription Ordinance must be done before the action is prescribed. In ***Albert and Others v. Sivakumar*** **[S.C. (CHC) Appeal 04/2007; S.C.M. 23.01.2023]** I held that the *legal effect of sections 5 to 10 of the Prescription Ordinance is only to bar action on the cause of action and not extinguishment of the cause of action itself* and as such there is no rational justification to insist that to be effective, an acknowledgment must be made before the expiry of the limitation period.

Therefore, the date on which the cause of action accrued in favour of the Respondent is irrelevant in determining whether a valid acknowledgement was made. A valid acknowledgment may be made even after the *action is prescribed* by any provision of the Prescription Ordinance.

For the foregoing reasons, I hold that the letter V3 amounts to an acknowledgment of the debt and interrupts the operation of prescription which must therefore start afresh.

Relevant Period

We must determine whether the action was commenced within the applicable period from the date of the acknowledgement in document V3. The issue is which is the applicable provision in the Prescription Ordinance which determines the time within which this action should have been filed from the date of the valid acknowledgment. Is the relevant time to be determined by applying the time frame for the original cause of action or is it to be determined by considering the acknowledgment to be a contract within the meaning of section 6 of the Prescription Ordinance?

In ***Albert and Others v. Sivakumar*** **(supra)** I further held that upon an acknowledgment of the debt was made by the debtor, to use the colourful words of Lawton J. in ***Busch v. Stevens*** **[(1962) 1 All E.R. 412 at 415]**, *the right of action is given a notional birthday and, on that day, like the phoenix of fable, it rises again in renewed youth-and also like the phoenix, it is still itself*.

Hence, in the present case, the original cause of action, namely failure to pay the price payable on goods sold and delivered survives and as such the action should have been filed within one year from the date of acknowledgment in terms of section 8 of the Prescription Ordinance. Any other interpretation works to the detriment of the debtor and in favour of the creditor by giving him 6 years' time from the date of acknowledgment to file action when he should do so within one year in terms of the original cause of action.

The date of acknowledgment in terms of document marked V3 is 28.02.2008, and the action was filed on 04.11.2008. Accordingly, I hold that this action was filed within one year from the date of acknowledgement and is not time barred. Hence, question no. 2 is answered in the affirmative.

For the foregoing reasons, the appeal is dismissed with costs. The Appellant shall pay the costs of the Respondent in the two lower courts.

Appeal dismissed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No: 19 of 1990 as amended by Act No: 54 of 2006.

SC Appeal No: 188/14

SC/HCCA/LA No: 220/2014

NWP/HCCA/KUR/Appeal No:93/2007 (F)

D.C. Kurunegala Case No: 6014/L

Ratnayake Maudiyanselage
Herath Banda,
Thiththawella,
Kubukgete.

Plaintiff

Vs.

1. Ihala Welgamage Abeysinghe,
   Kalawellandawatta,
   Kumbukgete.

2. G.G. Sanjeewa Karunaratne,
   No. 15, Jayawardane Place,
   Hill Street, Dehiwala.

3. Pushpa Karunaratne,
   No.15, Jayawardane Place,
   Hill Street, Dehiwala.

Defendants

AND

1. Ihala Welgamage Abeysinghe,
   Kalawellandawatta,
   Kumbukgete.

2. G.G. Sanjeewa Karunaratne,
   No. 15, Jayawardane Place,
   Hill Street, Dehiwala.

3. Pushpa Karunaratne,
   No.15, Jayawardane Place,
   Hill Street, Dehiwala.

Defendants- Appellants

Vs.

Ratnayake Maudiyanselage Herath Banda,
Thiththawella,
Kubukgete.

Plaintiff- Respondent

AND NOW

Ratnayake Maudiyanselage Herath Banda,
Thiththawella,
Kubukgete.

Plaintiff- Respondent-Appellant

Vs.

1. Ihala Welgamage Abeysinghe,
   Kalawellandawatta,
   Kumbukgete.

2. G.G. Sanjeewa Karunaratne,
   No. 15, Jayawardane Place,
   Hill Street, Dehiwala.

3. Pushpa Karunaratne,
   No.15, Jayawardane Place,
   Hill Street, Dehiwala.

Defendants- Appellants-Respondents

BEFORE:	**MURDU N.B.FERNANDO, PC, J.** **YASANTHA KODAGODA, PC, J.** **K.KUMUDINI WICKREMASINGHE, J.**
COUNSEL:	Jacob Joseph for the Plaintiff-Respondent-Appellant Roshan Dayaratne instructed by R.Gamage for the Defendant-Appellant-Respondents.
WRITTEN SUBMISSIONS:	By the Plaintiff-Respondent-Appellant on 28th of November, 2014 and 8th of April 2022. By the Defendant-Appellant-Respondent on 6th of January, 2015 and 15th of March 2022.
ARGUED ON:	21.02.2022.
DECIDED ON:	12.06.2023.

K. KUMUDINI WICKREMASINGHE, J.

This is an appeal from a judgment of the High Court of the North Western Province, Kurunegala dated 27.03.2014 which set aside the judgment of the District Court of Kurunegala, case bearing No: 6014/L dated 30.04.2007.

The Plaintiff-Respondent-Appellant (hereinafter referred to as the "Appellant") instituted the initial action before the District Court of Kurunegala against the Defendants-Appellants-Respondents (hereinafter referred to as the "Respondents") seeking a declaration that the Appellant is entitled to the land described in the schedule to the Plaint, ejectment of the Defendants from the subject land and claiming damages. The Respondents sought the dismissal of the Appellants' action and claimed prescriptive title to the property.

After the conclusion of the trial, the District Court delivered the Judgment in favour of the Appellant and ordered damages to be paid till vacant possession is given to the Appellant. Aggrieved by the said decision, the Respondents appealed to the High Court of the Northwestern Province, Kurunegala. In the Judgment of the High Court, it was held that the Appellant's action being a Rei Vindicatio action, the Appellant had to prove the title to the land in the suit and the Deed marked "P2" produced by the Appellant does not refer to the crown grant given to the vendor, the father of the vendees in "P2". The Learned High Court Judges presumed that the land has been granted under the Land Development Ordinance and questioned whether the correct legal procedure under the said act was followed by the vendor of the Deed marked P2 when alienating the land to the Appellant. Since the crown grant was not produced, their Lordships applied the presumption in Section 114(F) of the Evidence Ordinance and held that no title was passed to the Appellant.

The Appellant is before this Court challenging the said Judgment. This Court by Order dated 17.10.2014, granted Leave to Appeal on the questions of law stated in paragraph 24 (i) to (vi) of the Petition dated 07.05.2014, as set out below.

1. Did the High Court of the Northwestern Province Kurunegala err in law in holding that the Petitioner has not proved the title to the land in the suit?

2. Did the High Court act on assumptions and presumptions which were not warranted and against the issues raised and the weight of evidence in the above case?

3. Did the High Court fail to consider that the Respondents were only relying on the alleged prescriptive right of their Father Karunaratne who was not a party to the case?

4. Did the High Court fail to consider the substance of the defence put forward by the Respondents namely *Jus tertii*?

5. Whether the said Judgment of the High Court is against the evidence led in the case by the Appellant and the Respondents?

6. Did the High Court err in law in holding that the trial Judge has failed to investigate the title properly and holding in favour of the Appellant?

My analysis hereafter will be confined to examining the aforesaid questions of law based on which leave was granted.

The first matter for consideration by this court is whether the High Court erred in law in holding that the Appellant has not proved the title to the land in suit. This action indubitably being a rei vindication action, the onus clearly lies on the Appellant to establish his title to the land in question.

In ***Abeykoon Hamine v. Appuhamy,*** **(1950) 52 N.L.R. 49**, at page 49-55, Dias, SPJ. quoted with approval, the decision of ***de Silva v. Goonetileke*** **(1931) 32 N.L.R. 27**, where Macdonell, C.J., had stated that,

> *"There is abundant authority that a party claiming a declaration of title must have title himself. —To bring the action rei vindication plaintiff must have ownership actually vested In him‖- 1 Nathan p.362, s. 593……..This action arises from the right of dominium…….The authorities unite in holding that plaintiff must show title to the corpus in dispute, and that if he cannot, the action will not lie."*

This position was affirmed in ***Peeris v. Savunhamy*** **(1951) 54 N.L.R. 207**, at page 208 where Dias SPJ. With Gratiaen J. agreeing stated that,

> *"This being an action for declaration of title, and the defendants being in possession, the burden lay on the plaintiff to prove that she had dominium to the land in dispute".*

Further, in commenting on the standard according to which the plaintiff in a vindication action is required to establish, H.N.G. Fernando J, in ***Pathirana v. Jayasundara*** **(1955) 58 N.L.R 169**, at page 171 stated that,

> *"I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a rei vindicatio for which strict proof of the Plaintiff's title would be required, or else is merely ono for a declaration (without strict proof) of a title which the tenant is by law precluded from denying."*

Accordingly, the Appellant has to narrate and prove his title fully in strict sense. The Respondent has raised two main issues under the first question of law during the arguments. Firstly, the Appellant has failed to produce the crown grant mentioned in the Deed marked P2 which the Appellant has primarily relied on in proving documentary title before both District Court and Civil Appellate High Court. Secondly, that the Appellant has failed to prove the identity of the subject matter in the present action.

With regard to the first issue, the Deed marked P2 which the Appellant has relied upon is a Deed of Transfer No. 117 dated 05.01.1960 attested by Anton Wilson Amirthanayagam Emmanuel, Notary Public. The vendor in the said Deed is one Kalukumara Mudiyanselage Banda and it refers to three allotments of lands namely,

1. Land called Kadurugahamulahene, Dalupothebogahamulahena, and Dalupothevewaismaththeva depicted as Lots 96, 211 and 215 in Title Plan No. S 20383 dated 23.02.1948 consisting of 3 Acres 2 Roods 23 Perches (3A-2R-23P) held and possessed by the said Vendor under and by virtue of Settlement Order No.993 dated 07.12.1948,
2. Land called Kurundungollahena and Bulugahamulahenayaya depicted as Lot 156 in Title Plan No.9169 dated 28.03.1951 consisting of 2 Acres 1 Rood 20 Perches (2A-1R-20P), and

3. Land called Konmadehena and Konmadegala depicted as Lots 57 and 58 in the Plan No. 9168 dated 28.03.1951 consisting of 1 Acre 3 Roods 34 Perches (1A-3R-34P) held and possessed by the said Vendor under and by virtue of Crown Grant dated 19.07.1951.

The subject matter to this action is the third allotment of land which is the land called Konmadehena and Konmadegala situated at Thittawella village.

As per the position of the Appellant, the said Kalukumara Banda by the abovementioned Deed marked P2 has transferred the title to the land in question to H.M.Dingiri Banda, H.M.Bandara Menike, H.M.Mudiyanse and H.M.Appuhamy.
The said H.M Dingiri Banda, H.M. Bandara Menike, the successors of other vendees, namely, H.M. Wasantha Piyathilaka Herath, H.M, Seneviratne Banda, H.M Jayawardhana Banda and H.M Amarasooriya Banda have amicably divided the land among themselves by Deed No.15911 dated 29.09.1997 attested by Padma Kumari Wanigasooriya, Notary Public according to Plan No.96213 dated 31.12.1996 made by H.Wijetunge, Licensed Surveyor.
By the abovementioned Deed No.15911, H.M. Bandara Menike and H.M. Wasantha Piyathilaka Herath became entitled to the land marked Lot 1 in Plan No.96213 consisting of 3 Roods 37 Perches (A0-R3-P37) and they have transferred their portion of land to the Appellant of the present case by Deed No.15420 dated 26.02.1997 attested by Padma Kumari Wanigasooriya, Notary Public.

The issue raised by the Respondents is that the Appellant had failed to correctly establish the chain of title by not producing the Crown Grant mentioned in the Deed marked P2.

With regard to establishing the chain of title in rei vindicatio action, in ***Kanapadian v. Pieters*** **9 S.C.C Vol. ix No. 47-185** Clarence J. stated that,

> *"where title to land is a circumstance upon which the plaintiff bases his claim to relief, the intention of the Code is that title should be disclosed in the plaint so that the defendant may have notice of the case which he has to meet."*

Nevertheless, in the same case it was further stated that,

> *"The defendant might have asked to have the plaint taken off the file, as not disclosing the title set up.* ***The Defendant however took no such course, but answered traversing plaintiff's averments as to ownership and possession and setting up a specific title in himself****".[emphasis added]*

In the abovementioned case, the plaintiff failed to disclose how he obtained title. Even in the absence of such, the court decided to allow the plaintiff to amend the plaint on the sole basis of the defendant's failure to raise objections at the right time.

In the present case, the Appellant has established the chain of title to the land in question from 1960 by presenting the relevant deeds and thereby, has fully disclosed how he lawfully became entitled to the land in question.

Thus, it is noteworthy that none of the documents produced by the Appellant was objected by the Respondents. Henceforth, the Respondents answered the averments of the Appellant by setting up a specific title to himself. As stated by Samarakoon, C.J., in ***Sri Lanka Ports Authrity and another v. Jugoilnija – Boat east*** **(1981) 1 Sri L.R 18**, at page 24,

> *"if no objection to any particular marked document is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of law".*

The above decision was followed by the Supreme Court in the case of ***Balapitiye Gunananda Thero Vs. Thalalle Methananda Thero*** **[1997] 2 Sri L.R 101** which stated at page 101 that,

> *"When a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the cursus curiae."*

Therefore, it is evident that the Respondents have neither questioned the documentary title of the Appellant to the land in question nor have they objected to any of the documents the Appellant produced as evidence. Hence, this constitutes an acceptance of the Appellant's documentary title by the Respondents.

Moreover, the Deed marked P2 contains details of the Crown Grant and the Appellant has also produced the said Crown Grant before this court.

While considering the possibility of accepting fresh document at the appeal stage, ***Beatrice Dep v. Lalani Meemaduwa*** **[1997] 3 Sri L.R** Ismail J. at page 379 stated that,

> *"In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled:*
>
> *i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.*
>
> *ii) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.*
>
> *iii) The evidence must be such as is presumable to be believed or in other words it must be apparently credible although it need not be incontrovertible."*

Further, in ***Endiris de Silva v Arnolis*** **33 – C.L.W 39,** Dias J. stated at page 39 that,

> *"It is, of course, obvious that this right is one which must be very cautiously exercised but the court would have less hesitation in*

admitting such evidence when it consist of a judicial record, or ***a deed or a similar evidence which came into existence long before the dispute arose and the chances of fabrication are extremely remote****" [emphasis added]*

In the present case, as per the page 5 of the decision of the High Court the Appellant has stated that he does not possess the said Crown Grant and it is in the possession of H.M. Wasantha Piyathilake. However, the Appellant has presented all the deeds in his possession and the Deed marked P2 contains all the material details of the Crown Grant.

In light of these circumstances, this court is of the opinion that the Crown Grant presented by the Appellant which the argument of the Respondent is vehemently based upon must be accepted on the following grounds,

i. this Crown Grant bears an important influence on the result of the case,
ii. it is apparently credible,
iii. the Crown Grant was executed in 1951 long before the dispute arose,
iv. the Deed marked P2 produced by the Appellant mentions the material details of the Crown Grant. Therefore, there is no room for fabrication of such,
v. the rejection of such would lead to a miscarriage of justice.

The Respondent has further contended that the Partition Deed No. 15911 which the transferors of Deed No.15420 acquired their title has been executed on 29.09.1997 which is subsequent to the Appellant's title Deed (Deed No.15420 dated 26.02.1997).

Nonetheless, the Privy Council in ***The Colombo Apothecaries Company Limited v. M.A.Peiris and Others*** **Appeal 58 N.L.R 361** at page 361 stated that,

"when a deed of transfer of immovable property is executed at a time - when the grantor has no title to the property, the subsequent acquisition

of title by the grantor would not only give the benefit of such title to the instrument already executed but would also give the granter the benefit of priority by the registration of that instrument."

In ***Rajapkse v. Fernando*** **20 N.L.R 30,** Lord Moulton at page 495 has stated that,

"Where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires,, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee."

In light of these circumstances, it is evident that the subsequent acquisition of title by the grantors by the Partition Deed No.15911 gave the title to the Appellant and the exception *rei venditae et traditae* applies to this situation.

The second main issue raised by the learned Counsel for the Respondent is that the Appellant had failed to correctly identify the land in question, and this must be considered as a fatal weakness in the Appellant's action.

In ***Jamaldeen Abdul Latheef and v. Abdul Majeed Mohamed Mansoor and another*** **[2010] 2 Sri L.R** at page 377-378, Saleem Marsoof J. quoted with approval, a passage from **Wille's Principles of South African Laws (9th Edition -2007)** at pages 539-540 which stated that,

".. to succeed with an action rei vindication, which this case clearly is, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is ***clearly identifiable****" [emphasis added]*

In the above case neither the Surveyors of the Plan referred to in the Plaint nor other witnesses who testified at the trial placed any evidence in identifying the northern and southern boundaries in the land in dispute. Hence, it was held at page 384 that,

“In the absence of such evidence, there is no justification to conclude that the boundaries of the land surveyed by these surveyors as the land in dispute, tally with the land described in the schedule to the petition of the Respondents.”

In the present case, the land described in the schedule to the plaint according to the Plan No. 96213 made by H.Wijetunga, Licensed Surveyor on 31.12.1996 is as follows,

"බලයලත් මිනින්දෝරු එච්. විජේතුංග විසින් සාදන ලද අංක 96213 දරණ පිඹුරේ කැබලි අංක 1ට මායිම්:

උතුරට: පී.පී.ආර් කරුණාරත්නට අයිති ඉඩම,

දකුණට: මමෙ පිඹුරේ 2ඒ් සහ 2බී් ද,

නැගෙනහිර: එම්.පි වික්‍රමසිංහට අයිති ඉඩම,

බස්නාහිරට: කොන්මඩේ වැව ද යන මායිම් තුල රූඩ් තුනයි පර්චස් තිස් හතක් විශාල ඉඩම”

The identification of the subject matter was in dispute at the trial and on a Commission issued by Court, E.G.A. Edirisinghe, Licensed Surveyor prepared the Plan No.202106 dated 16.08.2002. The boundaries of the disputed land is described in the above plan as follows,

බලයලත් මිනින්දෝරු ඒ.ඒ.ජී එදිරිසිංහ විසින් සාදන ලද අංක 202106 දරණ පිඹුරේ කැබලි අංක 1ට මායිම්:

උතුරට: වැව ,

දකුණට: මමෙ පිඹුරේ 2ඒ් සහ 2බී් ද,

නැගෙනහිර: එම්.පි වික්‍රමසිංහට අයිති ඉඩම,

බස්නාහිරට: කොන්මඩේ වැව ද යන මායිම් තුල අක්කර එකයි රූඩ් එකයි පර්චස් දකෙයි දශම අනුවක් විශාල ඉඩම

Doubts in regard to the identity of the land sought to be vindicated arises from the inconsistencies in the northern boundary of the above two survey plans. However, it is important to emphasize that the H.Wijetunga, Licensed

Surveyor who prepared the Plan No.96213 testified at the trial and admitted that the alleged discrepancy in the copies of the Plan No.96213 marked P (1) by the Appellant and V (1) by the Respondent was a mistake on his part (page 273 of the brief). Mr. Wijetunga was also shown the plan prepared by Mr.Edirisinghe and as per page 284 of the brief he admitted that Lot 5 in Plan No.202106 is the Tank and beyond that is the land possessed by the Respondents (පී.පී.ආර් කරුණාරත්නට අයිති ඉඩම). The Respondent presented another plan prepared by Rohan Rathnayake, Licensed Surveyor bearing No.66/2003 which also shows the Tank beyond the Northern boundary of Lot 1.

As the Licensed Surveyor who prepared the plan referred to in the Plaint has testified at the court and clearly stated the boundaries of the land, it is evident that the identity of the land has been properly proved by the Appellant.

Moreover, the Respondents have argued that according to the Appellant's title deed (Deed No.96213) his total entitlement is only a land of three Roods and thirty seven Perches (A0-R3-P37) but the land already possessed by the Appellant as per Plan No.202106 is one Acre one Rood and two decimal nine zero Perches (A1-R1-P2.90) which is very much more than his entitlement.

However, it must be noted that the land possessed by the Appellant as per the Plan No.202106 includes his wife's share as well which was admitted in the court. (page 150 of the brief) Therefore, I am of the view that the Appellant has correctly proved the identity of the land and his title to the same.

Hence, in relation to the first question of law, I conclude that the Appellant has correctly proved his title to the land in question.

The second question of law that must be determined is whether the High Court acted on assumptions and presumptions which were not warranted and against the issues raised and the weight of evidence in the above case.

The Learned Judge of the High Court has stated in page 5 of his Judgment that the Deed marked P2 does not refer to the crown grant given to the vendor, the father of the vendees in "P2" and the said crown grant was not produced in evidence.

In the absence of such, the High Court applied the presumption in Section 114(F) of the Evidence Ordinance in arriving at the conclusion that the father of the Appellant, the vendor in Deed marked P2 had failed to follow the correct procedure under the Land Development Ordinance No.19 of 1935. Thereby, no title has been passed to the Appellant, the vendee of the said deed.

In ***Hemathilake v Allina and Others*** **[2003] 2 Sri L.R,** Somawasa,J at page 147 stated that,

> *"What section 114 of the Evidence Ordinance provides for is the common sense advice that court may from a proved fact infer another fact which it thinks is likely to be true regard being had to human conduct and the common course of natural events. The particular facts of each case must be carefully considered before any inference is drawn under section 114 of the Evidence Ordinance."*

In ***Walimunige John v. State*** **76 N.L.R 488,** G.P.A Silva J. stated that,

> *"But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."*

Further, **Dr.U.L.Abdul Majeed** at page 721 of his book called **"Applicability of the Evidence Ordinance in Civil Action"** has stated that,

> *"This illustration deals with the presumption which arises from withholding evidence and from the spoliation or fabrication or suppression of evidence. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence if produced would operate against him. An adverse inference can be drawn against a party if there is withholding of evidence* ***and not merely on account of the failure of the party to obtain evidence****". [emphasis added]*

These authorities elucidates that the court must first be satisfied that the evidence was available and was withheld before applying the presumption under Section 114 (f) of the Evidence Ordinance. Accordingly, there is no presumption if the evidence is not within the control of the party failing to produce it and if it is cumulative of the other.

In the present case, the Appellant has clearly mentioned at the trial that he does not possess the said Crown Grant and it is in the possession of one, Wasantha Piyathilake. (page 122 of the brief) This elucidates that the Appellant never tried to withhold the evidence but rather failed to obtain it as it was not within the control of the Appellant. Further, it must be noted that the material details of the said Crown Grant are mentioned at the schedule of the Deed marked P2. Thenceforth, this document must be considered as cumulative of the other evidence already produced by the Appellant.

Hence, I am of the opinion that the presumption that the High Court Judge acted upon is unwarranted and is against the weight of the evidence of this case.

The third and fourth matters for consideration by this court can be examined together as both of these questions of law are on the defence of *jus tertii* and the alleged prescriptive title of the father of the 2nd and 3rd Respondents who is not a party to the case.

The Respondent in answering the Plaint of the Appellant in the District Court has claimed prescriptive title to the land in question. The Respondent has taken the position that one, R.Karunarathne, the father of the Respondents had prescribed the said portion of land. Nevertheless, there are two main lacunas in their claim. First, the Respondent has failed to give any definite period with regard to the commencement of their prescriptive possession. Second, the said R.Karunaratne has not been made a party to the present action.

With regard to the first lacuna, in ***S.K. Chelliah v. Wijerathan et al.*** **54 N.L.R 337,** Gratiaen J, at page 342 has stated that,

> *"Where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights."*

This position was affirmed in ***Sirajudeen and Two Others v. Abbas*** **[1994] 2 Sri L.R 365**.

Therefore, it is evident that in the present case, the Respondents cannot succeed on the prescriptive title to the land in question as they have failed to provide any definite time period with regard to the commencement of their prescriptive possession.

When analyzing the second lacuna pointed out, the defence of *jus tertii* has been considered as a valid defense in several Sri Lankan Judgments. In ***Allis Appu v. Endris Hamy*** **(1894) 3 S.C.R 87**, and ***Dharmalankara Thero v. Ahamadulebbe Marikkar*** **(1952) 54 N.L.R. 181**, the applicability of this defence under our law was conceded.

Nevertheless, in ***Dharmasena v. Alles*** **[1985] 2 Sri L.R 35, G.P.S. De Silva J**, by citing ***Timothy David v Ibrahim*** **(1910) 13 N.L.R. 318** with approval, observed that a party to a suit cannot under **Section 3 of the Prescription Ordinance** set up a title of a third party who has not been joined in the action.

Similarly, in ***Luwis Singho and Others v. Ponnamperuma*** **1996 2 Sri L.R 320** Wigneswaran J. at page. 321 has stated that,

> *"While refusing to accept the submission that jus tertii as a defence in vindicatory actions is not available under our law, it must be admitted that jus tertii as a defence in cases filed for Declaration of Title and ejectment based on the provisions of section 3 of the Prescription Ordinance* ***would not be available if the third party is not a predecessor in Title or has not been joined in the action****." [emphasis added]*

In light of these circumstances, I am of the view that the Respondents cannot rely on the defence of *jus tertii* as the third party; R. Karunaratne has not been joined in the action.

The fifth question of law that needs to be examined is whether the said Judgment of the High Court is against the evidence led in the case by the Appellant and the Respondents.

The decision of the Learned High Court Judge is solely based on the Appellant's failure to produce the said Crown Grant before the court. At page 5 of the High Court Judgment, it is stated that the Appellant has failed to substantiate that the said land was granted to the original owner by the crown and has also failed to reveal when it was granted.

However, it is to be noted that at the schedule of the Deed marked P2 it is clearly mentioned that the said land was *"held and possessed by the said vendor under and by virtue of Crown Grant dated 19.07.1951"*. It is unfortunate that the Learned High Court Judge has failed observe this

material detail in the evidence adduced by the Appellant and has thereby, unwarrantedly presumed that said grant was made after 1951. (page 6 of the Judgment of the High Court of Kurunegala)

To further prove his title to the land in question, the Appellant in this case has presented all the relevant deeds as evidence and also has answered the issues raised by the Respondents with regard to the alleged discrepancies in the Plans through the oral evidence. (pages 266-279 of the brief)

Nevertheless, none of these evidence were considered by the Learned High Court Judge in arriving at his conclusion. Further, the High Court Judge disregarded that the Respondents in the present case has not produced any evidence whatsoever to substantiate their claim of prescriptive title to the land in question. Therefore, I am of the opinion that the Judgment of the High Court is against the evidence led in the case by the Appellant and the Respondents.

The sixth and the last question of law to be examined is whether the High Court erred in law in holding that the trial Judge has failed to investigate the title properly and holding in favour of the Appellant.

As correctly pointed out by the trial judge, the plaintiff in a *rei vindicatio* action need not prove anything other than his documentary title to the corpus. The appellant has produced two deeds, Deed No. 117, where the original owner transferred the title to the vendees, and Deed No. 15911, where two of the said vendees transferred their title to the appellant, to prove his title to the land. It must be noted that none of these documents were disputed by the Respondents at the trial. To further substantiate his claim, the Appellant called several witnesses including the Licensed Surveyor who prepared the plans he presented to the court. The trial judge before arriving at his conclusion has comprehensively analyzed all of such oral and documentary evidence adduced by the Appellant in proving his title to the land in question.

When considering all the above discussed circumstances, it is evident that the Appellant in the present case has correctly proved his title to the subject matter and his claim has met all the requirements in a rei vindicatio action. On the other hand, the Respondents have failed to bring conclusive evidence to defend his prescriptive title to the land in question.

Having examined the facts of the case, and the material placed before this court, I allow the appeal of the Appellant and hold that the Appellant is entitled to the subject matter of this action. The judgment of the High Court of Kurunegala dated 27.03.2014 is set aside and the judgment of the District Court of Kurunegala dated 30.04.2007 is affirmed.

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

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

L B Finance PLC
No. 275/75,
Prof. Stanley Wijesundara
Mawatha,
Colombo 07.

SC/CHC Appeal/56/2013 **Plaintiff**
CHC (Civil) 202/2009 (MR)

Vs.

Wadduwa Palliyagurunnanselage
Namal Senanayake,
"Nihathamani",
Ambagahawatta,
Kaikawala,
Induruwa.

Defendant

AND NOW BETWEEN

Wadduwa Palliyagurunnanselage
Namal Senanayake,
"Nihathamani",
Ambagahawatta,
Kaikawala,
Induruwa.

Defendant-Appellant

L B Finance PLC
No. 275/75,
Prof. Stanley Wijesundara
Mawatha,
Colombo 07.

Plaintiff-Respondent

Before	:	**E. A. G. R. Amarasekera, J** **Yasantha Kodagoda, PC. J** **K. Priyantha Fernando, J**
Counsel	:	Prinath Fernando for the Defendant-Appellant Kanchana Peiris with Anjula Rajapaksha instructed by Wickrama Punchihewa for the Plaintiff-Respondent
Argued on	:	09.05.2023
Written Submissions Tendered on	:	07.05.2019 on behalf of the Defendant-Appellant. 07.06.2019 on behalf of the Plaintiff-Respondent.
Decided on	:	14.06.2023

****

K. PRIYANTHA FERNANDO, J

1. The defendant-appellant (hereinafter referred to as the appellant) has obtained a loan of Rs. 2,000,000 upon the security of the mortgage of the appellant's property. After paying some installments, the appellant has failed to pay the balance moneys due. Thereafter, the plaintiff respondent (hereinafter referred to as the respondent) filed action in the Commercial High Court of *Colombo* to recover a sum of Rs. 3,262,938.08 and interest thereon, and to sell the mortgaged property and recover the moneys due if the appellant fails to pay the money.

2. After trial, the learned Judge of the Commercial High Court of *Colombo* delivered the judgment in favour of the respondent. The instant appeal has been filed by the appellant against the above judgment of the learned Judge of the Commercial High Court dated 25.06.2013.

3. In his petition of appeal, the appellant has averred that the impugned judgment of the learned Judge of the Commercial High Court is contrary to law. In that, it is averred that the land mortgaged as security for the aforestated loan is situated in the district of *Kalutara* and therefore, the Commercial High Court of *Colombo* lacks jurisdiction. It has further been averred that, the witnesses for the respondent have admitted that the appellant has paid a sum of Rs. 1,700,000 to the respondent and therefore the learned Judge of the Commercial High Court has misled himself when he decreed to recover the total amount stated in the prayer of the plaint. It was also averred that the appellant challenged the attestation of the mortgage bond. However, it is observed that neither the Notary Public who attested the bond nor the witnesses to the attestation have been called to give evidence by the appellant on this regard.

4. Although the above points were averred in the petition of appeal, at the hearing, the learned Counsel for the appellant failed to pursue any such ground of appeal against the judgment of the learned Judge of the Commercial High Court.

5. At the hearing of this appeal, the learned Counsel for the respondent submitted that, none of the documents tendered in evidence by the respondent were challenged by the appellant at the trial. Further, the documents were not tendered by the appellant subject to proof. Further, the calculation of the moneys due to the respondent from the appellant were also not challenged and hence, the judgment of the learned Judge of the Commercial High Court cannot be impeached.

6. Although no ground of appeal was pursued by the learned Counsel for the appellant at the hearing of this appeal, I propose to consider and discuss the matters raised in the petition of appeal and the written submissions filed on behalf of the appellant.

7. It is submitted on behalf of the appellant that, according to the issue No. 14 that was raised at the trial, the respondent was unable to prove the validity of the mortgage bond on the basis that the mortgage bond in question has not been attested in terms of section 2 of the Prevention of Frauds Ordinance. This issue has been aptly discussed by the learned Judge of the Commercial High Court in his judgment. As rightly concluded by the learned Judge of the Commercial High Court, the mortgage bond in question has been produced in Court marked P-8 without any objection. It was not produced subject to proof. Hence, the learned Judge of the Commercial High Court, upon citing authorities, has rightly concluded that the mortgage bond has been proved, by the respondent.

8. It is pertinent to consider the transitional provision (section 3) of the Civil Procedure Code (Amendment) Act No. 17 of 2022 that was certified on 23rd of June 2022. The said section 3 provides;

> *"Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or* ***appeal*** *pending on the date of coming into operation of this Act –*
>
> *(a) (i) if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or*
>
> *(ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence,*
>
> *the court shall admit such deed or document as evidence without requiring further proof;*
>
> *(b) if the opposing party objects or has objected to it being received as evidence, the court may decide*

whether it is necessary or it was necessary as the case may be, to adduce formal proof of the execution or genuineness of any such deed or document considering the merits of the objections taken with regard to the execution or genuineness of such deed or document."

[Emphasis added]

9. When considering the above provision of law in light of this case, as the said mortgage bond was produced at the trial without objection, it is my view that the Court shall admit the same in evidence without requiring further proof. Further, as it is expressly stated in the above provision, this applies to pending appeals as well. Thus, it is applicable to the adjudication of the instant appeal. Hence, the argument raised by the appellant is devoid merit.

10. In his written submissions, the learned Counsel for the appellant has also taken up the position that the land that was mortgaged as the security for the loan is situated beyond the territorial jurisdiction of the Commercial High Court of *Colombo* and therefore, the Commercial High Court of *Colombo* is not the competent Court to hear and determine this case. This matter has also been sufficiently discussed by the learned Judge of the Commercial High Court in his judgment. The initial contract for granting/obtaining the loan was signed in *Colombo*. Therefore, in terms of section 9 of the Civil Procedure Code, the Commercial High Court of *Colombo* clearly has the jurisdiction to hear and determine this case as the contract sought to be judicially enforced had been entered into within the territorial jurisdiction of Commercial High Court of *Colombo*. Thus, this ground too has no merit.

11. The learned Counsel of the appellant in his written submissions submitted that, the installment payments that were already paid by the appellant has not been given credit. This issue has also been sufficiently considered by the learned Judge of the Commercial High Court.

12. On behalf of the respondent, the accountant of the respondent company has given evidence, and the statement of accounts has also been submitted without any objection. The said document has not been produced subject to proof. No evidence was led by or on behalf of the appellant at the trial to show that the payments that he had already been made were not taken into consideration. Therefore, this ground also fails.

13. At the trial, the respondent has led clear evidence to prove the granting of the loan subject to a mortgage of the property which is mentioned in the mortgage bond and the failure on the part of the appellant to make the necessary installment payments that were due. Therefore, this Court has no reason to interfere with the judgement of the learned Judge of the Commercial High Court of *Colombo* dated 25.06.2013.

The appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

JUSTICE E. A. G. R. AMARASEKERA.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE YASANTHA KODAGODA, PC.

I agree

JUDGE OF THE SUPREME COURT

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

SC/FR/Application No: 90/2023

In the matter of an Application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Dr. Harini Amarasuriya
   Member of Parliament,
   No. 33B, Janatha Mawatha,
   Kotte

2. Sunil Handunneththi,
   No. 92/3, Paasal Mawatha,
   Rukmale,
   Pannipitiya.

3. Dr. M.R. Nihal Abeysinghe
   No. 134A, St. Saviour Road,
   Ja-Ela.

PETITIONERS

Vs.

1. K. M. Mahinda Siriwardena
   Secretary to the Ministry of Finance
   Ministry of Finance
   Colombo-01.

2. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

(*Named as a Respondent in terms of the First Proviso to Article 35(1) of the Constitution)*

3. G. K. D. Liyanage
   Government Printer
   Department of Government Printing
   No. 118, Dr Danister De Silva Mawatha,
   Colombo 08

4. Inspector General of Police
   Police Headquarters
   Colombo 01.

5. Neil Bandara Hapuhinna
   Secretary
   Minister of Public Administration
   Home Affairs
   Provincial Councils
   and Local Government
   Independence Square
   Colombo 07.

6. Nimal Punchihewa
   Chairman,
   The Election Commission,
   Elections Secretariat,
   Sarana Mawatha,
   Rajagiriya.

7. S. B. Divarathne
   Member

8. M. M. Mohammed
   Member

9. K. P. P PAthirana
   Member

6th to 9th Respondents are all of:
The Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya

10. P. S. M. Charles
(Former Member of the Election Commission)
1/8, Blue Ocean Apartments,
No. 5, Railway Avenue,
Nugegoda.

11. Saman Sri Rathnayake
Commissioner of General of Elections, Elections Secretariat
No. 02, Sarana Mawatha,
Rajagiriya

12. Director General of
Government Information
Department of Government Information
163, Kirulapana Avenue,
Colombo 06.

13. Tiran Alles
Minister of Public Security
14th Floor,
Suhurupaya,
Battaramulla

14. Dinesh Gunawardena,
Prime Minister and the Minister of Public Administration, Home Affairs Provincial Council and Local
Government,
Independence Square,
Colombo 07.

15. Nimal Siriplala De Silva
Minister of Ports,
Shipping
and Aviation,
No. 19, Chaithya Road,
Colombo 01.

16. Susil Premajayantha,
Minister of Education
Isurupaya,
Battaramulla

17. Pavithra Devi Wanniarachchi
Minister of Wildlife and
Forest
Resource Conservation,
No. 1090,
Sri Jayawardenapura
Mawatha, Rajagiriya

18. Douglas Devananda
Minister of Fisheries
New Secretariat
Maligawatta, Colombo 10.

19. Bandula Gunawardena
Minister of Mass Media
Minister of Transport and
Highways
9th Floor,
"Maganeguma Medura"
Denzil kobaddkaduwa
Mawatha,
Koswatta, Battaramulla.

20. Keheliya Rambukwella
Minister of Health
"Suwasiripaya"
No. 385,
Baddegama
Wimalawansa
Thero Mawatha,
Colombo 10.

21. Mahinda Amaraweera
Minister of Agriculture
No.80/5,
"GovijanaMandiraya",
Rajamalwatta road
Battaramulla

22. Wijeyedasa Rajapaksa
Minister of Justice,
Prison Affairs and
Constitutional Reforms,
No.19, Sri Sangarja
Mawatha, Colombo 10.

23. Harin Fernando,
Minister of Tourism and
Lands,
2nd Floor, Assets Arcade
Building,
51/2/1, York street
Colombo 1.

24. Ramesh Pathirana
Minister of Industries,
Minister of Plantation
Industries,
11th Floor, Stage II,
"Sethsiripaya",
Battaramulla.

25. Prasanna Ranatunga,
Minster of Urban
Development and Housing
17th Floor,
"Suhurupaya",
Sri Subhuthipura road,
Battaramulla.

26. Ali Sabry,
Minister of Foreign Affairs
Republic Building,
Sir Baron Jayathilaka
Mawatha, Colombo 01.

27. Vidura Wickramanayake,
Minister
Buddhasasana,
Religious and Cultural
Affairs,
No.135,
SrimathAnagarika
Dharmapala Mawatha,
Colombo 07

28. Kanchana Wijesekara,
Minister of Power
and Energy,
No. 437,
Galle road,
Colombo 03

29. Nazeer Ahamed,
Minister of Environment,
No. 416/C/1,
"SobadamPiyasa",
Robert Gunawardena
Mawatha,
Battaramulla

30. Roshan Ranasinghe,
Minister of Sports and
Youth Affairs,
Minister of Irrigation,
No.500,
10th Floor,
T B Jaya Mawatha,
Colombo 10

31. Manusha Nanayakkara,
Minister of Labour and
Foreign Employment,
6th Floor,
"Mehewara Piyasa",
Narehenpita, Colombo 05

32. Nalin Fernando,
Minister of Trade,
Commerce and Food,

Security,
No.492,
L H Piyasena Building
R A De Mel Mawatha,
Colombo 12.

33. Jeevan Thondaman,
Minister of Water Supply and Estate Infrastructure Development,
No.35,
"LakdayaMedura",
New Parliament Road,
Pelawatta,
Battaramulla

34, Secretary to the cabinet of Ministers
Office of the Cabinet of Ministers,
Republic building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

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

RESPONDENTS

AND

1. People's Action for Free and Fair Elections (PAFFREL)
No. 16, Byrde Place,
Off Pamankada Road,
Colombo 06.

2. Rohana Nishantha Hettiarachchi
Executive Director

SC/FR/Application No: 139/23

People's Action for Free and
Fair Elections (PAFFREL)
No. 16, Byrde Place,
Off Pamankada Road,
Colombo 06.

PETITIONERS

Vs.

3. Hon. Attorney General
   Attorney General's
   Department
   Colombo 12.

4. Hon. Dinesh Gunawardena
   Hon. Prime Minister and
   Minister of Public
   Administration,
   Home Affairs, Provincial
   Councils and
   Local Government
   Prime Minister's Office,
   No. 58, Sir Ernest De Silva
   Mawatha,
   Colombo 07.

3. Hon. Nimal Siripala De Silva,
   Minister of Ports, Shipping
   and Aviation

4. Hon. (Mrs.) Pavithra Devi
   Wanniarachchi
   Minister of Wildlife & Forest
   Resources conservation.

5. Hon. Douglas Davananda
   Minister of Fisheries

6. Hon. Susil Premajayantha
   Minister of Education

7. Hon. (Dr.) Bandula Gunawardena
   Minister of Transport and Highways and
   Minister of Mass Media

8. Hon. Keheliya Rambukwella
   Minister of Health

9. Hon. Mahinda Amaraweera
   Minister of Agriculture

10. Hon. (Dr.) Wijayedasa Rajapaka, PC
    Minister of Justice, Prison Affairs and
    Constitutional Reforms

11. Hon. Harin Fernando
    Minister of Tourism and Lands.

12. Hon. (Dr.) Ramesh Pathirana
    Minister of Plantation Industries and
    Minister of Industries.

13. Hon. Prasanna Ranatunga
    Minister of Urban Development and Housing.

14. Hon. Ali Sabry, PC
    Minister of Foreign Affairs

15. Hon. Vidura Wickramanayaka
    Minister of Buddhasasana, Religious and Cultural Affairs.

16. Hon. Kanchana Wijesekara
    Minister of Power and Energy

17. Hon. Nazeer Ahamed
    Minister of Environment

18. Hon. Roshan Ranasinghe
    Minister of Irrigation and
    Minister of Sports and
    Youth Affairs

19. Hon. Manusha Nanayakkara
    Minister of Labour and
    Foreign Employment

20. Hon. Tiran Alles
    Minister of Public Security

21. Hon. Nalin Fernando
    Minister of Trade, Commerce
    and Food Security

22. Hon. Jeevan Thonaman
    Minister of Water Supply and
    Estate Infrastructure
    Development

    All of the above 3rd to 22nd Respondents are of:

    Office of Secretary to the Cabinet of Minister,
    Lloyd's Building,
    Sir Baron Jayathilaka Mawatha,
    Colombo 01.

23. Mr. W. M. D. J. Fernando
    Office of Secretary to the
    Cabinet of Ministers,
    Lloyd's Building,
    Sir Baron Jayathilaka Mawatha,
    Colombo 01.

24. Mr. K. M. Mahinda Siriwardana

Secretary to the Treasury and
Secretary to the Ministry of
Finance, Economic
Stabilization and National
Policy,
Ministry of Finance,
The Secretariat, Colombo 01.

25. Mr. Neel Bandara
Hapuhinne
Secretary to the Ministry of
Public Administration,
Home Affairs,
Provincial Councils and Local
Government,
Independence Square,
Colombo 07.

26. Mr. P. V. Gunatillake
Secretary to the Ministry of
Public Security,
14th Floor, "Suhurupaya",
Battaramulla.

27. Mrs. G. K. D. Liyanage
Government Printer,
Department of Government
Printing,
No 118, Dr. Danister de Silva
Mawatha,
Colombo 08.

28. Mr. C. D. Wickramaratne
Inspector General of Police,
Police Headquarters,
Colombo 01.

29. S.R. W. M. R. P. Sathkumara
Postmaster General
Post Head Quarters,
No. 310, D. R. Wijewardana
Mawatha, Colombo 01.

30. Nimal G. Punchihewa
Chairman-Election
Commission

31. S. B. Divaratne

32. M. M. Mohamed

33. K. P. P. Pathirana

the 31st to 33rd Respondents, Members of the Election Commission

34. Saman Sri Ratnayake
Commissioner- General of
Elections

the 30th to 34th Respondents are of:
Elections Secretariat, Sarana Mawatha, Rajagiriya

RESPONDENTS

Before: Buwaneka Aluwihare PC, J
Priyantha Jayawardena PC, J
Vijith Malalgoda PC, J
Murdu N.B. Fernando PC, J
E.A.G.R. Amarasekara, J

Counsel: Nigel Hatch PC with Shantha Jayawardena, Sunil Watagala, Ms. S. Illangage and Hiranya Damunupola for the Petitioners in SC/FR/90/2023

Priyantha Nawana PC, SASG, with Ms. Sabrina Ahamed, SC for the, 1st - 3rd, 13th, 15th, 33rd, 34th and 35th Respondents in SC/FR/90/2023 and for the 1st, 2nd, 22nd, 23rd, 24th, 27th and 28th Respondents in SC/FR/139/2023

Faisz Musthapha PC with Ms. Faisza Marker, Hafeel Faris and Bishran Iqbal for the 14th Respondent in SC/FR/90/2023

Asthika Devendra with Kaneel Maddumage and Wasantha Sandaruwan for the Petitioners in SC/FR/139/2023

Argued: 9th June, 2023

Decided: 27th June, 2023

Priyantha Jayawardena PC, J

I have considered the draft Order of the aforementioned applications prepared by Justice Buwaneka Aluwihare PC and;

(i) I agree with the conclusion of the said Order with regard to the preliminary objection raised by the learned Senior Additional Solicitor General in the above applications,

(ii) However, I am afraid I am not in agreement with the reasoning and the conclusion in respect of the preliminary objection raised by the learned President's Counsel for the 14th respondent in SC/FR/90/2023 with regard to the jurisdiction of this court.

Hence, my reasoning and the decision on the said preliminary objections are stated below.

These applications were filed by the petitioners, alleging that their Fundamental Rights have been violated by not holding the Local Authorities Elections on the 9th of March, 2023 as scheduled by the Election Commission.

The learned Senior Additional Solicitor General who appears for the 1st, 2nd, 22nd, 23rd, 27th and 28th respondents in SC/FR/139/2023 and the 1st, 2nd, 3rd, 13th, 15th to 33rd, 34th and 35th respondents in SC/FR/90/2023 raised the following preliminary objection:

'the petitioners have failed to name a necessary party to the instant applications. Particularly, though the Chairman and the members of the Election Commission

> are named in the petitions as respondents, the petitioners have failed to name the Election Commission as a party to the petitions. Thus, the said applications should be dismissed in *limine*'

He submitted that there is a clear distinction between the Election Commission and its members, and therefore, the activities of the members of the commission cannot be considered as actions of the said commission. Thus, the Election Commission is a necessary party to any litigation filed in respect of matters relating to the said commission.

The learned Senior Additional Solicitor General further submitted that, though the Constitution does not specifically state that the Election Commission has a legal personality, the Constitution has given a legal status to the Election Commission by implication. Therefore, the Election Commission is a necessary party to the instant application. In this regard, the learned Senior Additional Solicitor General drew the attention of court to section 2(s) of the Interpretation Ordinance, which states;

> "Person" includes any body of persons corporate or unincorporate"

Further, he cited The Law of Contracts by C.G. Weeramantry at page 529, where it stated;

> "Quasi Corporations. There are in existence many entities, which, though not corporations or legal personae strictly so called, still enjoy many of the attributes of corporate personality. Thus, many unincorporated associations are capable of a continuous existence in spite of periodical changes in their composition, although the state does not confer on them the gifts of legal personality."

In the circumstances, he submitted that the Election Commission should be considered as an institution that has acquired legal status, and therefore, it must be named as a party to the instant applications. Thus, the failure to name the Election Commission as a party to the instant application is fatal, and thus, the application should be dismissed in *limine*.

The learned President's Counsel appearing for the petitioners in SC/FR Application No. 90/2023 and the counsel appearing in SC/FR Application No. 135/2023 submitted that the independent commissions have been created by or under the Constitution. In this regard, they drew the attention of court to the Public Service Commission, National Police Commission, etc. and submitted that the said commissions have no independent legal status, and therefore, the cases are filed against the members of those commissions.

Furthermore, as the Election Commission does not have a legal personality, it cannot be made a party to a case filed in court. Thus, the petitioners have made the members of the Election Commission parties to the instant applications. Hence, they submitted that the said preliminary objection should be overruled.

In addition to the above preliminary objection, the learned President's Counsel appearing for the 14th respondent in application No. SC/FR /90/2023 raised the following preliminary objection;

'The Supreme Court lacks jurisdiction to hear the said applications'

In this regard, he submitted that the allegations averred in the petition are before Parliament, and therefore, the Supreme Court has no jurisdiction to entertain the said application. He drew the attention of court to paragraph 32 of the petition, the newspaper article annexed and produced as P20(a), the press release marked and produced as P21 and the Hansard dated 23rd of February, 2023 filed by the petitioner in application No. SC/FR/90/2023. Thus, he moved for a dismissal of the said application in *limine.*

Responding to the above objection, the learned President's Counsel for the petitioner in SC/FR/ 90/2023 submitted that the subject matter of the petition is not before the Parliament and therefore, the Supreme Court can proceed with the instant application. He further submitted that, in any event, there is no legal impediment for the court to consider a matter that is pending before Parliament and cited the instance where, while the impeachment proceeding was taking place to impeach the former Chief Justice Shirani Bandaranayaka, the Supreme Court heard the cases that were filed challenging the said impeachment proceedings. In this regard, he cited the judgment delivered by Justice Saleem Marsoof PC in S.C. Application No. 665/2012 (FR), S.C. Application No. 666/2012 (FR), S.C. Application No. 667/2012 (FR)and S.C. Application No. 672/ 2012 (FR).

Is the Election Commission a necessary party to the petition

Rule 44 Supreme Court Rules *inter alia* states;

> *"44. (1) Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126(2) of the Constitution, for relief or redress in respect of an infringement or an imminent infringement, or any fundamental right or language right, by executive or administrative action, he shall –*

(a) set out in his petition a plain and concise statement of the facts and circumstances relating to such right and the infringement or imminent infringement thereof, including particulars of the executive or administrative action whereby such right has been, or is about to be, infringed; where more than one right has been, or is about to be, infringed, the facts and circumstances relating to each such right and the infringement, or imminent infringement thereof shall be clearly and distinctly set out. He shall, also refer to the specific provisions or the Constitution under which any such right is claimed.

(b) name as respondents the Attorney-General and the person or persons who have infringed, or are about to infringe, such right;

[emphasis added]

Hence, Rule 44(1)(b) of the Supreme Court Rules requires to name the persons who infringed or are about to infringe the Fundamental Rights, in petitions filed under Article 126(2) of the Constitution. Thus, it needs to be considered whether the Election Commission is a necessary party to the above applications.

Establishment of the Election Commission

The Election Commission was established by Article 103 of the Constitution. Article 103 of the Constitution, *inter alia*, states; "There shall be an Election Commission (in this Chapter referred to as the "Commission") consisting of five members appointed by the President……..."

Further, Article 104B(1), *inter alia*, states that the Commission shall exercise, perform and discharge all such powers, duties and functions conferred or imposed on or assigned to the Commission; or to the Commissioner-General of Elections, by the Constitution, and by the law.

(a) Does the Election Commission have a legal personality

The law recognises natural persons and legal persons. A legal person is a fiction created by the law. Further, a legal fiction that has legal status can be created only by an Act of Parliament or under a law passed by Parliament. However, the courts have no power to create a legal personality by reading words into a provision in the law.

Moreover, a legal person created by law is distinct from the natural persons who are its members. The powers of a legal person are conferred by law at the time it is created. e.g. the power to sue and be sued. Further, no legal proceedings can be instituted against a non-incorporated body, as the law has not conferred power to sue or be sued by such a body. A similar view was also expressed in ***Divisional Forest Officer v Sirisena*** **[1990] 1 SLR 44 at page 49,** where it was held;

> *"The other ground on which the Appellant relied was that the Defendant to this action was not a legal person and that the action could, therefore, not have been maintained against the Defendant named in the plaint. As is evident from the plaint, the Defendant has been described as the Divisional Forest Officer, Southern Division, Galle. It is submitted that the Defendant so described is not a statutory functionary who could be sued as a Corporation Sole. In The Land Commissioner v. Ladamuttu Pillai it has been held by the Privy Council that Land Commissioner is not a Corporation Sole. So also, in Singho Mahatmaya v. The Land Commissioner the Supreme Court has held that the Land Commissioner cannot be regarded as a Corporation Sole and, therefore, cannot be sued nominee officii."*
>
> [emphasis added]

(b) Interpretation of Article 103 of the Constitution

The constitutional provisions should always be interpreted to protect the rights enshrined in the Constitution and not to deny them by applying a narrow interpretation. A similar view was expressed in ***Ramadhari Mandal v Nilmoni Das*** **AIR 1952 Cal 184**, where it was held;

> *"Constitutional provisions are not to be interpreted and crippled by narrow technicalities but as embodying the working principles for practical Government. The Constitution is not the home for legal curiosities."*
>
> [emphasis added]

Further, in ***Edirisuriya v Navaratnam*** **[1985] 1 SLR 100 at page 106**, the Supreme Court held;

> *"A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their*

intangible heritage. It, therefore, behooves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations."

In ***Velupillai v The Chairman, Urban District Council* 39 NLR 464**, Abrahams CJ held;

"This is a court of Justice, it is not an Academy of Law."

Further, the aforementioned objection raised by the learned Senior Additional Solicitor General should be considered in light of the established principles of interpretation of Constitutions whilst giving effect to the Fundamental Rights of the people enshrined in the Constitution and the *curses curie est lex curiae.*

The Constitution has established the Election Commission, the Public Service Commission, the National Police Commission, the Audit Service Commission, the Finance Commission, the Delimitation Commission, and the National Procurement Commission.

However, it is pertinent to note that the Constitution has not established the Commission to Investigate Allegations of Bribery or Corruption. On the contrary, it has made provision for the Parliament to enact legislation to establish a Commission to Investigate Allegations of Bribery or Corruption.

Upon a careful reading of Article 103 of the Constitution, it is evident that the Election Commission has not been created as a Corporate Sole by the legislature, nor is it stated that it may sue or be sued in a corporate name. Furthermore, Article 103 does not seem to reveal any intention of the legislature to incorporate the Election Commission as a legal person. When applying the literal interpretation to interpret a provision in law, the court should give full effect to the language used by the legislature. If the language of the legislature is clear and unambiguous, the court cannot read words into the Act in interpreting the same. Further, where the language is plain, the task of interpretation will not arise.

A similar view was expressed in ***Somawathie v Weerasinghe* [1990] 2 SLR 121 at page 124**, where it was held;

"How should the words of this provision of the Constitution be construed? It should be construed according to the intent of the makers of the Constitution. Where, as in the Article before us, the words are in themselves precise and unambiguous and

there is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense."

(c) Cursus curiae est lex curiae (*The practice of the court is the law of the court*)

As the Public Service Commission, the National Police Commission, etc. were not created as legal persons that can sue and be sued, a *curses curie est lex curiae* has been developed in Sri Lankan courts that legal proceedings can be instituted against the members of such commissions. In this regard, it is pertinent to note that it has been the practice of this court to entertain not only the Fundamental Rights Applications filed against the members of the Election Commission but also to entertain Writ Applications filed against the members of some of the said commissions under the Constitution.

Broom's Legal Maxims (10th Edition) at page 82 states;

"Every Court is the guardian of its own records and master of its own practice'; and where a practice had existed it is convenient, except in cases of extreme urgency and necessity to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience."

Further, in ***Jeyraj Fernandopulle v De Silva and Others*** **[1999] 1 SLR 83,** Amerasinghe, J held;

"Cursus curiae est lex curiae. The practice of the court is the law of the Court. Wessels, J in Wayland v Transvaal Government, held that it is no argument to say that there was no actual contested case in which this procedure has been laid down; for a course of procedure may be adopted and hold good even though there has been no decision on the point. However, in Sri Lanka the practice of the Court has been recognized in judgments of the Court.

The practice of the Court in these matters is in accordance with the conventions of judicial comity."

Thus, for the reasons stated above, I am of the opinion that the petitioners are entitled to name the members of the Election Commission as respondents by following the *cursus curiae* of the court.

(d) Applicability of the Interpretation Ordinance to Constitutional Interpretation

The Constitution states that it is the Supreme Law of the Republic. Thus, other laws cannot be used to interpret the provisions of the Constitution, as they are subordinate to the Constitution. On the contrary, the other laws should be interpreted to be consistent with the provisions of the Constitution.

In SC Reference 01/2014, it was observed; "…… the rules pertaining to Constitutional interpretation are different to those of statutory interpretation. In this context, it is relevant to quote His Lordship Justice Sharvananda CJ in his publication on Fundamental Rights in Sri Lanka (Arnold's International Printing House), 1993 at page 43, in the following terms;

> "Though the Interpretation Ordinance does not apply to the Interpretation of the provisions of the Constitution, as the Constitution was enacted in the exercise of Constitutional power and not in the exercise of legislative power of Parliament and hence is not written law within the meaning of section 2 of the Interpretation Ordinance, it may legitimately be referred to, to appreciate the concept of 'person' in our law."'
>
> [emphasis added]

(e) Applicability of the principals in other laws to Constitutional Interpretation

Further, as stated above, since the Constitution is the supreme law of the country, it is not possible to apply the principles of interpretation of other laws to interpret the Constitution. A similar view was expressed in ***Julliard v Greenman*** **10 US 421 at page 439**, where it was held;

> "*A Constitution ……. is not to be interpreted with the strictness of private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a Code of laws, to*

enumerate the sub-division of those powers, or to specify all the means by which they may be carried into execution."

[emphasis added]

Therefore, I am not inclined to agree that the Election Commission has been conferred with legal status directly or by necessary implication. Hence, I hold that the Election Commission is not a corporate sole. Further, the petitioners are not in breach of Rule 44 of the Supreme Court Rules as the Election Commission does not have an independent legal status from its members. Therefore, the aforesaid preliminary objection raised by the learned Senior Additional Solicitor General is overruled.

DOES THE COURT LACK JURISDICTION TO HEAR THE APPLICATION

The learned President's Counsel appearing for the 14th respondent in SC/FR/90/2023 drew the attention of court to paragraph 32 of the petition filed in SC/FR/90/2023, the press release dated 24th of February, 2023 produced marked as 'P21' and the Hansard dated 23rd of February, 2023 marked and produced as 'P20(b)' and submitted that the subject matter of the said application is now before the Parliament and therefore, this court has no jurisdiction to hear the said application.

The said paragraph 32 states;

> "The petitioners state that on 24.02.2023 the Election Commission released a press release informing of two decisions made by the Election Commission at its meeting held on 24.02.2023, namely (l) that for reasons beyond the control of the Election Commission the local authorities election will not be held on 09.03.2023 and a fresh date for the election would be notified on 03.03.2023 and (2) that to make a request to the Speaker of Parliament to intervene to obtain finances from the Treasury for the conduct of the election.
>
> *A true copy of the said press release dated 24.02.2023 was annexed to the petition marked as P21 and pleaded as part and parcel hereof."*

The said press release stated *inter alia* as follows;

"2023.02.24 දින රැස් වූ මැතිවරණ කොමිෂන් සභාව මතු දැක්වෙන තීරණ ගෙන ඇති බව මෙයින් නිවේදනය කරනු ලැබේ

2023.03.09 දිනට පැවැත්වීමට නියමිත පළාත් පාලන ආයතන ඡන්ද විමසීම සම්බන්ධව මැතිවරණ කොමිෂන් සභාව විසින් ව්‍යවස්ථාපිතව සිදුකළ කාර්යයන් පිළිබඳව තොරතුරු ඇතුලත් වාර්තාවක් සමඟ ඡන්ද විමසීම සඳහා අවශ්‍ය මුද්‍රල් ප්‍රතිපාදන භාණ්ඩාගාරය වෙතින් ලබා ගැනීම සඳහා මැදිහත් වන ලෙස ඉල්ලීමක් ශ්‍රී ලංකා පාර්ලිමේන්තුවේ ගරු කථානායකතුමා වෙත ඉදිරිපත් කිරීම;

මැතිවරණ කොමිෂන් සභාවේ පාලනයෙන් බැහැරව පැන නැඟී ඇති කරුණු හේතුවෙන් 2023.03.09 දිනට පැවැත්වීට නියමිත පළාත් පාලන ආයතන ඡන්ද විමසීම එදිනට නොපැවැත්වෙන අතර, එම ඡන්ද විමසීම පැවැත්වෙන දිනය පිළිබඳව 2023.03.03 දින ප්‍රකාශයට පත් කිරීම;

මැතිවරණ කොමිෂන් සභාවේ නියමය පරිදි"

[emphasis added]

Further, the learned President's Counsel referred to the newspaper article dated 24th of February, 2023 marked and produced as P20(a), which *inter alia* stated as follows;

> "The Parliament has asked to appoint a select committee on this matter. So I request to appoint it, record all and take the report to the Supreme Court. According to section 4 of the Constitution, the financial power is vested in the Parliament. After the 1688 Revolution according to the Magna Carter Agreement, all monetary powers vested in Parliament. Therefore, given that report to Supreme Court through a select committee."

Further, after the Order on the preliminary objection was reserved by court, the Instructing Attorney for the said 14th respondent filed a motion dated 22nd of June, 2023 and furnished a copy of the "ADDENDUM TO THE ORDER BOOK No. 1 OF PARLIAMENT" issued on the 15th of February, 2023 which contained, *inter alia*, the following;

"ADDENDUM TO THE ORDER BOOK No. 1

OF

PARLIAMENT

Issued on Wednesday, February 15, 2023

And whereas the Election Commission is responsible to Parliament under Article 104B (3) of the Constitution;

And whereas by Article 30(4) of the Twenty First Amendment to the Constitution the members of the Commission have ceased to hold office and are exercising and discharging of powers and functions of the transitionary members;

And whereas on 18th January 2023 the Election Commission purported to call nominations for the Local Authorities Elections;

And whereas two members of the Commission decided to fix 09tg March 2023 as the date of polling and claimed to have obtained the consent of the other three members;

And whereas the Secretary to the Ministry of Finance, Economic Stabilization and National Policies has filed an Affidavit in Court stating that it would be challenging to find funds for holding such an election in March 2023;

And whereas there is a question of whether the Commission itself is satisfied that all preconditions for holding such an election are fulfilled;

And whereas on 25th January 2023 Ms. P. S. M. Charles member of the Commission tendered her resignation to the President;

And whereas the Commission has failed to report. to Parliament which is responsible for public finance on issues that have arisen on Local Authorities Elections:

And whereas if the privileges of the Members of Parliament and of the Parliament have been infringed, it should be investigated into and suitable recommendations in that regard should be made;

This Parliament resolves that a Select Committee of Parliament be appointed to investigate into the matters relating to the Election Commission in respect of the incidents of infringement of privileges of the Members of Parliament and of the Parliament and to make suitable recommendations in that regard.

2. ……

3. ……..

4. ……”

I have considered the aforementioned preliminary objection raised by the learned President’s Counsel for the 14th respondent in SC/FR/90/2023 and the submissions made by the learned President’s Counsel who is appearing for the petitioners in SC/FR/90/2023, and I am of the view that if the subject matter of a court case is pending before the Parliament, the courts have no jurisdiction to hear and determine such a case in terms of section 3 of the Parliamentary (Powers and Privileges) Act read with Article 67 of the Constitution. A similar view was expressed by Justice Marsoof PC in the aforementioned Fundamental Rights Applications. However, there are no sufficient materials before this court to consider the merits of the said preliminary objection. Further, the said preliminary objection should be considered after hearing all the parties in the application. Thus, I am not inclined to uphold the said preliminary objection. However, the said respondent has the liberty to raise the said objection if leave is granted by court after hearing the merits of the said application.

Judge of the Supreme Court

IN THE SUPREME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of section 5C of the High Court of the Provinces (Special provisions) Act No.19 of 1990 as amended by Act No. 54 of 2006 against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5A of the said Act.

SC Appeal No. 104/2017

SC (HC CA) Leave to Appeal Application No. 94/2016

Civil Appellate High Court Jaffna Case No. 33/2015

DC Jaffna Case No. L/157/2013

1. Arulampalam Gnaneswaran,

2. And his wife Suganthini
Dutch Road,
Alaveddy West, Alaveddy.

PLAINTIFFS

Vs

1. Kasilingam Sritharan,

2. And his wife Manohari
Sithankeni Santhiyadi,
Sithankeni.

DEFENDANTS

AND THEN BETWEEN

1. Kasilingam Sritharan,
Sithankeni Santhiyadi,
Sithankeni.

1ST DEFENDANT - APPELLANT

Vs

1. Arulampalam Gnaneswaran,

2. And his wife Suganthini
Dutch Road,
Alaveddy West, Alaveddy.

PLAINTIFF - RESPONDENTS

AND NOW BETWEEN

1. Arulampalam Gnaneswaran,

2. And his wife Suganthini
Dutch Road,
Alaveddy West, Alaveddy.

PLAINTIFF - RESPONDENT - APPELLANTS

Vs

1. Kasilingam Sritharan,
Sithankeni Santhiyadi,
Sithankeni.

1ST DEFENDANT - APPELLANT - RESPONDENT

2. And his wife Manohari
Sithankeni Santhiyadi,
Sithankeni.

2ND DEFENDANT-RESPONDENT-RESPONDANT

Before : **P. Padman Surasena, J**

Janak De Silva, J

Mahinda Samayawardhena, J

Counsel : N. R. Sivendran with Renuka Udumulla for the Plaintiff - Respondent - Appellants

S. Kumarasingham for the 1st Defendant - Appellant - Respondent

Argued on : 05.05.2022

Decided on : 27.06.2023

P Padman Surasena J:

The Plaintiff-Respondent-Appellants (hereinafter sometimes referred to as the Plaintiffs) instituted action relevant to this case on 14.08.2013 in the District Court of Jaffna against the 1st Defendant-Appellant-Respondent (hereinafter sometimes referred to as the 1st Defendant) and the 2nd Defendant-Respondent-Respondent (hereinafter sometimes referred to as the 2nd Defendant) seeking a declaration of title to the land described in the schedule to the plaint and the ejectment of the said Defendants from the said land.

As per the first journal entry of the District Court record, upon the Plaintiff filing the plaint along with summons, the learned District Judge had taken steps to issue summons on the Defendants returnable on 11.09.2013. Thereafter, the learned District Judge had taken further steps on several dates when the case was called in Court. This was with a view of having the summons served on the Defendants. As the 1st Defendant had not responded to summons, the learned District Judge on 20.11.2013 had fixed the case for *ex parte* trial against the 1st Defendant.

Upon the Fiscal of the District Court reporting his failure to serve summons on the 2nd Defendant on multiple occasions, the learned District Judge had ordered summons to

be served on the 2nd Defendant by way of substituted service. i.e., by pasting the summons on the door of the house where the 2nd Defendant had last resided. Consequent to the above order, the Fiscal had reported on 05.02.2014, that the summons had been served on the 2nd Defendant by way of substituted service. It is also to be noted that on the same day, i.e., on 05.02.2014, an Attorney-at-Law also had appeared on behalf of the 2nd Defendant in Court (Journal Entry No. 5) and the Court had ordered the case to be called in Court on 12.02.2014. When the case was called on 12.02.2014, neither the 2nd Defendant nor her agent had appeared in Court. The learned District Judge had then fixed the case for *ex parte* trial against the 2nd Defendant as well.

Accordingly, the *ex parte* trial against both Defendants commenced, concluded and the *ex parte* decree was entered on 26.02.2014. Thereafter, the *ex parte* decree was served on the 1st Defendant on 22.05.2014 and on the 2nd Defendant by way of substituted service on 07.05.2014. Upon the *ex parte* decree being served on the Defendants, the 1st Defendant on 28.04.2014, had filed proxy, petition and affidavit, seeking to purge his default and prayed *inter alia* that the *ex parte* decree be vacated. This was sought to be done under Section 86(2) of the Civil Procedure Code.

Subsequent to the filing of the above application, when the Court took up the matter for inquiry, the Plaintiffs had raised a preliminary objection to the maintainability of the said application on the basis that the said application was time barred. Thereafter, the parties had filed written submissions on the afore-mentioned preliminary objection. It was thereafter that the learned District judge, by his order dated 19.11.2014, had upheld the afore-stated preliminary objection raised by the Plaintiffs and proceeded to dismiss the afore-stated application of the 1st Defendant. The dismissal of the application of the 1st Defendant by the learned District Judge was on the basis that he is obliged to strictly calculate the 14 days set out in Section 86(2) of the Civil Procedure Code. The learned District Judge had adopted this course of action based on the case of The Ceylon Brewery Limited vs Jax Fernando, Proprietor, Maradana Wine Stores.[1] The learned District Judge upon that conclusion had proceeded to hold that the District Court had no jurisdiction to inquire into the

[1] (2001) 1 Sri. L. R 270.

application of the 1st Defendant as he had not complied with the provisions in Section 86(2) of the Civil Procedure Code.

Being aggrieved by the above decision of the District Court, the 1st Defendant appealed to the Provincial Appellate High Court of the Northern Province praying *inter alia* that the said order dated 19.11.2014 of the District Court be set aside.

Accordingly, the Provincial High Court of Civil Appeals after the argument of the said appeal, by its judgment dated 27.01.2016 had decided in favour of the 1st Defendant. Accordingly, the Provincial High Court of Civil appeal had set aside the order of the District Court dated 19.11.2014 which upheld the preliminary objection raised by the Plaintiffs and dismissed the application of the 1st Defendant made under section 86(2) of the Civil Procedure Code. It had also set aside the *ex parte* decree. The decision of the learned Judge of the Provincial High Court was on the basis that section 86(2) of the Civil Procedure Code does not specify a limitation on the computation of the 14-day period and therefore when calculating the said 14 days, one must exclude Sundays and public holidays as per section 754(4) of the Civil Procedure Code which applies for similar computations of time. It was on that basis that the Provincial High Court had proceeded to conclude that the application made by the 1st Defendant under section 86(2) of the Civil Procedure Code was not time barred. Accordingly, the Provincial High Court had taken the view that the District Court had the jurisdiction to consider the application of the 1st Defendant made under section 86(2) of the Civil Procedure Code.

Being aggrieved by the afore-stated judgment of the Provincial High Court of Civil Appeal, the Plaintiffs sought Leave to Appeal from this Court. After hearing counsel for both parties, this Court by its order dated 30.05.2017 had granted Leave to Appeal on the following questions of law.

(a) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that the 1st Defendant-Appellant-Respondent has not filed a valid and proper application within the time limit in terms of Section 86(2) of the Civil Procedure Code?

(b) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that Sundays and Public Holidays are not to be excluded in calculating the period under Section 86(2) of the Civil Procedure Code?

(c) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to appreciate that the provision of [section] 754 of the Civil Procedure Code has no application to the period specified in Section 86(2) of the Civil Procedure Code in calculating the period?

(d) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to follow the judgment of the Supreme Court in The Ceylon Brewery Limited Vs. Jax Fernando 2001 (1) SLR 270?

(e) Have Their Lordships of the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) erred in law when they failed to give due consideration to the Written Submissions filed by the Plaintiffs-Respondents-Petitioners in the Provincial Civil Appellate High Court of the Northern Province (Holden in Jaffna) wherein specific reference was made to the said judgment reported in 2001 (1) SLR 270?

A closer look at the above questions of law shows clearly that the central question that this Court must resolve in the instant appeal is as to how a judge should calculate the period of 14 days stipulated in section 86(2) of the Civil Procedure Code. For convenience of further discussion on this point, I would reproduce below, section 86(2) of the Civil Procedure Code which reads as follows:

> *"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies Court, that he had reasonable grounds for such default, the Court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to cost or otherwise as to the Court shall appear proper"*

At the outset let me refer to the case of The Ceylon Brewery Limited vs Jax Fernando, Proprietor, Maradana Wine Stores,[2] in which the Supreme Court was called upon to consider exactly the same issue. In the afore-mentioned Ceylon Brewery's case, the defendant had been served with the *ex parte* decree on 03.02.1997 and the application under section 86(2) of the Civil Procedure Code to set aside the same had been filed on 18.02.1997. This meant that the application under section 86(2) of the Civil Procedure Code had been filed on the 15th day (late by one day on strict calculation of number of days within that period). Thus, the question before the Supreme Court in Ceylon Brewery's case was whether the period of 14-days provided in section 86(2) of the Civil Procedure Code for filing an application to purge the default and set aside an *ex parte* decree, must be strictly complied with. When deciding the afore-mentioned question, the Supreme Court, in that case, also addressed the question as to how the said 14-days under section 86(2) should be calculated. Indeed, that was the main issue, this Court had to address in that case, the facts of which I will briefly set out below.[3]

The learned Additional District Judge in the case of Ceylon Brewery had vacated the *ex parte* judgment and decree granted against the defendants in that case (due to their default in filing an answer) and had then proceeded to permit the said defendants to file an answer. This was despite the fact that the application under section 86(2) of the Civil Procedure Code was filed in that case after the lapse of 14 days. This was done by the learned Additional District Judge in that case by excluding Sundays and public holidays when calculating the period of 14-days. The Plaintiff in that case had challenged the said decision of the learned Additional District Judge in the Court of Appeal.

The Court of Appeal in the Ceylon Brewery's case having dealt with several questions, had held that the learned Additional District Judge could not have lawfully excluded Sundays and public holidays when calculating the 14-days set out in section 86(2) of the Civil Procedure Code. In arriving at this conclusion, the Court of Appeal examined the provisions of law in sections 754(4) and 757(1) of the Civil Procedure Code which

[2] Supra.
[3] The facts of the Ceylon Brewery's case has been more fully set out in its Court of Appeal judgment which is reported in (1998) 3 Sri. L. R. 61.

also contain identical time-limit (14-day period), but had expressly excluded Sundays and public holidays (unlike section 86(2) of the Civil Procedure Code). The Court of Appeal then proceeded to hold that Sundays and public holidays should not be excluded when calculating the said period of 14 days referred to in section 86(2) of the Civil Procedure Code.

However, the Court of Appeal in the Ceylon Brewery's case held that the requirement of 14-days in section 86(2) of the Civil Procedure Code for an application to set aside a default decree was merely directory and not mandatory. It was on that basis that the Court of Appeal proceeded in its judgment to affirm the learned Additional District Judge's order allowing the defendants in that case to file an answer and proceed with an inter-parte trial despite the application under section 86(2) having been delayed by one day than the stipulated 14-day period.

Being aggrieved by the afore-stated judgment of the Court of Appeal, the Plaintiffs of the Ceylon Brewery's Case appealed to the Supreme Court. Thus, the Supreme Court in that case was called upon to consider the question whether or not the requirement under section 86(2) of the Civil Procedure Code to make such an application within 14 days is merely directory as held by the Court of Appeal. Having considered the said question, Justice Mark Fernando in that case stated as follows:

> *"We are of the view that Section 86(2) of the Civil Procedure Code is the provision which confers jurisdiction on the District Court to set aside a default decree. That jurisdiction depends on two conditions being satisfied. One condition is that the application should be made within 14 days of the service of the default decree on the defendant."*
>
> *It is settled law that provisions which go to the jurisdiction must be strictly complied with. See Sri Lanka General Workers Union vs Samaranayake.*[4]

Having stated so, Justice Mark Fernando in the above case, set aside both the judgment of the Court of Appeal and the order of the District Court and affirmed the *ex parte* decree previously entered by the Additional District Judge.

[4] 1996 2 Sri L. R. 265.

In arriving at the decision that section 86(2) of the Civil Procedure Code is mandatory and requires strict compliance, Justice Mark Fernando proceeded to hold as follows:

> *"The learned District Judge entertained the application to set aside the default decree after the period of 14 days had expired, on the ground that intervening holidays had to be excluded. The Court of Appeal held, correctly, that the learned District Judge was in error, because intervening holidays cannot be excluded in computing a period exceeding six days."*

Justice Mark Fernando decided the Ceylon Brewery's case in the year 1999. Then again in SC Appeal No. 153/2014 decided on 10.06.2016, Justice Anil Gooneratne also reiterated the view that the compliance of the requirement under section 86(2) of the Civil Procedure Code is mandatory as it has been the intention of the Legislature to stipulate strictly the 14-day time limit to enable the District Court to assume jurisdiction to inquire into such applications. This Court has been consistent in taking that view. Justice Anil Gooneratne in SC Appeal No. 153/2014, followed the afore-mentioned dicta of Justice Mark Fernando in Ceylon Brewery's case.

I observe that the learned Judge of the Civil Appeal High Court in his judgment has made a reference to the Plaintiff's written submissions[5] and that the said written submissions had contained a specific reference to the judgement of the Ceylon Brewery's Case reported in 2001 (1) SLR 270. However, unfortunately, the learned Judge of the Civil Appeal High Court had failed to give due recognition and apply the said ratio decidendi when he decided the instant case.

Although the above analysis would sufficiently dispose of the instant case, for the sake of completeness, let me set out below the applicability of section 8(1) of the Interpretation Ordinance in respect of calculating the 14-day period referred to in section 86(2) of the Civil Procedure Code. In doing so, I would first reproduce below, section 8(1) of the Interpretation Ordinance:

> *"Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a*

[5] Vide paragraph 2, Part C of the Judgement dated 27.01.2016.

day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open."

The Supreme Court dealt with the question whether section 8(1) of the Interpretation Ordinance would be applicable for the calculation of 14-day period referred to in section 86(2) of the Civil Procedure Code in the case of Flexport (Pvt) Limited & two others vs. Commercial Bank of Ceylon Limited.[6] In that Case, Priyasath Dep PC J[7] holding that that section 8(1) of the Interpretation Ordinance is applicable when making an application to purge the default under section 86(2) of the Civil Procedure Code stated as follows:

"I am inclined to follow the Supreme Court judgments in State Trading Corporation V. Dharmadasa,[8] Nirmala de Mel V. Seneviratne and others,[9] Selenchina v. Mohomad Marikkar,[10] which held that if the last date of filing falls on a public holiday or on a day the court house was closed, the act of filing of papers could be done or taken on the next date thereafter, the day the court or office is open. I hold that section 8(1) of the Interpretation Ordinance applies to section 86(2) of the Civil Procedure Code"

In the instant case, the *ex parte* decree was served on the 1st Defendant on 22.05.2014.[11] The 1st Defendant had made the application to set aside the said *ex parte* decree on 09.06.2014. The 14-day period as per section 86(2) of the Civil Procedure Code did not fall on a public holiday. Accordingly, the application of section 8(1) of the Interpretation Ordinance would not arise in the instant case. Therefore, I would not endeavour to engage in any further discussion on that aspect than what has already been mentioned above.

For the foregoing reasons, I answer all the above questions of law in respect of which this Court has granted Leave to Appeal in the affirmative. I proceed to set aside the

[6] SC Appeal No. 03/2012 decided on 15.12.2014 [Reported in (2014-2) ABH LR 370 SC].
[7] As he was then.
[8] 1987 (2) Sri L. R. 235.
[9] 1982 (2) Sri L. R. 569.
[10] 2000 (3) Sri L. R. 100.
[11] Vide Journal Entry No.11.

judgment of the Civil Appeal High Court of the Northern Province dated 27.01.2016. I restore and affirm the order dated 19.11.2014 pronounced by the learned District judge. The petition filed on 09.06.2014 by the 1st Defendant seeking to purge his default and praying for the vacation of the *ex parte* decree filed under Section 86 (2) of the Civil Procedure Code must stand dismissed on the ground that it was not filed within the stipulated timeframe. I allow the appeal without costs.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA J

I agree,

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J

I agree,

JUDGE OF THE SUPREME COURT

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

A.M. Sanjaya Nayanaka Darshana,
"Riverside" Restaurant,
Daragala, Welimada.
Petitioner

SC/FR/38/2018

Vs

1. J.J. Chamila Indika Jayasinghe,
1A. M.M.K. Pushpakanthi,
1B. Suvineetha Gunasekara,
Divisional Secretary, Uvaparanagama,
Divisional Secretariat, Lunuwatta.
2. R.P.R. Rajapaksha,
2A. R.M.C.M. Herath,
G.D. Keerthi Gamage,
Land Commissioner General,
Land Commissioner General's
Department,
"Mihikatha Madura",
No. 1200/6, Rajamal Waththa Road,
Battaramulla.
3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Respondents

Before: S. Thurairaja, P.C., J.
E.A.G.R. Amarasekera, J.
Mahinda Samayawardhena, J.

Counsel: Uditha Egalahewa, P.C., with Vishva Vimukthi for the Petitioner.
Rajiv Goonetilleke, D.S.G., for the Respondents.

Argued on: 10.01.2023

Written submissions:

by the Petitioner on 02.07.2019 and 31.01.2023.
by the Respondents on 16.06.2021 and 15.02.2023.

Decided on: 28.06.2023

Samayawardhena, J.

The Petitioner was issued the Annual Permit (P8) under the State Lands Ordinance by the 1st Respondent Divisional Secretary of Uvaparanagama on 12.02.2013. The endorsements on this Permit show that the validity period of it has been extended on yearly basis for the years 2014, 2015 and 2016 ending on 31st of December each year. The Permit is for a portion of Lot 4 in extent of 10 perches in Final Village Plan No. 196 made by the Surveyor-General marked P1(a). The Petitioner has shaded on P1(a) the area he occupies, which is located immediately adjacent to the Doolgolle Oya. This is also made clear by Plan marked P11, another recent Plan prepared by the Surveyor-General. It may be observed that although the Annual Permit is for 10 perches, according to P11, the Petitioner is in occupation of a land in extent of 20 perches. The Petitioner has constructed a building on the Permit land and has been carrying on a business by the name of Riverside Restaurant. A liquor licence has also been obtained to the premises.

In 2016, he requested from the Divisional Secretary a long-term lease for this land instead of a yearly Permit. The Divisional Secretary has not flatly refused this request. As a prerequisite to the issuance of a long-term lease, the Divisional Secretary has taken steps to have a survey done through the Surveyor-General to ascertain whether the land falls within reservations of Doolgolle Oya and Road (*vide* R2). By R3 the Surveyor-General has informed the Divisional Secretary that, according to the List of the Lands (which appears to be a reference to the Tenement List), Lot 4 has been reserved for Doolgolle Oya and therefore new survey is unnecessary. It may be recalled that the Petitioner's Permit is in respect of part of Lot 4 in the Final Village Plan 196. The Tenement List marked P1(b) attached to the Final Village Plan 196 *inter alia* states that Lot 4 is "*Reservation for Doolgolle Oya*". According to P1(b), this remark has been made as far back as 1928, when the Plan was originally prepared. Hence the Divisional Secretary has informed the Petitioner by P13 dated 07.12.2017 that the Annual Permit cannot be renewed. He has further informed the Petitioner that steps have also been taken under the State Lands (Recovery of Possession) Act to recover possession of the adjoining lands. The Notice to Quit dated 12.01.2018 marked P15 has been issued to the Petitioner under the State Lands (Recovery of Possession) Act.

Without defending the action in the Magistrate's Court in terms of the State Lands (Recovery of Possession) Act if a case is filed against him or without invoking the writ jurisdiction of the Court of Appeal against the decisions of the Divisional Secretary as the law provides, the Petitioner filed this application on 24.01.2018 seeking declarations that his fundamental rights guaranteed under Articles 12(1), 12(2) and 14(1)(g) of the Constitution have been violated by the 1st to 5th Respondents (whereas there are only three Respondents – the Divisional Secretary, the Land Commissioner General and the Attorney-General), and that the Quit Notice P15 is null and void. He also sought six interim reliefs primarily

preventing the Divisional Secretary from taking action to evict the Petitioner as initiated by the Quit Notice.

This Court has granted leave to proceed under Article 12(1) of the Constitution and an interim relief preventing the Respondents from making an application to the Magistrate's Court for an order of ejectment pending determination of this application.

Let me now consider the arguments presented on behalf of the Petitioner.

The first argument of the learned President's Counsel for the Petitioner is that, in view of condition 5 of the Permit, the Permit is personal to the Petitioner. Therefore, in terms of section 16 of the State Lands Ordinance, "*all rights under such Permit or licence shall be finally determined by the death of such grantee*." According to the learned President's Counsel, this means that the Petitioner is entitled to enjoy the land until his death, or in other words, the Permit is valid for life. Hence, he argues that, before the Divisional Secretary decides not to renew the Permit, the procedure laid down for cancellation of a Permit (section 17 of the State Lands Ordinance and sections 106-128 of the Land Development Ordinance) shall be followed. This argument is clearly misconceived in law.

The meaning of condition 5 of the Permit that the Permit is personal to the Permit holder can be understood by reading condition 6 which states that the Permit holder shall not sublet, mortgage or alienate his rights in the land during the time the Permit is in force.

This can also be understood by comparing section 11 with section 16. Section 11 of the State Lands Ordinance states "*Where the rights under any instrument of disposition are not personal to the grantee but may be assigned by act inter vivos or may pass on his death to his heirs or devisees, the burden of any covenants or conditions inserted in such instrument shall*

run with the land and shall be binding upon the grantee and upon all persons claiming that land through, from or under the grantee."

What section 16 states is:

(1) Where it is provided in any Permit or licence that such Permit or licence is personal to the grantee thereof, all rights under such Permit or licence shall be finally determined by the death of such grantee.

(2) Where it is provided in any Permit or licence that such Permit or licence shall be personal to the grantee thereof, the land in respect of which such Permit or licence was issued and all improvements effected thereon shall, on the death of the grantee, be the property of the Crown; and no person claiming through, from or under the grantee shall have any interest in such land or be entitled to any compensation for any such improvements.

The procedure laid down in section 17 of the State Lands Ordinance and sections 106-128 of the Land Development Ordinance shall be followed in the cancellation of a Permit during its validity period. After the yearly Permit lapses due to effluxion of time, the question of cancellation does not arise. Hence those sections have no relevance in this context. The condition 1 of the Permit is very clear: unless renewed for one year at the discretion of the Divisional Secretary, the Permit shall lapse at the end of one year period.

The argument of learned President's Counsel for the Petitioner that "*As a result of the statutory protection afforded by the aforesaid Ordinance to the Petitioner [section 17 of the State Lands Ordinance and sections 106-128 of the Land Development Ordinance], the Petitioner made improvements which amounting to 15 million rupees in the said land while carrying out business for 17 years. Every year, the Petitioner renewed his Permit and excise license after complying the conditions and making due payments. Therefore,*

the Petitioner had a legitimate expectation that his Permit would be renewed as he has not violated any conditions for the past 17 years while doing business." is unacceptable. As I explained earlier, there is no such statutory protection afforded to the Petitioner.

The condition 11 of the Permit expressly and unambiguously states that no compensation is payable for any improvements on the land and no damages are payable for any loss caused. Even in the case of cancellation of the Permit, section 18 of the State Lands Ordinance states that neither the grantee nor any other person shall be entitled to any compensation or damages whatsoever by reason of the cancellation of a Permit or licence under section 17, and no claim for compensation or damages shall in any such case be entertained by any Court.

On the facts and circumstances of this case, the decision of the 1st Respondent Divisional Secretary not to renew the Annual Permit when he was satisfied that the land is part of Doolgolle Oya reservation is not illegal. If he had done the opposite, it would have been an illegality. No legitimate expectation can be founded on or arise from illegality. The representation made by the public authority shall be *intra vires* as opposed to *ultra vires* to form a legitimate expectation enforceable in law. The principle of legality is a fundamental ingredient of the rule of law.

Wade in *Administrative Law* (11th Edition) page 454-455 state:

> *An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the power of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect*

> *to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.*

People expect that the public authorities act within the scope of their powers in accordance with the law; if they fail to do so and people who place their trust in *ultra vires* representations act upon them, innocent representees are not without a remedy. Wade states at page 455 that such representees can seek compensation. This he states "*not upholding an ultra vires representation but simply recognising that the undoubted fact of the representation may be an element in establishing that the compensation should be paid.*" However, Wade stresses: "*The protection of the trust placed in an expectation is important; but it is not as important as upholding the rule of law.*"

De Smith's Judicial Review (8th Edition) pages 702-703 states:

> *In R. v. Ministry of Agriculture, Fisheries and Food Ex p. Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 at 731, Sedley J. said that to bind public bodies to an unlawful representation would have the "dual effect of unlawfully extending their statutory power and destroying the ultra vires doctrine by permitting the public bodies arbitrarily to extend their powers." On the other hand, to bind bodies to a promise to act outside the powers would in effect endorse an unlawful act. It must, on this view, be doubtful whether the expectation that a body will exceed its powers can be legitimate.*

In *C.W. Mackie & Co. Ltd. v. Hugh Moragoda, Commissioner-General of Inland Revenue and Others* [1986] 1 Sri LR 300 at 309, Sharvananda C.J. stated:

> *[T]he equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate*

> *of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law. … In the exercise of its powers under Article 126(4) of the Constitution this court can issue a direction to a public authority or official commanding him to do his duty in accordance with the law. It cannot issue a direction to act contrary to the provisions of the law or to do something which in law, would be in excess of his powers.*

In the case of *Nimalsiri v. Colonel P.P.J. Fernando and Others* (SC/FR/256/2010, SC Minutes of 17.09.2015) Jayawardena J. held:

> *An expectation the fulfilment of which results in the decision maker making an unlawful decision cannot be treated as a legitimate expectation. Therefore, the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation case.*

In the original petition, the Petitioner did not take up the position that the land in dispute is not part of reservation of Doolgolle Oya. The Petitioner was challenging the decision not to extend the yearly Permit for other reasons, the main of which was political victimization because his family had been involved in politics. This was not pursued at the argument. At the argument, one of the main contentions was that the land had not been identified as a reservation. As I stated earlier, relying on the Plans of the Surveyor-General, the Divisional Secretary has come to the finding that the land in dispute is within the Doolgolle Oya reservation. The Petitioner has not countered that position by tendering a different Plan. The Petitioner in his counter affidavit drawing attention of the Court to section 50 of the State Lands Ordinance which deals with reservations states that no regulations have been made prescribing the limits of reservation for public streams except for the Western Province.

Section 50 of the State Lands Ordinance states:

> *Subject as hereinafter provided and without prejudice to the powers conferred by section 49, any Crown land which is immediately adjacent to a public stream and lies within a prescribed distance therefrom measured in such manner as may be prescribed shall, for the purposes of this Ordinance, be deemed to be a Crown reservation constituted by Notification under section 49; and all the provisions of this Part shall apply accordingly to any such reservation:*

At the argument, learned Deputy Solicitor General for the Respondents drew the attention of Court as well as learned President's Counsel for the Petitioner to the Gazette dated 15.10.1948 and paragraph 228 of the Land Manual that had been tendered to Court with the motion dated 29.10.2021, which addresses this issue.

By the Ceylon Government Gazette No. 9,912 dated 15.10.1948, Crown Lands Regulations have been published. In reference to section 50 of the State Lands Ordinance on the subject of Crown reservations for public streams, it states:

> *11. (1) The distance to be prescribed for the purpose of section 50 of the Ordinance-*
>
> *(a) in the case of any Crown land which is referred to in that section and is not marked, described or indicated as a stream reservation in any plan prepared by or under the authority of the Surveyor-General shall-*
>
> > *(i) where the width of the public stream does not extend fifteen feet, be one chain,*
> >
> > *(ii) where the width of such stream exceeds fifteen feet but does not exceed fifty feet, be two chains,*

(iii) where the width of such stream exceeds fifty feet, be three chains …

In terms of section 81 of the Evidence Ordinance, the Court shall presume the genuineness of Gazettes. In terms of section 83 of the Evidence Ordinance, the Court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate.

In terms of section 49 of the State Lands Ordinance, the Minister in charge of the subject can by Notification published in the Gazette declare that any State land is considered a State reservation *inter alia* for the protection of the source, course or bed of any public stream, springs, tanks, reservoirs, lakes, ponds, lagoons, creeks, canals, aqueducts, elas, channels (whether natural or artificial), paddy fields and land suitable for paddy cultivation.

The submission of learned Deputy Solicitor General that, when the Surveyor-General has not specifically demarcated an area next to a public stream as a reservation, the deeming provision in section 50 of the State Lands Ordinance would apply to bring such areas within a reservation, is acceptable.

In any event, the Petitioner in this case does not seek a direction to the Divisional Secretary to issue a yearly Permit or a long-term lease to this land. He seeks a declaration that the Notice to Quit issued under the State Lands (Recovery of Possession) Act is a nullity. The Notice to Quit has been issued on the basis that the Petitioner is in unlawful occupation of a State land, not that the Petitioner is in unlawful occupation of a reservation for a public stream.

The Petitioner in his counter affidavit says "*The 1st Respondent has not taken any steps to remove existing illegal constructions in Uwaparanagama*

which built along the river bed obstructing the water flow of Doolgolla Oya. Such illegal constructions show that the 1st Respondent has no genuine interest to remove the illegal constructions other than to politically victimize me and damage my family business and reputation." But he has not stated whether what is stated in paragraph two of P13 where the 1st Respondent states that eviction orders have already been obtained from Court against people who have made unauthorized constructions in the vicinity of the Petitioner's business premises is false. The Petitioner has tendered a number of photographs to show the danger to the riverbed by those constructions. But he had been careful not to attach a photograph of his business establishment for the Court to get an idea about the real location of his business establishment. In any event, two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong (*Gamaethige v. Siriwardena* [1988] 1 Sri LR 384 at 404). Article 12 of the Constitution cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases (*Jayasekera v. Vipulasena* [1988] 2 Sri LR 237). Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. For a complaint of unequal treatment to succeed, the Petitioner must demonstrate unequal treatment in the performance of a lawful act (*Seelavansa Thero v. Tennakoon, Additional Secretary, Public Service Commission* [2004] 2 Sri LR 241 at 248).

On the facts and circumstances of this case, the decision of the 1st Respondent Divisional Secretary not to renew the Annual Permit for another year is not illegal.

I hold that there is no violation of Article 12(1) of the Constitution and there is no reason to declare that the Quit Notice P15 is a nullity. I dismiss the application of the Petitioner with costs.

As agreed at the argument, this decision would be binding on the connected case SCFR/14/2018.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekera, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal where leave was granted on an application for Leave to appeal under and in terms of Article 127 (2) of the Constitution read with section 5(c) of the High Court of the Provinces (special Provisions) (Amendment) Act No.54/2006

SC/APP/02/2014

NWP/HCCA/KUR/84/2003F

NWP/HCCA/KUR/85/2003F

D.C. Kuliyapitiya Case No.5726/P

D.C. Kurunegala Case No. 1318/P

20(a). Hetti Achchi Arachchilage Karunaratne
Pothuwatawana, Leehiriyagama.

31. A. M. Ekanayake

32. A. M. Lakshman

33. A. M. Dharmaratne

All of:

Hendiyagala, Sandalankawa

20(a), 31st, 32nd, 33rd
Defendant/ Appellant / Appellants

-Vs.-

Edirisinghe Muhandiram Appuhamilage
Amarasinghe Appuhamy (deceased)

Lalitha Edirisinghe
Hingurandamana
Hingurakgoda.

Substituted
Plaintiff/Respondent/Respondent

1. Hettiachchi Arachchilage Manchonona
Watakayawa, Gonawila.

2. Hettiachchi Arachchilage Simonsingho
Watakayawa, Gonawila.

3. Hettiachchi Arachchilage Jangenoha
   Watakayawa, Gonawila.

4. Hettiachchi Arachchilage Pubilis Singho
   Watakayawa, Gonawila.

5. Hettiachchi Arachchilage William
   Singho
   Watakayawa, Gonawila.

6. Herath Pathirannahelage Punchi Banda
   (Deceased)

6(a) Herath Pathiranahelage Jayasiri
   Herath Pathirana
   Hendiyagala, Sandalankawa.

7. Herath Pathiranahelage Ukkubanda
   (Deceased)

7(a). Herath Pathiranahelage Upali
   Nandasiri
   Watakayawa, Gonawila.

8. Herath Pathiranahelage Amarasiri
   Hendiyagala, Mokelewatta,
   Sandalankawa.

9. Herath Achchi Arachchilage Abbraham
   Singho
   Hendiyagala, Sandalankawa

10. Herath Achchi Arachchilage
    Karunaratne.
    Pothuwatawana, Leehiriyagama.

    Presently at
    C/O. Deeptha Jayantha
    157, Kahatawila, Pothuwatawana.

11. Loku Hettige Ensohamy
    Madurugamuwa, Gonawila.

12. Loku Hettige Punchi Nona alias
Ensohamy
Nadalagamuwa, Yakwila.

Presently at
C/O. H.M.J.K.M. Damayanthi
Nadalagamuwa, Wadumunnegedara.

13. Loku Hettige Elisahamy
Watakayawa, Gonawila.

14. Loku Hettige Mai Nona
Singakkuliya, Sandalankawa.

15. Loku Hettige Podinona alias Babynona
Nadalagamuwa, Yakwila

Presently at
C/O. W.A. Leela Damayanthi
Madurugamuwa, Gonawila.

16. Loku Hettige Premawathi
Watakayawa, Gonawila.

17. Loku Hettige Somawathie
Hamangalla, Narangoda, Giriulla

Presently at
C/O. Champika Priyanthi Herath,
Watakayawa, Gonawila.

18. Singhe Prutuwi Attanayake
Mudiyanselage Gunawardane
(Deceased)

18(a). Loku Hettige Alashamy, Watakayawa
Gonawila.

19. Hetti Achchi Arachchilage Ebrahim
Singho
Watakayawa, Gonawila.

28 (c). M.A. Charlis Singho
Thulawala, Koswatta.

28(d). M.A. Podisingho
Thulawala, Koswatta.

Presently at,
C/O. M.A. Kusumawathie
Eriyagolla, Yakwila.

28(e). M.A. Haramanis Singho
Thulawala, Koswatta.

29. A.M. Amarasena
Thulawala, Koswatta.

Presently at,
Hendiyagala, Sandalankawa

30. A.M. Amarasena (Deceased)
Thulawala, Koswatta.

30(a). A.M. Danny Amaradasa,
Hendiyagala, Sandalankawa Post.

30(b). A.M. Amarasiri,
Kapuruwala, Alawwa Post

30 (c). A.M. Amarawathi
Saman Madura, Pannala Post

30(d). A.M. Rohini Chandralatha
Hendiyagala, Sandalankawa Post.

30(e). Suriya Mudiyanselage Sadi Menike
Hendiyagala, Sandalankawa Post.

Defendant/Respondent/Respondents

Before	:	Hon. Buwaneka Aluwihare, PC., J.
		Hon. Padman Surasena, J.
		Hon. E.A.G.R. Amarasekara, J.
Counsel	:	W. Dayaratne PC. with Miss R. Jayawardena for the 20(a), 31(a) 32nd and 33rd Defendant – Appellant – Appellants
		Lakshman Perera, PC. with Shalini Fernando for the Plaintiff – Respondent and 24(a) Defendant – Respondent – Respondent
		M.C. Jayaratne, PC. with M.D.J. Bandara and Ms. H.A. Nishani H. Hettiarachchi instructed by Sanjeewa Kaluarachchi for the 7(a) and 30(a) Defendant-Respondent-Respondents.
Argued on	:	15/09/2020
Decided on	:	30/06/2023

E.A.G.R. Amarasekara J.

As per the amended petition dated 12.12.2011 filed on behalf of the 20(a), 31st to 33rd Defendant-Appellant-Appellants (hereinafter sometimes referred to as Defendant- Appellants), the first judgment dated 28/06/1995 delivered by the District Court of Kuliyapitiya was set aside by the Court of Appeal and the Court of Appeal directed to take steps and hold a trial de novo. The case proceeded to trial for the second time and, after trial the learned trial judge delivered his judgement on 09/05/2003 to partition the subject matter of the District Court action. Being aggrieved by the said judgement the 31st to 33rd Defendant Appellants lodged an appeal to the Court of Appeal which was subsequently transferred to the Civil Appellate High Court of Kurunegala. Aforesaid Petition of Appeal to the Court of Appeal has been tendered along with the Petition marked as P1. It must be noted at the beginning, the Petition of Appeal to the Court of Appeal dated 07.07.2003 tendered along with the Petition to this court marked as P1, has been referred to as the petition of Appeal of the 20(a) Defendant-Appellant appeared by his Attorney-at-Law Mr. Sunil Jayakody and it has been signed at the end by the Attorney-at-law of the 20(a) Defendant-Appellant but the prayer in the said petition is made by the 31st, 32nd and 33rd Defendant- Appellants. Relevant caption of the said petition to the Court of Appeal named only the 20(a) Defendant-Appellant as the Appellant. However, paragraph 13 of the original petition as well as of the amended petition to this court refers to a petition of appeal made by 31st to 33rd Defendant Appellants. Thus, in the first instance I wonder whether there was a proper Petition of Appeal on behalf of the 20(a) Defendant-Appellant before the Civil Appellate High Court which contained a prayer for 20(a) Defendant Appellant. However, in the amended petition to this court at paragraph 21, the Appellants state that the Learned High Court Judges dismissed both the appeals upholding a preliminary objection, indicating that there was another appeal

which was subject to the same preliminary objection. It may be the one filed by the 31st-33rd Defendant-Appellants which is found among other documents in the Civil Appellate High Court brief. The observations I have made above does not relate to the matter in issue, but I think it is worthwhile to record those observations as this matter is pending before our courts for more than half a century and delayed further after the de novo trial on this type of applications.

The said appeals before the Civil Appellate High Court were dismissed as stated above after considering the preliminary objections taken up by the substituted Plaintiff-Respondent on the premise that the Notice of Appeal of each appeal was out of time. Being dissatisfied with the said dismissal of the appeals, the Defendant Appellants filed a leave to appeal application dated 18.01.2011 before this court and thereafter tendered an amended petition dated 12.12.2011. This court granted leave on 27.11.2013 on the following questions of law.

"a) Did their Lordships err in law when they held that the Notices of Appeal submitted by 31st, 32nd and 33rd and 20(a) Appellant/Petitioners along with documents were only on 02/06/2003 which is totally erroneous as it is very clear that all the other documents clearly carry the seals and also the signature of the Registrar and also the receipts issued by the postal department as 26/05/2003?

b) Did their Lordships fail to consider that in terms of Section 75(4) [Sic] of the Civil Procedure Code, filing of the Notice of Appeal is the 1st step of lodging an appeal and without the Notice of Appeal, there is no provision in the Civil Procedure Code to accept security bonds, cost of appeal and serving Notice of Appeal through courts?

c) Is the appellant entitled in law to contradict the record of the District Court in Appeal?"

The judgment, as said before, was delivered on 09/05/2003. Thus, as per the provisions of section 754(4) of the Civil Procedure Code Notice of Appeal had to be lodged on or before the 30/05/2003 as it has to be tendered within 14 days from the judgment exclusive of the day judgment /order was pronounced, and of the day on which the notice was presented and Sundays and public holidays.

Journal entry dated 02.06.2003 in the District Court record indicates that the Appellants tendered their Notices of Appeal of their respective appeals along with the other accompanying documents and it does not mention that the said notices were tendered to court on a date prior to that date, i.e., 02.06.2003. However, it clearly mentions the dates of some of the accompanying documents tendered along with the said notices such as Security Deposit Receipts Nos. K/20 557722 and K/20 557723 both dated 26.05.03. The said Journal entry among other things further indicates that postal article receipts Nos. 7230 to 7235 and 7236 to 7241 as proof that notices were posted to the registered attorneys of other parties, security bonds, stamps, stamped envelopes and secretary's certificate pertaining to the appeal were also filed along with the said notices of appeal of respective appeals. The secretary's certificate mentioned there in the journal entry seems to be the Registrar's certificate that has to be sent by the Registrar when he sends the case record to the appellate court as per section 755(5) of the Civil Procedure Code after filling of the petition of appeal. As Registrar's Certificate is meant to be sent by the Registrar after filing of the Petition of Appeal, the reference to the secretary's certificate mentioned therein the journal entry must

be a form prepared by the Appellant's Attorney at Law which was to be perfected by the Registrar before sending it as the Registrar's Certificate after filing of the Petition of Appeal. The said Registrar's certificate dated 07/07/2003 perfected and signed by the Registrar is found in the brief along with written submissions tendered to High Court marked P2 with Petition to this court. In the said submissions made to the High Court (P2) to challenge the correctness of the journal entry dated 02/06/2003, the Appellants had contended that the said certificate dated 07/07/2003 could not have been handed over on 02/06/2003. The said certificate has been signed by the Registrar of District Court on 07/07/2003 deleting the word 'මැයි' which is there to indicate the month of May. This shows that this form was prepared in May. As said before, when looking at the said deletion in the Registrar's certificate along with the journal entry dated 02.06.2003, it is clear that the form which was to be perfected by the Registrar as his certificate was prepared in May and tendered on 02.06.2003 along with the other accompanying documents and, now the Appellants are trying to give a different interpretation to the contents in the journal entry using the date on which the Registrar signed the said Registrar's certificate. Registrar has to sign and prepare the certificate only when he sends the brief to the Appellate court. Thus, the mere fact that the date of the Registrar's Certificate being 07/07/2003 does not establish that the certificate as a draft form that has to be perfected by the Registrar as his certificate was not tendered along with other documents on 02/06/2003 and the said minute dated 02.06.2003 was erroneous.

It appears that the Defendant-Appellants heavily rely on the dates that appear on the accompanying documents that were to be tendered along with the Notice of Appeal. The accompanying documents and the notice of appeal of each appeal evinced following facts;

a) The security bonds of the Defendant-Appellants have been signed on 26/05/2003 and the Registrar has placed his signature and written the date as 26/05/2003.

b) The receipts bearing numbers K/20 557722, K/20557723 issued by the District Court for the payment of cash as security which was annexed to the Notices of Appeal were dated 26/05/2003.

c) Notices of Appeal are dated as 26/05/2003

d) The postal article receipts and the other documentary evidence tendered in proof of posting Notices of Appeal of the Defendant-Appellants indicate that they were done on 26/05/2003.

Since the accompanying documents have to be tendered to court with the Notice of Appeal of the relevant Defendant-Appellant or Appellants, they have to be prepared, signed or posted, as the case may be, prior to the tendering of Notice of Appeal of the relevant party or parties. Therefore, dates on those documents may be the dates that they were prepared, signed or posted and do not prove that the date of tendering the relevant Notice of Appeal is the same date or is a date other than the date the minute was made, namely 02/06/2003.

On the other hand, date stamp on the two Notices of Appeal of 20(a) Defendant-Appellant and 31st, 32nd and 33rd Defendant-Appellants clearly show that they were tendered to District Court only on 02/06/2003. Even the Registrar in his hand writing has made a note on those Notices of Appeal indicating that they

were tendered to the District Court on 02/06/2003 at 10.am. Thus, the facts indicate that the Notices of Appeal were tendered only on 02.06.2003 even though, the accompanying documents and the Notices of Appeal bore the date of 26/05/2003. As said before, since those accompanying documents have to be prepared, signed and posted, as the case may be, prior to the tendering of relevant Notice of Appeal so that they could be tendered with the Notice of Appeal to the Court of first instance, the dates of the accompanying documents could not be used to challenge the correctness of the Journal Entry dated 02/06/2003. Even the Notice of Appeal could bear a different date than the date it was tendered as it has to be prepared before tendering it to Court. What is important is the date it was tendered to court. If the date of the journal entry and the date stamp of the respective Notices of Appeal or Registrar's note on the Notice of Appeal were incorrect, the Appellants could have easily raised it in the original court, so that the learned District Judge could have held an inquiry and decided the correctness of the Journal Entry and the date stamps by questioning the Registrar, while perusing the motion register/book etc. The Judges hearing appeal have to be guided by the entries in the case record and cannot decide on extraneous facts, in the absence of sufficient material to contradict the entries in the record.

After making my observations relating to the facts revealed by the case record as above, now I would refer to the relevant legal provisions and the decided cases in this regard.

In terms of Section 754(4) of the Civil Procedure Code, Notice of Appeal shall be presented to the Court of first instance within a period of 14 days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays. Further, if such conditions are not fulfilled the court shall refuse to receive the Notice of Appeal. It is common ground that the date of judgment is 9/5/2003. 11th, 18th and 25th of the said month were Sundays and 14th, 15th and 16th were public holidays. Since the day on which the petition is presented can be excluded, the Notice of Appeal should have been presented on or before the 30th of May. As mentioned before, the minute dated 02.06.2003 in the case record, the Registrar's hand written note on the Notices of Appeal and the date stamps on the relevant Notices of Appeal evinced that they were presented to the District Court only on 02.06.2003. The Appellants attempted to create a doubt as to the date of presentation of the Notices of Appeal by referring to the dates found on the accompanying documents. As said before they had to be prepared prior to the moment of tendering the relevant Notice of Appeal so that they could be tendered along with the relevant Notice of Appeal.

As argued by the Defendant-Appellants, if the Notices of Appeal were tendered on 26/5/2003, namely the date on which the accompanying documents were made or posted etc. and the minutes dated 02/06/2003 and /or the date stamp and/or Registrar's hand written notes on the Notices of Appeal were incorrect, as said before, it was the duty and responsibility of the Defendant-Appellants' and their lawyers to bring it to the notice of the relevant District Judge who had the opportunity of holding an inquiry in that regard to come to a correct finding on the facts alleged while giving an opportunity for the opposite parties to cross examine the witnesses and place other evidence. If such a step was taken by the Appellants before the District Judge to rectify any alleged error, the High Court Judges or this Court sitting in appeal gets the benefit of such inquiry in evaluating the stance taken by the parties. Mere self-serving statements made during an appeal would not be appropriate to be used to contradict what is recorded

or found in the case record. Afterall, there is a presumption that all judicial and official acts have been regularly performed (See section 114 of the Evidence Ordinance).

The following judgments cited by the Plaintiff-Respondent-Respondents support the position mentioned above.

a) In **Shell Gas Company V All Ceylon Commercial and Industrial Workers Union [1998], 1 Sri LR, 118,** the Court of Appeal held that it is not open to a petitioner to file a convenient and self-serving affidavit for the first time before the Court of Appeal and thereby seek to contradict a judicial or quasi- judicial record and that if a litigant wishes to contradict the record, he ought to file the necessary papers before the court or tribunal of first instance, initiate an inquiry before such authority, obtain an order from the deciding authority of first instance and thereafter raise the matter in appropriate proceedings before the Appeal Court so that the appellate court would be in a position on the material before it to make an appropriate adjudication with the benefit of the order of the deciding authority in the first instance. The decision in **Jayaweera v Asst. Commissioner of Agrarian Services Ratnapura and another [1996] 2 Sri LR, 70,** also expressed a similar view.

b) In **King V. Jayawardena [1947] XLVIII NLR – 497** Dias J**,** in a criminal appeal, referring to decided cases pointed out that the record cannot be contradicted or impeached by affidavits and it would be improper to allow an affidavit to be filed on material point by a person who cannot be cross examined by the opposite parties.

c) In **Vannakar V Urhumalebbe [1996] 2 Sri LR 73 CA** states that if a party had taken such steps to file papers before the presiding officer of the Court of first instance, then an inquiry would be held by him and the self-serving statements and averments would be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the court of appeal would have the benefit of the recorded evidence which has been subjected to cross-examination and the benefit of the findings of the judge of the court of first instance. When such a procedure is not adopted, the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavit to contradict or vary the record.

At this point, I must reiterate the presumption that official and judicial acts have been regularly performed. Thus, this Court has to conclude that the Notices of Appeal were presented to the District Court only on 2/6/2003.

In **Nachchiduwa V Manzoor (1995) 2SLR 273** the Court of Appeal held that the act of the Registered Attorney in tendering the Petition of Appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the Petition of Appeal constitute the presentation of the Petition of Appeal.

No doubt the same principle applies to the presentation of Notice of Appeal. Thus, in my view, the date stamp and the note made by the Registrar on relevant Notices of Appeal are decisive and thus the Notices of Appeal were tendered to Court only on 02.06.2003 which was out of time.

Hence, we cannot find any reason to interfere with the impugned order dated 08.12.2010 by learned High Court Judges of the Civil Appellate High Court of Kurunegala. For the reasons given above, the questions of law (a) and (b) mentioned above are answered in the negative and the question of law (b) has been framed on a wrong premise since the case record confirms that the Notices of Appeal along with the accompanying documents were tendered only on 26.05.2003. Thus, question of law (b) also has to be answered in the negative.

This case seems to have been pending for more than a half a century in our courts. The partition action was filed in1961 and the de novo trial was ordered in Nineteen Nineties and concluded in 2003. Due to the lack of diligence in filing the Notices of Appeal within time by the Defendant Appellants, the learned High court Judges have dismissed the appeals of the Defendant-Appellants. The fault that caused the dismissal by the High Court was of the Defendant Appellants and their lawyers.

I do not see any merit in this appeal. Therefore, I dismiss this appeal while giving the entitlement to the Plaintiff-Respondents to claim taxed costs with an additional Rs. 200000/- as costs of this appeal.

Appeal Dismissed.

……..

Judge of the Supreme Court

Buwaneka Aluwihare P.C., J

I agree.

……

Judge of the Supreme Court

P. Padman Surasena, J

I agree.

……

Judge of the Supreme Court

JULY

2023

JUDGMENTS

JULY INDEX

1.	SC/APPEAL/39/2014	1454
2.	SC/APPEAL/40/2014	1482
3.	SC/APPEAL/90/2021	1510
4.	SC/CHC/23/2008	1529
5.	SC/APPEAL/101/2012	1538
6.	SC/ /54/2015	1555
7.	SC/APPEAL/52/2016	1564
8.	SC/APPEAL/52/2021	1576
9.	SC/APPEAL/160/2014	1591
10.	SC/APPEAL/117/2019	1598
11.	SC/APPEAL/SC/APPEAL/58/2018	1608
12.	SC/APPEAL/SC/APPEAL/83/2021	1618
13.	SC/FR/204/2022	1626
14.	SC/APPEAL/144/2017	1636

15.	SC/APPEAL/81/2013	1642
16.	SC/APPEAL/93/2019	1649
17.	SC/APPEAL/45/2017	1659
18.	SC/FR/442/2016	1680
19.	SC/FR/531/2011	1692
20.	SC/APPEAL/104/2019 and 105/2019 SC/SPL/LA/428/2018 and 429/2018	1709
21.	SC/APPEAL170/2011 SC/SPL/LA/100/2011	1720
22.	SC/182/2019	1748

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

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff

SC APPEAL NO: SC/APPEAL/39/2014
SC LA NO: SC/HCCA/LA/243/2010
HCCA NO: UVA/HCCA/BDL/106/2003 (F)
DC BADULLA CASE NO: L/946

Vs.

Anura Gamage,
No. 03/A, Bandarawela Road,
Badulla.
Defendant

AND BETWEEN

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff-Appellant

Vs.

Anura Gamage,
No. 03/A, Bandarawela Road,
Badulla.
Defendant-Respondent

AND NOW BETWEEN

Bank of Ceylon,
No. 04,
Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff-Appellant-Appellant

Vs.

Anura Gamage,
No. 03/A,
Bandarawela Road,
Badulla.
Defendant-Respondent-Respondent

Before: Vijith K. Malalgoda, P.C., J.
P. Padman Surasena, J.
Mahinda Samayawardhena, J.

Counsel: Jagath Wickramanayake, P.C., with Pujanee De Alwis for the Plaintiff-Appellant-Appellant.

H. Withanachchi with Shantha Karunadhara for the Defendant-Respondent-Respondent.

Argued on : 11.01.2023

Written submissions:

by the Plaintiff-Appellant-Appellant on 28.02.2014 and 13.10.2022.
by the Defendant-Respondent-Respondent on 28.04.2017.

Decided on: 04.07.2023

Samayawardhena, J.

Introduction

The plaintiff (Bank of Ceylon) filed this action in the District Court of Badulla seeking declaration of title to, ejectment of the defendant from, the land described in the second schedule to the plaint, and damages. The defendant filed answer seeking dismissal of the plaintiff's action. After trial, the District Court dismissed the plaintiff's action. On appeal, the High Court of Civil Appeal of Badulla affirmed the judgment of the District Court. Hence this appeal by the plaintiff.

This Court granted leave to appeal against the judgment of the High Court on three questions suggested by the plaintiff (1st to 3rd below) and one suggested by the defendant (4th below). They read as follows:

(1) Did the High Court make a fundamental error in construing the nature of the action in view of the fact that the defendant not having claimed adverse title against the plaintiff?
(2) Did the High Court err with regard to standard of proof in an action for declaration of title when the defendant does not set up adverse title as against the plaintiff?
(3) Did the High Court err in the assessment of the title deed P1 produced at the trial?
(4) Can the plaintiff in a *rei vindicatio* action prove title by mere production of his title deed without predecessor's title being proved as in this action?

There is no issue regarding the identification of the land/premises in suit. No such issue was ever raised in the District Court. Therefore this Court cannot be misled by making submissions on the identification of the land.

The simple case for the plaintiff is that the plaintiff is the owner of the land by deed of transfer marked P1 at the trial and the defendant is in unlawful occupation of the land. He is a trespasser. The deed P1 was not marked subject to proof. The plaintiff did not think it necessary to prove the devolution of title, and rightly so. This is not a partition case to prove the pedigree. The defendant never claimed ownership of the property by deed or by prescription or any other mode. His position was that he occupied the premises in suit as an employee of Browns & Co. on payment of rent and Brown & Co. was closed down on 22.11.1994 and from that day he is not an employee of that company. He further admits that he is in unlawful occupation of the premises since 22.12.1994. He has been paid compensation for the termination of his employment by his former employer and thereafter that amount has been enhanced by the Labour Tribunal. It is clear that he thinks the compensation awarded was inadequate. This is the evidence of the defendant in that regard:

ප්‍ර: 94.11.23 වන දින සිට තමන් බ්‍රවුන් සමාගමේ සේවකයෙක් නොවෙයි?

උ: ඔව්.

ප්‍ර: තමන් කියන විදියට තමන් මේ පැමිණිල්ල විසින් සඳහන් කර තියෙන පරිශ්‍රයේ රැඳී සිටියේ බ්‍රවුන්ස් සමාගමේ සේවකයෙකු හැටියට එහි නිල නිවාසයේ කියා? දැන් කියනවා 94.12.22 සිට සේවකයෙක් නොවෙයි කියා? 94න් පසුව මේ පරිශ්‍රයේ රැඳී සිටින්නේ නීති විරෝධී ලෙස නේද?

උ: ඒ අවස්ථාවේ අපෙන් ඉල්ලුවා නම් අපට ගේ දෙන්න වෙනවා. මම ඒක පිළිගන්නවා. කිසිම ආයතනයකින් අපට දැන්වූවේ නැහැ අපේ නිල නිවස බාර දිය යුතුයි කියා. 94 එහෙම නම් අපට දීලා අයින් වෙන්න තිබුනා.

ප්‍ර: තමන් කියන්නේ ආයතනය ඇවිත් ඉල්ලුවා නම් නම් බාර දෙනවා කියා?

උ: ඔව්.

ප්‍ර: ඒ අනුව තමන් පිළිගත්තා 94 නොවැම්බර් වලින් පසුව ආයතනයෙන් ඇවිත් ගේ ඉල්ලුවා නම් ගේ දෙන්න වෙනවා කියා?

උ: ඔව්.

ප්‍ර: 94 නොවැම්බර් මාසයෙන් පසුව තව දුරටත් එහි රැඳී සිටින්නට තමන්ට නීත්‍යානුකූල අයිතියක් තිබුනේ නැහැ?

උ: නැහැ.

(pages 71-72 of the appeal brief)

In my view, this should end the matter. But unfortunately, the District Court thought that the plaintiff did not prove his title in the manner a plaintiff in a *rei vindicatio* action ought to have proved. What is this standard of proof the District Court expected from the plaintiff and on what basis? The District Court states that the mere production of the title deed of the plaintiff is not sufficient but the plaintiff shall prove his predecessors' title as well. In other words, the plaintiff in a *rei vindicatio* action shall prove the chain of title as in a partition case. In elaborating the basis for this very high standard, citing *Pathirana v. Jayasundera* (1955) 58 NLR 169, the District Judge states that, since a *rei vindicatio* action is filed against the whole world, the plaintiff shall prove title to the property strictly. This is what the District Judge states: "පතිරණ එදිරිව ජයසුන්දර නඩුවේ (58 නව නීති වාර්තා 169) එච්.එන්.ජී ප්‍රනාන්දු විනිසුරුතුමා දැන්වූයේ රේවින්ඩිකාටියෝ නඩුවක පැමිණිල්ල හිමිකම සම්බන්ධ තදබල ලෙස ඔප්පු කළ යුතු බවයි. එමෙන්ම එම නඩුවේදී ග්‍රේෂන් විනිසුරුතුමා දැන්වූයේ රේවින්ඩිකාටියෝ නඩුවක් ලෝකයටම එරෙහිව නිසා හිමිකම් තදබල ලෙස ඔප්පු කළ යුතු බවයි". In reference to the defendant's evidence quoted above, citing *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167, the District Judge states that, in a *rei vindicatio* action, the defendant's evidence can never be used to support the plaintiff's case. The High Court affirmed these findings unhesitatingly. I must state that those findings are misconceived in law. In summary, the correct position is as follows:

(a) A *rei vindicatio* action is not an action filed against the whole world. In modern law, *rei vindicatio* action is an action *in personam* and not an action *in rem* in the popular sense.

(b) In a *rei vindicatio* action, the plaintiff needs only to prove his case on a balance of probabilities, and no higher degree of proof is required.

(c) If there is no challenge, in a *rei vindicatio* action, the mere production of the title deed is sufficient to prove title to the property.

(d) The Court can consider the defendant's evidence in a *rei vindicatio* action.

Let me elaborate on these matters in greater detail.

Burden of proof in a *rei vindicatio* action

The burden of proof in a *rei vindicatio* action is overwhelmingly shrouded in misconceptions and misconstructions.

In order to succeed in a *rei vindicatio* action, first and foremost, the plaintiff shall prove his ownership to the property. If he fails to prove it, his action shall fail. This principle is based on the Latin maxim "*onus probandi incumbit ei qui agit*", which means, the burden of proof lies with the person who brings the action. Section 101 of the Evidence Ordinance is also to a similar effect.

Macdonell C.J. in *De Silva v. Goonetilleke* (1960) 32 NLR 217 at 219 stated:

> *There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action rei vindicatio plaintiff must have ownership actually vested in him". (1 Nathan p. 362, s. 593.) ... The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.*

In *Pathirana v. Jayasundera* (1955) 58 NLR 169 at 172, Gratiaen J. declared:

> *"The plaintiff's ownership of the thing is of the very essence of the action." Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

In *Mansil v. Devaya* [1985] 2 Sri LR 46, G.P.S. De Silva J. (later C.J.) stated at 51:

> *In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership.*

In *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 352, Marsoof J. held:

> *An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title.*

Having said the above, it needs to be emphasised that the plaintiff in a *rei vindicatio* action has no heavier burden to discharge than a plaintiff in any other civil action. The standard of proof in a *rei vindicatio* action is on a balance of probabilities.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition (2007), states at page 539:

> *To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly, the*

> *defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration.*

In *Preethi Anura v. William Silva* (SC/APPEAL/116/2014, SC Minutes of 05.06.2017), the plaintiff filed a *rei vindicatio* action against the defendant seeking a declaration of title to the land in suit and the ejectment of the defendant therefrom. The District Court held with the plaintiff but the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to prove title of the land. The plaintiff's title commenced with a statutory determination made under section 19 of the Land Reform Law in favour of his grandmother, who had bequeathed the land by way of a last will to the plaintiff, with the land being later conveyed to the plaintiff by way of an executor's conveyance. No documentary evidence was tendered to establish that the last will was proved in Court and admitted to probate in order to validate the said executor's conveyance. The District Court was satisfied that the said factors were proved by oral evidence but the High Court found the same insufficient to discharge the burden that rests upon a plaintiff in a *rei vindicatio* action, which the High Court considered to be very heavy. The Supreme Court reversed the judgment of the High Court and restored the judgment of the District Court, taking the view that the plaintiff had proved title to the land despite the purported shortcomings. In the course of the judgment, Dep C.J. (with De Abrew J. and Jayawardena J. agreeing) remarked:

> *In a rei vindicatio action, the plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as*

> *it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the plaintiff discharged the burden on balance of probability.*

What is the degree of proof expected when the standard of proof is on a balance of probabilities? This is better understood when proof on a balance of probabilities is compared with proof on beyond a reasonable doubt.

On proof beyond a reasonable doubt, in *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning declared at 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.*

In relation to proof on a balance of probabilities, it was stated at 374:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.*

In consideration of the degree of proof in a *rei vindicatio* action, we invariably refer to the seminal judgment of *Pathirana v. Jayasundara* (1955) 58 NLR 169. In that case the plaintiff sued the defendant on the

basis that the defendant was an overholding lessee. The defendant admitted the bare execution of the lease but stated that the lessors were unable to give him possession of the land. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment on the footing that his rights of ownership had been violated. The Supreme Court held:

> *A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action rei vindicatio if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title.*

In the course of the judgment the Court distinguished an action for declaration of title (based on the contractual relationship between the plaintiff and the defendant) from an action *rei vindicatio* proper. In general terms, in both actions, a declaration of title is sought – in the former, as a matter of course, without strict proof of title, but in the latter, as a peremptory requirement, with strict proof of title. H.N.G. Fernando J. (later C.J.) at page 171 explained the distinction between the two in this way:

> *There is however the further point that the plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiff's title would be*

> *required, or else is merely one for a declaration (without strict proof) of a title which the tenant by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule in estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a rei vindicatio. But this choice can I think be properly exercised only by clearly setting out the claim of title and sounding in delict.*

The term "strict proof of the plaintiff's title" used here does not mean that the plaintiff in a *rei vindicatio* action shall prove title beyond a reasonable doubt or a very high degree of proof. The term "strict proof of the plaintiff's title" was used here to distinguish the standard of proof between a declaration of title action based on a contractual relationship between the plaintiff and the defendant such as lessor and lessee, and a *rei vindicatio* action proper based on ownership of the property. In a *rei vindicatio* action, if the plaintiff proves on a balance of probabilities that he is the owner, he must succeed.

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, makes it clear at page 304:

> *It must be emphasized, however, that the observations in these cases to the effect that the plaintiff's title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition actions. … It is clear that a standard*

characterized by this degree of severity does not apply to the proof of a plaintiff's title in a rei vindicatory action.

(Justice) Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", Vol 2, International Property Investment Journal 217 at pages 243-244:

In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant. See de Silva v. Gunathilleke, 32 N.L.R. 217 (1931); Abeykoon Hamine v. Appuhamy, 52 N.L.R. 49 (1951); Muthusamy v. Seneviratne, 31 C.L.W. 91 (1946). Once title is established, the burden shifts to the defendant to prove that by adverse possession for a period of 10 years he has acquired prescriptive title. Siyaneris v. Udenis de Silva, 52 N.L.R. 289 (1951). In rei vindicatory action once the plaintiff proves he was in possession but then he was evicted by the defendant, the burden of proving title will shift to the defendant. In Kathiramathamby v. Arumugam 38 C.L.W. 27 (1948) it was held that if the plaintiff alleges that he was forcibly ousted by the defendant the burden of proving ouster remains with the complainant. As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property.

The view of Dr. Tambiah "*As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property*" shall be understood in the context of his view expressed at the outset that "*In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant.*"

The recent South African case of *Huawei Technologies South Africa (Pty) Limited v. Redefine Properties Limited and Another* [2018] ZAGPJHC 403 decided on 29.05.2018 reveals that the burden of proof of a plaintiff in a *rei vindicatio* action is not unusually onerous. In this case it was held that what the plaintiff in a *rei vindicatio* action needs to prove is that he is the owner of the property (which the Court stated could be done by producing his title deed) and that the defendant is holding or in possession of the property. Once this is done, the onus shifts to the defendant to establish a right to continue to hold against the owner. Cele J. declared:

> *The rei vindicatio is the common law real action for the protection of ownership. C.P. Smith, Eviction and Rental Claims: A Practical Guide at p. 1-2; Graham v. Ridley 1931 TPD 476; Chetty v Naidoo 1974 (3) SA 13 (A). It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in possession of the res. The onus is on the Defendant to allege and establish a right to continue to hold against the owner. Chetty v. Naidoo (supra) at 20 A–E. A court does not have an equitable discretion to refuse an order for ejectment on the grounds of equity and fairness. Belmont House v. Gore NNO 2011 (6) SA 173 (WCC) at para [15]. In the case of eviction based on an owner's rei vindicatio, the owner has only to prove his ownership which can be done by producing his title deed indicating that the property is registered in his name. Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd [1999] ZASCA 208; 1993 (1) SA 77 (A) at 82 A–C.*

The requirement of proof of chain of title which is the norm in a partition action is not applicable in a *rei vindicatio* action. If there is no challenge to the title deed of the plaintiff on specific grounds, the plaintiff can prove his ownership to the property by producing his title deed.

This view was expressed by Professor Wille (op. cit. at page 539) when he stated that "*In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name*."

When the standard of proof is on a balance of probabilities, the Court is entitled to consider whose version – the plaintiff's or the defendant's – is more probable.

Banda v. Soyza [1998] 1 Sri LR 255 is a *rei vindicatio* action filed by a trustee of a temple seeking a declaration of title, the ejectment of the defendant and damages. The Court of Appeal set aside the judgment of the District Court and the plaintiff's action was dismissed on the ground that the plaintiff had failed to establish title to the subject matter of the action or even to identify the land in suit. But the Supreme Court set aside the judgment of the Court of Appeal and restored the judgment of the District Court on the basis that there was "*sufficient evidence led on behalf of the plaintiff to prove the title and the identity of the lots in dispute*." G.P.S. de Silva C.J. laid down at page 259 the criterion to be adopted in a *rei vindicatio* action in respect of the standard of proof in the following manner:

> *In a case such as this, the true question that a court has to consider on the question of title is,* ***who has the superior title?*** *The answer has to be reached upon a consideration of the totality of the evidence led in the case.*

Dr. H.W. Tambiah (op. cit. at p. 244) refers to proof of superior title by the defendant as a defence to a *rei vindicatio* action.

> *In a vindicatory action, the defendant has numerous defenses, which include: denial of the plaintiff's title; establishment of his own title, in the sense of establishing a title superior to that of the plaintiff; prescription; a plea of res judicata; right of tenure under the plaintiff – for example usufruct, pledge or lease of land; the right to retain possession subject to an indemnity from the plaintiff under peculiar conditions; a plea of exception rei venditae et traditae; and, ius tertii.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 adverted to **superior title** and **sufficient title** and held that the plaintiff in a *rei vindicatio* action shall prove that he has title to the disputed property and that such title is superior to the title, if any, put forward by the defendant, or that he has sufficient title which he can vindicate against the defendant.

The plaintiff in *Jinawathie*'s case filed a *rei vindicatio* action against the defendants relying upon a statutory determination made under section 19 of the Land Reform Law, No. 1 of 1972. The defendants sought the dismissal of the plaintiff's action on the basis that the alleged statutory determination did not convey any title on the plaintiff and that in the absence of the plaintiff demonstrating dominium over the land, the plaintiff's action shall fail. Both the District Court and the Court of Appeal held with the plaintiff and the Supreme Court affirmed it. Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J., Wanasundera J., Atukorale J., and Tambiah J., whilst emphasising that in a *rei vindicatio* action proper, the plaintiff's ownership of the land is of the very essence of the action, expressed the view of the Supreme Court in the following terms at page 142:

> *This principle was re-affirmed once again by Gratiaen J. in the case of Palisena v. Perera (1954) 56 NLR 407 where the plaintiff came into court to vindicate his title based upon a permit issued under the*

provisions of the Land Development Ordinance (Chap. 320). In giving judgment for the plaintiff, Gratiaen, J. said: "a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser had prevented him from entering upon the land does not afford a defence to the action."

In a vindicatory action the plaintiff must himself have title to the property in dispute: the burden is on the plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the defendant in occupation. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence.

On a consideration of the foregoing principles – relating to the legal concept of ownership, and to an action rei vindicatio – it seems to me that the plaintiff-respondent did, at the time of the institution of these proceedings, have, by virtue of P6 [statutory determination], "sufficient" title which she could have vindicated against the defendants-appellants in proceedings such as these.

In the Supreme Court case of *Khan v. Jayman* [1994] 2 Sri LR 233 the plaintiff sued the defendant for ejectment from the premises in suit and damages on the basis that the defendant was in forcible occupation of the premises after the termination of the leave and licence given to the defendant. The defendant claimed tenancy. The District Court dismissed the plaintiff's action on the basis that the plaintiff failed to establish that the defendant was a licensee and the Court of Appeal affirmed it. On appeal, the Supreme Court held that the plaintiff shall succeed since the defendant failed to establish a "better title" to the property after the plaintiff established his title and the defendant in his evidence admitted

the plaintiff's title. Kulatunga J. with the agreement of G.P.S. De Silva C.J. and Wadugodapitiya J. stated at page 235:

> *The plaintiff did not pray for a declaration of title or raise an issue on ownership, presumably because no challenge to his ownership was anticipated. Indeed the defendant's answer did not deny the plaintiff's title. At the trial, the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title to the premises in suit. This action is, therefore, a vindicatory action i.e. an action founded on ownership. Maasdorp's Institutes of South African Law Vol. II Eighth Edition page 70 commenting on the right of an owner to recover possession of his property states –*
>
> *"The plaintiff's ownership in the thing is the very essence of such an action and will have to be both alleged and proved …"*
>
> *He also states –*
>
> *"The ownership of a thing consists in the exclusive rights of possession … and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession from anyone who cannot set up a* ***better title*** *to it and warn him off the property, and eject him from it".*

The argument of the defendant that he was prejudiced in his defence as the plaintiff did not sue the defendant as the owner of the premises was rejected by the Supreme Court. Kulatunga J. stated at 239:

> *Learned Counsel for the defendant-respondent also submitted that in view of the fact that this was not a case of the plaintiff suing as owner simpliciter and in the absence of an issue on ownership, the defendant would not have known the case he had to meet and was prejudiced in his defence. I cannot agree. As stated early in this*

> *judgment, the plaintiff pleaded his ownership and clearly set out his case, including the fact that the defendant was in occupation of a room of the premises in suit by leave and licence. The defendant too set out his case in unambiguous terms viz. that he was a protected tenant from 1971. In the end, the plaintiff proved his case whilst the defendant failed to establish a better title to the property. As such, the question of prejudice does not arise.*

When the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property.

In *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289 the Privy Council held:

> *In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant.*

In *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222, Sharvananda C.J. stated:

> *In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession.*

This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227 at 229 and reiterated in *Candappa*

nee Bastian v. Ponnambalam Pillai [1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah* [1999] 1 Sri LR 53, *Gunasekera v. Latiff* [1999] 1 Sri LR 365 at 370, *Jayasekera v. Bishop of Kandy* [2002] 2 Sri LR 406 and *Loku Menika v. Gunasekara* [1997] 2 Sri LR 281 at 282-283.

Maasdorp's Institutes of South African Law (Vol II, 8th Edition (1960), p. 27) states the rights of an owner are *"comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition".* He goes on to say that *"these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time".*

As stated in K.J. Aiyar's Judicial Dictionary, 11th Edition (1995), page 833, it is not possible to give a comprehensive definition to the rights of ownership. Traditionally, those rights include:

> *Jus utendi* – the right to use of the thing
> *Jus possidendi* – the right to possess a thing
> *Jus abutendi* – the right to consume or destroy a thing
> *Jus despondendi vei transferendi* – the right to dispose of a thing or to transfer it as by sale, gift, exchange etc.
> *Jus sibi habendi* – the right to hold a thing for oneself
> *Jus alteri non habendi* or *Jus prohibendi* – the right to exclude others from its use

These rights unmistakably point to the conclusion that a person having paper title to the property need not necessarily possess it in order for him to protect his ownership intact. The right to possession is an essential attribute of ownership. Either he can possess it or leave it as it is. That is his choice. He will not lose title to the property if he does not possess it. Conversely, he has the right to exclude others from its use.

In general, in a *rei vindicatio* action the plaintiff's case is based on his paper title whereas the defendant's case is based on prescriptive title. Prescriptive title necessarily commences and continues with violence, hostility, force and illegality. Court should not in my view encourage such illegal conduct. Court must resist converting illegality into legality unless there are cogent and compelling reasons to do so. As stated by Udalagama J. in the Supreme Court case of *Kiriamma v. Podibanda* [2005] BLR 9 at 11 "*considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action.*"

Evidence of the defendant in a *rei vindicatio* action

Whilst emphasising that (a) the initial burden in a *rei vindicatio* action is on the plaintiff to prove ownership of the property in suit and (b) the burden of proof in a *rei vindicatio* action is proof on a balance of probabilities, if the plaintiff in such an action has "sufficient title" or "superior title" or "better title" than that of the defendant, the plaintiff shall succeed. No rule of thumb can be laid down on what circumstances the Court shall hold that the plaintiff has discharged his burden. Whether or not the plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.

In this process, the defendant's evidence need not be treated as illegal, inadmissible or forbidden. The oft-quoted dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167 that "*The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.*" shall not be misinterpreted to equate a defendant in a *rei vindicatio* action with an

accused in a criminal case where *inter alia* his confession made to a police officer is inadmissible and he can remain silent until the prosecution proves its case beyond reasonable doubt.

I must add that even in a criminal case, if a strong *prima facie* case has been made out against the accused by the prosecution, the accused owes an explanation, if it is within the power of him to offer such explanation. This is in consonance with the dictum of Lord Elenborough in *Rex v. Cochrane* (Garney's Reports 479) which is commonly known as Elenborough dictum. In reference to this dictum, Dep J. (later C.J.) in *Ranasinghe v. O.I.C. Police Station, Warakapola* (SC/APPEAL/39/2011, SC Minutes of 02.04.2014) states:

> *This dictum could be applied in cases where there is a strong prima facie case made out against the accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against him.*

The dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy (supra)* is eminently relevant to the facts of that particular case but has no universal application to all *rei vindicatio* actions. Since it is a one-page brief judgment, the facts are not very clear. However, as I understand, the plaintiffs in that case had filed a *rei vindicatio* action against the defendant on the basis that the defendant was a trespasser notwithstanding that he (the defendant) had been in occupation of some portions of the land for some considerable period of time. From the following sentence found in the judgment, "*In this case, the plaintiffs produced a recent deed in their favour and further stated in evidence that they could not take possession of the* ***shares purchased by them*** *because they were resisted by the 1st defendant"*, it is clear that the plaintiffs, if at all, had only undivided rights in the land. It is also clear from the

judgment that whether or not the defendant also had undivided rights was not clear to Court. It is in that context Herat J. states "*The learned District Judge, in his judgment expatiates on the weakness of the defence case; but unfortunately has failed to examine what title, if any, has been established by the plaintiffs.* ***No evidence of title has been established by the plaintiffs in our opinion***."

It may be noted that in *Wanigaratne's* case, the finding of the Supreme Court is that "*No evidence of title has been established by the plaintiffs*". The facts are totally different in the instant case. In the instant case, the plaintiff has established title to the land in suit by deed P1, which title was never challenged by the defendant; nor did the defendant ever make a claim for title to the land. He is admittedly in unlawful occupation.

As this Court held in *Wasantha v. Premaratne* (SC/APPEAL/176/2014, SC Minutes of 17.05.2021), the Court can in a *rei vindicatio* action consider the evidence of the defendant in arriving at the correct conclusion:

> *Notwithstanding that in a rei vindicatio action the burden is on the plaintiff to prove title to the land no matter how fragile the case of the defendant is, the Court is not debarred from taking into consideration the evidence of the defendant in deciding whether or not the plaintiff has proved his title. Not only is the Court not debarred from doing so, it is in fact the duty of the Court to give due regard to the defendant's case, for otherwise there is no purpose in a rei vindicatio action in allowing the defendant to lead evidence when all he seeks is for the dismissal of the plaintiff's action.*

This Court took the same view in *Ashar v. Kareem* (SC/APPEAL/171/2019, SC Minutes of 22.05.2023).

The finding of the District Judge that in a *rei vindicatio* action the Court cannot rely on the defendant's evidence to decide whether the plaintiff has proved his case is unacceptable.

Actio rei vindicatio* and action *in rem

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173 Gratiaen J. states:

> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*

The learned District Judge *inter alia* relying on the above observation of Gratiaen J. states that an action *rei vindicatio* is an action filed against the entire world (action *in rem*) and therefore the plaintiff in a *rei vindicatio* action must prove title to the land very strictly.

The phrase "*in rem*" requires an explanation rather than a definition. The Latin term "*in rem*" derives from the word "*res*", which means "*a thing or an object*" whether movable or immovable. Actions *in rem* were originally used as a means of protecting title to movables, especially slaves, because land was not at first the object of private ownership – Buckland and McNair, *Roman Law and Common Law Comparison* (Cambridge University Press, 1936) p. 6. Also, *in rem* jurisdiction is invoked in maritime cases where a party could bring an action *in rem* against a ship instead of the owner of the ship. It is the ship that suffers the consequences. The owner suffers the consequences if it is an action *in personam.*

Maasdorp's Institutes of South African Law, Vol II, 8th Edition (1960), p.70 states "*The form of action for the recovery of ownership was under the Roman law called vindicatio rei, which was an action in rem, that is, aimed at the recovery of the thing which is in the possession of another, whether such possession was rightfully or wrongfully acquired, together with all its accretions and fruits, and compensation in damages for any loss sustained by the owner through having been deprived of it.*"

Black's Law Dictionary, 11th edition, defines the term "*in rem*" as "*Latin 'against a thing' – Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing.*" It defines the term "*in personam*" as "*Latin 'against a person' – Involving or determining the personal rights and obligations of the parties. (Of a legal action) brought against a person rather than property.*"

The following passage of Dr. H. W. Tambiah (op. cit. p. 242) explains why *rei vindicatio* is an action *in rem*.

> *The primary remedy granted to an owner against the person who disputes his ownership is rei vindicatio. This Roman-Dutch Law remedy has been adopted by the courts in Sri Lanka. Since the owner, as dominus, has a right of possession, occupation and use of the land, this action is in the nature of an action in rem. See Vulcan Rubber Ltd. v. South African Railways and Harbours, 3 S.A. 285 (1958); Hissaias v. Lehman, 4 S.A. 715 (1958). In this type of action, the owner of land whose title is disputed and who has been unlawfully ejected, may bring an action for a declaration of title and ejectment. If the owner has not been ejected but his title is disputed he is entitled to bring a declaratory action to dismiss any disputes to his title. Where an owner is unlawfully ejected he may bring an action for declaration of title for mesne profits, damages and ejectment.*

In the case of *Allis Appu v. Endris Hamy* (1894) 3 SCR 87, Withers J. categorised *rei vindicatio* both as an action *in rem* and action *in personam*:

> *Certain actions of an analogous nature apart, the action rei vindicatio is allowed to the owner and to him alone. Lesion to the right of property is of the very essence of the action and in that respect constitutes it an action in rem. Lesion to the personal right of the true proprietor properly constitutes a claim to compensation for the produce of which he has been deprived by the possessor and in that respect constitutes it an action in personam.*

In classical Roman Law although *actio rei vindicatio* is classified as an action *in rem* as opposed to an action *in personam*, the term "action *in rem*" shall not be understood in the popular sense that we conceive in contemporary society. An action *in rem* means an action against a thing whereas an action *in personam* means an action against a person. A partition action is considered an action *in rem* in that the judgment in a partition action has a binding effect on all persons having interests in the property whether or not joined as parties to the action. It transcends the characteristic of an *inter partes* action and assumes the characteristic of an action *in rem* resulting in title good against the world. The scheme of the Partition Law is designed to serve that purpose. But the entire world is not bound by the judgment in a *rei vindicatio* action. The judgment in a *rei vindicatio* action binds only the parties to the action and their privies. In modern-day legal jargon, *rei vindicatio* is not an action *in rem* but an action *in personam*.

The fact that *rei vindicatio* is not an action *in rem* in the popular sense is reflected in the dicta of Dep C.J. in *Preethi Anura v. William Silva (supra)* where in reference to the standard of proof in a *rei vindicatio* action it was stated "*The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in*

rem and the trial judge is required to carefully examine the title and the devolution of title."

In *Sithy Makeena v. Kuraisha* [2006] 2 Sri LR 341 at 344, Imam J. with Sriskandarajah J. in agreement stated "*It is well-settled law that only the parties to a rei vindicatio action are bound by the decision in such a case, as a rei vindicatio action is an action in personam and not an action in rem.*"

In the Supreme Court case of *Mojith Kumara v. Ariyaratne* (SC/APPEAL/123/2015, SC Minutes of 29.03.2016), the plaintiff filed action seeking declaration of title to the land in suit, ejectment of the defendants therefrom and damages. It was a *rei vindicatio* action proper. The defendants sought dismissal of the plaintiff's action. The plaintiff relied on a decree entered in his favour in a previous *rei vindicatio* action filed against a different party, but in respect of the same land. The District Court dismissed the plaintiff's action on the basis that the defendants before Court were not parties to the previous action and therefore they are not bound by that judgment. On appeal, the High Court set aside the judgment of the District Court and held that the plaintiff can claim ownership to the land on the strength of the previous decree apparently on the basis that *rei vindicatio* is an action *in rem*. The Supreme Court held that the previous action is an action *in personam* and not an action *in rem* and therefore third parties are not bound by that judgment. Chitrasiri J. with the agreement of Aluwihare J. and De Abrew J. held:

> *A decree in a case in which a declaration of title is sought binds only the parties in that action. Such a proposition is not applicable when it comes to a decree in rem which binds the whole world. Effects and consequences of actions in rem and actions in personam are quite different. Action in rem is a proceeding that determines the rights over a particular property that would become conclusive against the*

entire world such as the decisions in courts exercising admiralty jurisdictions and the decisions in partition actions under the partition law of this country. Procedure stipulated in Partition Law contains provisions enabling interested parties to come before courts and to join as parties to the action even though the plaintiff fails to make them as parties to it. Therefore there is a rationale to treat the decrees in partition cases as decrees in rem.

Actions in personam are a type of legal proceedings which can affect the personal rights and interests of the property claimed by the parties to the action. Such actions include an action for breach of contract, the commission of a tort or delict or the possession of property. Where an action in personam is successful, the judgment may be enforced only against the defendant's assets that include real and personal or movable and immovable properties. Therefore, a decree in a rei vindicatio action is considered as a decree that would bind only the parties to the action. In the circumstances, it is clear that the plaintiff cannot rely on the decree in 503/L to establish rights to the property in question as against the defendants in this case are concerned.

Conclusion

I answer the questions of law upon which leave to appeal was granted in the affirmative. The judgments of the District Court and the High Court of Civil Appeal are set aside. The defendant never challenged the evidence of the plaintiff on damages. I direct the District Judge to enter judgment as prayed for in the prayer to the plaint. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

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

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff

SC APPEAL NO: SC/APPEAL/40/2014
SC LA NO: SC/HCCA/LA/244/2010
HCCA NO: UVA/HCCA/BDL/82/2003 (F)
DC BADULLA CASE NO: L/947

Vs.

A.C. Rajasingham,
No. 03/C, Bandarawela Road,
Badulla.
Defendant

AND BETWEEN

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff-Appellant

Vs.

A.C. Rajasingham,
No. 03/C, Bandarawela Road,
Badulla.
Defendant-Respondent

AND NOW BETWEEN

Bank of Ceylon,
No. 04, Bank of Ceylon Mawatha,
Colombo 01.
Plaintiff-Appellant-Appellant

Vs.

A.C. Rajasingham,
No. 03/C, Bandarawela Road,
Badulla.
Defendant-Respondent-Respondent
(deceased)

1. Jenita Margret Swarnabai,
   Rajasingham nee Rajamoni,
   No. 03, Bandarawela Road, Badulla.
2. Amanda Priyadarshani Rajasingham,
   No. 03, Bandarawela Road, Badulla.
3. Aaron Dhayalan Rajasingham,
   Presently at Flat 16 Building 8,
   Al Kharaib, Street 920, Najma,
   Doha Qatar.
   Substituted Defendant-Respondent-
   Respondents

Before: Vijith K. Malalgoda, P.C., J.
P. Padman Surasena, J.
Mahinda Samayawardhena, J.

Counsel: Jagath Wickramanayake, P.C., with Pujanee De Alwis for the Plaintiff-Appellant-Appellant.

H. Withanachchi with Shantha Karunadhara for the Defendant-Respondent-Respondent.

Argued on : 11.01.2023

Written submissions:

by the Plaintiff-Appellant-Appellant on 28.02.2014 and 13.10.2022

by the Defendant-Respondent-Respondent on 28.04.2017.

Decided on: 04.07.2023

Samayawardhena, J.

Introduction

The plaintiff (Bank of Ceylon) filed this action in the District Court of Badulla seeking declaration of title to, ejectment of the defendant from, the land described in the second schedule to the plaint, and damages. The defendant filed answer seeking dismissal of the plaintiff's action. After trial, the District Court dismissed the plaintiff's action. On appeal, the High Court of Civil Appeal of Badulla affirmed the judgment of the District Court. Hence this appeal by the plaintiff.

This Court granted leave to appeal against the judgment of the High Court on three questions suggested by the plaintiff (1st to 3rd below) and one suggested by the defendant (4th below). They read as follows:

(1) Did the High Court make a fundamental error in construing the nature of the action in view of the fact that the defendant not having claimed adverse title against the plaintiff?

(2) Did the High Court err with regard to standard of proof in an action for declaration of title when the defendant does not set up adverse title as against the plaintiff?
(3) Did the High Court err in the assessment of the title deed P1 produced at the trial?
(4) Can the plaintiff in a *rei vindicatio* action prove title by mere production of his title deed without predecessor's title being proved as in this action?

There is no issue regarding the identification of the land/premises in suit. No such issue was ever raised in the District Court. Therefore this Court cannot be misled by making submissions on the identification of the land.

The simple case for the plaintiff is that the plaintiff is the owner of the land by deed of transfer marked P1 at the trial and the defendant is in unlawful occupation of the land. He is a trespasser. The deed P1 was not marked subject to proof. The plaintiff did not think it necessary to prove the devolution of title, and rightly so. This is not a partition case to prove the pedigree. The defendant never claimed ownership of the property by deed or by prescription or any other mode. His position was that he occupied the premises in suit as an employee of Browns & Co. on payment of rent and Brown & Co. was closed down on 22.11.1994 and from that day he is not an employee of that company. He further admits that he is in unlawful occupation of the premises since 22.12.1994. He has been paid compensation for the termination of his employment by his former employer and thereafter that amount has been enhanced by the Labour Tribunal. It is clear that he thinks the compensation awarded was inadequate. This is the evidence of the defendant in that regard:

ප්‍ර: 1994 නොවැම්බර් මාසේ මොකද්ද සිදු වුනේ?

උ: බ්‍රවුන් සහ සමාගම වැහුවා. අපි තවදුරටත් එහි සේවකයන් නොවන බවට දැන්වූවා.

ප්‍ර: එහෙම නම් 94 නොවැම්බර් මාසෙන් පසුව ඔබ බ්‍රවුන් සමාගමේ තවදුරටත් සේවකයෙක් නොවන බවයි කියන්නේ?

උ: ඔව්.

ප්‍ර: ඔබ මෙම පරිශ්‍රයේ රැඳී සිටියේ බ්‍රවුන් සහ සමාගම සේවකයෙක් වශයෙන් නේද?

උ: ඔව්.

ප්‍ර: මම ඔබට යෝජනා කරනවා ඔබ බ්‍රවුන් සහ සමාගමේ සේවකයෙක් ලෙස කටයුතු කිරීම අවසන් වුනාට පසුව තවදුරටත් ඔබට නීත්‍යානුකූල අයිතියක් නැහැ කියා මෙම ස්ථානයේ රැඳී සිටීමට?

උ: ඔව්.

ප්‍ර: 1992 වසර සඳහා වූ වැටුප් ලැයිස්තු වී.1අ, වී.1ආ, වී.1ඇ වශයෙන් ලකුණු කරපු ලේඛණ 92 වර්ෂ සම්බන්ධයෙන් නිකුත් කළ ඒවා?

උ: ඔව්.

ප්‍ර: මම යෝජනා කරනවා නඩුවට අදාල ස්ථානයේ ඔබට පදිංචිවීමට තවදුරටත් නීත්‍යානුකූල කිසිම අයිතියක් නැහැ කියා?

උ: වෙන්න පුළුවන්.

(pages 59-60 of the appeal brief)

In my view, this should end the matter. But unfortunately, the District Court thought that the plaintiff did not prove his title in the manner a plaintiff in a *rei vindicatio* action ought to have proved. What is this standard of proof the District Court expected from the plaintiff and on what basis? The District Court states that the mere production of the title deed of the plaintiff is not sufficient but the plaintiff shall prove his predecessors' title as well. In other words, the plaintiff in a *rei vindicatio* action shall prove the chain of title as in a partition case. In elaborating the basis for this very high standard, citing *Pathirana v. Jayasundera* (1955) 58 NLR 169, the District Judge states that, since a *rei vindicatio* action is filed against the whole world, the plaintiff shall prove title to the property strictly. This is what the District Judge states: "පතිරණ එදිරිව ජයසුන්දර නඩුවේ (58 නව නීති වාර්තා 169) එච්.එන්.ජී ප්‍රනාන්දු විනිසුරුතුමා දැන්වූයේ රේවින්ඩිකාටියෝ නඩුවක පැමිණිල්ල හිමිකම සම්බන්ධ තදබල ලෙස ඔප්පු කළ යුතු බවයි.

එමෙන්ම එම නඩුවේදී ශ්‍රේෂන් විනිසුරුතුමා දැන්වූයේ රේවින්ඩිකාටියෝ නඩුවක් ලෝකයටම එරෙහිව නිසා හිමිකම් තදබල ලෙස ඔප්පු කළ යුතු බවයි". In reference to the defendant's evidence quoted above, citing *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167, the District Judge states that, in a *rei vindicatio* action, the defendant's evidence can never be used to support the plaintiff's case. The High Court affirmed these findings unhesitatingly. I must state that those findings are misconceived in law. In summary, the correct position is as follows:

(a) A *rei vindicatio* action is not an action filed against the whole world. In modern law, *rei vindicatio* action is an action *in personam* and not an action *in rem* in the popular sense.
(b) In a *rei vindicatio* action, the plaintiff needs only to prove his case on a balance of probabilities, and no higher degree of proof is required.
(c) If there is no challenge, in a *rei vindicatio* action, the mere production of the title deed is sufficient to prove title to the property.
(d) The Court can consider the defendant's evidence in a *rei vindicatio* action.

Let me elaborate on these matters in greater detail.

Burden of proof in a *rei vindicatio* action

The burden of proof in a *rei vindicatio* action is overwhelmingly shrouded in misconceptions and misconstructions.

In order to succeed in a *rei vindicatio* action, first and foremost, the plaintiff shall prove his ownership to the property. If he fails to prove it, his action shall fail. This principle is based on the Latin maxim "*onus probandi incumbit ei qui agit*", which means, the burden of proof lies with

the person who brings the action. Section 101 of the Evidence Ordinance is also to a similar effect.

Macdonell C.J. in *De Silva v. Goonetilleke* (1960) 32 NLR 217 at 219 stated:

> *There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action rei vindicatio plaintiff must have ownership actually vested in him". (1 Nathan p. 362, s. 593.) ... The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.*

In *Pathirana v. Jayasundera* (1955) 58 NLR 169 at 172, Gratiaen J. declared:

> *"The plaintiff's ownership of the thing is of the very essence of the action." Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

In *Mansil v. Devaya* [1985] 2 Sri LR 46, G.P.S. De Silva J. (later C.J.) stated at 51:

> *In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership.*

In *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 352, Marsoof J. held:

> *An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title.*

Having said the above, it needs to be emphasised that the plaintiff in a *rei vindicatio* action has no heavier burden to discharge than a plaintiff in any other civil action. The standard of proof in a *rei vindicatio* action is on a balance of probabilities.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition (2007), states at page 539:

> *To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration.*

In *Preethi Anura v. William Silva* (SC/APPEAL/116/2014, SC Minutes of 05.06.2017), the plaintiff filed a *rei vindicatio* action against the defendant seeking a declaration of title to the land in suit and the ejectment of the defendant therefrom. The District Court held with the plaintiff but the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to prove title of the land. The plaintiff's title commenced with a statutory determination made under section 19 of the Land Reform Law in favour of his grandmother, who had bequeathed the land by way of a last will to the plaintiff, with the land being later conveyed to the plaintiff by way of an executor's conveyance. No documentary evidence was tendered to establish that the last will was proved in Court and admitted to probate in order to validate the said executor's conveyance. The District Court was satisfied that the said factors were proved by oral evidence but the High Court found the same insufficient to discharge the burden that rests upon a plaintiff in a

rei vindicatio action, which the High Court considered to be very heavy. The Supreme Court reversed the judgment of the High Court and restored the judgment of the District Court, taking the view that the plaintiff had proved title to the land despite the purported shortcomings. In the course of the judgment, Dep C.J. (with De Abrew J. and Jayawardena J. agreeing) remarked:

> *In a rei vindicatio action, the plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the plaintiff discharged the burden on balance of probability.*

What is the degree of proof expected when the standard of proof is on a balance of probabilities? This is better understood when proof on a balance of probabilities is compared with proof on beyond a reasonable doubt.

On proof beyond a reasonable doubt, in *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning declared at 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is*

> *proved beyond reasonable doubt, but nothing short of that will suffice.*

In relation to proof on a balance of probabilities, it was stated at 374:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.*

In consideration of the degree of proof in a *rei vindicatio* action, we invariably refer to the seminal judgment of *Pathirana v. Jayasundara* (1955) 58 NLR 169. In that case the plaintiff sued the defendant on the basis that the defendant was an overholding lessee. The defendant admitted the bare execution of the lease but stated that the lessors were unable to give him possession of the land. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment on the footing that his rights of ownership had been violated. The Supreme Court held:

> *A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action rei vindicatio if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title*.

In the course of the judgment the Court distinguished an action for declaration of title (based on the contractual relationship between the plaintiff and the defendant) from an action *rei vindicatio* proper. In

general terms, in both actions, a declaration of title is sought – in the former, as a matter of course, without strict proof of title, but in the latter, as a peremptory requirement, with strict proof of title. H.N.G. Fernando J. (later C.J.) at page 171 explained the distinction between the two in this way:

> *There is however the further point that the plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule in estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a rei vindicatio. But this choice can I think be properly exercised only by clearly setting out the claim of title and sounding in delict.*

The term "strict proof of the plaintiff's title" used here does not mean that the plaintiff in a *rei vindicatio* action shall prove title beyond a reasonable doubt or a very high degree of proof. The term "strict proof of the plaintiff's title" was used here to distinguish the standard of proof between a declaration of title action based on a contractual relationship between the plaintiff and the defendant such as lessor and lessee, and a *rei*

vindicatio action proper based on ownership of the property. In a *rei vindicatio* action, if the plaintiff proves on a balance of probabilities that he is the owner, he must succeed.

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, makes it clear at page 304:

> *It must be emphasized, however, that the observations in these cases to the effect that the plaintiff's title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition actions. … It is clear that a standard characterized by this degree of severity does not apply to the proof of a plaintiff's title in a rei vindicatory action.*

(Justice) Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", Vol 2, International Property Investment Journal 217 at pages 243-244:

> *In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant. See de Silva v. Gunathilleke, 32 N.L.R. 217 (1931); Abeykoon Hamine v. Appuhamy, 52 N.L.R. 49 (1951); Muthusamy v. Seneviratne, 31 C.L.W. 91 (1946). Once title is established, the burden shifts to the defendant to prove that by adverse possession for a period of 10 years he has acquired prescriptive title. Siyaneris v. Udenis de Silva, 52 N.L.R. 289 (1951). In rei vindicatory action once the plaintiff proves he was in possession but then he was evicted by the defendant, the burden of proving title will shift to the defendant. In Kathiramathamby v. Arumugam 38 C.L.W. 27 (1948) it was held that if the plaintiff alleges that he was forcibly ousted by the*

> *defendant the burden of proving ouster remains with the complainant. As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property.*

The view of Dr. Tambiah "*As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property*" shall be understood in the context of his view expressed at the outset that "*In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant.*"

The recent South African case of *Huawei Technologies South Africa (Pty) Limited v. Redefine Properties Limited and Another* [2018] ZAGPJHC 403 decided on 29.05.2018 reveals that the burden of proof of a plaintiff in a *rei vindicatio* action is not unusually onerous. In this case it was held that what the plaintiff in a *rei vindicatio* action needs to prove is that he is the owner of the property (which the Court stated could be done by producing his title deed) and that the defendant is holding or in possession of the property. Once this is done, the onus shifts to the defendant to establish a right to continue to hold against the owner. Cele J. declared:

> *The rei vindicatio is the common law real action for the protection of ownership. C.P. Smith, Eviction and Rental Claims: A Practical Guide at p. 1-2; Graham v. Ridley 1931 TPD 476; Chetty v Naidoo 1974 (3) SA 13 (A). It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in*

possession of the res. The onus is on the Defendant to allege and establish a right to continue to hold against the owner. Chetty v. Naidoo (supra) at 20 A–E. A court does not have an equitable discretion to refuse an order for ejectment on the grounds of equity and fairness. Belmont House v. Gore NNO 2011 (6) SA 173 (WCC) at para [15]. In the case of eviction based on an owner's rei vindicatio, the owner has only to prove his ownership which can be done by producing his title deed indicating that the property is registered in his name. Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd [1999] ZASCA 208; 1993 (1) SA 77 (A) at 82 A–C.

The requirement of proof of chain of title which is the norm in a partition action is not applicable in a *rei vindicatio* action. If there is no challenge to the title deed of the plaintiff on specific grounds, the plaintiff can prove his ownership to the property by producing his title deed.

This view was expressed by Professor Wille (op. cit. at page 539) when he stated that "*In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name*."

When the standard of proof is on a balance of probabilities, the Court is entitled to consider whose version – the plaintiff's or the defendant's – is more probable.

Banda v. Soyza [1998] 1 Sri LR 255 is a *rei vindicatio* action filed by a trustee of a temple seeking a declaration of title, the ejectment of the defendant and damages. The Court of Appeal set aside the judgment of the District Court and the plaintiff's action was dismissed on the ground that the plaintiff had failed to establish title to the subject matter of the action or even to identify the land in suit. But the Supreme Court set aside the judgment of the Court of Appeal and restored the judgment of the District Court on the basis that there was "*sufficient evidence led on*

behalf of the plaintiff to prove the title and the identity of the lots in dispute." G.P.S. de Silva C.J. laid down at page 259 the criterion to be adopted in a *rei vindicatio* action in respect of the standard of proof in the following manner:

> *In a case such as this, the true question that a court has to consider on the question of title is,* ***who has the superior title?*** *The answer has to be reached upon a consideration of the totality of the evidence led in the case.*

Dr. H.W. Tambiah (op. cit. at p. 244) refers to proof of superior title by the defendant as a defence to a *rei vindicatio* action.

> *In a vindicatory action, the defendant has numerous defenses, which include: denial of the plaintiff's title; establishment of his own title, in the sense of establishing a title superior to that of the plaintiff; prescription; a plea of res judicata; right of tenure under the plaintiff – for example usufruct, pledge or lease of land; the right to retain possession subject to an indemnity from the plaintiff under peculiar conditions; a plea of exception rei venditae et traditae; and, ius tertii.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 adverted to **superior title** and **sufficient title** and held that the plaintiff in a *rei vindicatio* action shall prove that he has title to the disputed property and that such title is superior to the title, if any, put forward by the defendant, or that he has sufficient title which he can vindicate against the defendant.

The plaintiff in *Jinawathie*'s case filed a *rei vindicatio* action against the defendants relying upon a statutory determination made under section 19 of the Land Reform Law, No. 1 of 1972. The defendants sought the dismissal of the plaintiff's action on the basis that the alleged statutory determination did not convey any title on the plaintiff and that in the

absence of the plaintiff demonstrating dominium over the land, the plaintiff's action shall fail. Both the District Court and the Court of Appeal held with the plaintiff and the Supreme Court affirmed it. Ranasinghe J. (later C.J.) with the agreement of Sharvananda C.J., Wanasundera J., Atukorale J., and Tambiah J., whilst emphasising that in a *rei vindicatio* action proper, the plaintiff's ownership of the land is of the very essence of the action, expressed the view of the Supreme Court in the following terms at page 142:

> *This principle was re-affirmed once again by Gratiaen J. in the case of Palisena v. Perera (1954) 56 NLR 407 where the plaintiff came into court to vindicate his title based upon a permit issued under the provisions of the Land Development Ordinance (Chap. 320). In giving judgment for the plaintiff, Gratiaen, J. said: "a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser had prevented him from entering upon the land does not afford a defence to the action."*
>
> *In a vindicatory action the plaintiff must himself have title to the property in dispute: the burden is on the plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the defendant in occupation. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence.*
>
> *On a consideration of the foregoing principles – relating to the legal concept of ownership, and to an action rei vindicatio – it seems to me that the plaintiff-respondent did, at the time of the institution of these proceedings, have, by virtue of P6 [statutory determination], "sufficient" title which she could have vindicated against the defendants-appellants in proceedings such as these.*

In the Supreme Court case of *Khan v. Jayman* [1994] 2 Sri LR 233 the plaintiff sued the defendant for ejectment from the premises in suit and damages on the basis that the defendant was in forcible occupation of the premises after the termination of the leave and licence given to the defendant. The defendant claimed tenancy. The District Court dismissed the plaintiff's action on the basis that the plaintiff failed to establish that the defendant was a licensee and the Court of Appeal affirmed it. On appeal, the Supreme Court held that the plaintiff shall succeed since the defendant failed to establish a "better title" to the property after the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title. Kulatunga J. with the agreement of G.P.S. De Silva C.J. and Wadugodapitiya J. stated at page 235:

> *The plaintiff did not pray for a declaration of title or raise an issue on ownership, presumably because no challenge to his ownership was anticipated. Indeed the defendant's answer did not deny the plaintiff's title. At the trial, the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title to the premises in suit. This action is, therefore, a vindicatory action i.e. an action founded on ownership. Maasdorp's Institutes of South African Law Vol. II Eighth Edition page 70 commenting on the right of an owner to recover possession of his property states –*
>
> *"The plaintiff's ownership in the thing is the very essence of such an action and will have to be both alleged and proved …"*
>
> *He also states –*
>
> *"The ownership of a thing consists in the exclusive rights of possession … and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession*

> *from anyone who cannot set up a **better title** to it and warn him off the property, and eject him from it".*

The argument of the defendant that he was prejudiced in his defence as the plaintiff did not sue the defendant as the owner of the premises was rejected by the Supreme Court. Kulatunga J. stated at 239:

> *Learned Counsel for the defendant-respondent also submitted that in view of the fact that this was not a case of the plaintiff suing as owner simpliciter and in the absence of an issue on ownership, the defendant would not have known the case he had to meet and was prejudiced in his defence. I cannot agree. As stated early in this judgment, the plaintiff pleaded his ownership and clearly set out his case, including the fact that the defendant was in occupation of a room of the premises in suit by leave and licence. The defendant too set out his case in unambiguous terms viz. that he was a protected tenant from 1971. In the end, the plaintiff proved his case whilst the defendant failed to establish a better title to the property. As such, the question of prejudice does not arise.*

When the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property.

In *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289 the Privy Council held:

> *In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant.*

In *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222, Sharvananda C.J. stated:

> *In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession.*

This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227 at 229 and reiterated in *Candappa nee Bastian v. Ponnambalam Pillai* [1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah* [1999] 1 Sri LR 53, *Gunasekera v. Latiff* [1999] 1 Sri LR 365 at 370, *Jayasekera v. Bishop of Kandy* [2002] 2 Sri LR 406 and *Loku Menika v. Gunasekara* [1997] 2 Sri LR 281 at 282-283.

Maasdorp's Institutes of South African Law (Vol II, 8th Edition (1960), p. 27) states the rights of an owner are *"comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition"*. He goes on to say that *"these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time"*.

As stated in K.J. Aiyar's Judicial Dictionary, 11th Edition (1995), page 833, it is not possible to give a comprehensive definition to the rights of ownership. Traditionally, those rights include:

> *Jus utendi* – the right to use of the thing
> *Jus possidendi* – the right to possess a thing
> *Jus abutendi* – the right to consume or destroy a thing

Jus despondendi vei transferendi – the right to dispose of a thing or to transfer it as by sale, gift, exchange etc.
Jus sibi habendi – the right to hold a thing for oneself
Jus alteri non habendi or *Jus prohibendi* – the right to exclude others from its use

These rights unmistakably point to the conclusion that a person having paper title to the property need not necessarily possess it in order for him to protect his ownership intact. The right to possession is an essential attribute of ownership. Either he can possess it or leave it as it is. That is his choice. He will not lose title to the property if he does not possess it. Conversely, he has the right to exclude others from its use.

In general, in a *rei vindicatio* action the plaintiff's case is based on his paper title whereas the defendant's case is based on prescriptive title. Prescriptive title necessarily commences and continues with violence, hostility, force and illegality. Court should not in my view encourage such illegal conduct. Court must resist converting illegality into legality unless there are cogent and compelling reasons to do so. As stated by Udalagama J. in the Supreme Court case of *Kiriamma v. Podibanda* [2005] BLR 9 at 11 "*considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action.*"

Evidence of the defendant in a *rei vindicatio* action

Whilst emphasising that (a) the initial burden in a *rei vindicatio* action is on the plaintiff to prove ownership of the property in suit and (b) the burden of proof in a *rei vindicatio* action is proof on a balance of probabilities, if the plaintiff in such an action has "sufficient title" or "superior title" or "better title" than that of the defendant, the plaintiff

shall succeed. No rule of thumb can be laid down on what circumstances the Court shall hold that the plaintiff has discharged his burden. Whether or not the plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.

In this process, the defendant's evidence need not be treated as illegal, inadmissible or forbidden. The oft-quoted dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167 that "*The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.*" shall not be misinterpreted to equate a defendant in a *rei vindicatio* action with an accused in a criminal case where *inter alia* his confession made to a police officer is inadmissible and he can remain silent until the prosecution proves its case beyond reasonable doubt.

I must add that even in a criminal case, if a strong *prima facie* case has been made out against the accused by the prosecution, the accused owes an explanation, if it is within the power of him to offer such explanation. This is in consonance with the dictum of Lord Elenborough in *Rex v. Cochrane* (Garney's Reports 479) which is commonly known as Elenborough dictum. In reference to this dictum, Dep J. (later C.J.) in *Ranasinghe v. O.I.C. Police Station, Warakapola* (SC/APPEAL/39/2011, SC Minutes of 02.04.2014) states:

> *This dictum could be applied in cases where there is a strong prima facie case made out against the accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against him.*

The dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy (supra)* is eminently relevant to the facts of that particular case but has no universal application to all *rei vindicatio* actions. Since it is a one-page brief judgment, the facts are not very clear. However, as I understand, the plaintiffs in that case had filed a *rei vindicatio* action against the defendant on the basis that the defendant was a trespasser notwithstanding that he (the defendant) had been in occupation of some portions of the land for some considerable period of time. From the following sentence found in the judgment, "*In this case, the plaintiffs produced a recent deed in their favour and further stated in evidence that they could not take possession of the* ***shares purchased by them*** *because they were resisted by the 1st defendant"*, it is clear that the plaintiffs, if at all, had only undivided rights in the land. It is also clear from the judgment that whether or not the defendant also had undivided rights was not clear to Court. It is in that context Herat J. states "*The learned District Judge, in his judgment expatiates on the weakness of the defence case; but unfortunately has failed to examine what title, if any, has been established by the plaintiffs.* ***No evidence of title has been established by the plaintiffs in our opinion***."

It may be noted that in *Wanigaratne's* case, the finding of the Supreme Court is that "*No evidence of title has been established by the plaintiffs*". The facts are totally different in the instant case. In the instant case, the plaintiff has established title to the land in suit by deed P1, which title was never challenged by the defendant; nor did the defendant ever make a claim for title to the land. He is admittedly in unlawful occupation.

As this Court held in *Wasantha v. Premaratne* (SC/APPEAL/176/2014, SC Minutes of 17.05.2021), the Court can in a *rei vindicatio* action consider the evidence of the defendant in arriving at the correct conclusion:

> *Notwithstanding that in a rei vindicatio action the burden is on the plaintiff to prove title to the land no matter how fragile the case of the defendant is, the Court is not debarred from taking into consideration the evidence of the defendant in deciding whether or not the plaintiff has proved his title. Not only is the Court not debarred from doing so, it is in fact the duty of the Court to give due regard to the defendant's case, for otherwise there is no purpose in a rei vindicatio action in allowing the defendant to lead evidence when all he seeks is for the dismissal of the plaintiff's action.*

This Court took the same view in *Ashar v. Kareem* (SC/APPEAL/171/2019, SC Minutes of 22.05.2023).

The finding of the District Judge that in a *rei vindicatio* action the Court cannot rely on the defendant's evidence to decide whether the plaintiff has proved his case is unacceptable.

Actio rei vindicatio* and action *in rem

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173 Gratiaen J. states:

> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*

The learned District Judge *inter alia* relying on the above observation of Gratiaen J. states that an action *rei vindicatio* is an action filed against the entire world (action *in rem*) and therefore the plaintiff in a *rei vindicatio* action must prove title to the land very strictly.

The phrase "*in rem*" requires an explanation rather than a definition. The Latin term "*in rem*" derives from the word "*res*", which means "*a thing or an object*" whether movable or immovable. Actions *in rem* were originally used as a means of protecting title to movables, especially slaves, because land was not at first the object of private ownership – Buckland and McNair, *Roman Law and Common Law Comparison* (Cambridge University Press, 1936) p. 6. Also, *in rem* jurisdiction is invoked in maritime cases where a party could bring an action *in rem* against a ship instead of the owner of the ship. It is the ship that suffers the consequences. The owner suffers the consequences if it is an action *in personam*.

Maasdorp's Institutes of South African Law, Vol II, 8th Edition (1960), p.70 states "*The form of action for the recovery of ownership was under the Roman law called vindicatio rei, which was an action in rem, that is, aimed at the recovery of the thing which is in the possession of another, whether such possession was rightfully or wrongfully acquired, together with all its accretions and fruits, and compensation in damages for any loss sustained by the owner through having been deprived of it*."

Black's Law Dictionary, 11th edition, defines the term "*in rem*" as "*Latin 'against a thing' – Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing*." It defines the term "*in personam*" as "*Latin 'against a person' – Involving or determining the personal rights and obligations of the parties. (Of a legal action) brought against a person rather than property*."

The following passage of Dr. H. W. Tambiah (op. cit. p. 242) explains why *rei vindicatio* is an action *in rem*.

> *The primary remedy granted to an owner against the person who disputes his ownership is rei vindicatio. This Roman-Dutch Law*

> *remedy has been adopted by the courts in Sri Lanka. Since the owner, as dominus, has a right of possession, occupation and use of the land, this action is in the nature of an action in rem. See Vulcan Rubber Ltd. v. South African Railways and Harbours, 3 S.A. 285 (1958); Hissaias v. Lehman, 4 S.A. 715 (1958). In this type of action, the owner of land whose title is disputed and who has been unlawfully ejected, may bring an action for a declaration of title and ejectment. If the owner has not been ejected but his title is disputed he is entitled to bring a declaratory action to dismiss any disputes to his title. Where an owner is unlawfully ejected he may bring an action for declaration of title for mesne profits, damages and ejectment.*

In the case of *Allis Appu v. Endris Hamy* (1894) 3 SCR 87, Withers J. categorised *rei vindicatio* both as an action *in rem* and action *in personam*:

> *Certain actions of an analogous nature apart, the action rei vindicatio is allowed to the owner and to him alone. Lesion to the right of property is of the very essence of the action and in that respect constitutes it an action in rem. Lesion to the personal right of the true proprietor properly constitutes a claim to compensation for the produce of which he has been deprived by the possessor and in that respect constitutes it an action in personam.*

In classical Roman Law although *actio rei vindicatio* is classified as an action *in rem* as opposed to an action *in personam*, the term "action *in rem*" shall not be understood in the popular sense that we conceive in contemporary society. An action *in rem* means an action against a thing whereas an action *in personam* means an action against a person. A partition action is considered an action *in rem* in that the judgment in a partition action has a binding effect on all persons having interests in the property whether or not joined as parties to the action. It transcends the

characteristic of an *inter partes* action and assumes the characteristic of an action *in rem* resulting in title good against the world. The scheme of the Partition Law is designed to serve that purpose. But the entire world is not bound by the judgment in a *rei vindicatio* action. The judgment in a *rei vindicatio* action binds only the parties to the action and their privies. In modern-day legal jargon, *rei vindicatio* is not an action *in rem* but an action *in personam*.

The fact that *rei vindicatio* is not an action *in rem* in the popular sense is reflected in the dicta of Dep C.J. in *Preethi Anura v. William Silva (supra)* where in reference to the standard of proof in a *rei vindicatio* action it was stated "*The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title.*"

In *Sithy Makeena v. Kuraisha* [2006] 2 Sri LR 341 at 344, Imam J. with Sriskandarajah J. in agreement stated "*It is well-settled law that only the parties to a rei vindicatio action are bound by the decision in such a case, as a rei vindicatio action is an action in personam and not an action in rem.*"

In the Supreme Court case of *Mojith Kumara v. Ariyaratne* (SC/APPEAL/123/2015, SC Minutes of 29.03.2016), the plaintiff filed action seeking declaration of title to the land in suit, ejectment of the defendants therefrom and damages. It was a *rei vindicatio* action proper. The defendants sought dismissal of the plaintiff's action. The plaintiff relied on a decree entered in his favour in a previous *rei vindicatio* action filed against a different party, but in respect of the same land. The District Court dismissed the plaintiff's action on the basis that the defendants before Court were not parties to the previous action and therefore they are not bound by that judgment. On appeal, the High Court set aside the

judgment of the District Court and held that the plaintiff can claim ownership to the land on the strength of the previous decree apparently on the basis that *rei vindicatio* is an action *in rem*. The Supreme Court held that the previous action is an action *in personam* and not an action *in rem* and therefore third parties are not bound by that judgment. Chitrasiri J. with the agreement of Aluwihare J. and De Abrew J. held:

> *A decree in a case in which a declaration of title is sought binds only the parties in that action. Such a proposition is not applicable when it comes to a decree in rem which binds the whole world. Effects and consequences of actions in rem and actions in personam are quite different. Action in rem is a proceeding that determines the rights over a particular property that would become conclusive against the entire world such as the decisions in courts exercising admiralty jurisdictions and the decisions in partition actions under the partition law of this country. Procedure stipulated in Partition Law contains provisions enabling interested parties to come before courts and to join as parties to the action even though the plaintiff fails to make them as parties to it. Therefore there is a rationale to treat the decrees in partition cases as decrees in rem.*
>
> *Actions in personam are a type of legal proceedings which can affect the personal rights and interests of the property claimed by the parties to the action. Such actions include an action for breach of contract, the commission of a tort or delict or the possession of property. Where an action in personam is successful, the judgment may be enforced only against the defendant's assets that include real and personal or movable and immovable properties. Therefore, a decree in a rei vindicatio action is considered as a decree that would bind only the parties to the action. In the circumstances, it is clear that the plaintiff cannot rely on the decree in 503/L to establish*

rights to the property in question as against the defendants in this case are concerned.

Conclusion

I answer the questions of law upon which leave to appeal was granted in the affirmative. The judgments of the District Court and the High Court of Civil Appeal are set aside. The defendant never challenged the evidence of the plaintiff on damages. I direct the District Judge to enter judgment as prayed for in the prayer to the plaint. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

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

Senanayake Arachchilage Chandana Sarath Kumararathna,
No. 302/01, Aluthwela,
Karalliyadda,
Theldeniya.

Plaintiff

SC Appeal No: 90/2021
SC (HCCA) LA No. 385/2020
CP/HCCA/FA/191/2018
DC Kandy Case No. DMR/1641/09

Vs.

Sri Lanka Insurance Corporation,
Rakshana Mandiraya,
No. 21, Vauxhall Street,
Colombo 02.

Defendant

AND BETWEEN

Senanayake Arachchilage Chandana Sarath Kumararathna,
No. 302/01, Aluthwela,
Karalliyadda,
Theldeniya.

Plaintiff-Appellant

Vs.

Sri Lanka Insurance Corporation,
Rakshana Mandiraya,
No. 21, Vauxhall Street,
Colombo 02.

Defendant-Respondent

AND NOW

In the matter of an application for Leave to Appeal in terms of Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, against the Judgment of the High Court of the Central Province (Civil Appeal) dated 18/11/2020.

Sri Lanka Insurance Corporation,
Rakshana Mandiraya,
No. 21, Vauxhall Street,
Colombo 02.

Defendant-Respondent-Petitioner

Vs.

Senanayake Arachchilage Chandana Sarath Kumararathna,
No. 302/01, Aluthwela,
Karalliyadda,
Theldeniya.

Plaintiff-Appellant-Respondent

Before: **Justice P. Padman Surasena**
Justice A.L. Shiran Gooneratne
Justice Mahinda Samayawardhena

Counsel: Chandaka Jayasundere, PC with Tharindu Rajakaruna instructed by Manjula Jayathilake for the **Defendant-Respondent-Petitioner.**

Nilshantha Sirimanne with Shalomi Daniel for the **Plaintiff-Appellant-Respondent.**

Argued on: 10/11/2022

Decided on: 05/07/2023

A.L. Shiran Gooneratne J.

By Plaint dated 08/06/2009, the Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff) filed this Action No. DMR/1641/09 in the District Court of Kandy against the Defendant-Respondent-Appellant (hereinafter sometimes referred to as the Defendant or Defendant company) and sought to recover a sum of Rs. 1,151,350/- together with interest based on a contract of insurance relating to Motor Vehicle No. CPGC 4672 against the said Defendant. The Defendant by Answer dated 27/08/2010, denied the said claim based on failure on the part of the Plaintiff to act in utmost good faith and sought a dismissal of the Plaintiffs action.

The said action was mentioned in the District Court on 28/01/2011 and was fixed for trial on 22/06/2011. Thereafter the respective parties filed list of witnesses and documents prior to the said date of trial, according to law.

When the said action was taken up for trial on 22/06/2011, the Defendant company was unrepresented and on default of appearance on the date fixed for trial, the Court made Order to proceed to hear the case *ex-parte* against the Defendant. The Court after hearing some evidence for the Plaintiff on the same day, put off the hearing for 29/11/2011. When the case was taken up on 29/11/2011, the Counsel representing the Defendant company gave no reasons for the default in appearance of a representative of the Defendant company or the Registered Attorney on the first date fixed for trial. However, a verbal application was made to vacate the said Order for *ex-parte* trial on payment of costs, and to permit the Defendant company to defend the said action. The Court refusing to grant the said application proceeded with the evidence already recorded. At the conclusion of the hearing, the learned District Judge by Order dated 05/11/2014 held with the Plaintiff and granted the reliefs as prayed for in the Plaint and an *ex parte* decree was entered accordingly.

Being aggrieved by the said Order, by Petition dated 02/04/2015, the Defendant made an application in terms of Section 86(2) of the Civil Procedure Code seeking to vacate the said *ex-parte* Judgment and the decree entered in favor of the Plaintiff.

The instructing Attorney for the Defendant company, Chandani Wijayaratne filed affidavit dated 02/04/2015 and stated *inter alia*, that due to a bona fide mistake the date of trial was mistakenly taken down as 22/07/2011 as opposed to 22/06/2011. While asserting that the recording of a wrong date and the non-appearance on 22/06/2011 as a genuine mistake, she tendered to Court the following documents marked 'X1' to 'X6' which are now marked in this application as A9(i) to A9(vi), to vindicate her default. The documents marked are as follows -

A9(i) - Professional diary of Ms. Chandani Wijayarathna for the year 2011

A9(ii) - Entry of Case No. DMR/1641/09 on 22/07/2011

A9(iii) - A letter sent to the Petitioner, by Ms. Chandani Wijayarathna, informing the next trial date as 22/07/2011

A9(iv) - A letter sent to U.I Wijayathilake, Attorney-at-Law, by the Petitioner, to retain Mr. Wijayathilake's professional service as the Counsel and to appear on 22/07/2011

A9(v) - An internal memo from the Legal Department to the Manager of Kandy branch, to represent the Petitioner in Court on 22/07/2011

A9(vi) - Entries of 22/06/2011 in the Professional diary of Ms. Chandani Wijayarathna for the year 2011

Having considered the Petition, affidavits, oral evidence, and the written submissions tendered by the respective parties, the Additional District Judge by Order dated 21/08/2018, *inter alia*, held that -

a) when considering the available evidence, the Court is satisfied that the recording of the trial date as 22/07/2011 was a mistake on the part of the instructing Attorney;
b) with reference to satisfying Court with reasonable grounds in terms of Section 86(2) of the Civil Procedure Code, held that the recording of a wrong date and the failure to examine the case record clearly amounts to an act of negligence on the part of the registered Attorney-at-Law;
c) the Defendant must not suffer due to an act of negligence on the part of the Defendants Attorney-at-Law;

and permitted the Petitioners Application made under Section 86(2) of the Civil Procedure Code to vacate the said *ex-parte* Judgment and decree, subject to payment of costs, and fixed the case for *inter parte* trial.

Being aggrieved by the said Order, the Plaintiff by Petition of Appeal dated 12/10/2018, appealed to the High Court of the Central Province exercising civil appellate jurisdiction holden in Kandy ("the Appellate Court"). The Appellate Court by Judgment dated 18/11/2020, set aside the said Order made by the Additional District Judge dated 21/08/2018 and reinstated the *ex-parte* Judgment and decree against the Defendant on the basis that the Defendant must suffer the consequences of an act of negligence of the Attorney-at-Law.

The Defendant company, by Petition dated 22/12/2020, is before this Court, to set aside the said Judgment dated 21/08/2018, delivered by the Appellate Court.

By Order dated 28/10/2021, this Court granted leave to appeal on the following question of law;

> *"Did the learned Judges of the Civil Appellate High Court of Kandy err in law in failing to hold that the defendant had satisfied court that there are reasonable grounds for such default as provided for in section 86(2)"*

The main position taken by the Plaintiff is that the learned District Judge having made a clear and express finding that there was negligence on the part of the Registered Attorney of the Defendant, erred in law by vacating the *ex-parte* Judgment dated 05/11/2014. In response the Defendant company takes up the position that the error made by the Registered Attorney was a case of mistake and not negligence and further states that the Attorney-at-Law had taken all steps required to be taken in the cause of action, in accordance with the Civil Procedure Code. It is further contended that the

Attorney had reasonable grounds for non-appearance, which was established at the hearing and thus, the Defendant in the circumstances of this case, should not be deprived to proceed with the District Court trial.

In the above context it is important to consider the ratio in the case of ***Kathiresu vs. Sinniah (71 NLR 450)***, where H.N.G. Fernando J (as he then was), held that the absence of both the Proctor and the Petitioner on the given date, arising out of confusion of dates, was taken as a mistake and not due to the negligence of the parties. The Court came to the aforesaid conclusion primarily on the basis that the District Judge had accepted the affidavit and the evidence before Court as correct. The Court also observed that the District Judge *"refused to set aside the decree nisi because he relied on certain decisions in which the failure of a party to appear was due to his own negligence."* The Court cited with approval the case of ***Punchihamy vs. Rambukpotha*** (16 Times of Ceylon Law Reports page 19)

where De Krester J held that;

> *"The whole case indicates very gross carelessness on the part of the Defendant and it is most unfortunate that there should be now, in addition, a mistake on the part of the proctor. The mistake however is there and must be given effect to"*

and noted that in ***Punchihamy vs. Rambukpotha (Supra)*** *"the only reason for non-appearance was a mistake made by the parties' Proctor."*

The Court allowed the Appeal and sent the case back to the District Court.

In the instant case too, the Additional District Judge accepted the affidavit and the documents marked 'X1' to 'X6' led in evidence as correct and held that the inadvertence on the part of the Attorney amounts to a mistake. However, having recognized that the

burden is on the Plaintiff to prove that default was due to a genuine mistake, referred to Section 86(2) of the Civil Procedure Code which requires the Defendant to satisfy court that the Defendant had reasonable grounds for such default. The Court held that the default arising out of recording a wrong entry as the date of trial and not verifying the said date from the registry, amounts to an act of negligence on the part of the instructing Attorney.

Therefore, the facts and circumstances in the case of ***Kathiresu vs. Sinniah (Supra)*** is clearly distinguishable from that which is found in the instant case.

The Court also held that an act of negligence on the part of an instructing Attorney should not be at the peril of the party the Attorney represents.

When deciding that the Defendant company must not suffer due to a mistake of the Defendants Attorney-at-Law, the learned Additional District Judge referred to the Supreme Court decision in ***P.M. Premarathna vs. Sunil Pathirana***, [(inadvertently stated as Sunil Premarathna in the Impugned Order dated 21/08/2018) SC Appeal 49/2012 (SC minutes dated 27/03/2015)] which held as follows;

> *"the litigant who has come before court for relief should not be deprived of his right to seek relief due to a lapse on the part of the lawyers preparing and filing the papers"*

In ***P.M. Premarathna vs. Sunil Pathirana (Supra)***, the Court came to the above conclusion when it considered a lapse on the part of the Attorney where, the High Court dismissed the Appeal upholding the preliminary objections taken by the Plaintiff-Respondent on two grounds, namely,

- That all necessary parties who were before the District Court had not been named as parties to the Appeal, and
- That the notice of Appeal was invalid.

Accordingly, it is clear that the facts and circumstances in the case of ***P.M. Premarathna vs. Sunil Pathirana (Supra)*** can be differentiated from the facts of the instant case and that the learned Additional District Judge has erred in applying, the decision in the case of ***P.M. Premarathna vs. Sunil Pathirana***, which is not applicable in this case.

In its Judgment dated 18/11/2020, the Appellate Court –

a) Upon a comparison of facts, referred to in the Judgment of ***Pakir Mohideen vs. Mohamadu Casim*** **(4 NLR 299),** with those in the instant case**,** applied the legal position –

   "If the Proctor did not do his duty, he is to blame for the absence of the defendant and the defendant must suffer for the fault of his Proctor".

b) Considered that at the inquiry there had been a specific finding by the learned Additional District Judge on negligence on the part of the Registered Attorney
c) The Appellate Court examined the rule laid down in ***Pakir Mohideen vs. Mohamadu Casim,*** and for the reasons mentioned therein held, that the said Order dated 21/08/2018 made by the learned Additional District Judge is erroneous and has to be set aside.

In ***Pakir Mohideen vs. Mohamadu Casim (Supra),*** Bonser C.J. made the said observation, where the Defendant had noted the trial date incorrectly when his proctor's clerk gave it to him, took no steps to get ready for trial and was absent at the trial. His

proctor appeared and stated that he had no instructions and withdrew from the case. After *ex parte* proceedings decree nisi was entered against him. An application to set aside the Judgment on the ground that the Defendant had mistaken the date of trial was refused by the District Judge. The Supreme Court refused to revise that Order observing that the proctor had been forgetful or neglectful of the interests of his client in particular in failing to ask for instructions in the matter.

At the inquiry held to vacate the *ex-parte* Judgment, the Defendants position in brief was that, the default in appearance by the Registered Attorney on 22/06/2011 was due to a mistake in taking down the trial date as 22/07/2011. In her evidence in mitigation of her default in appearance before the learned Additional District Judge, the Registered Attorney produced documents in support of her position that all pre-trial steps akin to this action were taken with due diligence in the best interest of her client in the hope of defending the cause of action filed against the Defendant company.

Conformity with the law relating to pre-trial steps invariably flow from the date a case is first fixed for trial. No doubt it is the responsibility of the Registered Attorney to ensure compliance of the provisions of the Civil Procedure Code to ensure that all pre-trial steps are taken with strict adherence to the laid down procedure.

As mentioned earlier, the instant action was taken up for *ex parte* trial on 22/06/2011 and further trial was resumed on 29/11/2011. On 29/11/2011, the Defendant company was represented by Counsel on instructions of the Registered Attorney. The Counsel submitted that the Registered Attorney is not before Court due to a professional commitment undertaken in the District Court of Nuwaraeliya. The Counsel further stated that he was instructed that this case was a partly heard trial and that he was not aware that the case was proceeding *ex parte*.

It is observed that the Registered Attorney failed to be present in Court or to provide the necessary instructions to the Counsel who appeared on 29/11/2011. At least by the 22/07/2011, the Registered Attorney should have known that the case was fixed for *ex parte* trial and accordingly instructed the Counsel of the next date of hearing. Not only did the Registered Attorney fail to inform the Counsel of the next step of the case but also failed to make a reasonable explanation for the default of non-appearance on the date first fixed for trial, at the first available opportunity. Further, the Registered Attorney in her evidence before the trial court failed to explain the reasons for not having instructed the Counsel who appeared for the Defendant company on 29/11/2011, that the case was fixed for *ex parte trial* or the default in non-appearance on 22/06/2011.

The Registered Attorney, in her affidavit and also in her evidence tendered before the trial court, repeatedly stated that she inadvertently recorded the date as 22/07/2022. The learned Additional District Judge was convinced that, there had been negligence on the part of the Registered Attorney due to her failure in not examining the case record to have the trial date confirmed. In response, the Defendant in the written submissions filed in the Appellate Court dated 10/10/2019, has taken up the position that it is not humanly possible to examine the case record by every Registered Attorney every time a date is appointed by Court ----, if that be a requirement to be followed, Registered Attorneys would be spending more time in record rooms perusing case records than in Court----.

In the Order dated 21/08/2018, the learned Additional District Judge specifically referred to the evidence given by the Plaintiff where he stated that, on the date the case was called to fix for trial ie, 28/01/2011, the Court had announced the trial date twice, once as 2011 June 22 and again as 06.22. This position was never challenged by the Defendant when the Plaintiff was cross examined. The position taken by the Registered

Attorney is that the month June was heard as July and therefore had mistakenly reordered as July as perceived.

It is observed that the Registered Attorney took no remedial steps to file a motion or an affidavit to mitigate her default upon being aware that she had taken down the wrong date as the first date fixed for trial. In most part of her evidence in mitigation of default in non-appearance, the Registered Attorney tried to show that she has taken all necessary pre-trial steps required to be taken in keeping with the trial date as recorded by her ie, 22/07/2011, and that such process was duly conveyed to the Defendant company.

In ***U.W. JANDI vs. D.S. PINIDIYA and 16 others (1971) 74 NLR 433***, (Divisional Bench) H.N.G. Fernando C.J. emphasized the importance of the rule set out in ***Pakir Mohideen vs. Mohamadu Casim[1 (1900) 4 N. L. R. 299.]*** and also cited in ***Scharenguivel vs. Orr [2 (1926) 28 N. L. R. 302.]***, that when there is negligence on the part of a proctor, in consequence of which some necessary step is not taken in an action, the client must suffer for his proctor's negligence, and opined thus;

> *"The obvious ground for this ruling is that because a proctor is the recognized agent of his client, the fault of the agent has to be attributed to the client. The true justification for this principle does not however appear to be well understood by practitioners. It is that under the common law a client has a right of action against his proctor for damages which he may sustain as a result of the negligence of the proctor."*

In the above case, where Weeramantry J. dissented, declared that;

> *"It seems to admit of no argument that the date of any step in a case is the date given by the judge when the case is called before him at the roll. If a proctor*

proceeds on the assumption that the date which had been indicated to him in advance of the roll by an official of the court would be the date eventually accepted by the judge, and he neither attends the roll nor verifies the judge's confirmation of the date, he does so at his peril."

The Defendant company in their written submissions tendered to this Court has cited many cases which signifies the importance of giving a valid excuse for the default by the affected party in order to establish reasonable grounds and has emphasized the need to be reasonable as opposed to a rigid standard of proof as enunciated in ***David Appuhamy vs. Yassassi Thero (1987) 1SLR 235, Mallika vs. Karunaratne BALJ 2012 Vol. XIX Part II p.380, Sanicoch Group of Companies vs. Kala Traders (Pvt) Ltd BALJ 2016 Vol. XXII p. 44.***

In the written submissions tendered to this Court, the Defendant placed much reliance in the case of ***Rohan Ajith Jude Silva vs. Y.B. Aleckman***, [SC. Appeal No. 46/05 (SC minutes dated 18/11/2013)] to differentiate between a mistake and negligence of an Attorney-at-Law. In the above case the Supreme Court distinguished the precedent set out in ***Pakir Mohideen vs. Mohamadu Casim*** (Supra) ie. *"The Plaintiff must suffer for his proctors negligence"* and similarly followed in ***Packiyanathan vs. Singarajah (1991) 2 SLR 205***, and ***Schareguivel vs. Orr 28 NLR 302***, where it was held that, when a Judgment is entered against a party by default, it is not a sufficient excuse for his absence that his proctor had failed to inform him of the date of the trial, as opposed to the *dicta* in ***Kathiresu vs. Sinniah 71 NLR 450***, where *"the absence of both the proctor and the Petitioner on the given date, arising out of confusion of dates, was a mistake and not due to the negligence of the parties".*

In Rohan ***Ajith Jude Silva vs. Y.B. Aleckman (Supra)***, this Court having examined the facts relating to the issue whether the error made by the Registered Attorney was due to negligence or a mistake and drawing a distinction between the two elements, the Court placed importance in ***Packiyanathan vs. Singarajha (Supra)*** where Kulatunga J. noted that;

> *"it is necessary to make a distinction between a mistake or inadvertence of an Attorney -at-Law or party, and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend upon the facts and circumstances of each case."*

The Court also noted that these sentiments are similarly echoed in ***Wimalasiri and another vs. Premasiri [(2003) 3 SLR 330]***, Where, the Supreme Court refused to grant relief on the basis that their conduct was negligent stemming from the fact that measures had not been taken by neither the Attorney-at-Law nor the Appellant until the lapse of 9 months.

Upon a comparison of the facts and the rule referred to in the Judgment in the case of ***Pakir Mohideen vs. Mohamadu Casim***, and the cases which followed the same precedent, Shiranee Tilakawardane, J. having differentiated the facts and circumstances of the case, did not dispel the application of the said *dicta* to the case but alluded to the importance of the Registered Attorney and the Petitioner taking all feasible Measures to remedy the delay upon discovery of it. And appreciated the effort made by them in rectifying the error, which qualified as one arising out of mistake as opposed to negligence.

In the instant case the Registered Attorney has failed to appear or to act in the required manner on the date fixed for trial. In the circumstances of this case this Court is called

upon to decide as to whether such inadvertence/ mistake constitutes sufficient reasonable grounds to purge default. In ***Sanicoch Group of Companies vs. Kala Traders (Pvt) Ltd (Supra)***, the Supreme Court emphasized that when interpreting Section 86(2) the Court must use the yardstick of a subjective test rather than an objective test in determining what is reasonable. The Court also contemplated of a liberal approach in accessing the aspect of reasonableness as opposed to a rigid standard of proof.

Where an *ex parte* decree is entered against a party for default in failure to appear on the date fixed for trial, the burden is on the affected party to establish with reasonable grounds that such default was not due to negligence but due to a genuine mistake. If the Court is satisfied with the reasons offered, the *ex parte* Judgment and decree would be set aside and the defaulter would be permitted to proceed with the defence from the stage of default. If there is no sufficient evidence led before the trial court to determine the reasonableness of such failure to appear on the date fixed for trial, the *ex parte* decree will stand. Therefore, the burden is on the Attorney to prove the existence of reasonable grounds for the default in appearance when seeking relief. *"Unless there is sufficient cause for the absence of the attorney who was entitled to appear, the matter should stand dismissed."* ***Jinadasa vs. Sam Silva (1994) 1 SLR 232.***

When deciding this case, it is important to examine whether the attended facts and circumstances of this case establish reasonable grounds considered to be valid in terms of Section 86(2) of the Civil Procedure Code.

In a series of cases this Court has emphasized the importance of conformation of the next date to avoid any negligence on the part of the Attorney. It is the responsibility of an Attorney to be always vigilant of a pending case to take appropriate steps as

warranted, on the given date, to ensure that no undue delay is caused to the detriment of his client or to the larger interest of administration of justice. Therefore, one cannot be complacent to record the next date as self-perceived and to take up a strong position that it is not humanly possible to examine the case record every time a date is appointed by Court. To say irrational, to the said stand at the outset, would be an understatement when a Registered Attorney is mandated to discharge professional duties promptly and with due diligence. If the Attorney is unable to be present at the office of the court in person to verify the next date fixed for trial, an application to obtain a copy of the previous day's proceedings, would certainly suffice for such purpose. *"It is expected of a diligent counsel to verify the previous day's proceedings and if that was not done, such failure could not amount to a mistake."* ***(The Attorney General vs. Herath and another [(2003) 2 SLR 162].***

In a very recent Judgment delivered by this Court ***(Wimal Weerawansa vs. Ravindra Sandresh Karunanayake,*** [SC/Appeal No. 59A/2006, (SC minutes dated 29/07/2020)], E.A.G.R. Amarasekara, J. with Sisira de Abrew J. and Murdu N.B. Fernando, PC, J agreeing held;

> *"Even if the court thinks that a genuine mistake can be considered to give relief to meet the ends of justice, what could have been avoided by due diligence cannot be considered as a mistake as it falls within the ambit of negligence. A lawyer being a human being, he/she may err in many aspects including what he heard as the next date of inquiry. The registered attorney who was in charge of the Defendant Petitioners brief must foresee such short comings that may take place. He is not a mere intermediatory between his client and the court to file documents and appear in court. He is a professional who can gain access to the case record through the registry and who can get the next date verified through the office of the court. ----*

There was a time gap of more than two months in between. If the inquiry was fixed for the next day or the following day, one may say that there was no sufficient time to get the date verified. I do not think one can say that the registered attorney in the case at hand acted with due diligence, among others, with regard to the date fixed for the inquiry on the amended answer."

There is uncontroverted evidence that the date fixed for trial was announced by the officer of court twice in two different ways. It is also revealed in evidence that for nearly a period of 6 months, the Registered Attorney has failed to examine the case record to verify the next date of trial or to obtain a copy of the previous day's proceedings from the office of court. In her evidence before the learned Additional District Judge, it was admitted that the trial date was not verified by going through the journal entries. The Registered Attorney also admitted that she came to know that the first date fixed for trial was 22/06/2011 when she was in court on 22/07/2011. Thereupon, having known the correct trial date, she failed to take any meaningful action to rectify the error. The Counsel who appeared for the Defendant was unaware that the said action was fixed for *ex parte* trial or the reason for such default by the Registered Attorney, even on 29/11/2011, ie. after 10 months from the date first fixed for trial. Having being aware of the said default, no meaningful action was taken to rectify the error manifests the lack of due diligence and reasonable competence expected from a Registered Attorney in the discharge of his or her professional duties. When negligence is visible in the act of default, it can no longer be excused as a mistake. The conduct of the Attorney clearly resonates an act of negligence on her part.

For the aforesaid reasons, I hold that, the Registered Attorney has failed to show sufficient reasonable grounds to purge default envisaged in terms of Section 86(2) of the Civil Procedure Code.

Therefore, I answer the question of law on which leave to appeal was granted to the Defendant in the negative.

For these reasons, the Appeal of the Defendant is dismissed; the Judgment of the Appellate Court is affirmed. No order for costs.

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

Samayawardhena, J.

I regret that I am unable to agree with the majority judgment.

In my view, at the inquiry into purging the default held under section 86(2) of the Civil Procedure Code, the defendant's Attorney-at-Law and two officers of the defendant corporation gave sufficient evidence to establish that the Attorney-at-Law made a mistake in noting down the date of trial as 22.07.2011 whereas the actual date of trial was 22.06.2011.

The High Court in the impugned judgment states that the failure to correctly note down the date was a mistake on the part of the defendant's Attorney-at-Law and according to Pakir Mohidin v. Mohamadu Casim (1900) 4 NLR 299 the defendant must suffer for the fault of his Attorney-at-Law. The High Court also makes an oblique reference to negligence on the part of the Attorney-at-Law as found by the District Court.

I take the view that an application under section 86(2) need not be decided on the basis that the defendant must suffer for the fault of his Attorney-at-Law. In terms of section 86(2) of the Civil Procedure Code, if the defendant satisfies the Court that he had reasonable grounds for the default, the Court shall set aside the judgment.

The question of law on which leave was granted in my view should be answered in the affirmative and the appeal should be allowed.

Judge of the Supreme Court

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

In the matter of an appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions Act) Act No. 10 of 1996.

Bank of Ceylon
No. 4,
Bank of Ceylon Mawatha,
Colombo 01.

DEFENDANT

SC Appeal No. SC/CHC/23/2008

Case No. HC (Civil) 167/2005 (1)

vs.

AraliyaImpex (Pvt) Ltd.
No. 69, Old Moor Street,
Colombo 12.

PLAINTIFF

AND NOW BETWEEN

AraliyaImpex (Pvt) Ltd.
No. 69, Old Moor Street,
Colombo 12

DEFENDANT – APPELLANT

vs.

Bank of Ceylon
No. 4,
Bank of Ceylon Mawatha,
Colombo 01
PLAINTIFF – RESPONDENT

Before: Priyantha Jayawardena PC, J
Murdu N.B. Fernando PC, J
S. Thurairaja PC, J

Counsel: Lakmini Amaratunga for the Defendant-Appellant

N. Wigneshwaran, Deputy Solicitor General with G.M. Gamage for the Plaintiff-Respondent

Argued on: 6th December, 2021

Decided on: 5th July, 2023

Priyantha Jayawardena PC, J

The Plaint

The plaintiff-respondent (hereinafter referred to as the "respondent bank") had instituted action in the District Court of Colombo to recover money given as an overdraft to the defendant-appellant (hereinafter referred to as the "appellant"). The respondent stated that the appellant had maintained a current account at the Gas Works branch of the respondent bank.

The respondent bank stated that, at the request of the appellant, it had provided an overdraft facility to the appellant on or about the 10th of October, 2000 at a rate of 30% interest per annum.

The respondent bank further stated that, as at 31st of July, 2003 the appellant had an outstanding amount of Rs. 1,829,489.21 and accrued interest of Rs. 1,212,909.98 to be paid to the respondent

bank. Hence, by the letter of demand dated 19th of August, 2002 the respondent bank had requested the appellant to pay the outstanding amount along with the interest due.

As the appellant failed to settle the said overdraft facility given to him, an action was instituted by the respondent bank in the District Court of Colombo to recover a sum of Rs. 3,042,398.29/- against the appellant on the 18th of December, 2003.

The Answer

Thereafter, the appellant filed its answer *inter alia* denying that a cause of action had been accrued to the respondent bank to sue the appellant.

Further, the following preliminary objections were raised in the answer filed by the appellant:

"(a) this Court has no jurisdiction to hear and determine this matter in that, the alleged cause of action falls within the 1st limb of schedule 1 to the High Court of the Provinces (Special Provinces) Act No. 10 of 1996.

(b) the Plaintiff does not have the authority to file this action.

(c) the Plaintiffs purported cause of action is prescribed in law."

The appellant further stated that it does not owe any money to the respondent and that the action should be dismissed.

Request to transfer the case to the Commercial High Court

On the 3rd of August, 2005 the appellant had made an application to the District Court to transfer the case to the Commercial High Court in terms of section 9 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, stating that the District Court has no jurisdiction to hear and determine actions where the monetary value of the action exceeds Rs. 3 million.

Having considered the said application, the learned District Judge allowed the said application and transferred the case to the Commercial High Court.

Proceedings before the Commercial High Court

The trial had commenced before the High Court, by making admissions and raising issues. After the respondent bank raised its issues, the appellant raised the following issues:

"18. As pleaded in paragraph 2 of the Answer, does the Plaintiff have the authority to file this action?

19. Has a cause of action accrued to the Plaintiff to sue the Defendant?

20. Does the Appellant have to pay the sum of money due to the Plaintiff as submitted in the Plaint?

21. Should the Respondent's case be dismissed if one or more or all of the above issues are answered in favour of the Appellant?"

Judgment of the Commercial High Court

After an *inter-parte* trial, the learned High Court Judge delivered the judgment in favour of the respondent bank and held, *inter alia*, that in terms of section 7 of the Prescription Ordinance No. 22 of 1871, as amended, the applicable prescription period to recover money lent without a written agreement is three years. Further, it was held that the prescription period is calculated starting from the date of the last payment. Moreover, according to the evidence led in the case, the last payment had been made on the 23rd of April, 2001. Therefore, since the instant case had been filed in the District Court on the 18th of December, 2003 within the stipulated period of three years, this case is not prescribed.

Appeal to the Supreme Court

Being aggrieved by the aforementioned judgment of the High Court, the appellant filed an appeal in the Supreme Court. At the hearing before the Supreme Court, the parties informed court that they would confine their submissions to the following ground of appeal referred to in paragraph (b) of the petition of appeal, which is as follows:

"(b) the learned Judge has not given sufficient thought to question of the action being prescribed in law"

Computation of time for the purpose of considering prescription

An action can be filed for a breach of an agreement/contract, whether the agreement/contract is in writing or not.

In respect of a written agreement, an action shall be filed within six years from the date of the breach of the said written agreement (from the date of the cause of action), in terms of section 6 of the Prescription Ordinance No. 22 of 1971 as amended by Act No. 2 of 1889 [hereinafter referred to as the Prescription Ordinance]. However, in the case of an unwritten agreement, an action should be filed within three years from the breach of the said agreement (from the date of the cause of action), in terms of section 7 of the said Ordinance.

In the instant appeal, it is common ground that the respondent bank had granted the overdraft facility to the appellant without a written agreement. Hence, section 7 of the Prescription Ordinance applies to the instant appeal.

Section 7 of the Prescription Ordinance states;

> *"No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be-commenced within three years from the time after the cause of action shall have arisen."* [emphasis added]

Accordingly, the said section imposes a deterrent to institute action after three years from the time the money became due upon an unwritten agreement.

In the instant appeal, the appellant had made the last payment to repay the overdraft on the 23rd of April, 2001. Thereafter, the appellant had failed and/or neglected to pay the money due on the

overdraft. Hence, the cause of action arose on the 23rd of April, 2001, which is the date of default in the repayment of the overdraft given to the appellant by the respondent bank.

Further, because the overdraft facility was not granted based on a written agreement, the action ought to have been filed within three years from the 23rd of April, 2001 in terms of section 7 of the Prescription Ordinance. Thus, the respondent bank was required to institute the action on or before the 22nd of April, 2004.

The journal entries maintained by the District Court show that the plaint of the respondent bank was filed in the District Court on the 18th of December, 2003 which is within the three-year period stipulated in section 7 of the Prescription Ordinance.

When the District Court case was taken up in court on the 3rd of August, 2005 the appellant had made an application to the said court to transfer the case to the High Court established under the High Court of the Provinces Act (Special Provisions) Act No. 10 of 1996 [hereinafter referred to as the "High Court of the Provinces Act"] in terms of section 9 of the said Act on the basis that the District Court had no jurisdiction to hear and determine cases where the monetary value of the action exceeded Rs. 3 million (which was the applicable monetary limit at that time).

Accordingly, at the request of the appellant, the instant appeal was transferred to the Commercial High Court, and the said court had received the case record on the 3rd of August, 2005.

When the case was taken up for trial before the Commercial High Court, the learned counsel for the appellant raised an objection to the plaint on the basis that the cause of action pleaded in the plaint is prescribed in terms of section 7 of the Prescription Ordinance. The said objection was based on the fact that, the case was transferred to the Commercial High Court after three years from the date of the cause of action alleged in the plaint.

However, after an *inter-parte* trial, the learned High Court Judge had held that the cause of action pleaded in the plaint filed by the respondent bank was not prescribed in terms of the Prescription Ordinance as the case was filed in the District Court within three years from the date of the cause of action.

Hence, the issue that needs to be considered in the instant appeal is whether the date of institution of the action in the District Court or the date of transfer of the case from the District Court to the Commercial High Court should be taken into consideration in computing the prescription period.

Section 9 of the High Court of the Provinces Act provides for the transfer of cases to the Commercial High Court. It states as follows:

> *"Where there is evidence that the value of any action filed in any District Court is one that should have been filed in the High Court established by Article 154P of the Constitution exercising jurisdiction under section 2, the Judge shall record such fact and make order accordingly and thereupon the action shall stand removed to the appropriate Court."* [emphasis added]

The phrase *"the action shall stand removed to the appropriate Court"* in the above section 9 shows that if an action is filed in the District Court which should have been filed in the Commercial High Court, the case stands transferred to the Commercial High Court by operation of law. Further, there is no legal provision in the said Act preventing the filing of an action in the District Court where the cause of action falls within the scope of the High Court of the Provinces Act.

Thus, if a case that falls under the provisions of the said High Court Act is filed in the District Court, the said court cannot reject the plaint on the basis that the plaint has been filed in the wrong court or on the basis that the District Court has no jurisdiction to entertain the plaint.

However, in such an instance, the District Court has no jurisdiction or power to hear and determine the case, including the granting of interim relief. Furthermore, the District Court should transfer such a case to the Commercial High Court in terms of section 7 of the said Act.

Hence, in computing the prescription period, it should be calculated from the date of the alleged cause of action and the institution of the action in the District Court and not from the date on which the case was transferred to the Commercial High Court.

As stated above, the journal entries maintained by the District Court show that the plaint was filed in the District Court on the 18th of December, 2003. As the respondent bank had filed the action in the District Court within the stipulated time under section 7 of the Prescription Ordinance, the cause of action pleaded in the plaint by the respondent bank is not prescribed.

The learned counsel for the appellant cited ***Hatton National Bank Limited v Helenluc Garments Ltd. and Others [1999] 2 SLR 365*** in support of her contention. However, the said judgment has no relevance to the instant appeal, as the said case relates to an overdraft given subject to a

mortgage bond furnished as security for the repayment of the money lent by the defendant. Further, in the said case, the cause of action arose on the date of the demand.

Further, the learned counsel for the appellant cited ***Mudiyanse v Siriya*** **23 NLR 285**, ***Kuluth v Mohamadu*** **38 NLR 48** and ***Amarasekara v Abeygunawardena*** **56 NLR 361** in support of her submissions.

The above two cases were filed in the District Court, which lacked jurisdiction to hear the said cases and therefore, the plaints were returned to be presented to the proper court by the said court in terms of section 47 of the Civil Procedure Code. However, in the instant appeal, the case was filed in the District Court and transferred to the Commercial High Court in terms of section 9 of the High Court of the Provinces Act.

Furthermore, section 47 of the Civil Procedure Code has no application to a case filed under the said High Court of the Provinces Act. Therefore, the cases cited by the counsel for the appellant have no application to the instant appeal.

Moreover, the learned Deputy Solicitor General cited ***Merchant Bank of Sri Lanka v Buddhadasa and Another*** **[2002] Bar Association Law Report Vol. IX, Part II, 64** and ***Seylan Bank Limited v Intertrade Garments (Private) Limited*** **[2005] 1 SLR 80** in support of his submissions. Both of those cases are in respect of the requirement to demand money lent on a written agreement. In the instant appeal, there was no requirement to demand the money as it was not lent on a written contract or agreement, and therefore, there was no request to demand the repayment of that money given and advanced to the appellant. Therefore, the above cases also have no relevance to the instant appeal.

Conclusion

Thus, the following ground of appeal should be answered as follows:

"The learned Judge has not given sufficient thought to question of the action being prescribed in law"

No

In the circumstances, I am of the view that the learned Judge of the Commercial High Court has correctly decided that the cause of action pleaded in the plaint is not prescribed.

Accordingly, the appeal is dismissed with costs. I order a sum of Rs. 100,000 as costs.

Judge of the Supreme Court

Murdu N.B. Fernando PC, J

I Agree Judge of the Supreme Court

S. Thurairaja PC, J

I Agree Judge of the Supreme Court

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

In the matter of an Appeal in terms of Article 128 of the Constitution read with Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Officer-In-Charge,

Police Station,

Wennappuwa.

Complainant

SC Appeal No: 101/2012

HCA Appeal No: 11/2011

MC Marawila Case No: 47051/C/X

Vs.

Nishantha Gamage

No. 34/A, Meda Katukenda,

Dankotuwa.

Accused

Hetti Achchige Anton Sujeewa Perera

No. 30/01, Bolawatta Road,

Dankotuwa.

Claimant

And between

Hetti Achchige Anton Sujeewa Perera

No. 30/11, Bolawatta Road,

Dankotuwa.

Claimant-Appellant

Vs.

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

Respondent

2. Officer-In-Charge,
   Police Station,
   Wennappuwa.

Complainant-Respondent

3. Nishantha Gamage
   No. 34/A, Meda Katukenda,
   Dankotuwa.

Accused-Respondent

And between

Hetti Achchige Anton Sujeewa Perera

No. 30/01, Bolawatta Road,

Dankotuwa.

Claimant-Appellant-Appellant

Vs.

1. Hon. The Attorney General

Attorney General's Department,
Colombo 12.

Respondent-Respondent

2. Officer-In-Charge,
Police Station,
Wennappuwa.

Complainant-Respondent-Respondent

3. Nishantha Gamage
No. 34/A, Meda Katukenda,
Dankotuwa.

Accused-Respondent-Respondent

Before : Priyantha Jayawardena PC, J

A. L. Shiran Gooneratne, J

Arjuna Obeyesekere, J

Counsel : K. A. Upul Anuradha Wickramaratne for the Claimant-Appellant-Appellant.

Anoopa De Silva, DSG for the Complainant-Respondent-Respondent.

Argued on : 30th November, 2021

Decided on : 5th July, 2023

Priyantha Jayawardena PC, J

Facts of the case

This is an appeal to set aside the judgment of the Provincial High Court holden in Chilaw [hereinafter referred to as the "High Court"], dismissing an appeal preferred against an Order that forfeited a lorry transporting gravel without a valid licence by the Magistrate's Court.

The claimant-appellant-appellant [hereinafter referred to as the "appellant"] is the registered owner of the lorry bearing registration number SG GM-1178, which was forfeited to the State by the learned Magistrate.

The driver of the said lorry was arrested by the Police while transporting gravel without a valid licence and proceedings were instituted against the driver in the Magistrate's Court of Marawila in terms of section 136(1)(b) of the Code of Criminal Procedure, Act No. 15 of 1979, as amended [hereinafter referred to as the Code of Criminal Procedure]. Further, the said lorry, along with the gravel, was produced in the Magistrate's Court by the Police.

Subsequently, the learned Magistrate had framed a charge against the said driver under section 182(1) of the Code of Criminal Procedure for transporting two cubes of gravel in a vehicle bearing registration number SG GM-1178 without a valid licence issued in that behalf by the Competent Authority, and that the said driver committed an offence by violating section 28(1) of the Mines and Minerals Act No. 33 of 1992, punishable under section 63(1) of the said Act.

The driver of the lorry had pleaded guilty to the said charge. Accordingly, he was convicted and imposed a fine of Rs. 60,000/-, which was paid by him on the same day. Further, the two cubes of gravel that were being transported were forfeited by the learned Magistrate and ordered to be released to the State Engineering Corporation.

On an application made by the appellant, who is the owner of the lorry, the said lorry was released to the appellant on a bond of Rs. 1,500,000/-, pending the inquiry in terms of section 63A(2) of the Mines and Minerals Act as amended by Act No. 66 of 2009. At the said inquiry, only the appellant had given evidence.

After the conclusion of the said inquiry, the learned Magistrate delivered the Order holding that the appellant had failed to take the necessary precautions to prevent the driver of the said lorry

from illegally transporting gravel without a valid licence, and therefore, the said lorry was forfeited in terms of section 63(1) of the Mines and Minerals Act No. 33 of 1992.

Being aggrieved by the Order of the learned Magistrate forfeiting the said lorry, the appellant had preferred an appeal to the High Court to set aside the said Order.

After the hearing of the said appeal, the High Court held that the appellant had no right to appeal against the Order of the Magistrate's Court to forfeit the lorry used for the offence in terms of the Mines and Minerals Act, and affirmed the Order of the learned Magistrate dated 22nd of December, 2010.

Being aggrieved by the said judgment, the appellant had moved the High Court to grant leave to appeal to the Supreme Court in terms of section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, and leave to appeal was granted on the following questions of law:

"i. Was the charge framed in this case legal and valid when it did not contain the mandatory requirement prescribed by section 164(4) of the Code of Criminal Procedure No. 15 of 1979 to mention in it the law and the section of the law under which the said confiscation/forfeiture, being a punishment, could be made?

ii. Did this Provincial High Court err in law in dismissing Appeal No. HCA 11/2011 filed against the confiscation/forfeiture of lorry No. SGGM 1178 based upon the conviction of the accused-respondent-respondent of such an illegal and invalid charge?

iii. Did this Provincial High Court err in law when it upheld the confiscation/forfeiture of the said lorry based on a conviction of a charge punishable under section 63(1) of the Mines and Minerals Act No. 33 of 1992 neither which nor any amending act thereof had provided for the confiscation/forfeiture of a vehicle?

iv. Did the Provincial High Court err in law when it refused Appeal No. HCA 11/2011 filed by the petitioner based on a preliminary objection raised by the learned State Counsel of the said High Court which was not tenable in law?"

When the instant appeal was taken up for hearing, the parties to the appeal submitted that, even though the learned High Court Judge dismissed the appeal on the premise that the appellant had

no right to appeal against an Order made under section 63B(1) of the Mines and Minerals Act No. 34 of 1992, as amended by Act No. 66 of 2009 [hereinafter referred to as the "Mines and Minerals Act"] section 63B(3) of the said Act provides for an appeal against an order made for forfeiture. Hence, both counsel appearing for the appellant and the respondent submitted that they will confine themselves only to the third question of law set out above.

Submissions of the appellant

The learned counsel for the appellant submitted that section 63B(1) of the Mines and Minerals Act, as amended, confers power on the Magistrate to forfeit any mineral, machinery, equipment or material used in or in connection with the commission of an offence under the said Act.

However, the aforesaid section does not specifically refer to vehicles and therefore, the said section does not confer power on the Magistrate's Court to forfeit vehicles. Further, similar Acts such as section 40(1) of the Forest Conservation Ordinance, section 3A of the Animals Act, and section 79 of the Poisons, Opium and Dangerous Drugs Act expressly provide for the "vehicle" used in the commission of an offence to be forfeited to the State.

Furthermore, the learned counsel contended that if the words in an Act are clear, the court does not need to interpret the words and cited the Court of Appeal judgment delivered by Justice Salam in ***Nishantha and 3 others v State*** **[2014] 1 SLR 105** in support of said contention.

Moreover, the learned counsel cited the case of ***P.S. Priyantha Rajapakshe v Hon. Attorney General*** **(CA/PHC No. 72/2012) CA Minutes 27th of October, 2012,** where the Court of Appeal had released the vehicle to the registered owner following the aforementioned judgment (*Nishantha and 3 others v State* [2014] 1 SLR 105).

In the circumstances, the learned counsel for the appellants stated that the Order of the learned Magistrate and the learned High Court Judge erred in law and therefore, the said judgments should be set aside.

Submissions of the respondent

The learned Deputy Solicitor General for the respondent submitted that the purpose of the Mines and Minerals Act is to regulate, *inter alia,* the transportation of minerals. In this regard, the learned Deputy Solicitor General drew the attention of the court to the long title of the Mines and Minerals Act and submitted that if the intention of the legislature was to regulate the transportation of minerals, it is necessary for the forfeiture of the vehicle being used to illegally transport the gravel to achieve the intention of the said Act.

Further, it was contended that if the submissions of the appellant that the language of section 63B(1) of the Mines and Minerals Act as amended, in its ordinary meaning and grammatical construction is accepted, that would lead to absurdity. Thus, the said section cannot be interpreted to mean that only mineral, machinery, equipment or material used in or in connection with the commission of the offence or the proceeds of the sale of any such mineral or material deposited in court under the proviso to section 63A can be forfeited to the State, as the offence of transportation of gravel cannot be committed without the use of a vehicle. Therefore, the said Act requires the forfeiture of vehicles involved in the commission of an offence under section 63(1) of the Act.

Hence, it is necessary to adhere to the ordinary meaning of the words used in the statute and to the grammatical construction, unless that is at variance with the intention of the legislature. However, if the language of the statute leads to any manifest absurdity, the language may be varied or modified so as to avoid such absurdity.

I shall now consider the following question of law where leave to appeal was granted by the High Court.

Did the Provincial High Court err in law when it upheld the forfeiture of the lorry under consideration based on a conviction of a charge punishable under section 63(1) of the Mines and Minerals Act No. 33 of 1992?

The issue that needs to be considered in the instant appeal is whether the lorry used to transport gravel could be forfeited to the State after an inquiry held under section 63B(1) of the Mines and Minerals Act No. 33 of 1992, as amended by Act No. 66 of 2009.

In order to consider the above, the provisions of the Mines and Minerals Act and the purpose of enacting the Act would be considered first. Thereafter, the effects of the Mines and Minerals Act (Amendment) No. 66 of 2009 will be considered.

Mines and Minerals Act No. 33 of 1992

The long title of the said Act states as follows;

> *"An Act to provide for the establishment of the geological survey and mines bureau to regulate the exploration for, mining, transportation, processing, trading in or export of, minerals for the transfer to such bureau of the functions of the department of geological survey for the repeal of the salt ordinance (chapter 211) the radioactive minerals act, No. 46 of 1968, and the mines and minerals law, No. 4 of 1973; and to provide for matters connected therewith or incidental thereto."*
>
> [emphasis added]

Upon a careful consideration of the long title of the Mines and Minerals Act, it is evident that the Mines and Minerals Act No. 33 of 1992 repealed the Salt Ordinance (chapter 211), Radioactive Minerals Act, No. 46 of 1968, and the Mines and Minerals Law, No. 4 of 1973 and established the Geological Survey and Mines Bureau to regulate the exploration for, mining, **transportation**, processing, trading in or export of, minerals and to provide for matters connected therewith or incidental thereto with the view to having a more efficient and effective framework to regulate the exploration of mining in the country.

Thus, repealing the previous legislation and enacting the new Act, which consolidated the important provisions contained in the repealed legislation and introducing new provisions, shows the intention of Parliament and the importance placed by the legislature in revising the laws at that time.

However, the Principal Act did not provide sufficient stringent provisions to regulate the exploration for mining, transportation, processing, trading in or export of minerals. Particularly, there were no provisions to detect and forfeit to the State the machinery, equipment, material or vehicles used in or in connection with the commission of an offence under the Mines and Minerals Act. Moreover, the punishments stipulated in the Principal Act were not sufficient deterrents to prevent violations under the said Act from occurring again.

Mines and Minerals (Amendment) Act No. 66 of 2009

Therefore, as the State could not achieve the intention of the Parliament in enacting the Principal Act due to lack of sufficient provisions in it, the legislature amended sections 4, 5, 6, 8, 12, 13, 20A, 27, 28, 29, 30, 31, 33, 35, 37, 42, 46, 46A, 47, 48, 49, 51, 55, 57, 58, 61, 63, 64, 68, and 70 of the Principal Act by enacting the Mines and Minerals (Amendment) Act No. 66 of 2009.

Thus, a careful consideration of the said amendments to the Principal Act fortifies the said observation made with regard to the intention of the legislature in enacting the Principal Act. Thus, the intention of the Parliament in enacting and amending the Principal Act is a necessary factor that should be taken into consideration in interpreting the provisions of the said Act.

In this regard, *N S Bindra's Interpretation of Statutes*, Tenth Edition at page 492 to 493 states;

> "Turner LJ observed in the case of *Hawkins v Gathercole* (1855) 6 DM & G1, 'Regard must be had to the intent and meaning of the legislature'. The rule upon this subject is well expressed in the case of *Stradling v Morgan* 75 ER 308."

Further, Lord Blackburn cited the said judgment with approval in ***Charles Bradlaugh v Henry Lewis Clark*** **Appeal [1893] 8 AC 354 at 373**, which held as follows:

> "…. where a statute was passed for the purpose of repealing and in part re-enacting former statutes *in pari materia* are to be considered in order to see what it was that the legislature intended to enact in lieu of the repealed enactments. It may appear from the language used that the legislature intended to enact something quite different from the previous law, and where that is the case effect must be given to the intention."

Ownership and Discovery of Minerals

Section 26 of the Mines and Minerals Act, as amended, states that the ownership of minerals is vested with the State notwithstanding any right of ownership that any person may have to the soil where the minerals are found or situated.

Mining to be under the authority of a licence

Section 28(1) of the said Act states:

> ***"No person shall*** *explore for, mine,* ***transport****, process, store, trade in or export any mineral* ***except*** *under the authority of, or otherwise than in accordance with, a licence issued in that behalf under the provisions of this Act and the regulations made thereunder:*
>
> *Provided ……"* [emphasis added]

Thus, section 28(1) of the said Act imposes restrictions, *inter alia*, on the transportation of minerals without a valid license.

Offences

Section 63(1) of the said Act states:

> *"(1)* ***Any person who-***
>
> *(a) Explores for, or mines, processes, stores,* ***transports****, trades in or exports, any mineral* ***without a licence in that behalf issued under this Act****;*
> *(b) ……..*
> *(c) ……..*
> *(d) being the holder of a licence issued under this Act, fails to notify the Bureau of the discovery of any mineral discovered by him in the carrying out of the activities authorized by the licence, shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding five hundred thousand rupees and in the case of a second or subsequent offence, to a fine not exceeding one million rupees or to imprisonment for a term not exceeding one year or to both such fine and imprisonment."* [emphasis added]

Thus, in terms of section 63(1)(a) of the Mines and Minerals Act as amended, any person who explores or mines minerals, processes, stores, **transports**, trades in or exports any minerals without a valid license in that behalf issued under the Act commits an offence under the Act. It is important

to note that exploration or mining, storing, transporting, trading or exporting of any minerals are separate and distinct offences under the said section.

Further, as stated above, the Principal Act was amended by inserting sections 63A and 63B along with several other sections to achieve the object of the Principal Act by conferring power on Police Officers to seize and then forfeit to the State, any machinery, equipment or materials used in or in connection with the commission of an offence when an offence has been committed under this Act.

Power to seize any mineral, machinery, equipment or material

Section 63A of the Mines and Minerals Act states as follows:

> *"(1) A police officer who has reasonable grounds to believe that an* ***offence has been committed under this Act*** *may, with or without a warrant, seize any mined mineral quantity of mineral which has been mined, or any machinery,* ***equipment*** *or material used in or in connection with, the commission of that offence.*
>
> *(2) Where any mineral, machinery, equipment or material is seized by a police officer in pursuance of the powers conferred on him by this section, he shall forthwith produce such mineral, machinery,* ***equipmen****t or material before, or make it available for inspection by, a Magistrate, who shall make such order as he thinks fit relating to the detention or custody of such mineral, machinery,* ***equipment*** *or material, pending the conclusion of a prosecution instituted in respect of such mineral, machinery,* ***equipment*** *or material.*
>
> *Provided however, that where* ***any*** *minerals, machinery,* ***equipment*** *or material so seized is subject to speedy decay, the Magistrate may order that such minerals, machinery,* ***equipment*** *or material be sold and the proceeds of such sale be deposited in Court."* [emphasis added]

Thus, section 63A confers power on Police Officers to **seize any machinery, equipment, or materials used in or in connection with the commission of an offence** under the said Act and produce them in the Magistrate's Court.

Power to forfeit to the State

Section 63B of the said Act reads as follows:

> *"(1) Where any person is convicted of an offence under this Act, the Magistrate may make order that* ***any*** *mineral, machinery,* ***equipment*** *or material* ***used in, or in connection with, the commission of that offence*** *or the proceeds of the sale of any such minerals, or material deposited in court under the proviso to section 63A, be forfeited to the State."*
>
> *(2) Any mineral, machinery, equipment or material forfeited by an order under subsection (1), shall vest absolutely in the State upon the making of such order.*
>
> *(3) ……*
>
> *(4) The Court shall cause any mineral, machinery, equipment or material which has been vested in the State under subsection (2) to be sold and the proceeds of such sale to be deposited in Court."* [emphasis added]

Thus, section 63B(1) of the Act confers power on the learned Magistrate to forfeit to the State **any** minerals, **machinery**, **equipment** or material produced in court under section 63A of the said Act where any person is convicted of an offence under the Act.

However, the Mines and Minerals Act does not provide for an interpretation of the words "minerals, machinery, equipment, or material" referred to in the Act.

Does the Magistrate's Court have jurisdiction to forfeit to the State a vehicle under section 63B(1) of the Act?

Thus, it is necessary to consider whether a vehicle (lorry, tractor, tipper, boat, ship, etc.) that is used to transport minerals contravening the provisions of the Act could be forfeited to the State by a Magistrate after a conviction for committing an offence under the Act, when section 63B(1) of the Mines and Minerals Act has not specifically referred to the forfeiture of '**vehicles**'.

A cursory glance at sections 63A and 63B shows that a 'vehicle' is not specifically included in the said sections. Thus, it is necessary to consider whether the words "any", "machinery" and/or

"equipment" "**used or in connection with the commission of an offence"** in the said section comes within the scope of sections 63A and 63B, notwithstanding the fact that a 'vehicle' is not specifically referred to in the said sections.

In interpreting a provision of law, it is necessary not only to look at the words of the section on the face of the provision but also to consider the real meaning of it. Further, the legal meaning shall prevail over a mere literal meaning on the face of a word or a phrase in an Act. Particularly, the real meaning of a word should be considered when the meaning on the face of a word does not lead to achieving the object of the Act or leads to absurdity over the real intended meaning by enacting the legislation.

Further, if the plain meaning of the words used in an Act would lead to absurdity or be contrary to the very purpose for which the legislation has been enacted, the intention of the legislature should be ascertained and taken into consideration not only in considering a particular section but also the entire Act and its amendments.

Furthermore, an interpretation of an Act shall not curtail the effect of the intended purpose of the Act or restrict the results that it would otherwise achieve. Hence, it is necessary to adopt a construction that would not result in futility, lead to difficulties in implementing an Act or cause hardships to the public at large.

In the circumstances, a question will arise as to whether a "machinery" or "equipment" can be used to transport the minerals. In this regard, it is necessary to give a purposive interpretation to the words **"machinery"** or '**equipment"** in order to achieve a logical and rational meaning. Moreover, giving an interpretation confined to these words will make the said part of the section futile.

Hence, taking into consideration the rapid development in the technology of the equipment and machinery used in the mining industry, the aforementioned words should be given an interpretation that would be applicable to include the modern equipment and machinery used at present.

Therefore, the dictionary meaning of the word *equipment* will be considered to ascertain the real meaning and the intended purpose of using the word "equipment" referred in the said Act.

Dictionary meaning

"equipment"

Black's Law Dictionary (2nd edition) defines the word 'equipment' as:

> "Tools, be they devices, machines/**vehicles**. Assist a person in achieving an action beyond the normal capabilities of a human. Tangible property that is not land/buildings, but facilitates business operation. [emphasis added]

Further, *Stroud's Judicial Dictionary* (6th edition) defines the word "equipment" as:

> "Equipment for the purposes of s.1(1)(a) of the Employer's Liability (Defective Equipment) Act 1969 (c.37) was held to be wide enough to **include a ship of whatever size, *notwithstanding* that ships are not specifically mentioned in the definition of "equipment" in subsection (3), whereas vehicles and aircrafts are (*Coltman v Bibbly Tankers* [1987] 3 (3) W.L.R. 1181)."** [emphasis added]

Furthermore, in ***Coltman v Bibbly Tankers*** *(supra),* it was held that the term **"ship" should be included in the term "equipment" to achieve the intention of Parliament by making employers liable for the injury or death of employees**.

Longman Dictionary defines "equipment" as:

> "the tools, machines etc. that you need to do a particular job or activity."
>
> [emphasis added]

Thus, the dictionary meaning of the word 'equipment' shows that the word "equipment" includes a vehicle used in or in connection with the commission of that offence under Mines and Minerals Act No. 33 of 1992.

Applicability of Article 27(14) of the Constitution

Article 27(14) of the Constitution states:

> *"The State shall respect, preserve and improve the environment for the benefit of the community."*

Hence, Article 27(14) requires the court to interpret the provisions of Mines and Minerals Act No. 33 of 1992, as amended, to harmonise with the said Article, as the Constitution is the Supreme Law of the country. Further, no Act should be interpreted contrary to the provisions of the Constitution. Thus, as mining has a direct impact on the environment, the provisions of the Mines and Minerals Act No. 33 of 1992 should be interpreted in harmony with Article 27(14) of the Constitution. Further, in this instance, such an interpretation is necessary in order to preserve and improve the environment for the benefit of the community.

A similar view was observed in the case of ***Bulankulama and others v Secretary, Ministry of Industrial Development and others*** **[2000] 3 SLR 243,** where it was held:

> *"Article 27(14) states that "The State shall protect, preserve and improve the environment for the benefit of the community." Article 28(f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th respondents claimed in learned counsel's submissions on their behalf to protection under Article 12 of the Constitution relating to equal protection of the law) "is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches.""*

Consideration of the word "any" in section 63B

Section 63B of the Mines and Minerals Act also provides for **any** mineral, machinery, **equipment** or material used in or in connection with the commission of that offence to be forfeited to the State by the Magistrate. Taking into consideration the intention of the legislature and the scheme of the Act, the said amendment to the Principal Act shows that the legislature has used the word **"any",** as it is not practical to specify all the minerals, machinery, equipment or materials that may be used for exploration of minerals. Thus, the word "any" referred to in the said section shows that the said word has been intentionally used to include **any** mineral, machinery, **equipment** or material that has been used in connection with an offence committed under the said Act.

Applicability of section 28

Further, section 63B(1) should be considered along with the other provisions of the said Act. Particularly, section 28(1) of the Act which prohibits *inter alia* the transportation of minerals

without a licence. Accordingly, any person transporting minerals without a valid licence commits an offence under the Act. Thus, such a person is liable to be convicted under section 63(1) of the said Act.

Furthermore, as stated above, section 63B(1) has conferred power on the learned Magistrate to forfeit to the State any mineral, machinery, equipment or material used in or in connection with the commission of an offence under the Act. Moreover, as the transportation of minerals without a valid licence issued under the Act is an offence under the said Act, the equipment used to transport minerals falls within the scope of section 63B(1). In this regard, it is pertinent to note that any machinery, equipment or material used not only directly for exploration of mining but also anything that would facilitate mining and transportation are subject to the scope of the said section.

Thus, having considered the aforesaid dictionary meaning and the context where the word "equipment" is used in the Mines and Minerals Act, I am of the opinion that the word "equipment" used in the Act should be taken to include a 'vehicle' (lorry, tipper or even a bullock cart) used to transport minerals without a valid license issued under the said Act.

Therefore, I am of the view that the High Court did not err in law when it upheld the forfeiture of the said lorry, which was transporting gravel contrary to the provisions of the said Act, based on a conviction of a charge punishable under section 63B(1) of the Mines and Minerals Act as amended.

Further, the judgment delivered in ***Nishantha and 3 others v State*** *(supra)* has not considered section 63B(1) of the said Act, as amended in the above context. Furthermore, in the said judgment, the aforementioned amendments to the Principal Act were not considered in the context of sections 26, 28(1), 63(1), 63A and 63B of the Act and in the light of the object of enacting the Principal Act. As a result, the said interpretation defeats the object of the said amendments made to the Principal Act. Moreover, I am of the opinion that the interpretation given to the word "equipment" in the said judgment is repugnant to Article 27(14) of the Constitution. Thus, I am of the view that the said judgment is per in curium though it was cited by the appellants.

In light of the above, the following question of law should be answered as follows:

Did this Provincial High Court err in law when it upheld the confiscation/forfeiture of the said lorry based on a conviction of a charge punishable under section 63(1) of the Mines and Minerals

Act No. 33 of 1992 neither which nor any amending act thereof had provided for the confiscation/forfeiture of a vehicle?

No

The appeal is dismissed. I order no costs.

Judge of the Supreme Court

A. L. Siran Gooneratne, J

I Agree

Judge of the Supreme Court

Arjuna Obeysekere, J

I Agree

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under and in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code.

1. Muthu Jeewarathnam

2. Sellappan Mehaletchumi
   No. 14,
   Ebenzer Place,
   Dehiwela.

Plaintiffs

SC Appeal No. 54/2015

SC (HC) Leave to Appeal
Application N. 16/2013

High Court Case No. H.C. (Civil) 290/2012(MR)

Vs

Commercial Bank of Ceylon PLC
Commercial House,
No. 21, Bristol Street,
Colombo 01.

Defendant

AND NOW

Commercial Bank of Ceylon PLC
Commercial House,
No. 21, Bristol Street.
Colombo 01.

Defendant-Petitioner

Vs

1. Muthu Jeewarathnam

2. Sellappan Mehaletchumi
   No. 14,
   Ebenzer Place,
   Dehiwela.

Plaintiffs-Respondents

Before : Priyantha Jayawardena PC, J

A. L. Shiran Gooneratne, J

Mahinda Samayawardhena, J

Counsel : Harsha Amerasekara PC with K. Peiris for the Defendant-Appellant

Dr. Sunil Coorey for the Plaintiff-Respondent

Argued on : 14th November, 2022

Decided on : 5th July, 2023

Priyantha Jayawardena PC, J

Facts of the case

This is an appeal to set aside the Order of the Commercial High Court dated 12th of March, 2013 granting an interim injunction restraining the *parate execution* of a mortgaged property until the conclusion of the trial.

The 2nd plaintiff-respondent (hereinafter referred to as "the 2nd respondent"), who is the wife of the 1st plaintiff-respondent (hereinafter referred to as "the 1st respondent"), had obtained a housing loan of Rs. 8 Million on the 12th of April, 2005 from the defendant-appellant (hereinafter referred to as "the appellant bank") by mortgaging the property described in the schedule to the plaint as security, which is owned by her. In addition to the above security, the 1st respondent had given a personal guarantee to secure the said loan.

Thereafter, the 2nd respondent had obtained another loan of Rs. 6 Million on the 17th of January, 2007 from the appellant bank against the same property by entering into a secondary mortgage. Further, the said loan was settled in full by the 2nd respondent and the secondary mortgage bond had been discharged by the appellant bank.

Subsequently, the respondents had jointly obtained another loan of Rs. 5 Million on the 25th of February, 2008 from the appellant bank by entering into a secondary mortgage as security against the same property.

After some time, the respondents had defaulted on the repayment of both the said loans. Hence, the appellant bank had sent a letter of demand dated 14th of February, 2011 to the respondents, requesting them to settle the money due to the appellant bank.

However, as the respondents did not pay the money due on the aforesaid loans, the appellant bank had passed a resolution for the sale of the said mortgaged property by *parate execution* to recover the sum due on the aforesaid loans.

The said resolution dated 20th of December, 2011 states *inter alia*, to sell the mortgaged property by public auction for the following reasons:

(a) recovery of a sum of Rs. 4,670,691/- with further interest at 12% per annum from the 17th of September, 2011 together with costs of advertising and any other incurred less payments (if any) since received; and

(b) recovery of a sum of Rs. 9,129,306/- with further interest on a sum of Rs. 5 Million per annum from the 17th of September, 2011 to date of sale together with costs of advertising and any other incurred less payments (if any) since received.

In the circumstances, the respondents instituted action against the appellant bank in the Commercial High Court on the 30th of May, 2012 alleging that the resolution passed by the appellant bank to *parate execute* the said mortgaged property to recover both the aforesaid loans is unlawful as the appellant bank was not entitled to treat the loan of Rs. 8 Million in default. Further, the respondents prayed for an interim injunction staying the sale of the mortgaged property by *parate execution*.

Thereafter, the learned High Court Judge, by his Order dated 12th of March, 2013 granted an interim injunction restraining the appellant bank and any persons acting under it from selling the said mortgaged property until the conclusion of the said case in the Commercial High Court.

Being aggrieved by the said Order of the Commercial High Court, the appellant bank appealed to this court and this court granted leave to appeal on the following questions of law:

"ii) the Learned High Court Judge erred gravely in law and misdirected himself in law in failing to consider the provisions of s.12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 by which the Defendant Bank has been specifically empowered by the legislature to adopt a resolution of the manner of 'X14' and take steps thereunder;

v) the Learned High Court Judge gravely erred in law and misdirected himself in law in failing to take cognizance of the fact that the Plaintiffs were expressly barred from obtaining the relief prayed for in the plaint in law;

vi) the Learned High Court Judge gravely erred in law and misdirected himself in law in failing to consider and/or apply and/or properly apply the tests required for the grant of an interim injunction in the delivery of his Order."

Further, the learned counsel for the respondents raised the following question of law to be considered by this court:

"In any event in the totality of the circumstances of this case and in view of the amendments brought to Act No. 01/11 (Section 5(A) and Section 22) and as further amended by Act N. 19/11, was a High Court Judge in event right in granting the interim injunction."

The Learned High Court Judge erred gravely in law and misdirected himself in law in failing to consider the provisions of s. 12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 by which the Defendant Bank has been specifically empowered by the legislature to adopt a resolution of the nature of 'X14' and take steps thereunder

In respect of the above question of law, the issue that needs to be considered is whether the appellant bank has been conferred with the power under section 12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (hereinafter referred to as the "Recovery of Loans by Banks Act) to adopt a resolution to authorise the sale of a mortgaged property for the recovery of money due on two or more loans when the respondents have defaulted only on one loan.

In terms of section 3 read with section 4 of the Recovery of Loans by Banks Act, whenever a default is made in the payment of any sum due on any loan granted to a borrower, the Board of Directors of the bank may, *inter alia*, pass a resolution to sell the mortgaged property by public auction to recover the whole of the unpaid portion of such loan.

However, in terms of section 5A(1) of the said Act, a bank is not entitled to recover a loan under the said Act if the principal sum of the loan does not exceed Rs. 5 Million. Further, the interest accrued on such a loan or the penalty imposed thereon shall not be taken into consideration when calculating the principal sum borrowed by a borrower from the bank. Thus, the said section contemplates situations where the principal sum given as a loan or money advanced should be more than Rs. 5 Million to fall within the purview of the Act.

In the instant appeal, the principal amounts borrowed from the appellant bank are Rs. 8 Million and Rs. 5 Million. Thus, both loans exceed the Rs. 5 Million threshold stipulated in the said section. Hence, the bank is entitled by law to invoke the provisions of the said Act to recover both loans granted to the borrower.

In the circumstances, the appellant bank has passed a resolution under section 4 of the said Act to recover the total sum of the money due on the mortgage bond as well as on the secondary mortgage loan by authorising the sale of the property.

Further, the appellant bank has published a notice of the resolution in the Gazette dated 11th of May, 2012 and in three daily newspapers, and copies of such publications were sent to the respondents in terms of section 8 of the Recovery of Loans by Banks Act. Nevertheless, the respondents had not settled the arrears due to the appellant bank on the Rs. 5 Million loan. Therefore, the appellant bank had advertised the sale of the mortgaged property to recover the total sum due to it in respect of both loans under section 9 of the said Act and served copies of the notices of sale on the respondents.

Section 12 of the Recovery of Loans by Banks reads as follows:

> *"(1) In any case* ***where two or more loans have been granted by a Bank on the security of the same property and, default made in the payment of any sum due upon any one*** *or more* ***of such loans****, the foregoing provisions of this Act shall apply* ***notwithstanding that default may not been made in respect of the other loan*** *or any of the other loans and the Board may, in any such case, by resolution under section 4* ***authorise the sale of the property for the recovery of the total amount due to the Bank in respect of both or all of the loans****, as the case may be, and these provisions shall apply accordingly.*
>
> *(2) Nothing in section 3 to 15 (both sections inclusive) shall be read or construed as prohibiting a Bank from recovering the amount due on a mortgage bond in accordance with the provisions of any other law."*
>
> [emphasis added]

Accordingly, the words *"notwithstanding that default may not have been made in respect of the other loan"* referred to in section 12(1) means that where two or more loans have been granted to a borrower against the security of the same property and if a borrower defaults to repay any one or more of those loans, the bank is entitled to pass a resolution under section 4 of the said Act to authorise the sale of the mortgaged property for the recovery of the total amount due to the bank in respect of all the loans granted to a borrower even though the borrower has not defaulted on the other loans granted to him by the bank.

If the said section is interpreted to mean that, when two or more loans have been granted on the security of the same property, a bank is not entitled to sell the mortgaged property to recover the money due on loans that are being defaulted merely because the other loans have been serviced without any default, the bank would not be able to recover the money due on the defaulting loan. Such an interpretation would render the said section nugatory.

Thus, the appellant bank is entitled to pass a resolution in terms of section 12(1) of the said Act for the sale of the mortgaged property to recover the total amount due on both of the aforesaid loans, even though there was no default in the re-payment of the loan of Rs. 8 Million since both of the aforesaid loans have been granted on the security of the same property.

Therefore, I am of the view that the appellant bank is entitled to sell the said mortgaged property to recover the total sum due to the bank on both of the aforesaid loans.

However, section 14 of the said Act stipulates that if there is any excess money remaining from the proceeds of sale of the said mortgaged property, it should pay the balance remaining, if any, to the borrower after deducting from the amount due on the mortgage and the money and Costs recoverable under section 13 of the said Act.

In the circumstances, I am of the opinion that the learned High Court Judge erred in law in failing to hold that the appellant bank has been specifically conferred power under section 12 of the Recovery of Loans by Banks Act to adopt the resolution marked and produced as 'X14' to take steps to sell the said mortgaged property to recover the outstanding money due on both of the aforesaid loans.

The Learned High Court Judge gravely erred in law and misdirected himself in law in failing to consider and/or apply and/or properly apply the tests required for the grant of an interim injunction in the delivery of his Order

The learned High Court Judge, by his Order, granted an interim injunction restraining the appellant bank from selling the said mortgaged property until the conclusion of the said case in the Commercial High Court.

However, as stated above, the appellant bank is entitled to sell the mortgaged property to recover the money due to the bank. In view of the aforementioned findings and taking into consideration

the other facts and circumstances of the case, I am of the opinion that the respondents have failed to establish a prima facie case in favour of them and that the balance of convenience lied in favour of the appellant bank, as section 12 of the Recovery of Loans by Banks Act allows the bank to sell the mortgaged property to recover the money due to them.

Therefore, I am of the view that the High Court Judge erred by not properly applying the aforementioned tests required for the grant of an interim injunction and issuing an interim injunction preventing the appellant bank from *parate executing* the mortgaged property.

Conclusion

In the circumstances, I am of the view that the following questions of law should be answered as follows;

"the Learned High Court Judge erred gravely in law and misdirected himself in law in failing to consider the provisions of s.12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 by which the Defendant Bank has been specifically empowered by the legislature to adopt a resolution of the nature of 'X14' and take steps thereunder."

Yes

"the Learned High Court Judge gravely erred in law and misdirected himself in law in failing to consider and/or apply and/or properly apply the tests required for the grant of an interim injunction in the delivery of his Order."

Yes

Due to the foregoing answers, the other questions of law need not be considered.

Therefore, the appeal is allowed. I set aside the order of the learned High Court Judge.

No costs.

Judge of the Supreme Court

A. L. Siran Gooneratne, J

I Agree

Judge of the Supreme Court

Mahinda Samayawardhena, J

I Agree

Judge of the Supreme Court

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

SC. Appeal No. 52/2016

SC. HC (CA) LA Application No. 293/2015

CP/HCCA/Kandy No. 47/2014 (LA)

D.C. Kandy Case No. 35137/05/MR

Bakmeeange Gedara Sunil Ananda Senevirathne,
No.35, Diyapalagoda,
Muruthalawa

Plaintiff-Respondent-Appellant

Vs.

Athula Amarasinghe,
Officer-in-Charge,
Police Station,
Hasalaka.

Defendant-Petitioner-Respondent

Before: Buwaneka Aluwihare PC, J.,
P. Padman Surasena J.,
E.A.G.R. Amarasekara J.

Counsel: H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondent-Appellant.
Suren Gnanaraj SSC for Hon. AG.

Argued on: 28.01.2020

Decided on: 11.07.2023

E.A.G.R. Amarasekara J.

The Plaintiff-Respondent-Appellant (hereinafter referred to as 'the Plaintiff') instituted the action bearing No. 35137/05/MR in the District Court of Kandy against the Defendant-Petitioner-Respondent (hereinafter referred to as 'the Defendant') praying inter alia for a judgment as follows.

a) Directing the Defendant to pay a sum of Rs. 1,000,000/= as damages to the Plaintiff for the alleged acts done maliciously against the Plaintiff under the cover of his authority.

b) For legal interests at 15% on the aforesaid amount from the date of the Plaint till the payment in full.

In the caption, the Defendant was named as Athula Amarasinghe, Officer in Charge, Police Station, Hasalaka. Thus, it is clear that the allegations were based on the acts of the Defendant done under his authority as the Officer in Charge of the Police Station, Hasalaka.

The Plaintiff in his Plaint averred as follows;

1. The Defendant had maliciously directed Plaintiff's wife, a WPC, to make a complaint against the Plaintiff.

2. The Defendant, using the said Police Complaint, had informed the Plaintiff via several telephone messages to the Koswatta Police Station where he was serving, to be present on 03.04.2005 at 10 a.m. at Hasalaka Police Station for an inquiry into the said Complaint-vide paragraph 7 of the Plaint.

The said messages received via telephone contained information about certain inquiries to be held against him into an alleged assault to his wife, neglect to maintain his children and wife and use of abusive words to threaten his wife. It is further stated that steps would be taken under Section 308 (a) of the Penal Code.

3. The Plaintiff attended Hasalaka Police Station on 03.04.2005 to comply with the said messages he received but the Defendant used obscene words towards the Plaintiff and attempted to assault him, threatened him and kept him in police custody- vide paragraph 9 of the Plaint.

4. On 19.04.2005, the Plaintiff's wife, on the instigation of the Defendant, filed a maintenance action bearing No. 34725 in the Mahiyanganaya Magistrate Court.

5. The Defendant on 25/7/2005 also submitted a report under reference No. BR 750/05 on the basis of a complaint made by his wife on 30.05.2005 and sought notices to be issued on the Plaintiff through Koswatta Police.

6. On 02/6/2005 and 05/6/2005, the Defendant informed the Plaintiff, by telephone messages through OIC Police Station Puttalam, to be present at Hasalaka Police Station and caused notice to be served through Koswatta Police Station knowing very well that

the Plaintiff was serving at Puttalam Police Station. This was done with an intention to get a warrant issued against him.

7. When the Plaintiff made his presence at the Hasalaka Police Station he was subjected to abusive words and threats by Police Officers who were instigated by the Defendant.

8. The Defendant's malicious conduct on 03.04.2005 at the police station was defamatory and caused mental pain to the Plaintiff and this conduct of the Defendant caused the breakdown of the Plaintiff's matrimonial life.

9. Even though the Defendant had acted in the capacity of a Public Officer, he had used his official capacity maliciously towards the Plaintiff and the Defendant is personally liable for his conduct.

Thus, it is clear that the action is based on the actions taken by the Defendant in his capacity as a Police Officer, but the Plaintiff alleges that the Defendant is personally liable as the Defendant's conduct was malicious. Other than, stating that the Defendant acted maliciously, nothing is clearly revealed in the Plaint as to why he attributes malice to the Defendant.

By answer dated 18.03.2011, among other things, the Defendant denied the allegations of the Plaintiff and also raised the objection that an action against a public officer cannot be maintained without making the Honourable Attorney General a party and the action would be liable to be dismissed for non-compliance with the provisions of Crown (Liability in Delict) Act. By filing replication dated 24.06.2011, the Plaintiff stated that since the Plaint had been filed against unlawful acts of the Defendant, it was not necessary to name the Honourable Attorney General as a party.

Trial commenced on 06.12.2011, issues and admissions were recorded, and the evidence of the witness also commenced. However, the Defendant was not represented by the Attorney General at the beginning. On 02/12/2013, the Defendant was represented by Honourable Attorney General and further legal objections were raised as issues by the Learned State Counsel as to whether the Plaint was contrary to the provisions of Section 88 of the Police Ordinance, and if so whether the action could be maintained.

The learned District Judge, Kandy by order dated 22.08.2014 rejected the said preliminary objection based on Section 88 of the Police Ordinance. The Defendant preferred an application seeking leave to appeal to the High Court of Civil Appeal, Kandy and the High Court after considering the said application and the main matter

together, by order dated 11.08.2015 allowed the appeal and set aside the order of the District Court dated 22.08.2014 and directed the District Judge to dismiss the plaint.

In granting leave against the said decision of the Learned High Court Judges, this court permitted the following questions of law.

a) whether the protection given under Sec. 88 of the Police Ordinance extends to acts done maliciously and mala fide by the public officer under the cloak of his authority?

b) In any event whether the non-compliance of Sec. 88 of the Police Ordinance was fatal to the plaintiff's action in the circumstances of this case?

In this regard it is worthwhile to see the scope of the Sec. 88 of the Police Ordinance which reads as follows;

"All actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done under the provisions of this Ordinance, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the principal officer of the district in which the act was committed, one month at least before the commencement of the action; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant".

To answer the aforementioned first question of law, it is necessary, to decide whether the words 'anything done or intended to be done under the provisions of this Ordinance, or under the General Police powers hereby given' includes any act/acts done maliciously or with mala fide intentions by police officers.

It is observed some case laws dealing with Sec. 88 of the Police Ordinance have referred to a similar provision in the Civil Procedure Code, namely Section 461 and vice versa. As per Sec. 461 of the Civil Procedure Code, 'no actions shall be instituted against Attorney General as representing the State or against a Minister, Deputy Minister or a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of one month next after notice in writing has been delivered to such Attorney General, Minister, Deputy Minister, or officer (as the case may be)……' However, by an amendment to the Civil Procedure Code in 1977, Section 461 A was introduced and now, if such an action is filed without giving notice as aforesaid and an objection is taken, the court has to stay the proceedings for one month subject to such costs as ordered by the Court and the date immediately following one month after the institution of such action is treated as the date of the institution for the purpose of

determination whether the action is prescribed. However, no such amendment has been introduced in relation to Sec. 88 of the Police Ordinance. Learned Senior State Counsel in his submission has shown the chronology of the case law and judicial pronouncement relating to the scope and intent of the Sec. 88 of the Police Ordinance and also relating to Sec. 461 of the Civil Procedure Code. It appears that in the first half of the 20th century our courts have interpreted said sections in a more restricted manner. In terms of those decisions motives of the officer concerned is relevant to the applicability of the said provisions.

What follows below would illustrate the restricted view taken by our courts;

1. ***Perera v Hansard (1886) 8 SCC 1***
   The Supreme Court had to interpret Section 79 of the Police Ordinance which was worded similar to Sec. 88 of the Police Ordinance as it stands today. It was held that the officer was entitled to notice of action for anything done or intended to be done by him as a police officer, when he acted with bona fides (page 3), and as the defendant did not believe that he was justified in searching the plaintiff's house without a warrant and he was fully aware of the illegal manner the warrant was issued to which he had been a party, he was not entitled to notice of action (page 6).

2. ***Appusingo Appu v Don Aron 9 NLR 138*** – in interpreting "an act purporting to be done by him in his official capacity" as occurring in Section 461 of the Civil Procedure Code it was observed while referring to some English authorities that 'purporting' is equivalent to 'in pursuance of' and if the relevant officers honestly intended to put the law in force and believed that the plaintiff had committed the offence with which he was charged, even though there was no reasonable grounds for such belief , the officer was acting in pursuance of his statutory authority. It was further held that it would be intolerable if these privileges could be claimed by a public officer who is acting wrongfully and for the gratification of private malice, and whose official authority appears only in his badge. (At page 140).

3. Above was followed in ***Abaran Appu V Banda 16 NLR 49*** where in interpreting section 461, it was observed that the protection given by sections expressed in these or in similar terms do not extend to the acts maliciously done by the public officer under the cloak of his authority and the protection is intended to be given when the defendant has acted in good faith and with an honest intention of putting the law into force (vide pages 50, 51). It appears that in coming to the conclusions Lascelles CJ relies on the authority of **Perera V Hansard** (above) and some English case laws. Wood Renton J saw no reason to anticipate any difficulty in considering whether or not the defendant had a right to notice of action due to the fact that the question of good faith was incapable of being determined before the action

had been tried since no difficulty of that kind had arisen in England in consequence of the constructions by the English Courts on expressions such as 'in pursuance of or anything done or intended to be done'. – (at Page 52).

4. Referring to the aforementioned decisions, in ***Saranankara v Kapurala Aratchi (1916) 3 CWR 121*** it was held that where the question as to whether or not a defendant can claim notices under Section 461 is one of fact, evidence must be taken before the decision is arrived at. Further it was stated that the Learned District Judge seemed to have not considered the question as to whether the Defendant acted mala fide. Hence the decision was set aside and sent back for a decision to be made after trial.

5. ***Van Hoff V Keegal (1917) 4 CWR 258*** is another case which states that a Police Officer who is found to have acted maliciously and not in the bona fide exercise of his official duties is not entitled to depend on the limitations of action provided in Section 79 (as it stands then) of the Police Ordinance No 16 of 1868. The decision in ***Van Hoff V Keegal*** was followed even in ***Ismalanne Lokka v Harmanis 23 NLR 192*****.**

6. ***Punchi banda V Ibrahim*** **reported in 29 NLR 139** also considered the scope of section 79 (as it stands then) of the Police Ordinance, Fisher J stated that by the words 'intended to be done', section 79 extends the protection to any act which a police officer does in the reasonable and bona fide belief that he is acting within the scope of his authority, that is to say, that when he did the act under consideration he intended to do what he conceived and reasonably and honestly thought to be his duty and was not actuated by malice or ulterior motive (page 139) Drieberg A.J. also held that the police officer would not be entitled to the protection if he acted maliciously and not in bona fide exercise of official duties (At page 144)

As indicated by above case law, relevance and application of Section 88 of the Police Ordinance were circumscribed by the motive of the relevant officer, that is to say, if he had acted maliciously, he could not have claimed that section 88 is applicable.

However, in the second half of the 20th century and thereafter it appears that there is a significant departure in the approach and judicial thinking in this regard. However, before going through such cases that took a different view, it is important to highlight some negative aspects of the approach taken by our courts in the above decisions in the 1st half of the 20th century.

1. Section 88 of the Police Ordinance expects to commence proceedings within 3 months from the act complained of and the notice of action has to be given to the defendant or to the principal officer of the district at least one month prior to the commencement of the action. The latter part of the section indicates that the idea of giving notices is to make necessary amends in appropriate instances.

However, as indicated above and also decided in ***Saranankara v Kapurala Aratchi*** whether notice should have been given or whether the action has been prescribed has to be decided only after trial or after hearing considerable amount of evidence in relation to the relevant facts. When it is pleaded that an act was done maliciously with mala fide intent it is a matter to be decided through evidence. Thus, a mere averment in the plaint that alleged acts were done maliciously may deprive the defendant officer or the relevant principal officer his opportunity to receive notice prior to the institution of the action and also his ability to take up an objection at the beginning of the action that the action is prescribed since the relevant facts in relation to the malice has to be established through evidence. On the other hand, on such occasions after hearing the evidence, if the court comes to the conclusion that there was no malice, the relevant officer by that time would have gone through the trial in negation of his entitlement to receive notice under section 88.

Moreover if the court decides after hearing evidence that there was no malice, but harm has been caused due to exceeding of powers or undue use of powers, the opportunity to make amends may be lost and the Plaintiff may have to lose his case as he acted against a positive rule of law by not giving notice as contemplated by section 88 and/or not filing the action within the stipulated time frame: therefore, even though in *Abaran Appu vs Banda* Wood Renton J expressed his view that there is no reason to anticipate any difficulty would arise under our procedure, as explained above an allegation of malice which cannot be proved may negate the rights of the officer concerned. On the other hand, when the alleged malice is not proved but the harm is proved the Plaintiff may lose his entire claim.

2. Section 88 of the Police Ordinance contemplates acts which can be described as 'anything done or intended to be done under the provisions of said ordinance, or under the general police powers given under the said ordinance'. In interpreting the courts must first give the general meaning to the words used. To interpret it in a manner limiting its meaning to acts done in good faith and without malice, such words have to be introduced to section to read it some way similar to "…for anything done or intended to be done in good faith / without malice …". This seems to be contrary to rules in constructing the meaning of a statutory provision.

3. Further there may be occasions where the officer acts with malice, but the act is lawful. For an example, if a police officer raids a given place where the illicit liquor trade is carrying on by the owner greater number of times than he does in relation to other illicit liquor trading places in the area due to some malice the officer has against the said owner, can one say that the officer is not entitled to the notice and plea of time bar under the section, if the raid is lawful?

In the above backdrop, it is necessary to view the change of judicial thinking from 1950 onwards till now. In ***Ratnavira vs Superintendent of Police (CID) 51 NLR 217*** in relation to section 461 of Civil Procedure Code Wijewardena CJ considered some of the cases referred to above but relying on some Indian cases which considered similar provisions, stated that ***Appusingo Appu Vs Don Aron*** and ***Abaran Appu Vs Banda*** have taken a restricted view of the section 461 where it was laid down that the section did not apply to public officers acting *malafide*. Wijewardena CJ in the discourse of his judgment refers to one Indian judgment ***Koti Reddi vs Subbiaha et al (1918) Indian Law Reports 41 Madras 792*** which held that a public officer was entitled to notice of the action under section 80 of the Indian code even though he has acted malafide and quotes Sadasiva Ayyar J as follows: "…..*I think that the expression 'any act purporting to be done by such public officer in his official capacity'… means 'any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance'. …….an act done by a public officer would 'Purport' to be an act done in his official capacity not only if it was properly and rightly done by him in such capacity and within his powers but also if it has such a reasonable resemblance (though a false pretended resemblance) to a proper and right act that ordinary person could reasonably conclude from the character of the act and from the nature of his official powers and duties that it was done in his official capacity. But if the act done is so outrageous and extraordinary that no reasonable person could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice. ……. I think the question of good faith and bad faith of the public officer either as regards his belief in legality or propriety of his act or the limit of his powers or the existence of facts justifying the existence of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice……*"

Wijewardena CJ also refers to ***Dakshina Ranjan Ghosh v Omar Chand Oswal (1923)*** *Indian Law Reports, 50 Calcutta 994 and* ***Abdul Rahim V Abdul Rahim (1924) All India Law Reports, 46 Allahabad 851*** and quotes the following passages from them.

"The *decision of the Learned Subordinate Judge implies the importation of words into the section which cannot be found there. He would read the section as if it were 'in respect of any act purporting to be done by such public officer bona fide in his official capacity'. In my judgment it is not legitimate to construe the section by importing into the section words which do not appear in the Section*." (Quoting Sanderson CJ).

"*The contention urged on behalf of the Respondent in this court is that which was adapted by the court below, namely that section 80 has no application unless to act complained of was done in good faith. On the language of this section the question*

seems to us to admit no doubt. The section does not require that the act should have been done in good faith. It merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as in ordinarily done by the officer in the course of his official duties and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the 'ordinary' meaning of the term 'purport'. The motives with which the act was done do not entered the questions at all." (Quoting Neave JJ)

De Silva V Illangkoon 57 NLR 457 was a decision made by the Supreme Court. The Court relied on two Privy Council decisions over two Indian cases namely ***Albert West Meads V the King, and Gill and another V King*****.** Basnayake ACJ held that he was unable to find in the language of section 461 anything which requires a person bringing in an action against a public officer to ascertain beforehand whether the act which he purported to do in his official capacity was *malafide* or *bonafide* " and it was further held that when construing a provision such as section 461, in the first instance, the expression used therein should be given the ordinary meaning; further the word 'purport' means ordinarily 'profess' or 'claim' or 'mean' or 'imply'.

Whereas in that case a public officer clearly in the exercise of his function as the Principal of a School had given a certificate to a pupil in accordance with the requirement of Government regulations, there was no doubt in the mind of the court that the act was one that he purported to do in his official capacity and there was no other capacity in which he could have given such a certificate. Basnayake ACJ stated that clearly therefore the mental process whether it be malicious or otherwise which induced him to write the words 'extremely bad' against the case 'conduct' was immaterial. (Pages 459-460).

In the case **H.H.B. Gill V the King 1948 A.I.R.128 at 133**, mentioned above it was stated as follows;

"*A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office*".

In **Liyanage V Municipal Council Galle (1994) 3 Sr L R 216 at 226** in relation to a discussion on a similar provision in Section 307 of the Municipal Council Ordinance Mark Fernando J after considering many of the above-mentioned cases, stated that Section 461 is not intended to give some special advantage to the Defendant, but to

enable him to consider or reconsider the grievance of the citizen and to offer amends" [also see **Attorney General v Arumugam (1963) 66 NLR 403, 404**].

In ***Amersinghe V Bandara CA (Rev) 517/96***, dated 11.07.1997 Edirisuriya J observed as follows:
"… so that, even if the Respondent acted maliciously, the act of taking the Petitioner into custody and later producing the Petitioner before a Magistrate were done under the provisions of the Police Ordinance. It is on the allegation of malice that the action for damages has been instituted," and there the Court of Appeal held that Section 88 of the Police Ordinance applies even whether an action for malicious arrest is brought against the complainant.

The Court of Appeal again In ***Palitha Perera V Vincendrarajan* No. CALA 543/2002** on 18.05.2010, after considering some of the cases referred to above in this decision, decided to follow the reasoning in *De Silva V Illangakoon* (supra) and held that "*whether the act was done lawfully or unlawfully and bona fide or mala fide they are acts purportedly done by virtue of the office. Hence the Plaintiffs is bound by section 88 of the Police Ordinance*. "

As indicated above, our cases demonstrate that our judicial dicta on the matter in issue is divided, while the earlier authorities interpreted the scope of the section 88 of the Police Ordinance and similar Sections like section 461 of the Civil Procedure Code in a restricted manner, decisions since 1950 onwards have taken more liberal view to state that motives of an officer are immaterial to the applicability of those provisions.

Previously in this judgment I have already mentioned certain negative aspects of the earlier approach taken up by our courts. Moreover, in earlier decisions, even though some English cases were merely followed, there appear to be a lack of proper analysis of those decisions to see whether they were correctly decided and/or to see whether they are in fact relevant to the matters in dispute before our courts.

It was mentioned previously in this judgment that practical difficulties that may arise due to the situation, especially when the courts have to decide the existence of malice after hearing evidence. However, in my view, the most important part of the section which is relevant to filing an action against the police officer contains in the words '*for anything done and intend to be done under the provisions of the ordinance or under the general police powers hereby given*'. These words indicate that the section applies only for,

a) anything done or intended to be done by a police officer under the provisions of police ordinance and/or
b) anything done or intended to be done by a police officer under the general powers given by the ordinance.

These words do not contemplate the motive of the officer involved, whether there is malice or not, whether he acted in bad faith or not. Bindra on interpretation of Statute (10th Edition) at page 438 refers to a basic principle in constructing statutes as follows;

"*Where the meaning of the word is plain, it is not the duty of the courts to busy themselves with supposed intention. A court cannot stretch the language of a statutory provision to bring it in accord with the supposed legislative intention underlying it unless that words are susceptible of carrying out the intention".*

Thus, as indicated before, the approach of our courts in interpreting section 88 and the Police Ordinance and similar provisions in the early part of the 20th century appear to be not in line with the said principles as it requires one to understand the words as 'anything done or intended to be done without malice or bad faith'. Therefore, in my view that observations made by Wijewardene CJ in ***Ratnavira vs superintendent of police (CID) 51 NCR 217*** interpreting Section 461 of the Civil Procedure Code, which is also relevant in interpreting section 88 of the Police Ordinance, is more appropriate to follow. Further, in my view ***De Silva v Illangakoon*** *(supra),* ***Palitha Perera v Vincendrarajan*** *(Supra),* ***Liyanage v Municipal Council of Galle*** *(Supra),* ***Amerasinghe v Bandara*** *(Supra)* exhibited the correct approach in interpreting section 81 of the Police Ordinance or similar provisions such as Section 461 of the Civil Procedure Code.

Apparent intention of the legislature of giving notice as per Section 88 is to make amends prior to the institution or at the beginning of the action. Deciding whether one acted with malice or not through evidence and then deciding entitlement to notice appears to be in conflict with such intention. As mentioned above, if one adheres to the previous approach mere pleading of malice of the defendant in the plaint would take all such actions out for the scope of section 88 till the motive is decided through evidence. Further if one acts with bona fide and according to law, there may be very limited occasions to make amends such as in a matter where the relevant officer acts in bona fide but exceeds his powers.

In my view what is important is not the fact whether the relevant officer acted with malice or with bad faith but whether he had acted or intended to act under the provisions of the Ordinance or general powers given under the Ordinance. In recognizing whether the relevant officer acted or intended to act so, Judicial insights expressed by Sadasiva Ayyar J and Neave J as quoted in **Ratnavira Vs Superintendent of Police** (Supra) as well as what is quoted above from **H.H.B Gill Vs the King** (Supra) may shed light.

Thus, in my view the judicial dicta and approach expressed in cases decided from the beginning of the second half of the 20th century till now as referred to above are correct. Further, since there is a time limit to file the action from the occasion of the

incident and direction to give notice of the action one month prior to expiry of that period, non-compliance of the requirements of the section is fatal.

One may argue that some of the allegations namely, getting another officer to scold at and threaten the plaintiff and/or scolding the plaintiff or attempting to assault the plaintiff do not fall within the scope of 'anything done or intended to be done under the provisions of the Police Ordinance or general powers given under ordinance. (See para 14, 15 of the plaint) However, as per the paragraph 17, the plaintiff himself has taken up the position that all the acts, complained of were done by maliciously using Defendant's official status and authority. As said the plaintiff cannot be understood as taking up such a stance as his complaint is that the defendant used his official position maliciously against him. Thus, overall position of the plaint is that the Defendant's acts were done or intended to be done under the provisions of the police ordinance or general powers given under the ordinance but maliciously.

Hence, the questions of law mentioned above have to be answered in the following manner in favour of the defendant.

1. Section 88 contemplates any act done by a police officer under the cloak of his authority. Motive is irrelevant.
2. Whether the non-compliance of section 88 of the Police Ordinance was fatal to the Plaintiff's action is answered in affirmative.

Thus, the appeal is dismissed with costs.

……
Judge of the Supreme Court

Buwaneka Aluwihare PC, J.

I agree.

……
Judge of the Supreme Court

Padman Surasena J.

I agree.

……
Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Wickremasinghage Francis Kulasooriya

2. Devamuni Lakshman De Silva

Presently remanded at;
Remand Prison, Mahara.

Petitioners

SC Appeal 52/2021

SC (SPL) LA No. 410/2018
CA (Writ) Application No. 338/2011

Vs,

1. Officer-in-Charge,
   Police Station, Kirindiwela.

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

3. W. Aravinda Perera,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

3A. D. A. R. Pathirana,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

4. Amaraginghe Arachchige Simon Amarasinghe,
   172B, Siyabalagahawatta,
   Pepiliyawala.

Respondents

And now Between

1. Wickremasinghage Francis Kulasooriya
   49/1, Kathuruwatte, Mudungoda, Gampaha.

2. Devamuni Lakshman De Silva
   No. 246/A, Kudagoda, Horampella, Minuwangoda.

Petitioner- Petitioners

Vs,

1. Officer-in-Charge,
   Police Station, Kirindiwela.

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

3. W. Aravinda Perera,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

3A. D. A. R. Pathirana,
   The Magistrate of Pugoda,
   Magistrate's Court of Pugoda,
   Pugoda.

4. Amaraginghe Arachchige Simon Amarasinghe,
   172B, Siyabalagahawatta,
   Pepiliyawala.

Respondents-Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice E.A.G.R. Amarasekara
Justice K.K. Wickremasinghe

Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam instructed by S. Kaluarachchi for the Petitioner-Appellants

Rohantha Abeysuriya, PC, ASG, with Malik Azeez, SC, for the 1st and 2nd Respondent-Respondents

Pulasthi Hewamanna with Ms. Fadhila Fairoze for the 4th Respondent-Respondent

Argued on: 13.09.2022

Decided on: 14.07.2023

Vijith K. Malalgoda PC J

The Petitioners to the instant application namely, Wickremasinghage Francis Kulasooriya and Devamuni Lakshman De Silva had sought special leave to appeal against the Judgment by the Court of Appeal in CA Writ Application 338/2011 dated 22.10.2018.

This Court after considering the material placed on behalf of all parties, decided to grant special leave to appeal on the questions of law referred to in paragraph 10 (a) and (c) of the petition dated 03.12.2018 which reads as follows;

10 (a) Did the Court of Appeal err in law in failing to appreciate that in view of the extraordinary circumstances, the Petitioners' application was a fit and proper case for the Court of Appeal to exercise its writ jurisdiction under Article 140 of the Constitution?

(c) Did the Court of Appeal err in law in failing to appreciate that the mere availability of an alternative remedy does not prevent the Court of Appeal from exercising Writ Jurisdiction under Article 140 of the Constitution?

As revealed before us the 1st Petitioner was a Sub-Inspector of Police and the 2nd Petitioner was a Police Constable serving at the Kirindiwela Police Station. According to the two Petitioners, while they were on mobile duty on 13.08.2010, at about 20.55 hours they were informed by the Kirindiwela

Police Station that a person under the influence of liquor was behaving violently and causing a nuisance to the public close to the Pepiliyawala Junction within the Police area of Kirindiwela. The Petitioners who proceeded to the Pepiliyawala Junction in a single cab of Kirindiwela Police Station arrested one Amarasinghe Arachchige David Amarasinghe for his unruly behavior under the influence of liquor. When the cab proceeded towards Kirindiwela Police Station after getting him into the rear portion of the cab, the suspect jumped out of the moving cab and was lying on the road with bleeding injuries. With the assistance of the public, the injured were rushed to Radawana Hospital. The injured who was transferred to Gampaha Hospital and thereafter to National Hospital succumbed to his injuries in the early hours of 14th August 2010.

On the 14th itself, the Officer in Charge of the Police Station Kirindiwela had reported the facts before the learned Magistrate Pugoda by way of a 'B' Report. the Acting Magistrate before whom the 'B' Report was called, had made two orders, one was to the J.M.O Colombo to hold the Post Mortem Examination and the other was a directive for the Police Officers who were on mobile duty on the 13th to be present before the Magistrate for inquest proceeding.

The inquest proceedings were commenced on 18.08.2010 before Magistrate Pugoda and the evidence of several witnesses was recorded during the inquest proceedings. Some of the witnesses who testified before the Magistrate gave versions different from what was reported to the Magistrate in the 'B' Report. After recording the evidence of several witnesses, the Magistrate made an order remanding the two Police Officers who were engaged in the arrest of the deceased person and discharged the Police Driver who drove the police cab at the time the deceased was said to have jumped out from the police cab.

As revealed before us, on behalf of the two Police Officers (the two Petitioners before this Court) an application was made for bail before the Magistrate on 23.08.2010 but the said application was refused by the Magistrate as the investigations were incomplete at that time. The Revision Application filed against the Order of the Magistrate too was rejected by the High Court Judge of Gampaha on 24.11.2010. Magistrate Pugoda by order dated 28.04.2011 decided to commence a non-Summary proceeding for the death of Amarasinghe Arachchige David Amarasinghe.

Whilst the non-summary proceedings were pending before the Magistrate's Court of Pugoda, a fresh bail application was filed on behalf of the two suspects before the High Court of Gampaha but the

said application too was rejected by the High Court on 25.02.2011 despite Hon. Attorney General informing Court that there is no objection for granting bail.

In the meantime, the Hon. Attorney General had called for the original case record acting under Section 398 (1) of the Code of Criminal Procedure Act No. 15 of 1979 (as amended).

As submitted before us, the Hon. Attorney General After considering the material available to him at that time, formed an opinion that the said material was insufficient to establish a *prima-facia* case against the two accused, (the two Petitioner-Petitioners before this Court) and has sent the following instruction to the Officer in Charge of Police Station Kirindiwela by letter dated 28.02.2011 with a copy to the Magistrate Pugoda.

"පූගොඩ මහේස්ත්‍රාත් අධිකරණයෘ - නඩු අංක 678/10

පහත සඳහන් චූදිතයින්ට විරුද්ධව තවදුරටත් නීති මඟින් කටයුතු කිරීමට අදහස් නොකරන බවත් ඔවුන් නිදහස් කල හැකි බවත් මහේස්ත්‍රාත් වෙත දැන්විය යුතුය. මේ සම්බන්ධව මහේස්ත්‍රාත් අධිකරණය වෙත වාර්තා කිරීමෙන් පසුව ඒ පිළිබඳව අධිකරණය ගත් ක්‍රියා මාර්ගය මේ සමඟ අමුණා ඇති ආකෘතිය මඟින් මෙම ලිපිය ලැබී දින දාහතරක් (14) ඇතුළත දී මා වෙත වාර්තා කල යුතුය.

1. ඌ.පොෘ.ප. වික්‍රමසිංහගේ ප්‍රැන්සිස් කුලරත්න
2. පොෘ.කොෘ. 47797 දේවමුණි ලක්ෂ්මන් සිල්වා"

During the argument before us, the learned Additional Solicitor General who represented the Hon. Attorney General took up the position that the Hon. Attorney General had made the above order acting under section 398 (2) of the Code of Criminal Procedure Act No. 15 of 1979 (as amended) and therefore the learned Magistrate was bound to act on the said directive.

However as submitted by the Petitioners, the learned Magistrate Pugoda had refused to act on the above instructions, when the Officer in Charge of Kirindiwela Police Station had reported the above position before the Magistrate on 03.03.2011. On a directive made by the Magistrate Pugoda, an Officer from the Attorney General's Department was present before the Magistrate's Court of Pugoda on 31.03.2011 and explained the reasons and the legality of the directive dated 28.02.2011 but the Magistrate had refused to act on the said directive. By his order dated 28.04.2011, he ordered the non-summary inquiry to proceed against the two Petitioner-Petitioners.

As admitted by all parties before us the said order of the learned Magistrate was not a final order but was amenable to the revisionary jurisdiction of the High Court. However, as it appears from the

material before us, neither the aggrieved party nor the Hon. Attorney General filed papers before the High Court in order to revise the order of the Magistrate dated 28.04.2011.

However, the two Petitioners invoke the writ jurisdiction of the Court of Appeal and filed a Writ Application seeking the following relief,

a) A Writ of *Certiorari* to quash the proceedings in case No. NS/577 in the Magistrate's Court of Pugoda;
b) A Writ of *Certiorari* to quash the order of the 3rd Respondent refusing to discharge the Petitioners in Case No. NS/577 in the Magistrate's Court of Pugoda;
c) A Writ of *Prohibition* prohibiting the 3rd Respondent from refusing to discharge the Petitioners in Case No. NS/577 in the Magistrate's Court of Pugoda;
d) A Writ of *Mandamus* directing the 3rd Respondent to discharge the Petitioners from the proceedings in Case No. NS/577 in the Magistrate's Court of Pugoda;

When the said matter was argued before the Court of Appeal, parties argued the jurisdiction of the Court of Appeal to issue orders in the nature of writs against an order of the courts of first instance and whether the Magistrate is bound to act on the directive issued by the Attorney General.

However, as a preliminary matter Court decided to consider, whether the Court should use its discretion and issue orders in the nature of writs when the Petitioners had failed to make use of the alternative remedies available to them. It was submitted that in the instant case, the Petitioners had failed to make use of revisionary jurisdiction under Article 138 of the Constitution before invoking writ jurisdiction under Article 140 of the Constitution.

Both remedies referred to above are remedies identified in the Constitution and the relevant Article of the Constitution reads as follows;

Article 138 (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in the law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision, and *restitutio in integrum*, of all causes, suits, actions,

prosecutions, matters, and things [of which such High Court, Court of First Instance] tribunal or other institution any have taken cognizance;

Provided that no judgment, decree, or order of any Court shall be reversed or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

Article 140 Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person

The plain reading of any of the above constitutional provisions does not explain the characteristics of each remedy but our Courts have decided/explained the parameters within which these remedies will be available to an aggrieved party.

The revisionary jurisdiction of the Court of Appeal is further explained under Article 145 of the Constitution as follows;

Article 145 The Court of Appeal may *ex mere motu* or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require.

When considering the above two provisions, it appears that the revisional power of the Court is very wide but when implementing those powers our Courts were careful in discharging them.

In the case of ***Gnanapandithan and Another V. Balanayagam and Another (1998) 1 Sri LR 391 at 397 GPS de Silva CJ*** observed the following;

> "On consideration of the proceedings in this case, I hold that there had been a miscarriage of justice, the object of the revision as stated by Sansoni CJ in *Mariam Beebee V. Seyed Mohomed*. "Is the due administration of justice…." In the words of Soza J in Sommawathie and Madawala and Others "The Court will not hesitate to use its revisionary power to give relief where a miscarriage of justice has occurred Indeed the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice" The words underline above are equally applicable to the present case.
>
> I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary power having regard to very special and exceptional circumstance of this partition case."

In the case, ***Don Chandra Maximan Elangakoon V. OIC Eppawala and another CA PHC APN 99 2006*** CA Minute 04.10.2007 Sarath Abrew Judge of the Court of Appeal (as he then was) had observed the tests that should be used in granting relief in a revision application. Whilst giving reference to a series of cases decided by the Court of Appeal, his Lordship has identified some of the tests that should be applied as follows;

> The Petitioner should plead or establish exceptional circumstances warranting the exercise of the revisionary power,
>
> There should not be any unreasonable delay in filing the application
>
> There should be full disclosure of material facts and show *uberrima fide* as non-disclosure is fatal.

With regard to the powers vested with the Court of Appeal under Article 140 in issuing orders in the nature of writs, it is well settled that when an alternative and equally efficacious remedy is available to a party, the party should be required to pursue that remedy before invoking the writ jurisdiction.

This position was considered by Shirani Thilakawardena J in the case of Ishak V. Lakshman Perera Director of Customs and Others (2003) 3 Sri LR 18 as follows;

> "Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision." Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with the **judicial review being properly regarded as being a remedy of last resort.** It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament intention." (Emphasis by me)

Her ladyship had considered invoking the writ jurisdiction as the "last resort." In the above circumstances, it is necessary for the Petitioners in a writ application either to aver that the party had exhausted the alternative remedy or explain why the party decided to invoke writ jurisdiction without resorting to the alternative remedy available to them.

As observed by the Court of Appeal, the Petitioners before the Court of Appeal were silent regarding their decision to invoke the writ jurisdiction of the Court of Appeal without resorting to the revisionary jurisdiction of the High Court, which is an equally effective remedy available to them. When responding to the above and whilst challenging the decision by the Court of Appeal, before the Supreme Court, the Petitioners have submitted that;

a) Court of Appeal also conceded the non-availability of judgments where writ applications were rejected for failure to exercise revisionary jurisdiction as an alternative remedy
b) The judgment in ***Halwan and Others V. Kaleelful Rahuman (2000) 3 Sri LR 50*** relied upon the Court of Appeal in the impugned judgment is also not a case where writ application

was dismissed on the basis that there was the possibility of instituting a revision application

c) At the time the impugned order was made by the learned Magistrate refusing to comply with the directive given by the Attorney General, the Petitioners were under continuous remand custody and their bail application to the High Court had also been refused. In the circumstances, the Appellants opted to come before the Court of Appeal by way of a Writ Application as that would be the most efficacious remedy

d) Revisionary jurisdiction of the Court of Appeal under Article 138 of the Constitution or the revisionary jurisdiction of the Provincial High Court in terms of Article 154 (3) of the Constitution read with High Courts of Provinces (Special Provision Act No 19 of 1990) are discretionary remedies

e) Litigant must establish exceptional circumstances to invoke Revisionary jurisdiction

and argued that there is no necessity for the Petitioners to give reasons before the Court of Appeal when they invoke the writ jurisdiction since it was the most efficacious remedy available to them.

As already observed above, it appears that each remedy referred to above has its own characteristics which need to be fulfilled when invoking the said jurisdiction. As further observed by this Court both, revisionary jurisdiction and the writ jurisdiction are discretionary remedies and when granting such relief, the Court will consider whether the party who invoke the relevant jurisdiction had fulfilled the requirements to invoke the said jurisdiction.

A party who invokes the revisionary jurisdiction is required to satisfy Court that there are exceptional circumstances for the party to invoke such jurisdiction and the Court will use its discretion when deciding to grant such relief. Similarly, a party invoking the writ jurisdiction of the Court of Appeal is necessary to satisfy Court that the said party had exhausted all equally efficacious remedies available to them before invoking the writ jurisdiction. In other words, failure by a party to make use of equally efficacious remedies available to them will become a ground for the Court to use its discretion and refuse to grant such relief.

As further observed by this Court the party who does not wish to invoke the jurisdiction of an alternative remedy available, the said party, should give reasons as to why the party had decided to

invoke the writ jurisdiction of such Court and the Court is free to make use of its discretion when considering the reasons placed before Court.

The Petitioners argued, that the revisionary jurisdiction being a discretionary remedy where the parties who invoke the revisionary jurisdiction need to establish exceptional circumstances, it cannot be considered as an effective alternative remedy to oust the writ jurisdiction of the Court.

In this regard, the Petitioners tried to compare the appellate jurisdiction of the Court and argue that the cases relied on by the Respondents before the Court of Appeal had been decided based on the failure of Petitioners in those cases to make use of the appellate jurisdiction available to them by a statute.

Unlike in a statutory appeal where the Appellant should act within a specific period and within the framework identified in the statute, the revisionary jurisdiction of the Court has a wide range where it will be available for litigants who do not have any other remedy to address them. It is well-settled law that revisionary jurisdiction is available to a litigant when he failed to exercise his statutory remedy within the stipulated period and also in a situation similar to the instant case where the order challenged before Court is not a final order amenable to a final appeal.

As guided by the Court of Appeal in the instant case, I do agree and would be happy to be guided by the decision in the case of ***Mariam Beebee V. Seyed Mohomed and Other 69 CLW 34*** to the effect;

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this court. Its object is the due administration of justice and the correction of the errors, sometimes committed by this Court itself, in order to avoid a miscarriage of justice"

In the above context when using the extraordinary power vested with the Court, the law requires the Court to be vigilant on the wide discretion given to such Court and that is why our Courts expect the parties who invoke the revisionary jurisdiction to establish "exceptional circumstances" under which the party wishes to invoke the revisionary jurisdiction of the said Court.

Therefore, I cannot agree when the petitioners submitted that the revisionary jurisdiction is not an effective alternative remedy since the party who invoke the revision jurisdiction need to establish exceptional circumstances, whereas no such requirement is to be fulfilled when invoking writ jurisdiction. The extraordinary nature of the revisionary jurisdiction as discussed above clearly establishes that the revisionary jurisdiction is an equally efficacious jurisdiction when compared to writ jurisdiction.

Even though the petitioners have failed to explain the reason for them to invoke the writ jurisdiction of the Court of Appeal without resorting to the revisionary jurisdiction of the High Court, it was submitted before us on behalf of the Petitioners that, the writ jurisdiction was the most effective remedy compared to a revision application since the Petitioners moved the Court of Appeal to issue a writ of *certiorari* quashing the decision of the Magistrate to proceed with the non-summary inquiry ignoring the directive of the Hon. Attorney General and to issue a writ in the nature of a *mandamus* directing the Magistrate to act on the directive of the Hon. Attorney General and discharge the Petitioners.

As already referred to in this judgment, writ jurisdiction of the Court of Appeal too has its own characteristics and the party who invokes writ jurisdiction must necessarily satisfy that the said party had exhausted all equally efficacious remedies available to him.

Similarly, Courts are reluctant to grant orders in the nature of writs when the matters on which the relief is claimed are in dispute or in other words when the facts are in dispute.

This was considered in the following terms by Ranasinghe J (as he then was) in a celebrated case of ***Thajudeen V. Sri Lanka Tea Board [1981] 2 Sri LR 471***;

> "A comparison of the respective positions taken up by the Respondents and the Petitioner unmistakably shows that the claim of the Petitioner, that he is entitled to the amount set out in his Petition, is denied by the Respondents and that such denial is not based only upon questions of law alone. One of the main grounds of objections raised in respect of the said claim is that the said sum of money is not, in fact, due. This objection is one based upon questions of fact. The Respondents dispute the correctness of the figures relating to the purchases of the green tea leaf. They deny that such

> quantities of green tea leaf were in fact purchased as claimed by the Petitioner. The very foundations of fact, which the Petitioner must establish to prove that he is, in fact, entitled to claim the payment of the sum of money, which he seeks to compel the Respondents to pay him, are therefore, not only not admitted by the Respondents but are also very strenuously denied and disputed by the Respondents. The basic of fundamental issues of fact the proof of which is essential, to the claim for the relief the Petitioner seeks in these proceedings, have in the first instance to be established by the Petitioner. In the absence of incontrovertible proof or an admission by the respondents of such matters of fact, the petitioner's claim to the payment of the said sum of money cannot be maintained. **All such disputed matters of fact must be resolved before a mandatory order, such as is claimed by the Petitioner in these proceedings and goes out from this court.** The issuance of such an order carries with it the implication that this Court is satisfied that the said amount is in fact due to the Petitioner and that there is no question about the basic primary questions of fact upon which the Petitioner's claim is founded. When, however, such questions of fact are in dispute they can and must only be settled by a regular action between the disputants before the appropriate Court of First Instance. Such questions, the decision of which calls for the leading of evidence, both oral and documentary, and the cross–examination of witnesses are all questions that can be best decided by way of regular procedure falling within the ordinary jurisdiction of the Courts of First Instance. (Emphasis added)

The Petitioners before the Court of Appeal had made the learned Magistrate Pugoda as the 3rd Respondent in the said application and the 3rd Respondent in his affidavit submitted to the Court of Appeal has taken up the position that there was no directive made by the Hon. Attorney General directing the Magistrate to conduct and/or conclude and/or terminate the non-summary proceeding under section 398 (2) of the Code of Criminal Procedure Act No. 15 of 1979, as amended. Even though the Officer in Charge of the Police Station Kirindiwela had filed a communication received by him from the Attorney General, it was the position of the 3rd Respondent that the said communication cannot be construed as a directive issued under section 398 (2)

As further observed in this judgment it was transpired at the inquest proceeding held before the Magistrate Pugoda, that there were witnesses who contradicted the version given in the 'B' Report

with regard to the incident that took place on 13.08.2010. These are factual matters that need to be considered in a regular action but not in an application for judicial review.

When considering the matters already discussed in this judgment it appears to me that the Court of Appeal was correct in refusing to entertain the application filed before the said Court, for the failure by the Petitioners to invoke revisionary judicial of the High Court which is an equally effective remedy available to them.

In the said circumstances, I answer the first question of law in negative. I will not be answering the 2nd question of law under which the leave was granted since I cannot agree with the term used by the Petitioners "mere availability of an alternative remedy "as against "equally effective remedy."

As already discussed in this Judgment, the Court of Appeal was mindful of this fact and had correctly decided the case.

The appeal is dismissed/ No Costs.

Judge of the Supreme Court

Justice K.K. Wickremasinghe,

I agree,

Judge of the Supreme Court

E. A. G. R. Amarasekara, J.

I had the privilege of reading the Judgment written by His Lordship Justice Vijith. K. Malalgoda in its draft form. I am in agreement with his lordship's final conclusion to dismiss the appeal without costs. I intend to set down in writing following reasons to fortify my view that this appeal should be dismissed.

1. The Petitioners' case is based on the premise that the communication from the Honourable Attorney General to the SSP Gampaha Dated 28.02.2011 is a directive issued in terms of

section 398(2) of the Criminal Procedure Code and the learned magistrate was bound to act on the said directive. The Position of the Petitioners is that by refusing to discharge the petitioners and proceeding with the non-summary inquiry made the proceedings before the magistrate court ultra vires and hence the better remedy was to file a writ application when compared with other available remedies.

2. For the reasons mentioned below, I do not see that the said communication can be considered as a directive issued in terms of section 398(2) of the Criminal Procedure Code.
    a) Firstly, it is addressed to the SSP, Gampaha Division and not the Magistrate. It directs the said SSP to inform the magistrate that the magistrate may discharge the petitioners since further legal proceedings are not intended against the petitioners. This communication may be considered as a directive to the SSP to convey the opinion contained therein to the relevant magistrate but it cannot be considered as a directive issued to the magistrate as it is not addressed to the magistrate concerned.
    b) Secondly, the Contents of the said communication state that the magistrate may discharge the Petitioners (ඔවුන් නිදහස් කල හැකි බව දැන්විය යුතුය). The use of the word “May” indicates that it gives a discretion to the magistrate. The contents do not compel the magistrate to discharge the petitioners. When the words used has given a discretion to the magistrate, one cannot say that the proceedings became ultra vires by not following the instructions. The character of the said communication does not change merely because a state counsel appeared on a subsequent date and confirmed the opinion expressed in the said communication.

Hence, the first question of law has to be answered in the negative and it is sufficient to dismiss the appeal.

Appeal dismissed without costs.

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal in terms of Section 5 C (1) of High Court of the provinces (Special Provisions) Act No. 19 of 1990 an amended and read with Chapter L VIII of the Civil Procedure Code.

Gonayamalamage Titus Sri Lal
Montany Aponsu,
Upper Katuneriya,
Katuneriya.

SC Appeal 160/2014 **Plaintiff**
NWP/HCCA/Kur/159/2004(F)
DC Marawila Case No. 1061/L

Vs.

1. Gamage Nihal Yasendra Jayawardhana,

2. Warnakulasuriya Mary Bridget Thamel,

Both of
Jansa Road,
Lower Katuneriya,
Katuneriya.

Defendants

AND

1. Gamage Nihal Yasendra Jayawardhana,

2. Warnakulasuriya Mary Bridget Thamel,

Both of
Jansa Road,
Lower Katuneriya,
Katuneriya.

Defendant-Appellants

Gonayamalamage Titus Sri Lal
Montany Aponsu,
Upper Katuneriya,
Katuneriya.

Plaintiff-Respondent

AND NOW BETWEEN

Warnakulasuriya Mary
Bridget Thamel,
Jansa Road,
Lower Katuneriya,
Katuneriya.

2nd Defendant-Appellant-Petitioner

Gonayamalamage Titus Sri Lal
Montany Aponsu,
Upper Katuneriya,
Katuneriya.

Plaintiff-Respondent-Respondent

Before : **Buwaneka Aluwihare, PC. J**
S. Thurairaja, PC. J
K. Priyantha Fernando, J

Counsel : Jagath Abeynayake for the
2nd Defendant-Appellant-Petitioner

Dr. Sunil Coorey with Diana Stephanie Rodrigo for the Plaintiff-Respondent-Respondent

Argued on : 16.06.2023

Decided on : 18.07.2023

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K. PRIYANTHA FERNANDO, J

1. The plaintiff-respondent-respondent (hereinafter referred to as Plaintiff) sued the 1st defendant and the 2nd defendant-appellant-petitioner (hereinafter referred to as defendant) in the District Court of *Marawila* seeking for a declaration that the plaintiff is the owner of the property in dispute, judgment to hand over the vacant possession of the property by ejecting the defendants and for damages.

2. In his plaint, the plaintiff averred that, by deed No. 912 dated 01.02.1999 the defendants transferred the property in dispute to the plaintiff subject to a condition specified therein. The condition specified in the said deed No. 912 was that, the defendants have the right to pay a sum of Rs. 375,000/- within one year with a 48% interest per annum to the plaintiff and redeem the property in dispute. The condition further stated that, the defendants could possess the property until it is redeemed within that one year period.

3. The Plaintiff further averred that, as the defendants failed to pay the said amount or part thereof or the interest within the specified period it violated the said condition specified. As a result, the plaintiff has become the owner of the property in dispute.

4. The 2nd defendant-appellant-petitioner along with her husband the 1st defendant took up the position that, the 1st defendant obtained a loan of Rs. 375,000/- from the

plaintiff and the property in question was transferred to the plaintiff as security for the said loan. It was the position of the defendant that they never intended to transfer the beneficial interest of the premises to the plaintiff. They pleaded that the plaintiff held the premises in trust on behalf of the defendants.

5. After trial, the learned District Judge arrived at a judgment in favour of the plaintiff. The defendants appealed against the judgment of the learned District Judge and the learned Judges of the High Court of Civil Appeal dismissed the appeal affirming the judgment of the learned District Judge.

6. Being aggrieved by the said judgment of the High Court of Civil Appeal, the instant appeal was preferred to this Court. This Court on 10.09.2014 granted leave to appeal on the questions of law set out in paragraphs 15 (a), 15 (c) and 15 (e) of the petition of appeal dated 12.12.2013. The said questions of law are,

    I. Have the learned Appellate High Court Judges erred in law by failing to evaluate the presence of the attendant circumstances admitted by the plaintiff respondent at the trial?

    II. Have the learned Appellate High Court Judges erred in law by holding that the parole evidence is not permissible to show that the execution of the deed in question (P2) created a constructive trust, in terms of section 83 of the Trust Ordinance?

    III. In the aforesaid circumstances, has the Judgment marked 'B' occasioned a grave miscarriage of justice?

7. At the hearing of this appeal, the learned Counsel for the 2nd defendant-appellant-petitioner submitted that, the learned High Court Judges of the High Court of Civil Appeal failed to appreciate that the notary's fee for the

attestation of the deed in question and the stamp fees were paid by the borrower. It was further submitted that, the first interest installment was deducted when the amount of Rs. 375,000/- was paid initially and that the defendants were in possession of the land. It is the contention of the learned Counsel for the 2nd defendant that, in the above attendant circumstances it is clear that the defendants did not have any intention to transfer the beneficial interest of the premises to the plaintiff.

8. Relying on the case of ***Dayawathie and Others V. Gunasekera and Another*** **[1991] Sri L.R. page 115**, the learned Counsel submitted that, when the transferor did not intend to pass the beneficial interest in the property, the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust.

9. The learned Counsel for the plaintiff submitted that, the deed P2 is clearly a conditional transfer and not a constructive trust. The defendants have violated the condition laid down in the deed P2 and therefore the attendant circumstances relied upon by the defendants has no application whatsoever as this is not a 'constructive trust' but a 'conditional transfer'. The learned Counsel for the plaintiff relied on the case of ***Shanmugam and Another V. Thambaiyah 1989 2 Sri.L.R.*** *at page 151.*

10. In ***Shanmugam*** (supra), their Lordships in the Supreme Court said;

> *"We have on 'P1' a legal obligation on the purchaser to retransfer upon fulfillment of the contract within 2 years. The terms of the deed show it is an outright sale or transfer of interest in the land subject to a condition to reconvey if the sum of Rs. 5000/- owned by the vendor is paid in full within the time stipulated. No question of trust*

arises in such a context. Time is explicit. On the expiry of two years the purchaser is relieved of the undertaking to transfer the property. The true construction of the deed P1 is that the property has been offered as security for the payment of a sum of money within two years. It is not a pledge or mortgage." Referring to what was said in case of Maggie Silva V. Sai Nona [1975] 78 N.L.R. page 313, their Lordships said further; *"When the condition underlying the conditional transfer is not fulfilled the transferee becomes absolute owner in terms of the agreement of parties free from any obligation to retransfer."* Their Lordships further said*; "After the two years lapsed the vendors remaining in possession of the property without fulfilling the condition rendered themselves liable to be ejected. …"*

11. In the instant case according to the condition specified in the deed No. 912 dated 01.02.1999, the defendants can get the property redeemed by paying Rs. 375,000/- with the stipulated interest within one year from the date of the deed. The defendants have clearly failed to fulfill the said condition. Even after the lapse of one year the plaintiff has given the defendants further time to pay the amount and redeem the property. The defendants have failed to do so.

12. Thus, as clearly stated in ***'Shanmugam'*** (supra), as the underlying condition in deed P2 conditional transfer has not been fulfilled, the plaintiff has become the absolute owner in terms of the agreement of the parties. After the lapse of one year from the date of the deed P2, the plaintiff is also entitled to eject the defendants who are in possession. As referred to earlier, the attendant circumstances pleaded by the defendants have no application to the instant case and they are not entitled to claim a constructive trust and lead parole evidence in terms of section 83 of the Trust Ordinance. Hence,

questions of law No. 1 and No. 2 raised by the defendant-appellants have to be answered in the negative.

13. In the circumstances, I am of the view that no miscarriage of justice has occasioned to the appellant (question of law No. 3) and the said question is also answered in the negative.

14. The judgment of the High Court of Civil appeal dated 31.10.2013 is affirmed and the appeal is dismissed with costs in this Court and in the District Court.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE BUWANEKA ALUWIHARE, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 9 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990.

In the matter of an Application under and in terms of Section 10(1) of the Agrarian Development Act No. 46 of 2000 as amended.

SC (Appeal) No. : 117/2019
SC (SPL) LA : 74/2019
High Court : SP/HC/GA/ APL 1148/16
Agrarian Board of Review: AGBR/2016/7/1
Agrarian Tribunal : AT/07/07/10/2002/ 09/R/14

Gunawardane Liyanage Sirisena,
Dannangodawila, Thelikada,
Ginimellagaha.

Complainant

-Vs-

K. G. Piyadasa (deceased),
Medakeembiya, Podala.

Respondent

AND

In the matter of an Appeal under and in terms of Section 42 of the Agrarian Development Act No. 46 of 2000 (as amended).

Gunawardane Liyanage Sirisena,
Dannangodawila, Thelikada,
Ginimellagaha.

Complainant-Appellant

-Vs-

Naamulla Arachchige Premawathie,
Medakeembiya, Podala.

Substituted Respondent-Respondent

AND

In the matter of an Appeal under and in terms of Section 42B of Section 5c of the Agrarian Development Act No. 46 of 2000 (as amended) read with the High Court of Provinces (Special Provisions) Act No. 54 of 2006.

Naamulla Arachchige Premawathie,
Medakeembiya, Podala.

Substituted Respondent-Respondent-Appellant

-Vs-

Gunawardane Liyanage Sirisena,
Dannangodawila, Thelikada,
Ginimellagaha.

Complainant-Appellant-Respondent

AND NOW BY AND BETWEEN

Naamulla Arachchige Premawathie,
Medakeembiya, Podala.

Substituted Respondent-Respondent-Appellant-Appellant

-Vs-

Gunawardane Liyanage Sirisena,
Dannangodawila, Thelikada,
Ginimellagaha.

Complainant-Appellant-Respondent-Respondent

BEFORE : **E. A. G. R. AMARASEKARA, J.**
K. KUMUDINI WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL : S. N. Ihalakathrige for the Substituted Respondent-Respondent-Appellant-Appellant

Nuwan Bopage with P. R. S. Pinnaduwa for the
Plaintiff-Appellant-Respondent-Respondent

ARGUED ON : 06.12.2021

DECIDED ON : 18.07.2023

K.KUMUDINI WICKREMASINGHE J.

This is an appeal from a judgment of the Provincial High Court holden in Galle dated 31.01.2019 affirming the decision of the Agrarian Board of Review dated 06.10.2016 pertaining to the recovery of rent due from an alleged tenant (*ande*) cultivator.

I will briefly set out the factual background of the case as follows:

The Complainant- Appellant- Respondent- Respondent (hereinafter referred to as the "Respondent") instituted action before the Agrarian Tribunal holden in Galle against one K. G. Piyadasa, the predecessor of the Substituted Respondent- Respondent- Appellant- Appellant (hereinafter referred to as the ""Appellant). The Respondent instituted two complaints in 2002 and 2003 under and by virtue of Section 10 (1) of the Agrarian Development Act, No. 46 of 2000 as amended by Act No. 46 of 2011, contending that he is the owner of the paddy land in question, of which the aforesaid K. G. Piyadasa, the husband of the Appellant, is the tenant cultivator who has failed to pay rent due to him. The said K. G. Piyadasa rejected the Respondent's contention of being the owner of the aforesaid land, and argued that the land was possessed and cultivated by his predecessors over a long period, and as such, that he is not a tenant cultivator of the land and therefore is not bound by law to pay rent to the Respondent.

This matter was initially called up to be heard before the Office of the Deputy Commissioner of Agrarian Development of Galle. Following the establishment of the Agrarian Tribunal both complaints of the Respondent which were of a similar nature were taken up for inquiry before the Tribunal as one matter.

Afterwards, an inquiry was held and the Agrarian Tribunal pronounced its decision dated 20.01.2016 dismissing the Respondent's complaint holding that the Respondent had failed to establish the fact that the said K. G. Piyadasa was a tenant cultivator of the land. Being aggrieved by the decision of the Tribunal, the Respondent preferred an appeal on 29.01.2016 to the Agrarian Board of Review. When the matter was in progress before the Board of Review, K. G. Piyadasa passed away, after which his wife, the Appellant, was substituted for him in the action.

The Board of Review pronounced its decision on 06.10.2016 allowing the Respondent's appeal and setting aside the Agrarian Tribunal decision. The aggrieved Appellant preferred an appeal against said decision to the High Court of the Southern Province holden in Galle praying to set aside the decision of the Board of Review. After both parties filed their written submissions, the Learned High Court Judge pronounced the judgment dated 31.01.2019 affirming the Board's decision and dismissing the Appellant's appeal without costs.
The Appellant now appeals to the Supreme Court seeking to set aside the judgment of the High Court.

This Court on 02/07/2019, has granted leave only on the following question of law referred to in the paragraph 28(1) (i) of the Petition, namely;

1) Whether the learned High Court judge in his judgment dated 31.01.2019 failed to consider that the Respondent failed in proving in the inquiry before the Agrarian Tribunal that the K.G Piyadasa was the Tennent Cultivator of the paddy land in dispute

This being a civil dispute there is a grave error and a misdirection in the decision of the Agrarian Tribunal, as the tribunal in its order at several places had considered that the dispute before it was one that had to be proved beyond reasonable doubt- vide pages 3 and 4 of the said decision. The learned High Court Judge has correctly identified this error and misdirection of the original order and has stated as follows;

"*Having perused the record, it is found that the Agrarian Tribunal misdirected itself by seeking the standards of proof of the matter as of a criminal case i.e. beyond reasonable doubt. Where in an inquiry before an Agrarian Tribunal, matter before it need not be established by proof beyond reasonable doubt. Even where in an inquiry before a Labour Tribunal when it was alleged the reason for termination of employment was that the workman was guilty of criminal act involving moral turpitude, the allegation need not be established by proof beyond reasonable doubt. (Associated Battery Manufacturers Ceylon Ltd. Vs United Engineering Workers Union && N L R 451)*
It gives a strong inference that the matters to be decided in an inquiry need not be proved beyond reasonable doubt. Agrarian Disputes are civil in nature and the complainant must establish the respondent's liability only according to the preponderance of evidence."

After finding the said misdirection relating to the standard of proof, the learned High Court judge has confirmed the finding of the Agrarian Board of Review as the learned Judge was of the view that the Appellant had never denied during the inquiry that he was an Ande Cultivator and Respondent's stand point on the Appellant had remained unchallenged.
To sustain the judgment of the learned High Court judge and to answer the aforementioned question of law, it is not sufficient to find a misdirection or error in relation to the standard of proof by the Agrarian Tribunal but it is necessary to see whether there were sufficient materials before the Agrarian Tribunal for the proof of the stance of the Respondent that the Appellant was the Tenant Cultivator of the paddy field in dispute. The Question of law

allowed by this court when granting leave does not contemplate the validity of the paper title of the Respondent to the paddy land in dispute.

However, it is the contention of the Respondent that the Respondent holds good title to the land in question, named as "*Walapalle Liyadda*", situated in Thelikada, Galle. The Respondent had produced Deed of Transfer bearing No. 258 dated 19.01.1980, attested by P. D. G. Wimalarathne Notary Public, in support of his position that he had purchased the aforesaid property. He has produced the original of this deed which was more than 30 years old at the time of producing in evidence along with a photocopy for the perusal of the Tribunal. As per the order of the Tribunal even the extract of the folios of the land registry have been produced as P9. As per the said deed and the land registry folios the name of the paddy land is mentioned as "Walapalle Liyadde" and the extent is described as fifteen vee kurinis. Agricultural land register marked as P2 also confirm the existence of a paddy land named "Wallapalle Liyadde" of which the Respondent is the registered land owner. Through the deed marked P1 the Respondent has bought $1/10^{th}$ and $9/10^{th}$ (whole land) from 2 people. No evidence was placed before the Agrarian tribunal by the Appellant at least to say that the land in the deed and P2 is not the land Piyadasa and the Appellant enjoyed. It must be noted that the entries in the agricultural land register can be treated as prima facie proof of the facts stated therein- vide section 53(6) of the Agrarian Development Act No 46 of 2000. When P1 and P2 were marked, they were not challenged to indicate that the Respondent should further summon other witnesses to prove the authenticity of those documents. Even though, in P2 extent is described as 3 roods 30 perches, the boundaries described there in P2 tally with the boundaries found in the deed. It is true that there is no reference in P2 as to the time the said entries were made but the register is maintained by the officers of the relevant department, the respondent cannot be penalized for their lapses. P2 contains prima facie proof as to the paddy land and its owner even though it does not contain materials for the prima facie proof of that the Appellant's predecessor was the tenant cultivator.

The Respondent further has stated in evidence that K. G. Piyadasa, was his tenant cultivator, who had duly given the Respondent his share of the cultivation until the year 2001. In the aftermath of the failure of K. G. Piyadasa to pay the share due to him since the *Maha* cultivation season (කන්නය) of 2001, the Respondent instituted action before the Agrarian Tribunal.

The Respondent has further tendered a document marked P4, extract of the diary of the agrarian officer, Sugathadasa Ralahamy, to indicate that the rent was received for the years 1985 and 1986 from the Tenant cultivator Martin who was the father of said K G Piyadasa. This document also was not objected when it was produced. The diary of the former Agrarian officer would have been kept in the official custody of the Grama Niladari who certified photocopies of those entries and issued it to the Respondent. It is true some questions have been asked during cross examination to create some doubt or suspicion over these documents. This was not a criminal case to decide against the Respondent who was the complainant before the Agrarian Tribunal on certain doubts created through cross examination. As explained above this is where the Agrarian Tribunal misdirected itself and erred in deciding. The Respondent, as mentioned before, has placed sufficient material to show by prima facie evidence that he is the owner of the paddy land in dispute and along with the aforesaid documents has given oral evidence to say that that aforesaid Piyadasa was his tenant cultivator. It is common ground that the Appellant enjoys Property. If the Respondent is prima facie the owner and if there is nothing placed in evidence before the Tribunal against that, the Appellant and his predecessors must be trespassers, if not they must be licensees or Tenant Cultivators etc. under the Respondent. Respondent by marking certain documents, though some doubts were created through cross examination, and by giving oral evidence has taken up the position that Piyadasa and his predecessors were tenant cultivators.

The Respondent has also submitted extensive accounts of complaints made to officials attached to the Department of Agrarian Development on the grounds of irregular cultivation and non-payment of rent by Piyadasa. This shows that this is not a new stance taken up by the Respondent. The Respondent alleges that the Appellant was informed at numerous instances to participate at inquiries into the matter, which the Appellant had repeatedly refrained from doing. In particular, the Respondent submits a letter dated 21.05.2011 (marked ඇ8) issued following an ex-parte inquiry conducted before an official of the Agrarian Service Centre of Keradewala, Galle, which identified K. G. Piyadasa as the Respondent's tenant cultivator and ordered him to pay the owner's share due to the latter. Even though, the Appellant, in her written submissions dated 09.08.2019 vigorously denies the contents and credibility of the aforesaid letter, written submission is not evidence.

At the inquiry before the tribunal, the appellant has not placed anything or given at least oral evidence to deny the stance of the Respondent. In my view mere doubts created through cross examination or denials through written submissions do not suffice. Against the evidence placed by the Respondent, the Appellant should have explained how they possess the paddy land. If the Appellant has a paper title or she is a licensee or a person who holds the property on the strength of some other relationship she should have naturally placed that evidence before the tribunal. If the Appellant has become the owner of the property by prescription, she should have placed such evidence before the tribunal. The silence shown without placing evidence against the documentary and oral evidence placed before the tribunal on behalf of the Respondent, indicates that the Appellant had nothing to place against the said evidence led before the tribunal. In my view the balance should tilt in favour of the Respondent.

Upon perusing the evidence submitted at the inquiry before the Tribunal, it appears that the Respondent had succeeded in validly proving his paper title to the land in question by preponderance of evidence.

Conclusion

For the foregoing reasons, it can conclusively be determined that the Complainant- Appellant- Respondent- Respondent had succeeded in proving, on a balance of probabilities, that, *firstly*, he is the lawful owner of the land in question, *secondly*, that the predecessor of the Appellant, K. G. Piyadasa, had cultivated the land as a tenant cultivator, and *thirdly*, that the aforesaid K. G. Piyadasa had defaulted in paying the rents due since the *maha* season of 2001.

Thereby, it is noted that both the Agricultural Board of Review, by order dated 06.10.2016, and the High Court of the Southern Province holden in Galle, by judgment dated 31.01.2019 had correctly determined that the Appellant owes an arrears of rent to the Respondent.

Under these circumstances and for reasons elucidated in my judgment, I see no reason to interfere with the finding of the learned High Court Judge. This appeal is accordingly dismissed. The Court orders no costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

Don Premaratne Wijesinghe,
No. 559, Peradeniya Road,
Kandy.
Plaintiff

SC APPEAL NO: SC/APPEAL/58/2018
SC LA NO: SC/HCCA/LA/388/2016
HCCA/KANDY NO: CP/HCCA/KANDY/63/2013 (FA)
DC MATALE NO: L 5896

Vs.

1. Ekanayake Mudiyanselage Sarath Bandara Ekanayake, Pologolla.
2. District Land Registrar,
   Land Registry, Matale.

Defendants

AND BETWEEN

Don Premaratne Wijesinghe,
No. 559, Peradeniya Road,
Kandy.
Plaintiff-Appellant

Vs.

1. Ekanayake Mudiyanselage Sarath
   Bandara Ekanayake, No. B 2,
   Mahaweliniwasa, Polgolla.
2. District Land Registrar,
   Land Registry, Matale.
   Defendant-Respondents

AND NOW BETWEEN

Don Premaratne Wijesinghe,
No. 559, Peradeniya Road,
Kandy
Plaintiff-Appellant-Appellant

Vs.

1. Ekanayake Mudiyanselage,
   Sarath Bandara Ekanayake,
   No. B 2, Mahaweliniwasa,
   Polgolla.
   Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: J.P. Gamage with Namal Ralapanawa and Nisansala Pathirana for the Plaintiff-Appellant-Appellant.

Harindra Rajapaksha with Subhashini Priyanthika for the Defendant-Respondent-Respondent.

Argued on : 05.05.2022

Written submissions:

by the Plaintiff-Appellant-Appellant on 04.06.2018 and 16.06.2022.

by the Defendant-Respondent-Respondent on 13.09.2018.

Decided on: 19.07.2023

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Matale seeking a declaration of title to the land described in the schedule to the plaint and a declaration that the defendant's title deed No. 1711 is a forgery. Conversely, the defendant sought a declaration of title to the same land and a declaration that the plaintiff's title deed No. 275 is a forgery. At the trial, paragraphs 2-5 of the plaint were recorded as admissions, i.e., Atipola Kiri Banda Karunaratne was the original owner of the land; he transferred his rights by deed No. 1451 to four persons including Heen Banda Atipola; the other three persons later transferred their rights to the said Heen Banda Atipola by deed No. 10601; and Heen Banda Atipola by deed No. 183 dated 01.02.1997 gifted the land to Bandaranayake. Both parties accept that the said deed of gift No. 183 was later revoked by Heen Banda Atipola. The fact that Heen Banda Atipola was at one time the owner of this land was admitted by both parties. The real issue was whether Heen Banda Atipola transferred the land to the plaintiff by deed No. 275 or whether he transferred the land to the defendant by deed No. 1711. In the event the Court decided that the forgery was not proved, the defendant alternatively claimed priority by registration of his deed in the correct folio despite his deed having been executed after the deed of the plaintiff.

However, during the course of leading evidence in the defendant's case, a further issue was raised by the defendant on the basis that by judgment delivered on 10.06.2009 in case No. CA/1152/98 marked V3 (page 542 of the brief), the Court of Appeal had come to the conclusion that the aforementioned deed No. 1451 attested by a notary public, namely T.M.A. Sally, is null and void since the notarial licence of Mr. Sally had not been extended at the time of execution of the deed and therefore both parties to the present case cannot derive title from Heen Banda Atipola.

The Court of Appeal concluded that "*According to the evidence of Malani Perera an official of the High Court of Kandy, the notarial license of T.M.A. Sally who executed the deed No. 1451 of 11.04.1978 had not been extended beyond 22.02.1978. Accordingly Mr. T.M.A. Sally was not a notary public on the date he attested the deed No. 1451 which was marked V1 at the trial.*" But according to the judgment of the District Court marked V8 (page 580 of the brief), witness Malani Perera's evidence is that notary Sally had a valid licence at the time of the execution of deed No. 1451. The evidence is not available in the brief. The Court of Appeal in its judgment has not explained why the finding of the District Court in that regard is wrong. In any event, as I will explain below, even if the notarial licence has not been extended, the notary does not cease to be a notary and the deeds executed during that period do not become invalid *ipso facto*.

The Court of Appeal in the said judgment (page 543) also states that the aforesaid Etipola Kiribanda Karunaratne died on 28.04.1978 leaving a last will whereby this property was bequeathed to Chandrasena Karunaratne who transferred the same to the plaintiff in that case by deed No. 4151 dated 31.12.1984. According to the judgment of the Court of Appeal, the deed had been tendered for the first time to the Court of Appeal. The Court of Appeal has accepted that position despite there

being no indication that the said last will was proved before a court of law and admitted to probate.

Ultimately the Court of Appeal set aside the judgment of the District Court which was in favour of the defendant-respondent in that case on the submissions made by counsel for the defendant-respondent himself. This is very unusual. The Court of Appeal states: "*Upon submission made before this Court by the counsel for the defendant-respondent it is contended that the deed No. 4151 marked as X conveys title to the plaintiff/appellant. And the deed No. 1451 attested by T.M.A. Sally 11.04.1978 conveys no title to the defendant-respondents. Accordingly we allow the appeal and grant the reliefs prayed by the plaintiff-appellant in the amended plaint dated 10.03.1992.*" Unless there is collusion, it is hard to believe that the defendant-respondent, in favour of whom judgment has been entered, would make submissions on appeal in support of their opponent.

The subject matter of this case and the aforesaid Court of Appeal case is the same. The defendant in this case is the substituted defendant in the Court of Appeal case. But the plaintiffs are different. The application for intervention in the Court of Appeal case by the plaintiff in the instant case was refused by the Court of Appeal in view of the objections raised by the plaintiff-appellant and the substituted defendant in the Court of Appeal case, the latter being, as I have already stated, the defendant in this case (*vide* V4 at page 545).

The judgment of the Court of Appeal is not binding on the plaintiff in the instant action *inter alia* because he was not a party to the said (in my view, collusive) appeal.

E.R.S.R. Coomaraswamy in his book *The Law of Evidence*, Vol I, 2nd Edition (1989), at pages 528-529 states that in order to establish a plea of *res judicata*, the following constituents must be established:

(i) the former action must have been a regular action;
(ii) the two actions must be between the same parties or their representatives in interest (privies);
(iii) the previous decision must be what in law is deemed such;
(iv) the particular judicial decision must have been in fact pronounced as alleged;
(v) the previous judgment must be a final judgment;
(vi) the same question or identical causes of action must have been involved in both actions;
(vii) the judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf;
(viii) the judgment should not have been obtained by fraud or collusion;
(ix) if it is a foreign judgment, it should have been passed in accordance with the principles of natural justice.

The learned author adds that the correctness of the decision is not a relevant consideration.

After a lengthy trial before the District Court on several contentious issues, which commenced on 27.03.2006 and ended on 28.06.2012, spanning over six years, the District Court by judgment dated 23.01.2013 dismissed the plaintiff's action as well as the defendant's cross claim stating that the District Court is bound by the judgment of the Court of Appeal on the doctrine of *stare decisis*. In view of that finding, the District Court did not answer the real issues raised by both parties over which voluminous evidence was led at the trial. The District Court merely

concluded that answering those contentious issues does not arise in view of the Court of Appeal judgment.

On appeal, the High Court of Civil Appeal of Kandy affirmed the judgment of the District Court and dismissed the appeal. The plaintiff is before this Court against the judgment of the High Court. This Court granted leave to appeal on the question whether the High Court and the District Court erred in law in applying the doctrine of *stare decisis* to this case.

The doctrine of *state decisis* was considered in the Full Bench decision of this Court in the case of *Mallika v. Siriwardena and Others* (SC/APPEAL/160/2016, SC Minutes of 02.12.2022). *Stare decisis* is an abbreviation of the Latin phrase *stare decisis et non quieta movere* (to stand by precedent and not to disturb settled points).

Regarding deed No. 1451, the Court of Appeal found it to be a nullity because "*the notarial license of T.M.A. Sally who executed the deed No. 1451 of 11.04.1978 had not been extended beyond 22.02.1978.*" Assuming this is true, this does not make the deed a nullity.

According to section 2 of the Notaries Ordinance No. 1 of 1907 as amended every appointment to the office of notary shall be by warrant granted by the Minister in charge of the subject. According to section 13, it is a punishable offence for a person to practice as a notary without such warrant. Once enrolled as a notary, he shall renew his certificate on a yearly basis. Section 27 sets down the procedure to be followed in granting certificates to practice as a notary on a yearly basis by every Registrar of the High Court holden in every judicial zone. Section 29 provides for appeals for an aggrieved notary whose application for certificate has been refused. What happens if such notary practices as a notary without renewal of the certificate? Section 30 provides the answer: "*If any person shall act as a notary without having obtained such*

certificate as aforesaid, he shall for or in respect of every deed executed or acknowledged before him as such notary, whilst he shall have been without such certificate, be guilty of an offence and be liable to a fine not less than five thousand rupees and not exceeding twenty five thousand rupees." He will have to pay a fine in a sum not less than five thousand rupees and not exceeding twenty five thousand rupees for every deed executed. Until the Increase of Fines Act No. 12 of 2005 was enacted, the fine was a sum not exceeding fifty rupees for every such deed. In terms of section 35, such offence is even compoundable by the Registrar-General. There is no provision in the Notaries Ordinance which makes those deeds invalid.

I must emphasise that the instant appeal is not against the judgment of the Court of Appeal. But consideration of the said Court of Appeal judgment is intensely relevant to decide this appeal. Insofar as the instant appeal is concerned, I hold that the said judgment of the Court of Appeal does not represent the correct position of the law.

The High Court in its judgment cites *Wickramanayake v. Perera* (1932) 34 NLR 168 and states that in that case "*the issue of failure to renew notarial license was discussed and it was held that if a notary had acted as a notary before renewal of his certificate and obtained it later it has no retrospective effect*." I am in agreement with this statement of law. However, in that case the question was not whether the deeds the notary executed during that period were valid or invalid but whether the conviction of the notary for failure to renew the certificate at the correct time was right or wrong. That case is of no assistance to resolve the instant issue.

The District Court in my view should not have allowed the defendant to present a different case after the plaintiff closed his case by raising additional issues on a judgment of a different case to which the plaintiff

was not a party. The District Court whilst answering issue Nos. 31 and 32 admits that the defendant was not a party to that case and therefore the defendant is not bound by the judgment of the Court of Appeal. Thereafter the learned District Judge fell into error by concluding that the District Court is bound by that judgment on the doctrine of *stare decisis*.

> අභියාචනා අධිකරණ තීන්දුවකින් දිසා අධිකරණයේ අනුගමන්‍ය පූර්ව නිදර්ශන නියායට (stare decisis) යටත්ව බැඳී සිටි. එසේම එල්. 3412 හා සී ඒ 1152 අභියාචනාධිකරණ තීන්දුවෙන් පැමිණිලි කරු බැඳි නොමැති නම් 1451 දරණ සලේ මහතාගේ ඔප්පුව වලංගු ඔප්පුවක් බව සනාථ කිරීමට සාක්ෂි කැඳවීමට ඉල්ලා සිටීමට පැමිණිල්ලට අවස්ථාවක් තිබුනි. එසේ ඔහු කර නොමැති බැවින්, 1451 ඔප්පුව වලංගු ඔප්පුවක් බව සනාථ කිරීමට කිසිදු සාක්ෂියක් පැමිණිල්ලෙන් ඉදිරිපත් වී නොමැත. ඒ අනුව අභියාචනාධිකරණ නියෝගය බලාත්මකව පවති.

The District Court held that the plaintiff did not prove deed No. 1451 by calling witnesses. At page 19 of the judgment, the District Court held that in terms of section 31 of the Evidence Ordinance, admissions recorded at the trial are not conclusive. This interpretation is erroneous. There was no necessity to prove deed No. 1451 because it was recorded as a formal admission at the commencement of the trial. Section 31 of the Evidence Ordinance reads as follows: "*Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.*" Section 31 relates to informal admissions. It is section 58 which is applicable to formal admissions in Court. Section 58 reads as follows: "*No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*"

I answer the question of law on which leave was granted in the affirmative and set aside the judgments of the High Court and the District Court and allow the appeal. In view of the judgment of this Court there is no purpose in directing the High Court to rehear the appeal. As I stated previously, voluminous evidence has been led before the District Court on several issues raised before that Court although the District Court ultimately disregarded the entirety of the evidence on the erroneous basis that the Court of Appeal judgment is binding on it. I direct the incumbent District Judge of Matale to pronounce the judgment afresh on the evidence led and to answer all the issues raised at the trial. Counsel for both parties shall be given an opportunity to file comprehensive written submissions before the matter is fixed for judgment. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court

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

1. Rajapaksha Mudiyanselage Jayathilaka Rajapaksha,
2. Risanga Nelka Riyensi Rajapaksha,
   Both of
   "Jayamani" Kehelwathugoda,
   Dewalegama.
   Petitioners

SC APPEAL NO: SC/APPEAL/83/2021
SC LA NO: SC/HCCA/LA/356/2020
HCCA KEGALLE NO: SP/HCCA/KAG/31/2019 (F)
DC KEGALLE NO: 8106/SPL

Vs.

1. Mallawa Waduge Samantha,
   No. 167/12, Udambewatta,
   Olagama, Kegalle.
2. Maggoma Ralalage Upali Jayawansha,
   No. 08, Dharmapala Mawatha,
   Kegalle.
   Respondents

AND BETWEEN

Maggoma Ralalage Upali Jayawansha,
No. 08, Dharmapala Mawatha,
Kegalle.
2nd Respondent-Appellant

Vs.

1. Rajapaksha Mudiyanselage Jayathilaka Rajapaksha,
2. Risanga Nelka Riyensi Rajapaksha,

Both of
"Jayamani"
Kehelwathugoda.
Dewalegama.
Petitioner-Respondents

Mallawa Waduge Samantha,
No. 167/12, Udambewatte,
Olagama,
Kegalle.
1st Respondent-Respondent

AND NOW BETWEEN

Maggoma Ralalage Upali Jayawansha,
No. 08, Dharmapala Mawatha,
Kegalle.
2nd Respondent-Appellant-Appellant

Vs.

1. Rajapakshe Mudiyanselage Jayathilaka Rajapaksha,
2. Risanga Nelka Riyensi Rajapaksha,

Both of
"Jayamani"
Kehelwathugoda,
Dewalegama.
Petitioner-Respondent-Respondents

Mallawa Waduge Samantha,
No. 167/12, Udambewatte,
Olagama, Kegalle.
1st Respondent-Respondent-Respondent

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Sudarshani Cooray for the 2nd Respondent-Appellant-Appellant.
Erusha Kalidasa for the Petitioner-Respondent-Respondents.

Argued on: 21.02.2022

Written submissions:
by the 2nd Respondent-Appellant-Appellant on 10.01.2022.
by the Petitioner-Respondent-Respondents on 05.05.2022.

Decided on: 19.07.2023

Samayawardhena, J.

In accordance with the written settlement dated 07.12.2010, the dispute was settled before the Debt Conciliation Board between the 2nd respondent-appellant (appellant) as the creditor and the two petitioners-respondents (respondents) as the debtors, in terms of which the respondents agreed to pay Rs. 900,000 to the appellants on or before 06.06.2011 in order for the appellant to retransfer the property to the respondents. This did not happen.

The respondents filed action against the appellant in the District Court (more than five years after that date) on 08.09.2016 under summary procedure in terms of section 43(1) of the Debt Conciliation Ordinance, No. 39 of 1941, as amended, seeking enforcement of the settlement. One of the objections taken up by the appellant creditor against the maintainability of the action was that the respondent debtors cannot file action in the District Court under section 43(1) of the Debt Conciliation Ordinance as that section can only be invoked by a creditor, not by a debtor.

Both the District Court and the High Court overruled this objection and granted relief to the respondents. The High Court stated that the term "creditor" in section 43(1) could include "debtor" as well. This Court granted leave to appeal on the question whether the High Court erred in law by interpreting section 43(1) of the Debt Conciliation Ordinance in that manner.

Section 43 of the Debt Conciliation Ordinance reads as follows:

> *43(1). Where the debtor fails to comply with the terms of any settlement under this Ordinance, any creditor may, except in a case where a deed or instrument has been executed in accordance with the provisions of section 34 for the purpose of giving effect to those terms of that settlement, apply to a court of competent jurisdiction, at any time after the expiry of three months from the date on which such settlement was countersigned by the Chairman of the Board, that a certified copy of such settlement be filed in court and that a decree be entered in his favour in terms of such settlement. The application shall be by petition in the way of summary procedure, and the parties to the settlement, other than the petitioner shall be named respondents, and the petitioner shall aver in the petition that the debtor has failed to comply with the terms of the settlement.*

(2) If the court is satisfied, after such inquiry as it may deem necessary, that the petitioner is prima facie entitled to the decree in his favour, the court shall enter a decree nisi in the petitioner's favour in terms of the settlement. The court shall also appoint a date, notice of which shall be served in the prescribed manner on the debtor, on or before which the debtor may show cause as hereinafter provided against the decree nisi being made absolute.

(3) In this section "court of competent jurisdiction" means any court in which the creditor could have filed action for the recovery of his debt, if the cause of action in respect of that debt had not been merged in the settlement; "summary procedure" has the same meaning as in Chapter XXIV of the Civil Procedure Code.

Learned counsel for the respondents accepts that upon a plain reading of this section it is clear that this section can only be invoked by a creditor, not by a debtor. The respondents are debtors. However, learned counsel submits thus: The Debt Conciliation Ordinance was originally enacted to cover only simple loan transactions between a creditor and a debtor, and therefore section 43(1) was intended to cover only a situation where the debtor violates the settlement since in a simple loan transaction there is no way the creditor can violate the settlement. The Ordinance was amended by Act No. 20 of 1983 and Act No. 29 of 1999, which extended its scope to include conditional transfers and outright transfers under the purview of the Debt Conciliation Board. Once these amendments were made, there should be a provision for the debtor also to file an action in the District Court to have the settlement enforced when the creditor violates the agreement; for instance, if the debtor pays the money to the creditor in terms of the settlement but the creditor does not retransfer the property.

Learned counsel submits that unless section 43(1) is interpreted allowing the debtor also to file action in the District Court, it would result in great injustice to the debtor because in the event the settlement is violated by the creditor, the debtor will have to file a regular action in the District Court to enforce the settlement whereas if the settlement is violated by the debtor, the creditor can file action in the District Court under section 43(1) following summary procedure to have the settlement enforced. He says this cannot be the intention of the legislature.

When the language of a material provision of a statute is plain, clear, unambiguous and explicit and admits only one meaning, the question of interpretation of the provision does not arise. The intention of the legislature shall be deduced from the language used in the statute. In such circumstances, the statute speaks for itself and no addition, subtraction or extension to the text is necessary. It is only when words are unclear, ambiguous and open to more than one construction, the Court needs to go after the intention of the legislature. This is the first canon of construction of statutes, which is known as the literal rule.

When section 43(1) clearly states that any “creditor” may apply to the District Court in terms of that section, how can the District Court and the High Court read into that section the word “debtor” to say that any creditor or debtor may apply to the District Court in terms of that section. It cannot be an oversight as learned counsel for the respondents sought to suggest. For instance, section 14 specifically refers to both the debtor and creditor when it comes to making an application to the Debt Conciliation Board to effect a settlement of the debts. Suffice it to say that creditor and debtor cannot be treated alike. However, the debtor is not without a remedy. The debtor can file a regular action to have the settlement enforced, if he so desires.

I cannot agree with learned counsel for the respondents when he states that when the Ordinance was enacted in 1941 the legislature contemplated only simple loan transactions between the creditor and the debtor without any collaterals, but complicated loan transactions were permitted to be entertained by the Debt Conciliation Board only after the Debt Conciliation Ordinance Amendment Acts No. 20 of 1983 and No. 29 of 1999. Section 19 of the Debt Conciliation Ordinance was first amended as far back as 1959 by Act No. 5 of 1959 whereby applications in respect of debts purporting to be secured by conditional transfers of immovable property were also allowed to be entertained. Thus, at least since 1959, the Debt Conciliation Board has been entertaining applications other than applications relating to simple loan transactions, but the legislature did not think it fit or necessary to amend section 43(1) to include the debtor in addition to the creditor. If the legislature thinks that, not only the creditor but also the debtor should be allowed to make an application under section 43(1), it is up to the legislature to amend the law.

I answer the question of law upon which leave to appeal was granted in the affirmative and hold that only the creditor can file an action in the District Court under section 43(1) of the Debt Conciliation Ordinance as the law stands today. I set aside the judgment of the District Court and the judgment of the High Court. The action of the respondents in the District Court shall stand dismissed. The appeal of the 2nd defendant appellant is allowed. I make no order as to costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

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

Pavithra Tharangi Illeperuma,
No. 312/3/2,
Orchid Apartment,
Havelock Road,
Colombo 05.
On behalf of
Ayurda Lithuli Ganapriyan (Minor)
Plaintiff

SC/FR/204/2022

Vs.

1. Principal,
   Visakha Vidyalaya,
   Colombo.
2. President of the Appeal Board,
   Visakha Vidyalaya,
   Colombo.
3. Director of National Schools,
   Ministry of Education,
   "Isurapaya",
   Battaramulla.
4. Secretary to the Minister of Education,
   Ministry of Education,
   "Isurupaya",
   Battaramulla.

5. Minister of Education,
   Ministry of Education,
   "Isurupaya",
   Battaramulla.
6. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.
   Respondents

Before: Priyantha Jayawardena, P.C., J.
P. Padman Surasena, J.
Mahinda Samayawardhena, J.

Counsel: Lakshan Dias with Maneesha Kumarasinghe and Heshan Bandara for the Petitioner.
Yuresha De Silva, D.S.G., for all the Respondents.

Argued on: 09.03.2023

Written submissions:
by the Petitioner on 08.03.2023 and 06.04.2023.
by the Respondents on 25.01.2023 and 13.03.2023.

Decided on: 19.07.2023

Samayawardhena, J.

Introduction

The Petitioner filed this application on the basis that the refusal to admit her daughter to Visakha Vidyalaya, Colombo, by the 1st Respondent principal and the 2nd Respondent Chairman of the Appeal Board is a

violation of her fundamental right guaranteed by Article 12(1) of the Constitution.

The Petitioner's application pertains to grade 1 admission for the year 2022 under the close proximity category – *vide* R1. There is no dispute about the applicable circulars issued by the Ministry of Education in this regard. They were marked by the Petitioner P4(a)-(f).

The Petitioner's application was summarily rejected even without calling the Petitioner for an interview stating that "the religious quota vacancies had already been filled" – *vide* P8. This is on the erroneous assumption that the child's religion is Hinduism (*vide* P21) despite the Petitioner stating in the application that the child is a Buddhist. The mother of the child is a Buddhist and the father a Hindu. In any event, the admission was sought not under the religious percentage category but under the close proximity category.

Upon the Petitioner taking up this arbitrary decision with the principal, the Human Rights Commission etc., the application was reconsidered by the School Appeal Board. However, the Petitioner says that the Appeal Board did not make an independent decision; instead, it acted in accordance with the directives of the school authorities.

According to the decision of the Appeal Board marked P14, the Petitioner obtained a total of 47 marks:

Main documents in proof of residence	02
Additional documents in proof of residence	00
Electoral registers in proof of residence	25
Proximity to the school	20
Total	47

The Petitioner says she should have been awarded 69 marks instead of 47 marks:

Main documents in proof of residence	10
Additional documents in proof of residence	04
Electoral registers in proof of residence	25
Proximity to the school	30
Total	69

Main documents

At the time of tendering the application, the Petitioner was residing as a lessee at No. 312/3/2, Orchid Apartments, Havelock Road, Colombo 5.

In terms of Clause 6.1.I of the Public Notice issued by the Secretary of the Ministry of Education relating to the admission of children to grade one in government schools for the year 2022 marked P4(f), Lease Agreements fall into the category of main documents to prove residence, and a maximum of 10 marks can be earned based on the length of occupation. To clarify, if the period of occupation exceeds 5 years, the applicant is entitled to the full marks (10 marks).

The first Lease Agreement pertaining to No. 312/3/2, Orchid Apartments, Havelock Road, Colombo 5 marked P7(q) is valid from 11.06.2020 to 10.06.2022. The second Lease Agreement pertaining to No. 312/3/2 marked P7(r) is valid from 11.06.2022 to 10.06.2023. The other Lease Agreements marked P7(m)-(p) covering the period of 10.12.2015 to 10.07.2020 are not relevant to No. 312/3/2, but to No. 312/3/3.

In addition to the aforesaid Lease Agreements, the Petitioner has tendered the following documents as proof of residence at both No. 312/3/2 and No. 312/3/3 for more than 5 years.

1. The Petitioner's National Identity Card
2. The Petitioner's husband's (child's father) National Identity Card
3. Child's birth certificate
4. Grama Niladhari Certificate
5. Petitioner's Bank Account at the Commercial Bank
6. Dialog Bills
7. Child's Father's HSBC Credit Card
8. Child's Father's Bank Account at Commercial Bank
9. Child's Father's Bank Account at BOC
10. Parent's Joint Account at Commercial Bank
11. Life Insurance Policy at SLI
12. Certificate of Registration of a Vehicle
13. Revenue Licences relevant to the Vehicle
14. Vehicle Insurance Certificate
15. SLT telephone bills
16. Electoral Registration Certificates

The Appeal Board has awarded only 2 marks for the main documents (Lease Agreements) because 5 years of residence was established by Lease Agreements relevant to both No. 312/3/2 and No. 312/3/3 (not only to No. 312/3/2).

The Petitioner's submission is that these two units (No. 312/3/2 and No. 312/3/3) are adjoining units separated by a wall and therefore she should have been awarded full marks (10 marks) as she had been living in these adjoining units for over 5 years (from 10.12.2015 to 11.07.2020 at No. 312/3/2 and thereafter at No. 312/3/2 from 10.07.2020) at the time of submitting the application to the school. This position of the Petitioner has been amply supported by the Grama Niladhari in his certificate of residence marked P7(l) and the letter issued by a Licensed Surveyor marked P6.

The Petitioner has applied to several other schools and Sirimavo Bandaranayake Vidyalaya has awarded full marks (10 marks) for the same Lease Agreements – *vide* P15. Both these schools are governed by the same circulars.

The Respondents do not challenge this factual position that No. 312/3/2 and No. 312/3/3 are adjoining units separated by a wall, but their position is that according to clause 6.0(ඊ), the documents tendered as proof of residence should be relevant to the place of residence at the time of submitting the application (i.e. strictly to No. 312/3/2) and therefore documents relevant to No. 312/3/3 cannot be taken into account.

In my view, the Appeal Board has viewed the concept of residence in an abstract sense and has given an overly literal interpretation to that clause. I acknowledge that granting interview panels the authority to interpret clauses of the circulars based on their own discretion or preferences might result in impropriety. However, it does not mean that they are debarred from giving a purposive interpretation to clauses to give effect to the intention of the drafter of the circulars. If I may give an example, circular 13/2021 marked by the Petitioner P4(d) has a clause empowering the interview board to decide on the distance to school depending on the unique facts of the case before the board: "ඉහත මාර්ග දුර ගණනයේදී ප්‍රායෝගිකව ගැටලු සහගත අවස්ථා විසඳාගැනීම සඳහා අවස්ථානුකූලව සාධාරණ හා පොදු තීරණයක් ගැනීමට සම්මුඛ පරීක්ෂණ මණ්ඩලවලට බලතල හිමිවන අතර, එම තීරණ හේතු සහිතව සටහන් තබා ගත යුතු ය." The petitioner is not challenging the circular; her complaint is that the application of that circular to the facts of this case by the Appeal Board is wrong. There is merit in this complaint.

Based on the documents placed before the Appeal Board, I take the view that the Appeal Board should have awarded the Petitioner 10 marks for those main documents.

Additional documents

No marks were awarded for the additional documents (documents other than Lease Agreements) mentioned above on the basis that "the Petitioner failed to fulfil the requirement of residing at the given address continuously for a period of 6 years". However, the relevant circulars do not state that marks for additional documents can be given only if 6-year period of residence is established. Applicants who are entitled to marks on main documents can claim marks for additional documents – *vide* last paragraph of 6.1. I (අ) of P4(f).

> මෙම ගණය යටතේ ඉහත කරුණුවලට අදාල ව පදිංචිය තහවුරු කිරීම සඳහා හිමිවන ලකුණු උපයා ඇති අයදුම්කරුවන්ට පමණක් මින් ඉදිරියට ඇති කොටස් සඳහා ලකුණු ලබා දිය යුතු ය.

The Appeal Board at least awarded 2 marks for the main documents. Therefore they cannot totally reject additional documents.

In terms of clause 6.1.I (ආ) of P4(f), the Petitioner can receive a maximum of 5 marks for the additional documents.

> **පදිංචිය තහවුරු කරන අතිරේක ලේඛන**
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> අයදුම්කරු හෝ කලත්‍රයා නමින් ඇති පහත ලේඛන අතරින් ඕනෑම 05ක් සඳහා එක් ලේඛනයකට එක් ලකුණක් බැගින් - ලකුණු 05
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> ජාතික හැඳුනුම්පත හෝ රියදුරු බලපත්‍රය/ස්ථාවර දුරකථන බිල්පත් (රැහැන් සහිත)/පාසල හැරයාමේ සහතිකය/විවාහ සහතිකය/ජීවිත රක්ෂණ හිමිකම් ඔප්පුව/ළමයාගේ උප්පැන්න සහතිකය/බැංකු පොත/වාහන ලියාපදිංචි සහතිකය හෝ වාහන ආදායම් බලපත්‍රය හෝ වාහන රක්ෂණ සහතිකය.
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> (නේවාසික විදුලි බිල්පත්/ජල බිල්පත්/වරිපනම් බදු බිල්පත්/අක්කර බදු බිල්පත්, පදිංචිය තහවුරු කරන ප්‍රධාන ලේඛන යටයතේ වෙනත් පිළිගත හැකි ලේඛනයක් ලෙස ලකුණු උපයා නොමැති නම් පමණක්, පදිංචිය තහවුරු කරන අතිරේක ලේඛනයක් ලෙස යොදාගත හැකිය.)

The Petitioner claims that she is entitled to 4 marks for the additional documents and the Respondents have not disputed this claim except to argue that a 6-year period of residence is required to award marks for additional documents.

The Petitioner is entitled to 4 marks for additional documents.

Proximity to the school

The Petitioner also argues that she is entitled to receive 30 marks for their proximity to the school, rather than the 20 marks that were initially given. The Petitioner claims that out of the 6 schools within the aerial distance, the aerial distance of St. Clare Primary School and Mahamathya Maha Vidyalaya falls over the Kirulapana canal, which should be considered a natural barrier and therefore the actual road distance to those two schools should be considered rather than the aerial distance. Hence the Petitioner says 10 marks should not have been deducted to those two schools.

Circular 13/2021 marked by the Petitioner P4(d) was issued after the Supreme Court judgment in the case of *Lyensa Fernando (Minor) and Another v. S.A.S.U. Dissanayake and Others,* (SC/FRA/17/2019, SC Minutes of 23.03.2021) marked P19. However, circular 13/2021 did not abolish aerial distance method in calculating the distance from the place of residence to schools but stated *inter alia* "යම් පාසලක් ඉහත වෘත්ත සීමාව තුළ පිහිටිය ද ගංගා, කලපු, වගුරුබිම්, රක්ෂිත වනාන්තර ආදී ස්වභාවික බාධාවන් හෝ අධිවේගී මාර්ග පවතින අවස්ථාවලදී පමණක් නිවසේ සිට එම පාසලට ගමන් කල හැකි කෙටිම මාර්ග දුර ඉල්ලුම් කරන පාසලට ඇති කෙටිම මාර්ග දුරට වඩා වැඩි නම් ලකුණු අඩු නොකෙරේ. එහිදී දෙමාපියන් පිළිගත හැකි සාක්ෂි සහිතව මාර්ග සිතියම සම්මුඛ පරීක්ෂණ මණ්ඩලයට ඉදිරිපත් කළ යුතු ය." This is repeated in clause 6.0 (ඉ) of P4(f).

The Petitioner in her post argument written submissions defining the term "natural barrier" states "a natural object that effectively precludes or deters access." However, Kirulapana canal does not effectively precludes

or deters access as there is a bridge over the canal facilitating access to the other side. If this is interpreted in the way the Petitioner now suggests, that would in my view be discriminatory against all other similarly circumstanced applicants.

I am not inclined to accept this argument.

Conclusion

On the facts and circumstances of this case, I hold that the decision of the principal to reject the application on a wrong basis at the threshold level and thereafter the refusal by the Appeal Board to award the Petitioner the marks she was entitled to, was arbitrary, irrational and is inconsistent with the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution.

The principal admits that cut off mark was 53. The Petitioner ought to have received 59 marks.

Main documents in proof of residence	10
Additional documents in proof of residence	04
Electoral registers in proof of residence	25
Proximity to the school	20
Total	59

I direct the 1st Respondent principal to admit the child of the Petitioner to grade 2 or the relevant grade at Vishaka Vidyalaya, Colombo within two weeks from the receipt of the judgment.

The registrar is directed to send a copy of the judgment to the 1st Respondent principal without delay.

Application is allowed. No costs.

Judge of the Supreme Court

Priyantha Jayawardena, P.C., J.

I agree.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

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

Ranaweera Kankanamge Premananda
Kadegedara,
Murungasyaya, Middeniya.
Plaintiff

SC APPEAL NO: SC/APPEAL/144/2017
SC LA NO: SC/HCCA/LA/470/2016
HCCA TANGALLE NO: SP/HCCA/TA/08/2015 (F)
DC WALASMULLA NO: L/735

Vs.

1. Hendrick Abeysiriwardane,
   Hendrick Stores, Hungama Road,
   Middeniya.

2. Ranaweera Kankanamge Indrani,
   Murungasyaya, Middeniya.
   Defendants

AND BETWEEN

Ranaweera Kankanamge Premananda
Kadegedara,
Murungasyaya,
Middeniya.
Plaintiff-Appellant

Vs.

1. Hendrick Abeysiriwardane,
   Hendrick Stores, Hungama Road,
   Middeniya.

2. Ranaweera Kankanamge Indrani,
   Murungasyaya,
   Middeniya.
   Defendant-Respondents

AND NOW BETWEEN

Hendrick Abeysiriwardane,
Hendrick Stores,
Hungama Road,
Middeniya.
1st Defendant-Respondent-Appellant

Vs.

Ranaweera Kankanamge Premananda
Kadegedara,
Murungasyaya,
Middeniya.
Plaintiff-Appellant-Respondent

Ranaweera Kankanamge Indrani,
Murungasyaya,
Middeniya.
2nd Defendant-Respondent-Respondent

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

Counsel: Indunil Bandara for the 1st Defendant-Respondent-Appellant.
Kanaga Sivapathasundaram for the Plaintiff-Appellant-Respondent.

Argued on: 06.06.2022

Written submissions:

by the 1st Defendant-Respondent-Appellant on 30.08.2017.
by the Plaintiff-Appellant-Respondent on 17.10.2017.

Decided on: 19.07.2023

Samayawardhena, J.

The Plaintiff instituted this action in the District Court of Walasmulla in 2005 against the 1st Defendant seeking a declaration that he is entitled to have a six-foot wide right of way from Thalawa-Middeniya road to his land (dominant tenement) and for an order to remove the wall erected by the 1st Defendant obstructing the said right of way and damages. The 2nd Defendant who is a co-owner of the dominant tenement was made a party only for notice and no relief was sought against her. She is the sister of the Plaintiff. The 1st Defendant filed answer seeking dismissal of the Plaintiff's action and compensation for harassment. After trial, the District Court dismissed the Plaintiff's action on the basis that the right of way the Plaintiff seeks to establish is not based on (a) any previous Judgment (b) any deed or (c) prescription. The cross-claim of the 1st Defendant for damages was also refused. On appeal, the High Court of Civil Appeal set aside the Judgment of the District Court and granted the reliefs sought by the Plaintiff except for damages. This appeal by the 1st Defendant is against the Judgment of the High Court.

The High Court Judgment is comprehensive. The High Court analyzed the evidence led at the trial in the correct perspective, which the District Court failed to do. There is no necessity to repeat them here. As the High Court has stated in the Judgment, there was clear documentary evidence before the District Court to decide the matter in favour of the Plaintiff although the District Court erroneously dismissed the Plaintiff's action on the ground that there is no basis to grant relief to the Plaintiff.

If I may state the facts briefly, this right of way starts from Middeniya-Talawa road and runs between the 1st defendant's building (a business premises on the left side) and Abeysinghe Stores on the right side. The owner of Abeysinghe Stores is not a party to the case.

There was a previous partition case No. P/52 in the District Court of Walasmulla to partition the dominant tenement. The Preliminary Plan of that case was marked P4 without any objection and without subject to proof. P4 had been prepared in 1986. In P4 this road is shown as the access road to the land to be partitioned. The road was bounded by the two walls of the said two buildings. There were no obstructions on the road at that time. The Final Partition Plan prepared in 1999 was marked P1A without any objections and without subject to proof although the surveyor was called as a witness by the plaintiff. According to the Final Partition Plan and the Report, Lot 1C of the Final Partition Plan, which is six-foot wide, serves as the access road to the land; and this road had been obstructed by the 1st Defendant of the instant case by constructing a wall in the middle of the road (*vide* pages 157 and 160 of the brief). This is the disputed road which is the subject matter of this action. The surveyor has further stated in the Report that unless the said obstruction is removed, there will be no access to Lots 1A and 1B of the Final Partition Plan. The Final Decree of the partition case was marked P1 without objection and without subject to proof. It *inter alia* states that Lot 1C is

declared as the access road: "තවද එකී බෙදුම් පිඹුර අනුව බෙදා වෙන් කර දෙන්නට යෙදුන ආකාරයට, මෙහි පහත උපලේඛණයේ සඳහන් අංක 1 ඒ දරණ කැබැල්ල මෙම නඩුවේ පැමිණිලිකරුටද, අංක 1 බී දරණ කැබැල්ල 1 වන විත්තියටද, අංක 1 සී දරණ කැබැල්ල අඩි 6 ක් පළල පාරක් ලෙසද, අයිතිකර පවරා හිමිකර තීන්දු කරමි." The plaintiff has purchased Lot 1A from the Plaintiff in the partition case by Deed marked P3 and Lot 1B from the heirs of the 1st defendant in the partition case by Deed marked P2.

How can then the District Judge says that there is no basis for the Plaintiff's action? The 1st Defendant has not challenged this portion of the partition decree in these proceedings or in the partition action itself or in any other proceedings. In any event, the Final Decree of the partition action cannot be interfered with in these proceedings.

According to the 1st Defendant's evidence, he came to Lot A of his Plan marked Y as a lessee in 1984. According to the Lease Agreement marked V1, the northern boundary is the public road and the western boundary is also a road. The 1st defendant says he purchased the leased property in 1987. He further says that he constructed this wall in the middle of the road in 1988. On what basis did he do so? The Plaintiff does not admit that the wall was constructed in 1988. According to the Plaintiff, the wall was constructed in 1999. The person who constructed the wall says that prior to the construction of the wall, the width of the road was 6 feet (page 115 of the brief). The Defendant has no right to construct such a wall obstructing the road which had been there even before the preliminary survey was done in the partition action in 1986. No Plan has been approved to construct this wall. It is an unauthorized construction.

I answer the following questions of law upon which leave to appeal was granted in the negative.

Did the High Court err in law (a) in failing to evaluate the case presented before it; (b) in law in holding that the Plaintiff has acquired the right of way by prescription; (c) in failing to appreciate that the Plaintiff has failed to discharge his burden of proof; (d) in failing to appreciate that there should be cogent evidence to establish a claim for right of way; and (e) in substituting its opinion in place of that of the District Court?

The appeal is dismissed with costs. The 1st defendant shall pay the costs in all three Courts and remove the wall constructed by him in the middle of the right of way on his own expense and clear the road within one month of the reading out of the Judgment in the District Court.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court

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

1. Weerawarnakurukulasooriya
   Boosabaduge Daisy Matilda Fernando,
   No. 8, Polkotuwa,
   Beruwala.
2. Weerawarnakurukulasooriya
   Boosabaduge Reeni Prasida Fernando,
   No. 8, Polkotuwa,
   Beruwala.

   Plaintiffs

SC APPEAL NO: SC/APPEAL/81/2013
SC LA NO: SC/SPL/LA/29/2011
CA NO: CA/819/96 (F)
DC KALUTARA NO: 6217/P

Vs.

1. Jusecooray Mohotti Gurunnanselage
   Veronica Josephine Fernando,
   Galle Road, Polkotuwa,
   Beruwala.
2. Mahabaduge Francis Fernando,
   Galle Road, Polkotuwa,
   Beruwala.

2A. Mahabaduge Katherine Fernando,
   Galle Road, Dhiyalagoda,
   Maggona.

3. Mahabaduge Clara Fernando,
   Galle Road, Polkotuwa,
   Beruwala.
   Defendants

AND BETWEEN

Mahabaduge Clara Fernando,
Galle Road,
Polkotuwa,
Beruwala. (Deceased)

Pestheruwe Liyanararalage Robert
Chrisanthus Cooray Wijewarnasooriya,
No. 18/23,
Walawwatte Road,
Gangodawila,
Nugegoda.
Substituted 3rd Defendant-Appellant

Vs.

1. Weerawarnakurukulasooriya
   Boosabaduge Reeni Prasida Fernando,
   No. 8, Polkotuwa,
   Beruwala.

2. Weerawarnakurukulasooriya
   Boosabaduge Reeni Prasida Fernando,
   No. 8, Polkotuwa,
   Beruwala.
   Plaintiff-Respondents

1. Jusecooray Mohotti Gurunnanselage
   Veronica Josephine Fernando,
   Galle Road, Polkotuwa,
   Beruwala.

2. Mahabaduge Francis Fernando,
   Galle Road, Polkotuwa,
   Beruwala. (Deceased)

2A. Mahabaduge Katherine Fernando,
   Galle Road,
   Dhiyalagoda,
   Maggona.
   Defendant-Respondents

AND NOW BETWEEN

Pestheruwe Liyanararalage Robert Chrisanthus Cooray Wijewarnasooriya,
No. 18/23,
Walawwatte Road,
Gangodawila,
Nugegoda.
Substituted 3rd Defendant-Appellant-Appellant

Vs.

1. Weerawarnakurukulasooriya
   Boosabaduge Reeni Prasida Fernando,
   No.8, Polkotuwa,
   Beruwala.

2. Weerawarnakurukulasooriya
Boosabaduge Reeni Prasida Fernando,
No.8, Polkotuwa,
Beruwala.
Plaintiff-Respondents-Respondents

1. Jusecooray Mohotti Gurunnanselage
Veronica Josephine Fernando,
Galle Road, Polkotuwa,
Beruwala.

2. Mahabaduge Francis Fernando,
Galle Road, Polkotuwa,
Beruwala.

2A. Mahabaduge Katherine Fernando,
Galle Road, Dhiyalagoda,
Maggona. (Deceased)

2B. Loyala Anton Sebastian,
Ocean Lodge, Galle Road,
Diyalagoda, Maggona.

2C. Mary Nishani Orilia,
No.60, Kudawa Road,
Kudawa, Maggona.
Defendant-Respondents-Respondents

Before: Vijith K. Malalgoda, P.C., J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Saliya Peiris, P.C., with Anjana Ratnasiri for the 3rd Defendant-Appellant-Appellant.

Upul Kumarapperuma with Radha Kuruwita Bandara and Duvini Godagama for the 2B and 2C Defendant-Respondent-Respondents.

Ranjan Suwandaratne, P.C., with Anil Rajakaruna and Dulna de Alwis for the Plaintiff-Respondent-Responden

Argued on: 29.05.2023

Written submissions:

by the Substituted 3rd Defendant-Appellant-Appellant on 24.07.2013.

by the 2B and 2C Defendant-Respondent-Respondents on 11.10.2013.

by the Plaintiff-Respondent-Respondent on 26.02.2014.

Decided on: 19.07.2023

Samayawardhena, J.

The two Plaintiffs filed this action in District Court to partition the land described in the schedule to the plaint among two of them and the 1st-3rd Defendants. The contesting 3rd Defendant who is also a co-owner claimed prescriptive title to the entire land. After trial, the District Court dismissed the 3rd Defendant's prescriptive claim and proceeded to partition the land according to the pedigree set out in the plaint. According to the plaint, the allocation of shares shall be as follows:

1st Plaintiff	8/24
2nd Plaintiff	8/24
1st Defendant	2/24
2nd Defendant	3/24
3rd Defendant	3/24
Total	24/24

The Court of Appeal dismissed the appeal filed by the 3rd Defendant. This Court granted leave to appeal to the 3rd Defendant against the Judgment of the Court of Appeal on several questions of law. However, at the argument, learned President's Counsel for the 3rd Defendant confined his argument to one question of law: whether the Court of Appeal erred in law when it held that there is no basis to interfere with the Judgment of the District Court in respect of the devolution of title.

According to the pedigree of the Plaintiffs, there were four original owners, namely, Marcelina, Pelis, Lusia and Andiris. The Plaintiffs state that Marcelina transferred her ¼ share by Deed P1 to Philip, who is the father of the plaintiffs, and thereby they became entitled to that ¼ share by inheritance.

The Plaintiffs also state that Lusia's ¼ share devolved on her widower and three children, and they transferred that ¼ share to Philip and Lawrence by Deed P2 and thereafter Lawrence transferred his rights also to Philip by Deed P3 making Philip entitled to the entire ¼ share of Lusia. The Plaintiffs claim Lusia'a ¼ share also through their father, Philip.

The contention of the learned President's Counsel for the 3rd Defendant is that the Plaintiffs are not entitled to a ½ share of the land by Deeds P1-P3, and they are only entitled to 7/288 shares from Deed P1 and another 7/288 shares from Deeds P2 and P3.

The 1st Plaintiff who gave evidence at the trial for the Plaintiffs has been cross-examined on this point but the learned District Judge has not paid attention to it in the Judgment, probably because in the Judgment he mainly focused on the prescriptive claim of the 3rd Defendant.

However, by closer scrutiny of those Deeds, it is now clear that the Plaintiffs are only entitled to 7/288 shares from Deed P1 and another 7/288 shares from Deeds P2 and P3, and not the entire ¼ share of

Marcelina by P1 or the entire ¼ share of Lusia by P2 and P3. That is what is stated in those Deeds. The plaintiffs claimed title to a ½ share of the land solely based on those deeds, and not on any other basis.

The Court of Appeal is not correct when it held that there is no necessity to interfere with the devolution of title as accepted by the learned District Judge.

The correct shares should be as follows:

1st Plaintiff	7/288
2nd Plaintiff	7/288
1st Defendant	24/288
2nd Defendant	36/288
3rd Defendant	36/288
Unallotted	178/288
Total	288/288

The question of law upon which leave to appeal was granted is answered in the affirmative. The learned District Judge will enter Interlocutory Decree according to the share allocation set out above. The other findings of the learned District Judge will stand. The appeal is allowed. No costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal in terms of Article 154 P (3) (b) of the Constitution and Provisions of the Industrial Dispute Act No. 43 of 1950 (as Amended)

The Ceylon Estate Staffs' Union,
No. 06, Aloe Avenue, Colombo 03.
[On behalf of S.M.P.N. Samarakoon]

Applicant

SC Appeal 93/2019
WP/PHC/AV/10/2014ALT
LT Case No. 19/AV/738/12

Vs,

1. The Manager,
   Woodend Estate, Mahaoya Group, Dehiovita.

2. Lalan Rubbers (Pvt) Ltd,
   No. 198B, Gnanendra Mawatha, Nawala.

Respondents

And Between

Ceylon Estate Staffs' Union,
No. 06, Aloe Avenue, Colombo 03.
[On behalf of S.M.P.N. Samarakoon]

Applicant-Appellant

Vs,

1. The Manager,
   Woodend Estate, Mahaoya Group, Dehiovita.

2. Lalan Rubbers (Pvt) Ltd,
   No. 198B, Gnanendra Mawatha, Nawala.

Respondents- Respondents

And now between

1. The Manager,
   Woodend Estate, Mahaoya Group, Dehiovita.

2. Lalan Rubbers (Pvt) Ltd,
   No. 198B, Gnanendra Mawatha, Nawala.

Respondents- Respondents-Appellants

Vs,

Ceylon Estate Staffs' Union,
No. 06, Aloe Avenue, Colombo 03.
[On behalf of S.M.P.N. Samarakoon]

Applicant-Appellant -Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice A. L. Shiran Gooneratne,
Justice K. P. Fernando,

Counsel: M. Adamaly with Ms. Anoukshi Widanagamage instructed by Ms. Dinusha Mirihana for the Respondents-Respondents-Appellants

Pradeep Perera for the Applicant-Appellant-Respondent

Argued on: 20.03.2023

Decided on: 20.07.2023

Vijith K. Malalgoda PC J

The Respondents-Respondents-Appellants (hereinafter referred to as Respondents-Appellants) had initiated the instant appeal against the order of the High Court of Avissawella in a Labour Tribunal Appeal Pending before the said High Court.

As revealed before us the Applicant-Appellant-Respondent (hereinafter referred to as the Applicant-Respondent) who was employed by the Respondents-Appellants as a "Field Officer", filed an application before the Labour Tribunal of Avissawella against the unlawful termination of him by the said employer.

When the Labour Tribunal dismissed his application by order dated 23rd October 2014, and being dissatisfied with the said order the Applicant-Respondent appealed against the said order to the High Court of Avissawella. The learned High Court Judge by his order dated 27th November 2017 allowed the appeal and reinstated the Applicant-Respondent with back wages.

Against the said order the Respondents-Appellants had sought special leave from the Supreme Court and this Court on 28th May 2019 granted special leave on the following questions of law.

d) Has the learned High Court Judge erred in law in failing to consider that the Labour Tribunal is the best judge of the facts and or by replacing the Tribunal's findings with his own view of the facts?

e) Has the learned High Court Judge erred in law in failing to consider the past record of the Respondent and or its impact in differentiating the respondent from other employees in the taking of disciplinary action for misconduct?

f) Has the learned High Court Judge erred in law in giving undue weight to the non-production of the Domestic Inquiry Report when, in any event, the burden is on the Petitioners to justify termination of employment before the honourable Labour Tribunal?

l) In any event, has the learned High Court Judge erred in law in granting reinstatement to the Respondent and failing to take cognizance of the fact that the Petitioners cannot repose any confidence in the Respondent and or that reinstatement would, in these circumstances, disrupt discipline and or industrial harmony in the Petitioner company?

The Applicant-Respondent who was recruited as a Junior Assistant Field Officer in the year 1997 to Udabage Estate was working as a Field Officer of Woodend Estate -Dehiovita at the time his services were terminated by the Respondents-Appellants. Prior to his termination, the Applicant-Respondent was served with two charge sheets by his employer and a domestic inquiry was held against him. Consequent to the said inquiry his services were terminated with effect from 18th December 2011. The Applicant-Respondent who went before the Labour Tribunal of Avissawella against the said termination had prayed *inter-alia* a reinstatement from the date of suspension from the service, back wages, and compensation for illegal, unfair, and unlawful termination of his service. He has further complained to the Labour Tribunal that there was no proper evidence led against him at the domestic inquiry and therefore the employer could not establish charges against him.

As revealed before us two sets of charges were framed against the Applicant-Respondent at the Domestic Inquiry. The first charge sheet dated 01.11.2010 was produced at the inquiry before the Labour Tribunal marked R41A and the second charge sheet dated 22.03.2011 was produced marked R9A. The first set of charges was based on the alteration of entries in the books maintained by the Applicant-Respondent. The other charges were based on the duties entrusted to a casual labourer as against the rubber tappers.

The extent to which the facts that were revealed before the Labour Tribunal should be considered by an Appellate Court and whether the High Court had analyzed the evidence placed before the Labour Tribunal in its correct perspective was the basis for the questions of law that were to be considered by me in the instant judgment.

Section 31 D (2) of the Industrial Disputes Act No. 43 of 1950 (as amended- hereinafter referred to as the Act) does not permit an appeal from the Labour Tribunal on the questions of facts. However, in the case of ***Ceylon Transport Board Vs. N. M. J. Abdeen 70 NLR 407***, it was held by the Supreme Court that,

> "Where the President of a Labour Tribunal misdirects himself on the facts, such misdirection amounts to a question of law within the meaning of section 31D (2) of the Act.

In the case of ***Ceylon Transport Board Vs. W.A.D. Gunasinghe 72 NLR 76*** it was also held that,

> "Where a Labour Tribunal makes a finding of fact for which there is no evidence – a finding which is both inconsistent with the evidence and contradictory of it – the restrictions of the

> right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the order based on such findings if the Labour Tribunal is under a duty to act judicially."

In the case of ***The Caledonian (Ceylon) Tea and Rubber Estates Ltd Vs. J.S. Hillman,*** it was held that,

> "Inasmuch as an appeal lies from an order of a Labor Tribunal only on a question of law an Appellant who seeks to have a determination of facts by the Tribunal set aside must satisfy the Appellate Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse even with regard to the evidence on record"

In the above circumstances, it is clear that an Appellate Court will not simply interfere with the findings of a Labour Tribunal unless the order made by the Labour Tribunal is perverse, the evidence is not supportive of the conclusion reached, the evidence is inconsistent or contradictory with the finding.

Even if the Appellate Court takes a different view, regarding an appeal before such Court, the evidence supports the view taken by the Labour Tribunal, in such a situation the role of the Appellate Court was discussed in the case of ***Ceylon Cinema and Films Studio Employees' Union V. Liberty Cinema (1994) 3 Sri LR 121*** as follows;

> "The question of assessment of the evidence is within the province of the Labour Tribunal and if there is evidence on record to support its findings, the Appellate Court cannot review those findings even though on its own perception to the evidence it may be inclined to come to a different conclusion."

When the Applicant-Respondent appealed against the findings of the Labour Tribunal to the High Court, the High Court by its order dated 27th November 2017 allowed the Appeal and made an order to reinstate the Applicant with back wages. Since the High Court decided to interfere with the finding of the Labour Tribunal in appeal, this Court will consider the legality of the said order, and in the said circumstances this Court will be considering the evidence led before the Labour Tribunal and the matters that were considered by the High Court when reversing the finding of the Labour Tribunal.

During the inquiry before the Labour Tribunal the Respondents (Respondents-Appellants before this Court) led the evidence of three witnesses including the General Manager of Mahaoya Group Thilakarathne, two Managers from Pinkanda Estate, Cristopher Senevirathne, and Rangajeewa Alahakoon. During their evidence, it was revealed that when the Applicant (Applicant-Respondent before this Court) was working as a field officer at Woodend Division of Mahaoya Estate he was served with a letter dated 20.07.2010 calling his explanation for discrepancies observed between the latex weighing register and the daily progress report both prepared by the Applicant. The above discrepancy was further observed on the name cards of the Rubber Tappers. According to the witnesses, these figures should be the same, and the wages of the tappers were prepared on the information contained in those documents. The name cards carried by the tapper will indicate the quantity of latex collected by the tapper and the said figure cannot be different from the entries made in the weighing register. The above discrepancies were further observed in the daily wages form on which the salaries were paid to the Rubber Tappers.

Since the explanation provided by the Applicant was unsatisfactory, the management of Mahaoya Group decided to inquire into the said matter and a charge sheet was issued to the Applicant with two charges (R41A)

Whilst the above inquiry was pending against the Applicant another charge sheet was served on the Applicant-Respondent which contained 4 charges for including a casual Labourer by the name of Somawathi into the check roll of rubber tappers and allowing her to work in his division as a tapper without obtaining approval from the management (R-9A). There was evidence led before the tribunal to the effect that in three months, i.e., in the months of July, August, and September her name was included as a Tapper while she worked as a casual Labourer. According to the witnesses Applicant being the most senior field officer of the Woodend division it was his responsibility to maintain records correctly and allowing one Labourer to get an advantage against the Tappers employed by the estate is illegal as per the instructions issued to the Field Officers (R-33). As per the domestic inquiry proceedings which were produced marked R-11, evidence had been led at the inquiry that when the employees attached to a division is insufficient, the field officers are permitted to use casual Labourers with the permission of the management but no such permission had been obtained by the Applicant-Respondent to obtain the services of casual laborer Somawathi as a tapper. However, on several occasions, the Applicant-Respondent had obtained the services of Somawathi as a Tapper.

As observed by me, the President of the Labour Tribunal had correctly analyzed the evidence placed before the Labour Tribunal by the above witnesses in detail and had concluded that the employer had established the charges leveled against the Applicant-Respondent except for charge 2 in R-41A and charge 3 in R-9A where the Applicant was found not guilty at the domestic inquiry.

When analyzing the evidence placed before the tribunal, the President was mindful of the matters elicited by the Applicant in cross-examination of the witnesses, especially with regard to four instances where field assistants namely Kamalaraj and Sureka entered the name of Somawathi as a Tapper.

In his order, the President Labour Tribunal had considered this issue as follows;

> "ඒ අනුව ඉල්ලුම්කාර පාර්ශවය අවධාරනය කර තිබෙන්නේ තමන් සේවයට වාර්තා නොකරන ඉහත දිනවල ද සිල්ලර වැඩට යොදවන ලද ටී. සෝමාවතී යන ස්ත්‍රිය කිරි කම්කරුවකු වශයෙන් වෙක් රෝලයට ඇතුලත් කර ඇති බවත් එහෙත් ඔවුන් සම්බන්ධයෙන් කිසිදු විනය ක්‍රියා මාර්ගයක් ගෙන නොමැති බවයි. වගඋත්තරකරු ඔවුන් සම්බන්ධයෙන් එවැනි විනය ක්‍රියා මාර්ගයක් නොගත්තත් ඔවුන්ට ඒ සම්බන්ධයෙන් අවවාද කර ඇති බවත් ඉල්ලුම්කරු මීට පෙර ද මෙවැනි වරදවල් සිදුකර තිබීම නිසා ඔහු සම්බන්ධයෙන් විනය ක්‍රියා මාර්ගයක් ගැනීමට තීරණය කල බව අවධාරනය කර ඇත. එසේම ඉල්ලුම්කරු Woodend කෙටසේ ක්ෂේත්‍රනිලධාරි බැවින් ඔහු යටතේ සිටින අනිකුත් ක්ෂේත්‍රනිලධාරීන්ගේ අකටයුතුකම් පිලිබඳ සොයා බැලීමේ වගකීමක් ඉල්ලුම්කරුට ඇති බව වගඋත්තරකරු පෙන්වා දී ඇත."`

As further observed by me, the President of the Labour Tribunal was mindful of the domestic inquiry held against the Applicant-Respondent and had referred to the Domestic Inquiry proceedings produced before him marked R-11 in his order. However, when concluding that the Applicant-Respondent was guilty of the charges level against him except for charge 2 in R41A and charge 3 in R-9A he had analyzed the evidence placed before him by the Respondents-Appellants at the Trial. He has not considered evidence given by the witnesses with regard to two charges where the Applicant-Respondent was discharged at the Domestic Inquiry. Therefore, it is clear that the President of the Labour Tribunal was mindful that the Applicant-Respondent was found not guilty of two charges at the Domestic Inquiry.

When the matter was appealed to the High Court by the Applicant, the learned High Court Judge had analyzed the evidence placed before the Labour Tribunal and observed the following; (page11)

..... “ඒ අනුව ඉල්ලුම්කාර අභියාචක විසින් මෙම ලේඛනය සකස් කොට නොමැති බවක් ද, එම සාක්ෂිය අනුව තහවුරු වන අතර කමල්රාජ් වැනි සෙසු සහකාර ක්ෂේත්‍ර නිලධාරීන් විසින් සකස් කරන ලේඛන බවට එකී ලිඛිත දේශනය මෙම අධිකරණයට තහවුරු වේ. නමුත් උගත් කම්කරු විනිශ්චය සභාවේ සභාපති වරයා එකී තත්වය සැලකිල්ලට නොගෙන ස්වකීය තීන්දුව දී ඇත. එය නීතිමය වශයෙන් වරදකි.”

The learned High Court Judge had observed a failure by the Labour Tribunal President to consider the conduct of the Respondents-Appellants when the Respondent decided not to charge sheet the Field assistants as follows; (page13)

“ඉල්ලුම්කාර අභියාචක කරන ලද එකී ක්‍රියාව කළමණාකාරීත්වය විෂමාචාර ක්‍රියාවක් ලෙස සලකන්නේ නම් ඉල්ලුම්කාර සේවකයාට අමතරව එම ක්‍රියාව සිදු කර ඇති අනෙක් සේවකයන් සම්බන්ධයෙන් ද වගඋත්තරකාර පාර්ශවය, ඉල්ලුම්කාර සේවකයා සම්බන්ධයෙන් ගෙන ඇති විනය ක්‍රියාමාර්ගය අනුගමනය නොකිරීම ඔවුන් සම්බන්ධයෙන් ලිහිල් ප්‍රතිපත්තියකිනුත් ඉල්ලුම්කාර සේවකයා වෙනුවෙන් දැඩි ප්‍රතිපත්තියකිනුත් කටයුතු කිරීම ඉල්ලුම්කාර අභියාචක සම්බන්ධයෙන් වගඋත්තරකරු වෙනස් ලෙස ක්‍රියාකර ඇති බවත්, එය අසාධාරණ, අයුක්ති සහගත ක්‍රියාවක් බවත්, අභියාචක විසින් ඔහුගේ ලිඛිත දේශන වලදී ප්‍රකාශ කොට ඇති අතර, මෙම සාක්ෂිය පිළිබඳව විශ්ලේෂණය කරන විටද එම තත්වය මෙම අධිකරණයට ද තහවුරු වේ. නමුත් එකී තත්වය කිසිසේත්ම නොසලකා කම්කරු විනිශ්චය සභාවේ සභාපතිවරයා ස්වකීය තීන්දුව වැරදි සහගත ලෙස නිකුත් කොට තිබේ.”

The learned High Court Judge had once again considered the same issue in his order as follows; (pages 14-15)

“එසේ ආර් 29 ඒ ලේඛනයේ සඳහන් තොරතුරු සුරේඛා නැමති සහකාර ක්ෂේත්‍ර නිලධාරීවරිය විසින් සටහන් කර තිබෙන බවද, අභියාචකගේ අත්සන එහි නොමැති බවද, වගඋත්තරකරුවන් වෙනුවෙන්ම සාක්ෂි දුන් සමානාධිකාරීවරයාගේ සාක්ෂියේ දී ම පිළිගෙන තිබේ. ඒ අනුව එකී ලේඛණය සම්බන්ධයෙන් ද, ඉල්ලුම්කාර අභියාචක විසින් වංචනික ලෙස සකස් කරන ලද ලේඛණ යනුවෙන් තහවුරු වී ඇති අතර, එම ලේඛණ සුරේඛා නැමති සහකාර ක්ෂේත්‍ර නිලධාරීවරිය අත්සන් කොට ඇති බවත්, කමල්රාජ් නැමැති සහකාර ක්ෂේත්‍ර නිලධාරී විසින් ආර් 29 බී ලේඛණය සටහන් කොට අත්සන් කොට ඇති බවත්, මෙම සමානාධිකාරීවරයා පිළිගෙන ඇත. ඒ පිළිබඳව ආර් 29 සී. ආර් 29 ඒ, ආර් 29 බී, ආර් 29 ඩී, ආර් 29 එෆ් ලේඛණවල වුඩ්එන්ඩ් කොටසේ සහකාර ක්ෂේත්‍ර නිලධාරී වශයෙන් සුරේඛා නැමැත්තිය සහ කමල්රාජ් නැමැත්තා සටහන් ලියා තිබෙන හෙයින් ඔවුන්ට වගකීම පැවරෙන කටයුත්තක් බව ද, ඉල්ලුම්කාර අභියාචක වෙනුවෙන් කම්කරු විනිශ්චය සභාවේ දී සහකාර සමානාධිකාරීවරයාගෙන් ප්‍රශ්නකොට ඇති අතර, එම සමානාධිකාරීවරයා එම තත්වය පිළිගෙන ඇත. ඔහු ප්‍රකාශ කොට ඇත්තේ, ඔවුන් පුද්ගලිකවම වගකිවයුතු බවත්, සියලුම නිලධාරීන් තමන් අතින් ලියන ලද ලේඛණ සම්බන්ධයෙන් වගකිව යුතු බවය. එසේ වුවද, එම නිලධාරීන්

සම්බන්ධයෙන් කිසිදු විනය ක්‍රියාමාර්ගයක් ගෙන නොමැති බවද, ඔහු හරස් ප්‍රශ්න වලදී තවදුරටත් පිළිගෙන ඇත.”

In a plain reading of the Judgment of the learned High Court Judge, it appears that he had restricted his judgment to a few issues. As observed by me the main issue he considered was the different treatment given to the Applicant as against two of his subordinates Kamalraj and Sureka. As already referred to by me, the President of the Labour Tribunal had analyzed the evidence given by the witnesses for the Respondents-Appellants in cross-examination, the documents produced in this regard, and the evidence given by the Applicant on this issue and given his reasons for his conclusion.

In his judgment, the High Court Judge has further gone into the answers given by the key witnesses with regard to the domestic inquiry. In this regard the High Court had further observed;

“කෙසේ වෙතත් ගෘහස්ථ විනය පරීක්ෂක නිලධාරීන්ගේ වාර්තාව වගඋත්තරකරුවන් විසින් තමන් වෙත ඉදිරිපත් කර නොමැති බවය. ඒ අනුව වගඋත්තරකරුවන් විසින් විනය පරීක්ෂණයේ පරීක්ෂණ වාර්තාව උගත් කම්කරු විනිශ්චය සභාවේ සභාපති වරයා වෙත ඉදිරිපත් නොකර එකී වාර්තාවේ කරුණු වසන් කිරීමක් සිදුකොට ඇති ආකාරයක්ද මෙම අධිකරණයට නිරීක්ෂණය වේ.”

As already referred to by me, Labour Tribunal was mindful of the proceedings of the Domestic Inquiry but, mainly relied on the evidence placed before the Labour Tribunal during the trial by both parties with regard to the charges on which the Applicant was found guilty at the Domestic Inquiry.

The President of the Labour Tribunal when deciding the above issues, was guided by the evidence and the documents placed before him. He had the advantage of observing the demeanor and the deportment of the witnesses who testified before him. Therefore, he is the best judge who can decide on the evidence placed before him ***Kotagala Plantations Ltd and another Vs. Ceylon Plantations Society 2010 (2) Sri LR 299***.

In appeal, our Courts are reluctant to interfere with the finding of the Trial Judge (including the findings before the Labour Tribunal) unless the order is not supported by the evidence. The learned High Court Judge is free to hold his view but, he needs to justify his findings. ***Jayasuriya Vs. Sri Lanka State Plantation Corporation 1995 (2) Sri LR 379***

As observed by this Court, High Court had overlooked the evidence led against the Applicant-Respondent which was analyzed in detail by the Labour Tribunal but come to a different conclusion

based on matters that had been correctly analyzed by the Labour Tribunal as already referred to in this Judgment.

For the reasons I have already referred to in this Judgment, I answer the first three questions of law in the affirmative and it is sufficient to allow the appeal before this Court.

The appeal is allowed. I make no order with regard to costs.

Judge of the Supreme Court

Justice A. L. Shiran Gooneratne,

I agree,

Judge of the Supreme Court

Justice K. P. Fernando,

I agree,

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal from the Judgment dated 17-06-2016 of the Court of Appeal in C.A. 509/97(F) in terms of Article 128 of the Constitution.

SC Appeal 46/2017

SC. Spl.L. A 144/2018

CA Appeal 509/97 (F)

D.C. Panadura Case No.16733/L

Gothamadattawa Weerasinghe, of
No.29, Jambugasmulla Road, Nugegoda
[Deceased]

Original 1st Plaintiff

Vijitha Weerasinghe, of
No. 29, Jambugasmulla Road, Nugegoda

Substituted 1st Plaintiff and the 2nd Plaintiff

Vs.

1. Epitawalage Eron Singho
No. 32/2, Walana Road, Panadura

2. B.T.P Rajakaruna of
No. 117, Kirillapone Road, Colombo 5
(Now residing at No. 117, Maya Avenue, Colombo 6)

1st and 2nd Defendants

AND BETWEEN

B.T.P. Rajakaruna of
No. 177, Maya Avenue, Colombo 6 and

No. 39/3, Auburnside,
Dehiwela

2nd Defendant-Appellant

Vs.

Vijitha Weerasinghe of

No. 29, Jambugasmulla Road, Nugegoda

[Deceased]

Substituted 1st Plaintiff-Respondent and Original 2nd Plaintiff-Respondent

Gladys Augusta Weerasinghe nee of Boralessa of No. 29, Jambugasmulla Road, Nugegoda.

Substituted 1st and 2nd Plaintiff-Respondent

Epitawalage Eron Singho of

No. 32/2, Walana Road, Panadura.

[Deceased]

1st Defendant-Respondent

Jayasinhage Anula of

No. 43/2, Galle Road, Walana,

Panadura.

Substituted 1st Defendant-Respondent

AND NOW BETWEEN

B.T.P Rajakaruna of

No. 39/3, Auburnside, Dehiwala

2nd Defendant-Appellant-Appellant

Vs.

Gladys Augusta Weerasinghe nee Boralessa
of No. 29, Jambugasmulla Road,
Nugegoda.

Substituted 1st and 2nd Plaintiff-Respondent-Respondent

Jayasinghe Anula, of
No. 43/2, Galle Road, Walana, Panadura

Substituted 1st Defendant-Respondent-Respondent

Before: Buwaneka Aluwihare P.C., J.
Priyantha Jayawardene P.C., J.
Murdu N.B. Fernando P.C., J.

Counsel: Gamini Marapana, P.C. with Navin Marapana for the 2nd Defendant-Appellant-Appellant.
Ranjan Gooneratne with Sarath Walgamage for the Substituted 1st and 2nd Plaintiff-Respondent-Respondents.

Argued on: 6th February 2020

Decided on: 20th July 2023

Judgement

Aluwihare PC. J,

The central question of this appeal is the validity of a deed of gift executed in favour of the 1st Defendant-Respondent by the donor, C.H. Weerasinghe. The Plaintiff's

argument was that C.H. Weerasinghe did not have the capacity to execute the deed of gift in issue, as he was a person of unsound mind and moved that the District Court declare the same null and void. The Defendant's case on the other hand was that Weerasinghe had recovered from his illness and that he was in a good state of mind when he executed the impugned deed.
In concurrent findings, both the District Court as well as the Court of Appeal held that the impugned deed of gift is void. The present appeal is against the said findings. This Court granted leave to appeal in this matter on seven questions of law which are referred to in paragraph (15) of this judgement.

Factual background

(1) The original Plaintiffs Gothamadattawa Weerasinghe (now deceased) (hereinafter sometimes referred to as the '1st Plaintiff') and Vijitha Weerasinghe (now deceased) (hereinafter sometimes referred to as the '2nd Plaintiff') are the widow and son respectively of one Charles Hector Weerasinghe (now deceased) (hereinafter sometimes referred to as C.H. Weerasinghe').

(2) The property in suit called "Meegahawatta" alias "Ambagahawatta" had been gifted to C.H. Weerasinghe by the original owners, Don Martinus Perera Weerasinghe and Dona Justina Peternella by Deed No. 217 dated 17th August 1917.

(3) In Case No. 2221/LG, the District Court of Colombo, on the basis that said C.H. Weerasinghe, [the purported donor of the gift referred to above], was a person of unsound mind, appointed the 1st Plaintiff's wife as the Manager of his estate 'until he was of sound mind and understanding', as evidenced by the certified copies of the certificate of management dated 18th September 1929, marked P2 (at page 568 of the Brief) and the security bond marked P3 (at page 570 of the Brief). This fact had not been disputed by the Defendants.

(4) C.H. Weerasinghe received treatment as an in-house patient at the Angoda Mental Hospital, and according to the 2nd Plaintiff's testimony (*vide* pages 416-417 of the Brief) he had been in the hospital for a period of 31 years, i.e., from 1933 and was discharged in 1964.

(5) After being released from the hospital, C.H. Weerasinghe had resided at the house of one O.J. Jayawardena, a male nurse who was attached to the Angoda Mental Hospital, up to his death, in 1977.

(6) While C.H. Weerasinghe was living with O.J. Jayawardena, he had gifted the property in suit to Eron Singho, the 1st Defendant-Respondent [hereinafter the 1st Defendant] by Deed No. 41 dated 2nd July 1977. C.H. Weerasinghe died the following month, on 24th August 1977 at the age of 87, leaving the Plaintiffs as his heirs. His estate was administered in D.C. Colombo case No. 1963 wherein the 1st Plaintiff was appointed as the administratrix of his estate.

(7) Following C.H. Weerasinghe's death, Eron Singo, the 1st Defendant, by execution of a Conditional Transfer No. 20390 dated 11th December 1978, had obtained a sum of Rs. 4000/- from one Lionel Ranasinghe. Having discharged the said Conditional Transfer by Deed No. 21524, the 1st Defendant transferred the said property to Rajakaruna, the 2nd Defendant-Appellant, for a sum of Rupees 30,000/- by Deed No. 21525 dated 4th March 1980.

(8) The Plaintiffs assert that C.H. Weerasinghe had transferred the property in suit to the 1st Defendant without the sanction of the Court or of his guardian while he was insane, thus making Deed No. 41 null and void. Therefore, it was argued that Deed No. 21525 by which 1st Defendant transferred the impugned property to Rajakaruna, is also void as no title passed to Eron Singo, the 1st Defendant.

Action Before the District Court

(9) The 1st and 2nd Plaintiff-Respondents instituted this action in the District Court of Panadura against the 1st Defendant [Eron Singo] and the 2nd Defendant [Rajakaruna], praying *inter alia*;

1. For a declaration of title to the property more fully described in the Schedule to the Plaint.
2. A Declaration that Deeds No. 41 and No. 21525 are null and void.
3. An interim and/or permanent injunction restraining the Defendants from entering the said property.

(10) The District Court dismissed the action of the 1st and 2nd Plaintiffs. The Plaintiff-Respondents appealed against the said judgment in Case No. 85/87(F) and on 15th February 1990, the Court of Appeal set aside the judgment of the District Court and directed the District Court to hold a trial *de novo.*

(11) The second trial commenced under the same case number in 1991 and at the conclusion of the trial, by his judgement dated 31.01.1997, the learned District judge held that both Deeds, i.e., No. 41 and No. 21525 were invalid.

(12) Aggrieved by the said judgment the 1st Defendant and 2nd Defendant-Appellant preferred appeals to the Court of Appeal. [CA Case No. 509A/97(F) and CA Case No. 509/97(F) respectively].

(13) Both appeals were consolidated and taken up for hearing and the Court of Appeal by its judgment dated 17th June 2016 dismissed the Appeals.

(15) Being aggrieved by the Judgment of the Court of Appeal, the 2nd Defendant-Appellant preferred a leave to appeal application to this Court and Leave to Appeal was granted on the following questions of law, set out in

paragraphs 19 (i), (iv), (v), (viii) and (ix) of the Petition which are reproduced verbatim below;

i. Did the Court of Appeal err in law by not taking into consideration that at the time of the execution of Deed No. 41 by Hector Weerasinghe, he was quite capable of managing his affairs as reflected by the uncontroverted evidence adduced at the trial in respect of his mental capacity?

iv. Was the Court of Appeal in error by not taking into cognizance that the 2nd Defendant being a bona fide purchaser was not bound to make application in terms of Section 578 of the Civil Procedure Code for a declaration that the said Weerasinghe was of sound mind prior to the execution of Deed No. 21525 by the 1st Defendant?

v. Whether our law prohibits a person who has been declared a person of unsound mind by a competent Court to enter into a contract when such a person was fully conscious and aware of what he intended to do and capable of understanding the transaction?

viii. Did the Courts below err in law by the conclusion that the presumption of lunacy created by the Court Order was in operation as the Defendants had not taken steps under Section 578?

ix. Did the Court below misdirect in law by insisting on a higher degree of proof which is not required by the Roman-Dutch Law?

The learned Counsel for the Substituted 1st and 2nd Plaintiff-Respondent-Respondents raised the following questions of law;

1."Has the Defendant formulated issue No. 12 based on the fact that C.H. Weerasinghe executed deed No. 41 during the lucid interval."

2. If so, that the Defendant admits that the deed was executed between the space of time between two fits of insanity either the Lucid interval to be proved by competent medical evidence as the Defendant failed to do so?"

The position of the 2nd Defendant-Appellant

(16) The learned President's Counsel on behalf of the 2nd Defendant contended that C.H. Weerasinghe was of sound mind when he executed the Deed No.41 and that ample evidence had been led in the District Court to substantiate that position.

(17) The 2nd Defendant primarily relied on the testimonies of the 1st Defendant and witnesses, O.J. Jayawardena and Notary Public Chandrapala Hettige, to establish that after being discharged, C.H. Weerasinghe had led a normal life, regained full sanity and Deed No. 41 had been executed by him while he was fully conscious and had the mental capacity to understand the nature of the transaction, i.e., the execution of the deed no 41.

(18) The position of the 2nd Defendant was that, when C.H. Weerasinghe was discharged from the Angoda Mental Hospital in 1964, he had fully recovered from his mental illness according to 'expert medical opinion of the specialist doctors' at the hospital. He also sought to prove that C.H. Weerasinghe was of sound mind through the testimony of O.J. Jayawardena, a male nurse who had worked at the said Mental Hospital with whom C.H. Weerasinghe had spent the final 13 years of his life after he was released from the hospital.

(19) Giving evidence at the trial, O.J. Jayawardena stated that he was a senior nursing officer who was attached to the Angoda Mental Hospital and that he had special knowledge of nursing mental patients. The witness had further stated that he had become acquainted with C.H. Weerasinghe while he was receiving treatment at the Mental Hospital. He observed that C.H. Weerasinghe possessed a sound knowledge of English and of Shakespeare and that during one of their light-hearted conversations he had expressed his desire to leave the hospital and Weerasinghe had requested the witness to keep him with the witness as his wife and son, [the 1st and 2nd Plaintiffs], did not want to take him back on account of their social status. Having informed the 1st Plaintiff and having obtained permission from the doctors, the witness stated that C.H. Weerasinghe was discharged and taken to the witness' home where he remained for 13 years till his death. When

questioned as to why C. H. Weerasinghe had been lodged in his house, the witness stated that it was at the requests made by C.H. Weerasinghe and the 1st and 2nd Plaintiffs. Jayawardena said that after C.H. Weerasinghe was brought to his place, the 1st and 2nd Plaintiffs visited him once every two to three months and the witness was paid for Weerasinghe's upkeep.

(20) O.J. Jayawardena, testified to the effect that he would never have taken the risk of accommodating C.H. Weerasinghe at his residence where he lived with his spouse and children, if he had been mentally unsound. According to him, C.H. Weerasinghe did not exhibit abnormal behaviour during his 13 year-stay at his residence. On the contrary, the witness claimed that C.H. Weerasinghe gave English tuition to children in the neighborhood, accompanied his children to school, bought items needed for the household, went out alone, attended cricket matches and occasionally enjoyed an alcoholic drink and a cigarette. These items of evidence, the 2nd Defendant claims, establish that he was quite sane, had regained his natural state of mind and lived a very productive life for a person of his age.

(21) In order to substantiate the assertion that C.H. Weerasinghe was of sound mind, memory and understanding at the time of execution of Deed No. 41, reference was made to the evidence of the Notary, Chandrapala Hettige who executed the deed. He had testified to the effect that when C.H. Weerasinghe visited him to give instructions regarding the drafting of the deed, *he appeared to be of sound mind* and that he did not have any doubts regarding his mental state.

(22) To further substantiate the assertion, the attention of the court was drawn to evidence of the 2nd Plaintiff-Respondent, who accepted that it was his father's signature on Deed No. 41 (*vide* page 425 of the Brief) and that even the District Judge in his judgment accepted the placement of the signature of C.H. Weerasinghe, thus, it was contended that it further established that he was of sound mind, memory and understanding when the deed was executed.

(23) The 2nd Defendant-Appellant has sought to justify the gifting of the property to the 1st Defendant-Respondent, by highlighting the evidence given by the 1st Defendant -Respondent during the trial. According to the 1st Defendant-Respondent's evidence, he was married to the niece of C.H. Weerasinghe and had been treated as his adopted child. The 2nd Defendant contrasted this with the estranged relationship between the Plaintiff-Respondents and C.H. Weerasinghe which is evidenced by the testimony of O.J. Jayawardena who stated that when the Plaintiff-Respondents visited him once every two to three months, they stayed only for a few minutes.

(24) In his evidence, the 1st Defendant-Respondent stated that he used to visit C.H. Weerasinghe at witness Jayawardena's residence, who had stated that he wished to donate the property in suit to the 1st Defendant-Respondent. The 1st Defendant -Respondent also stated that when he went to the Notary Public's office on 2nd July 1977, he met C.H. Weerasinghe and two witnesses and the said deed was executed by C.H. Weerasinghe and that he too signed the deed accepting the said gift. He admitted that the same had been transferred in the name of the 2nd Defendant-Appellant in 1980 by Deed No. 21525 and strongly denied that C.H. Weerasinghe was of unsound mind at the time he transferred the land in his name.

(25) To further buttress the 2nd Defendant-Appellant's position regarding C.H. Weerasinghe's mental state, attention was also directed towards the admission made by the 2nd Plaintiff-Respondent at the trial regarding his correspondence with his father after he was discharged from the mental hospital. It is to be noted that 2nd Plaintiff-Respondent had admitted that his father, while he was residing with O.J. Jayawardena, sent postcards to him and that he, in return, sent his father postcards to inform him of the dates of his to visits. It was suggested that the postcards had allegedly been destroyed by the 2nd Plaintiff-Respondent, which allegation was refuted by him. In the light of this evidence, it was submitted that Weerasinghe was not mentally deranged as the Plaintiff- Respondents had tried to make out when he was at Jayawardena's and could not have corresponded with him if he had been a lunatic.

(26) With respect to the validity of Deed No. 21525, the 2nd Defendant-Appellant giving evidence at the trial stated that she did not know of C.H. Weerasinghe's mental disabilities, and only entrusted her Notary, Arthur Wijesuriya with the task of examining the title to the land. Arthur Wijesuriya, giving evidence, stated that he examined the title before he attested the deed and recommended to the 2nd Defendant-Appellant that the title was good and therefore at her request, attested the deed. The 2nd Defendant-Appellant claimed that she was not aware of the mental illness of C.H. Weerasinghe prior to and during the period material to the execution of the deed.

(27) It was submitted that in any event, the 2nd Defendant is a bona fide purchaser for valuable consideration without any knowledge whatsoever of the mental ailments of C.H. Weerasinghe and that in the circumstances the 2nd Defendant-Appellant is entitled to the said property.

<u>The position of the Plaintiff-Respondents</u>

(28) The Plaintiff-Respondents argued that what has to be decided is whether C.H. Weerasinghe executed Deed No. 41 during a lucid interval, which has been conceded by the original Defendants by issue No. 12 which states (in translation) "At the time Charles Hector Weerasinghe executed Deed No. 41, did he sign the deed voluntarily, conscious of what he was doing?"

(29) The argument on behalf of the Plaintiff-Respondent was, that an insane person is presumed to be so, until it is shown that he has recovered and that the original Defendants on whom the burden of proof lay had failed to discharge that duty. The contention of the Plaintiff-Respondents is that C.H. Weerasinghe was mentally deranged up to his death in 1977. It was the contention of the Plaintiff-Respondents that he was lodged at the house of O.J. Jayawardena on the advice of his doctor who said that he should be kept in a place where he could be well provided for, and was close to the hospital so that he could be taken to the clinic every week (vide page 417 of the Brief).

(30) In countering the evidence adduced by the Defendants regarding the mental state of C.H. Weerasinghe, the Plaintiff-Respondents argue that despite the

assertion that it was the "expert opinion of specialist doctors at the hospital" that C.H. Weerasinghe had fully recovered from his mental illness, no expert opinions were adduced during the trial. It was argued that the most important evidence that can be led to establish a person's sanity is medical evidence. However, the 2nd Defendant-Appellant has primarily relied on the opinions of the male nurse, O.J. Jayawardena who cannot be regarded as an expert who is fully capable of assessing and submitting a professional opinion with respect to Weerasinghe's mental state to the satisfaction of the court. With respect to the testimony of O.J. Jayawardena, the Plaintiff-Respondents have highlighted the admissions made by him when giving evidence, which points to the fact that C.H. Weerasinghe was of unsound mind even after he was discharged from the mental hospital.

(31) According to O.J. Jayawardena, C.H. Weerasinghe suffered from simple schizophrenia and had experienced moments where he would zone out and stare into the distance (vide pages 474-475 of the Brief). He proceeded to admit that C.H. Weerasinghe would recover when given medication. The admission was also made that C.H. Weerasinghe was given psychopharmaceutical drugs on certain occasions, during his stay at O.J. Jayawardena's residence. (vide; pages 470 and 478 of the Brief).

(32) To further strengthen the assertion that C.H. Weerasinghe remained a mentally deranged individual to his death, the original Plaintiffs to the action, submitted two letters addressed to the 2nd Plaintiff-Respondent by O.J. Jayawardena marked P11 and P12. In the letter marked P11 dated 25th March 1972, O.J. Jayawardena states as follows with respect to C.H. Weerasinghe, "*he is also getting vitamin tablets and psychopharmaceuticals*." In the letter marked P12 dated 9th October 1965, the male nurse states as follows, "*Mrs. Weerasinghe, his doctor is on maternity leave. So I am getting treatment for him from Dr. Sittampalam*." Which confirms the position that that Weerasinghe continued to receive professional treatment for his mental disorder even after he was discharged from the hospital.

(33) Commenting on the evidence pertaining to placement of C.H. Weerasinghe's signature on Deed No. 41 and the Notary Public Chandrapala Hettige's

evidence, the Plaintiff-Respondents argue that it those testimonies are inadequate to establish C.H. Weerasinghe's sanity. It was submitted that attention must be given to the fact that although the 1st Defendant-Respondent's claimed that he informed the Notary Public Chandrapala of C.H Weerasinghe's period of treatment at the Angoda Hospital (page 336 of the Brief), this was denied by the Notary Public who claimed that if this information had been divulged to him, he would not have executed the deed (page 356 of the Brief). Witness Chandrapala's evidence recorded in the first trial was adopted by the consent of the parties.

(34) The Plaintiff-Respondents also note that, in Deed No. 41 Eron Singho is referred to as the "step-son" of C.H. Weerasinghe, which they argued indicated that at the time of the execution of the Deed, Weerasinghe was under the insane delusion that he was married to Eron Singho's mother.

(35) The Plaintiff-Respondent's Counsel argued that the postcards supposedly sent by the 2nd Plaintiff Respondent's father contained no meaning, [pg. 427 of the Brief]. They claimed that if these postcards had not been destroyed, they would have proven that C.H. Weerasinghe was still mentally ill and receiving treatment. Therefore, due to lack of expert evidence, medical or psychiatric, the presumption of insanity persists, and Deed No.41 and the ensuing Deed No.21525 are invalid, according to the Plaintiff-Respondent.

<u>The Legal position</u>

(36) The sanity of a person is presumed, [***R vs Laytou*** **1849 4 Cox C.C 149 at155**] unless the court adjudicates otherwise. If a court had declared someone to be insane, our law presumes this status still exists, though this can be disproved by clear evidence. This case concerns whether C.H. Weerasinghe who had been determined to be insane, could have signed a deed while adjudication was still in force. The first issue to be considered is whether he was having a lucid interval or had sufficiently recovered or rational. The second issue is what proof is needed to establish that he was of sound mind at the time of signing the deed, given the court's prior adjudication of insanity.

(37) The learned President's Counsel for the 2nd Defendant-Appellant argued that, according to the law, a person who has been declared of unsound mind by a

competent court does not need to seek a Court order to prove his sanity under Section 578 of the Civil Procedure Code. He also argued that, in this situation, the applicable law should be Roman Dutch Law and not English Law. I agree with this contention, as our law differs from English Law in that an adjudication is not considered conclusive proof of lunacy. In English Law, any contract entered into by an adjudicated person while the order is in place is null and void [***In re Walker L.R.*** 1905 1 Ch.8 at 160].

(38) The learned Counsel on behalf of the Plaintiff-Respondents on the other hand argued that a person who is adjudicated insane is presumed to be so until it is established that he had a lucid interval at the relevant time or that he had recovered from lunacy and the burden of establishing that fact is on the party so contending, before the court. It is trite law that lunacy is a contractual disability. Our courts, however, have recognized that a person of unsound mind could enter into valid contracts during a lucid interval. A lucid interval as understood in law refers to a perfect restoration to reason or a temporary cessation of the insanity (vide ***A.G. vs. Parnther*** (1792) 3 Bro. C. Rep. 442) which in turn would enable such individual to understand the nature and effect of a deed or contract.

(39) This principle of law is laid down in the cases of ***Hamid vs. Marikkar*** (1951) 52 NLR 269 and in the case of ***Amarasekara vs. Jayanetti*** 64 CLW 17.

In the case of ***Amarasekera vs. Jayanetti*** (supra), in which the appellant who was adjudged to be of unsound mind and incapable of managing his affairs had conveyed his interests in certain lands by way of deeds to the husband of the respondent, T.S. Fernando J. held,

> "(1) …*an alienation of land executed* ***during a lucid interval*** *by a person adjudicated by the District Court to be of unsound mind and incapable of managing his own affairs, is valid even though the execution has taken place while the adjudication remains unreversed.* [emphasis added]
>
> (2) *That this question must be determined by the Roman Dutch Law and not by the English Law. The provisions of Chapter XXXIV of the Civil Procedure Code have not superseded the Roman-Dutch law on this point.*"

(40) In the case of ***Hamid vs. Marikar*** **(1951) 51 NLR 269**, which arose in respect of a mortgage bond executed by a person who had been adjudicated to be of unsound mind at a time when the adjudication stood unreversed, Swan J., observed (at page 272);

"*Whether the mortgage bond entered into by Razeena Umma was null and void is a matter of interest. If it was executed by her during a lucid interval, it would, under the Roman-Dutch law, be considered valid. Under English law, however, once a person is adjudged to be of unsound mind and incapable of managing his affairs, any contract entered into by him, while that order stands, is null and void….Under the Roman-Dutch law, however, a contract made by a person, declared by a competent Court to be a lunatic and for whom a curator has been appointed,* ***would be valid if it was made during a lucid interval.***" [emphasis added]

Swan J., proceeded to cite the position taken up in the South African case of ***Prinsloo's Curators vs. Crafford and Prinsloo*** **(1905) T.S. 669**. In this case Prinsloo had, by order of Court been declared to be of unsound mind and curators were appointed. He married two years later and it was proved that he was no longer insane. It was contended that he could not contract while the order was in force. The Transvaal Supreme Court held that;

"*…an order declaring an alleged lunatic to be of unsound mind was not a judgment in rem but only operated, while in force, to create a rebuttable presumption that he was a lunatic.*"

(41) Therefore, the rebuttable presumption of lunacy can be held to be recognized by our law. Professor Weeramantry in his "The Law of Contracts"- at page 467 draws the distinction between the Roman-Dutch law and English law in the following words;

"*It is always a question of fact whether the person in question was mentally defective at the time of his making a contract. If there has been an adjudication of lunacy by a Court, there would under our law be a presumption of continuance of this condition, but this is rebuttable by clear evidence to the contrary. Our law differs in this respect from the English law under which an*

adjudication operates as conclusive proof of lunacy, and any contract entered into by the adjudicated person while such order stands is null and void."

(42) Therefore, in light of the abovementioned observations, the inference that can be drawn is that our law does not prohibit a person who has been declared to be of unsound mind by a competent court to enter into a contract when it can be shown that he was of sound mind and understood the nature of the transaction at the time he entered into it. The rationale behind this principle is succinctly enunciated by Professor Lee in 'Introduction to Roman-Dutch Law' (5th Ed.) at page 115 as follows;

"*It is tempting to speak of unsoundness of mind as constituting a status; but it would not be correct to do so, for mental unsoundness is not necessarily permanent or constant, and the question which must be answered is not, 'Has the man been declared mad?' but, 'Was he, in fact, incapable of understanding the particular transaction which is brought in issue?' If the answer is negative, the transaction stands.*'

(43) Considering these observations referred to above, the question of law No. (v) *"Whether our law prohibits a person who has been declared a person of unsound mind by a competent Court to enter into a contract when such a person was fully conscious and aware of what he intended to do and capable of understanding the transaction?"*, must be answered in the negative, that is, in favour of the Appellant.

<u>The evidence and burden of proof</u>

(44) In light of the legal principles pertaining to the instant case, attention shall be directed towards the **first (i) and ninth (ix) questions of law** which are as follows;

(i) Did the Court of Appeal err in law by not taking into consideration that at the time of the execution of Deed No. 41 by Hector Weerasinghe, he was quite capable of managing his affairs as reflected by the uncontroverted evidence adduced at the trial in respect of his mental capacity?

(ix) Did the Court below misdirect in law by insisting on a higher degree of proof which is not required by the Roman-Dutch Law?

In light of the aforementioned judicial decisions, [as referred to in paragraphs 41-43] it can be observed that a declaration of lunacy has no conclusive effect and the logical inference that can be drawn is that, when such declaration remains unrevoked the only legal effect would be to shift the burden to the person who asserts the validity of the impugned contract to satisfy the Court that the contractor was sane at the relevant time.

(44) Commenting on the onus of proof Solomon J in the South African case of ***Prinsloo's Curators vs. Crafford and Prinsloo*** **(1905) T.S. 669**, observed that;

"…an order declaring a person to be of unsound mind is conclusive proof of the fact that at the time that the order was made such person was insane and consequently an order of that nature merely shifts the onus of proof. For there is no doubt a presumption that when a person has been declared to be of unsound mind he continues to be of unsound mind, but it is open to him at any time to bring evidence to satisfy the Court that subsequent to the date of the order he became sane and that consequently a contract entered into by him was a valid contract…:"

(45) Counsel on behalf of the Plaintiff-Respondents, on the other hand argued that the presumption of lunacy/insanity created by a declaration of the court can only be rebutted by leading expert evidence which is the most important evidence that can be led to establish a person's sanity. Their contention is that a lay individual's evidence can *only supplement* expert evidence and that there was no strong medical evidence to support the alleged existence of a lucid interval at the time the transaction was entered into. In this vein, the Plaintiff-Respondents refer to the dicta of De Villiers J.P. in the case of ***Estate Rehne and Others vs. Rehne***;

"*I also take into consideration the expert evidence led to the effect that persons subject to delusions may appear quite sane to the lay mind, and that they are often secretive and, in many cases, will not tell their delusions to everyone but only to their doctors, and that they are apt to disguise their delusions.*'

(46) The crux of the case rests on the mental state of C.H. Weerasinghe. Although it is not a *sine-qua-non*, given the facts and circumstances of the case before us, producing some evidence emanating from a source having expert knowledge

of the subject of lunacy would have been desirable on the part of the Defendants to determine whether the disorder was still present, as the legal burden of rebutting the presumption was on the Defendant.

(47) In the absence of such evidence, the finding of fact on the part of the learned district judge in holding that C.H. Weerasinghe was a person of unsound mind until his death cannot be faulted. The learned district Judge had relied on the documents marked as P11 and P 12, both are letters written by witness Jayawardena to the 2nd Plaintiff. In one letter written in 1977, [P11] he refers to C.H Weerasinghe *"getting vitamin tablets and other psychopharmaceuticals"*. The learned District judge, in concluding, had stated that, having considered the evidence placed and the written submissions tendered by both parties, he accepts the evidence placed on behalf of the Plaintiffs, suggesting impliedly that the Defendants have failed to discharge the burden of rebutting the presumption of lunacy.

(48) It is trite law that a factual finding by the original court should not be disturbed on appeal, unless the finding is visibly erroneous. Therefore, the question of law No. (ix) regarding whether the Court below misdirected itself in law by insisting on a higher degree of proof which is not required by the Roman-Dutch Law, must be answered in the negative.

(49) In light of this standard of proof, the Appeal was dismissed by the Court of Appeal on the finding that the fact that C.H. Weerasinghe was experiencing a lucid interval had not been proved at the trial as there was no evidence pointing to the assertion that he was sane when the deed was being executed and the Court of Appeal observed that they saw no reason to interfere with the judgment of the learned District Judge.

(50) It is pertinent to note that the learned District Judge had the advantage of observing the demeanor and the deportment of the witnesses and had analyzed the entire gamut of evidence placed before the court, which is amply reflected in the judgment. In the case of ***Gunawardena V. Cabral and Others*** (1980) 2 Sri. LR 220, it was held that the appellate court will set aside inferences drawn by the trial Judge only if they amount to findings of fact based on: - (a) inadmissible evidence; or (b) after rejecting admissible and relevant evidence; or (c) if the

inferences are unsupported by evidence; or (d) if the inferences or conclusions are not rationally possible or Perverse.

(51) On the perusal of the judgement of the learned District Judge, it cannot be said that the findings and the inferences drawn by him are vitiated by any of these considerations and therefore as rightly held by the Court of Appeal, there was no justification for interfering with the conclusions reached by the learned District Judge which are based on the evidence placed before him. Therefore, the **first question of law also must be answered in the negative.**

The Applicability of Section 578

(52) Section 578 of the Civil Procedure Code reads as follows;

"578. Further inquiry, when a person of unsound mind so found alleged to have recovered.

(1) When any person has been adjudged to be of unsound mind and incapable of managing his affairs, if such person or any other person acting on his behalf, or having or claiming any interest in respect of his estate, shall represent by petition to the District Court, or if the Court shall be informed in any other manner, that the unsoundness of mind of such person has ceased, the Court may institute an inquiry for the purpose of ascertaining whether such person is or is not still of unsound mind and incapable of managing his affairs.

(2) The inquiry shall be conducted in the manner provided in section 560 and the four following sections of this Ordinance; and if it be adjudged that such person has ceased to be of unsound mind and incapable of managing his affairs, the Court shall make an order for his estate to be delivered over to him, and such order shall be final."

(53) As regards capacity of a lunatic to contract during a lucid interval, the settled position is that our common law [Roman Dutch law] on this matter must be taken to have superseded the provisions of Chapter XXXIX of the Civil Procedure Code (vide ***Amarasekera vs. Jayanetti*** (supra)). This, however, does not imply that the provisions of the Code are of no avail. According to our law, if a party to a contract is insane at the time of contracting, the contract

is null and void even though the other party contracted bona fide without knowledge of insanity (vide ***Soysa vs. Soysa*** (1916) 19 NLR 314). Therefore, if an application had been made under Section 578 to establish the sanity of an individual declared to be a lunatic by a court of law, it would be beneficial to that individual and other interested parties in securing the validity of contracts or deeds executed for or on behalf of such individual.

(54) In the present case, however, the 2nd Defendant, who had purchased his rights to the property from the 1st Defendant, was not aware that the original owner C.H Weerasinghe was a person who had been adjudicated as a person of unsound mind by the court. He had merely got the property transferred to himself from the 1st Defendant after having checked the land registry as to the devolution of title, and having satisfied himself that 1st Defendant Eron Singho had title to the land in issue, he had proceeded with the transfer of the property. Therefore, the questions of law [no. iv and viii] pertaining to whether the Court of Appeal erred *by not taking into cognizance that the 2nd Defendant being a bona fide purchaser was not bound to make application in terms of Section 578 of the Civil Procedure Code for a declaration that the said Weerasinghe was of sound mind prior to the execution of Deed No. 21525 by the 1st Defendant* and whether *the Courts below err in law by the conclusion that the presumption of lunacy created by the Court Order was in operation as the Defendants had not taken steps under Section 578,* must be answered in the affirmative, in favour of the Appellant.

(55) In conclusion, it can be held, however, that the Defendant-Appellants had failed to prove that C.H. Weerasinghe, [in respect of whose property his wife was appointed by the District Court to manage his property until said lunatic (Weerasinghe) is of sound mind and understanding], was of sound mind, memory and understanding at the time of the execution of Deed No. 41. Therefore, the conclusion of the learned District judge that, the Deed No. 41 is *null and void ab initio* and consequently, the 1st Defendant-Respondent had no legal title to pass on to the 2nd Defendant-Appellant under Deed No. 21525, thus Deed No. 21525 should also be held to be null and void, in my view, cannot be faulted.

Conclusions;

I have answered the questions of law referred to in subparagraphs (iv), (v) and (viii) of paragraph 19 of the Petition of the Appellant in favour of the Appellant and the questions of law referred to in subparagraphs (i) and (ix) of the said paragraph of the Petition in favour of the Respondents.

As referred to in this judgement, questions (i) and (ix) are the primary issues, namely whether the Appellant [The 2nd Defendant] and the 1st Defendant have rebutted the presumption of insanity [of C.H. Weerasinghe] by adducing sufficient evidence. For the reasons set out, I have concluded that the finding of the learned trial judge on that issue cannot be faulted. In the circumstances, the judgement of the District Court and the Court of appeal are affirmed, and the appeal dismissed.

The substituted 1st and 2nd Plaintiff Respondent -Respondent would be entitled to the cost of this matter.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC. J

I agree

JUDGE OF THE SUPREME COURT

MURDU FERNANDO, PC. J

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 17 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Kegalle Plantation PLC
   No. 310, High Level Road,
   Nawinna, Maharagama.

   Appearing on behalf of;

2. Sriyan Eriagama,
   Director (Operations) Kegalle Plantation PLC,
   No. 310, High Level Road,
   Nawinna, Maharagama.

3. S.D. Munasinghe,
   The Superintendent,
   Etna Estate, Warakapola.

Petitioners

SC FR 442/2016

Vs,

1. L.D. Kumara Tennakoon,
   Divisional Secretary, Warakapola.

1A. Laxmendra Damayantha Kumara Tennakoon,
Divisional Secretary, Warakapola.

2. W.M.A.Wanasuriya,
   Divisional Secretary- Kegalle District, Kegalle.

3. Hon. John Amaratunga,
   Minister of Lands, Ministry of Lands, Mihikathamedura, 1200/6, Rajamalwatta Road, Battaramulla.

3A. Hon. Gayantha Karunathilala,
Minister of Lands, Ministry of Lands,
1200/6, Rajamalwatta Road, Battaramulla.

3B. Hon. S.M.Chandrasena,
Minister of Lands, Ministry of Lands,
Mihikatha Medura, 1200, Rajamalwatte Road,
Battaramulla.

4. Commissioner of Lands,
Land Commissioner's Department, 1200/6, Rajamalwatta Road, Battaramulla.

5. Upali Marasinghe,
Secretary, Ministry of Lands, 11th Floor, Sethsiripaya, 2nd Stage, Battaramulla.

5A. J.A. Jagath, Secretary, Ministry of Lands,
11th Floor, Sethsiripaya, 2nd Stage, Battaramulla.

5B. Ravindra Hewavitharana,
Secretary Ministry of Plantation Industries,
11th Floor, Sethsiripaya, 2nd Stage, Battaramulla.

6. State Timber Corporation,
No.82, Sampathpaya, Rajamalwatta Road, Battaramulla.

7. Land Reform Commission,
No. C 82, Hector Kobbekaduwa Mawatha,
Colombo 12.

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

Respondents

Before: **Hon. Justice Vijith K. Malalgoda PC**
Hon. Justice Janak de Silva
Hon. Justice Mahinda Samayawardhena

Counsel: Shantha Jayawardena with Pasindu Silva, Hiranya Damunupola, Azra Basheer and Thishya Jayasundera for the Petitioners

Ganga Wakishta Arachchi, DSG, for the 1st to 6th and 8th Respondents

Saman Galappatthi for the 7th Respondent

Argued on: 21.11.2022

Decided on: 20.07.2023

Vijith K. Malalgoda PC J

Petitioners to the instant application, Kegalle Plantation PLC, Sriyan Eriyagama, Director (Operations) Kegalle Plantation PLC, and S.D. Munasinghe, The Superintendent Etna Estate Warakapola came before this Court alleging that their Fundamental Rights guaranteed Under Article 12 (1) had been violated by the Action of the 1st to 7th Respondents, by evicting them from the land referred to in the document produced marked P-12.

As submitted by the Petitioners, the 1st Petitioner had entered into a Lease Agreement with Janatha Estate Development Board (hereinafter referred to as JEDB) on or about 4th May 1995 which was amended by Amendment of lease dated 25th July 1995 to lease out the land referred to in the schedule including Etna Estate and the said land has been more fully disrobed in the schedule to the above Lease Agreements. Part H referred to Etna Estate and includes 5 divisions namely, Etna Division, Northland Division, Talawatta Division, Monrovia Division, and Penihela Division.

The initial Lease Agreement was entered between the parties for a period of 99 years, but as per the amendment agreement, it was reduced to 53 years and the agreement is valid until 2045.

As revealed before us, with the introduction of the Land Reform Law in the year 1972, a large volume of agricultural land was vested with the state and those were devolved with the Land Reform Commission. According to the Petitioners, the management of those lands was given to the State Plantation Corporation (hereinafter referred to as SPC) and the JEDB. In the said process the management of Etna Estate was given to JEDB and the said decision was Gazetted in Government Gazette Extraordinary No. 183/18 dated 12th March 1982.

A policy decision was taken with regard to the agricultural land Managed by the two Government owned institutions namely SPC and JEDB under the provisions of conversion of Government-owned business undertakings into Public Corporations Act No. 22 of 1987 to privatize the management of those land, and in the said process the lands which were managed by SPC and JEDB were leased out to private plantation companies. It is in this process only Etna Estate, which was managed by JEDB was leased out to Kegalle Plantations PLC the 1st Petitioner before this Court as per the documents marked P-1 and P-2.

According to the Petitioners, after the relevant leases were executed, Etna Estate was handed over to the 1st Petitioner by the JEDB and what was handed over to them were the land, buildings, and machinery that were part and parcel of Etna Estate. As already referred to in this judgment, Etna Estate consists of 5 divisions, and the total extent of the estate is 1219 acres 1 rood, and 1.6 perches.

As submitted by the Petitioners, from the time the estate referred to in the indenture of lease 336 (P-2) and the amendment of lease 1525 (P2A) were executed the lands referred to in part 'H' to the schedule were occupied by the 1st Petitioner and was developed without any objection until P-12 was issued by the 1st Respondent in the year 2016. i.e., 21 years after handing over the estate to the 1st Petitioner. By this time the 1st Petitioner had invested a large sum of money in developing the land and in fact, the portion of land referred to in P-12 had been re-planted with rubber investing a large sum of money.

As submitted by the Petitioners, they have received a letter dated 30th April 2016 somewhere around the 4th May 2016, requesting them to attend a meeting on 16th May at the Land Reform Commission.

At the said meeting, the 1st Petitioner was represented by the 3rd Petitioner and it was informed to the 3rd Petitioner by the Executive Director of Land Reform Commission who presided over the said meeting, to hand over an extent of 50 acres from Penihelawatta to the Divisional Secretary Warakapola which is one of the 14 fields from the Penihela Division of Etna Estate, for a Housing Project.

However, the 3rd Petitioner objected to the said request and informed that the 1st Petitioner is the lawful lessee of the said land and refused to comply with the said request. On or around 30th May 2016 the Manager of Etna Estate was served with a copy of a letter dated 23rd May 2016, addressed to the Senior Superintendent of the Kegalle District Survey Department office by the 1st Respondent requesting him to prepare a block plan in order to distribute a portion of land from Penihela Estate occupied by the 1st Petitioner since the said portion of land had already been acquired by the state in the year 1973.

The second Petitioner once again objected to the said decision of the 1st Respondent, on the ground that the 1st Petitioner is occupying Penihela Division of Etna Estate based on a valid agreement signed between the 1st Petitioner with JEDB and conveyed the said position to the 1st Respondent. In the meantime, the Petitioner obtained a copy of the Gazette Extraordinary 65/10 dated 28.06.1973 (P3B) and learned that four portions of land from Penihelawatte were acquired by the said Gazette under section 38 (2) of the Land Acquisition Act No 09 of 1950 (as amended) by the then Minister of Land, but had taken up the position that in the absence of a proper mechanism to manage the lands vested with the state, the lands were given to SPC and JEDB in the year 1982 and the lands acquired by the said order too was handed over as one single estate to JEDB. It was also the position of the Petitioners before this Court that, the Penihela Division of Etna Estate including the portion called 'Penihelawatte' was since then managed under JEDB and on a policy decision of the Government, leased out to the 1st Petitioner as one single estate namely Etna Estate. The 1st Respondent or any other agent of the 1st Respondent or his predecessors had never entered into those lands and in fact, it was managed until 1995 by the JEDB and since then by the 1st Petitioner as one single estate. It was the position of the Petitioners before this Court that they never encroached into private or state-owned land other than the land legally handed to them by JEDB after entering into the lease agreements.

Whilst referring to P-7, the Petitioners have further taken up the position that until a state minister of the area had shown an interest in this well-maintained portion of Rubber land to the extent of 50 acres the land was managed by the 1st Petitioner and it had uninterrupted possession for the said land for more than two decades.

On the other hand, the Petitioners argued further, that the change of the purpose for which the land is going to be used is another factor that shows the *mala fides* of the Respondents. In this regard on behalf of the Petitioners, our attention was drawn to the 1st paragraph of the document produced marked P-7 which reads as,

"නිවාස යෝජනා ක්‍රමයක් සඳහා පැණිහෙල වත්ත මැනුම් කිරීම"

"උක්ත කරුණට අදාලව කර්මාන්ත හා වාණිජ කටයුතු රාජ්‍ය අමාත්‍ය _____ මැතිතුමාගේ යෝජනාවකට අනුව වරකාපොල ප්‍රාදේශීය ලේකම් කොට්ඨාශයේ පැණිහෙල ග්‍රාම නිලධාරී වසමේ පිහිටි දැනට කෑගලු වැවිලි සමාගම විසින් භුක්ති විඳිනු ලබන ඉඩම් කොටසක් හඳුනාගෙන ඇත"

and paragraph 25 of the affidavit filed by the 1st Respondent to the effect that,

25. I state further that there is a shortage of land in the Kegalle District due to the risk of landslides and there is an urgent requirement to allocate land for a housing scheme in order to evacuate persons from areas that have been identified as posing a landslide risk.

The position taken up by the Petitioners was challenged by the Respondents and on behalf of the Respondents the 1st and the 7th Respondents have submitted affidavits objecting to the grant of any relief to the Petitioners along with documents to support their argument.

Out of the two Respondents, the 7th Respondent Land Reform Commission had submitted the statement of objection along with an affidavit of its chairman W.M.N. Wijesinghe giving the following details of the land in question.

a) Etna Estate which was leased by JEDB to Kegalle Plantation in the extent of 462 acres 01 rood and 09 perches had been devolved on the Land Reform Commission and the management of the same was assigned to JEDB by the LRC.
b) Penihelawatte is a separate and distinct entity, which is not part of the said Etna Estate
c) By operation of Land Reform Law, the land called Penihelawatte which is 225 acres 3 roods and 23 perches in extent was vested with the LRC by a statutory declaration submitted on behalf of the late Walter Seton Scott by Francis Seton Scott and Cobhan Scott. (7R1 and 7R2)

d) By statutory determination, 100 Acres of the said estate were devolved on the heirs namely Francis Seton Scott and Cobhan Scott, 50 acres each but none of them were interested in having Land in Sri Lanka since they were living in Australia at that time. Out of the said 100 acres, 50 acres had already been distributed among the needy public and it is the balance of 50 acres that was acquired under section 38 (a) acquisition order made by the Minister but has not been regularized by the 1st Respondent since the said land was occupied by the 1st Petitioner.

e) Remainder of Penihela Estate which is 125 acres 3 roods and 23 perches has been illegally occupied by the 1st Petitioner, but Penihela Estate which is not a part of Etna Estate is still vested with the 7th Respondent and the said land was never handed over to JEDB under Gazette Extraordinary 183/10 dated 12th March 1982 and therefore JEDB was not empowered to lease out the said estate to the 1st Petitioner in the year 1995.

f) As per the two Surveyor General Plans produced marked 7R4 and 7R5 two lots of Land of Penihela Estate had been clearly identified. 7R4 refers to a portion of 51 acres and 36 perch Block and 7R5 refers to a 113 acres 1 rood and 11 perch Block.

g) Out of 51 acres and 36 perch Block (7R4) 50 acres had been identified as the portion of Land subject to the statutory determination of Francis C. Scott, Darlin Point Sydney Australia which was subsequently acquired by P3B dated 28th June 1973.

When filing the objections by way of an affidavit dated 22nd January 2020, the incumbent additional Secretary Warakapola had produced marked 1R1 the Gazette Extraordinary 183/10 dated 12.03.1982 and submitted that,

a) Gazette Extraordinary dated 12.03.1982 by which lands were vested in the JEDB categorically stipulates that the extent of Etna Estate which is vested in JEDB is 324.43 hectares, which is approximately 801.43 acres

b) As the Petitioners claim that they are in possession of 1219 acres of the Etna Estate, it is apparent that the Petitioners are occupying over 418 acres in excess of what they are entitled to occupy of the Etna estate

Whilst submitting the above, on behalf of the 1st Respondent it was further submitted that the Minister of Lands by order made under section 38 (1) of the Land Acquisition Act No 28 of 1964 acquires 237 acres 01 rood and 05 perches from Penihela Estate including a portion of 51 acres and

36 perches, which is situated in the village of Penihela and the said land which is now occupied by the 1st Petitioner had been properly identified by the Surveyor General by Plans produced as 1R2-1R4.

The 1st Respondent had further produced a document marked as 1R7 to show that as per the acquisition order, the Penihela Estate had been handed over to the District Revenue Officer (DRO) of Beligal Korale on 4th July 1973 by its previous managing agents "Penihela wathu Hawula Ltd".

When considering the material submitted by the parties before this Court, it appears that the parties before this Court had taken up three different versions when submitting their respective cases. Even though the 1st and the 7th Respondents before this Court had taken up a contradictory position with regard to the main Penihela Estate, both parties admit that by Gazette Extraordinary 65/10 dated 23.06.1973 the subject matter, 50 acres from Penihela Estate had been acquired under section 38 (a) of the Land Acquisition Act 28 of 1964 and the said land had been properly handed over by its managing agents to the Divisional Revenue officer in the year 1973.

However, the story of the Petitioner begins in the year 1995 and the 1st Petitioner had taken up the position that the lands vested with the state under Land Reform law were handed over to JEDB in the year 1982 and on a policy, decision taken by the state in 1995, Etna Estate which was managed by JEDB was leased out to 1st Petitioner for the period of 53 years in 1995.

Even though there were no plans prepared or referred to any plans in the lease agreement, the Petitioner had taken up the position that, what was leased to them was the land occupied and /or released to the JEDB for the management of the said land.

There is no doubt that agricultural land that was vested with LRC when the Land Reform Law came into force, was entrusted with SPC and JEDB by a decision of the State. However, the Petitioners have failed to challenge the Government Gazette Extraordinary 183/10 dated 12.03.1982 by which the lands that were vested with JEDB were identified.

According to the said Gazette Etna Estate from Kegalle District with the extent of 324.43 Hectares had been vested with the JEDB. According to the 7th Respondent, the JEDB was given Etna Estate only. Penihela Estate or any other Estate in the vicinity were not given to JEDB and therefore it was the argument of the Respondents that JEDB could not have leased out any land which was not vested

with JEDB to a third party. The Petitioners had decided not to make JEDB a Respondent to the instant case.

If JEDB was before us, the JEDB could have explained how the above discrepancy had taken place but this Court is deprived of any explanation with regard to the above position. Neither the Petitioners nor the Lessor, the JEDB, had surveyed Etna Estate prior to it being leased to the 1st Petitioner and therefore the Petitioners, are not in a position to establish the exact extent of Etna Estate.

As it is revealed before us, the extent of Etna Estate,

a) According to LRC it was 462 acres 01 rood, and 09 perches;
b) According to the Gazette Extraordinary 183/10 dated 12.03.1982 Etna Estate consist of 324.43 Hectares (Approx. 801.43 Acres); and,
c) According to the lease agreements P-2 and P-3 Etna Estate consists of Approximant 1219 acres

Even though the 7th Respondents had taken up the position that Etna Estate which consists of only 462 acres was vested to the JEDB. The 7th Respondent had failed to submit any documentation to support this position. The said position is contradictory to the decision in the Government Gazette Extraordinary 183/10 under which 324.43 hectares (approx. 801.43 acres) were vested to the JEDB. In these circumstances, this Court is reluctant to act on the submission placed on behalf of the 7th Respondent.

However, the discrepancy between the extent referred to in the Gazette and the two deeds by which the 1st Petitioner was entrusted with Etna Estate has not been explained by the Petitioners before us. The failure by the Petitioners to bring before this Court the lessor who leased out Etna Estate which consists of 1219 acres, is a vital lapse on the part of the Petitioners. The Petitioner has failed to bring a necessary party before this Court.

In the case of ***Senaweera and others V. Vocational Training Authority of Sri Lanka and Others 2011 BLR 93*** Suresh Chandra J whilst referring to the decisions in ***Dr. K.D.G. Wimalarathne V. Secretary to the Ministry of Public Administration SC Application 654/95*** SC minute dated 09.06.1997 and ***H.A.S. Hettiarachchi V. Secretary of Public Administration and Home Affairs Sc Application 780/1999*** SC minute dated 25.01.2001 had concluded that,

a) a party coming into Court must decide as to who should be made necessary parties to such application and it is not for a party to surmise what objections would be taken up by the opposing party and then decide to add parties to the application when it becomes necessary.
b) When it comes to a situation where the proper and necessary parties have to be brought in at the time of filing the application is a mandatory requirement, reserving a right to add parties would not be sufficient and would amount to a fatal defect in the maintaining of such an application.
c) The promotions that are complained of have been made after a recommendation had been made by the Political Victimization Committee and after obtaining Cabinet approval. In such a situation the Political Victimization Committee and the Cabinet of Ministers would be necessary parties to the application at the time of filing the application.
d) Failure to cite the Cabinet of Ministers as a necessary party at the time of filing an application has been held to be a fatal defect in several judgments of this Court.

On the other hand, it was the position of the 1st Respondent that 237 acres from Penihela Estate had been acquired in the year 1973 under section 38 (a) of the Land Acquisition Act No 09 of 1950 (as amended). When the said order was made by the Minister, in the Government Gazette Extraordinary 65/10 dated 28.06.1973, he had identified four separate lots from Penihela Estate including the lot in question, 51 acres and 36 perches in extent. This was clearly identified by the Surveyor General who submitted his reports which were produced marked 1R2-1R5.

Part 'H' to the Schedule of the two deeds that were produced by the Petitioners, identified Etna Estate and according to the said schedule Etna Estate Consist of 05 divisions and they have been identified in the schedule as follows;

a) Etna division 462 acres 01 rood and 08 perches
b) Northland division 259 acres and 27.2 perches
c) Talawatta division 228 acres 4.6 perches
d) Monrovia division 47 acres 02 roods and 30.4 perches
e) Penihela division 222 acres and 11.2 perches

The total extent of the Estate comes to 1219 acres 01 rood and 1.4 perches

In the said schedule, each division too had been separately identified and the divisions referred to above consist of several lots. As per the said schedule Penihela division consist of 25 lots and they have been identified in the schedule from (a) –(y).

The extent of each lot is identified under the above schedule and among the 25 lots identified under 'Penihela', there are lots ranging from 244 acres to 1.5 perch. As already referred the entire Penihela division contains only 222 acres and 11.2 perches but the lot identified as "Kathurukandehenayaya" consists of 244 acres 3 roods and 33 perches (under 'x') According to the schedule the 25 lots referred under 'Penihela' totally consist of 560 acres 02 roods and 18.5 perches. The Petitioners have failed to give an explanation for this discrepancy, but in their submissions, before this Court, they have taken up a position that, apart from the Penihela division that was handed over to them by P2 and P3, another portion of land called Penihela Estate too was included to the said division and therefore Penihela Estate is also a part of Etna Estate. However, they have failed to explain how they got 560 acres 02 roods, and 18.5 Perches instead of 222 acres and 11.2 perches of Penihela division.

The only party who could have explained this discrepantly is the lessor, JEDB, but the Petitioners have failed to make them a party to the instant case and I have already concluded that the Petitioners have failed to bring a necessary party before this Court.

As further observed by this Court by 1R1 JEDB had been vested with 324.43 Hectares from Etna Estate and the JEDB is not legally entitled to lease out any land over and above the said extent to a third party. However, the Petitioners before this Court were of the opinion that they had a legitimate expectation to possess Etna Estate for a period of 53 years as per the two-lease agreements produced marked P2 and P3 but a question arises whether the Petitioners could entertain a legitimate expectation to possess land in excess of the extent referred to in the lease agreement under which the land was entrusted to them.

In the case of ***Ginigathgala Mohandiramlage Nimalsiri V. Colonel P.P.J. Fernando and others SC 256/2010*** SC minute dated 17.09.2015, it was observed that,

> "An expectation the fulfillment of which results in the decision maker making an unlawful decision cannot be treated as a legitimate expectation. Therefore, the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation case.

It was also decided in the case of ***Tokyo Cement Company (Lanka) Ltd V. Director General Customs and four Others SC Appeal 23/2004 2005BLR 24*** that a legitimate expectation has to be taken in the sense of expectation which will be protected by law.

Considering the matters already discussed in this Judgment, I conclude that,

a) The Petitioners had failed to bring JEDB a necessary party to the instant application which is a fatal lapse on the part of the Petitioners that warrants dismissal of the instant application
b) The Petitioner could not have entertained a legitimate expectation to possess the entire extent of Etna Estate handed over to them for a period of 53 years. Since the Petitioners have failed to establish that the lessor was entitled in law to lease out any extent beyond 324.43 Hectares to a third party.

I therefore dismiss the application with cost fixed at Rs. 200000/-

Application is dismissed with cost.

Judge of the Supreme Court

Hon. Justice Janak de Silva,

I agree,

Judge of the Supreme Court

Hon. Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court

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

In the matter of an application made in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC FR 531/2011

1. Engineering Diplomates Association,
   National Water Supply and Drainage Board,
   Head Office, Ratmalana.

2. Technical Officer's Union,
   National Water Supply and Drainage Board,
   Head Office, Ratmalana.

3. E. D. Subadra,
   Jayathilake Garden, Munagama, Horana.

4. M.W. Chandrani,
   23/20, New Hospital Road, Pamunuwa,
   Maharagama.

5. R.M. Piyadasa,
   48/1, Udabowala, Kandy.

6. R.G.A. Ranatunga, 483/11, Jeramius Fernando Mawatha, Rawathawatta, Moratuwa.

7. A.A.N. Dias,
   58, Ganga Boda Road, Wewela, Piliyandala.

8. J.D.S.N. Karunathilake,
   Asiri Uyana, Paltota, Katubedda.

Petitioners

Vs,

1. Mr. A. Abeygunasekara,
   Secretary,
   Ministry of Water Supply and Drainage,
   "Lakdiya Medura", New Parliament Road, Pelawatta, Battaramulla.

1A. Mr. Sarath Chandrasiri Vithana,
   Secretary,
   Ministry of Water Supply and Drainage.

1B. Mr. M.P.K. Mayadunne,
   Secretary,
   Secretary to the Ministry of City Planning, Water Supply, and Higher Education.

1C. Dr. Priyath Bandu Wickrama,
   Secretary,
   Ministry of Urban Development, Water Supply, and Housing Facilities.

1D. W. Samaradiwakara
   Secretary,
   Ministry of Water Supply and Drainage,
   "Lakdiya Medura", New Parliament Road, Pelawatta, Battaramulla.

2. National Water Supply and Drainage Board,
   Head Office, Ratmalana.

3. N. Godakanda,
   Director General, Department of Management Services, Ministry of Finance and Planning, General Treasury, Colombo 01.

3A. Mr. H. G. Sumanasinghe,
   Director General, Department of Management Services,

3B. Mrs. L. T. D. Perera,
Director General, Department of Management Services,

3C. Mrs. Hiransa Kaluthantri,
Director General, Department of Management Services, 3rd Floor, Ministry of Finance, General Treasury, Colombo 01.

4. B. Wijeratne,
Secretary, National Salaries and Cadre Commission,
2G-10, BMICH, Bauddaloka Mawatha, Colombo 07.

4A. Mr. Asoka Jayasekera,
Secretary, National Salaries and Cadre Commission,

4B. Mr. Anura Jayawickrama,
Secretary, National Salaries and Cadre Commission,

4C. Mrs. Chandrani Senaratne,
Secretary, National Salaries Commission,
Room No. 2–116, BMICH, Colombo 07.

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

Respondents

6. Engineer's, Union, [Reg: No 7139]
National Water Supply and Drainage Board, Galle Road, Rathmalana.

Intervenient Petitioner Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Achala Wengappuli
Justice Arjuna Obeyesekere

Counsel: Faiz Musthapa PC with Uditha Egalahewa PC, Ms. Thushani Machado, and N.K. Asjhokbharan instructed by Ms. Lilanthi De Silva for the Petitioners.

Ms. Indika Demuni De Silva PC, SG with I. Randeny SC for the 1st to 5th Respondents.

Razik Zarook PC with Rohana Deshapriya, Ms. Chankya Liyanage, and J.K. Wijesinghe for the Intervenient Respondent.

Argued on: 03. 03. 2023

Decided on: 20.07.2023

Vijith K. Malalgoda PC J

Petitioners to the instant case, two trade unions namely Engineering Diplomates Association and Technical Officers Union both from the National Water Supply and Drainage Board (hereinafter referred to as NWS&DB) along with six employees of NWS&DB who are members of the aforesaid two unions had come before this Court alleging the violation of the Petitioners Fundamental Rights guaranteed under Article 12 (1) of the Constitution by,

a) Failure to implement the Board decision dated 26th May 2011 (P-8), the Board Circular No P2/3/EA(c)/Special dated 27th June 2011 (P-10), and the Memorandum of Understanding (MOU) signed between the NWS&DB and the 1st and the 2nd Petitioners on 8th June 2011 (P-9)
b) Implementing the two decisions of the Department of Management Service (DMS) dated 1st June 2011 (P-11) and 3rd October 2011 (P-14)

This Court on 4th October 2012 granted leave to proceed for the alleged violation under Article 12 (1) of the Constitution.

When this matter was taken up for argument, the Solicitor General who appeared for the Respondents raised a preliminary objection with regard to the maintainability of the instant application on the ground that the 1st and the 2nd Petitioners being trade unions, cannot have maintained the application on behalf of its members in terms of Article 17 read with Article 126 (2) of the Constitution. The Solicitor General heavily relied on the decision in *Ceylon Electricity Accountants' Association V. Patali Champika Ranawaka and Others SC FR 18/2015* SC minute dated 11.03.2016 when raising the above objection.

Except for the first -two Petitioners six other Petitioners, also had come before this Court, when filing the instant application, and as revealed before us they are office bearers and members of the 1st and 2nd Petitioner Associations who were said to have affected with the impugned decisions of the 3rd Respondent.

In the case of *N.B. Krishantha Kumara and three others V. Dharmasena Dissanayake and Others SC FR 460/2017* SC minute dated 01.03.3023, this Court has considered several decisions of the Supreme Court including, the decisions in *Ceylon Electricity Board Accountants Association V. Patali Champika Ranawaka (Supra)*, *Public Services United Nurses Union V. Montague Jayawickrema Minister of Public Administration and Others 1988 1 Sri LR 229*, *and Environmental Foundation V. Urban Development Authority (2009) 1 Sri LR 123* had now concluded that "it is clear that the locus standi of an unincorporated body that comes before the Supreme Court in an application filed under Article 17 read with Article 126 (2) is now settled and the Court has permitted the members of the unincorporated body to pursue the application in the instances when their rights guaranteed under the Constitution has been violated by the conduct of the Respondent. Therefore, I see no merit in the first objection raised by the Respondents before this Court."

Having considered the objection raised and the decision of this Court referred to above, I reject the objection raised before this Court.

As submitted by the Petitioners the 3rd to the 8th Petitioners are holders of National Level Engineering Diplomas awarded after full-time courses ranging from 3 to 3 ½ years, and such diploma holders were recruited to the NWS&DB to Board Grades 11 or 10 based on their qualifications. As per the Scheme of Recruitment (SOR) which was in operation at that time, officers who were recruited to Board Grades 11 and 10 were promoted to Board Grades 9 and 8. Once an officer reaches Board Grade 8 and obtained 3 years of experience as an Engineering Assistant CL-l Board Grade 8, he will

become eligible to be promoted to the position of Engineer Board Grade 7. However, only 25% of the total available number of cadre positions of Engineer CL-l, CL-ll, and Senior Engineer were available for the promotion of Engineering Assistants CL-I Serving in Board Grade 8.

It was also the position of the Petitioners before this Court that, a total of 12 years, 17 years, or 21 years were required based on the Education Qualifications and the Board Grade an Officer was recruited, in order for the officers to become eligible to be promoted to the position of Engineer Board Grade 7.

Those who were not successful in entering Board Grade 7 as an Engineer Board Grade 7 due to the above restriction, the Officer will be stagnated as an Engineering Assistant (Special Grade) Board Grade 7 until their retirement from the service.

However, those who were recruited to Board Grade 11 as Quantity Surveyors and Draughtsmen with similar qualifications were entitled to be promoted beyond Board Grade 7 up to Board Grade 3, 4, or 5 during their carrier. In those circumstances, it was submitted that those who do not fall within the 25% slot as Engineer Class II in Board Grade 7 have a long period of stagnation without any prospect of promotion beyond Board Grade 7.

In those circumstances several discussions were held between the management of the NWS&DB and the 1st and the 2nd Petitioners and an agreement was reached between the two parties and a MOU was signed. The progress made during the discussion and thereafter has been summarized as follows;

a) It was decided at the meeting held on 2nd December 2010 to take steps to enable the Engineering Assistant (Special Grade) Board Grade 7 to arrive at Board Grades 5 and 6.
b) A Board paper titled “Promotional path for Engineering Assistants-Special Class up to Board Grade 6 and 5” dated 20th January 2011 was submitted to the NWS&DB Board. (P-6) In the said Board paper it was recommended that; “to create Board Grade 6 and 5 in the SOR of Engineering Assistants subject to the conditions contained in the Board paper.”
c) The said recommendation was approved by the Ministry of Water Supply and Drainage and by letter dated 27th April 2011 Secretary to the Ministry advised the 2nd Respondent, of the manner in which the recommendation is to be implemented (P-7)
d) Special instructions were given in the said letter,

i. To promote the Engineering Assistants- Special Grade, who had completed 6-10 years to Board Grade 6
ii. To promote the Engineering Assistants- Special Grade, who had completed more than 10 years to a Grade above Board Grade 6
iii. The promotions should be personal to the said officers
iv. To propose a suitable designation to those who were promoted under these instructions

e) By Board decision dated 26th May 2011 the said instructions were adopted by the NWS&DB Board of Directors.

f) Based on the above decisions MOU was signed between the 1st and 2nd Petitioners and the 2nd Respondent to give effect to the said decisions and it was further agreed between the parties that the agreement is only applicable to 362 officers only.

g) Accordingly, by P-10 NWS&DB had called for applications by advertisement dated 27.06.2011 to give effect to the above agreement from those who were eligible i.e., Engineering Assistant – Special Grade completed more than 10 years in Board Grade 7 for the post of Assistant Engineer (this designation was decided by NWS&DB under (d)-IV above) Board Grade 6 and to place them at a salary scale of MM I-I and Engineering Assistant-Special Grade who has worked more than 6 years and less than 10 years in Board Grade 7 for the post of Assistant Engineer Board Grade 6 and to place them at a salary scale of JM l-2.

Whilst the above process was in progress Department of Management Service had forwarded new cadre recommendations to the NWS&DB by letter dated 1st June 2011. (P-11) As submitted by the Petitioners before this Court, in the said cadre recommendation a post was created as Assistant Engineer for those who belong to the cadre of Engineering Assistant-Special Board Grade 7 but placed them in the salary scale of JM l-2 which is contrary to the MOU already signed between the 1st and 2nd Petitioners and the 2nd Respondent. It was further observed that P-11 had not provided any promotional path for Engineering Assistants in Board Grade 7, those who do not fall within the 25% slot as the Engineer category, but provided positions in the MM category for Quantity Surveyors and Surveyors who were also recruited to Board Grade 10 and 11 along with the Petitioners.

During the same time, the Engineers' Union of the NWS&DB too had objected to P-10 specifically for the positions provided in Board Grade 5 and 6 for the Petitioners and naming those positions as Assistant Engineers instead of the remaining designation Engineering Assistants.

Since there were threats of Trade Union action by both parties, i.e., by the 1st, 2nd Petitioners and Engineers' Union, the 2nd Respondent decided to refer the matter to the Department of Management Services for their recommendation but continued in holding the interviews for Engineering Assistants Board Grade 7as per the applications called by P-10.

In the said circumstances, it was alleged that all attempts made to resolve the issues faced by the Engineering Assistants mainly with regard to their promotions beyond Board Grade 7, by

a) Holding discussions with the Management of the NWS&DB and signing an MOU between the two parties
b) The relevant Ministry and NWS&DB agreeing to grant promotions to the Engineering Assistants belonging to Board Grade 7 special to Board Grade 6 and above based on their experience
c) Calling for applications from the qualified Engineering Assistants to implement the MOU signed between the two parties,

in order to resolve the stagnation of the Engineering Assistant failed, but holding the interviews without any assurance and/or without any final decision of resolving the main grievance i.e., granting promotions beyond Board Grade 7, was in violation of the Fundamental Rights of the Petitioners to equal protection of Law guaranteed under article 12 (1) of the Constitution.

In addition to the parties who were made as the Respondents to the instant application, including the Secretary to the Ministry of Water Supply and Drainage, the Director General of the Department of Management Service, and the Secretary of the National Salaries and Cadre Commission, Engineers' Union of the NWS&DB came forward to resist the application filed by the Petitioners before this Court. The Engineers' Union of NWS&DB filed papers before this Court and sought permission from this Court for intervention in the instant application. The application for intervention was also supported before this Court on 4th October 2012 when the main matter was supported for leave to proceed, and this Court permitted intervention by the Engineers' Union of NWS&DB to the instant case.

On behalf of the 2nd Respondent, the General Manager of the NWS&DB and the 3rd Respondent had filed affidavits explaining how the decisions that were challenged before this Court were arrived by the Respondents. In this regard, the position taken by the 3rd Respondent before this Court is very much material since the decisions that were challenged by the Petitioners were decisions made by the 3rd Respondent. In his affidavit filed before this Court the 3rd Respondent had submitted that;

a) Pursuant to the Budget Speech 2006, the Government made a policy decision to implement a new salary structure for the Public Service, and the Public Administration Circular 6 of 2006 dated 25.04.2006 was issued containing the restructured salaries of the Public Service.
b) With the introduction of the new salary structures, the Public Service needs to be re-structured to fit into the salary scales proposed by the circular.
c) With the above proposal, it was also decided to revise the salaries of employees in public Corporations, Statutory Bodies, and Government own business undertakings except those whose salaries were determined by collective agreements
d) In order to implement the above proposal and to restructure the organizational structures to implement the new salary structures, Management Service Circular 30 of 2006 dated 22.09.2006 was issued by the Department of Management Service (3R2)
e) Consequent to the issue of the said circular, discussions were held with the institutions referred to in paragraph 'c' above including the NWS&DB with the participation of the officials of the Ministry of Finance, Ministry of National Water Supply and Drainage and National Salaries and Cadre Commission
f) As a result of the said discussions regarding the NWS&DB it was agreed to implement the common management structure proposed in the said circular and to abolish the Board Grade system followed by NWS&DB
g) The said decision was communicated to the 2nd Respondent by letter dates 23.05.2011 (3R5 and 3R5A) and the cadre based on the above structure relevant to NWS&DB was informed to the 2nd Respondent and the relevant Ministry by letter dated 01.06.2011 (3R6)
h) As per the said decision the Cadre for Engineering Assistant Class III, II and I was 700 under MA 2-2 category and the Engineering Assistant (Special Grade) Board Grade 7 which existed in the 2nd Respondent was re-designated as Assistant Engineer and a cadre of 390 was approved under JM I-2 category.

As submitted by the 3rd Respondent, the said decision which was communicated to the 2nd Respondent and the Ministry of Water Supply and Drainage was in terms of the policy of the Government embodied in Public Administration Circular 6/2006 and Management Service Circular 30 of 2006 and the 3rd Respondent was unaware of any agreement reached between the 2nd Respondent and the Petitioners to the instant application outside the provisions of the circular. It was the position taken up by the 3rd Respondent before this Court that any agreement reached contrary to the provisions of the circulars referred to above is in violation of the policy of the Government.

On behalf of the 2nd Respondent Board, the General Manager of NWS&DB Liyanage Lal Premanath had submitted an affidavit before this Court. According to the said affidavit, on behalf of the 2nd Respondent, it was submitted that,

a) At the time the Management Service Circular 30 of 2006 was issued, the Engineering Assistant (Special Grade) Board Grade 7 were eligible to apply for 25% of the vacancies in the cadre of Engineers provided they possess the requisite experience. Since the cadre of Engineers at NWS&DB was 418 at that time, 105 posts were available for Engineering Assistants.
b) Similar to Quantity Surveyors and Draughtsmen who were provided with a promotional path up to Board Grade 5, the Engineering Assistants too had the opportunity to secure promotions to Board Grade 6, 5, 4, and beyond, depending on the availability of vacancies in the cadre of Engineers, Chief Engineer, and Senior Manager posts such as Deputy and Additional General Manager subject to the above restriction. At the time the affidavit was tendered to Court, there were 03 Additional General Managers, 02 Deputy General Managers, and 06 Chief Engineers who were initially recruited as Engineering Assistants to the NWS&DB.
c) However, the 2nd Respondent was concerned with the grievance complained on behalf of the Engineering Assistants by their Trade Unions, and it was agreed after obtaining necessary approvals from the Ministry of Water Supply and Drainage and the Board of the NWS&DB to promote certain Engineering Assistants in the Special Grade as being personal to them in the following manner,

> Engineering Assistants in Special Grade with 6 to 10 years of service are to be promoted to Board Grade 6 and placed on the initial of the applicable salary scale and,

Engineering Assistants with over 10 years of service are to be promoted to Board Grade 6 and to be placed on a higher step of the applicable salary scale.

d) Steps were taken to implement the above decisions by advertising the above positions but the interviews to select the eligible candidates could not be held due to;
    i. Engineers' Union of the NWS&DB raised objections threatening Trade Union action
    ii. A communication received from the Department of Management Service approving the New Cadre to NWS&DB implementing the Management Service Circular 30 of 2006.
e) Subsequent to the issue of Management Service Circular 30 of 2006, the Department of Management Service wrote to the 1st and 2nd Respondents explaining the manner in which the above circular should be implemented at the 2nd Respondent Board.
f) Several discussions were held between the stakeholders to implement the above Circular with the NWS&DB and the 2nd Respondent Board were granted a salary increase of 22% with effect from 01.01.2010, and a series of discussions were held thereafter to restructure the posts in keeping with the above Circular.
g) Whilst the outcome of the said discussions was pending the 2nd Respondent engaged in some discussions with the 1st and the 2nd Petitioners as referred to in subparagraph (c) above, since the said unions complained of the grievance faced by its membership due to stagnation at Board Grade 7.

As revealed from the material submitted before this Court by the 2nd and the 3rd Respondents it is evident that the Engineers Union of the NWS&DB had objected to,

a) Holding interviews as per the MOU signed between the 2nd Respondent and the two Petitioners to recruit Assistant Engineers from Engineering Assistant (Special Grade) Board Grade 7
b) Re-designating Engineering Assistant (Special Grade) Board Grade 7 as Assistant Engineers under JM I-2 category as per the decision of the Department of Management Service which was communicated to the 2nd Respondent by letter dated 23.05.2011

As already referred to in this judgment, the Engineers' Unit of the NWS&DB had sought permission to intervene in the instant application and the said application too was supported before this Court

on the same day, the main matter was supported for leave to proceed. This Court granted permission for the Engineers' Union to intervene in these proceedings. As revealed from the material placed before this Court, the said Union had several reasons to object to the decisions of the 2nd and 3rd Respondents, with regard to the promotions proposed to the Engineering Assistants (Special Grade) Board Grade 7.

As submitted by the party sought permission to intervene, they had reasons to believe that;

a) The promotions agreed by the MOU signed between the 2nd Respondent and the first- two Petitioners before this Court are contrary to the approved scheme of Recruitment of the NWS&DB.
b) By promoting the Engineering Assistant to Board Grades 6 and 5 as agreed, will create an imbalance in the management structure since that will provide an additional path for the Engineering Assistant to get into the Higher Management of the NWS&DB.
c) The creation of a cadre designated as Assistant Engineer for Engineering Assistants (Special Grade) Board Grade 7 is in violation of all accepted norms and principles in stating professional nomenclatures.

During the Arguments before this Court, on behalf of the Engineers of the NWS&DB, it was further submitted that the cadre for Engineers in the NWS&DB is only around 400 and the said 400 posts are divided as per their qualifications as follows;

i. Holders of BSC Degree from a recognized University (240 at the time the papers were filed before the Court)
ii. Those who joined NWS&DB with Diplomas and completed the Examination conducted by the Institute of Engineers of Sri Lanka (IESL) or equivalent (60 at the time the papers were filed before the Court)
iii. 25% allocated for Engineering Assistants (Special Grade) Board Grade 7 (100-at the time the papers were filed before Court)

In those circumstances, it was submitted that grave prejudice would cause to the BSC Engineers of the NWS&DB by creating an additional path for the Engineering Assistants outside the approved scheme of recruitment of the NWS&DB.

At the time the Petitioners, including 5 Engineering Assistants of the NWS&DB complained about the violation of their Fundamental Rights guaranteed under Article 12 (1), the grievance complained by them was reflected in the matters that have already been discussed by me in this Judgment.

However, when the matter was taken up for argument, on behalf of the Respondents and the Intervenient Petitioner- Respondents, it was submitted that the *status quo* is much different from what it was, and submitted that the grievance complained before this Court no longer exists, and that has now been resolved.

Even though the President's Counsel who represented the Petitioners before us does not fully agree with the above submission, it is my duty to consider the above position to come to a correct finding in this case.

The 3rd Respondent had explained the events that took place after communicating the decision of the Department of Management Service by letter dated 23.05.2011 and 01.06.2011, in the objections that were filed on 11th April 2012. As already referred to in this Judgment, the Engineers strongly objected to renaming the designation of Senior Engineering Assistant as Assistant Engineers and providing opportunities for promotions outside the scheme of recruitment to the relevant cadre. The Engineering Assistants (Special Grade) Board Grade 7 were also unhappy with the decision to implement the decision of the Department of Management Service ignoring the MOU already signed to provide promotions beyond Board Grade 7.

It is at this stage the 3rd to the 7th Petitioners and the Unions; the 1st and the 2nd Petitioners came before this Court seeking redress for their grievances. However, it appears that the parties to the instant case had continued with discussion in order to resolve the grievance complained by the Petitioners. It is important to note at this stage that the 2nd Respondent too had at one stage accepted that the Engineering Assistants (Special Grade) Board Grade 7 who were not successful to come within the 25% of the Engineers cadre had to stagnate in the same position until their retirement and therefore agreed to resolve the issue by signing a MOU between the parties.

During the said discussions with all the stakeholders, parties explored the possibility of renaming the designation of the post of "Assistant Engineer" which was proposed by the letter dated 01.06.2011 by the Department of Management Service, and also to resolve the issues of stagnation by placing them beyond the J.M Category which was the basis for the proposed management structure by the Department of Management Service under Management Circular 30 of 2006, since the Board Grade

structure was repealed by the Management structure proposed by the Department of Management Service (P-11).

Even though the parties before Court had not fully agreed, two proposals were made during those discussions, for the remaining cadre of Engineering Assistants (Special Grade)

a) To create the posts of work superintendent with a cadre of 28 (MM I-I salary code),
   Senior Engineering Assistant with a cadre of 362 (JM I-2 salary code (3R7))
b) To create the posts as below instead of the posts referred to in (a) above
   Senior Engineering Assistant (Supra) MM I-I
   Senior Engineering Assistant JM I-2
   with proposal (b) above it was further agreed to absorb Engineering Assistants (Special Grade) who have over10 years of service to the post of "Senior Engineering Assistant (Supra)" in the employee category of "Middle Manager" and those with 6 to 10 years of service to the post of "Senior Engineering Assistant" in the employee category of "Junior Manager" and to make those appointments personal to those officers.

However, it is evident from the additional papers filed before this Court on behalf of the 2nd and 3rd Respondent with permission of the Court after concluding the oral submissions made on behalf of the Respondents including the Intervenient Petitioner Respondent, that the second proposal referred to above had been given effect personal to those who were aggrieved from the SOR which was in operation prior to the SOR introduced in 2011, and those officers have been granted promotions even beyond the grades to which they were appointed with the implementation of the New SOR based on the Management Circular 30 of 2006.

As per the papers filed before this Court, out of the six Petitioners before this Court (Petitioners 3-8) five Petitioners were promoted to the post of "Senior Engineering Assistant (Supra)" Grade and the other was holding the position as "Senior Engineering Assistant" at the time he was retired in the year 2017. Among the five Petitioners who were promoted to "Senior Engineering Assistant (Supra)," three of them were promoted to Engineers in the NWS&DB with effect from March 2018.

Out of the Balance 309 Engineering Assistants (Special Grade) Board Grade 7, who were the subject matters in the MOU signed between the 1st and 2nd Petitioners and the 2nd Respondent, all officers were promoted as "Senior Engineering Assistants (Supra)" Grade and out of them 60 were promoted as Engineers. Out of the 309 officers, 80 officers are still in the Service holding the position either as

Senior Engineering Assistant (Supra) Grade or as Engineers, and the Balance had retired from the service as Senior Engineering Assistants (Supra).

At the time the Petitioners came before the Supreme Court, the Petitioners whilst challenging the Circular dated 01.06.2011 (P-11) requested to implement the agreement reached in the MOU (P-9). As observed by this Court the MOU too had categorized the Engineering Assistants (Special Grade) Board Grade 7, into two groups when implementing the agreement. i.e., those who serviced over 10 years and served between 6-10 years.

Even though there is no reference to these groups in P-11, the subsequent discussions had granted relief to the same two groups and as revealed from the documentation filed after arguments, all officers similarly circumstanced with the Petitioners were treated equally and promoted to Higher grades, even as Engineers under the New SOR.

On behalf of the petitioners, an affidavit from the 3rd and the 4th Petitioners was tendered along with a motion dated 18.05.2023, even after the preliminary draft judgment was circulated. However, it is observed that the grievance complained in the said affidavit must be considered within the remaining cadre of the NWS&DB, and as already observed in this judgment the matters had been resolved within the remaining framework.

This Court on numerous occasions had declared the powers vested with the Cabinet of Ministers in deciding the Policy, and Article 55 (4) of the Constitution (the text that was operative in the year 2000) and Article 55 (1) of the Constitution (the text that was operative after 9th September 2010) granted the Cabinet of Ministers the following powers;

55 (4) subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.

55 (1) The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policies relating to appointments, promotions, transfers, disciplinary control, and dismissal

In the case of ***Samastha Lanka Nidahas Grama Niladhari Sangamaya and Others V. D. Dissanayake, Secretary, Public Administration and Ministry of Home Affairs, and Others SC Appeal 158/2010*** SC minute 14.06.2013 this court observed;

> "The first substantive question that has to be determined on appeal, in this case, is purely one of the *vires* and arises in the context of certain constitutional provisions which seek to distinguish between two categories of decisions that can be made by the executive arm of Government. The first of these are decisions relating to "the appointment, transfer, dismissal, and disciplinary control" of public officers, which was vested in the Public Service Commission by Article 55 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka") as amended by the Seventeenth Amendment thereto, which was in force at the time of the pronouncement of the impugned judgment of the Court of Appeal the second of these categories are decisions pertaining to policy, which in the context of the public service are exclusively vested in the Cabinet of Ministers by Article 55 (4) of the Constitution of Sri Lanka, as amended by the Seventeenth Amendment."

As already revealed before us the two Circulars one with regard to the Public Service (Public Administration Circular No 6 of 2006) and the other with regard to the Public Corporations, Statutory Bodies, and state-owned Enterprises (Management Circular 30 of 2006) were issued to implement the Government Policy declared in the Budget Speech 2006 to introduce a new salary and service structures in the two sectors referred to above. The proposed structure to the Public Corporations, statutory bodies, and state-owned Enterprises was to implement irrespective of the structures in place at that time, and as a result, all Government Corporations, Statutory Bodies, and State-Owned Enterprises will have similar service and salary structures within those institutions. In the circumstances the Board Grade Promotions, that were identified in the SOR of the NWS&DB will have no force and any decision to implement the said scheme will be in violation of the State Policy.

The new structure had provided a scheme, based on the management responsibilities instead of any other categorization identified by the SOR of the respective Agency including the Board Grade system at the NWS&DB.

The MOU signed between the parties too had provided a scheme to categorize Engineering Assistants into two groups based on their service and to treat them separately under the remaining Board Grade system. As already discussed in this Judgment the same categorization has been applied under the new system and placed them in JM I-2 and MM I-I categories. In this regard the Petitioners

have failed to establish that they were differently treated as against the MOU signed between the two parties when implementing the State Policy declared in Management Circular 30 of 2006.

Even though the Petitioners were reluctant to admit the fact that the grievances they complained about were resolved by the New SOR with the amendments introduced after discussions with the stakeholders, the fact that 3rd to the 8th Petitioners as well as all other officers, similarly circumstanced at NWS&DB were granted promotions by the time the matter is taken up for argument is the best evidence that reveals the outcome of the document challenged before this Court.

Even though the amendments proposed had not specifically gone into the "stagnation" as complained by the Petitioners, the implementation of the proposals had given ample opportunities for the Engineering Assistants to be promoted as Engineers within the SOR introduced with the implementation of the state policy.

In these circumstances, we hold that the Petitioners have failed to establish the violation of their Fundamental Rights guaranteed under Article 12 (1) of the Constitution as alleged in their Petition filed before the Court.

The Application is therefore Dismissed.

We make no order with regard to costs.

Judge of the Supreme Court

Justice Achala Wengappuli,

I agree,

Judge of the Supreme Court

Justice Arjuna Obeyesekere

I agree,

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal to the Supreme Court in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Kehelkaduvithanalage Don Dihan Ajantha Dias
   No. 114, Weththewa,
   Raddolugama.

2. M. M. Neil Priyantha
   No. 71, Sadasarana Mawatha,
   Rilaulla,
   Kandana.

Applicants

SC Appeal 104/2019 and 105/2019
SC(SPL)LA/428/2018 and 429/2018
HCALT 563/2017 and 562/2017
LT/21/1153/2013 and 1152/2013

Vs.

Blue Diamond Jewellery Worldwide PLC
No. 49, Ring Road,
Phase I, IPZ,
Katunayake.

Respondent

AND BETWEEN

Blue Diamond Jewellery Worldwide PLC
No. 49, Ring Road,
Phase I, IPZ,
Katunayake.

Respondent-Appellant

Vs.

1. Kehelkaduvithanalage Don Dihan Ajantha Dias
   No. 114, Weththewa,
   Raddolugama.

2. M. M. Neil Priyantha
   No. 71, Sadasarana Mawatha,
   Rilaulla,
   Kandana.

Applicants-Respondents

AND NOW BETWEEN

1. Kehelkaduvithanalage Don Dihan Ajantha Dias
   No. 114, Weththewa,
   Raddolugama. (SC Appeal 104/2019)

2. M. M. Neil Priyantha
   No. 71, Sadasarana Mawatha,
   Rilaulla,
   Kandana. (SC Appeal 105/2019)

Applicants-Respondents-Appellants

Vs.

Blue Diamond Jewellery Worldwide PLC
No. 49, Ring Road,
Phase I, IPZ,
Katunayake.

Respondent-Appellant-Respondent

Before : **P. Padman Surasena, J**
Yasantha Kodagoda, PC, J
K. Priyantha Fernando, J

Counsel	:	S. K. Parathalingam, PC with V. Fernando for Applicants-Respondents-Appellants. Uditha Egalahewa, PC with N. K. Ashokbharan instructed by Ms. Niluka Welgama for Respondent-Appellant-Respondent.
Argued on	:	03.04.2023
Decided on	:	20.07.2023

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K. PRIYANTHA FERNANDO, J

1. The learned President's Counsel for the Applicants-Respondents-Appellants as well as the learned President's Counsel for the Respondent-Appellant-Respondent agreed that it would suffice for this court to pronounce one judgment in respect of both the appeals, namely SC/Appeal/104/2019 and SC/Appeal/105/2019 as both the appeals emanate from a single award of the Labour Tribunal and a single judgment of the High Court.

2. The Applicants-Respondents-Appellants (hereinafter referred to as the applicants) instituted proceedings in the Labour Tribunal of *Negombo*, against the Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent) for compensation, on the basis that their employment was constructively terminated.

3. The learned President of the Labour Tribunal of *Negombo*, by her award dated 31.10.2017 [A-2] held in favour of the applicants stating that, the respondent had constructively terminated the employment of the

applicants and ordered compensation to be paid to the applicants in a sum of Rs.8,419,383 and Rs.8,788,602.69, respectively.

4. Being aggrieved by the said award of the learned President of the Labour Tribunal, the respondent preferred an appeal to the High Court of *Negombo*. The learned High Court Judge delivering his judgment dated 30.10.2018 [A-3] held in favour of the respondent company holding that, the applicants were removed from the position of directors of the company by virtue of the resolution that was passed and according to the Articles of Association of the company, the employment of the applicants also ceased altogether by the operation of law. It was further held that, as there was no termination of employment by the respondent company, the Labour Tribunal had no jurisdiction in respect of the matter.

5. Being aggrieved by the judgment of the learned High Court Judge, the applicants appealed to this Court seeking special leave to appeal. This Court granted leave to appeal on the following questions of law;

    I. Is the employer respondent justified in coming to the conclusion that the applicant ceases to be an employee under Article 81(2) once he ceases to be a director?

    II. Is the employer entitled to say that it (the employer) has not terminated the services of the employee by operation of Article 81(2)?

    III. Did the employee discharge his burden in establishing constructive termination as pleaded in the application to the Labour Tribunal?

6. The applicants state that, they were initially employed by the respondent company in 1991 and were appointed to the positions of Executive Directors in the year 2005.

Thereafter, by letters dated 07.04.2005 [A-5] in SC/appeal/105/2019 and [A-23] in SC/Appeal/104/2019, they were appointed as directors of the company with effect from 01.05.2005. Thereafter, a resolution was passed by the respondent company at the Annual General Meeting held on 28.09.2012, and by letter dated 08.10.2012 [A-14] in SC/Appeal/105/2019 and [A-30] in SC/Appeal/104/2019 the applicants were informed that they have been removed from their offices as directors of the company with effect from 28.09.2012. The respective letters further stated that, according to the Articles of Association of the company read with the provisions of the Companies Act No. 07 of 2007, as a result of ceasing to be a director of the company, the applicants no longer held an executive position in the company and further stated that, by virtue of this, they have also ceased to hold the respective offices initially held by them as Product Development Director and Production Director in the company.

7. Since the first and the second questions of law set out above are interconnected, those questions can be considered together.

8. At the argument of this appeal, the learned President's Counsel for the applicants stated that, the reliance placed on Article 81(2) of the Articles of Association of the respondent company was erroneous and inapplicable to the facts of the instant case.

9. The position of the applicants is that, Article 81(1) and 81(2) of the Articles of Association of the company must be read together. Further, simply due to the fact that the applicants ceased to hold their respective offices as directors of the respondent company, does not mean that they cease to be employees of the company. In that, it is their position that, the executive positions were not given to them on the basis of Article 81(1) of the Articles of Association of the company, and that although they were

later appointed as directors of the company, they continued to be employees of the company. It was further stated that, their appointment as directors of the company did not bring their employment to an end as their salaries were continued to be paid. Therefore, it is their position that, Article 81 (2) of the Articles of Association of the company does not apply to them.

10. In his written submissions, the learned President's Counsel for the applicants submitted that, there exists no restriction on appointing employees to the board of directors contained in the Companies Act, nor is there any restriction to the same effect in the Articles of Association of the company, and therefore, holding employment with the company and accepting the office of a director of the company are not mutually exclusive events.

11. The learned President's Counsel for the applicants further submitted that, the position of the respondent stating that when an employee assumes the office of a director his employment terminates by operation of law, is unsupported by any authority, as there exists no document in the form of a letter of resignation, nor is there any fresh letter of employment upon assuming office of director. He further submits that, ETF and EPF contributions have also been continued to be made to the applicants by the respondent company.

12. The position of the respondent is that, according to Article 18(2) of the Articles of Association of the company, ceasing to hold office as a director of the company would not only amount to a termination of any executive office held in such company, but it would also terminate any existing contract of employment with the company. The respondent states that, the applicants by ceasing to hold office as directors of the company, have by the operation of the law ceased to hold office as employees of the company as well.

13. The learned President's Counsel for the respondent in his written submissions contended that, a director is an employee to the extent of his executive role as a director. It was further contended that contribution of EPF and ETF is not determinative of the status of employment.

14. The learned President's Counsel for the respondent further submitted that, when the applicant accepted the appointment as a director of the company and became a member of the board of directors, his previous employment ceased. He further submitted that, it is completely misleading for the applicant to portray his appointment to the board of directors as a promotion, as the letter of appointment dated 07.04.2005 categorically uses the term "new appointment" clearly showing that it is not a continuation of the previous employment and therefore, upon being appointed as directors of the company, the original employment of the applicant with the company ceased.

15. The Articles of Association of the respondent company sets out that,

Article 81(1)

"The Board may from time to time appoint one or more of their body to be the holder of any executive office, including the office of Chairman, Deputy Chairman or Managing or Joint Managing Director or Manager on such terms and for such period as they may determine. A Director so appointed shall not whilst holding that office, require any qualification or subject to retirement by rotation or be taken into account in determining the rotation of retirement of Directors."

Article 81(2)

> *"The appointment of any Director to the office of Chairman or Managing or Joint Managing Director or Manager or any other executive office shall be subject to termination if he ceases from any cause to be a Director but without prejudice to any claim he may have for damages for breach of any contract of service between him and the Company."*

16. It is my view that, Article 81(1) of the Articles of Association of the respondent company relates to the power of the board to appoint directors for any executive office of the company and Article 81(2) provides that, where a director ceases to hold office as a director, such appointment would be terminated. In a meaningful reading and interpretation of Articles 81(1) and 81(2) of the Articles of Association of the respondent company, it is clear that, Article 81(2) applies to appointments that were made under Article 81(1), and thus, the Articles 81(1) and 81(2) must be read together.

17. The applicants in the instant case had been employees of the company for a long period of time when they were appointed as directors of the company. It is vital to note that, even after being appointed as directors of the company, their salaries under the contract of employment were continued to be paid and the EPF and ETF contributions were also continued to be made. In light of these facts, it is clear that the executive offices held by them were not given to them in terms of Article 81(1) of the Articles of Association of the company. Hence, the employment of the applicants that continued even after they were appointed as directors, will not cease in terms of Article 81(2), as Article 81(2) does not apply to the applicants in the instant case. Therefore, in answering the first question of law that was raised, I hold that the respondent was not justified in having come to the conclusion that the applicants ceased to be employees of

the company under Article 81(2) once they ceased to be directors of the company.

18. In answering the second question of law which is more or less connected to the first question of law, it is my view that, in the circumstances of this case, the respondent company is not entitled to say that the employment of the applicants were terminated by the operation of law in terms of Article 81(2).

19. It is clear that the learned High Court Judge has erred in coming to the finding that the termination of employment of the applicants occurred through the operation of law and that there was no constructive termination of employment in the instant case.

20. In addressing the final question of law, it was submitted by the learned President's Counsel for the applicants that, the respondent company without resorting to the practice of seeking the voluntary resignation from the applicants, sought to explore less ethical means to secure their exit.

21. It was submitted on behalf of the applicants that, the respondent company has attempted to introduce a Non-Disclosure Agreement (NDA), which attempted to impose unfavourable covenants towards the applicants. The applicants have proposed amendments to the NDA prior to placing their signatures to it. The applicants state that, following their reluctance to sign the NDA, the respondent company has taken a decision to subject the applicants to a full strip search prior to entering the respondent's compound. This has been admitted in evidence. There exists no proof to show that this rule was not selectively applied. Therefore, it is submitted that the applicants were victimized. In these circumstances, from 30.08.2012 the applicants have not reported to work based on constructive termination of employment.

22. The learned President's Counsel for the respondent submitted that, the burden of proving constructive

termination of employment is on the applicants. He further submitted that, the security procedure at the gate to the company and premises was a normal procedure, therefore it cannot be considered as amounting to degrading treatment. Therefore, the applicants did not report to work on their own free will without justifiable reasons.

23. It was submitted on behalf of the applicants that, the respondent company had taken steps to amend the Articles of Association of the company to facilitate the removal of the applicants from the company. The said Articles were adopted by a Special Resolution passed on 04.05.2012 replacing the previous Articles of Association of the company.

24. Lord Denning in ***Western Excavating Ltd v. Sharp [1977] EWCA Civ 2.*** said;

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. …"*

25. The learned President of the Labour Tribunal in his order [A-2] discussed constructive termination of employment in detail, giving due regard to the facts and circumstances of the instant case and emphasizing on the conduct of the respondent company which demonstrate how the respondent company by their conduct, has made the applicants constructively terminate their employment.

26. Thus, in answering the third question of law, the applicants have effectively established constructive

termination of employment by discharging their burden of proof.

27. In view of the first two questions of law being answered in the negative and the final question of law being answered in the affirmative, it is my view that, there is merit in this appeal. Accordingly, I set aside the judgment of the learned High Court Judge and reaffirm the order of the learned President of the Labour Tribunal. The applicants are entitled to costs in the cause.

Appeals allowed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE YASANTHA KODAGODA, PC.

I agree

JUDGE OF THE SUPREME COURT

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

Mahapatabendige Edmund Piyasena,
No. 11, Old Waidya Road,
Dehiwala. (Deceased)

Chula Subadra Dissanayake Mahawela,
also known as Chula Piyasena,
No. 11, Old Waidya Road,
Dehiwala.
Plaintiff

SC APPEAL NO: SC/APPEAL/170/2011
SC LA NO: SC/SPL/LA/100/2011
CA APPEAL NO: CA/543/95 (F)
DC MT. LAVINIA NO: 2379/T

Vs.

R.M. Seelawathie Menike Piyasena,
No. 44, Waidya Road, Dehiwala.
Intervenient Petitioner

AND BETWEEN

Chula Subadra Dissanayake Mahawela,
also known as Chula Piyasena,
No. 11, Old Waidya Road,
Dehiwala.
Petitioner-Appellant

Vs.

R.M. Seelawathie Menike Piyasena,
No. 44, Waidya Road, Dehiwala.
Intervenient Petitioner-Respondent

AND NOW BETWEEN

R.M. Seelawathie Menike Piyasena,
No. 44, Waidya Road,
Dehiwala.
Intervenient Petitioner-Respondent-Petitioner-Appellant

Vs.

Chula Subadra Dissanayake Mahawela,
also known as Chula Piyasena,
No. 11, Old Waidya Road,
Dehiwala.
Petitioner-Appellant-Respondent-Respondent

Before: Murdu N.B. Fernando, P.C., J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J

Counsel: J.A.J. Udawatta with Kawshalya Molligida and Anuradha N. Ponnamperuma for the Intervenient Petitioner-Respondent-Appellant.

Faisz Musthapha, P.C., with Faisza Markar for the Petitioner-Appellant-Respondent.

Argued on: 03.11.2021

Written submissions:

by the Intervenient Petitioner-Respondent-Appellant on 05.12.2011 and 22.11.2021.

by the Petitioner-Appellant-Respondent on 29.02.2012 and 07.12.2021.

Decided on: 26.07.2023

Samayawardhena, J.

Introduction

The Respondent instituted proceedings in the District Court of Mount Lavinia seeking to prove and to have the probate issued in her name as the executrix of the last will of her late husband. The Appellant who is the wife of the younger brother of the deceased testator intervened in the proceedings after the order *nisi* was published in the newspapers. After inquiry, the District Court held that the last will was not an act and deed of the deceased as there are suspicious circumstances attached to the will and dismissed the Respondent's application. On appeal, the Court of Appeal reversed the judgment of the District Court and held that the District Court had erroneously rejected the evidence led on behalf of the Respondent and ruled that the last will is proved. Learned counsel for the Appellant submits that the principal issue for adjudication before this Court is whether the Court of Appeal erred in law and fact in overturning the judgment of the District Court and holding that the last will is the act and deed of the deceased testator.

Burden of proof of a last will

It is well-settled law that the party propounding the last will must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator of sound disposition of mind. If there

are circumstances which excite the suspicion of the Court, the burden is on the party propounding the will to remove all such suspicion and doubt. If the propounder of the will fails to do so, the Court shall hold against the will and dismiss the application without further ado.

Speaking on the rules of law according to which last will cases are to be decided, in the seminal case of *Barry v. Butlin* [1838] II Moore 480 at 482-483, Baron Parke, delivering the opinion of the Judicial Committee of the Privy Council, articulates:

> *The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present Appeal: and they have been acquiesced in on both sides. These rules are two; the first that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.*
>
> *The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.*

These dicta of Baron Parke are consistently adopted and applied as good law for nearly two centuries. *Vide The Alim Will Case* (1919) 20 NLR 481, *Pieris v. Wilbert* (1956) 59 NLR 245, *Sithamparanathan v. Mathuranayagam* (1970) 73 NLR 53, *Ratnayake v. Chandratillake* [1987] 2 Sri LR 299.

What can be regarded as suspicious circumstances in a last will case? Suspicious circumstances will necessarily vary from case to case. As stated in *Barry v. Butlin (supra)*, for instance, if the beneficiary of a will has actively participated in the execution of the will, it is a circumstance that ought generally to excite the suspicion of the Court. In such an instance the will can be attacked on undue influence. *Vide Arulampikai v. Thambu* (1944) 45 NLR 457.

In *Sellammah v. Sellamuttu* (1957) 59 NLR 376 certain obvious alterations were noticeable in a will in regard to the name of one of the devisees. The alterations were not attested or authenticated by the signatures of the notary or the testator and the witnesses in terms of either section 30(21) of the Notaries Ordinance or section 7 of the Prevention of Frauds Ordinance. When application for probate of the will was made, obtaining an affidavit from the attesting notary and witnesses proved to be quite difficult. In such circumstances, the Supreme Court held that the will should not have been admitted to probate. Sinnetamby J. at page 381-382 stated that "*it was incumbent on the propounders in the first instance to remove the suspicions created by alterations, the knowledge of which must necessarily be imputed to them. Having regard to the far-reaching effects of the alterations it was their duty if the alterations were made before due execution to have led some independent evidence to establish that the deceased during his lifetime confirmed the dispositions made in the will. This was necessary to meet the charge that the testator did not know and approve of the contents of the will.*"

In *Meenadchipillai v. Karthigesu* (1957) 61 NLR 320, the following circumstances were held to be suspicious, where it was shown that the testator died within seven hours after the execution of the will in a hospital: (a) the testator was severely ill at the time of execution that he was unable to speak or to hold a pen to sign; (b) the notary did not take

the precaution of consulting a doctor at the time he took instructions from the testator or at the time of executing the will; (c) the notary was a close relative of the petitioner who was the widow of the testator and the primary beneficiary of the will; (d) the witnesses to the will were not of independent character.

However, this initial burden cast upon the propounder of the will is not as heavy as proof beyond reasonable doubt. It would be unrealistic to expect proof of a will with mathematical precision when the actual author of the will (testator) is not among the living. The question the Court has to grapple with in last will cases is to understand what the deceased intended to do, or, in some instances such as the instant one, whether the deceased intended anything because the appellant alleges that the will was prepared after the death of the testator. The standard of proof is, like in any other civil case, on a balance of probabilities.

When suspicion is attached to the will, what the Court is actually expected to do is to adopt the criterion proposed by Baron Parke in *Barry v. Butlin* in the case of undue influence, i.e. "*to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased.*" *Vide The Alim Will Case (supra)* at 494.

If the propounder of the will successfully discharges the aforesaid initial burden, the burden then shifts to the opposing party to prove fraud, conspiracy, coercion, undue influence or any other ground they rely upon to invalidate the will.

In another landmark case on the subject, namely, *Tyrrell v. Painton* [1894] P.D. 151, Lindley L.J. stated at 157 that the rule laid down in *Barry v. Butlin* and similar other cases such as *Fulton v. Andrew* Law Rep.

7 H.L. 448 and *Brown v. Fisher* 63 L.T. 465 which places the *onus probandi* upon the party propounding the will to satisfy the conscience of the Court that the instrument so propounded is the will of a free and capable testator should not be limited to cases where the beneficiary was actively participated in the preparation of the last will, but should also be extended to "*all cases in which circumstances exist which excite the suspicion of the Court; and whatever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will*."

This was reiterated by Davey L.J. at 159-160 when he stated:

> *There rests upon that will a suspicion which must be removed before you come to the plea of fraud. It must not be supposed that the principle Barry v. Butlin is confined to cases where the person who prepares the will is the person who takes the benefit under it – that is one state of things which raises a suspicion; but the principle is, that whatever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.*

Lindley L.J. was quoted with approval by Sansoni J. in *Meenadchipillai v. Karthigesu (supra)* at 322 and Davey L.J. was quoted with approval by Bertram C.J. in *The Alim Will Case* at 494.

When the burden shifts to the opposing party too, the required standard of proof is not stringent. For instance, if the ground of attack is fraud, the fraud need not be proved by the opposing party beyond reasonable doubt.

The Court need not disregard the evidence that casts suspicion on the will on the basis that, even if it suggests fraud, it does not warrant a definite finding of fraud. In *The Alim Will Case* at pages 493-494, Bertram C.J. explained the law as follows:

> *It has been established by a long series of decisions, the most important of which are Barry v. Butlin (1838) 2 Moore P.C. 480, Baker v. Batt (1838) 2 Moore P.C. 317, Fulton v. Andrew L.R. 7 H.L. 448, Tyrrell v. Painton (1894) P.D. 151 (see also Orion v. Smith (1873) L.R. 3 P.& D. 23, Dufaur v. Croft 3 Moore P.C. 136, Wilson Basil (1903) P. 329 and Sukhir v. Kadar Nath I.L.R All. 405), that wherever a will is prepared and executed under circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it unless the party propounding it adduces evidence which would remove such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument. It is now settled that this principle is not limited to cases in which the will is propounded by a person who takes a special benefit under it, and himself procured or conducted its execution. It may very well be that a refusal to grant probate in such a case may involve an imputation of fraud upon the party propounding the will. This is no objection to the operations of that principle. (See Baker v. Batt (supra).) The Court is not necessarily bound to give a decision upon the truth or falsehood of the conflicting evidence adduced before it upon the question of fraud. What it has to ask itself is whether in all the circumstances of the case it will give credit to the subscribing witnesses, or the other witnesses adduced to prove the execution.*

> *Nor is it an objection to the operation of this principle that the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in a finding of fraud. (See Tyrrell v. Painton.) The principle does not mean that in cases where a suspicion attaches to a will a special measure of proof or a particular species of proof is required. (See Barry v. Butlin (supra).) It means that in such cases the Court must be "vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."*

In *Samarakone v. The Public Trustee* (1960) 65 NLR 100 at 115, Weerasuriya J. stated:

> *As held by Lindley, L.J., in Tyrell v. Painton (1894) P. 151, where there are features which excite suspicion in regard to a will, whatever their nature may be, it is for those who propound it to remove such suspicion. Suspicious features may be a ground for refusing probate even where the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. It has also been stated that the conscience of the Court must be satisfied in respect of such matters. These principles have been applied in several local cases, such as The Alim Will Case (supra), John Pieris et al. v. Wilbert (1956) 59 N.L.R. 245 and Meenadchipillai v. Karthigesu (1957) 61 N.L.R. 320.*

However, in *Barry v. Butlin* at page 491 it was remarked that "*The undue influence, and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility*". On the facts and circumstances of that case, it was held that those were

only "*insinuated but not proved*". In *Pieris v. Pieris* (1906) 9 NLR 14 at 23-24 Wood Renton J. (later C.J.) by citing *Boyse v. Rossborough* (1856) 6 H.L.C. 2 remarked that "*Undue influence is not to be presumed; the party alleging it must prove the fact.…In order to be "undue" the influence must amount to coercion or fraud".*

At this point, a word of caution may be necessary. Specific grounds of challenge, such as fraud, conspiracy, coercion, undue influence should not be considered as distinct and separate grounds that must be proved by the opposing party alone after closing the propounder's case. If the opposing party alleges, for instance, fraud or undue influence, it has a direct bearing on the initial burden of the propounder. The propounder must first prove that the will was duly executed in terms of law and it is the act and deed of a free and capable testator who not only was aware of but also approved of the contents of it.

As pointed out by Viscount Dunedin in *Robins v. National Trust Company* (1927) A.C. 515 at 519 "*In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity."* The proof of due execution, testamentary capacity of the testator etc. are upon the propounder of the will.

Before the question of fraud, undue influence etc. can arise, any suspicion arising from the circumstances under which the will was executed has to be dealt with and removed. In the course of establishing his case, the propounder needs to address the allegations of his opponent and remove all suspicion attached to the will before the burden is shifted to the opposing party. It would be naive on the part of the propounder if

he leaves such allegations untouched on the basis that it is solely up to those who oppose the will to establish them.

This was explained by Bertram C.J. *in Andrado v. Silva* (1920) 22 NLR 4 at 6-7 in the following manner:

> *I do not mean to say that the principle that it is the duty of the propounders to remove suspicions does not apply to undue influence. I think it does so apply in exactly the same manner as it applies to fraud. But it is necessary that the Court should ask itself, what are the nature of the suspicions which are said to be excited. The only material suspicions are suspicions which affect issues the proof of which is on the propounders. It lies upon the propounders to prove (1) the fact of execution, (2) the mental competency of the testator, (3) his knowledge and approval of the contents of the will. If the circumstances are such that a suspicion arises affecting one of these matters, it is for the propounders to remove it. The Court is required under these circumstances to watch the evidence tendered with special vigilance, and not to declare that the onus of proof is discharged unless the suspicion is removed. The suspicion may point to fraud. The onus of fraud is ordinarily on those who allege it. But in the case of a will there may be a suspicion of fraud affecting either the fact of execution, or the mental condition of the testator at the moment of execution, or his knowledge and approval of the document or part of the document. In such a case it is for the propounders to remove the suspicion, and if this is not done the will must be rejected, even though the suspicious circumstances do not amount to a prima facie case of fraud, and even though it cannot be said, on a review of the evidence on both sides, that fraud has been established. Undue influence, as it seems to me, is on the same footing as fraud, and I observe that in Tyrrell v. Painton (1894) P. D.*

> *151 Davey L.J. speaks of them together:- "If the circumstances are such that a suspicion arises that the apparent approval by the testator is not a real approval, that his act was not the expression of his own free will, but of a will coerced or dominated by another, then I take it that it is for the propounders to remove the suspicion, and that if they fail to do so their whole case fails, even though the suspicious circumstances do not constitute a prima facie case of undue influence, and even though, on a review of the evidence on both sides, it cannot be said that undue influence has been positively established." I take this to be the meaning of Wood-Renton J. in his observations in the case of Pieris v. Pieris (1907) 9 N.L.R., on page 23.*

However, mere *ipse dixit* from the opposing party should not be regarded as suspicious circumstances. Not every circumstance can be considered suspicious; a circumstance warrants suspicion when it deviates from the norm. The suspicion must be real, reasonable and well-founded, and not based on conjecture, surmise and innuendo. In *Tyrrell v. Painton* at 159, Davey, L.J. observed "*the principle is, that whatever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.*" In *Andrado v. Silva*, Bertram C.J. at 6 observed "*The only material suspicions are suspicions which affect issues the proof of which is on the propounders.*" The circumstances should indeed arouse the Court's suspicion peculiar to the case the Court is called upon to decide.

In the ultimate analysis, in last will cases, no rigid rules can be laid down in respect of burden of proof or appreciation of evidence. The matter rests fairly and squarely on the facts and circumstances of each individual case.

The decision on the will is essentially a question of fact

Whether there are in fact suspicious circumstances surrounding the will and if so whether such suspicious circumstances have been removed to the satisfaction of the Court is a question of fact best left to the trial Judge. In *Sithamparanathan v. Mathuranayagam* (1970) 73 NLR 53 at 61, Lord Hodson stated:

> *The law as laid down in the older cases to which a reference has been made was reiterated in the judgment delivered by Lord Du Parcq in the Privy Council in Harmes and Another v. Hinkson 62 T.L.R. 445 at 446 in these words "Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact."*

Learned Counsel for the Appellant strenuously submits that the Court of Appeal should not have reversed the District Judge's findings of fact which he arrived at after seeing and hearing the witnesses.

As Chief Justice G.P.S. de Silva stated in *Alwis v. Fernando* [1993] 1 Sri LR 119 at 122, "*It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.*" This widely recognized general rule is largely predicated on the premise that the trial Judge is at a distinctly advantageous position of hearing and seeing witnesses giving evidence in the witness box. This priceless opportunity, which is denied to a judge sitting in appeal, enables the trial Judge to accurately determine which party is speaking the truth.

Fradd v. Brown & Co. Ltd (1918) 20 NLR 282 is a case where the Privy Council quashed the judgment of the Court of Appeal and restored the judgment of the trial Court because the whole case depended upon the

veracity and trustworthiness of the witnesses who gave evidence at the trial. Earl Loreburn stated at 282-283:

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

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

> *If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining*

> *from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.*

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

Chief Justice Samarakoon in *Undugoda Jinawansa Thero v. Yatawara Piyaratna Thero* [1982] 1 Sri LR 273 at 281 acknowledged the importance of this well-established principle when he stated:

> *The District Judge had the priceless advantage of seeing and hearing these witnesses and of watching their demeanour. After careful analysis and cogent reasoning he has rejected their evidence. I can see no justification for holding that he was wrong.*

Having quoted all these judgments, I must say that the accepted principle that the findings of fact of the trial Judge should not be lightly disturbed cannot be considered an absolute rule of law. If the findings of fact of the trial Judge are not upon or not only upon the credibility or demeanour and deportment of the witnesses, but upon or also upon analysis of the evidence, and the appellate Court is fully convinced that the trial Judge has manifestly failed to analyze the evidence in the proper perspective, there is no impediment for the appellate Court to give effect to its own conviction and reverse the findings of fact of the trial Judge.

It is important to understand that failure to analyze or evaluate the evidence in the proper perspective is not necessarily a question of fact but rather a question of law. (*Collettes Ltd. v. Bank of Ceylon* [1982] 2 Sri LR 514) This includes rejecting relevant evidence, accepting irrelevant evidence, clam and dispassionate appreciation of evidence.

After reviving a number of local and foreign authorities, in *De Silva v. Seneviratne* [1981] 2 Sri LR 7 at 17, Ranasinghe J. (later C.J.) held:

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

In *Collettes Limited v. Bank of Ceylon* [1984] 2 Sri LR 253 at 264-265 Sharvananda J. (later C.J.) held:

> *Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate*

> *cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may but is under a duty to examine the supporting evidence and reverse the findings.*

Vide also *Anulawathie v. Gunapala* [1998] 1 Sri LR 63, *De Silva v. De Croos* [2002] 2 Sri LR 409.

On the facts and circumstances of this case which I have discussed below, I take the view that no special sanctity can be attached to the findings of fact arrived at by the trial Judge as he has manifestly failed to properly analyze the evidence and unnecessarily taken irrelevant matters into consideration in the assessment of evidence. This has unfortunately led him to come to an erroneous conclusion at the end.

Suspicious circumstances

Let me now consider the circumstances that the learned District Judge deemed suspicious to hold that the last will is not the act and deed of the deceased. The District Judge accepted the version of the Appellant that the will was prepared after the death of the deceased and is therefore a forgery.

The main ground upon which the will is attacked appears to be that it is an irrational will in that the exclusion of the three children of the Appellant as beneficiaries is highly suspicious. In my view, this is an unreasonable suggestion. The Respondent is the wife (widow) of the

testator. They had no children. They had been living in harmony as husband and wife throughout their married life. The Respondent was unemployed. The deceased had been employed in the tourism industry but towards the latter part he had been living a retirement life. The testator did not have too many properties. The testator possessed a modest estate. The sole immovable property owned by the testator comprised the land and the house in which they resided together throughout their married life. In addition, he had a paltry sum of Rs. 6,835 in his Bank Account and some shares in the Associated Motorways company. Is it an irrational act to bequeath this modest property solely to his wife with whom he found solace in life? Is this conduct inherently improbable? This a rational and natural will rather than an irrational and unnatural one. The argument of the Appellant that since the deceased did not have children and he had an affection towards the three children of his brother (who predeceased the testator), it is unlikely that he would have excluded them (who would have become entitled to half of the property had he died without a last will) is based on imagination, illusion and wishful thinking.

Even if the deceased had children but bequeathed all the above properties to his wife, the Court cannot look at it with suspicion. It should be understood that a person takes the decision to execute a will to deviate from the legal rules of succession. Hence, uneven distribution or denial of any legacy to some heirs should not make otherwise genuine will an ingenuine one. In adjudicating a last will case, it should not be the task of the Court to see equitable and fair distribution of property among the heirs of the deceased. The duty of the Court is to give effect to the wish of the testator. There is no requirement in law that the rationality of the will shall be established by the propounder of the will. However I must add that if there are other suspicious circumstances surrounding the will, the Court may take the irrationality of the will also into account in

deciding whether the will truly represents the act and deed of a free and capable testator.

The learned District Judge in his judgment states that the following items are suspicious.

The deceased was in good health when he is alleged to have executed the last will about two months before his untimely death at the age of 59. The Appellant states that this is highly unnatural, i.e. a healthy man executing a last will. The vanity of this argument is demonstrable by the fact that this healthy man died of a heart attack nearly two months after the alleged execution of the will.

The learned District Judge states that if the last will had indeed been executed, it would be expected for the wife to be informed immediately. However, according to the Respondent wife, the deceased husband informed her about it during their journey by train to attend a wedding in Kandy. The Respondent stated in her testimony that she did not further inquire into the matter as the deceased had already told her that the property would be written to her. She discovered the last will in the almirah approximately one week after the death. There is no cause for panic or curiosity when the husband states that he executed a last will. The wife is aware of the husband's wealth. At the risk of repetition, the husband virtually had only the matrimonial home and the appurtenant land. What is there to share with others?

The Respondent in her evidence tried to show that the two families, i.e the Respondent's family and the Appellant's family (although lived adjoining to each other on the same land which the two brothers inherited from their parents) did not have a close association maybe to convince that there was no reason to give anything to the children of the brother. That is the layman's way of thinking. The Appellant gave

evidence to the contrary, which the District Judge believed. On that basis, the District Judge treated the Respondent as an untrustworthy witness and rejected her entire evidence. Rejection of her evidence *in toto* on that basis is unreasonable. Even if there was a cordial relationship between the two families and the deceased was fond of his brother's three children, one cannot assume that he should give a portion of the matrimonial house or a portion of his paltry savings to the brother's three children.

The Appellant further argues that the Respondent did not obtain an opinion from the Examiner of Questioned Documents (EQD). On the application of the Appellant a commission was issued to the EQD but the EQD indicated that he was unable to give an opinion due to the insufficiency of specimens for the comparison of the signatures. The Appellant has not pursued the matter thereafter.

Taking into account all the facts and circumstances of this case I do not think that these are circumstances seriously arouse the suspicion of the Court as to the genuineness of the will.

Proof of a last will: statutory provisions

Wills Ordinance, No. 21 of 1844, as amended, makes provisions with respect to testamentary dispositions of property. Section 2 thereof (after the amendment by Act No. 29 of 2022) admits in no uncertain terms the legal capacity of the testator to execute wills as he pleases even to the exclusion of natural heirs without assigning any reasons whatsoever.

> *2(1). It shall be lawful for any person who has reached the age of eighteen years and residing within or outside Sri Lanka to execute a will bequeathing and disposing any movable and immovable property and all and every estate, right, share or interest in any property which belong to him at the time of death and which, if not so devised, bequeathed or disposed would devolve upon his heirs of*

such person not legally incapacitated from taking the same as he shall seem fit.

(2) Every testator shall have full power to make such testamentary disposition as he shall feel disposed, and in the exercise of such right to exclude any child, parent, relative, or descendant, or to disinherit or omit to mention any such person, without assigning any reason for such exclusion, disinheritance, or omission, any law, usage, or custom now or herefore in force in Sri Lanka to the contrary notwithstanding.

The due execution of the will is regulated by section 4 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended by Act No. 30 of 2022.

4(1) No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing and executed subject to the provisions specified in subsection (2);

(2) The testator shall -

(a) sign; and

(b) affix his left or right thumb impression,

at the foot or end of the will, testament or codicil referred to in subsection (1), before a notary public and two witnesses who shall be present at the same time:

Provided however, in the event the thumb impression of the testator cannot be obtained due to any reason, he shall affix any other finger impression or the toe impression, as the case may be.

Section 31 of the Notaries Ordinance, No. 1 of 1907, as amended, lays down the rules to be observed by notaries but provides in section 33 that no instrument shall be deemed to be invalid by reason only of the failure of a notary to observe any provision of any rule set out in section 31 in respect of any matter of form.

Section 68 of the Evidence Ordinance regulates the proof of a will. This section reads as follows:

> *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.*

In this case, the notary and both attesting witnesses gave evidence. This is indeed rare.

The notary had known the deceased for about 20 years. The District Judge however rejected the evidence of the notary completely on the basis that he failed to produce the paper on which he had noted down the instructions given by the deceased prior to the execution of the last will. As previously mentioned, the estate of the deceased is not characterized by intricate complexities. The failure to produce the paper on which he wrote down instructions cannot be fatal to reject the evidence of the notary completely. It cannot be seriously considered a suspicious circumstance.

In the written submissions filed on behalf of the Appellant it is stated that the notary has not produced the monthly list. No question had been asked from the notary on the monthly list.

The Appellant claims that it is unnatural for the notary to send a message to the Respondent to "look for the will" upon hearing the death of testator. Considering the fact that the notary and the testator knew each other for a long time, I do not see any unnatural conduct on the part of the notary in it.

The notary in his evidence has stated that the testator unsuccessfully attempted to sell the house and thereafter wanted to gift the house to his wife. However, since he had financial constraints in covering the stamp fees for such a transaction, he opted to write a last will. The Appellant says this is irrational. I cannot agree.

When making a declaration by Court that a will is proved, minor lapses need not be taken very seriously. In *Ranasinghe v. Somalin* [2000] 2 Sri LR 225 at 233, Udalagama J. stated:

> *Even the notary's admission that the attestation was in error and the fact that she was unable to produce the relevant instruction book would not cast a doubt on the capacity of the testator or that there was undue influence or that the execution of P1 was fraudulent. The most the said infirmities would point to is a lapse in the formalities to be observed in the execution of a last will. As stated in the course of the judgment in Corea's case (supra) court would always be anxious to give effect to the wishes of the testator. Court could not allow a matter of form to stand in its way, subject however to the condition that essential elements of execution had been fulfilled. However if there is affirmative evidence to show that there was no due execution Court would no doubt hold against the will even though the will was the act and deed of a free and capable testator.*

Given the other circumstances of the case, contradictions regarding the place of execution and attestation of the will were considered "minor

discrepancies" in *Wijewardena v. Soysa* [2002] 1 Sri LR 50. *Vide* also *Wijewardena v. Ellawala* [1991] 2 Sri LR 14.

The District Judge rejected the evidence of the first attesting witness of the will, namely Farook, on the sole basis that he could not identify the signature of the deceased although he had stated that he knew the deceased for about 20 years. The District Judge considers this as a suspicious circumstance. According to the evidence of this witness, which I read, he has never stated that he could not identify the signature of the deceased on the will. What he has stated is that the deceased signed the will in front of him and thereafter he signed it, and that was the first occasion on which he saw the deceased signing a document. His evidence was that he had been meeting the deceased during their regular encounters, particularly at the club where they met in the evenings. There was no opportunity for the witness to see him signing documents. It cannot be regarded as a suspicious circumstance.

The second attesting witness is Rita. She was a clerk of the notary. Her evidence was that she knew Farook since he used to come to the notary's office in relation to some other Court cases. The notary is also an Attorney-at-Law. She also says that the deceased testator also came on some occasions to meet the notary to the office. The day on which the last will was signed she was asked by the testator to sign the will as an attesting witness which she agreed with the consent of the notary. This is not an unusual practice or illegal practice. This happens in notarial practice. The District Judge disbelieved the witness because she was a clerk of the notary. This is unacceptable.

I accept that when there are suspicious circumstances, the mere proof of compliance with the statutory requirements itself is not sufficient to prove a will.

Sir John Woodroffe and Amir Ali's Law of Evidence, Volume 3 (Edited by M.L. Singhal, 15th Edition, 1991) states at page 603 that:

> *under ordinary circumstances, the competency of a testator will be presumed, if nothing appears to rebut the ordinary presumption; ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence which shows that it is (to say the least) very doubtful whether his state of mind was such that he could have duly executed the will, as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will.*

This requirement is not confined to the testamentary capacity only. It is applicable in all instances where there is suspicion surrounding the will.

However, in this case there are no suspicious circumstances to hold against the will.

The failure to name the Appellant as a party to the main case

Let me now turn to the additional points the Appellant relies on before this Court to say that the last will is suspicious.

The main additional ground is that the Respondent filed the application seeking probate in the District Court without making any intestate heirs parties to the application. The Respondent filed the action on the basis that the Respondent is the sole heir of the deceased and that to her knowledge no one would object to her being granted probate. This is not a suspicious circumstance. This is not against the law either.

At the time the application was made to the District Court (i.e. on 28.03.1990) there was no express provision in the Civil Procedure Code to make intestate heirs as parties to the application.

However, section 524(1) of the Civil Procedure Code required *inter alia* to name "*the heirs of the deceased to the best of the petitioner's knowledge*" in the body of the application.

Section 525(1) at that time provided that "*If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect and may omit to name any person in his petition as Respondent.*"

The said requirement in section 524(1) was taken away by the Civil Procedure Code (Amendment) Act, No. 14 of 1993.

Section 525(1) was also repealed and reintroduced as section 524(5) by the Civil Procedure Code (Amendment) Act, No. 14 of 1993.

Section 524(5) was repealed, and section 524(1)(bb) which requires the petitioner to name in the body of the petition "*the heirs of the deceased to the best of the petitioner's knowledge*" was re-introduced by the Civil Procedure Code (Amendment) Act, No. 38 of 1998.

Even as the law stands today, in the case of proving a last will, the law does not require the petitioner to name the heirs of the deceased <u>as Respondents</u> to the application.

The failure to name the heirs in the body of the application also will not make the application bad in law *per se*. Compliance with all the provisions of section 524(1)(a)-(d) is not mandatory but directory. If it is mandatory, for instance, failure to mention one property of the deceased or one heir of the deceased would render the entire proceedings void *ab initio*. The section requires the heirs of the deceased to be stated in the petition "*to the best of the petitioner's knowledge*". The language itself gives the indication that it is not mandatory. If the petitioner is a stranger to the family and has no personal knowledge of the heirs of the deceased,

for instance, he will not be able to list out the names of the heirs of the deceased. Hence as was held in *Biyanwila v. Amarasekere* (1965) 67 NLR 488 and *Pieris v. Wijeratne* [2000] 2 Sri LR 145, the provisions of section 524(1)(a)-(d) are directory. However, willful suppression of material particulars will not be tolerated by Court. It is in this context that Sirimane J. in the *Biyanwila* case stated at 494 "*I am of the view that the provisions of this section [524] are only directory, and that a failure to strictly comply with those provisions, does not render the proceedings void ab initio. They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*." Referring to the failure to name heirs as parties to the application for probate, in the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95 at 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

These observations have no practical relevance to the instant appeal. In the instant case, upon order *nisi* being published in the newspapers, the Appellant intervened in the action and contested the Respondent's case.

Conclusion

In the circumstances of this case, there is hardly anything significant to cast any suspicion on the will. There are no legitimate doubts. The circumstances suggested as being suspicious are all capable of natural explanation. The due execution of the will had been proved by the evidence of the notary who drew it and the two attesting witnesses who signed it. The Appellant objected to the will on the sole basis that the will is a forgery. This was never established by the Appellant when the initial burden was discharged by the Respondent.

I answer the question of law whether the Court of Appeal erred in law and fact in overturning the judgment of the District Court and holding that the last will is the act and deed of the deceased testator in the negative and dismiss the appeal with costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with section 9(A) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and section 31DD (i) of the Industrial Disputes Act from a Judgement of the Provincial High Court of the Western Province (Holder in Colombo).

SC/Appeal/ 182/2019
SC (HC) LA/19/2016
Provincial High Court Revision
No. HCRA 175/2014
LT Case No.13/245/2011

B. K. M. Mahinda
No. 106/D, Meegaha Uyana,
Mabima, Heyyanthuduwa.

APPLICANT

Vs.

Sri Lanka Ports Authority
No. 19, Church Road, Colombo 1

RESPONDENT

AND THEN BETWEEN

Sri Lanka Ports Authority
No. 19, Church Road, Colombo 1

RESPONDENT-PETITIONER

Vs.

B. K. M. Mahinda
No. 106/D, Meegaha Uyana,
Mabima, Heyyanthuduwa

. **APPLICANT-RESPONDENT**

AND NOW BETWEEN

B. K. M. Mahinda

No. 106/D, Meegaha Uyana,

Mabima,

Heyyanthuduwa

APPLICANT-RESPONDENT-APPELLANT

Vs.

Sri Lanka Ports Authority

No. 19, Church Road,

Colombo 01.

RESPONDENT-PETITIONER-RESPONDENT

Before: Jayantha Jayasuriya PC CJ

Buwaneka Aluwihare PC J

Priyantha Jayawardena PC J

E.A.G.R. Amarasekara J

A.H.M.D. Nawaz J

Counsel: Uditha Egalahewa PC with N. K. Ashokbharan for the Applicant-Respondent- Appellant instructed by R. Pigera.

Viveka Siriwardena ASG with Nirmalan Wigneswaran DSG and Sureka Ahmed SC for the Respondent-Petitioner-Respondent.

Written Submissions: Written submissions of the Applicant-Appellant 29.11.2021

Written submissions of the Respondent 15.12.2021

Argued on: 09.11.2021

Decided on: 26.07.2023

JUDGEMENT

Aluwihare PC. J,

(1) The Applicant-Respondent-Appellant (hereinafter sometimes referred to as the "Applicant-Appellant") who was employed by the Sri Lanka Ports Authority, the Respondent-Petitioner-Respondent (hereinafter sometimes referred to as the "Respondent"), filed an application (P1') in terms of Section 31B of the Industrial Disputes Act No. 43 of 1950 (as amended), in the Labour Tribunal of Colombo stating *inter alia* that his services were terminated unlawfully and unjustifiably by the Respondent.

(2) The Respondent raised a preliminary objection that the said application cannot be maintained against it as the Applicant-Appellant had failed to give one-month notice to the Respondent, which the Respondent asserted was required in terms of Section 54 of the Sri Lanka Ports Authority Act No. 51 of 1979 (as amended) (hereinafter sometimes referred to as "the SLPA Act"), and moved the Labour Tribunal to dismiss the application.

(3) By order dated 30th June 2014, the learned President of the Labour Tribunal overruled the said preliminary objection and held that Section 54 of the SLPA Act has no application regarding the 'Applications' made to the Labour Tribunal, in terms of Section 31B of the Industrial Disputes Act (P10).

(4) Aggrieved by the said order, the Respondent moved by way of revision to the High Court, seeking to have the order of the Labour Tribunal set aside. By order dated 24th February 2016 (P17), the learned High Court Judge set aside the order of the learned President of the Labour Tribunal, upholding the preliminary objection of the Respondent, and dismissed the application filed by the Applicant-Appellant in the Labour Tribunal.

(5) Aggrieved by the said order of the learned High Court Judge, the Applicant-Appellant moved this Court by way of an application for special leave to appeal and special leave was granted on a solitary question of law;

Did the Learned High Court Judge err in law, in coming to the conclusion that Section 54 of the Sri Lanka Ports Authority Act No. 51 of 1979 is a mandatory provision and should be adhered to, even in the filing of an

application in the Labour Tribunal in accordance with the Industrial Disputes Act?

The Issue

(6) The fundamental issue to be determined in this appeal is whether an applicant who wishes to invoke the jurisdiction of the Labour Tribunal, is bound by the notice requirement stipulated in section 54 of the Sri Lanka Ports Authority Act.

(7) Section 54 of the Sri Lanka Ports Authority Act stipulates that;

"***No Action shall be instituted*** *against the Ports Authority for anything done or purported to have been done in pursuance of this Act-*

(a) ***without giving the Authority at least one month's previous notice*** *in writing of such intended action; or*

(b) after twelve months have lapsed from the date of accrual of the cause of action." [Emphasis added]

The Placement of Section 54 in the SLPA Act

(8) The Applicant-Appellant claimed that the purpose and scope of s. 54 of the SLPA Act, as evidenced by its heading and placement is limited to tortious and related damages claims against the SLPA, and has no relevance or application to employment matters and in particular, applications to Labour Tribunals in terms of Section 31B of the Industrial Disputes Act.

(9) The meaning of the words used in any part of a statute must necessarily depend on the context in which they are placed, whilst being mindful of the fact that all parts of an enactment must be construed together as forming one whole.

(10) In deciding the issue at hand, it would be pertinent to consider the well accepted canons of interpretations of statutes as well as the decisions handed down by Appellate courts regarding interpretation of provisions of statutes. As Maxwell points out, "Granted that a document which is presented to it [parliament] as a statute is an authentic expression of the

legislative will, the function of a court is to interpret that document 'according to the intent of them that made it" [Maxwell on Interpretation of Statutes 12th Edition pg1]

(11) Bindra states that,

"*…so far as possible, that construction must be placed upon words used in any part of the statute which makes them consistent with remaining provisions and with the intention of the legislature to be derived from a consideration of the enactment. The words may be given a wider or* ***more restricted meaning than they ordinarily bear,*** *if the context requires it. In construing a particular section of an Act, one must look at the whole Act, and it is necessary to consider the context in which the section occurs.*" [Interpretation of Statutes, 12th Edition (2017) at page 355] (the emphasis is mine)

(12) In **Ram Narain vs. State of Uttar Pradesh**, AIR 1957 SC 13, the Supreme Court of India observed that "*the meaning of words and expressions used in an Act must take their colour from the context in which they appear*" and in the case of **Sheikh Gulfan vs. Sanat Kumar Ganguli**, AIR 1965 SC 1839, it was said that; "*Normally, the words used in a statute have to be construed in their ordinary meaning; but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words does not meet the ends of a fair and a reasonable construction. Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material…*"

In **Union of India vs. Elphinstone Spg & Wvg Co Ltd** (2001) 4 SCC 139, the Indian Supreme Court expressed the view that,

"*General words of a particular provision of a statute may be given a restrictive meaning if the context requires it. By 'context' is meant not only the textual context arising out of the other provisions of the statute, but also factual context including the mischief to be remedied, and the circumstances under which the statute was passed. 'Context' refers to the statute as a whole, the previous state of law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy.*"

(13) What could be gleaned from the decisions referred to above is that a provision should not be construed as if it stood in isolation from the rest of the statute. When a court is called upon to interpret a term of any provision of a statute, it should not confine its attention to that particular provision. The court should also consider the other parts of the statute which shed light on the intention of the Legislature.

(14) Considering this well-settled principle, Section 54 of the SLPA Act should not, in my view, be interpreted in isolation, but must be looked at in light of its placement in the Act.

Section 54 is found in PART VI of the SLPA Act under the heading "*Liability of the Ports Authority*".

The first section under this Part, namely Section 45 reads as follows;

"*The Ports Authority shall not be liable for any loss, damage or injury caused to any property or person within the limits of any specified port unless such loss, damage or injury is caused by the negligence or wrongful or unlawful act of that Authority or any of its employees or agents acting within the scope of his employment.*"

(15) The subsequent sections in this Part set out provisions pertaining to the limitation of the liability of the Respondent Authority in relation to any loss, damage or injury caused to any person or property within the limits of any specified port. It is in this context that Section 54 is placed in the Act.

(16) Additionally, Section 52 of the Act states as follows;

"***This Part shall not affect*** *any liability that may be imposed on the Ports Authority by any written law* ***relating to compensation to workmen.***" [Emphasis mine]

(17) It is also pertinent to note that the 'Part' or in other words the 'Chapter' in which Section 54 is placed is titled; "*Liability of the Ports Authority*". According to Bindra; [supra]

"*The title of a chapter in a statute is not a determining factor regarding the interpretation of the provisions of a section in the chapter, but the title certainly throws considerable light upon the meaning of the section, and where it is not inconsistent with the section, one should presume that the title correctly described the object of the provisions of the chapter.*"

(18) Having taken into account the provisions contained in Part VI of the Act, this chapter, can be said to be dealing with 'the limitation of the liability of the Respondent Authority' in relation to civil claims for damages for any loss, injury or damage caused to persons or property. If the intention of the Legislature was for the notice requirement to encompass and apply to all forms of litigation [against SLPA] including applications to Labour Tribunals filed under Section 31B of the Industrial Disputes Act, then this procedural pre-requisite ought to have been placed in the 'General' chapter of the Act instead of Chapter on 'Liability of the Ports Authority'. Part VIII of the Act begins with the Chapter titled 'General'. This Chapter delineates *inter alia* rules and regulations which may be made by the SLPA, and includes a provision declaring that suit/action does not lie against the SLPA or any of its members for any bona fide act taken under the Act (S.69), and a provision that writs cannot be issued against any member of the SLPA in any action brought against the SLPA (S. 70).

(19) On examination of the provisions of Part VI, as referred to earlier, it is evident that the applicability of section 54 is confined to actions in relation to civil claims for damages for any loss, injury or damage caused to persons or property made against the Sri Lanka Ports Authority. Section 52 in particular highlights that Part VI of the Act was not intended to affect **claims**

made by workmen against the Sri Lanka Ports Authority. Accordingly, in my view, Section 54 of the SLPA Act must be given a restrictive meaning so as to not affect an application made by a workman to a Labour Tribunal.

Whether the termination of employment is an act done in the pursuance of the SLPA Act

(20) Counsel on behalf of the Applicant-Appellant further submitted that section 54 of the SLPA Act is limited in scope to acts done or intended to be done in pursuance of the Act which does not include the termination of services of workmen.

(21) In order to substantiate this contention, the Court's attention was directed towards its interpretation of section 307 (1) of the Municipal Councils Ordinance No. 29 of 1947 (as amended) which stipulates a similar notice requirement. It was submitted that the provisions contained in section 54 of SLPA Act and section 307 (1) of the Municipal Councils Ordinance are similar and work towards the same objective and therefore must be interpreted in a similar manner, considering the principle of *pari materia*.

Section 307 (1) of the Municipal Councils Ordinance states as follows;

"*No action shall be instituted against any Municipal Council, or the Mayor or any Councillor or any officer of the Council or any person acting under the direction of the Council or Mayor for anything done or intended to be done under the provisions of this Ordinance or by any by-law, regulation or rule made thereunder*…" (emphasis added).

(22) Several judgments pertaining to the interpretation of Section 307 (1) of this Ordinance have been cited in order to substantiate the abovementioned contention.

In the case of **Liyanage vs. Municipal Council Galle** (1994) 3 SLR 216 this Court held that,

"*Section 307(1) requires notice of action in respect of "anything done or intended to be done under the provisions of [the] Ordinance". Clearly, it is*

not in respect of every act or omission that notice is required, for if that was the legislative intention section 307(1) could have simply provided that "no action shall be instituted against any Municipal Council [etc.]… until the expiration of one month….

It has been held in Perera vs. Municipal Council, Kandy, that the corresponding section of the old Ordinance- "…applies to causes of action accruing from 'something done or intended to be done under the provisions of the Ordinance.' The entering into forcible possession of another's land cannot be done or intended to be done with any propriety under the Ordinance; at least I hope so."

This was followed in Ferdinandus vs. Municipal Council, Colombo- the plaintiff (ratepayer) sent a blank cheque to the Municipal Council, with instructions to fill it for the amount due as rates; the Council inserted an amount which also included warrant costs. This was held not to be an act done or purported to be done in pursuance of the provisions of the Ordinance, but only under the authority of the ratepayer;

"if the act does not fall within the express ambit of the section….it can neither be regarded as having been performed under the provisions of the Ordinance nor as an act intended to be performed under any such provision."

(23) In **Weerasooriya Arachchi vs. Special Commissioner, Galle Municipality** (1967) 69 NLR 437, this Court held that,

"*Section 307 (2) of the Municipal Councils Ordinance is not applicable to a case where the cause of action arose from an act which was done under section 16 of the Electricity Act and which a Municipal Council has no power to perform under any of the provision of the Municipal Councils Ordinance.*"

(24) The interpretation of Section 307 (1) of the Municipal Councils Ordinance is that a notice is required only with respect to actions taken under that particular Act and not any other Act. The judgements also recognize that

even those actions are subject to exceptions i.e., not all actions under that Act are subject to the notice requirement (eg; *mala fide* actions). In light of the narrow interpretation accorded to the notice requirement provision in the Municipal Councils Ordinance, it was argued by the learned President's Counsel that a similar interpretation must be rendered to section 54 of the SLPA Act too.

(25) In order to substantiate this contention, the learned President's Counsel for the Applicant-Appellant submitted that the application of section 54 is restricted to "anything done or purported to have been done in pursuance of this Act." (Emphasis added), and that the Act does not vest the Respondent Authority with the power to terminate the services of its employees as it is in fact a term implied by the common law.

(26) It would be appropriate at this stage to briefly discuss an employer's right to terminate employment under common law.

A contract of employment can be terminated in a variety of ways, namely,

a) Termination by the employer on disciplinary grounds and constructive dismissal.

b) Termination by the employer on non-disciplinary grounds. This has assumed particular importance in view of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

c) Termination by operation of law, which includes termination of a contract due to such factors as frustration of contract and impossibility of performance.

d) Termination by effluxion of time, e.g., by the arrival of a mutually agreed date.

Termination by the employee, which may arise due to a variety of circumstances such as resignation, vacation or abandonment of employment or repudiation of the contract by the employee."

(The Contract of Employment, S.R. De Silva, Revised Edition-2017)

(27) The employer's right to terminate the services of an employee has been recognized as a term implied by common law (Roman Dutch Law). In "***The Contract of Employment***" by **S.R. De Silva** (2017-Revised Edition), it is stated that;

"*In the common law either party was entitled to terminate the contract of employment in accordance with its provisions without consequences.*"

In "***Egalahewa on Labour Law***" at page 13, it is stated that;

"*Implied terms may also come from common law, which is the foundation of contract of employment. Eg. the right of the employer to select the employee of his choice, to deal with misconduct, right to transfer, right to be supervised and direct the manner of performance, vacation of post, frustration, right to terminate the contract etc. subject, however to the modifications made by the statute law, if any as some of these rights are modified by statute law. The court may always imply statutory terms as are reasonably necessary to give effect to the contract even though the parties have omitted to settle any particular point, before engagement.*"

(28) In **State Distilleries Corporation vs. Rupasinghe** (1994) 2 SLR 395, it was held that;

"*Under the common law, an employer had an absolute right to terminate the contract of employment (subject only to an obligation as to notice or payment in lieu)…*"

(29) In **Vasantha Kumara vs. Skyspan Asia (Pvt.) Ltd.** (2008) 1 SLR 324, Dr. Shirani Bandaranayake, J. held that,

"*It is to be noted that although this position would have been correct under the common law, where either party was entitled to terminate the contract of employment in accordance with its provisions without any consequential effect, the introduction of Labour Laws had modified this position.*"

(30) Under common law, therefore, an employer has a right to terminate the employment of a workman. On this basis, it was argued on behalf of the

Applicant-Appellant that the termination of employment by the Sri Lanka Ports Authority is not an act done in pursuance of the SLPA Act.

(31) The Respondent, on the other hand argued that the long title of the Act and section 7(1) of the SLPA Act covers matters relating to workmen/employees as well.

The Long Title states that; "*this Act shall apply for matters in relation to the officers and servants, property, rights, obligations and liabilities of the Port (Cargo) Corporation and the Port Tally and Protective Services Corporation and the public officers of, the property held by, and the rights, obligations and liabilities of, the department of the Port Commissioner…and for connected matters*".

It was contended that the objectives of the Respondent Authority spelled out in the Long Title to the Act cannot be achieved without its workmen/employees who thus form an integral part of the Authority and are therefore covered by the Long Title.

Section 7 (1) of the SLPA Act states that the Respondent Authority has the power to;

"*(b) employ such officers and servants as may be necessary for carrying out the work of the Authority;*

"(e) to make rules in relation to the officers and servants of the Authority, including their appointment, promotion, remuneration, discipline, conduct, leave, working times, holidays and the grant of loans and advances of salary to them;

(f) to make rules and prescribe procedures in respect of the administration of the affairs of the Authority"

It was argued that under sections 7 (1) (e) and (f), the Respondent Authority has the power to make rules regarding conduct and discipline and prescribe procedures relating to the administration of affairs to achieve its objectives and thus it is only logical and pragmatic for the Respondent Authority to terminate the services of the workmen when carrying out the foregoing.

(32) The learned Additional Solicitor General also submitted that by-laws or rules of the SLPA provided for termination of its employees and therefore section 54 encompasses the act of termination of services. Counsel on behalf of the Applicant-Appellant, however, argued that this contention is baseless as section 54 only refers to "the Act" and not to any by-laws, rules or regulations.

(33) It was pointed out that this is in contrast to section 307 (1) of the Municipal Councils Ordinance which makes a notice mandatory for all actions "*instituted against any Municipal Council, or the Mayor or any Councillor or any officer of the Council or any person acting under the direction of the Council or Mayor for anything done or intended to be done under the provisions of this Ordinance or by any by-law, regulation or rule made thereunder.*" (Emphasis added)

(34) The maxim *expressio unius est exclusio alterius* enunciates the maxim of interpretation that the express/specific mention of one item in a list implies the exclusion of other items. This appears to be, in my view, an instance in which this maxim should be applied to raise the inference that the express exclusion of acts done or purported to have been done by any rule, regulation or by-law made under the SLPA Act, denotes that section 54 only applies with respect to acts done in pursuance of the **Act** itself.

(35) Despite the Respondent's argument that the SLPA Act refers to workmen and that the power to terminate the services of workmen is a necessary act performed under and by virtue of the SLPA Act, there is no specific provision contained in the Act which relates to termination of employment, apart from Section 22A, which states as follows,

> "*Where the services of any employee of the Ports Authority are to be terminated on any ground other than that of misconduct, notice of such termination shall be given by the Ports Authority to such employee at least one month before the date of such termination or one month's*

salary or wages shall be paid to him by such Authority in lieu of such notice."

(36) This section does not vest the Respondent Authority with any power to terminate the employment of workmen. It merely stipulates an obligation that the Respondent Authority has to follow whenever the services of an employee are terminated on non-disciplinary grounds.

(37) Accordingly, there is nothing in the SLPA Act itself, which authorizes the Respondent Authority to terminate the services of a workman. Accordingly, the act of termination of a workman cannot be said to be an act done "in pursuance of this Act". Therefore, the inference that can be drawn is that section 54 of the SLPA Act does not encompass applications made to Labour Tribunals by workmen on the termination of their services.

<u>The Definition of "Action"</u>

(38) It was the contention of the learned President's Counsel for the Applicant-Appellant that the notice requirement contemplated in Section 54 of the Act is only in relation to "Action" filed against the SLPA and that an Application to the Labour Tribunal is not an "Action" within the meaning contained in the Civil Procedure Code but proceedings of *sui generis* nature.

(39) It was further contended that upon scrutiny of Section 54 of the SLPA Act, it is abundantly clear, the word "Action" referred to therein is an action within the meaning of Sections 5 and 6 of the Civil Procedure Code.

(40) The Applicant-Appellant, in his replication, admitted that he did not give prior notice under section 54 of the Act, on the ground that the Labour Tribunal application filed under the Industrial Disputes Act was for relief or redress and was not an "action" instituted against the Respondent.

(41) The term "Action" has not been defined in the SLPA Act.
In ***Black's Law Dictionary***, 11th Edition, page 37, the term "action" is defined as,

"*A civil or criminal judicial proceeding- An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. But in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceeding, which if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment.*"

Wharton's Law Lexicon (14th Ed.) states that, "*actions are divided into criminal and civil……".*

(42) Section 5 of the Civil Procedure Code (CPC) defines "Action" as "*a proceeding for the prevention of redress of a wrong"*

Section 6 of the CPC states that an action is,

"*Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.*"

Learned Counsel appearing for the Applicant-Appellant contended that an application before a Labour Tribunal is a *sui generis* application, and not an "action". Therefore, Labour Tribunals are not bound by the notice requirement stipulated in section 54 of the SLPA Act which is for "actions" instituted against the Respondent Authority.

(43) It was contended that *ex facie*, the Civil Procedure Code (CPC) which defines "action" only refers to the matters filed under the CPC, and therefore the CPC has no application to applications filed in a Labour Tribunal under section 31B of the Industrial Disputes Act No. 43 of 1950 (as amended).

(44) It was also contended that Section 5 of the Civil Procedure Code which states that the words and expressions mentioned therewith "shall have the meanings hereby assigned to them, **unless there is something in the subject or context repugnant thereto**" not only limits the scope of application of the definitions contained in the CPC but also enunciates the view that no

blanket meaning can be attributed to a word and that every term must be interpreted in light of the context and/or subject.

(45) In light of Section 6 of the CPC which states that an action is an "*…. application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference…….*", it was argued that applications before Labour Tribunals are not actions as Labour Tribunals are not Courts *per se*.

(46) The distinction between Tribunals and Courts is said to be further evinced by Article 105 of the Constitution which provides as follows;
"*105. (1) Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be-*
(a) the Supreme Court of the Republic of Sri Lanka,
(b) the Court of Appeal of the Republic of Sri Lanka,
(c) the High Court of the Republic of Sri Lanka and such other Courts of the First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.
*(2) **All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes**, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or amend the powers, duties, jurisdiction and procedure of, such courts, tribunals and institutions.*" (Emphasis added)

(47) It was submitted that the Constitution itself distinguishes between courts, tribunals and other institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes. The contention is that Labour Tribunals are not courts and therefore an application before a Labour Tribunal is not an action as per Section 6 of the CPC.

(48) Furthermore, Section 7 of the CPC states that;

"*The procedure of an action may be either regular or summary.*"

Counsel for the Applicant-Appellant argued that Section 6 read with Section 7 clearly indicate the fact that an "action" as contemplated by the CPC is restricted to "regular" and "summary" actions contained therein, and does not include or even appear to contemplate applications to Labour Tribunals whose proceedings are neither regular nor summary but are of a *sui generis* nature.

(49) Furthermore, in order to substantiate the contention that Labour Tribunals operate differently from ordinary courts of law, great emphasis was placed on the distinct nature, function and powers of the Labour Tribunal.

(50) It was submitted that Labour Tribunals are conferred with just and equitable jurisdiction and are thus empowered to grant compensation to a workman, even when his/her dismissal is lawful and just, which in turn cannot be strictly construed as the redressing of a wrong. It was also noted that Labour Tribunals are entrusted with powers to be more flexible with procedural and evidential requirements in order to achieve justice and equity which evince their *sui generis* nature. Hence, it is argued that the Respondent's contention that Labour Tribunals are courts of law in which actions are instituted cannot stand.

(51) It was further submitted that this court has upheld the flexible nature of the Labour Tribunals in **Somawathie vs. Backsons Textile Industries Ltd** (1973) 79 NLR 204 affirming the position that Labour Tribunals function differently from courts of law and are not strictly bound by procedural requirements.

In this case it was held that (pages 206-207),

"*Labour Tribunals were never intended to perform the functions of Courts of Law, and make an order whether the applicant is guilty or not of the allegations made against him by the employer. It is not a verdict that the Law requires from the President but a just and equitable order -order that is just and equitable in relation to the employer and employee and the employer-employee relationship, due consideration being given to discipline and the resources of the employer and even the interests of the*

public may have been given thought to. It is for this reason that the Labour Tribunals are not confined by the rules of evidence. They can adopt their own procedure, they can act on confession and the testimony of accomplices so that they can have a free hand to make a fair order."

(52) Furthermore, in the High Court case of **Sri Lanka Ports Authority vs. Chandrawansa** (HCRA/52/2011) it was held that, "*What the learned President of the Labour Tribunal is required to do at the end of the inquiry is to pronounce a just and equitable order. This shows that such decisions should not be untrammeled by the technicalities.*"

(53) However learned Counsel on behalf of the Respondent submitted that this Court has been consistent in holding that Labour Tribunals are bound by the notice requirement stipulated by section 54 as evidenced by the case of **Dissanayake Gamini Ratnasiri vs. Sri Lanka Ports Authority** (SC/Appeal/212/12), where it was held that "*when an employee of the Sri Lanka Ports Authority files a case in the Labour Tribunal in terms of section 31B of the Industrial Disputes Act (IDA), he must give one month notice to the Sri Lanka Ports Authority in terms of section 54 of the Sri Lanka Ports Authority Act and if he has failed to comply with the said requirement his application in the Labour Tribunal is bound to be dismissed.*"

(54) It was further submitted that this position is fortified by the refusal of this Court to grant leave on this notice requirement matter in **R.P. Nandasiri vs. Sri Lanka Ports Authority** (SC/SPL/LA/92/2012) and **P. Welis vs. Sri Lanka Ports Authority** (SC/SPL/LA/230/2009). When leave to appeal was refused in **P. Welis vs. Sri Lanka Ports Authority**, Marsoof PC J stated that *"…in view of the fact that there is some evidence that a miscarriage of justice might have occurred in this case, Learned Deputy Solicitor General is requested by Court to see whether some administrative relief can be afforded, after considering any appeal that might be made on behalf of the petitioner to the Respondent Authority with a copy to the Attorney General.*"

(55) It is argued that this indicates not only the fact that this Court upheld the mandatory nature of the notice requirement but also indicates that in the

event of non-compliance with this mandatory requirement, it is the Respondent Authority that must decide on equitable considerations.

(56) Commenting on the **Backsons Textile** case relied on by the Applicant-Appellant, it was argued that when considering the dicta quoted by the Applicant-Appellant it is evident that this Court had held that in relation to rules of evidence, the Labour Tribunals can adopt their own procedure, which is in fact fortified by Section 34(6) of the Industrial Disputes Act which provides that "*In the conduct of proceedings under this Act, any industrial court, labour tribunal, arbitrator, or authorized officer or the Commissioner shall not be bound by any of the provisions of the Evidence Ordinance.*" Therefore, it is argued that the Applicant-Appellant's stance in relation to the **Backsons Textile** case is misconceived in law.

(57) It was also contended that apart from section 34(6) of the IDA which limits the application of the Evidence Ordinance to Labour Tribunal proceedings, there is no other provision in the IDA which broadly grants Labour Tribunals immunity from Acts of Parliament. Therefore, it is argued that one month's prior written notice to the Respondent Authority as per section 54 of the SLPA Act must be complied with prior to invoking the jurisdiction of the Labour Tribunal.

(58) Despite Labour Tribunals exercising just and equitable jurisdiction, the Respondent's contention is that equity cannot override Acts of Parliament, and that when Labour Tribunals make just and equitable orders, they must do so within the four corners of the existing legal framework which includes the SLPA Act.

(59) In order to illustrate this point, the Respondent cites the following cases,
In **Hayleys v Crossette** 363 NLR 248 it was held that,
"…. *It is indeed a strange proposition to state that, when section 24 of the Industrial Disputes Act conferred jurisdiction on the Industrial Court to make such award as may appear to the Court to be just and equitable such a Tribunal can completely disregard the law of the country and act in an arbitrary manner. In my opinion, the Industrial Court should take into*

account the law of the country, and, in particular, the law governing contracts."

(60) In **Richard Peiris & Co. Ltd vs. Wijesiriwardena** 262 NLR 233 it was held that,

"*In regard to the power of the Tribunal to make such order as may appear to be just and equitable there is point in the Counsel's submission that justice and equity can themselves be measured according to the urgings of a kind heart but only within the framework of the law.*"

(61) In **Municipal Council of Colombo vs. Munasinghe** 71 NLR 223, H.N.G. Fernando CJ held that,

"*…where the Industrial Disputes Act confers on an Arbitrator the discretion to make an Award which is Just and Equitable the Legislature did not intend to confer on an Arbitrator the freedom of the wild horse……An Arbitrator holds no license from the Legislature to make any such Award as he may pleases, for nothing is Just and Equitable which is declared by whim or caprice or by the toss of a double headed coin.*"

(62) Therefore, it is the Respondent's position that the Labour Tribunal is bound by the Acts/Ordinances/ Laws and Statutes of Parliament and therefore just and equitable orders envisaged under the Industrial Disputes Act must be made within the framework of the law of the country.

(63) The Applicant-Appellant had contended that all actions under the CPC have to either be "regular" or "summary" actions as outlined in Section 7 of the CPC. However, in the case of **In re Goonesingha** 44 NLR 75 it was held that the classification of actions as regular and summary is not exhaustive. Mosley S. P. J. held that,

"*…Crown Counsel's argument was that section 6 is qualified by section 7, which provides that "the procedure of an action may be either regular or summary," and contended that the procedure upon an application for a writ of certiorari is neither regular nor summary. A somewhat similar argument had been advanced in* ***Subramaniam Chetty v. Soysa*** *(supra) in*

which the question for decision was whether proceedings to set aside a sale constituted an action. That view was rejected by Bertram C. J., who conceived, for the purposes of the case before him, the possibility of "an action within an action". That, of course is not the case here, but, at all events, Bertram C.J. does not appear to have considered that the classification of actions in section 7 as regular or summary is exhaustive."

(64) In the more recent case of **Jayawardene vs. Obeysekere and 5 Others**, J. A. N. de Silva C.J., held,

"The Civil Procedure Code itself, despite the wording in section 7 paves the way for another type of proceedings i.e. found in chapter VIII to be followed in respect of liquid claims. The procedure set out therein is distinctly different to the "regular" procedure as well as the "summary" procedure already referred to….

…….

The legislature may have in its wisdom adopted various procedures to be followed in relation to the diverse actions which it deems appropriate".

(65) Accordingly, the contention of the Applicant-Appellant that all "actions" under the CPC must follow either the "regular" or "summary" procedure as specified in Section 7 cannot be supported.

(66) The main argument raised by the Applicant-Appellant is that an application before a Labour Tribunal is not an "action" within the meaning of the CPC. In order to assess this contention, it would be useful to determine judicial pronouncements surrounding the term "action".

(67) In **M. L. Marikkar vs. Abdul Aziz** 1 NLR 196, it was held that the term "action" does not encompass insolvency proceedings. Withers, J. stated "… *Action is not an apt term to describe insolvency proceedings, the procedure in regard to which is regulated by Ordinance No. 7 of 1853.*"

(68) In **Silverline Bus Co., Ltd vs. Omnibus Co., Ltd** 58 NLR 193, the Privy Council held that an application for a writ of *certiorari* does not come within the meaning of the term "action" as defined in the CPC. Basnayake, C. J., held,

"*… A writ of certiorari is not a means of obtaining a relief or remedy through the Court's power or authority. It is purely a supervisory function of the Court, while section 6 of the Civil Procedure Code contemplates an entirely different function. In my view it would be wrong to read section 6 by itself without reference to other provisions of the Civil Procedure Code. To my mind section 6 when read with the other sections of the Civil Procedure Code leaves no room for the view that a writ of certiorari falls within the definition of action in the code…*"

(69) The cases referred to above suggest, that not all applications or proceedings before a Court of Law can be classified as "actions" as defined in the CPC. In determining whether an application or proceeding falls within the meaning of an "action" as per the CPC, it must be examined whether the Court is exercising its ordinary power or authority when dealing with such application or proceeding.

(70) The Applicant-Appellant in addition to contending that a Labour Tribunal is not a "Court", has highlighted many features of Labour Tribunals which distinguish applications before such Labour Tribunals from ordinary claims before a Court. The differences that exist between Labour Tribunals and ordinary Court of law can be seen from an examination of the history surrounding the establishment of Labour Tribunals.

(71) The Industrial Disputes Act was enacted in 1950 with the aim of preventing, investigating and settling industrial disputes and for matters connected therewith or incidental thereto, as indicated in its long title. It has long been recognized that the object and purpose of this Act is the maintenance and promotion of industrial peace. In **Colombo Apothecaries Co. Ltd Vs. Wijesooriya** [70 NLR 481 at p. 490], G.P.A. Silva J said that *"…. there can be hardly any doubt-that the sole object of the Act is the promotion and maintenance of industrial peace*."

(72) Originally, the remedies provided to a workman under this Act were limited to, conciliation, arbitration, collective bargaining and Industrial Courts. However, these remedies had certain drawbacks. For example, arbitration greatly depended on the co-operation of the employer, when the employer failed to co-operate with the voluntary arbitration process, the only effective remedy available was compulsory arbitration at the discretion of the Minister. Thus, if the Minister did not refer the parties to compulsory arbitration the aggrieved workman would have no remedy available.

(73) Furthermore, when a dispute arose from unfair termination of employment, there was no direct remedy except under the Common Law of Sri Lanka (i.e. Roman Dutch Law) where a workman could resort to a civil action against the employer in the District Court. Since the Roman Dutch Law does not recognize specific performance of a contract of service, the aggrieved party was not entitled to reinstatement either directly by an order for reinstatement or indirectly by an injunction against the employer. Therefore, the only remedy available in a District Court was damages for wrongful termination. In **R v. National Arbitration Tribunal, ex parte Horatio Crowther & Co. Ltd** (1948) 1 KB 424, it was observed that,
"*a remedy which no court of law or equity has ever considered it had power to grant. If an employer breaks his contract of service with his employees…..the workmen's remedy is for damages only. A court of equity has never granted an injunction compelling an employer to continue a workman in his employment or to oblige a workman to work for an employer.*"

(74) In the backdrop of the aforesaid lacunae found in the Industrial Disputes Act, Labour Tribunals were introduced and established under Part IVA of the Industrial Disputes (Amendment) Act No. 62 of 1957, to which aggrieved workmen whose services had been terminated could directly apply to for relief. Unlike ordinary courts of law which would only consider whether the termination was in terms of the contract, Labour Tribunals go beyond the parameters of the contract in order to ascertain whether the termination was wrongful and is vested with the power to

award reinstatement or compensation to an employee who was unfairly dismissed even though the termination was in accordance with the contract, which is in contrast to the approach adopted in the District Courts.

(75) This is clearly evinced by the wording of Section 31B (1)(a) which states that a workman or a trade union on behalf of a workman who is a member of that union can make an application to a Labour Tribunal for relief or redress in respect of the **termination of his services by his employer**, which implies that termination in accordance with the contract of employment does not bar a workman from seeking relief or redress from a Labour Tribunal. The order of the Tribunal would be on the basis of what appears to it just and equitable.

(76) The *sui generis* nature of Labour Tribunals which distinguishes them from ordinary courts of law in which actions are instituted was highlighted in the case of **The United Workers Union vs. Devanayagam** (1967) 69 NLR 289. In this case the Privy Council held that a Labour Tribunal President did not hold judicial office when dealing with an application made to the Tribunal. It was also held that when a direct application is made to a Labour Tribunal, its powers and duties (i.e. to make a just and equitable order) do not differ from the powers and duties of an arbitrator, an Industrial Court or a Labour Tribunal on a reference by the Minister or the Commissioner of Labour. The Privy Council also specifically referred to the fact that in dealing with applications, the Labour Tribunals are not restricted by the terms of the contract of employment in granting relief or redress. Therefore, Labour Tribunals perform a different function to that of an ordinary Court of law.

(77) In consideration of the unique nature of Labour Tribunals and the rationale behind their establishment, the inference that can be drawn is that for the purpose of Section 54 of the SLPA Act, applications filed in the Labour Tribunals cannot be considered as "actions" contemplated in section 54 of that Act. Despite the Respondent's contention that the Industrial Disputes Act does not specifically exclude the application of the SLPA Act, on the

interpretation of section 54 it is clear that this procedural pre-requisite has absolutely no bearing on applications filed in Labour Tribunals.

(78) The Respondent relied heavily on the decided case of **Dissanayake Gamini Ratnasiri vs. Sri Lanka Ports Authority** (SC/Appeal/212/12) in support of their position that Labour Tribunals are bound by the notice requirement stipulated by Section 54 of the SLPA Act. In the said case it was held as follows,

"*Black's law Dictionary 9th edition page 32, in relation to the word action, states as follows.*

"A civil or criminal judicial proceeding- Also termed action at law- An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offence."

In the present case, the Applicant-Appellant prosecutes the Respondent for the enforcement or protection of his right to be in his employment. Thus, in my view, the application filed in the Labour Tribunal falls within the ambit of action.

Section 6 of the Civil Procedure Code reads as follows:

> *"Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action."*

In the present case the Applicant-Appellant whose services were terminated by the Respondent has made an application to the Labour Tribunal for relief which can be obtained through the exercise of the power of Labour Tribunal. After considering the above legal literature, I hold that the present application filed in the Labour Tribunal falls within the ambit of the term action in section 54 of the Sri Lanka Ports Authority Act."

(79) On the basis of the reasons stated above, this court in **Dissanayake Gamini Ratnasiri vs. Sri Lanka Ports Authority** has come to the finding that an

application to a Labour Tribunal is an action within the meaning of Section 54 of the SLPA Act. The Applicant-Appellant in the present action has raised several novel arguments such as the placement of Section 54 within the SLPA Act, the distinction between a Court and a Tribunal, as well as the *sui generis* nature of applications before Labour Tribunals which, presumably not urged before the court and thus, not come up for consideration in the aforementioned case. Consequently, I must most respectfully state that I am unable to agree with the findings arrived at in the decision of **Dissanayake Gamini Ratnasiri vs. Sri Lanka Ports Authority**.

(80) Accordingly, I hold that an application before a Labour Tribunal is not an "action" as contemplated in section 54 of the SLPA Act.

Whether the six-month statutory time limit provided for by Section 31B(7) of the Industrial Disputes Act cannot be fettered by the SLPA Act.

(81) It is noteworthy that Section 31B (7) of the Industrial Disputes Act as amended by Act No. 21 of 2008 imposes a six-month statutory time limit from the date of termination for a workman to make an application to a Labour Tribunal. The Applicant-Appellant submits that the aforementioned six-month statutory time limit is not subject to any other law. It is also submitted that the amendment made by Act No. 21 of 2008 represents the latest intention of the legislature which is to provide an employee six months to file an application before the Labour Tribunal. Accordingly, the Applicant-Appellant's contention is that prior to the submission of such application, if one month's notice is required to be given under S. 54 of the SLPA Act, it would only leave 5 months for a workman to invoke the jurisdiction of the Labour Tribunal. The contention is that the latest intention of the legislature as enacted in 2008, is to grant a six-month limit, and therefore an unrelated provision cannot be said to override the latest intention of the legislature reflected in section 31B (7) of the IDA.

(82) In my view, this position of the Applicant-Appellant cannot be supported. It is indeed possible for two distinct statutes, to set out two different obligations in relation to the same process, without the later statute

necessarily having to supersede the earlier statute. There is nothing to suggest that the six-month statutory time period cannot be subject to any other requirements. Nothing in S. 31B(7) of the IDA or Act No. 21 of 2008 suggests that the said section should prevail over the SLPA Act. As the Respondent contends, when two distinct statutes impose different requirements or obligations, they should be read harmoniously so as to give effect to both statutes.

Bindra states that,

"When two provisions are mutually contradictory, they should be interpreted and read together so as to obviate the apparent inconsistency". [Interpretation of Statutes, 8th Edition (2017) at page 507]

Accordingly, I find the contention of the Applicant-Appellant that the six-month statutory time limit provided by Act No. 21 of 2008, being the latest intention of the legislature prevails over all other requirements, cannot be supported.

Conclusion

(83) In conclusion, this Court has arrived at the following findings. Firstly, an "action" as contemplated under section 54 of the SLPA act is an action against the SLPA in relation to civil claims for damages for any loss, injury or damage caused to persons or property and does not encompass an application made by a workman to a Labour Tribunal. Secondly, as the termination of employment of a workman is not an act done in pursuance of the SLPA Act, Section 54 does not apply to an application made by a workman before a Labour Tribunal. Thirdly, an application before a Labour Tribunal is not an "action", as contemplated under section 54 of the SLPA Act but is a proceeding of *sui generis* nature.

(84) Therefore, having analysed section 54 of the Sri Lanka Ports Authority Act, it can be held that Labour Tribunals are not bound by the notice requirement stipulated in section 54 of that Act and the question of law on which special leave was granted is answered in the affirmative.

(85) Accordingly, the impugned order of the learned High Court judge dated 24.02.2016 is hereby set aside and the application of the Appellant is

remitted to the Labour Tribunal to be dealt with expeditiously as the circumstances would permit, in accordance with the law.

Under the circumstances of this case, I do not order costs.

Appeal Allowed

JUDGE OF THE SUPREME COURT

JUSTICE JAYANTHA JAYASURIYA PC

I agree

CHIEF JUSTICE

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE A.H.M.D. NAWAZ

I agree

JUDGE OF THE SUPREME COURT

AUGUST

2023

JUDGMENTS

AUGUST INDEX

1.	SC/FR/41/2017	1777
2.	SC/FR/211/2016	1788
3.	SC/FR/158/2013	1809
4.	SC/APPEAL/28/2018	1825
5.	SC/APPEAL/80/2015	1843
6.	SC/APPEAL/66/2020	1863
7.	SC/APPEAL/151/2015	1879
8.	SC/FR/360/2016	1891
9.	SC/RULE/04/2022	1904
10.	SC/APPEAL/107/2017	1913
11.	SC/CONTEMPT/02/2022	1922
12.	SC/FR/100/2016	1936

1.

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

In the matter of an Application under Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 41/2017

1. H. Sarath Wickramasinghe,
   Dangahawila, Karandeniya.

2. T.D.K. Ariyawansa,
   No. 60/7, Sri Rathanapala Mawatha,
   Matara.

3. A.A. Chandrasiri
   No. 1/1, Medagama, Netolpitiya.

4. Ariyasena Narasinghe,
   'Sampath,' Palolpitiya, Thihagoda.

5. K.H. Piyasena,
   No. 21/5, Sri Sugathapala Mawatha,
   Karapitiya.

6. A.M.A. Chandra,
   'Rasangi,' Ganegama South, Baddegama.

7. H.P. Premadasa,
   Sathsara, Kongala, Hakmana.

PETITIONERS

vs.

1. The Governor
   Southern Province,
   Governor's Secretariat,
   Lower Dickson Road,
   Galle.

2. The Chairman,
Provincial Public Service Commission,
Sothern Province, 6th floor,
District Secretariat Building Complex,
Kaluwella, Galle.

3. K.K.G.J.K. Siriwardena

4. K.L.S. Marathons

5. Srimal Wijesekera

6. Samarapala Vithanage

2nd to 6th Respondents are members of
the Provincial Public Service Commission,
Southern Province, 6th Floor,
District Secretariat Building,
Kaluwella, Galle.

7. The Secretary,
Provincial Public Service Commission,
Southern Province, 6th floor,
District Secretariat Building,
Kaluwella, Galle.

8. Commissioner of Cooperative
Development,
Cooperative Development Department of
the Southern Provincial Council,
No. 147/3, Pettigalawatta, Galle.

9. Secretary,
Provincial Ministry of Food, Cooperative,
Roads, Electricity, Alternative Energy and
Trade, Galle.

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

RESPONDENTS

Before: **P. Padman Surasena, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Pasindu Silva for the Petitioners

Rajitha Perera, Deputy Solicitor General for the Respondents

Argued on: 18th October 2021

Written Submissions: Tendered on behalf of the Petitioners on 23rd February 2021

Tendered on behalf of the Respondents on 4th September 2020

Decided on: 2nd August 2023

Obeyesekere, J

The issue that arises for the determination of this Court is whether the decision of the Provincial Public Service Commission of the Southern Province [the Provincial Public Service Commission] to cancel the promotions granted by it to each of the Petitioners to the posts of District Officer for Co-operative Development or Assistant Commissioner of Co-operative Development, is arbitrary and whether it amounts to an infringement of the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

Provisions of the Provincial Councils Act

In terms of Section 32(3) of the Provincial Councils Act, No. 42 of 1987, as amended, "***The Governor shall provide for and determine all matters relating to officers of the provincial public service****, including the formulation of schemes of recruitment and codes of conduct for such officers, the principle to be followed in, making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of such officers. In formulating such schemes of recruitment and codes of conduct the Governor shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service and the codes of conduct prescribed for officers holding corresponding offices in the public service*." [emphasis added]

While Section 32(1) provided that, "*Subject to the provisions of any other law, the appointment, transfer, dismissal and disciplinary control of officers of the provincial public service of such Province is hereby vested in the Governor of that Province*," this power may be delegated to the Provincial Public Service Commission in terms of Section 32(2) of the Act, which reads thus:

> "*The Governor of a Province may, from time to time, delegate his powers of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service to the Provincial Public Service Commission of that Province*."

The above provisions can thus be summarised as follows:

(a) The Governor of a Province shall provide for and determine all matters relating to officers of the Provincial Public Service;

(b) The Governor of a Province has been vested with the power of appointment and the transfer, dismissal and disciplinary control of officers in the Provincial Public Service;

(c) The Provincial Public Service Commission can exercise such powers of appointment, transfer, dismissal and disciplinary control only upon its delegation by the Governor and to the extent to which such power has been delegated.

It is admitted that the 1st Respondent had delegated the powers of appointment, transfer, dismissal and disciplinary control to the Provincial Public Service Commission.

<u>The Co-operative Service and Schemes of Recruitment</u>

The Petitioners had been appointed as Co-operative Inspectors in the Department of Co-operative Development during the period 1983 to 1988. With the subject of co-operative development being devolved to the Provincial Councils pursuant to the 13th Amendment to the Constitution, the Petitioners had been appointed as Co-operative Inspectors by the Provincial Public Service Commission. The post of Co-operative Inspector had been re-designated as Co-operative Development Officer [CDO] in 2015, and as at the time of the filing of this application, the Petitioners were serving as CDOs.

The Scheme of Recruitment that prevailed at the time the Petitioners joined the service, as well as the Scheme of Recruitment that replaced the said Scheme in 1996, contained provisions relating to the promotion of Co-operative Inspectors to the posts of District Officer for Co-operative Development [DOCD] and Assistant Commissioner of Co-operative Development [ACCD], based on seniority and satisfactory service, with satisfactory service being determined on confidential assessment reports. In January 2015, with the concurrence of the Provincial Public Service Commission, the 1st Respondent. i.e., the Governor of the Southern Province, had introduced three separate Schemes of Recruitment for CDOs, DOCDs and ACCDs. As provided for therein, all Petitioners were absorbed into Grade I of the CDO service with effect from 19th January 2015.

Appointment of the Petitioners

The Provincial Public Service Commission had decided that vacancies that existed at the time the new Schemes of Recruitment were introduced in January 2015 should be filled under the 1996 Scheme of Recruitment, while vacancies that arose after January 2015 were to be filled in terms of the criteria specified in the newly introduced 2015 Schemes of Recruitment.

Accordingly, by letter dated 3rd March 2016, the Provincial Public Service Commission had directed the Commissioner of Co-operative Development to call for applications in terms of the 1996 Scheme of Recruitment to fill three vacancies in the post of DOCD that had arisen prior to 19th January 2015. Although the 1st, 2nd, 5th and 6th Petitioners had applied and thereafter been called for the interview, they were not successful, as selection under the 1996 Scheme of Recruitment was based on seniority and satisfactory service.

On the same date, i.e., 3rd March 2016, the Provincial Public Service Commission had also called for applications to fill a further five vacancies that had arisen in the post of DOCD after the introduction of the 2015 Scheme of Recruitment, for the filling of which vacancies the Scheme of Recruitment introduced in 2015 was to apply. The notice issued by the Provincial Public Service Commission contained the criteria that had to be fulfilled by all candidates, and specifically provided that all candidates must have successfully completed all three Efficiency Bar Examinations in the CDO service.

Further to the interviews that were held on 31st May 2016 and 7th June 2016, and based on the results thereof, the 1st, 3rd, 4th, 6th and 7th Petitioners were appointed to the post of DOCD by the Provincial Public Service Commission, soon thereafter.

In addition to the above, applications had also been called on 23rd February 2016 from those in the Supra Grade of the CDO service and those who had completed five years in Grade I in the CDO service to fill three vacancies in the post of ACCD that had arisen after the introduction of the 2015 Scheme of Recruitment. This notice too specified that CDOs in Grade I must have passed all three Efficiency Bar Examinations for CDOs. Pursuant to the conducting of interviews in June 2016, the 1st, 2nd, 5th and 6th Petitioners were appointed by the Provincial Public Service Commission to the post of ACCD.

Challenging the appointments

On 21st June 2016, eighteen persons holding the posts of either CDO or DOCD and who had also faced the above interviews to fill the vacancies in the posts of DOCD or ACCD that had arisen after January 2015 but were unsuccessful, challenged the said appointments of the Petitioners by invoking the jurisdiction of this Court in SC (FR) Application No. 211/2016. While the Petitioners in this application had been named as respondents in that application, the primary complaint of the petitioners in that application was that the marking scheme attached to the 2015 Schemes of Recruitment was arbitrary and contrary to their legitimate expectations in that it departed from the existing scheme of selection based on seniority and satisfactory service, and instead sought for the first time to confer thirty of the one hundred marks to candidates possessing additional educational qualifications (Bachelors Degrees or equivalent), and professional qualifications (local or foreign training). On 23rd September 2016, this Court had granted leave to proceed in SC (FR) Application No. 211/2016 in relation to the alleged infringement of the fundamental rights of those petitioners guaranteed under Articles 12(1) and 14(1)(g) of the Constitution.

Cancellation of the appointments

The issue that culminated in this application arose when the Secretary to the Provincial Public Service Commission informed the Petitioners by his letter dated 19th December 2016 that the aforementioned promotion of the Petitioners had been cancelled

pursuant to a directive dated 2nd December 2016 issued by the 1st Respondent. Aggrieved by the said decision, the Petitioners filed this application on 27th January 2017 complaining that neither the 1st Respondent nor the Provincial Public Service Commission had any legal authority to cancel the said appointments and hence the said decision was arbitrary and illegal as well as contrary to the rules of natural justice and hence was in violation of their fundamental right to equality before the law and the equal protection of the law, as guaranteed by Article 12(1) of the Constitution. Leave to proceed in relation to the alleged infringement of Article 12(1) had been granted by this Court on 2nd August 2017. With the consent of all parties, both applications were taken up for argument together.

I shall now consider the reasons adduced by the Provincial Public Service Commission for the above decision to cancel the promotions granted to the Petitioners.

Requirement to complete the Efficiency Bar Examinations

The learned Deputy Solicitor General appearing for the Respondents submitted that Clause 8 of the 2015 Scheme of Recruitment for CDOs makes it mandatory for each CDO to complete three Efficiency Bar Examinations at the times specified therein, with the 3rd Efficiency Bar Examination having to be completed within five years of being promoted to Grade I of the CDO service. Clause 7.4.2.5 of the 2015 Schemes of Recruitment for DOCDs and ACCDs stipulated further that an applicant must have passed the 3rd Efficiency Bar Examination in order to be eligible for promotion to the post of DOCD or ACCD. It must be noted that paragraph 4 of the letter informing the Petitioners of their absorption to Grade I of the CDO service specifically provided that the Petitioners must pass all three Efficiency Bar Examinations in the CDO service to be eligible for promotion, thus placing the Petitioners on notice of that fact.

The learned Deputy Solicitor General submitted further that none of the Petitioners had passed the 3rd Efficiency Bar Examination for CDOs and therefore were not eligible to be considered for promotion to the post of either DOCD or ACCD. Of course, one must bear in mind that this requirement to pass the 3rd Efficiency Bar Examination was only introduced in the Scheme of Recruitment issued in January 2015 and that the said examination had not been held since the introduction of the 2015 Schemes of Recruitment, with the result that it was impossible for any of the CDOs in service at that time to be eligible for promotion to the posts of DOCD and ACCD.

Exemption from the requirement to pass the Efficiency Bar Examinations

The learned Deputy Solicitor General, while submitting that none of the three Schemes of Recruitment introduced in 2015 contained any transitional provisions addressing this issue, drew the attention of this Court to Paragraph 15 in each of the three Schemes of Recruitment of 2015 which reads as follows: "මෙම බදවා ගැනීමේ පටිපාටියේ විධිවිධාන සලසා නොමැති යම් කරුණක් වෙතොත් ඒ සම්බන්ධයෙන් දකුණු පළාත් රාජ්‍ය සේවා කොමිෂන් සභාව විමසා ආණ්ඩුකාරතුමා විසින් තීරනය කරනු ලැබේ."

It was therefore the position of the learned Deputy Solicitor General that in the absence of any of the applicants having passed the 3rd Efficiency Bar Examination, it was imperative upon the Provincial Public Service Commission to have sought a decision from the 1st Respondent whether an exemption could be granted from the said requirement and/or whether appointments could be made in the aforementioned circumstances, taking into consideration that the said requirement had only been introduced in 2015 and that no examinations had yet been conducted.

Notwithstanding the fact that none of the CDOs had passed the 3rd Efficiency Bar Examination, and without having obtained a decision of the 1st Respondent, the Provincial Public Service Commission had proceeded to call for applications to fill the vacancies, conducted the interviews and proceeded to appoint the Petitioners to the applicable posts in June/July 2016. The learned Deputy Solicitor General submitted that in the absence of any approval from the 1st Respondent, the Provincial Public Service Commission had no mandate to appoint the Petitioners to the posts of DOCD and ACCD, and hence, the actions of the Provincial Public Service Commission are *ultra vires* the powers delegated to it in terms of Section 32(2) of the Provincial Councils Act.

Reason for the cancellation of the promotions

This issue of the Petitioners not having passed the 3rd Efficiency Bar Examination came to the forefront only after the filing of the aforementioned SC (FR) Application No. 211/2016, with the petitioners in that application claiming that the appointments of the Petitioners in this application were bad in law. By his letter dated 14th July 2016, the Commissioner of Co-operative Development (Southern Province) had sought the advice of the Secretary, Ministry of Co-operative Development (Southern Province) in this regard. The Secretary in turn had sought the advice of the Provincial Public Service

Commission, which had confirmed by its letter dated 8th August 2016 that an exemption from the above requirement was granted by the Provincial Public Service Commission, taking into consideration the fact the Petitioners had already completed five years of service in Grade I of CDO and had duly earned all salary increments.

The aforementioned letter of the Provincial Public Service Commission does not disclose whether the said decision had been taken prior to the making of the appointments of the Petitioners to the posts of DOCD or ACCD. However, pursuant to further discussions between the Provincial Public Service Commission and the 1st Respondent, the Provincial Public Service Commission had decided to cancel the aforementioned promotions and to call for fresh applications to fill the vacancies that existed in the posts of DOCD and ACCD, as the 1st Respondent had not approved the granting of an exemption. This decision had been communicated to the 1st Respondent by letter dated 8th November 2016, and the approval of the 1st Respondent for such decision of the Provincial Public Service Commission had been granted by letter dated 2nd December 2016. It is only thereafter that the decision to cancel the promotions was duly communicated to the Petitioners by letter dated 19th December 2016.

Is the cancellation of the promotions arbitrary?

The learned Counsel for the Petitioners submitted that the power of promotion delegated to the Provincial Public Service Commission included the power to grant an exemption from the aforementioned requirement with regard to the 3rd Efficiency Bar Examination and that the Provincial Public Service Commission has been pressurised into withdrawing the promotions granted to the Petitioners by those persons who filed SC (FR) Application No. 211/2016.

It was the position of the learned Deputy Solicitor General that even though the power of appointment of public officers and their promotion had been delegated to the Provincial Public Service Commission, the Commission did not have the power either in terms of the said delegation or in terms of the said Scheme of Recruitment to grant an exemption from the requirement to have passed the 3rd Efficiency Bar Examination in order to be eligible for promotion. He submitted that this power had been conferred exclusively on the 1st Respondent by Section 32(3) of the Provincial Councils Act and that paragraph 15 in the 2015 Schemes of Recruitment stipulating that anything not

provided for in the Scheme of Recruitment shall be decided by the 1st Respondent in consultation with the Provincial Public Service Commission, is a reflection of that power.

Having carefully considered the submissions of the learned Counsel for the Petitioners and the learned Deputy Solicitor General, I am of the view that the provisions of the 2015 Scheme of Recruitment must be strictly followed in making appointments to, and promotions within, the Provincial Public Service. This includes ensuring compliance with the requirement set out in Clause 7.4.2.5 of the said Schemes of Recruitment for both DOCDs and ACCDs stipulating that in order to be eligible for promotion to either of the posts of DOCD or ACCD, the candidate must have passed the 3rd Efficiency Bar Examination stipulated for CDOs. Although the power of the 1st Respondent that is delegated to the Provincial Public Service Commission in terms of Section 32(2) includes the power to appoint or promote officers, I am in agreement with the learned Deputy Solicitor General that in the absence of any provision in the Scheme of Recruitment that enables the Provincial Public Service Commission to grant exemptions from the requirements specified in the said Schemes, and in view of the fact that decisions in respect of matters not provided for in the Schemes of Recruitment have been reserved for the 1st Respondent, the Provincial Public Service Commission did not have the power to deviate from the Schemes of Recruitment in granting the promotions.

The Provincial Public Service Commission must take full responsibility for the plight of the Petitioners, for the reason that, having introduced the new Schemes of Recruitment which contained the above requirement to successfully complete all three Efficiency Bar Examinations in order to be eligible for promotion to the post of DOCD and ACCD in January 2015, and in spite of the Schemes of Recruitment clearly specifying that the examinations must be held at least once a year, the Provincial Public Service Commission has failed to conduct the said examinations prior to calling for applications. In fact, a time period of over one year had lapsed between the introduction of the 2015 Schemes of Recruitment and the calling of applications to fill the vacancies that had arisen. In the alternative, prior to making appointments, the Provincial Public Service Commission should have consulted the 1st Respondent, and sought the approval of the 1st Respondent to exempt those candidates from the said requirement, which the Provincial Public Service Commission had failed to do.

Conclusion

In the above circumstances, I am of the view that:

(a) the decision of the Provincial Public Service Commission to cancel the promotions granted to the Petitioners, and the subsequent approval granted by the 1st Respondent for the cancellation of the said promotions, are not arbitrary;

(b) the decision of the Provincial Public Service Commission and the 1st Respondent is reasonable and based on discernible grounds, and is consistent with the object of ensuring that those who are promoted have acquired the necessary qualifications stipulated in the Schemes of Recruitment, unless an exemption had been granted from the said requirement, taking into consideration the peculiar circumstances that had arisen;

(c) the fundamental rights of the Petitioners enshrined in Article 12(1) of the Constitution have not been violated by the 1st Respondent.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Articles 12(1) and 14(1)(g) read with Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 211/2016

1) Weerathunga Arachchige Michael Padmasiri,
'Weerawansa',
Bolana, Ruhunu Ridiyagama.

2) Bala Manage Dayawathi,
'Sirimuthu', Mahawela Road, Dickwella.

3) Nanayakkara Wasam Goda Liyanage
Sumiththa Dias,
'Senehasa', Mountain Hall Watta,
Ambalanwatta, Galle.

4) Modara Gamage Dona Greta Maria Mallika,
No. 105, Kaduru Pokuna East, Tangalle.

5) Ambagaha Duwage Pearly,
Kadegederawatta, Ukwatta, Gintota.

6) Hewa Alankarage Misilin,
No. 289, Mayurupura, Hambanthota.

7) Anurasiri Muthumala,
'Baghya', Aluthgoda, Dikwella.

8) Manik Purage Ariyadasa,
'Asiri', Gangoda, Kolawenigama.

9) Swarna Jayanthi Wedaarachchi,
4th Milepost, Hapugala, Wakwella.

10) Basnayaka Jagath Perera

11) Kimbeeyage Neelamani De Silva,

Both of No. 19/1, Railway Station Road,
Unawatuna.

12) Asmulla Kankanamge Kalyani Kusumlatha,
'Senehasa', Mountant Hall Watta,
Ambalanwatta, Galle.

13) Wahideen Mohamed Razik,
No. 306, Malay Kolaniya, Ambalanthota.

14) Preethi Wimalasuriya,
No. 204, Tissa Road, Tangalle.

15) Pol Dhanaraja Pathirathna De Silva,
No. 331, Galle Raod, Wellawatta, Balapitiya.

16) Sanath Dayakantha Vidyalankara,
"Mekala", Waulagoda, Hikkaduwa.

17) Nadugala Vidanapathiranage Upali,
No. 111/A, Hiththatiya Meda, Matara.

18) Mewala Arachchilage Padma Priyadharshani Perera,
Kosmulla, Galle, Neluwa.

19) Singan Kutti Arachchila Athukoralage Bhadra Malani Athukorale,
Wadigala, Ranna.

PETITIONERS

vs.

1. The Governor – Southern Province,
   Governor's Secretariat,
   Lower Dickson Road, Galle.

2. The Chairman,
   Provincial Public Services Commission-
   Southern Province, 6th Floor,
   District Secretariat Building Complex,
   Kaluwella, Galle.

3. K.K.G.J.K. Siriwardena

4. K.L. Marathons

5. Srimal Wijesekara

6. D.K.S. Amarasuriya

7. Samarapala Vithanage.

   Members of the Provincial Public Service
   Commission – Southern Province, 6th Floor,
   District Secretariat Building Complex,
   Kaluwella, Galle.

8. The Secretary,
   Provincial Public Service Commission –
   Southern Province, 6th Floor, District
   Secretariat Building Complex,
   Kaluwella, Galle.

9. The Secretary,
   Ministry of Agriculture, Agrarian
   Development, Irrigation, Water Supply and
   Drainage, Food Supply and Distribution Trade
   and Co-operative Development of the

Southern Provincial Council, 4th Floor,
Dhakshinapaya, Labuduwa, Galle.

10. Commissioner of Cooperative Development,
Cooperative Development Department of the
Southern Provincial Council,
No. 147/3, Pettigalawatta, Galle.

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

12. H. Sarath Wickramasinghe,
Dangahawila, Karandeniya.

13. T.D.K. Ariyawansa,
No. 60/7, Sri Rathnapala Mawatha, Matara.

14. A.A. Chandrasiri,
No. 1/1, Medagama Netolpitiya.

15. Ariyasena Narasinghe,
'Sampath', Palollpitiya, Thihagoda.

16. K.H. Piyasena,
No. 21/5, Sri Sugathapala Mawatha,
Karapitiya.

17. A.M.A. Chandra,
'Rasangi', Ganegama South, Baddegama.

18. H.P. Premadasa,
Sathsara, Kongala, Hakmana.

19. Chief Secretary,
Southern Provincial Council,
Chief Secretary's Office,
S.H. Dahanayake Mawatha, Galle.

RESPONDENTS

Before: **P. Padman Surasena, J**
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Harsha Fernando with Chamith Senanayake for the Petitioners

Rajitha Perera, Deputy Solicitor General for the 1st – 10th Respondents

Pasindu Silva for the 12th – 18th Respondents

Argued on: 18th October 2021

Written Submissions: Tendered on behalf of the Petitioners on 18th September 2020 and 29th November 2021

Tendered on behalf of the 1st – 10th Respondents on 7th September 2020 and 29th October 2021

Tendered on behalf of the 12th – 18th Respondents on 25th February 2021 and 22nd November 2021

Decided on: 2nd August 2023

Obeyesekere, J

The Petitioners are officers of the Co-operative Development Department of the Southern Province. In January 2015, the 1st Respondent – i.e., the Governor of the Southern Province – acting in terms of the powers vested in him by Section 32(3) of the Provincial Councils Act, No. 42 of 1987 as amended, introduced new Schemes of Recruitment and Promotion for the following posts in the Co-operative Service of the Southern Province:

(a) Co-operative Development Officer [CDO];

(b) District Officer for Co-operative Development [DOCD]; and

(c) Assistant Commissioner for Co-operative Development [ACCD].

The marking schemes attached to the said Schemes of Recruitment for the posts of DOCD and ACCD sought to confer *inter alia*:

a) 15 marks and 10 marks respectively, for educational qualifications – i.e., a Bachelor's degree from a university recognized by the Government or an equivalent qualification;

b) 10 marks for professional qualifications and training – i.e., a higher diploma of a duration of one year or more in the fields of Management, Social Sciences, Auditing etc;

c) 5 marks and 10 marks respectively, for foreign training.

The 1st – 4th Petitioners who were serving as DOCDs and the 5th – 19th Petitioners who were serving as CDO's at the time of the filing of this application, did not possess any of the above qualifications, with the result that the said marking schemes severely affected their promotional prospects. Having made representations to the 1st Respondent and the Provincial Public Service Commission of the Southern Province [the Provincial Public Service Commission] and having faced the selection interview unsuccessfully, the Petitioners filed this application on 21st June 2016 complaining that the allotment of marks for additional educational and professional qualifications is arbitrary, irrational and violative of their fundamental rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution. Leave to proceed for the alleged infringement of the said Articles had been granted on 23rd September 2016.

Background facts

The Petitioners had been appointed as Co-operative Inspectors in the Department of Co-operative Development during the period 1981 – 1988. With the subject of Co-operative Development being devolved to the Provincial Councils pursuant to the enactment of the 13th Amendment to the Constitution, the Petitioners had been appointed, with their consent, as Co-operative Inspectors by the Provincial Public Service Commission. The post

of Co-operative Inspector has subsequently been re-designated as Co-operative Development Officer.

The entry point to the Co-operative Service was as Co-operative Inspector/CDO, with the basic educational qualification required for entry being four passes at the General Certificate of Education (Advanced Level) Examination. There were two promotional grades within the CDO service, with further promotion to the aforementioned post of DOCD and thereafter to the post of ACCD.

The Schemes of Recruitment that prevailed at the time the Petitioners joined the Service in the 1980's as well as the Schemes of Recruitment for the posts of DOCD and ACCD introduced in 1996 provided that promotion from CDO to DOCD and from DOCD to ACCD shall be on seniority and satisfactory service, with satisfactory service being determined on confidential assessment reports. The said Schemes did not require a CDO or a DOCD to obtain any further educational qualifications over and above the aforementioned qualifications at the General Certificate of Education (Advanced Level) Examination in order to be eligible for promotion to the next grade in the CDO service or as DOCD's or ACCD's.

<u>The proposed Schemes of Recruitment</u>

The Respondents state that as a result of the new salary grades introduced by the Public Administration Circular No. 6 of 2006, the necessity had arisen to introduce a new Scheme of Recruitment for each of the above three posts of CDO, DOCD and ACCD and match each of the said posts with the relevant salary grades stipulated in the said Circular. In 2014, the Provincial Public Service Commission had circulated the proposed schemes, with Clause 7.4.4 in each of the Schemes reading as follows:

> "ව්‍යුහගත සම්මුඛ පරීක්ෂණයක ප්‍රතිඵල මත එහිදි ලබාගන්නා ලකුණු වල කුසලතා පිළිවෙල අනුව සුදුසුකම් ලත් අපෙක්ෂකයින් අතුරෙන් බඳවා ගැනීමට අපේක්ෂිත නිලධාරීන් සංඛ්‍යාව බඳවා ගනු ලැබේ"

The marking schemes to which I have already referred to provided *inter alia* that 30 marks shall be allocated for the additional professional and educational qualifications while 60 marks were allocated for seniority, 5 marks for language proficiency and the balance 5 marks for performance at the interview. The Petitioners did not possess any educational qualifications over and above the four passes obtained at the General Certificate of Education (Advanced Level) Examination nor had the Petitioners received any training opportunities, either local or foreign. The proposed marking schemes were therefore clearly to the detriment of the Petitioners.

The Petitioners and the Union to which they belonged to had made representations with regard to the proposed allocation of marks for educational and professional qualifications, and discussions had taken place in that regard with the 1st – 10th Respondents in 2014. The Petitioners claim that at these discussions, they received an assurance that their grievances would be considered. Notwithstanding such assurances, the proposed Schemes of Recruitment had been adopted and thereafter published by the Southern Provincial Council, with the 1st Respondent granting his approval on 19th January 2015. It must be noted at this stage that the Petitioners did not seek to challenge in a Court of law, the said Schemes of Recruitment including the marking schemes attached thereto, soon after its approval by the 1st Respondent, and that this application, filed in June 2016, is the first occasion that the said Schemes of Recruitment have been challenged in Court. Instead, the Petitioners and their Unions had continued to make representations to the 1st Respondent and the Provincial Public Service Commission to exempt the Petitioners from the requirement to possess the aforementioned additional qualifications.

Applications to fill vacancies in the posts of DOCD and ACCD

By letter dated 3rd March 2016, the Provincial Public Service Commission had directed the Commissioner of Co-operative Development to call for applications in terms of the Schemes of Recruitment approved in January 2015, from those who possessed the qualifications set out in the said Schemes, to fill the vacancies that had arisen in the posts of DOCD and ACCD after the introduction of the said Schemes. Applications had

accordingly been called on 15th March 2016 with the closing date for applications being 28th March 2016.

Having submitted their applications, the Petitioners had presented themselves for an interview on 31st May 2016 and 7th June 2016, together with the 12th – 18th Respondents, who, although said to be junior to the Petitioners in service, possessed the additional qualifications stipulated in the impugned marking schemes. While the Petitioners were unsuccessful at the interview, the 12th – 18th Respondents had received appointments as DOCD/ACCD based on their performance at the interview. I must note at this stage that the Respondents have not placed before this Court the results of the interviews or details of the educational and professional qualifications that the 12th – 18th Respondents are said to have possessed which accrued to their advantage and ensured their selection over the Petitioners.

Application to this Court

It is only after participating at the above interviews that the Petitioners invoked the jurisdiction conferred on this Court by Article 126(1) of the Constitution, alleging *inter alia* that the allocation of marks for the aforementioned additional educational and professional qualifications, and that too without any prior intimation is an infringement of the Petitioners' fundamental right to equality before the law and the equal protection of the law enshrined in Article 12(1) of the Constitution, and the freedom to engage in a lawful occupation guaranteed by Article 14(1)(g) of the Constitution.

In addition to the above relief, the Petitioners have also sought the following:

a) Quash the results of the interviews held on 31st May 2016 and 7th June 2016 under the 2015 Schemes of Recruitment and any appointments made consequent to such interviews;

b) Quash the 2015 Schemes of Recruitment for DOCD and ACCD and direct the Provincial Public Service Commission to reformulate new schemes of recruitment without allocating any marks for additional educational and professional qualifications;

c) In the alternative, to direct that the implementation of the marking scheme attached to the said schemes be deferred for a period of five years, thereby affording the Petitioners a reasonable opportunity of acquiring the necessary qualifications.

The basis of the Petitioners case

The basis of the Petitioners case, as presented by the learned Counsel for the Petitioners at the hearing of this application, is three-fold. The first is that the Petitioners had a legitimate expectation at the time they joined the Service way back in the 1980's that no further educational qualifications would be required for their promotions as DOCD/ACCD. The second is that the marking scheme is illogical and arbitrary, in that there is no rational nexus between the scope of work/duties of a DOCD and ACCD and the need to obtain or possess additional educational and professional qualifications. The third is that in any event, the Provincial Public Service Commission ought to have given prior intimation of the proposed amendment, as well as granted a realistic period of time after the introduction of the Schemes of Recruitment to enable the Petitioners the opportunity to acquire the additional qualifications.

I must state at the outset that an employee cannot expect the criteria applicable for promotion that prevailed when he or she joined a particular Service to remain static right throughout his or her career in the Public Service. An employer certainly has a right to introduce new and innovative criteria with a view to improving the quality of the service that it provides to the public and in keeping with the rapid changes taking place in this technological era. However, it is critical to ensure *inter alia* that such changes (a) bear a rational nexus to the object that is sought to be achieved, (b) are implemented with adequate notice to those who would be affected, (c) do not discriminate between persons who are similarly circumstanced, and (d) do not violate the equal protection of the law guaranteed by Article 12(1).

It would perhaps be appropriate to refer to the judgment of this Court in **Guneratne and Others v Sri Lanka Telecom and Others** [(1993) 1 Sri LR 109], where, as in this application, the petitioners complained that the stipulated revised schemes for recruitment afford

more favoured treatment to graduates and that the preferential treatment sought to be given to graduates has no rational basis and hence amounted to discrimination violative of Article 12 (1) . Kulatunga J, having considered the said argument, summarised the applicable position in the following manner:

> "*In the result, I am satisfied that the classification of graduate clerks for preferential treatment under the impugned schemes is unreasonable because it is not based on criteria having a rational relation to the object sought to be achieved namely, the efficient functioning of the Telecommunications Service. If it is desired to give preferential treatment to them in the interest of the service and for utilising their skills, the Corporation may do so on the basis of relevant qualifications,* ***with reasonable notice to those affected*** *and* ***without prejudicing the legitimate expectations of clerks who are on the verge of promotion under the previous schemes****. The identification of relevent qualifications, the preparation of fresh schemes of recruitment and the period of notice to be given are matters for the Corporation to determine, after considering the total effect of such schemes on the officers who are presently in service and the needs of the Corporation*." [emphasis added]

The learned Counsel for the Respondents, while explaining the rationale for the allocation of marks for additional educational and professional qualifications, raised two preliminary objections at the hearing of this application. Although the three arguments presented by the learned Counsel for the Petitioners raise several issues that arise in the preparation of schemes of recruitment and deserve a closer examination upon its merits, I am inclined to first consider the said preliminary objections.

Proceeding with the application is futile

The first objection is that this application is futile, as the impugned appointments of the 12th – 18th Respondents have been cancelled.

The learned Deputy Solicitor General appearing for the 1st – 10th Respondents submitted that Clause 8 of the 2015 Scheme of Recruitment for CDOs makes it mandatory for each

CDO to complete three Efficiency Bar Examinations at the times specified therein, with the 3rd Efficiency Bar Examination having to be completed within five years of being promoted to Grade I of the CDO service. Such a requirement did not exist under the previous schemes. Clause 7.4.2.5 of the 2015 Schemes of Recruitment for DOCDs and ACCDs stipulates that an applicant must have passed the 3rd Efficiency Bar Examination in order to be eligible for promotion to the post of DOCD or ACCD. It must be noted that with the introduction of the new Schemes of Recruitment in 2015, the Petitioners were absorbed to Grade I of the CDO service and that paragraph 4 of the letter informing them of such absorption specifically referred to the fact that the Petitioners must pass all Efficiency Bar Examinations in the CDO service to be eligible for promotion, thus placing the Petitioners on notice of that fact.

It is admitted that the 3rd Efficiency Bar Examination had not been conducted until the interviews were held in June 2016, although the said Schemes required that such examinations be conducted at least once every year. Therefore, neither the 12th – 18th Respondents nor the Petitioners were afforded any opportunity to comply with this requirement, with the result that it was impossible for any of the CDOs in service at that time to be eligible for promotion to the post of DOCD or ACCD.

The learned Deputy Solicitor General, while submitting that none of the three Schemes of Recruitment introduced in 2015 contained any transitional provisions addressing this issue, drew the attention of this Court to Paragraph 15 of the said Schemes which reads as follows:

> "මෙම බඳවා ගැනීමේ පටිපාටියේ විධිවිධාන සලසා නොමැති යම් කරුනක් වෙතොත් ඒ සම්බන්ධයෙන් දකුණු පළාත් රාජ්‍ය සේවා කොමිෂන් සභාව විමසා ආණ්ඩුකාරතුමා විසින් තීරනය කරනු ලැබේ."

It was therefore the position of the learned Deputy Solicitor General that in the absence of any of the applicants having passed the 3rd Efficiency Bar Examination, it was imperative upon the Provincial Public Service Commission to have sought a decision from the 1st Respondent whether an exemption could be granted from the said requirement and/or whether appointments could be made in the aforementioned circumstances,

taking into consideration that the said requirement had only been introduced in 2015 and that no examinations had yet been conducted.

Notwithstanding the fact that none of the CDOs had passed the 3rd Efficiency Bar Examination, and without having obtained a decision of the 1st Respondent, the Provincial Public Service Commission had proceeded to call for applications to fill the vacancies, conducted the interviews and proceeded to appoint the 12th – 18th Respondents to the applicable posts in June/July 2016. After it transpired that none of the applicants had passed the 3rd Efficiency Bar Examination and therefore were not eligible for promotion either as DOCD or ACCD, the promotions of the 12th – 18th Respondents to the posts of DOCD/ACCD based on the results of the aforementioned interviews held in May and June 2016 had been cancelled in December 2016 by the Provincial Public Service Commission with the approval of the 1st Respondent. Fresh applications had been called to fill the vacancies, only after the 3rd Efficiency Bar Examination had been conducted. It must be stated that the 12th – 18th Respondents have challenged the cancellation of their appointments in SC (FR) Application No. 41/2017. That application was taken up for argument together with this application.

It is in the above factual circumstances that the learned Counsel for the Respondents submitted that as the said promotions granted pursuant to the said interviews have been cancelled, the necessity for this Court to make an order quashing the results of the interviews and directing that the Petitioners be appointed to the said posts does not arise. In a separate judgment delivered in SC (FR) Application No. 41/2017, I have held that the cancellation of the promotions granted to the 12th – 18th Respondents is not arbitrary. I am therefore in agreement with the learned Counsel for the Respondents that the Petitioners are not entitled to the relief claimed by them with regard to the cancellation of the interviews and the subsequent appointments. However, the matter does not end there as the Petitioners are also challenging the said Schemes and in particular the marking scheme attached thereto. Hence, I am of the view that the cancellation of the results of the interviews and the appointments does not render futile the entire application nor does it prevent this Court from considering whether the marking scheme

attached to the said Schemes of Recruitment infringes the fundamental rights of the Petitioners.

Application is time barred

The second preliminary objection that was raised is that this application has been filed outside the one-month time period stipulated in Article 126(2) of the Constitution and is liable to be rejected *in limine* as this Court lacks the jurisdiction to hear and determine this matter.

Article 126(2) of the Constitution stipulates that, "*Where any person alleges that any such fundamental right or language right relating to such person* ***has been infringed*** *or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf,* ***within one month thereof****, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court …*" [emphasis added].

In **Gamaethige v Siriwardena** [(1988) 1 Sri LR 384] Mark Fernando, J stated that:

> "*[T]he remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed time, and if not so availed of, the remedy ceases to be available."*
>
> *[…]*
>
> *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2):* ***Time begins to run when the infringement takes place****;* ***if knowledge on the part of the petitioner is required*** *(e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory),* ***time begins to run only when both infringement and knowledge exist****. (Siriwardena v. Rodrigo (1986) 1 Sri LR 384).* ***The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit****. While the time limit is mandatory, in exceptional cases, on the application of the principle*

lex non cogit ad impossibilia, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time." [emphasis added]

[…]

"*The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man–made disaster, would have to be considered in an appropriate case when it arises*.".

The imposition of a time limit in Article 126(2) demonstrates with certainty the need for the prompt invocation of the jurisdiction of this Court – *vide* **Kumarasiri and Others v Bandara and Others** [SC (FR) Application No. 277/2009; SC minutes of 28th March 2014]. The consequence of not complying with this requirement is that a petition which is filed after the expiry of the period of one month from the time when the alleged infringement occurred, would be time-barred, thus depriving this Court of jurisdiction to entertain and/or of proceeding further with the application.

In **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [SC (FR) Application No. 206/2008; SC minutes of 9th December 2016] Prasanna Jayawardena, PC, J considered a long line of jurisprudence on this matter, including **Edirisuriya v Navaratnam and Others** [1985 (1) Sri LR 100] and held as follows:

"The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution."

[…]

"[T]he general rule is clearly that, this Court will regard compliance with the 'one month limit' stipulated by Article 126(2) of the Constitution as being mandatory and

refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed ***after the expiry of one month from the occurrence of the alleged infringement*** *or imminent infringement"* [emphasis added].

While the infringement complained of in this application revolves around the marking scheme and arose upon the publication of the Schemes of Recruitment on 19th January 2015, the objection that this application is time-barred revolves around two principal events. The first is of course the publication of the 2015 Schemes of Recruitment, and the events that preceded and followed its approval and publication. The second is the notices dated 15th March 2016 and 1st March 2016 calling for applications to fill the vacancies that existed in the posts of DOCD and ACCD, respectively and which referred to the fact that applications will be assessed in accordance with the 2015 Schemes of Recruitment.

<u>One month from the date of publication of the SOR</u>

The need to introduce new Schemes of Recruitment can be traced back to the introduction of Public Administration Circular No. 6/2006 in terms of which the salaries of public servants were re-structured based on the Budget proposals of 2006. In 2010, those in the CDO, DOCD and ACCD services were categorised as Management Assistants (Supervisory), Management Assistants (Supra Grade) and Executive Grade, respectively, and placed on the corresponding salary scales of MN3-2006A, MN7-2006A and SL1-2006. It is the position of the Respondents that (a) the Petitioners were placed in the said salary scales in 2010 and were thereafter paid according to the new salary structure set out in the said Circular; (b) the categorization of DOCDs and ACCDs in terms of the said Circular required those being appointed to possess the qualifications referred to in the marking scheme in order to be promoted; and (c) the necessity had therefore arisen to prepare new schemes of recruitment to address the above. I must however state that the Respondents have not referred to any specific provisions of the said Circular in support of the matters set out in (b) above.

Discussions to amend the schemes of recruitment had been initiated in 2012, with the relevant Union of which the Petitioners were members being apprised of the amendments that were to be effected. The fact that the Petitioners were gravely concerned that the proposed introduction of the requirement to possess additional educational and professional qualifications would affect their promotional prospects is evident from the representations made on their behalf to the 1st Respondent and the Provincial Public Service Commission by letters dated 21st July 2014 and 28th November 2014. I have examined these letters and it is clear that while the Petitioners had no objection to the schemes of recruitment being amended, they had sought an interim period prior to the implementation of the proposed schemes to enable them to obtain the required qualifications. In spite of these representations, the 1st Respondent had proceeded to approve the new Schemes of Recruitment on 19th January 2015.

Kulatunga, J in **Guneratne and Others v Sri Lanka Telecom and Others** [supra; at page 115] explains the criteria for deciding the stage at which a scheme of recruitment must be challenged as follows:

> "… *If a scheme is prima facie non- discriminatory, it cannot be challenged in limine on the ground of possible discrimination in its application. In such a case, relief may be sought only upon the occurrence of discrimination. However, if a scheme, such as the one before us, affecting promotions in an existing service is inherently discriminatory,* ***the right to relief accrues immediately upon the adoption of such scheme*** *and prospective candidates for promotion under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an infringement or an imminent infringement of their rights under Article 12 (1).*" [emphasis added]

The Petitioners come within the latter category and were therefore required to challenge the Schemes of Recruitment within one month of 19th January 2015, which admittedly the Petitioners did not do. However, being disturbed by the fact that the Schemes had been approved in spite of their objections, by letter dated 13th February 2015 the Petitioners and their Union had sought an audience with the 1st Respondent to discuss

this issue. The fact that the 1st Respondent undertook to consider the grievances of the Petitioners and until then to place on hold the implementation of the said Schemes, is borne out by the minutes of the meeting that was held between the 1st Respondent and the 9th and 15th Petitioners on 26th February 2015, and the letters dated 4th June 2015 and 2nd July 2015 that followed the said meeting.

It is in this background that the Petitioners claim that (a) they were assured that the said Schemes would not be made applicable in a manner that would affect their career prospects, and (b) the necessity for them to mount a legal challenge at that stage did not therefore arise. The 1st Respondent has not filed an affidavit before this Court explaining the steps that he took in this regard pursuant to the said meeting and whether the Petitioners were informed at any stage that their representations have been rejected. I have already referred to **Gamaethige v Siriwardena** [supra] where Mark Fernando, J stated that the pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While I am in full agreement with that view, I am also of the view that the question of time bar must not be applied mechanically and is an issue that would depend on the circumstances of each case. What has taken place in this application can be distinguished on the basis that the Petitioners received an assurance that their grievances would be considered, and until then, the scheme would not be implemented. The failure on the part of the Petitioner to come to Court within one month of the publication of the said schemes was therefore not due to any lapse on their part.

In **Alawala v The Inspector General of Police** [SC (FR) 219/2015; SC minutes of 15th February 2016], Aluwihare, PC, J stated that, "*Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application where the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner*."

In **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [supra], Jayawardena, PC, J went on to state as follows:

> *"However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires* ***Article 126(2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances*** *which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the* ***Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier****"* [emphasis added].

In these circumstances, the explanation of the Petitioners as to why they did not challenge the said Schemes of Recruitment as soon as they were published or as soon as the alleged infringement took place is accepted, with the result that this application cannot be rejected due to the failure to file action within one month of the approval and publication of the 2015 Schemes of Recruitment on 19th January 2015.

One month from the date of applications being called

The second event that relates to the objection that this application is time barred revolves around the letters dated 15th March 2016 and 1st March 2016, by which the Department of Co-operative Development called for applications to fill the vacancies in the post of DOCD and ACCD, respectively. While the first paragraph of the letter dated 15th March 2016 states that applications are being called in terms of the Scheme of Recruitment dated 19th January 2015, the second paragraph of both letters specifically state that educational and professional qualifications will be considered as special qualifications. This notice thus serves as the intimation by the Respondents that the representations made on behalf of the Petitioners have been disregarded and that the Provincial Public Service Commission would proceed to apply the 2015 Schemes of Recruitment when promoting officers to the post of DOCD/ACCD. This application should therefore have been filed within one month of 15th March 2016 and 1st March 2016, which is the date on

which the Petitioners had full knowledge that the 2015 Schemes of Recruitment would apply in the promotion of officers to the posts of DOCDs and ACCDs. Instead of invoking the jurisdiction of this Court within one month of the said letters, the Petitioners submitted their applications and faced the interviews on 31st May 2016 and 7th June 2016. Probably having become aware of their non-selection, the Petitioners invoked the jurisdiction of this Court on 21st June 2016.

A similar situation arose in **Kumarasiri and Others v Bandara and Others** [supra] where Sripavan, J (as he then was) observed as follows:

> "*It is necessary to state at the outset that I am not inclined to favour the conduct of the Petitioners who participated at the interview without any protest, fully availed themselves to the interview process and then when they observed that selection had gone against them, came forward to challenge the addendum P6 [N.B. this was the amended marking scheme] on the ground of unknown disability on their part. The participation, without challenging the addendum P6 with full knowledge of all the circumstances, preclude the Petitioners from objecting to the selection process embodied in P1 and P6 by an application filed seven months thereafter, namely, on 07.04.2009. The conferment of exclusive jurisdiction in terms of Article 126(1) and the imposition of a time-limit in Article 126(2) demonstrate with certainty the need for the prompt invocation of the jurisdiction of this Court. The addendum embodied in P6 therefore cannot be challenged in the proceedings.*"

The explanation offered by the Petitioners is that even at the time of calling for interviews, the 2015 Schemes of Recruitment were under consideration and therefore the Petitioners faced the interview on 31st May 2016 and 7th June 2016 on the understanding that the said Schemes would not be applied to them, and that it was only at the interview that they got to know that the said Schemes would be applied. This explanation cannot however be accepted as the notice calling for applications specifically provided that selections would be made in terms of the 2015 Schemes of Recruitment in respect of vacancies that had arisen after the introduction of the said Scheme. I am therefore of the

view that this application has been made outside the time period stipulated in Article 126(2) of the Constitution, thus depriving this Court of the jurisdiction to hear this matter.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application made in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Maligawa Tours and Exports (PVT) Ltd.
No. 19, Race Course Avenue,
Colombo 07.

PETITIONER

SC APPLICATION NO.
SC (FR) 158/2013

Vs.

1. The Land Reform Commission
No. C82, Hector Kobbekaduwa Mawatha,
Colombo 07.

2. L.R.Sumanasena,
Director,
District Land Reform Board,
I.R.D.P. Building,
Udapussella Road,
Nuwaraeliya.

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

RESPONDENTS

BEFORE: Hon. Buwaneka Aluwihare, PC, J.
Hon. Vijith K. Malalgoda, PC, J.
Hon. Janak De Silva, J.

COUNSEL: Uditha Egalahewa, PC with Amaranath Fernando for the Petitioner.
Dr. Sunil Cooray with Sudarshani Cooray for the 1st and 2nd Respondent.
Ms. Indumini Radeny, SC for the Hon. Attorney-General.

ARGUED ON: 07.09.2022.

WRITTEN SUBMISSIONS: 07.06.2017
05.06.2017

DECIDED ON: 03.08.2023

Judgement

Aluwihare, PC, J.,

In this matter, the court granted leave to proceed for the alleged violation of the Petitioner's fundamental right enshrined in Article 12(1) of the Constitution. In addition to a declaration that the Petitioner's fundamental rights guaranteed under the said Article had been violated by the Respondents, Petitioners also sought by way of further relief, that the letter issued by the Chairman Land Reform Commission dated 22nd April 2013[X5] be declared null and void and to quash the letter dated 29.04.2013, issued by the Director of the District Land Reform Board (Nuwara Eliya) [X7].

Background facts

The Petitioner contends that the Petitioner is the lawful owner of two parcels of land called 'Madalanda Estate' and 'Keenagaskebella'.

On 22nd April 2013, the Chairman of the Land Reform Commission, the 1st Respondent (hereinafter referred to as the 'LRC'), by way of a letter (marked and produced as 'X5') requested Deshamanya Siva Obeyesekere to handover several lands to the LRC. Listed among the properties were 'Medalanda Estate in the Colombo District' [listed under 'c'] and 'Keenagaskebella in Nuwara-Eliya [listed under 'e']. The ownership of these two lands, however, had been transferred to the Petitioner [Maligawa Tours and Export (PVT) Ltd] way back in 1982 and 1972 respectively. In the case of the land Keenagaskebella, the transfer had been made more than 41 years before the letter X5. It was submitted that the Petitioner has enjoyed both the ownership, and possession and further, utilised the two properties for various purposes since. It was revealed that, prior to receiving the letter X5, Deshamanya Siva Obeyesekere also had received several letters relating to some of her other properties, from the LRC, and had tendered an appeal to the 2nd Respondent [Director, District Land Reform Board, Nuwara-Eliya]. This letter of appeal (marked 'X6') had been copied to the then Legal Consultant for the LRC, Mahanama Thilekaratne.

Having been made aware of the attempts to take over the said properties, Chantal Obeyesekere (daughter of Deshamanya Siva Obeyesekere and as well as a Director of the Petitioner company) had met with Mahanama Thilekaratne to inquire about the matter and voice its grievance over the attempted takeover of lands which were lawfully conveyed over 30 years before. When the file pertaining to the lands was called for, it was observed that the file (bearing No. 2293) bore the endorsement "file closed". Having been apprised of the situation, Mahanama Thilekaratne had made an endorsement and directed the conduct of an inquiry. The letter marked X6 contains the hand-written endorsement and directions dated 03.04.2013; and reads thus: "*I have studied the files pertaining to this and the Director has no right or authority to intimidate persons like this. I recommend to have a full inquiry into*

this matter. Inform the Director not to take any action until the most essential inquiry is over."

Despite the directions of the legal Consultant Tillakaratne made on the 3rd April 2013, no inquiry was conducted, X5 was issued on the 22nd April (when for the first time the lands 'Medalanda' and 'Keenagaskebella' was included) and on the 29th April 2013, the 2nd Respondent informed Deshamanya Siva Obeyesekere by letter (marked 'X7') that she is required to handover the said lands, failing which, the lands will be taken over. Thereafter, fearing an imminent infringement of its Fundamental Rights guaranteed by Article 12(1), the Petitioner invoked the jurisdiction of this court. When this matter was supported on 7th September 2022, this Court, in addition to granting leave to proceed as referred to earlier, granted Interim relief, prohibiting the Respondents from taking any further action in pursuance of re-possessing the lands which form the subject of the dispute, as directed by the letter dated 29th April 2013 ('X7'). What follows is a narration of the facts in detail, as they relate to each property.

The two parcels of land

(i) The Medalanda Estate

The Medalanda Estate, more fully described in Plan No. 5453/L.R.C. CO 2317 dated 20th January 1980 was vested in the 1st Respondent by the operation of the Land Reform Law. Thereafter, **the LRC [the 1st Respondent] transferred the estate to Chantal Hiranthi Obeyesekere** (daughter of Mr. J.P. Obeysekera) **by Deed bearing No. 5619 dated 6th October 1982.** [X2(a)] This transfer was done for the purpose of 'agriculture or animal husbandry' by and under virtue of Section 22(1)(a) of the Land Reform Law. Subsequently, the Petitioner company obtained ownership of the estate when Chantal Hiranthi Obeyesekere transferred ownership to the Petitioner company by way of Deed bearing No. 5744 dated 17th June 1983. The Respondents, however, contend that this transfer was bad in law as it is an alienation deemed null and void as per Section 13 of the Land Reform Law.

On 22nd April 2013, more than 30 years after the conveyance, the Chairman of the LRC by the letter ('X5') had written to Deshamanya Siva Obeyesekere (widow of the late Mr. J.P. Obeyesekere) stating *inter alia* that "some land which has to be handed over to the LRC, has not been handed over yet". Among the lands listed for handover is the "Medalanda Estate at Colombo District" of extent 22A.0R.22P.

(ii) Keenagaskebella

Keenagaskebella, also known as 'Keena House' is located in the Nuwara Eliya District and was initially owned by the late J. P Obeysekera. By way of Deed of Transfer bearing No. 403 dated 5th February 1972, J.P. Obeysekera transferred the land to the Petitioner for shares of the Petitioner Company being the consideration. The Petitioner contends that this land was not declared as agricultural land since it was used by the company for tourism purposes, as a hotel project. A letter from the Ceylon Tourist Board addressed to the Director of the Petitioner company dated 12th October 1973 confirms the existence of a 'Guesthouse' at premises known as 'Keena House' in Nuwara Eliya, and therefore buttresses the above contention. As with Medalanda, Keenagaskebella is also not mentioned in any of the correspondence between the parties involved prior to the letter requesting handover on 22nd April 2013 [X5] which states that "Keenagaskebella Nuwaraeliya District Plan No. 4568 Lot A" of extent 7A.1R.08P must be handed over to the LRC. What is significant is that J.P. Obeyesekere by a letter dated 20th November 1972, put the LRC on notice that he would **not be declaring two properties** in Form (1) [presumably the prescribed declaration form in terms of the Land Reform Law] as they do not constitute Agricultural Land. One is premises No.19, Race Course Avenue and the other is Keena House Hotel and Premises which had received project approval from the Tourist Board [X8]. It appears that for a period of over 30 years the LRC had not disputed the position taken by J.P. Obeyesekere.

Violation of Article 12(1)

1) It is now settled in our Fundamental Rights Jurisprudence that Article 12(1) protects persons from any unlawful, arbitrary or mala fide executive or administrative actions or omissions and guarantees natural justice and legitimate expectations [vide ***Sampanthan vs. Hon. Attorney General and Others*** **SC. FR 351/2018**]. Thus, in order to determine whether there has been a violation and/or an imminent infringement, the submissions made by learned Counsel for the respective parties along with the facts and the applicable legal provisions, required to be analysed under each of the impugned actions, in relation to the procedures and remedies prescribed by law as they relate to each property and the interests of the Petitioner.

2) The Land Reform Law of 1972 was introduced with the aim of addressing longstanding inequalities in land ownership and use, in the country. Prior to the introduction of the law, the majority of agricultural land in Sri Lanka was owned by a small number of wealthy individuals and corporations, while the majority of the population lived in poverty and had limited access to land. The law sought to redistribute land ownership and promote a more equitable distribution of land by placing a limit on the amount of land that individuals and corporations could own. It also established a system for the acquisition and redistribution of excess land to landless peasants and small farmers and sought to promote more sustainable land use practices by encouraging the cultivation of crops. Section 2 of the Land Reform Law states that Purposes of the law are:

"(a) to ensure that no person shall own agricultural land in excess of the ceiling; and

(b) to take over agricultural land owned by any person in excess of the ceiling and to utilize such land in a manner which will result in an increase in its productivity and in the employment generated from such land."

3) Among the powers assigned to the LRC by Section 44 of the Land Reform Law

are the powers to "*(a) acquire, hold, take or give on lease or hire, exchange, mortgage, pledge, sell or otherwise dispose of, any movable or immovable property*", *"(b) carry out investigations, surveys and record data concerning and relating to any agricultural land and call for returns in the prescribed form concerning and relating to agricultural land; and encourage aspects of land*" and "*(f) call for and receive such documents relating to title, valuation, surveys and plans of agricultural land as may be necessary for carrying out such objects*". Broadly, it is acts committed in the pursuance of these powers which are challenged in these proceedings.

4) It must first be mentioned that all correspondence relating to the handover of the said lands has been addressed to Deshamanya Siva Obeysekera, and not to the Petitioner company. The Petitioner company canvassed this application to prevent the possession or seizure of lands owned by the Petitioner, which are namely Medalanda and Keenagaskebella.

5) With regard to the Medalanda Estate, the final correspondence appears to be the Appeal made [in terms of Section 13(3) of the LR Law] to the Minister, by J. P. Obeyesekere way back in 1974, against an order made under Section 13(2) of the said Law[X5(a) dated 5th July 1974]. The appeal states that 'Medalanda' situated in the Nittambuwa Division in Colombo in extent 22A.0R.02P, which had been transferred to Maligawa Tours & Exports Ltd in 1972 was declared null and void by the LRC. No subsequent document, order or letter refers to the Estate, and there is no indication of the consideration of J.P Obeyesekere's appeal until 22nd April 2013. There is no material whatsoever to indicate that the appeal had been considered when, more than 30 years after the conveyance, and almost 30 years after the appeal was made, the Chairman of the LRC by way of letter ('X5') written to Deshamanya Siva Obeyesekere, requested the handover of the Estate.

6) It seems to me that any dispute over the ownership of Medalanda predating the sale by the LRC [1st Respondent] to Chantal Hiranthi Obeysekera in 1982

is irrelevant for the purposes of determining the *vires* of the impugned acts, as the Obeyesekere's and the Petitioner company accepted the LRC's claim of ownership when they each purchased the land. It is the Respondents' submission that the subsequent transfer of ownership of Medalanda to the Petitioner is illegal as it was executed in violation of Section 22(1)(a) of the Land Reform Law. They contend that as Medalanda was initially sold to Chantal Hiranthi Obeysekera under Section 22(1)(a) for the purposes of 'agriculture or animal husbandry', the subsequent sale of Medalanda to the Petitioner; a company which does not engage in agriculture or animal husbandry, is illegal. Section 24(2) of the Land Reform Law provides the LRC with the authority to cancel such initial alienation where "*any term or condition subject to which agricultural land is alienated to any person by the Commission is not complied with.*"

7) Section 24(2) prescribes the process of cancellation of such alienation as follows: "*the Commission may by endorsement on a certified copy of the instrument of alienation, cancel such alienation, and thereupon such alienation shall be determined accordingly, and such agricultural land shall re-vest in the Commission…*". The letter addressed to Deshamanya Siva Obeyesekere requesting the handover of these lands [X5] notes that the alienation of Medalanda is null and void by virtue of Section 13. Section 13(1) requires persons alienating land held in excess of the ceiling (50 acres) on or after 29th May 1971 to report such alienation to the Commission. Contrary to the written submissions dated 5th June 2017, Section 13 does not require alienors to seek the LRC's "permission". Instead, Section 13(2) states that if the transfers appear to have been made for the purpose of 'defeating the purposes' of the Land Reform Law, the *"…Commission may by order made under its hand declare that such alienation is null and void. Every such order shall be sent by registered post to the alienor and alienee of the agricultural land to which that order relates.*"

8) Accordingly, if the alienation of Medalanda to Maligawa Tours was contrary

to the terms of the initial alienation to Chantal H. Obeyesekere (as contended by the Respondents), the LRC ought to have acted under Section 24(2) of the Land Reform Law, in the manner prescribed therein. There is no material before this court which suggests that such a course of action was taken. Accordingly, it can be concluded that the alienation has not been cancelled as per Section 24(2). The only mention of Medalanda after 1983 is in the LRC's letter in 2013, and that too denotes the alienation of Medalanda to be *"Sec 13 null and void"*. It is evident, therefore, that the only appropriate remedy for an alienation made contrary to terms of transfers made under Section 22(1)(a) of the Land Reform Law, which is an 'order of cancellation' as prescribed by Section 24(2) of the said Law, which course of action the LRC has not carried out for over 30 years.

9) It is possible that the conflation arose from the Appeal made to the Minister by J. P. Obeyesekere against an order made under Section 13(2) of the Land Reform Law in 1974 (X5(a)). However, as stated before, the LRC cannot claim the *vires* of its actions based on this document as the LRC itself transferred the estate to Chantal Hiranthi Obeysekera (daughter of J.P. Obeysekera) by Deed bearing No. 5619 dated 6th October 1982. Therefore, in failing to resort to the appropriate remedy over three decades, and subsequently attempting to possess the lands now owned by the Petitioner, the LRC has not acted within the confines of the procedures prescribed by the Land Reform Law.

10) The Petitioner acquired ownership of Keenagaskebella by virtue of Deed No. 403 dated 5th February 1972, wherein J. P. Obeyesekere transferred the property to the Petitioner. The Petitioner submits that the Petitioner was not obliged to declare the land as it was not agricultural land and was used for tourist projects. Additionally, the Petitioner notes that the fact that the land is being used entirely for tourist projects was informed to the LRC as far back as 1972 (letter marked 'X8'). Furthermore, the letter from the Ceylon Tourist Board addressed to the Director of the Petitioner company dated 12th October 1973 (marked 'X9') confirms the existence of a 'Guesthouse at premises

known as 'Keena House' in Nuwara Eliya, and therefore affirms the above contention. Finally, the Petitioner notes that the appeal tendered by Mr. J. P. in 1974 (marked and produced as 'X5(a)'), dated 5th July 1974, does not list 'Keenagaskebella' as a land whose alienation was ordered null and void as per Section 13, and contends that this is further evidence of the fact that there was no dispute with regards to the legality of the alienation of Keenagaskebella. I also wish to observe that the factual inaccuracy of the letter X5. X5 refers to Keenagaskebella as; "Keenagaskebella Nuwaraeliya District **Plan No. 4568** Lot A". As per the Deed of Transfer (X3(a)) in its Schedule the said land is described as a land depicted in **Plan No. 4565**. There is no mention of a 'Plan No. 4568' in any of the related documents submitted to court besides X5. It would appear therefore that the X5 was erroneous in fact too, as it relates to Keenagaskebella.

11) It was the submission of the Respondents' that land holders cannot be the arbiter of whether or not the lands held by them are agricultural lands. And that determination has to be made by the LRC alone. Accordingly, they contend that not declaring all lands held in excess of the ceiling would be an offence as per Section 18(5) of the Land Reform Law [hereinafter referred to as 'the Law"]. They further submit that the letters marked 'X8' and 'X9' which the Petitioner relies on to substantiate the contention that Keenagaskebella is used for tourism purposes cannot be taken to confirm the position that Keenagaskebella should not have been declared because it was not used for agricultural purposes as "the Land Reform Law does not in any way grant lands for hotel projects" (vide written submission dated 5th June 2017).

12) It appears to me that the submissions of the parties address a fundamental question regarding the Land Reform Law; whether *all* lands held in excess of the ceiling must be declared, and whether the LRC is permitted by law from considering utilization *all* such lands for the purposes of the Land Reform Law, even if the said lands bear no

relevance or use to agriculture. To that effect, it was submitted by the Respondents [written submission dated 5th June 2017] that "*All lands over 50 acres comes by operation of law to the LRC. Whether it is agricultural or not is a decision to be taken by the LRC and not by an individual*". It would be pertinent, at this stage, to examine the process by which owners of agricultural land may be allowed to retain certain portions of such land. As per Section 3(2) of the Land Reform Law, upon the law coming into force, by operation of Law, any agricultural land owned by any person in excess of the ceiling was deemed to vest in the LRC and such person is deemed to be a statutory lessee of the LRC. This deeming provision is followed by Section 18, which mandates that such person should make a "statutory declaration", in the prescribed form of the total extent of the agricultural land so held by him on such lease. Finally, as per Section 19, the LRC may make a "statutory determination", specifying the portion or portions of the agricultural land owned by the statutory lessee which he shall be allowed to retain, and publish such determination in the Gazette. It is crucial to note that Section 3(2) only contemplates the declaration of **agricultural land** held in excess of the ceiling. The Petitioner's contention rests on the argument that Keenagaskebella, also known as Keena Cottage, is not agricultural land, and therefore does not have to be declared as per Section 18 because it did not initially vest in the LRC. The Petitioner contends that 'Keena Cottage' is found in the Nuwara Eliya Town, within the Municipal Council limits and has been used, and continues to be used for the operation of a Tourist Hotel, and that accordingly, the land cannot be used for agricultural purposes.

13) To determine what constitutes agricultural land, I have reproduced the interpretation provided in Section 66 of the Land Reform Law:

"agricultural land" means land used or capable of being used for agriculture within the meaning given in this Law and shall include

private lands, lands alienated under the Land Development Ordinance or the State Lands Ordinance or any other enactment and includes also things attached to the earth or permanently fastened to anything attached to the earth but shall exclude

(a) any cultivated agricultural land owned or possessed by a public company on May 29, 1971, so long and so long only as such land continues to be so owned or possessed by such company;

(b) any such land which was viharagam or devalagam land on May 29, 1971, so long and so long only as such land continues to be so owned or possessed;

(c) any such land which was owned or possessed by a religious institution on May 29, 1971, so long and so long only as such land continues to be so owned or possessed by such religious institution;

(d) any such land which on May 29, 1971, constituted a charitable trust as defined in the Trusts Ordinance or a Muslim charitable trust or wakf as defined in the Muslim Mosques and Charitable Trusts or Wakfs Act, so long and so long only as such land continues to be so owned or possessed as such trust;

(e) any such land held in trust on May 29, 1971, under the Buddhist Temporalities Ordinance so long and so long only as such land is held in trust under that Ordinance

It is evident that none of the exclusions apply in this case. What is of vital relevance in the above interpretation is the phrase "*means land used or capable of being used for agriculture".* This interpretation lends credence to the contention that only land which could be used for agricultural purposes is required to be declared by the owners. The Petitioner, in its written submission dated 7th June 2017 drew reference to the interpretation provided for the word 'agriculture' in Section 66 of the Land Reform Law.

" agriculture " includes

(i) the growing of rice, all field crops, spices and condiments, industrial crops, vegetables, fruits, flowers, pasture and fodder;
(ii) dairy farming, livestock-rearing and breeding;
(iii) plant and fruit nurseries

14) Accordingly, it would be a misconception to state that the Land Reform Law requires owners to make a declaration in relation to *all* lands held in excess of the ceiling. One must be conscious of the fact that the drafters of this law, in their wisdom, provided a comprehensive interpretation of what may be identified as 'agricultural land' and laid the process of Land Reform in a manner that requires owners of land to make declarations as per that interpretation. Where landowners fail to act per the interpretation in an attempt to defeat the Law, the drafters provided the LRC with the authority to take remedial action under Section 18(5) of the Law, – which holds non-declaration of agricultural land to be an offence read with Section 63 of the Law, which provides the procedure for conviction upon commission of the offence. While I find it hard to agree with the Petitioner's contention that the land cannot be used for the growing of any crops or farming or planting, the submissions of the Respondents warrant questioning as to why the realization that the said land in question could be used for agricultural purposes did not arise for over 30 years. The Respondents have provided no reason for their inaction from 1972 to 2013, or as to why they are attempting to take over and possess lands alienated by transactions which were allegedly known to have been 'improper' 30 years ago.

15) It appears that the LRC had only got activated after all these years, because of the petitions received, criticising the LRC for their inaction on their part. In a letter [X4(h)] addressed to Deshamanya Siva Obeyesekere, the Chairman of the LRC states *"there are ample petitions against you stating that you are enjoying an extent more than approved by the Commission…"* and the letter goes on to state; "…*The*

Commission also under strong criticism for not taking legal action against you…". Any action on the part of the LRC should be based on the law and merely not on public petitions. The LRC is free to take action based on such complaints only after the proper inquiries are conducted and action is merited under the Land Reform Law, which does not appear to be the case in this instance.

16) Furthermore, the Respondents did not afford the Petitioner any opportunity to be heard and voice its grievances even after repeatedly being informed by Deshamanya Siva Obeyesekere that the Petitioner company was the lawful owner of the said lands. It must also be noted that the Legal Consultant to the LRC, Mahanama Thilekaratne directed the LRC to conduct an inquiry into the matter after observing that the particular file, which had been 'closed' for over 30 years was re-opened and action was pursued under it. This is evident in the letter marked X6. Neglecting the said direction and its subsequent conduct therefore wholly contravenes Principles of Natural Justice. It is regrettable that an agency charged with an administrative task as significant as the vesting and conveying of private property is seemingly negligent, indifferent and unwilling to abide by the principle of *audi alteram partem ,* a core tenet of administrative law.

17) As stated before, Article 12(1) protects all persons from arbitrary executive or administrative action. The petitioner company, being a duly incorporated entity, is a juristic person who may claim the protection of this court .[vide ***Sunway International (Pvt) Ltd & Another vs. Airport & Aviation Services (Sri Lanka) Limited & Others*, SC. FR 147/2017**]. A person's Fundamental Right to equal protection of the law is infringed when public authorities fail to treat such person as mandated by law. It is apparent that the Respondents have failed to treat the Petitioner as mandated by the law and are now attempting to indirectly seize or possess Petitioner's lands (vide letter marked 'X5') without following the

remedies prescribed by law or basic procedures which ensure administrative justice. In conclusion, I hold that the 1st Respondent would violate the Petitioner's Fundamental Right to Equal Protection of the Law guaranteed under Article 12(1) of the Constitution if it acted upon listings (c) and (e) of the letter marked 'X5' dated 22nd April 2013.

18) Additionally, I wish to note that while it does not bear relevance to the principal merits of this case, it would be reasonable, upon examination of the correspondence between the 2nd Respondent and Deshamanya Siva Obeyesekere (letters marked 'X4(a) to 'X4(g)), to draw the conclusion that the LRC exhibited manifest refusal to consider the merits of Deshamanya Siva Obeyesekere's plea relating to the impugned actions, and an utter lack of professionalism. In some consecutive letters, certain paragraphs appear to have been reproduced and replicated without consideration of the matters pleaded in the prior correspondence. Such conduct by officers holding public office, exercising powers and responsibilities conferred on them by law for the benefit of the People, warrants serious note.

19) The present Application by the Petitioner, Maligawa Tours and Exports (PVT) Ltd is in relation to the lands referred to in listings (c) and (e) of the letter dated 22nd April 2013 addressed to Deshamanya Siva Obeyesekere [X5] by the Chairman LRC.

Conclusions by the Court

For the reasons enumerated above, I declare that an imminent infringement of the Fundamental Rights of the Petitioner guaranteed under Article 12(1) of the Constitution has been established by the Petitioner. Until such time an inquiry is held affording an opportunity to the Petitioner to make representations, the 1st Respondent is directed not to resort to appropriate procedures laid down in the Land Reform

Law in relation to listings (c) and (e) referred to, under paragraph 10, on page 2 of the said letter marked 'X5' dated 22nd April 2013 [which are impugned in these proceedings]. The said listings ['c' and 'e'] are reproduced below;

(c) Medalanda Estate at Colombo District - 22A.0R.22P

(e) Keenagaskebella Nuwaraeliya District Plan No 4568 Lot A -7A 1R 08P

In the circumstances of this case, I order no costs.

Application allowed

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH MALAGODA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Articles 127 and 128 of the Constitution read with section 5(c) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006, for Leave to Appeal against the judgment dated 24/07/2017 of the Civil Appellate High Court of the Southern Province holden in Tangalle in case No. WP/HCCA/ 04/2016

SC Appeal 27/2018
S.C.(HC) CALA No.404/17
SP/HCCA/TA/RA/04/2016
DC Hambanthota Case No.281/P

Dayaratne Jayasuriya,
Debarawewa,
Tissamaharamaya

Plaintiff

Vs.

1. Warusha Hennadige Heen Nona (deceased)
1A. Indralatha Irene Jayasuriya
Both of Debarawewa, Tissamaharamaya

2. Gamini Jayasruiya (deceased)
Debarawewa, Tissamaharamaya
2A. Lekam Mudiyanselage Chandrawathi

3. Premalatha Jayasuriya

4. Indralatha Irene Jayasuriya

5. Chandraseeli Jayasuriya
All of Debarawewa,
Tissamaharamaya

6. A.H. Misinona (Deceased)
"Paradise Cafe"
Debarawewa, Tissamaharamaya

6A. Dayananda Jayasuriya,
Debarawewa, Tissamaharamaya

7. Dayananda Jayasuriya,
Debarawewa, Tissamaharamaya

Defendants

AND BETWEEN

Buddhika Wickramasuriya,
Coranel's Land,
Debarawewa, Tissamaharamaya

Petitioner

Vs.

Premalatha Jayasuriya,
Debarawewa, Tissamaharamaya

3rd Defendant/Respondent

AND BETWEEN

Premalatha Jayasuriya,
Debarawewa, Tissamaharamaya

3rd Defendant/ Respondent/ Petitioner

Vs.

Buddhika Wickramasuriya,
Coranel's Land,
Debarawewa, Tissamaharamaya

Petitioner/Respondent

AND NOW BETWEEN

Premalatha Jayasuriya,
Debarawewa, Tissamaharamaya

3rd Defendant/ Respondent/ Petitioner/ Appellant

Vs.

Buddhika Wickramasuriya,
Coranel's Land,
Debarawewa, Tissamaharamaya

Petitioner/Respondent/Respondent

Before: B.P. Aluwihare PC, J
Priyantha Jayawardena PC, J
V. K. Malalgoda PC, J

Counsel: W. Dayaratne, PC with Ms. R. Jayawardena for the 3rd defendant- respondent-petitioner- appellant
Sanath Vidanapathirana with Shihan Ananda and Amith Weerasekara for the petitioner- respondent- respondent.

Argued on: 12th December, 2019

Decided on: 9th August, 2023

Priyantha Jayawardena PC, J

Facts of the case

This appeal is in respect of the judgment of the Provincial High Court of the Southern Province dated 24th of July, 2017 (exercising civil appellate jurisdiction) (hereinafter referred to as the "High Court"), where it was held that after the final decree is entered in a partition action, a person who had derived a contingent interest to the corpus of a partition action is entitled in law to execute a writ to obtain possession of his entitlement under the Partition Law, No.21 of 1977, as amended, (hereinafter referred to as the "Partition Law"), notwithstanding the fact that he is not a party to the original partition action.

The plaintiff instituted a partition action in the District Court of Hambantota (hereinafter referred to as the "District Court") to partition the land described in the schedule to the plaint. Thereafter, in terms of the provisions of the Partition Law, a commission was issued by the District Court. Accordingly, a preliminary survey was carried out by a Surveyor and the commission was returned with the Preliminary Plan and the Surveyor's report to the court.

Thereafter, the case proceeded to trial without a contest. At the conclusion of the trial, the learned District Judge delivered the judgment and held that the plaintiff and the 2nd to 5th defendants were entitled to 1/5th share of the corpus to the partition action. Later, an interlocutory decree was entered. Therefore, a commission was issued by the District Court for the preparation of the final plan dividing the corpus of the partition action into lots according to the entitlement of shares of the said parties. The Surveyor had returned the commission to court with the 'Final Plan No.1805' dated 5th of April, 1995 and the surveyor's report dated 23rd of April, 1995.

Pending the final decree of the partition action, the 3rd defendant-respondent-petitioner-appellant (hereinafter referred to as the "appellant"), executed the Deed of Gift No. 358 dated 26th of February, 2006, and gifted her contingent rights to the corpus to the petitioner-respondent-respondent (hereinafter referred to as the "respondent"), "subject to the final decree of the partition action".

However, after a lapse of more than four years, the said deed of gift was unilaterally revoked by the appellant by executing the Deed of Declaration No.2882 dated 27th of December, 2010. Thereafter, once again the appellant had gifted her contingent rights to the 5th defendant, by

executing the Deed of Gift No. 2911 dated 25th of January, 2011, "subject to the final decree of the partition action".

Further, the final decree of the partition action was entered by court on the 10th of October, 2011. By the said final decree, lots 3 and 8 were allotted to the appellant. Therefore, by way of another Deed of Gift, the appellant once again gifted the same lots (3 and 8) to the 5th defendant.

However, after the final decree was entered by court, the respondent in the instant appeal made an application to the said District Court to obtain delivery of possession of the said lots 3 and 8, based on the said Deed of Gift No.358 dated 26th of February, 2006 making the appellant a party to the said application. Moreover, the respondent made the said application in the original partition action notwithstanding the fact that he was not a party to the original partition action.

In the said application, the respondent pleaded that the appellant gifted him her rights to the corpus "subject to the final decree of the partition action". Accordingly, the respondent stated that following the entering of the final decree in the partition action, he was entitled to the possession of lots 3 and 8 in terms of the Partition Law.

Subsequently, the appellant in the instant appeal had filed objections to the said application, stating *inter alia,* that the respondent acted with gross ingratitude towards the appellant which compelled the appellant to revoke the said deed of gift by executing the Deed of Declaration No.2882 dated 27th of December, 2010.

After an inquiry, the learned District Judge held that the said Deed of Gift No. 358 dated 26th of February, 2006 was a valid deed as it was executed as an irrevocable deed of gift which could only be revoked after proving gross ingratitude in a competent court. In the aforementioned circumstances, the learned District Judge allowed the said application of the respondent and issued a *writ of possession* to obtain the vacant possession of lots 3 and 8.

Thereafter, the Deputy Fiscal executed the said *writ* on the 16th of January, 2013 and reported to court that at the time he visited the property, lot 3 was vacant and lot 8 was occupied by one Rahubadda Kankanamge Amarasiri Premalal. However, said Premalal vacated the premises and therefore he placed the respondent in possession of lots 3 and 8.

Being aggrieved by the said order of the learned District Judge, the appellant preferred a revision application to the Civil Appellate High Court praying for an order, *inter alia,* to dismiss the said

application of the respondent filed in the District Court to obtain delivery of possession of lots 3 and 8 on the basis that the respondent was not entitled to make an application to obtain possession of the said lots under the Partition Law as he was not a party to the original partition action.

After the hearing of the appeal, the learned High Court Judge held, *inter alia*, that the Partition Law does not prevent the respondent from making an application to obtain possession of the contingent interests to lots allotted to a party in the Partition action.

Being aggrieved by the aforementioned Order, the appellant sought leave to appeal against the said judgment of the High Court. After hearing both parties, this court granted leave to appeal on the following questions of law:

> *"(i) Did their Lordships of the Civil Appellate High Court fail to consider that the respondent who was not a party in the partition action had no right to take over possession in terms of Section 52 of the Act by making an application against the 3rd defendant [appellant] who is the allottee of Lots 3 and 8 as it is clearly stated in the said section that only a party who had been declared to any land could make an application for delivery of possession?*
>
> *(ii) Did their Lordships of the Civil Appellate High Court also seriously misdirect themselves when they came to a conclusion that the Respondent has stepped into the shoes of the 3rd defendant [appellant] and her contingent interest of the property by operation of law and therefore she has no right to agitate against the application of the respondent and the objection to his application for delivery of possession is a mere technicality as Section 52 has not expressly prohibited the respondent from invoking the provisions of Section 52 of the Partition Law when it is settled law that failure to follow the mandatory provisions of Partition Law is fundamental vice".*

At that time, the learned counsel for the respondent suggested the following question of law:

> "*(iii) Is a party who becomes entitled to a contingent interest able to execute a writ in terms of Section 52(1) of the Partition Law?"*

It is pertinent to note that this court did not grant leave to appeal on the question of law pleaded by the appellant pertaining to the revocation of the Deed of Gift No.358 dated 26th of February

2006 whereby the appellant gifted her rights to the corpus of the partition action to the respondent. Thus, the effect of the purported revocation of the said deed will not be considered in this judgment. Further, only the submissions relating to the aforementioned Questions of Law are considered in this judgment.

Submissions of the appellant

The learned President's Counsel for the appellant submitted that the purpose of section 52(1) of the Partition Law is to hand over the possession of a lot allotted to "*a party to the partition action"*, ejecting any person in occupation of the lot other than a tenant or a tenant cultivator. Hence, the respondent cannot make an application under the said section or under any other section of the said Law to obtain possession of the land or partition of it as he was not a party to the partition action.

Further, the learned President's Counsel for the appellant submitted that the respondent was not entitled to make an application under section 52A of the Partition Law for restoration of possession as he was not dispossessed from the said lots.

Submissions of the respondent

The learned counsel for the respondent submitted that even though the respondent was not a party to the original partition action, he was entitled to make an application to obtain possession of the said lots as the respondent "stepped into the shoes of the appellant", upon the execution of the Deed of Gift No. 358 dated 26th of February, 2006.

It was further submitted that the District Court is conferred with the jurisdiction to make orders to give effect to every order or decree made or entered in a Partition action including the delivery of possession under section 53 of the Partition Act. Further, the words "*any person entitled thereto"* allows not only a party to the partition action but also "any person" who has derived any contingent interest to an allotment given by a final decree to make an application to obtain possession of his rights. In this regard, the attention of court was drawn to the words *"any person*

entitled thereto" in the said section and submitted that the legislature has intentionally used those words instead of the words "a party to the action".

It was further contended that section 53 stipulates the substantive law conferring jurisdiction on the trial judge, whereas section 52 stipulates the procedural law in which an application to obtain possession is to be made to court.

It was also submitted that the District Court has the power to make such orders as it considers necessary to prevent injustice in respect of issues arising from the procedure.

Hence, in order to prevent further delays, the legislature has imposed a ban on the alienation, leasing and hypothecation of the corpus or part of it in a Partition action to prevent taking steps to add/substitute new parties.

In ***Subaseris v Prolis*** **16 NLR 393 at 394** Woodrenton, ACJ held;

> *"The final decree did in fact allot to Dineshamy the divided share which he had previously transferred to the plaintiff. The decision in this case depends on the question whether that transfer, made as it was before the final decree in the partition action, is void in consequence of the provisions of section 17 Ordinance No. 10 of 1863. The learned Commissioner of Requests has answered this question in the affirmative, and has dismissed the plaintiff's action with costs. In my opinion it should have been answered in the negative, and the plaintiff is entitled to succeed. It must be remembered that section 17 of the Partition Ordinance imposes a fetter on the free alienation of property, and the Courts ought to see that fetter is not made more comprehensive than the language and the intention of the section require. The section itself prohibits only, in terms, the alienation of undivided shares or interests in property which is the subject of partition proceedings while these proceedings are still pending, and the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interest had been created since the proceedings began."*

Therefore, it was submitted that the application made to the District Court by the respondent should not be dismissed as the substantive law allows to make such an application to court to obtain delivery of possession of a lot allotted in a partition decree.

The issues that need to be considered in the instant appeal

In view of the above submissions made by the parties, the two issues that need to be considered in the instant appeal are;

(a) Can a party gift his co-owned rights subject to the final decree of the partition action?

(b) Was the respondent entitled in law to make an application under the Partition Law for the delivery of possession of his contingent interest after the District Court entered the final decree in the partition action?

Can a party to a Partition action alienate, lease or hypothecate his co-owned share or interest in the Corpus subject to the final decree?

Partition cases take a long time to conclude because of the several mandatory procedural steps that are required to be taken in such actions and the large number of persons that are required to be made parties to the case. Hence the legislature has included the following provisions in the Partition Law to minimise the delay in concluding Partition cases.

Section 66 of the Partition Law states:

> *"(1) After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under section 36 or by the entry of a certificate of sale.*
>
> *(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void:*
>
> *(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a lis pendens shall not be affected by the provisions of subsections (1) and (2) of this section.*"
>
> [emphasis added]

Thus, in terms of section 66 (2), any voluntary alienation, lease or hypothecation of the Corpus is void. Where an instrument is executed pending partition proceedings in respect of an interest to which the grantor may ultimately become entitled upon the final decree in a partition action, a question arises as to whether such a transfer should be construed as an actual alienation, lease or hypothecation of the rights or in a conditional transfer subject to a future entitlement from a final decree. In this regard, the allotment of shares in the final decree is a condition precedent to pass the actual alienation, lease or hypothecation.

A careful analysis of section 66 shows that there is no legal impediment to alienate, lease or hypothecate a contingent interest in a corpus which is the subject matter of the partition action "subject to the final decree". Further, whether the instrument that alienates the property specifically refers to "subject to the final decree of the partition action" or not, that does not prevent a contingent interest from passing to a recipient upon entering the final decree in a partition action.

Thus, no rights of ownership, lease or hypothecation pass to the grantee, upon the acquisition of such interest in the land until, and unless the grantor acquires a right under the final decree from the partition action.

A similar position was taken in the case of ***Sithi Fareeda v Mohamed Noor***, **SC/Appeal 134/2013, S.C. Minutes 28th October, 2014**, where it was held;

> *"I am of the view that it is settled law for many decades that in spite of the provisions included in the Partition Ordinance firstly by Section 17 and thereafter in the Partition Law by Section 66, any party to a law suit of partitioning a co-owned land is able to gift, sell, or hypothecate his entitlement to the share of the land which would be allocated to him at the end of the case*".
>
> [emphasis added]

Further, in ***M.W.A.P. Jayathilake v P.G. Somadasa*** **70 NLR 25** referring to section 67 of the repealed Partition Act No. 16 of 1951, which is the corresponding provision of section 66 of the Partition Law, it was held:

> "*Section 67 has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending partition does not prevent the changing*

or disposing of the interest to be ultimately to be allotted to a party in the pending action."

[emphasis added]

A similar view was explained in ***Karunaratne v Perera*** **67 NLR 529,** where it was held that where, pending a partition action, a co-owner gifts to certain persons the shares to which he will be declared entitled in the action, the interests which are allotted in that action to the donor pass automatically to the donees when the final decree is entered. It is not necessary that the interest which the done obtained on the deed of gift should be expressly conserved to them in the final decree even though they intervened in the action.

Further in ***Silie Fernando v Silmon Fernando*** **64 NLR 404**, the transferor pending the action, transferred the interests to which he would become entitled in the final decree. Thereafter, he died before the final decree was entered in the Partition Action. Thus, the rights of transferee were decided in the said case and the court held,

"Whatever will be allotted him by the final decree, the lot is in severalty finally allotted to the transferor or those representing him (if he has died before the entry of the final decree) will automatically pass and vest in the transferee without any further conveyance by the transferor or his representatives."

In ***Nazeer v Hassian 48 NLR 282,*** it was held that, where pending a partition action, some of the co-owners covenant to convey absolutely all the shares, right title and interest which will accrue to them under and by virtue of the final decree in the partition action, the other contracting party obtains an immediate interest in the property, but the title can only accrue upon the entering of the final decree.

In case of ***Sirinatha vs. Sirisena and other (*****1998) 3 SLR 19** it was held;

"In Sirisoma v. Saranelis Appuhamy (51 NLR 337), Gratiaen, J. interpreting section 17 of the Partition Ordinance held that it prohibits the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of partition proceedings. There is no statutory prohibition against a person's common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That

right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance.

The submission that the transfer by the 2nd defendant of the rights to which he may become entitled to in the partition action, is obnoxious to the provisions of section 66 of the Partition Law cannot therefore succeed. Section 66 of the Partition Law prohibits only the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings. There was no bar preventing the 2nd defendant from transferring the interests which he would acquire upon the conclusion of the partition action."

Automatic transfer of rights to a transferee after the final decree is entered in a partition action.

A similar view was held in ***Sirisoma v Sarnelis Appuhamy*** **51 NLR 337,** if a co-owner sells or donates an undivided interest in a land, a share will be allotted to the vendor or donor by a final decree in a partition action, will automatically pass and vest in the vendee or donee under the transfer deed or interest in question, without any further conveyance, either by the vendor or donor or by his heirs or representatives;

"Whether each question which I have discussed be examined by reference to the trend of past decisions of this Court or on the assumption that it may legitimately be considered as res integra, I think that the following propositions should now be accepted as settled law: -

(1) Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings, of an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending action;

(2) Where an instrument is executed, pending partition proceedings, in respect of an interest to which the grantor may ultimately become entitled upon the decree, the question whether it should be construed as an actual alienation or hypothecation, of such contingent interest or merely as an agreement to alienate or hypothecate such interest (if and when acquired) must be decided in

accordance with the ordinary rules governing the interpretation of written instruments;

(3) If such an instrument is in effect only an agreement to alienate or hypothecate a future interest, if and when acquired, no rights of ownership or hypothecary rights (as the case may be) pass to the grantee upon the acquisition of that interest by the grantor unless and until the agreement has been duly implemented ; if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be determined with reference to other legal principles such as the application of Section 93 of the Trusts Ordinance ;

(4) If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor; and no further instrument of conveyance or mortgage requires to be executed for the purpose; the execution of "a deed of further assurance" confirming the result which has already taken place may in certain cases be desirable but it is not essential in such a case;

(5) The provisions of section 9 of the Partition Ordinance do not invalidate a transaction whereby an interest (which is not presently vested in the grantor and which could only become vested in him, if at all, upon the passing of a final decree for partition) is intended to pass to the grantee upon its acquisition.

Any earlier decisions of this Court which express or appear to express opinions in conflict with the general propositions enumerated above should now be regarded as over-ruled to that extent. Owners of land, and the practitioners who are called upon to advise them, should not be left in a state of continual doubt as to the scope of the restrictions which the Partition Ordinance imposes upon the alienation and hypothecation of interests in land. As Dr. C. K. Allen points out, it would be disastrous to the public interest if "the vaunted ' certainty ' of our system of precedents has too much in common with the kind of 'certainty ' which is to be found on the race-course and the dog-track."

[emphasis added]

In ***B. Sillie Fernando v W. Silman Fernando*** **64 NLR 404,** it was held that, where prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before entering the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives.

Further, it was held:

> *"In this action, which is a partition action, the 2nd defendant claims certain soil shares, certain plantations and a thatched house. Prior to the entering of the interlocutory decree, the 2nd defendant, by the deed marked Z1, donated to his natural children born to his mistress the 41st defendant-appellant, the soil, plantations and thatched house, which would be allotted to him ultimately by the final decree.*

Is the respondent entitled to make an application under the Partition Law to obtain possession of his entitlement after the final decree is entered

In the instant appeal, the respondent had made an application to the District Court under the Partition Law to obtain possession of lots 3 and 8 allotted to the appellant by the final decree of the partition action.

Section 52 of the Partition Law sets out the procedure for a party to a partition action to obtain possession of the land or any portion of the land after the final decree is entered in a partition action.

Section 52(1) of the Partition Law states as follows:

> *"(1) Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application*

made by motion in that behalf, an order for the delivery to him of possession of the land:

Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.

(2) (a) Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as a tenant for a period not exceeding one month who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.

(b) After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application: otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue."

[emphasis added]

However, section 53(1) of the Partition Law states as follows:

"(1) A court exercising jurisdiction in a partition action shall have full power to give effect to every order or decree made or entered in the action ***(including the power to order delivery of possession*** *of any land or portion of land* ***to any person entitled thereto)*** *and to punish as for contempt of court any person who-*

(a) disobeys any such order, or

(b) obstructs or resists any person acting under the authority of the court or exercising any power conferred on him by this Law, or

(c) damages, destroys or removes, during the pendency of the action, any boundary mark which under section 31, has been made or set up on the land to which the action relates."

[emphasis added]

The appellant's position is that the respondent was not entitled to invoke the jurisdiction of the District Court to obtain possession of the land as he was not a "party to the partition action".

However, a careful consideration of sections 53(1) and 52(1) show that both sections have conferred power on the District Court to make *order for the delivery of any land or share of a land.* Hence, both the said sections should be considered together for the purpose of interpreting section 53(1) of the said Law. Moreover, it is pertinent to note that the said section 53(1) specifically stipulates that the court has power to "*order delivery of possession of any land or portion of land* ***to any person entitled thereto****",* as opposed to a ***'party to the partition action'***.

In view of the different words used in the abovementioned sections 52(1) and 53(1), it is necessary to consider whether only a 'party to the original partition action' could make an application to obtain possession of the lot allocated to a party in a partition action or whether any person who has acquired a contingent right to any of the allotments from a final decree could make such an application to court.

According to the rules of interpretation, the provisions in an Act shall be interpreted in harmony with other provisions in the Act to achieve the object of the Act.

A similar view was held by Sripavan, J (as he then was), in ***Herath v Morgan Engineering (Pvt) Ltd., (2013) 1 SLR 222 at 229:***

> "*Whether it is the Constitution or the Act, the Courts must adopt a construction that will ensure the smooth and harmonious working of the Constitution or the Act as the case may be, considering the cause which induced the legislature in enacting it."*

The purpose of enacting the Partition Law was to establish a special procedure to partition a land held in co-ownership, providing a simple and easy remedy for obtaining possession of the land, rather than resorting to the cumbersome general procedure set out in the Civil Procedure Code. It is trite law that the Partition Law of Sri Lanka stands above compiling both substantive and procedural law relating to the area.

Further, section 53(1) of the Partition Law has conferred power on the District Court to give effect to every order or decree made or entered in a Partition action. Moreover, the words "including the power to order delivery of possession of any land or portion of a land to any person entitled thereto" shows that any person who is entitled to have the benefit from an order

or a decree made or entered in a partition action can make an application for the delivery of possession of any land or portion of a land if he has got an entitlement to the land or portion of it consequent to a Partition decree.

However, neither section 53(1) nor any other section in the Partition Law set out the procedure to obtain possession of an entitlement to a land or portion of a land by "a person" who has gotten an entitlement from a partition decree.

Thus, I am of the opinion that any person who gets the contingent right to a property subject to the final decree steps into the room and in place of a party to the Partition action and therefore, such a person can invoke section 53(1) to obtain possession of rights that his predecessor got from a final decree of a partition action.

Further, as the said section does not stipulate the procedure to obtain possession of the land or the portion of which "the person" got rights from a final decree, he can make an application under section 52(1) to obtain possession of the entitlement he got from the final decree.

Conclusion

In the foregoing circumstances, the two questions of law raised by the appellant should be answered as follows:

(1) Did their Lordships of the Civil Appellate High Court fail to consider that the respondent who was not a party in the partition action had no right to take over possession in terms of section 52 of the Act by making an application against the appellant who is the allottee of Lots 3 and 8 as it is clearly stated in the said section that only a party who had been declared to any land could make an application for delivery of possession?

NO

(2) Did their Lordships of the Civil Appellate High Court also seriously misdirect themselves when they came to a conclusion that the respondent has stepped into the shoes of the appellant and her contingent interest of the property by operation of law and therefore she has no right to agitate against the application of the respondent and

the objection to his application for delivery of possession is a mere technicality as section 52 has not expressly prohibited the respondent from invoking the provisions of section 52 of the Partition Law when it is settled law that failure to follow the mandatory provisions of Partition Law is fundamental vice?

NO

Further, the question of law suggested by the respondent should be answered as follows:

(3) Is a party who becomes entitled to a contingent interest able to execute a writ in terms of section 52(1) of the Partition Law?

YES

Therefore, the order of the learned High Court Judge dated 24th of July, 2017 is affirmed. The appellant's appeal is dismissed without cost.

Judge of the Supreme Court

B. P. Aluwihare PC, J
I agree.

Judge of the Supreme Court

V. K. Malalgoda PC, J
I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal under and in terms of Article 128 (4) of the Constitution against an Order of the High Court of the Western Province Sitting in Colombo in the exercise of its Civil Jurisdiction in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No: 10 of 1996 as amended from the Order dated 14.05.2013.

SC Appeal 80/2015
SC/HC/LA Application
No: 31/2013
HC (Civil) Case No: 220/2011/MR

1.People's Merchant PLC,
Formerly known as
People's Merchant Bank PLC,
No:21, Nawam Mawatha,
Colombo 02.
Formely at
Level 2, Hemas Building,
Braybrooke Place, Colombo 02.

2.PMB Financial Services
(Private) Limited,
Formerly known as
PMB Credit Card Company
Limited,
No: 21, Nawam Mawatha,
Colombo 02.
Formerly at
Level 2, Hemas Building,
Braybroke Place, Colombo 01.

Plaintiffs

Vs

1.ABC Credit Card Company
Limited,
No: 117, Hunupitiya Lake
Road, Colombo 02.

2. Navigation Maritime
Colombo (Private) Limited,
14th Floor, East Tower,
World Trade Centre,
Echelon Square, Colombo 01.
(Presently No: 117, Hunupitiya Lake Road, Colombo 02.)

3. Tholkamudiyanselage John
Shiran Indranath
Dissanayake,
No: 21, Simon
Hewavitharana Road,
Colombo 03.

Defendants

AND NOW BETWEEN

ABC Credit Card Company
Limited,
No: 117, Hunupitiya Lake
Road, Colombo 02.

1st Defendant – Appellant

Vs.

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(Presently No: 117, Hunupitiya
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2nd Defendant- Respondent

4.Tholkamudiyanselage John
Shiran Indranath
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No: 21, Simon
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3rd Defendant- Respondent

AND

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AND NOW BETWEEN

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Defendants- Respondents

Before: Priyantha Jayawardena PC, J
Achala Wengappuli, J
K. P. Fernando, J

Counsel: S. A. Parathalingam PC with Nishkan Parathalingam and Ms. Upeka Sooriyapatabadige for the 1st Defendant-Appellant and the 2nd Defendant-Respondent in SC/Appeal/80/2015, for the 2nd Defendant-Appellant and the 1st Defendant-Respondent in SC/Appeal/81/2015 and for the 1st and 2nd Defendants-Respondents in SC/Appeal/82/2015

Nihal Fernando PC with Harshula Seneviratne for the 3rd Defendant-Respondent in SC/Appeal/80/2015 and SC/Appeal/81/2015 and for the 3rd Defendant-Appellant in SC/Appeal/82/2015

Manoj Bandara with Nayomi Chethana for the Plaintiff-Respondent for SC/Appeal/80/2015, SC/Appeal/81/2015 and SC/Appeal/82/2015

Argued on: 3rd May, 2023

Decided on: 9th August, 2023

Priyantha Jayawardena PC, J

Facts of the case

This is an appeal filed in respect of an Order made by the High Court of the Western Province (hereinafter referred to as the "Commercial High Court") overruling an objection to the jurisdiction of the said court on the basis that the alleged cause of action pleaded in the Plaint arose from a delict and also arose prior to entering into the commercial transaction. Therefore, the said court does not have jurisdiction to hear and determine the action.

Plaintiff's case

The plaintiffs-respondents in SC/Appeal No. 80/2015 (hereinafter referred to as the "plaintiffs") filed action in the Commercial High Court and pleaded that the 1st defendant-appellant in SC/Appeal No. 80/2015 (hereinafter referred to as the "1st defendant company") was facing financial difficulties due to the collapse of the Golden Key Credit Card Company, and the depositors of the said company were demanding the return of their deposits. At that stage, the 1st defendant company had made a proposal to the 1st plaintiff company to take over its assets and liabilities.

Further, pursuant to the negotiations between the plaintiffs and the defendants, they had entered into an agreement bearing No. 1717 dated 6th of March, 2009 for the plaintiffs to purchase the shares of the 1st defendant company in order to take over the assets and liabilities of the 1st defendant company. A copy of the said agreement was produced annexed to the Plaint marked as "A1".

In the Plaint, the plaintiffs further stated that the plaintiffs purchased the said company based on the representations made by the defendants and the warranties given by them in Clause 4 (iii) of the said agreement marked "A1". Further, it was pleaded that the defendants made representations and gave warranties in respect of the corporate status, records and related entries, financial statements of PMB Credit Card Company (2nd plaintiff company), details of the depositors and liabilities.

Furthermore, the Annexures 'C(II)' and 'C(III)' annexed to the said agreement ("A1") were the only Financial Statements provided to the 2nd plaintiff by the 1st defendant, and the plaintiffs had relied on the said Financial Statements in purchasing the 1st defendant company, particularly on the credit card receivables of the 1st defendant company, in arriving at the valuation of the assets and liabilities of the said defendant company.

The plaintiffs further stated that they bought the 1st respondent company based on the warranties and representations stated in the said agreement ("A1"). However, the said agreement contained incorrect information, and as a result of that, they suffered a loss and damages of Rs. 206,036,188/- due to the breach of warranty and misrepresentation contained in Clause 4(iii) of the said agreement in respect of the credit card receivables of the 1st defendant company.

Moreover, the plaintiffs alleged that they would not have entered into the said agreement to take over the assets and liabilities of the 1st defendant company if not for the credit card receivables shown in Annexures 'C(II)' and 'C(III)' to the said agreement.

The plaintiffs further stated that the defendants had neglected and/or refused to pay the said loss and damages amounting to Rs. 206,036,188/- despite the several demands that were made to them. In the circumstances, the plaintiffs stated that a cause of action has accrued to them to sue the defendants jointly and severally for a sum of Rs. 206,036,188/-.

Trial of Issues

The defendants filed three separate answers. Thereafter, the trial commenced by marking the admissions and the 1st defendant, *inter alia*, admitted the jurisdiction of the Commercial High Court. (During the hearing of this appeal, it was submitted that there was a patent lack of jurisdiction and therefore, the said admission has no effect). However, the 2nd and 3rd defendants denied the jurisdiction of the Commercial High Court on the basis that the alleged cause of action pleaded in the plaint did not arise from a commercial transaction but from a delict. Further, the alleged cause of action arose prior to entering the commercial transaction.

Further, the defendants admitted that the agreement dated 6th of March, 2009 produced along with the Plaint marked as "A1" and its annexures marked as 'C(II)' and 'C(III)'.

Thereafter, several issues were raised by the parties. Once the issues were framed, all the parties had agreed to try the following issues as preliminary issues of law in terms of section 147 of the Civil Procedure Code and filed written submissions;

"(16) (a) Has the Plaintiffs not set out a cause of action against the 2nd Defendants?

(b) If so, has the 2nd Defendant been improperly joined as a Defendant and entitled to be discharged from these proceedings?

(20) As set out in paragraph 1 of the Answer of the 3rd Defendant;

(a) Does the Plaint ex-facie not disclose a cause of action against the 3rd Defendant?
(b) Has the 3rd Defendant been wrongly joined as a Party to this case?
(c) Should the 3rd Defendant be discharged from this Case in limine?

(26) Does this Court not have jurisdiction under the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 to hear and determined this action against the 2nd and 3rd Defendant?

(27) If so, should the Plaintiff's action be dismissed in limine?"

After the parties filed their written submissions, the Commercial High Court delivered the Order dated 11th of May, 2013 and held that a cause of action had arisen out of a commercial transaction pleaded in the Plaint. Hence, the objection to the jurisdiction of the court was overruled. It was

further held that issues Nos. 16 and 20 would be answered at the end of the trial, as it is necessary to hear the evidence to answer those issues.

Being aggrieved by the Order of the Commercial High Court, the 1st defendant in the said case sought leave to appeal from this court and this court granted leave to appeal on the following questions of law:

"(i) Has the said Order dated 14th May, 2013 marked and annexed as 'X14' failed to properly understand the ambit and/or scope and/or limitations of the relevant provisions in the High Court of the Provinces (Special Provisions) Act No. 10 of 1996?

(ii) Has the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' failed to properly construe the cause of action as averred and/or maintained by the 1st and 2nd respondents?

(iii) Has the said Order dated 11th May, 2013 marked and annexed hereto as 'X14' failed to properly construe the cause of action as pleaded by the 1st and 2nd respondents and thus wrongly conclude that the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) did have jurisdiction to hear and determine the 1st and 2nd Respondents Case?

(iv) Has the Order dated 14th May, 2013 marked and annexed hereto as 'X14' failed to consider whether the cause of action as pleaded by in the plaint arose out of a commercial transaction within the meaning, scope and ambit of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996?

(v) Is the cause of action as pleaded and/or preferred in the plaint, a cause of action founded on the premise of a misrepresentation prior to entering into any commercial transaction, and if so, has the High Court of the Western Province (exercising Civil Jurisdiction and holden at Colombo) wrongly come to the finding that it has jurisdiction to try and determine the same?

(vi) Does the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 confer jurisdiction on the High Court of the Western Province (Exercising Civil Jurisdiction) to try and/or determine matters arising out of an alleged misrepresentation which took place prior to any commercial transaction?

(vii) Has the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' erred in its findings by virtue of misrepresenting the case of the 1st and 2nd respondents and failing to give due consideration to the wording and/or scope and/or meaning of the relevant provisions and/or stipulations of the High Court of the Provinces (Special Provision) Act No. 10 of 1996?

(viii) Has the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' erred in its findings because of *inter alia* failing to fully understand and/or comprehend the case of the 1st and 2nd Respondents?

(ix) Has the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' wrongly come to the finding that the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) does have jurisdiction to try and determine the 1st and 2nd Respondent's case, and then contradictorily answer issue No. 26 in the affirmative?

(x) Has the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' failed to properly and/or appropriately evaluate the submissions made by the Petitioner?

(xi) Is the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' flawed in its reasoning and/or logic?

(xii) Is the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' wrong and/or contrary to law?

(xiii) Is the said Order dated 14th May, 2013 marked and annexed hereto as 'X14' misconceived?"

At the hearing of the instant appeal, the court informed the parties that it would consider the question of law in respect of the jurisdiction of the Commercial High Court to hear the case, and all the parties agreed that it was the core issue in the instant appeal. Further, they agreed to have one judgment in respect of all three appeals.

Submissions of the 1st and 2nd defendants in SC/Appeal/80/2015

The learned President's Counsel for the 1st and 2nd defendants submitted that the cause of action as set out in the Plaint is based on an alleged misrepresentation and the incorrect warranty made by the defendants to the plaintiffs.

Further, the cause of action pleaded in the Plaint has not arisen out of a commercial transaction. Moreover, according to the averments in the Plaint, the alleged cause of action of the plaintiffs had arisen due to misrepresentation made by the 1st and/or 2nd and/or 3rd defendants, which induced the plaintiffs to enter into the said agreement marked and produced as "A1" annexed to the Plaint. Thus, the alleged cause of action is a delict, and therefore, the Commercial High Court does not have jurisdiction to hear the case.

It was further contended that the alleged misrepresentation had arisen prior to entering into the said agreement marked "A1". Hence, the cause of action as pleaded in the Plaint had arisen prior to entering the said agreement.

Therefore, it was submitted that the Commercial High Court lacks jurisdiction to hear and determine the plaintiff's case.

Submissions of the 3rd defendant in SC/Appeal No. 80/2015

The learned President's Counsel for the 3rd defendant submitted that, according to the averments of the Plaint, it is evident that the plaintiffs' purported claim is based on an alleged misrepresentation and the incorrect warranty given to the plaintiffs. Thus, the purported cause of action pleaded by the plaintiffs did not arise from a commercial transaction and therefore, it did not fall within the scope of the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996. Therefore, the Commercial High Court does not have the jurisdiction to hear and determine the said action as it did not arise from a 'commercial transaction'.

Submissions of the plaintiffs in SC/Appeal No. 80/2015

The learned counsel for the plaintiffs submitted that the averments in the Plaint are in respect of a breach of a misrepresentation and a warranty contained in the Agreement No. 1717 produced and marked as "A1" and not prior to entering into the said agreement.

It was further submitted that the case of the plaintiffs is in respect of a breach of agreement arising from a commercial transaction, and the defendants admitted entering into the said agreement "A1"). Further, the 1st defendant admitted that the said agreement was a commercial transaction by admitting the jurisdiction of the court at the time of making admissions at the trial.

It was further contended that, in any event, the misrepresentation led to the entering into the commercial transaction, and therefore, the Commercial High Court is vested with the jurisdiction to hear and determine the action. Hence, in the foregoing circumstances, the order of the Commercial High Court answering the said issues Nos. 16 and 20 in favour of the plaintiffs is correct, and the Commercial High Court has jurisdiction to hear and determine the action filed by the plaintiffs.

Has the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) erred in law by holding that it had jurisdiction to hear and determine the action filed by the respondent

The Commercial High Court held that the cause of action pleaded in the Plaint had arisen out of a commercial transaction, and thus, the court did have jurisdiction to hear the action filed by the plaintiff.

However, the defendants submitted that the cause of action pleaded in the plaint is based on an alleged misrepresentation and the breach of warranty given prior to entering into the commercial transaction under reference. Further, misrepresentation is a delict and therefore, it does not fall within the definition of a commercial transaction. Thus, the alleged cause of action pleaded in the Plaint did not fall within the First Schedule to the High Court of the Provinces Act, and therefore, the said court does not have jurisdiction to hear and determine the case. Thus, it is necessary to consider the following in the instant appeal:

Whether the alleged cause of action arose;

(1) prior to entering into the agreement contract sought to be enforced,
(2) as a result of misrepresentation and warranties given by the defendant, which is a *delict*, and
(3) from a commercial transaction.

Jurisdiction of the Commercial High Court

A High Court was established under the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 (hereinafter referred to as the "High Court of the Provinces Act") to hear and determine all actions, *inter alia*, where a cause of action has arisen out of a commercial transaction.

Section 2(1) of High Court of the Provinces Act states:

> "Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the Company is situated, within the province for which such High Court is established.
>
> [emphasis added]

The First Schedule to the said Act as amended by Gazette No. 943/12 dated 1st of October, 1996 states as follows:

> *1) All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export and import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, **damage** or demand is for a sum exceeding three million rupees or such other*

amount as may be fixed by the Minister from time to time, by Notification published in the Gazette, other than actions instituted under the Debt Recovery (Special Provisions), No. 2 of 1990.

2) *All applications and proceedings under the Companies Act, No. 07 of 2007.*
3) *All proceedings required to be taken under the Intellectual Property Act, No. 36 of 2003 in the High Court established under Article 154P of the Constitution*.

[emphasis added]

At present, the threshold to hear and determine matters in the Commercial High Court was increased to Rs. 50 Million by Gazette No. 2312/26 dated 28th of December, 2022.

Cause of action pleaded in the plaint

In the Plaint, the plaintiffs plead that they entered into an agreement produced marked as "A1" with the defendants to take over the assets and liabilities of the 1st defendant company. However, due to the alleged breach of a misrepresentation and the warranty contained in Clause 4(iii) of the said agreement produced with the Plaint marked as "A1", the plaintiffs had suffered damages of Rs. 206,036,188/-.

Clause 4 (iii) of the said agreement states;

> *"The Company had provided and/or will provide to PMB Credit Card true correct and complete copies of the Accounts of the Company ("Financial Statements") and that such Financial Statements are in accordance with generally accepted accounting principles."*

In this regard, the learned President's Counsel brought the attention of this court to paragraph 14 of the plaint, which stated;

> "The Plaintiffs reiterate that the Plaintiffs would not have entered into the aforesaid Agreement to take over the liabilities of the 1st Defendant up to a maximum of Rs. 785 Million if not for the credit card receivables of the 1st Defendant reflected in Annexures C(II) and C(III) to the Agreement bearing No. 1717 represented to the

Plaintiffs as true and correct Financial Statements of the 1st Defendant prepared in accordance with generally accepted accounting standards."

In the circumstances, the plaintiffs stated that they instituted action in the Commercial High Court against the defendants, claiming damages jointly and severally for the misrepresentation and breach of warranty that resulted in them purchasing shares of the said company.

It is pertinent to note that the misrepresentation and the incorrect warranty referred to in the Plaint were matters that took place during negotiations. Further, such matters had led to entering into the commercial transaction under consideration. Hence, it needs to be considered whether the cause of action pleaded in the Plaint relates to a misrepresentation and giving an incorrect warranty prior to entertaining the said commercial transaction, and therefore, the Commercial High Court has no jurisdiction to hear and determine the case.

In the instant appeal, the plaintiffs stated that they entered into the said commercial transaction on the premise that the defendants had provided them with accurate and complete copies of the 1st defendant's financial statements; records and related entries, corporate status, and the details of the depositors, credit card receivables, and liabilities. However, the defendants failed to disclose the true figures of the assets and liabilities of the 1st defendant company including the receivables from the credit cards issued by the said company.

Finality Clause

It is pertinent to note that there is a finality clause in the agreement marked as 'P1. Clause 14 of the said Agreement states;

> *"This Agreement, <u>including the Schedules and Annexures hereto</u>, sets forth the entire agreement between the Parties on this subject and supersedes all prior negotiations, understandings and agreements between the Parties concerning the subject matter."*
>
> [emphasis added]

Thus, the finality clause mentioned above excludes negotiations, understandings, and agreements between the parties prior to entering the said agreement. However, the said Clause states that the Schedules and Annexures to the agreement consist of the entire agreement. Hence, anything

relating to or arising from the said Schedules or Annexures should be considered part and parcel of the agreement produced with the Plaint marked as "A1".

A careful consideration of the plaint shows that the plaintiffs had instituted the action against the defendants, claiming damages jointly and severally on the basis of misrepresentation and breach of warranty referred to in Clause 4 (iii) of the said agreement and Annexures C(II) and C(III) to it. Thus, I am of the view that the alleged misrepresentation and breach of warranty referred to in the plaint are false within the scope of the said agreement filed along with the Plaint marked as "A1", as the annexures to the agreement are integral parts of the said agreement.

Whether the misrepresentation pleaded by the plaintiff amounts to a delict

Section 3 of the Introduction of Laws of English specifies the instances where English Law is applicable. In this context, it is pertinent to note that after the Dutch invasion of the coastal areas of Sri Lanka, the contracts and agreements were governed by Roman Dutch Law. However, after Sri Lanka became a colony of the British, our law of contract was superseded by English Law. Hence, at present, contracts and agreements are governed by the Roman Dutch Law supported by English Law.

Further, in '*The Law of Contracts' by C G Weeramanthry*, Volume 1(reprinted in 1999) at pages 78 to 80 states;

> *"Having reduced our sphere of inquiry to obligations recognised by the law, we must note that the term 'obligation' embraces not merely contractual but delictual or tortious obligations as well. It consequently becomes essential to distinguish obligations arising from contract from obligations arising from delict.*
>
> *A contractual obligation differs in nature from a delictual obligation in at least three respects.*
>
> *Firstly, contractual obligations arise from agreement between parties. In order to succeed, the plaintiff must depend on agreed terms, **whereas** in a delictual action the plaintiff does not and cannot spring from mere agreement between the parties.*
>
> *Secondly, duties arising from contract are owed to the parties to the contract (or their assignees), whereas delictual obligations are owed to a large and*

indeterminate class of person. The actual breach may however be by a specified individual, and enforcement of the duty therefore takes place against specified individual.

Thirdly, a delictual obligation imposes negative duties, that it to say, duties of forbearance, while a contractual obligation may impose positive or negative duties, this requiring either acts or forbearances.

A circumstance which tends to blur these distinctions between contract and delict is the fact that the very same situation may give rise to both contractual and delictual obligations. Thus where a common carrier causes damage by his negligence to goods entrusted to him, he would be liable in contract and alternatively in delict. A fraudulent misrepresentation in regard to the quality of goods may found an action in damages for breach of contract or an action in delict based on deceit.

The distinction between the two types of claim leads to the application of different principles and to the production of different results depending on whether the action is framed in contract or in tort. Thus the law of contract is concerned only with actual damages, whereas the law of delict sometimes awards exemplary damages. The law of contract is not concerned with pain of mind. Further, the form of action may have consequences on the question of remoteness of damage, for the tests of remoteness are different in contract and in tort. Most important of all, different criteria would determine the all-important question whether or not a cause of action has arisen."

[emphasis added]

Hence, a careful consideration of the facts and circumstances of the instant appeal shows that the cause of action pleaded in the Plaint arose from a misrepresentation and a breach of warranty that are incorporated in the said agreement marked as "A1".

Further, the cause of action pleaded in the Plaint has not arisen from a delict. In any event, misrepresentation, fraud, etc. that lead to entering into a commercial transaction cannot be considered as a delict as such matters lead to entering into an agreement or contract in respect of a commercial transaction fall within the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

In this regard, Mark Fernando, J in ***Cornall and Company Limited v Mitsui and Company Limited*** **[2000] 1 SLR 57** held that cases filed to claims damages arising from a commercial transaction can be heard by the Commercial High Court, i.e.;

> *"In the context, that word* ***only requires*** *that the* ***action "relates to"****, or* ***"is connected with"****, or* ***"involves"****, a debt,* ***damage*** *or demand (exceeding the prescribed amount); and that is consistent with its dictionary meanings."*
>
> [emphasis added]

Conclusion

In the circumstances, I am of the view that the alleged cause of action pleaded in the Plaint comes within the purview of the said High Court of Provinces (Special Provisions) Act No. 10 of 1996 and therefore, the Commercial High Court has the jurisdiction to hear the case under reference.

Has the said Order dated 11th May, 2013 marked and annexed hereto as 'X14' failed to properly construe the cause of action as pleaded by the 1st and 2nd respondents and thus wrongly conclude that the High Court of the Western Province (Exercising Civil Jurisdiction and holden at Colombo) did have jurisdiction to hear and determine the 1st and 2nd Respondent's Case?

No

In light of the above, the other questions of law need not be considered.

The appeal is dismissed. I order no costs.

Judge of the Supreme Court

Achala Wengappuli, J

I Agree

Judge of the Supreme Court

K. P. Fernando, J

I Agree

Judge of the Supreme Court

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

In the Matter of an Appeal for Special Leave to Appeal from the judgement of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution.

SC Appeal No. 66/2020
SC SPL LA No. 196/2019
CA (Writ) Application No. 87/2013

1. Salinda Dissanayake
Hon. Minister of Indigenous Medicine,
Ayurvedha Teaching Hospital complex
No. 325, N.M. Perera Mawatha
Colombo.

1A. Rajitha Senarathna
Hon. Minister of Health, Nutrition and Indigenous Medicine,
Ministry of Health, Nutrition and Indigenous Medicine,
No. 385, Baddegama Wimalawansa Himi Mawatha, Colombo 10.

1B. Keheliya Rambukwella,
Minister of Health
No. 385, Baddegama Wimalawansa Himi Mawatha, Colombo 10.

2. Secretary
Ayurvedha Teaching Hospital complex
No. 235, N.M. Perera Mawatha
Colombo.

2A. Secretary
Ministry of Health, Nutrition and Indigenous Medicine,
No. 385, Baddegama Wimalawansa Himi Mawatha, Colombo 10.

3. Homeopathy Council
No. 94, Shelton Jayasinghe Mawatha
Welisara, Ragama.

4. Ahinsaka Perera
Secretary
Homeopathy Council
No. 94, Shelton Jayasinghe Mawatha
Welisara, Ragama.

5. Newton Peiris
Advisor to the Minister of Indigenous Medicine,
Ministry of Indigenous Medicine,
Ayurvedha Teaching Hospital complex
No. 235, N.M. Perera Mawatha
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6. Professor K.K.G.S. Ranaweera
Chief of Branch Laboratory of
Ayurvedha, Ministry of Indigenous
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Hospital complex
No. 235, N.M. Perera Mawatha
Colombo.

7. Udani Jayamali
Acting Chief Accountant
Ministry of Indigenous Medicine,
Ayurvedha Teaching Hospital complex
No. 235, N.M. Perera Mawatha
Colombo.

7A. A.M. Manjula Abeysinghe
Chief Accountant
Department of Ayurvedha
Nawinna.

8. Dr.A.J.M.Muththwar
No. 50, Zahira Mawatha,
Mawanella.

9. P. Dayarathna
Additional Secretary
Ministry of Indigenous Medicine,
Ayurvedha Teaching Hospital complex
No. 235, N.M. Perera Mawatha
Colombo.

9A. Mrs. Geethamani C. Karunaratne
Additional Secretary
The State Ministry of Indigenous Medicine Promotion Rural and Ayurvedic Hospitals Development & Community Health,
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10. Homeopathy Interim Control Committee
Ministry of Indigenous Medicine,
Ayurvedha Teaching Hospital complex
No. 235, N.M. Perera Mawatha
Colombo.

11. Hon. Attorney General
Attorney General's Department
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12. Chandana Weerasekera
No. 194/4, Dremo Gardens
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13. Mohomed Abubakar Mohomed Muneer,
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14. Chandani, Jeewamali Herath
Homeopathy Hospital,
No. 94, Shelton Jayasinghe Mawatha
Welisara, Ragama.

15. Lokeshwara Anusha Madupali
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16. Geethamani C. Karunarathama
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16A. D.L.U. Peiris
Additional Secretary Admin 1
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No. 385, Baddegama Wimalawansa
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17. Professor. Hemantha Senanayake
University Grants Commission
No. 20, Ward Place, Colombo 07.

18. D.P. Wimalasena
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19. Senior Professor Gunapala Amarasinghe
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20. J.M.W. Jayasundera Bandara
Ministry of Health, Nutrition and
Indigenous Medicine,
No. 385, Baddegama Wimalawansa Himi
Mawatha, Colombo 10.

21. Chamindika Herath
Ministry of Health, Nutrition and
Indigenous Medicine,
No. 385, Baddegama Wimalawansa Himi
Mawatha, Colombo 10.

Respondents-Appellants

1. Dr. Ekanayake Mudiyanselage Supun
Minimekala Ekanayake,
Kalawana, Metikumbura
Polgahawela.

2. Dr. Kulatharage Yoshitha Priya
Chandrabharathi
No. 24, Lakeview Circular Road
Dikhenawatte, Mattegoda.

3. Dr. Mohamed Fazhrula Fayaz Ahamed
No. 259/12/B/2, Pallanchena Watta,
Thimbirigaskatuwa, Negombo.

Intervenient Petitioners

VS.

1. Koralagamage Sydny Sunimal Kularatne
No.1/15 Kandy Road,
Dalugama, Kelaniya.

2. Wickramanayake Pathirannehelage
Dissanayake,
Diwulwewa, Hettipola.

3. Liyana Arachchige Lawrance Perera
No. 548/2, Nelum Mawatha
Jayanthipura, Battaramulla.

Petitioners-Respondents

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. Yasantha Kodagoda, PC, J.
Counsel	:	Nirmalan Wigneswaran, DSG for the Respondent-Appellants. Sanath Weerasinghe with Jayalath Hissella for the Petitioners-Respondents. Saliya Peiris, PC with Upendra Walgampaya Instructed by Ms. Thushari Jayawardhana for the Intervenient Petitioners.
Written Submissions	:	07.10.2020 and 27.02.2023 by the Respondent-Appellant.
filed on		05.07.2021 and 07.03.2023 by the Petitioner-Respondents. 28.06.2021and 10.03.2023 by the 1st, 2nd and 3rd Intervenient Petitioners.
Argued on	:	09.03.2022 and 20.02.2023
Decided on	:	10.08.2023

Jayantha Jayasuriya, PC, CJ

This Court had granted special leave to appeal to respondents-appellants from the judgement of the Court of Appeal dated 15.05.2019. The three petitioners-respondents had invoked the jurisdiction of the Court of Appeal on 02nd April 2013 seeking *inter alia* a writ of certiorari to quash the decision of 1st, 2nd 4th and 5th to 10th respondents-appellants, to call applications from Sri Lanka Homeopathy degree holders and diploma holders for registration as new Homeopathy practitioners. An advertisement published in print media by the Registrar of the Homeopathy Medical Council was produced marked P8. Furthermore, petitioners-respondents sought a writ of Mandamus directing the respondent-appellants to publish an advertisement cancelling the aforesaid impugned advertisement – P8. Two other reliefs sought by the petitioner-respondents from the Court of Appeal against the aforesaid respondents-appellants were writs of prohibition preventing them from registering new Homeopathic practitioners and usurping powers and authority of the Homeopathic Council. Furthermore, they sought interim orders restraining the respondents-appellants from calling applications for registration as new homeopathic practitioners and doing any act incidental to and connected with calling said applications and / or making decisions and implementing them until the final determination of the application.

In the aforesaid application, the Minister in charge of Indigenous Medicine, the Secretary of the Ministry of Indigenous Medicine and Secretary of the Homeopathic Council were the 1st, 2nd and 4th respondents respectively. While the members of the Homeopathic Interim Control Committee were cited as 5th to the 9th respondents and the Homeopathic Interim Control Committee was cited as the 10th respondent.

Petitioners-respondents are registered practitioners of homeopathy and they invoked the jurisdiction of the Court of Appeal on the basis that the aforementioned respondents-appellants have usurped the powers and authority of the Homeopathic Council, established under the provisions of the Homeopathy Act No 7 of 1970. Petitioners-respondents further claimed that 5th to 9th respondents named before the Court of Appeal are not members of the Homeopathic Council recognised by the Act, but of an Interim Control Committee appointed by the Minister. It was contended that the Minister had no power to appoint such committee and the committee has no power to register Homeopathic medical practitioners. They contended that it is the Homeopathic Medical Council who has the power to register new practitioners as provided under section 16(3) of the Homeopathy Act.

The Court of Appeal by its judgement dated 15.05.2019, allowed the application of the petitioner-respondents and granted reliefs prayed for in the prayer of the petition.

Respondents-appellants sought special leave to appeal from this court and three intervenient petitioners sought to intervene. This court at the hearing of the special leave to appeal application of the respondent–appellants had also considered the submissions of the learned President's Counsel for the three intervenient-petitioners when granting special leave to appeal on six questions of law, including the following question framed by the intervenient-petitioners:

"Did the Court of Appeal err in failing to hear the intervenient-petitioners prior to its judgement dated 15.05.2019?"

Four of the five remaining questions of law relate to the legality of the impugned judgment of the Court of Appeal.

It is pertinent to note that the decisions the petitioners-respondents challenged in the Court of Appeal were made in 2013 and the judgement was delivered in the year 2019. The learned Deputy Solicitor-General at the outset of the hearing of this appeal submitted that the interim committee, whose decision was impugned in the Court of Appeal ceased to function and a council appointed under the provisions of the new Homeopathy Act, which came in to operation in 2016, is performing necessary duties, at present. Furthermore the said council had endorsed the registration of the intervenient-petitioners as homeopathy practitioners. In view of these changes due to intervenient factors, the learned Deputy Solicitor General submitted that the challenge to the Court of Appeal judgment based on the initial questions of law is an academic exercise and therefore he would confine himself to the sole legal question set out below:

"Did the Court of Appeal err in failing to hear the Intervenient Petitioners prior to its judgment dated 15th May 2019, and if so, whether the judgment dated 15th May 2019 could have an adverse impact on the intervenient petitioners and / or any others who are similarly circumstanced?"

Accordingly all parties agreed to pursue this matter based on the above question of law and restrict their respective cases to focus on the said question.

Before I proceed to examine the submissions on this legal issue I would first set out briefly the factual background as revealed by the material presented before this court.

Under the provisions of Homeopathy Act No 7 of 1970, a council called Homeopathic Council is established. During the period of first ten years commencing on the appointed date, the Minister had the power to appoint the members of the council and thereafter they are to be elected by the homeopathic practitioners registered under the Act. Powers of the council includes the power to register homeopathic practitioners. All the members of the council hold office for a term of five years and a member is deemed to have vacated from office on his removal by the Minister.

In the year 2006, a council had been elected and on 20th October 2009, the Minister had removed the members of the said council. Thereafter the Minister had appointed an interim committee and the term of office of the said interim committee came to an end on 30th January 2011. Thereafter, on 28th March 2011, having considered a memorandum submitted by the Minister, the cabinet of ministers had decided that action be taken in consultation with the Attorney-General. Thereafter, acting on the opinion of the Attorney-General, the Minister had appointed several interim committees. One such committee had been appointed with effect from 1st January 2013, and it is this committee that took steps to call for applications to register homeopathic practitioners. On 19th November 2013, petitioners-respondents challenged this decision and invoked the writ jurisdiction of the Court of Appeal. However, the said interim committee had ceased to hold office at the end of 2013 and a fresh interim committee had been appointed thereafter. On 4th December 2015, a gazette was published setting out the names of all registered homeopathic practitioners. In the following year a new Act had come in to force (Homeopathy Act No 10 of 2016) and on 7th November 2016 a council comprising of eleven members had been appointed in accordance with the provisions of the said Act.

The petitioners-respondents on 29th August 2017 had filed an amended petition in the Court of Appeal pleading inter alia that "they are entitled to and / or there are compelling reasons to maintain and continue with the application". Thereafter the impugned judgment of the Court of Appeal was delivered on 15 May 2019. It is also pertinent at this stage to note that the Court of Appeal when granting notices had refused granting interim relief prayed by the petitioners-respondents to restrain the respondents-petitioners calling applications for registration as new homeopathic practitioners and doing any act incidental to and connected with calling said applications and / or making decisions and implementing them.

The learned President's Counsel for the three intervenient petitioners submitted, that they in response to the advertisement P8, submitted applications to register themselves as homeopathic practitioners and obtained registration on or around 07th August 2013. Thereafter, on or around 18th May 2019 the Registrar of the 3rd Respondent-Petitioner Council informed that their registration would be cancelled as per the impugned judgement of the Court of Appeal dated 15th May 2019. He further submitted that the basis or the reason for said decision by the registrar of the council could be attributed to a specific finding of the Court of Appeal in the impugned judgment dated 15th May 2019. The learned judges of the Court of Appeal having granted relief prayed by the petitioner-respondents, further proceeded to hold:

"Learned Senior DSG for the respondents in his written submissions seeks to dismiss the petitioner's application on futility on the basis that five new homeopathy practitioners were registered in response to the advertisement P8 pending determination of this application. That registration of five new members is on the above-mentioned principle of law (is) a nullity".

On behalf of the intervenient-petitioners it was contended that they themselves and others who are similarly circumstanced are truly aggrieved by the impugned judgement, as their registration had been adversely affected without granting a hearing for them. They contend that they were necessary parties for the application and the failure on the part of the petitioners-respondents to name them as respondents is a fatal irregularity.

The registrar of the homeopathic council by the gazette No 1944 dated 05th December 2015, a copy of which is produced before this court by the intervenient-petitioners, had published the names of the registered homeopathic practitioners under the title "list of homeopathy practitioners-general register-2014". The said list contains two hundred and sixty one names including the three intervenient-petitioners. They are listed as 194, 195 and 197. The three petitioners-respondents are listed in the same list as 114,115 and 125. It is also pertinent to observe that the registrar of the homeopathic council had published a similar list of registered practitioners in the gazette no 1350 dated 16 July 2004 under the title "list of homeopathic practitioners – 2003" and the names of the three respondents-petitioners appear under the same sequential numbers. The three petitioners-respondents had produced a copy of this gazette along with their petition when invoking the jurisdiction of the Court of Appeal.

In this context it is pertinent to observe that the petitioners-respondents neither in their original petition dated 02nd April 2013 nor in the amended petition dated 29th August 2017 had prayed for the cancellation of any registration granted pursuant to the impugned advertisement P8. However, they sought interim orders restraining the respondents-petitioners from calling applications for registration as new homeopathy practitioners and registering them under the provisions of the Act as well as directing the Secretary of the homeopathic council to publish an advertisement cancelling the impugned advertisement marked P8, but were not successful as the Court of Appeal did not grant such interim relief.

The learned Deputy Solicitor General while associating himself with the submissions of the learned President's Counsel for the intervenient petitioners submitted, that a motion with a copy of a letter of the Registrar of the homeopathic council confirming the registration of five persons out of twenty persons who submitted applications in response to the impugned advertisement P8, as registered homeopathy practitioners, together with an extract of the gazette dated 04.12.2015 which contains the names of the intervenient petitioners and the date of their registration namely 07th August 2013, was filed in the Court of Appeal on 17th December 2018. Furthermore, it was contended that the written submissions filed on behalf of the respondents-petitioners in the Court of Appeal on 01st March 2019, categorically drew the attention of the court to the fact that five qualified homeopathic practitioners have been selected from among twenty applicants who responded to the impugned advertisement and that their names were published in the gazette dated 04th December 2015. In the aforementioned written submissions it had been contended that the writ application should fail *inter alia* on the ground of futility and due to the failure to sight necessary parties as respondents. However, the learned judge of the Court of Appeal in his judgment dated 15th May 2019 had restricted his consideration to the submission on futility, in deciding to grant the reliefs prayed for in the prayer. Therefore, it is further contended that the learned judge of the court of appeal erred in holding that the registration of five new members a nullity while granting reliefs prayed in the petition as he failed to consider the submission on the failure to sight necessary parties.

Both the learned President's Counsel for the intervenient petitioners as well as the learned Deputy Solicitor General submitted that the finding on the validity of the registration of the intervenient petitioners without affording them an opportunity to present their case violates the core principles on fair adjudication namely *audi alteram partem* a cardinal rule of natural justice. Therefore, they contend that the revised question of law should be answered in the affirmative.

The learned counsel for the petitioners-respondents contests the above positions of the respondents-appellants and intervenient petitioners. He contended that the legal question should be answered in the negative and the cases of respondents-petitioners as well as intervenient petitioners should be dismissed. It is his contention that the respondents-appellants and intervenient petitioners by restricting the scope of the appeal to the sole question of law and thereby abandoning the appeal on the rest of the questions of law have left two main conclusions of the Court of Appeal intact. It is his position that no person should be allowed to be benefitted from an illegal act and the attempt of the intervenient petitioners to derive benefit from illegality should fail. He claims while the two main findings of the Court of Appeal that 'the appointment of the interim committee by the minister is ultravires' and that 'the decisions made by the purported Interim Committee are null and void *ab initio*' remain unchallenged, registration of the intervenient petitioners as homeopathic practitioners has no force in law, even though they were not accorded a hearing in the Court of Appeal. Furthermore, he submits that the intervenient petitioners "cannot possibly claim that they were unaware of the case pending in the court of appeal challenging the legality of the interim committee by the Minister…. and therefore they should have acted with precautions….". Furthermore, he submits that they are not without remedy as they could obtain registration under the provisions of the Homeopathy Act no. 10 of 2016.

As I have enumerated herein before, the scope of this appeal was restricted to a solitary question of law on the basis that arguing the full appeal is only an academic exercise, due to the subsequent changes. Therefore both the learned Deputy Solicitor-General as well as the learned President's Counsel for the intervenient petitioners confined their challenge to the specific finding of the impugned judgment that directly adversely affected the intervenient petitioners. Therefore the sole issue before this court is whether the learned judge of the Court of Appeal erred when he proceeded to hold "that registration of five new members is on the above mentioned principle of law is a nullity" without according a hearing to the said five new members who were registered by the interim committee.

The registration of these five new members had taken place on 07 August 2013 and by that time there was no judicial pronouncement on the legality of the interim committee. Furthermore, the Court of Appeal had declined issuing an interim order to restrain the respondents-petitioners from calling for applications for registration as new homeopathic practitioners and proceeding to register

them or doing any act incidental or connected with calling said applications or making decisions and implementing them.

The Supreme Court in ***Gnanasambanthan v Rear Admiral Perera and others*** [1998] 3 SLR 167 at 172 observed that *"..it is both the law and practice in Sri Lanka to cite necessary parties to applications for Writs of Certiorary and Mandamus".*

In ***Rawaya Publishers and other v Wijedasa Rajapaksha, Chairman Sri lanka Press Council & Others*** [2001] 3 SLR 213 at 216, Justice J.A.N.De Silva, President Court of Appeal (as he then was) citing with approval ***Udit Narayan Singh v Board of Revenue,*** AIR 1963 – SC 786, observed that:

> *"it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board it self is a necessary party, but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that persons vitally affected by the writ petition are all necessary parties".*

In ***Wijeratne (Commissioner of Motor Traffic) v Ven. Dr Paragoda Wimalawansa Thero et al*** [2011] 2 SLR 258 at 267 the Supreme Court while examining the rules governing the issue of 'necessary parties' to an action observed that;

> *"the second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application".*

The Court further elaborated

> *"A necessary party to an application for a writ of mandamus is the officer or the authority who has the power vested by law to perform the act or the duty sought to be enforced by the writ of mandamus. All persons who would be affected by the issue of mandamus also shall be made respondents to the application"* (at 268).

In the matter before us, one of the reliefs sought by the petitioners-respondents is a Writ of Mandamus directing the respondents to publish an advertisement cancelling the impugned advertisement calling for applications to register new homeopathic practitioners and the Court of Appeal granted the said relief too. Three intervenient petitioners who gained registration based on the applications submitted in response to the said impugned advertisement are therefore necessary

parties to the said application. They had gained such registration within a period of just over four months of filing the application in the Court of Appeal by the petitioners-respondents. There had been a period of five years between the intervenient petitioners gaining registration and final submissions in the Court of Appeal. Such submissions had been made three years after the publication of the list of practitioners in 2015 that contained *inter alia* the names of the new practitioners who gained registration in 2013. It is also pertinent to observe that the petitioners-respondents filed an amended petition in the Court of Appeal, two years after the publication of the gazette, but opted not to add the practitioners who were registered in 2013 in consequent to the impugned advertisement. Petitioners-respondents failed to provide a valid explanation on their failure to add new practitioners other than the mere assertion that they were unaware of such registration. In my view this assertion is far from truth. It is clear that the publication of the list of practitioners is not unusual. Petitioners-respondents themselves produced the publication in 2004 containing 178 names. Their explanation, the claim of ignorance on the publication of list of practitioners in 2015, at a time they had invoked jurisdiction of a court of law challenging the registration of new practitioners is unacceptable. Filing of the amended petition in 2017 demonstrates that the petitioners-respondents had been vigilant on the changes that had been taking place in relation to matters surrounding the litigation they initiated in 2013. It is also interesting to note that apart from the five persons who had been registered in August 2013, sixty five new persons had been registered in the following year – 2014 and the publication in 2015 contains all persons who have been registered between the time the petitioners-respondents invoked the jurisdiction of the Court of Appeal and December 2015. This increase had taken place within the space of two years in a background there were only one hundred and ninety-two persons who had been registered between the years 1982 and 2011. When all these facts are taken cumulatively, the ignorance pleaded by the petitioners-respondents on the registration of three intervenient-petitioners by 2017, is unacceptable.

Respondent-petitioners having failed to discharge their responsibility to add necessary parties take up the position that the intervenient-petitioners should be denied of any relief by this court as they failed to intervene in the Court of Appeal. It is the contention of the petitioners-respondents that the intervenient-petitioners who gained registration in 2013 performed certain functions associated with the interim committee and therefore they ought to have known about the proceedings pending in the Court of Appeal. However, there is no proof as to the exact nature of interaction the intervenient-

petitioners maintained with the interim committee. Furthermore, there were no interim reliefs granted by the court. Petitioners-respondents further submitted that there is no bar for the intervenient-petitioners to seek registration under the 2016 Act, after satisfying that they possess necessary qualifications and hence they are not without any remedy.

Aforesaid contentions of the petitioners-respondents neither absolve them from the responsibility they shoulder nor valid explanations for their lapse. In my view requiring the intervenient petitioners to recommence the registration process under the 2016 Act, causes nothing but an unnecessary and unwarranted burden on them. In this regard it is pertinent to observe that the qualifications the intervenient-petitioner posses are set out in the petition, affidavit and annexures of the intervention application filed in this court and they are not disputed. Furthermore, it is pertinent to observe that in August 2013 out of twenty applicants, only four had been successful gaining registration. Petitioners-respondents do not claim that the intervenient petitioners do not possess required qualifications. The learned Deputy Solicitor-General submitted that the newly constituted homeopathic council, under the provisions of 2016 Act had already decided to ratify all the registrations previously made.

It is also pertinent to observe that the learned judge of the Court of Appeal has made reference to the findings of the Supreme Court in its judgment in SC FR 891/2009 and had relied on it when he proceeded to observe that the registration of five new members in consequent to impugned P8 advertisement is a nullity. In my view it is necessary to examine the facts and circumstances based on which SC FR 891/2009 had been instituted to decide the relevancy of its judgment to the matters under consideration in the Court of Appeal. In 2006, members to the homeopathic council had been elected for a period of five years. However, in 2009 the Minister had removed them and had appointed an interim committee. The members who were removed by the Minister had invoked the jurisdiction of the Supreme Court in SC FR 891/2009 and had challenged their removal. Meanwhile the term of the interim committee that was appointed in 2009 had come to an end in 2011. Thereafter several interim committees had been appointed until the enactment of the new Homeopathy Act in 2016. The impugned Advertisement P8 had been published on a decision of one such interim committee. The said committee had functioned from 01st January 2013 till end of the year and a new committee had been appointed thereafter. Therefore the scope of the instant writ application is limited to the decisions of the said interim committee appointed on 01st January 2013. The appointment of the members to the 2013 interim committee took place at a time there was no judicial

pronouncement on the initial removal of the members in 2009. Furthermore, the appointment of members to the interim committee in 2013 was not a matter that was impugned in SC FR 891/2009. The said judgment that was pronounced in March 2016 focused on the removal of members in 2009 and the appointment of the interim committee in the same year. The learned Deputy Solicitor-General submitted that the scope of the said judgment does not extend to the subsequent appointments of several interim committees, including the interim committee appointed in 2013 in consequent to a cabinet decision and on the advise of the Attorney-General.

When all these factors are considered in the backdrop of the failure on the part of the petitioners-respondents to add necessary parties to the application – parties who were directly affected from the impugned judgment - the intervenient-petitioners and who are similarly circumstanced - and the fact that they were denied a hearing before the Court of Appeal prior to the impugned judgment was delivered together with the fact that the learned judge of the Court of Appeal failed to consider this issue even though it was specifically raised, I am of the view, that the Court of Appeal erred in failing to hear the Intervenient Petitioners prior to its judgement dated 15th May 2019 and therefore the aforesaid judgement dated 15th May 2019 could not have an adverse impact on the Intervenient Petitioners and /or any others who are similarly circumstanced. Hence, the impugned judgement of the Court of Appeal dated 15th May 2019, is varied accordingly.

We make no order on costs.

Chief Justice

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, PC, J.
I agree.

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal in terms of Section 5 (c) (1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Manchanayake Arachchilage Dharmawathie,
Doranagoda, Udugampola.

S.C. Appeal No. 151/2015
SC/HCCA/LA NO. 565/2014
WP/HCCA/GMP/209/2002(F)
D.C. Gampaha Case No. 27302/P

Plaintiff

Vs.

1. Keppetiwalana Ralalage Rohini Lanka
2. Keppetiwalana Ralalage Shayamalie Dharmadasa
3. Keppetiwalana Ralalage Lakshman Dharmadasa
4. Keppetiwalana Ralalage Sisira Kumara Dharmadasa
5. Keppetiwalana Ralalage Dharmapriya
6. Keppetiwalana Ralalage Kapila Nimal Ruwan
7. Keppetiwalana Ralalage Malanie Pushpakanthi
8. Keppetiwalana Ralalage Jayaratna
9. Thalahitiya Gamaralalage Podihamine

All of Doranagoda, Udugampola.

Defendants

AND

1. Keppetiwalana Ralalage Rohini Lanka
2. Keppetiwalana Ralalage Shayamalie Dharmadasa
3. Keppetiwalana Ralalage Lakshman Dharmadasa
4. Keppetiwalana Ralalage Sisira Kumara Dharmadasa
9. Thalahitiya Gamaralalage Podihamine

All of Doranagoda, Udugampola.

1st to 4th and 9th Defendant-Appellants

Vs.

Manchanayake Arachchilage Dharmawathie, Doranagoda, Udugampola.

Plaintiff- Respondent

5. Keppetiwalana Ralalage Dharmapriya
6. Keppetiwalana Ralalage Kapila Nimal Ruwan
7. Keppetiwalana Ralalage Malanie Pushpakanthi
8. Keppetiwalana Ralalage Jayaratna

All of Doranagoda, Udugampola.

5th to 8th Defendant-Respondents

AND NOW BETWEEN

1. Keppetiwalana Ralalage Rohini Lanka

2. Keppetiwalana Ralalage Shayamalie Dharmadasa
3. Keppetiwalana Ralalage Lakshman Dharmadasa
4. Keppetiwalana Ralalage Sisira Kumara Dharmadasa
9. Thalahitiya Gamaralalage Podihamine (Deceased)

9(a) Keppetiwalana Ralalage Rohini Lanka
9(b) Keppetiwalana Ralalage Shayamalie Dharmadasa
9(c) Keppetiwalana Ralalage Lakshman Dharmadasa
9(d) Keppetiwalana Ralalage Sisira Kumara Dharmadasa

All of Doranagoda, Udugampola

1st to 4th and 9th Defendant-Appellant-Appellants

Vs.

Manchanayake Arachchilage Dharmawathie, Doranagoda, Udugampola. (Deceased)

1(a) Keppetiwala Ralalage Dharmapriya
1(b) Keppetiwalana Ralalage Kapila Nimal Ruwan
1(c) Keppetiwalana Ralalage Malanie Pushpakanthi

Plaintiff- Respondent-Respondents

5. Keppetiwalana Ralalage Dharmapriya
6. Keppetiwalana Ralalage Kapila Nimal Ruwan

7. Keppetiwalana Ralalage Malanie Pushpakanthi
8. Keppetiwalana Ralalage Jayaratna (Deceased)

8(a) Keppetiwalana Ralalage Nandani Hemalatha
8(b) Keppetiwalana Ralalage Jagath Rohana
8(c) Keppetiwalana Ralalage Thamara Dharshani
8(d) Keppetiwalana Ralalage Ajith Priyantha
8(e) Keppetiwalana Ralalage Geetha Gayani

All of Doranagoda, Udugampola

5th to 8(a) to (e) Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
K.K. Wickremasinghe, J.
Janak De Silva, J.

Counsel:

Ranjan Suwandaratne, PC with Anil Rajakaruna for the 1st to 4th and 9th Defendant-Appellant-Appellants

Sudharshani Cooray for the Substituted Plaintiff-Respondent-Respondent and 5th to 8(a) to 8(e) Defendant-Respondent-Respondents

Written Submissions tendered on:

29.10.2015 and 19.01.2023 by the 1st to 4th and 9th Defendant-Appellant-Appellants

03.05.2016 and 04.01.2023 by for the Substituted Plaintiff-Respondent-Respondent and 5th to 8(a), 8(b) and 8(c) Defendant-Respondent-Respondents

Argued on: 02.12.2022

Decided on: 10.08.2023

Janak De Silva J.

This appeal arises out of a partition action. There is no dispute as to the identity of the corpus. On the title dispute there was some common ground between Plaintiff-Respondent-Respondent (Plaintiff) and the 1st to 4th and 9th Defendant-Appellant-Appellants (Appellants).

According to them the original owner of the corpus was Keppetiwalana Ralalage Pabilis Appuhamy. It was also admitted that Pabilis Appuhamy by Deed of Transfer No. 29739 dated 14.05.1933 transferred the corpus in equal undivided shares to one Manchanayake Arachchilage Jamis Appuhamy and one Manchanayake Arachchige Podisingho. The title dispute between the Plaintiff and Appellants was on the devolution of title from the said Manchanayake Arachchilage Jamis Appuhamy and said Manchanayake Arachchige Podisingho.

According to the Plaintiff, Jamis Appuhamy by Deed of Transfer No. 275 dated 23.06.1939 (1වි.1) transferred his undivided ½ share of the corpus back to Pabilis Appuhamy. Thereafter Pablis Appuhamy by Deed of Transfer No. 17754 dated 17.11.1971 (1වි.2) transferred this undivided ½ share of the corpus to his grandchildren, the 1st to 4th Appellants. They are the children of the 9th Appellant and Keppetiwalana Ralalage Wijedasa, a son of Pabilis Appuhamy. Thus, according to the Plaintiff each of the 1st to 4th Appellants became entitled to an undivided 1/8th share of the corpus. Nevertheless, the Appellants contend that Keppetiwalana Ralalage Dharmadasa, another son of Pabilis Appuhamy has prescribed to the entire corpus through long and undisturbed possession adverse to the other co-owners.

The title dispute between the Plaintiff and the Appellants on one side and the 5th to 8(a), 8(b) and 8(c) Defendant-Respondent-Respondents (Respondents) on the other side revolved on whether Pabilis Appuhamy was the only son of Keppetiwalana Ralalage Akalis Appuhamy. According to the Plaintiff and the Appellants, Pabilis Appuhamy was the sole son of Akalis Appuhamy and inherited the corpus from Akalis Appuhamy. Nonetheless, according to the Respondents, Akalis Appuhamy had another son called Keppetiwalana Ralalage Juwanis Appuhamy. Hence, Pabilis Appuhamy and Juwanis Appuhamy each inherited an undivided ½ share of the corpus from Akalis Appuhamy.

The learned Additional District Judge accepted the pedigree claimed by the 8th Respondent and rendered judgment accordingly. The Appellants' prescriptive claim was denied. The appeal to the Civil Appellate High Court of the Western Province (holden in Gampaha) by the Appellants was dismissed.

Leave to appeal has been granted on the following questions of law:

1. Have the Hon. High Court Judges as well as the District Judge erred in law by basing the judgment on the purported pedigree of the 8th Defendant-Respondent-Respondent which has not beens proved at all during the course of the trial on the contrary the 8th Defendant-Respondent-Respondent contradicted himself with regard to the purported original ownership relied upon by him in arriving at his said conclusion?
2. Have the Hon. High Court Judges as well as the learned District Judge erred in law by granting an undivided half share of the property whereas the 8th Defendant-Respondent-Respondent by the Statement of Claim dated 04.09.1986 in fact only sought to obtain undivided 1/6th of the said property in arriving at their final conclusion?

3. The Hon. High Court Judges as well as the learned District Judge totally failed to consider the prescriptive possession of these Petitioners backed by their title deeds in arriving at their final conclusion?
4. Have the Hon. High Court Judges as well as the learned District Judge erred in law by failing to evaluate the evidence led by the parties at the trial with regard to the actual devolution of title of the property in a suit and prescriptive claims made by the Petitioners and also the other Respondents in arriving at their final conclusion?

Inheritance

The plaint claimed that Pabilis Appuhamy acquired the corpus through a long and undisturbed possession. This is the position taken up by the Appellants as well. Neither party has provided any evidence to support this position.

On the contrary there is evidence that Pabilis Appuhamy inherited an undivided share of the corpus from Akalis Appuhamy. Under cross-examination the Plaintiff admitted to being the daughter of Podisingho, a son of Pabilis Appuhamy. According to the Plaintiff, Pabilis Appuhamy by Deed of Transfer No. 29739 dated 14.05.1933 transferred the corpus in equal undivided shares to Manchanayake Arachchilage Jamis Appuhamy and Podisingho.

In ***Suhumaran v. Sathiyaseelan*** **[S.C. Appeal No. 28/2017, S.C.M. 04.10.2021]** I held that the probative value of the contents of a recital in a deed depends on the facts and circumstances of each case. Although it is mentioned in the proceedings that a photocopy of Deed of Transfer No. 29739 was produced marked as "පැ.1ඒ", it cannot be found in the brief. Nevertheless, the Plaintiff was cross examined on the contents of "පැ.1ඒ" and she admitted that the recital therein states that Pabilis Appuhamy obtained title to the corpus through inheritance from his father Akalis Appuhamy and his mother Helena.

In the absence of the marked deed "පැ. 1ඇ" in the brief, I am of the view that there is no legal impediment to the Court considering the evidence on record given by the Plaintiff on the contents of the recital therein. Given the relationship between Podisingho and Pabilis Appuhamy, I have no hesitation in accepting this evidence of the facts and circumstances of the case.

The fact that Akalis Appuhamy died intestate is further corroborated by the recital in deed marked ("8වී.1") wherein Helena states that she is transferring the rights, to another land, which she derived from marriage inheritance. Moreover, documents marked "8වී.2"and "8වී.3" (plaints of two partition actions instituted by the 8th Respondent in relation to partition of other property belonging to Akalis Appuhamy) establish the fact that Pabilis Appuhamy and Juwanis Appuhamy were sons of Akalis Appuhamy. In fact, the Plaintiff accepted under cross-examination that Juwanis Appuhamy was also entitled to his share of the corpus on the death of Akalis Appuhamy. Accordingly, I am of the view that the 8th Respondent has proved that both Pablis Appuhamy and Juwanis Appuhamy inherited an undivided ½ share each of the corpus from Akalis Appuhamy.

The Appellants strenuously contended that no share of the corpus should be granted to the 8th Respondent as neither he nor his predecessors were ever in possession of the corpus. The short answer to this point is that a co-owner's possession is in law the possession of all the other co-owners. Every co-owner is presumed to be in possession in his capacity as a co-owner.

Accordingly, I answer the first question of law in the negative.

The Appellants contend that nevertheless, the 8th Respondent failed to prove the devolution of title of Juwanis Appuhamy to him. In particular, it was contended that Juwanis Appuhmay had three children, namely Keppetiwalana Ralalage Jayaratne (8th Respondent), Keppetiwalana Ralalage Jayatilleke and Keppetiwalana Ralalage Helena.

Hence, if at all the 8th Respondent is only entitled to an undivided 1/6th share of the corpus. In fact, the 8th Respondent in his statement of claim only claimed an undivided 1/6th share of the corpus. However, the learned Additional District Judge granted the 8th Respondent an undivided ½ share of the corpus.

Admittedly notices were sent by the District Court to Keppetiwalana Ralalage Jayatilleke and Keppetiwalana Ralalage Helena. They did not come forward. Nevertheless, it is the bounden duty of the trial judge in a partition action to fully investigate the title to the corpus. The law does not permit him to allocate shares to a claimant merely because the other parties who are entitled to undivided shares do not make a claim in the partition action. In ***Ismail Lebbe v. Haniffa*** **(51 N.L.R. 299 at 301)** it was held that if no party is able to establish to the satisfaction of the Court that a co-owner is alive or, if he is dead, who his heirs are, his share would remain unallotted and the Court will proceed to enter a partition decree in respect of the remaining shares among other co-owners. In ***Yoosuf and Others v. Muttaliph*** **(13 C.L.Rec. 171)** it was held that where such a portion of the corpus is left unallotted, the title to this unallotted lot remains in the original co-owners and that title is in no respect affected by the partition decree**.** I am of the opinion that both the District Court and the High Court were mistaken in their decision to grant the 8th Respondent an undivided ½ share of the corpus. The 8th Respondent is only entitled to an undivided 1/6th share of the corpus.

Therefore, I answer question of law No. 2 in the affirmative.

Prescription

The 1st to 4th Appellants are the children of Keppetiwalana Ralalage Dharmadasa, a son of Pabilis Appuhamy. The 9th Appellant is the widow of Keppetiwalana Ralalage Dharmadasa. The Appellants claim that from around 1955 Keppetiwalana Ralalage Dharmadasa was in undisturbed and uninterrupted possession of the entirety of the corpus in a manner that

was adverse to the rights of aforementioned Podisingho and all those who claim the title through him. Consequently, they claim to have obtained title to the corpus.

The 9th Appellant's testimony shows that she got married to Dharmadasa in 1954 and acquired possession of the corpus in 1955. Nevertheless, the evidence in this case indicates that the corpus was co-owned property by then.

In ***Tillekeratne v. Bastian*** **(21 N.L.R. 12)** it was held that in order to acquire prescriptive title a co-owner should prove exclusive possession for ten years after changing the nature of the possession to one of adverse title to the others.

Furthermore, the Appellants and the parties they claim prescriptive rights against are related. In ***De Silva v. Commissioner General of Inland Revenue*** **(80 N.L.R. 292 at 295-6)** Sharvananda J. (As he was then) held:

> *"The principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from the facts and circumstances of each case and the relationship of the parties.* ***Possession which may be presumed to be adverse in the case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships****."*(Emphasis added)

Let me now examine the evidence presented by the Appellants against these principles.

The 9th Appellant's claim was that her husband Dharmadasa paid taxes for the corpus. This testimony has been corroborated by retired agrarian officer P.A.S. Sumanasiri. Nevertheless, in ***Hassan v. Romanishamy*** **(66 C.L.W. 112)** Basnayake C.J. held that the payment of rates is by itself not proof of possession for the purpose of section 3 of the Prescription Ordinance, for rates can be tendered by a tenant or one occupying any premises with the leave and license of the owner or by any other person. This statement was cited with approval in ***Sirajudeen and Others v. Abbas*** **[(1994) 2 Sri. L. R. 365]**.

Gamaralalage Joseph Perera, a friend of Dharmadasa, testified that Dharmadasa and the Appellants resided in the house built on the corpus. However, he stated that he is unaware as to who enjoyed the produce of the corpus or whether anyone else was in possession of or could claim title to the corpus. Gunapala Jayawardane, who is related to the 9th Appellant, lived in the house built on the corpus with Dharmadasa and the 9th Appellant from 1955 to 1978. He testified that Dharmadasa and the 9th Appellant were the only ones who had possession of the corpus and were the only ones who cultivated the corpus. However, during cross-examination on behalf of the Plaintiff, he admitted that Wijedasa frequently visited the corpus until his death in 1980 and that he is unaware whether Wijedasa was given a portion of the produce from the corpus.

H.S.A.P. Peris, a Deputy Provincial Director of the Department of Agriculture was called to prove documents “8වි.12” to “8වි.15”. He testified that these documents were issued by the Department of Agriculture allowing Dharmadasa and the 9th Appellant to cultivate specific types of crops on a land called Ambagahalanda.

Nevertheless, as pointed out earlier, every co-owner is presumed to be possessing the corpus in his capacity as a co-owner. One co-owner cannot put an end to such possession by any secret intention in his mind. It is only "ouster" or something equivalent to "ouster" which could bring about that result. The evidence in this case does not establish any such

ouster. The ouster was established only in December 1983 when the Appellants obstructed the possession of the Plaintiff and her children. This partition action was filed by the Plaintiff in November 1984.

For all the foregoing reasons, I hold that the learned Additional District Judge and the Civil Appellate High Court judges were correct in rejecting the prescriptive claim of the Appellants for the whole corpus.

Accordingly, question of law Nos. 3 and 4 are answered in the negative.

Based on the answer given to the question of law No. 2, I vary the judgment of the learned Additional District Judge and allocate an undivided 1/6th share of the corpus to the 8th Respondent. Another 2/6th share of the corpus should be left unallotted.

The learned District Judge of Gampaha is directed to enter an interlocutory decree in accordance with this judgment. If the interlocutory decree has already been entered, it should be amended in accordance with the judgment of the Court.

The parties shall bear the costs of this appeal.

The appeal is partly allowed.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

K.K. Wickremasinghe, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

D. S. Fernando,
No. 01, G. H. Perera Mawatha,
Rattanapitiya.

Petitioner

S.C.(F.R.) Application No: 360/2016

Vs.

1. Hon. Laxman Kiriella,
   The Former Minister of Higher Education and Highways,
   The Ministry of Highways,
   Denzil Kobbekaduwa Mawatha,
   Koswatta,
   Battaramulla.

1(a). Hon. Johnston Fernando,
The Former Minister of Roads and Highways,
The Ministry of Roads and Highways,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

1(b). Hon. Bandula Gunawardane,
Minister of Mass Media, Transport and Highways,
The Ministry of Highways,
9th Floor, Maganeguma Mahamedura,
Denzil Kobbekaduwa Mawatha,

Pelawatta,
Battaramulla.

2. Hon. John Amarathunga,
The Former Minister of Lands,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.

2(a). Hon. S. M. Chandrasena,
The Minister of Lands and Land Development,
The Ministry of Lands and Land Development,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.

2(b). Hon. Harin Fernando,
The Minister of Land and Tourism,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.

3. The Secretary,
The Ministry of Highways,
No. 216,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

4. The Road Development Authority,
3rd Floor, Sethsiripaya,
Battaramulla.

5. M. P. K. L. Gunarathne,
The Director General,
The Road Development Authority,

Sethsiripaya,
Battaramulla.

5(a). L. V. S. Weerakoon,
The Director General,
The Road Development Authority,
Maganeguma Mahamedura,
Denzil Kobbekaduwa Mawatha,
Pelawatta,
Battaramulla.

6. Director (Lands),
The Road Development Authority,
Sethsiripaya,
Battaramulla.

6(a). N. K. L. Neththikumara,
The Director (Lands),
The Road Development Authority,
Maganeguma Mahamedura,
Denzil Kobbekaduwa Mawatha,
Pelawatta,
Battaramulla.

7. W. K. Kodithuwakku,
The Project Director,
National Highways Sector Project,
No. 434/2, Danny Hettiarachchi Mawatha,
Ganahena,
Battaramulla.

8. L. A. Kalukapuarachchi,
The Divisional Secretary,
Divisional Secretariat of Kesbewa,
Piliyandala.

9. The Surveyor General,
   The Department of Surveyor General,
   Narahenpita,
   Colombo 05.

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

Respondents

Before: Hon. Buwaneka Aluwihare, P.C., J.

Hon. Janak De Silva, J.

Hon. Arjuna Obeyesekere, J.

Counsel:

Rasika Dissanayake with Shabeer Huzair for the Petitioner

Yuresha de Silva D.S.G. for the Respondents

Written Submissions:

Not filed by either party

Argued on: 10.01.2023

Decided on: 10.08.2023

Janak De Silva, J.

The Petitioner owns a parcel of land that is situated in Rattanapitiya, Boralesgamuwa and facing the Pamankada-Horana main road. According to the Petitioner this is the sole residential property owned by him. The State acquired two portions of the same parcel of land on two separate occasions for road development.

The factual circumstances of the two acquisitions are as follows.

A section 2 notice under the Land Acquisition Act (Act) dated 08.04.2008 (9R1) was published asserting that land was required for the public purpose of "*widening of Colombo – Horana Highway […] under the National Highways Sector Project*". On 06.02.2012, a section 5 notice under the Act (9R2) was published reflecting the decision of the Minister of Lands, *inter alia*, that Lot No. EF depicted in the Advance Tracing bearing No. CO/KSB/2008/198 (9R3) was required for the said public purpose. On 19.02.2013, an order (9R4) was made in terms of section 38 (a) of the Act (9R4). The notice in terms of section 7 of the Act (9R5) was published on 08.05.2013.

On 27.05.2013, an inquiry was held in terms of section 9 of the Act with the participation of the Petitioner. A decision in terms of section 10(1)(a) of the Act (9R8) was made accepting the claim of the Petitioner in respect of Lot No. 1 depicted in Plan bearing No. 9332 subject to the life interest of the mother of the Petitioner. On 10.03.2014, an award in terms of section 17 (1) of the Act (9R9) was made awarding a sum of Rs. 2,840,000/- as compensation for the acquisition of 2.29 perches.

Subsequently, the Petitioner preferred an appeal to the Land Acquisition Board of Review. Later, the Petitioner made an appeal to the Ministerial Committee as reflected in document marked P17. Upon considering the appeal, the Land Acquisition and Resettlement Committee ("LARC"), increased the compensation to Rs. 4,070,041/-. This decision was later affirmed by the Ministerial Compensation Appeal Board ("SUPER LARC"). The Petitioner refused to accept the said compensation along with the *ex-gratia* payment of Rs. 500,000/- claiming that he found the proposed compensation insufficient and that he wanted to seek an enhancement of the proposed compensation. The State has taken possession of the said portion of land.

In the second acquisition, a section 2 notice under the Act was published on 12.12.2013 for the same public purpose, namely widening of the Pamankada-Horana Road. A section 38 (a) order under the Act was published on 05.05.2014, covering 1.38 perches of land belonging to the Petitioner. On 08.02.2017 and 19.04.2017 respectively steps were taken to publish notices in terms of Sections 5 and 7 of the Act. On 08.05.2017, an inquiry in terms of section 9 of the Act was held with the participation of the Petitioner. The Petitioner's claim to the said land was accepted in terms of section 10 (1) (a) of the Act in the decision marked 9R26 dated 16.05.2017. On 03.10.2017, an award in terms of section 17 (1) of the Act was made awarding Rs. 1,496,500.00 as compensation. This was subsequently increased to Rs. 3,235,750.00 by LARC and to Rs. 4,623,875.00 by SUPER LARC. The State has taken possession of this portion as well.

Hence, a total sum of Rs. 8,693,916.00 has been determined to be paid as compensation to the Petitioner for the acquisition of a total of 3.64 perches of land. The Petitioner has thus far refused to accept this amount.

Leave to proceed has been granted under Articles 12(1), 12(2) and 14(1)(g) of the Constitution.

The Petitioner is seeking the following reliefs:

1. Declaration of an infringement and/or continuing violation of the Petitioner's fundamental rights guaranteed under Articles 12 (1) and/or 12 (2) and/or 14 (g) of the Constitution by the 1st – 10th Respondents; and,
2. A direction that the 1st – 10th Respondents pay compensation to the Petitioner for the acquisitions together without any delay.

Articles 12 (1) and 12(2)

Article 12(1) of the Constitution encompasses two distinct principles. The negative concept is that all individuals are equal before the law and that no one should be treated differently. The positive concept is that all individuals are entitled to equal protection of the law, which requires them to be treated equally in similar circumstances.

The negative concept requires the application of the law to everyone. No one is entitled to be treated differently, except where the law recognises a specific exemption to its application such as Articles 12(4), 15(7) and 15(8) of the Constitution. Any act which contravenes the law will violate the rule of law embedded in Article 12(1).

In ***C. W. Mackie and Company Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and others*** **[(1986) 1 Sri L.R. 300 at page 309]** Sharvananda C.J. held that:

> "*[…] [T]he equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12,* ***one cannot seek the execution of any illegal or invalid act****. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law.*" (Emphasis added)

This decision was quoted with approval in ***Farook v. Dharmaratne, Chairman, Provincial Public Service Commission, Uva and Others*** **[(2005) 1 Sri L.R. 133 at 140]** where Dr. Shirani Bandaranayake C.J. observed that:

> "***Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally****. The safeguard retained* ***in Article 12 (1) is for the performance of a lawful act and not to be directed to carry out an illegal function****. In order to succeed the petitioner must be in a position to place material*

before this Court that there has been unequal treatment within the framework of a lawful act." (Emphasis added)

Therefore, where there is an allegation of a violation of Article 12(1) of the Constitution, it is incumbent on the Petitioner to, inter alia, establish that the Respondent will not have to act contrary to law in providing the relief sought by the Petitioner.

The Petitioner does not challenge the legality of the acquisition of the two parcels of land. In fact, he makes a laudable assertion that he did not challenge the acquisition in the public interest. His grievance is that the compensation paid for the two acquisitions is inadequate as it was calculated based on the acquisition having been made on two different dates. The Petitioner contends that he is entitled in law to have the authorities calculate the compensation assuming the two acquisitions were done together and not independently.

In this context, I have to examine the basis on which compensation is calculated in terms of the Act.

Part VI of the Act deals with compensation. Section 46 of the Act deals with the "market value" of the land or servitude that is to be acquired for the stated public purpose. Section 45 of the Act specifies the factors that must be taken into account when determining the market value for compensation assessment.

It states that this market value refers to the value specified in section 7 of the Act. This position is clearly defined in the Act, but it has been reaffirmed in ***C.E.A Perera v. The Assistant Government Agent, Kaluthara*** **(74 N.L.R. 130)**, where Weeramantry, J. held:

"*Section 45 (1) of the Land Acquisition Ordinance (Cap. 460) provides that the market value of a land for the purposes of that Ordinance shall be the amount which the land might be expected to have realized if sold by a willing seller in*

the open market as a separate entity ***on the date of publication of notice under Section 7****.*" (Emphasis added)

It is evident that the market value of the land acquired must be determined on the date of the notice under section 7 of the Act. The section 7 notices for the two acquisitions were published on two different dates, 08.05.2013 and 19.04.2017. Thus, the market value of the two portions of land must be determined based on those two different dates on which the section 7 notices were made although acquired for the same public purpose. There is no provision in the Act to apply one date to both acquisitions.

The State has followed the provisions of the Act when calculating the compensation. The Petitioner is asking the State to determine the compensation for the two portions of land acquired in the two different days, assuming they were done on the same day. That basis may lead to the Petitioner receiving a higher compensation. Nevertheless, the existing law does not permit the Court to order such a course of action.

Court is certainly exercising just and equitable jurisdiction in terms of Article 126(4) of the Constitution. In ***Noble Resources International Pte Limited v. Hon. Ranjith Siyambalapitiya, Minister of Power and Renewable Energy and Others*** **[S.C. FR No. 394/2015, S.C.M. 24.06.2016]** The Court issued directives pursuant to Article 126(4) even if no violation of a fundamental right has been established. However, the Court cannot under the guise of just and equitable jurisdiction enshrined in Article 126(4) of the Constitution grant any remedy which requires any person to act contrary to law.

I hold that the Petitioner has failed to establish any violation of Article 12(1) of the Constitution. Moreover, the Court cannot direct the State to calculate compensation assuming both acquisitions were done on the same day as it would require the State to act contrary to law.

Furthermore, the Petitioner has failed to show that he was discriminated in calculating the compensation contrary to Article 12(2).

Article 14 (1) (g)

The petitioner contends that he and his wife were forced to cease their self-employment of supplying readymade garments because of the lack of space in their residence after the acquisition.

Article 14 (1) (g) of the Constitution states that "*[e]very citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise*."

The right to engage in any lawful trade or profession is infringed if that right is restricted contrary to law. **[*W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation* (1989) 2 Sri L. R. 393 at pages 407-408, *Nuwan Chathuranga Padmasiri and Others v. C.D. Wickremaratne and Others* (S.C. (F/R) No. 46/2021, S.C.M. 23.11.2022)]**.

Moreover, the fundamental right to engage in a trade or business, must be read together with Articles 15 (5), 15 (7) and 15 (8) which demonstrate that Article 14 (1) (g) is not an unrestricted fundamental right.

Specifically, Article 15 (5) states that:

"*15 (5).* ***The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy*** *or in relation to –*

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise." (Emphasis added)

In ***Licensing of Produce Brokers Bill*** **[Decisions of the Supreme Court on Parliamentary Bills, 1978-1983 (Vol. I), page 32]**, it was observed that Article 15 (5) restrictions are permitted only in accordance with law. Restrictions over an individual's employment shall be permitted in the interest of the general public **[*Jeshingbhai v. Emperor* AIR 1950 Bombay 363 at page 367]**.

Road transport is a significant part of economic activity, particularly in developing countries like Sri Lanka. Although it may be difficult to quantify in economic terms, the contribution of transport for national development, there is no doubt that developed road network plays an indispensable role in providing access to a myriad of economic activity including health, education and facilitating markets for economic growth.

Admittedly, the impugned acquisition has been made for a road widening project. The Petitioner in paragraph 14 of the affidavit dated 12.10.2016 states that he "*did not intend to stand in the way of the said road widening project considering the national importance of the same*". The national importance of the project is thus conceded.

Nevertheless, any restriction on the right *to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise* must be reasonable and proportionate to the object sought to be achieved. Such restrictions would not be reasonable if they arbitrarily and excessively invade the freedom of individuals **[*Chintamoan Rao v. State of M.P.* AIR 1951 SC 118; *Rashid Ahmed v. Municipal Board, Kairana* AIR 1950 SC 163]**.

I observe that the State has in this instance resorted to a least intrusive approach in the acquisition of land in the instant case by first acquiring a portion which was deemed to be absolutely necessary for the stated public purpose. The second acquisition followed sometime thereafter.

Moreover, in ***Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries*** **[(1985) 1 Sri. L. R. 285 at 323]** Sharvananda, C. J. held that the discontinuance of a job or employment in which any person is engaged in does not by itself infringe his fundamental right to carry on an occupation or profession which is guaranteed under Article 14 (1) (g) of the Constitution. Despite the claim of discontinuance of self-employment by the Petitioner, attachment marked P26(iv) shows that the Petitioner, at the time of filing this action, continued to engage in his employment, albeit somewhat restrictively for lack of space, and hence, the Petitioner was not completely deprived of his ability to engage in his trade or business.

In any event, the Respondents have factored in the employment of the Petitioner and the impact the acquisition had on it when compensation was calculated. In the final determination of the SUPER LARC dated 12.05.2015 marked as P35, that part has been addressed as "අවිධිමත් ව්‍යාපාර අහිමිවීම" in the computation of Rs. 4,070,041/=.

For all the foregoing reasons, I hold that the Petitioner has failed to establish any violation of Article 14(1)(g) of the Constitution.

Before parting with this judgment, I wish to draw attention to a shortcoming in the Act that must be corrected. The comity between the legislature and the judiciary requires the Court to draw the attention of the legislature to situations where a lacuna in the law prevents the Court from remedying an injustice. The State has chosen a less intrusive method of acquiring land for the project's development by doing it in two stages. This is in line with the principle of proportionality mentioned earlier and should be encouraged to be followed in future acquisitions as well. The Act does not provide for the compensation to be calculated equitably in such a situation, given the provisions in section 7.

The attention of the legislature is drawn to this deficiency in order to examine an appropriate amendment to the relevant provisions to provide for equitable compensation in similar situations.

The application is dismissed without costs.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 02 of 1978 against Mr..H.A. Ratnayake

SC Rule 04/2022

H.A. Mahinda Ratnayake
No. 26/13, Madarata Housing, Uplands,
Aruppola
Respondent

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. Mahinda Samayawardana, J.
Counsel	:	Anura Maddegoda, PC with Ms. Nadeesha Kannangara & Isuru Deshapriya for the Respondent Attorney-at-Law. Ms. W. Hettige, SDSG. for the Hon. Attorney General. Rohan Sahabandu PC, with Ms. S. Senanayake for the Bar Association of Sri Lanka.
Written submissions filed		On behalf of the Hon. Attorney General on 09.02.2023.
Inquiry on	:	14.07.2023
Decided on	:	10.08.2023

Jayantha Jayasuriya, PC, CJ

The Registrar of the High Court of the Central Province sitting in Kandy acting in terms of section 42(4) of the Judicature Act communicated to the registrar of the Supreme Court, that the respondent attorney-at-law was sentenced by the learned High Court judge having found him guilty of four counts on which he stood indicted. A fine of five hundred rupees had been imposed

on one count and he had been sentenced to a term of one-year rigorous imprisonment for 3 counts. Those terms of imprisonment had been ordered to run concurrently.

On 20th September 2022, the respondent attorney-at-law who was represented by counsel appeared on notice issued by this Court and the registrar of this Court read over the charges against him in open court. Thereafter the show cause notice along with the charges was served on him. The aforesaid charges allege, that the respondent attorney-at-law fraudulently conspired to attest the deed bearing no 387 dated 05.02.1999, made a false statement in attesting the said deed and committed forgery in attesting the said deed. Furthermore, the respondent attorney-at-law had acted in breach of the rules set out in section 31 of the Notaries Ordinance. Thereby, the respondent attorney-at-law had conducted in a manner which would reasonably be regarded as disgraceful or dishonourable by attorneys-at-law of good repute and competency as well as in a manner which is regarded as deplorable by fellow members of the profession. The respondent attorney-at-law thereby breached Rule 60 of the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules, 1988 as well as Rule 61 of the said Rules as he had conducted in such a manner that is unworthy of an attorney-at-law.

This Court acting in terms of section 42(4) of the Judicature Act, suspended the respondent attorney-at-law from practice in terms of section 42(3) pending the final determination of these proceedings. The learned President's Counsel for the respondent attorney-at-law submitted that no appeal has been made against the conviction or the sentence of the High Court and that the respondent attorney-at-law had already served the term of imprisonment and paid all fines. The respondent attorney-at-law pleaded guilty to the charges and sought time to show cause and plead in mitigation by way of an affidavit as to why he should not be either removed or suspended from practice, by this Court.

The respondent attorney-at-law by his affidavit dated 12th December 2022 pleaded not to suspend or remove him from practice. The learned President's Counsel in his submissions drew the attention of the Court to several mitigatory factors averred in the affidavit of the respondent attorney-at-law and pleaded the Court to act with clemency. Expression of regret and remorse,

the old age, previous good conduct and the fact that he had already served the term of imprisonment were pleaded as mitigatory factors.

The respondent was admitted and enrolled by the Supreme Court as an attorney-at-law on 17th November 1988 and on 01st March 1996 he had obtained the license to practice as a notary public. He had been in public service for nearly three decades before he commenced practicing as an attorney-at-law and a notary public. He holds a degree in Bachelor of Arts and a Diploma in Education. He had served as a teacher and a principal during his career in the public service. He plays an active role in many social service organisations and village societies. He is married with three children and is eighty-three years old.

The learned Deputy Solicitor-General who appeared to assist Court drew the attention of the Court to *inter alia* curses curiae relating to situations where the attorneys-at-law were found guilty of criminal conduct and thereafter subjected to disciplinary proceedings.

Basnayake CJ in **In Re Fernando** 63 NLR 233 at 235 observed that:

> *"There are many instances [In re Ellawala (1926) 29 N. L. R. 13 (acceptance of a bribe). In re Ranasinghe (1931) 1 Q. L. W. 47 (Criminal breach of trust by advocate). In re Kandiah (1932) 25 O. L. W. 87 (offence against the Opium Ordinance No. 5 of 1910), In re Ariyaratne (1932) 34 N. L. R. 196 (culpable homicide not amounting to murder). In re W. A. P. Jayatilleke (1933) 35 N. L. R. 376 (unlawful assembly, house-trespass and hurt). In re Brito (1942) 43 N. L. R. 529 (offence under the Post Office Ordinance sliding indecent or grossly offensive post cards)] in our reports of advocates and proctors having been removed from office for convictions which though quite unconnected with their professional duties have made them unfit to be entrusted thereafter with the office of advocate or proctor as the case may be".*

The learned Deputy Solicitor-General further contended that the conduct of the respondent attorney-at-law that led to the conviction for offences pleaded in the indictment has a direct link to the discharge of professional duties as a notary public and therefore is an aggravating factor

that needs to be given due regard in determining the nature of disciplinary sanctions that should be imposed on him.

It is pertinent to note that the attorney-general indicted the respondent attorney-at-law along with two others in the High Court. The indictment contained eight counts. All three accused were indicted for conspiracy to commit an offence punishable under section 34 read with section 31(3) of the Notaries Ordinance. In addition, there were two counts on which the respondent was indicted for committing an offence under section 39(c) of the same Ordinance and another count for committing forgery, an offence punishable under section 454 of the Penal Code. All counts in the indictment revolved around an incident where the respondent attorney-at-law attested a deed of transfer. While attesting the said deed he claimed that he did not know the transferor but was known to the two attesting witnesses.

The third accused who stood indicted along with the respondent and the second accused, had pleaded guilty. Thereafter the trial had proceeded against the respondent and the second accused. Evidence presented at the trial revealed that the second accused who was a clerk attached to the respondent's office had been one of the attesting witnesses to the deed in question. The third accused had been the other attesting witness. Even though, the second accused claimed that he knew the transferor, the evidence presented at the trial revealed that transferor is a fictitious person. Investigations revealed that no occupants were in the purported address of this fictitious transferor. Both the respondent attorney-at-law and the second accused had testified in the High Court. The learned High Court Judge having considered all the evidence presented at the trial found both the respondent attorney-at-law and the second accused, guilty of all counts framed against each of them, including the count for forgery framed against the respondent and the count for aiding and abetting the respondent to commit forgery, framed against the second accused. None of the accused namely the respondent attorney-at-law who was the first accused and his clerk the second accused appealed against the judgment of the High Court.

Section 3 of the Notaries Ordinance as amended, provides that an attorney-at-law who had passed the prescribed examination in conveyancing shall be entitled on application to a warrant authorizing him to practice as a notary. Therefore, the respondent's licence to practice as a

notary is granted primarily on the strength of him being admitted as an attorney-at-law. Therefore, the foundation of his notarial practice is based on him being an attorney-at-law and no distinction can be made in his conduct between discharging of professional duties as an attorney-at-law and as a notary public. Ill-effects of any dishonourable conduct in discharging professional duties as a notary public will inevitably make an adverse impact on the good name and repute on the legal profession. In the eyes of the general public no distinction will be made between the duties of the two professions in the context of good behaviour. Therefore, the fact that the wrongful conduct of the respondent attorney-at-law is arising from his discharge of duties as a notary public is not a factor that could either absolve or mitigate the respondent's breach of the duty to be of good repute and conduct, the duty arising as a member of the legal profession.

It is also pertinent to note that a conviction by a court of law is not a necessary prerequisite to initiate disciplinary proceedings against an attorney-at-law based on his alleged criminal conduct. Justice Amarasinghe in **Chandrathileke v Moonesinghe** (1992) 2 SLR 303 at 329 observed,

> *"An attorney whose misconduct is criminal in character, whether it was done in pursuit of his profession or not, (this Court has wider powers than those affirmed by section 4 of the Penal Code), may be struck off the roll, suspended from practice, reprimanded, admonished or advised, even though he had not been brought by the appropriate legal process before a court of competent criminal jurisdiction and convicted; and even though there is nothing to show that a prosecution is pending or contemplated. [See Edgar Edema- (1877) Ramanathan 380, 384; Re Isaac Romey Abeydeera - (1932) 1 CLW 358, 359; In re a Proctor - (1933) 36 NLR 9; In re C.E. de S. Senaratne - (1953) 55 NLR 97, 100; Re Donald Dissanayake - Rule 3 of 1979 S.C. Minutes of 31.10.1980; Re P.P.Wickremasinghe - Rule 2 of 1981, S.C. Mins. of 19.7.82 ; Re Rasanathan Nadesan - Rule 2 of 1987 S.C. Mins. of 20.5.1988; Stephens v Hill - (1842) 10 M & W 28 Vol. 152 ER (1915 Ed.) 368 (supra); Anon (supra) ; Re Hill - (1868) LR 3 QB 543, 545, 548 Re Vallance ; Anon (1894) 24 L.Jo 638 But cf. Short v Pratt - (1822) 1 Bing. 102 Vol. 130 (1912 Ed.) ER 42 and Re Knight - (1823) 1 Bing 142.]*

I might go further: If Moonesinghe had been charged with the commission of an offence in a competent court and acquitted, he could and ought, nevertheless, to have been dealt with by this Court, as the proctor was in Re Thirugnanasothy - (1973) 77 NLR 236, 239. See also Re Garbett - (1856) 18 CB 403; R v. Southerton - (1805) 6 East 126; Re W.H.B. - (1842) 17 L. Jo. 165. In Re Thirugnanasothy a proctor had been acquitted of criminal misappropriation by a District Court. He was, nevertheless, struck off the roll, G. P. A. Silva, SPJ., explaining at p.239 that although the reasons for the acquittal were "sound", they were technical in nature".

In **Re Brito** 43 NLR 529, it was held that a conviction for an offence *per se* is not a ground for disciplinary action against a proctor but is a prima facie reason for such action. It was further held that when there is a conviction, the fact that the conduct which led to such conviction is not qua attorney is immaterial in deciding whether the attorney concerned should be dealt with for such conduct.

It is the persons of "good repute and of competent knowledge and ability" who could be admitted as attorneys-at-law as provided under section 40(1) of the Judicature Act. Therefore, if a person of good repute after admission as an attorney-at-law engages in any conduct that changes the quality of his character and makes him no longer a person of good repute, such a person is liable to be subjected to disciplinary action as provided under the Judicature Act and the Rules of the Supreme Court.

The respondent attorney-at-law in these proceedings was admitted to the legal profession in the year 1988. He commenced his practice as an attorney-at-law three years later after retirement from his twenty-eight years long service in the public service. He commenced his career as a teacher and had retired from service in the year 1991 after serving as a principal. Within the first eight years of his practice as an attorney-at-law, he had engaged in the conduct for which he was convicted and sentenced for the commission of offences under the Notaries Ordinance and the Penal Code. The indictment for the offences committed in 1999 had been served in the year 2003 and the conviction was entered in the year 2020.

Pleading in mitigation before this court, it was submitted that the respondent who had engaged in the legal profession for more than thirty years is now eighty-three years of age and is actively engaged in social service and religious activities. He is the president of several social service organisations and his wife is seventy-five years old. The respondent prays for clemency and pleads not to suspend or remove him from the office of attorney-at-law allowing him to spend the rest of his life with dignity and respect enjoying the love and care of his wife, children and grandchildren. However, in response to a question by court the respondent attorney said that he also desires to continue with his practice.

In this regard, it is pertinent to observe that the respondent had chosen to enter the legal profession in the brink of his retirement from the public service. This Court having being satisfied with his credentials had granted his application having accepted inter alia that he is a person of good repute. However, within the first eight years of his admission to the Bar itself he had conducted in a manner that compromised his good repute. Such conduct of the respondent led to the conviction entered by the High Court. Eventhough, a conviction *per se* should not result in any sanctions in disciplinary proceedings, the mitigatory factors urged by the respondent fail to provide any explanation as to the conduct that breached not only the Notaries Ordinance but also amounted to the commission of an offence under the Penal Code. All the mitigatory factors urged by the respondent relate to his personal and social life. The respondent despite the conviction expressed his desire to continue in the legal profession in response to a question posed by Court. It is pertinent to observe that the proceedings initiated under the Judicature Act and Rules of the Supreme Court in relation to removal or suspension of attorneys-at-law from practice are not *"criminal or penal in nature but are intended to protect the public, litigants and the legal profession itself"* – [vide **In Re Dematagodage Don Harry Wilbert** (1989) 2 SLR 18 at 28]. The long period of time between the wrongful conduct and the conviction is not a ground that warrants any leniency towards the respondent as the conviction is in relation to the wrongful conduct in discharging professional duties. The respondent's desire to continue in the legal profession is to reap the benefits and privileges attached to the profession. However, in my view this Court is unable to act in sympathy based on factors surrounding the personal life of the respondent. The respondent had failed to honour the trust placed on him by this Court. He failed to maintain the good repute and therefore can no longer continue to enjoy the benefits as a

member of this noble profession. In this regard it is pertinent to echo the following views expressed by Justice Mukerjee, in- **Emperor v. Rajani Kanta Bose et.al** [49 Calc.p.804], that were cited with approval by Howard CJ in **Re Brito** (supra, at page 532)

> *"The practice of the law is not a business open to all who wish to engage in it; it is a personal right, or privilege limited to selected persons of good character with special qualifications duly ascertained and certified; it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the person holding the licence unfit to be entrusted with the powers and duties of his office. Generally, speaking the test to be applied is whether the misconduct is of such a description as shows him to be an unfit and unsafe person to enjoy the privileges and to manage the business of others as a proctor, in other words, unfit to discharge the duties of his office and unsafe because unworthy of confidence."*

For the foregoing reasons the Rule made against the respondent is made absolute and make order that the respondent Hettiarachchige Mahinda Ratnayake shall be forthwith struck out of the roll of attorneys-at-law.

Registrar of the Supreme Court is directed to take necessary steps and also to transmit a copy of this judgement to the Registrar General.

Chief Justice

S. Thurairaja, PC, J.
I agree.

Judge of the Supreme Court

Mahinda Samayawardana, J.
I agree.

Judge of the Supreme Court

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

Arpico Finance Company Limited,
No. 146, Havelock Road,
Colombo 05.
Plaintiff

SC APPEAL NO: SC/APPEAL/107/2017
SC LA NO: SC/HCCA/LA/198/2016
HCCA NO: WP/HCCA/MT/135/2011 (F)
DC MT LAVINIA NO: 3034/00/M

Vs.

1. Jayasinghe Chandrakeerthi Jayasinghe,
   No. 532/5, Elvitigala Mawatha,
   Colombo 05.
2. Chrishani Renuka Jayasinghe,
   No. 532/5, Elwitigala Mawatha,
   Colombo 05.

Defendants

AND BETWEEN

Arpico Finance Company Limited,
No. 146, Havelock Road,
Colombo 05.
Presently known as,
Associated Motor Finance Company PLC,
No. 89, Hyde Park Corner,
Colombo 02.
Plaintiff-Appellant

Vs.

1. Jayasinghe Chandrakeerthi Jayasinghe,
   No. 532/5, Elvitigala Mawatha,
   Colombo 05.
2. Chrishani Renuka Jayasinghe,
   No. 532/5, Elwitigala Mawatha,
   Colombo 05.

Defendant-Respondents

AND NOW BETWEEN

1. Jayasinghe Chandrakeerthi Jayasinghe,
   No. 532/5, Elvitigala Mawatha,
   Colombo 05.
2. Chrishani Renuka Jayasinghe,
   No. 532/5, Elwitigala Mawatha,
   Colombo 05.

Defendant-Respondent-Appellants

Vs.

Associated Motor Finance Company PLC,
No. 89, Hyde Park Corner,
Colombo 02.

Plaintiff-Appellant-Respondent

Before: S. Thurairaja, P.C., J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: Sandamal Rajapaksha for the Defendant-Respondent-Appellants.

Palitha Kumarasinghe, P.C., with Asanka Ranwala for the Plaintiff-Appellant-Respondent.

Argued on : 15.09.2022

Written submissions:

by the Defendant-Respondent-Appellants on 17.09.2018.

by the Plaintiff-Appellant-Respondent on 24.08.2017.

Decided on: 10.08.2023

Samayawardhena, J.

The plaintiff company filed this action in the District Court of Mount Lavinia against the two defendants seeking to recover a sum of Rs. 809,991.13 with interest arising out of the Lease Agreement marked P4. The defendants filed answer seeking dismissal of the plaintiff's action and made a claim in reconvention for a sum of Rs. 428,684 on unjust enrichment. After trial, the District Court dismissed the plaintiff's action as well as the defendants' claim in reconvention. Being dissatisfied with the judgment of the District Court, the plaintiff appealed to the High Court of Civil Appeal of Mount Lavinia. The High Court of Civil Appeal set aside the judgment of the District Court and entered judgment for the plaintiff. Hence this appeal by the defendants. This Court granted leave to appeal on the question whether the plaintiff is legally entitled to recover the balance due arising out of the Lease Agreement after its termination.

There is no dispute that the defendants entered into the Lease Agreement P4 dated 24.10.1997 with the plaintiff company. Under the terms of the Lease Agreement the defendant-lessees agreed to pay the plaintiff-lessor 48 monthly lease rentals of Rs. 48,219 each and take the Minor Passenger Bus on lease. Although the leased vehicle was in the possession of the defendants for 29 months, they only paid a total of Rs.

977,035 as rental fees. The defendants were admittedly in default (as seen from paragraph 14 of the answer and P8).

If there is a default, 4% monthly overdue interest is added to the amount due (as stated in item 5 of the schedule to the Lease Agreement).

Since arrears were not settled, the Lease Agreement was terminated by the plaintiff by P9 dated 27.03.2000 and the leased vehicle was repossessed and thereafter sold for a sum of Rs. 850,000 on 05.04.2000.

The position of the plaintiff is that as at 15.08.2000, the defendants were obliged to pay the plaintiff a sum of Rs. 809,991.13 (as seen from the statement of account marked P14).

The contention of learned counsel for the defendants before this Court is that, once the Lease Agreement is terminated, the plaintiff cannot recover future rentals but can only seek damages for the breach of contract. This is the crux of the matter.

In my view, this contention is unsustainable in view of the terms of the Lease Agreement the parties have agreed upon. Let me explain.

In terms of Article 5(1)(a) of the Lease Agreement, "*if Lessee fails to make due and effective payment of any rent as and when it falls due or of any other sum payable by Lessee as provided for in this Agreement after such sum becomes due and payable*", he is considered as a defaulter.

Article 5(2) reads as follows:

***"In the event of Lessee being in breach of this Agreement as aforesaid Lessor shall have the right to exercise <u>one or more or all the following remedies</u> without having to give any prior notice or demand to Lessee**:-*

(a) the Lessor to receive immediate payment from Lessee of a part or the entire amount of the total rent payable under this Lease Agreement for the full term of the lease and all other costs and expenses incurred by Lessor in this connection together with interest thereon at the rate specified in item (11) of the Schedule to this Agreement from the date of default less the amount of the rent paid by Lessee and duly received by Lessor under this Lease Agreement.

(b) to make a written demand to Lessee for the return of Property and to take possession of Property and to sell any or all of the said Property by public auction or private treaty without notice to Lessee or hold, use, operate, lease or otherwise dispose of or deal with such property as Lessor pleases. Lessee agrees that within 7 days of receipt of such written demand from Lessor for the return of Property, Lessee will return Property to Lessor in accordance with the provisions of Article 23 and if Lessee fails to return Property as aforesaid the provisions of Article 23 shall become applicable immediately.

Lessee further agrees that should Lessee fail to return Property to Lessor within 7 days of receipt of a written demand from Lessor for the return of Property, in the same condition Lessee received it, fair wear and tear excepted, Lessee will pay and will be liable to pay Lessor the market value of Property in fair and marketable condition.

(c) To terminate the Lease hereby created and to receive from Lessee compensation for all indirect and consequential damages including loss of profits and in particular loss of profits in the event of Lessor consequent to the termination of the Lease Agreement suffering loss as a result of being unable to re-let Property at a rental equivalent to the rental payable under this Lease Agreement.

(d) to exercise any other right or remedy available to Lessor in Law.

This is repeated in the schedule to the Lease Agreement (which includes the payment plan) where it states: "*Failure to comply with any of the above provisions shall entitle Lessor to all or any of the remedies provided for in Article 5 hereof [quoted above].*"

Learned counsel for the defendants relies on Article 5(2)(c) quoted above to contend that, after the plaintiff terminated the Lease Agreement, the plaintiff can only seek compensation/damages for loss of profit, and the plaintiff is not entitled to recover the balance due amount in terms of the Lease Agreement. This argument presupposes that the balance due amount in terms of the Lease Agreement (a sum of Rs. 809,991.13 as at 15.08.2000) comprises only profit, but this has not been established.

In terms of Article 5(2)(a) quoted above, when there is a default in payment of any rent as and when it falls due or any other sum payable by the lessee, the lessor shall have the right to receive immediate payment from the lessee the entire amount of the total rent payable under the Lease Agreement for the full term of the lease. The lessor has the right to do it without terminating the Lease Agreement.

In terms of Article 5(2)(c), if the lessor terminates the Lease Agreement, the lessor shall have the right to claim compensation for all indirect and consequential damages including loss of profits. Indirect and consequential damages would not include damages which arise naturally upon the breach of the Agreement. Loss of future rentals to my mind is a natural consequence of the breach of the Lease Agreement. The issue of whether future rentals include profits, and what proportion of future rentals is attributable to profits, has not been, as I stated earlier, clarified before this Court.

Article 5(2)(5) is also relevant in this regard. It reads: "*Even if the remedies provided for in sub-paragraphs 2(a) and 2(b) of this Article have been taken by Lessor, Lessee shall not be relieved from any other liability under this Lease Agreement including liability for damages*." This goes to show that, when there is a breach, a claim for damages has no direct bearing on the right of the lessor to claim the total rent payable under the Lease Agreement for the full term of the lease. It may be noted that, in the instant case, although the plaintiff has terminated the Lease Agreement, the plaintiff does not seek compensation or damages from the defendants.

Let us assume that the plaintiff seeks damages upon termination. Then Article 5(3) also becomes relevant. It reads: "*Lessee agrees that the sums due under this Article to Lessor are provided as liquidated damages for breach of contract and not as a penalty*." Liquidated damages are pre-determined damages set at the time of entering into the contract upon reasonable prior estimation of the damage which is likely to occur to the injured party. Liquidated damages are meant to be compensatory rather than punitive. Learned counsel for the defendant does not say that this Article is a spurious one intended to disguise its true nature and purpose. Instead, learned counsel accepts that "*unconditionally accrued rights, fixed sums payable under the contract in respect of performance rendered prior to breach, and causes of action which have accrued because of a breach, are also unaffected by termination*." As I stated earlier, in terms of Article 5(2)(a), a cause of action accrues to the lessor, before the termination of the Lease Agreement, to receive immediate payment from the lessee the entire amount of the total rent payable under the Lease Agreement for the full term of the lease when there is a default in payment of any rent as and when it falls due.

Let me re-emphasise that at the time of entering into the Lease Agreement, the parties have agreed to these terms. Although I accept that

freedom of contract is not absolute and enforcement is subject to countervailing reasons of public policy, illegality etc., the general rule is that, the parties must have the freedom to incorporate remedies into their terms of contract, and general principles would apply only in the event there are gaps.

Before I part with this judgment, let me explain the position taken up by the defendant in his answer when he claimed Rs. 428,684 from the plaintiff as a claim in reconvention. He admits that according to the Lease Agreement he had to pay 48 monthly instalments of Rs. 48,219 each and the total amount payable was Rs. 2,314,512 (Rs. 48,219 X 48=Rs. 2,314,512). He says he kept the vehicle 29 months and therefore he had to pay Rs. 1,398,351 (Rs. 48,219 X 29=Rs. 1,398,351) but paid only Rs. 977,035 and therefore the balance due at the end of 29 instalments was Rs. 421,316 (Rs. 1,398,351-Rs.977,035=Rs.421,316). Then he says the vehicle was sold for Rs. 850,000 and when Rs. 421,316 is deducted from that amount, the balance money of Rs. 428,684 should be returned by the plaintiff to him. It is on this basis the defendant makes a claim in reconvention for a sum of Rs. 428,684. At the trial, the defendant raised issues and the plaintiff's witnesses were cross-examined on this basis. This is a layman's approach and definitely not an approach to be adopted in the interpretation of a Commercial Lease Agreement, to say the least.

Defaults on Lease Agreements can have a detrimental effect on finance companies, as they may result in a loss of revenue and potentially impact the company's ability to make further investments. In order to ensure the financial stability of such companies, it is important to uphold the terms of Lease Agreements and permit finance companies to recover balance dues to the extent legally possible in the Agreement. This also supports the broader economic goals of maintaining a stable and prosperous financial sector.

For the aforesaid reasons, on the facts and circumstances of the case, I hold that the termination of the Lease Agreement does not prevent the plaintiff from claiming the defendants the total rent payable under the Lease Agreement for the full term of the lease.

I answer the question of law on which leave to appeal was granted in the affirmative and dismiss the appeal without costs.

However, since it has taken a very long time to see a finality of this matter from the date of the High Court judgment, for which the defendants are not singularly responsible, on the facts and circumstances of this particular case, I think, it is fit and proper and equitable to limit the reliefs of the plaintiff to the date of the High Court Judgment. I am persuaded to adopt this approach by following the observations made by Prasanna Jayawardena J. in *Seylan Bank Limited v. Epasinghe* (SC/CHC/39/06, SC Minutes of 01.08.2017). Let the District Court enter judgment accordingly.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA

In the matter of an application for a ruling of contempt of the court under Article 105(3) of the Constitution

Nagananda Kodithuwakku,
The General Secretary,
Vinivida Foundation,
99, Subadrarama Road,
Nugegoda.

SC/Contempt/ 02/2022 **Petitioner**

Vs

Jayantha Jayasuriya,
Chief Justice,
Supreme Court of Sri Lanka,
Colombo 12.

Respondent

Before: **Murdu N. B. Fernndo, PC., J.**
E.A.G.R. Amarasekara, J.
A.H.M.D. Nawaz, J.
Janak De Silva, J. and
Achala Wengappuli, J.

Counsel: The Petitioner appears in person.
Sanjay Rajaratnam, PC., Attorney General, with Ms. Kanishka de Silva DSG, Ms. S. Ahmed SC and R. Gooneratne SC appears as *Amicus Curiae*.

Argued on: 31-01-2023

Decided on: 11-08-2023

Oder of Court

The Petitioner an Attorney-at-Law, a public interest litigation activist and Vinivida Foundation General Secretary, filed the instant application dated 12th December, 2022 in terms of **Article 105(3)** of the Constitution against the Respondent, Jayantha Jayasuriya, the incumbent Chief Justice.

The Petitioner in paragraph two of his petition, referred to the Respondent and the cause of action as thus;

> (2) The Respondent is the incumbent Chief Justice of the Republic of Sri Lanka. In this contempt matter **he is 'charged' for contempt of court for a contemptuous act committed by him on 20th September, 2017** undermining the authority of the Supreme Court and bringing it into disrepute, **when he was the Attorney General** of the Republic of Sri Lanka…. (emphasis added)

The Petitioner, in paragraph 18 of the petition, referred to the alleged contemptuous act as *"an opinion given by the Respondent in his capacity as the Attorney General on 20th September, 2017 to the Honorable Speaker of the Parliament of Sri Lanka"*. A copy of the opinion was annexed to the petition marked **X12**.

The Petitioner pleaded, that such advice was patently flawed and the Respondent had deliberately undermined the good office of the Attorney General and the independence of the judiciary. The Petitioner also contended that **X12** advice, tantamount to a direct insult to the authority and an affront to the dignity of the judiciary and therefore moved *inter-alia* for the following relief:

> (b) issue summons on the Respondent to show cause as to why he **should not be punished** by the Supreme Court for **insulting and undermining the authority of the Supreme Court** and thereby committing an offence of contempt of the Supreme Court;
> (c) **charge the Respondent** on the offence of contempt of court in terms of Article 105(3) of the Constitution;
> (d) issue a Rule Nisi; and
> (e) to make the Rule Nisi into Absolute and **impose an appropriate sentence for defying the rule of law and bringing the court into disrepute.** (emphasis added)

On 16th December, 2022 by a chamber order, the listing judge directed the Petitioner's instant application be listed for notice on 31st January, 2023 before a nominated bench of five Judges of the Supreme Court. A direction was also made to issue notice on the Attorney General to appear and assist this court as *Amicus Curiae.*

When this matter was taken up for support on 31st January, 2023 the Attorney General Sanjay Rajaratnam, PC appearing as *Amicus Curiae* moved that this application be dismissed

in limine and contended that the Petitioner's application is misconceived in law. His challenge was twofold.

Firstly,

The learned Attorney General contended that the application of the Petitioner cannot be maintained before this court, as the papers filed before court *i.e.,* the petition and the supporting affidavit sworn to by the Petitioner Nagananda Kodithuwakku contained, *many an offensive and slanderous averments, flawed and erroneous statements, distorted facts, misleading and absolutely false accusations, willful suppression of material facts and twisted legal contentions* and is misconceived and thus not in accordance with the law.

Mr. Rajaratnam, also contended that the Attorney General's opinion reflected in the document **X12**, in respect of **Provincial Councils Elections (Amendment) Bill** was tendered to the Speaker of the Parliament by the Respondent, in the capacity as the Attorney General, way back in September 2017. Further it was submitted that the said opinion was tendered in order to discharge and fulfill the duties bestowed upon the Attorney General, in terms of the Constitution and specifically the provisions contained in the proviso to **sub-article (2) of Article 77** of the Constitution.

Mr. Rajaratnam, drew our attention to many averments of the petition, the assertions and surmises, wherein the Petitioner has mingled together the facts pertaining to the aforesaid **Provincial Council Elections (Amendment) Bill** and the **20th Amendment to the Constitution Bill** and contented that such distortion *creates mischief.*

Furthermore, the Attorney General as *Amicus Curiae* found offensive the use of the word *'charged'* and specifically the allegation of the Petitioner contained in the petition, that the Respondent is *'charged for contempt of court'*. He submitted it is a blatant lie and a serious accusation.

It was contended that the petition is founded upon distorted and erroneous facts and surmises and as such the petition is fundamentally flawed. Mr. Rajaratnam also submitted that the Petitioner's allegation propounded by an affidavit, that the opinion **X12** was tendered consequent to the Respondent in the capacity as the Attorney General been '*summoned'* to Parliament and the *'Respondent circumvented the legislative process in tendering advice for personal benefit,'* is also a lie and is based on Petitioner's wishful thinking and conjecture.

He strenuously contented that in the said circumstances, there was no basis whatsoever to permit the Petitioner to support this application which is replete with offensive and slanderous averments. Therefore, he moved that the instant application be rejected as the Petitioner by including such flawed and misleading averments in the petition and affidavit, not only slanders the Respondent but also this court and scandalizes the entire process of the administration of justice.

Another factor that the learned Attorney General in his inimitable style, put forward was that in any event the Attorney General is a Lawyer by profession and that **X12** is his opinion and a Legal Opinion of a Lawyer is his expression of ideas and cannot and should not

be construed as a contemptuous act, upon which an offence in terms of **Article 105 (3)** of the Constitution can be founded upon.

Secondly,

Our attention was drawn to the **motion dated 13th December, 2022** which was tendered to this court by the Petitioner together with the afore mentioned petition and affidavit and the documents annexed thereto and especially to the below mentioned paragraph in the motion which reads thus;

> *"Whereas this is a matter involving the **Chief Justice who is charged for criminal offence** of contempt of court committed in the month of September 2017, whilst holding the public office of the Attorney General of the Republic of Sri Lanka.*
>
> *In terms of Article 132(3) (iii) of the Constitution it is requested for the appointment of a special bench of not less than five j**udges who have not been made respondents in the judicial corruption case** SC/Writ/2/2021…"*

Mr. Rajaratnam, PC vigorously re-iterated that the words '*Chief Justice who is charged for criminal offence'*, is a contemptuous statement as the Chief Justice was never charged for a criminal offence by this court by or any other court, at any time what so ever and as such the use of such words, repeatedly, show case the Petitioner's co-lateral intentions, conduct and animosity.

The AG further, contended that the phrase '*judges who have not been made respondents in the judicial corruption case SC/Writ/2/ 2021'* is fundamentally flawed and erroneous as the said case filed by the Petitioner in the Supreme Court previously, was dismissed by this Court on 4th May, 2021. Mr. Rajaratnam also submitted that the decision to dismiss the said application was arrived after following the due process of the law and therefore, the use of the aforesaid term *'judges who have not been made respondents in the judicial corruption case'* is offensive and repulsive and the use of such slanderous language, scandalizes this court.

It was also the contention of the learned Attorney General, that the Petitioner who appeared in person in the said case, should be very much aware of the dismissal of such case way back in May 2021 and cannot plead ignorance and allege in a motion filed 1 ½ years later, *i.e.*, dated 13th December, 2022 to have this matter listed before '*judges who have not been made respondents in the judicial corruption case*', when in fact, such a case allegedly termed *judicial corruption* by the Petitioner himself for whatever reasons, no longer exists or pending in the court diary. It was emphasized that the decision of the divisional bench of this court was unanimous and the court refused to issue notice on the said writ application and *in limine* dismissed the purported '*judicial corruption case*' *viz, SC/Writ/2/2001*, for reasons stated in its Order dated 04th May, 2021.

Mr. Rajaratnam also contended that, nomination of judges to a 'bench comprising five or more judges of the Supreme Court is entirely within the purview of the Chief Justice in terms of **Article 132(3)** of the Constitution and by requesting to exclude certain judges, the Petitioner is *'forum shopping'* and such conduct of the Petitioner amounts to *'preposterous conduct'* of a litigant before court.

In response to the aforesaid submissions of the Attorney General, the Petitioner Nagananda Kodithuwakku appearing in person contended as follows:

Firstly,

With regard to the allegations contained in the petition and the motion, Mr. Kodithuwakku justified the use of the words *'charge'* and *'corruption'* and submitted since the Petitioner had complained to the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) against an alleged act of the Respondent and others, *which the Petitioner deems corrupt*, that the Petitioner is entitled to use the said words in the motion. (The communique which the Petitioner addressed to the CIABOC titled *'Complaint against the Attorney General, Speaker, Prime Minister and M.P.'s* was annexed to the petition marked **X15**).

Secondly,

The Petitioner justified the reference to SC/Writ/2/2021 in the motion, a case dismissed by this court on 04th May, 2021 and the request for empanelling a divisional bench, excluding certain judges of this court as correct. His contention was that when the said case, which the Petitioner allegedly terms a *'judicial corruption case*', was taken up for support since an observation was purportedly made that the *judiciary was helpless, as the judicial power of the people was being exercised by the Parliament through the judiciary,* that the Petitioner has no impediment to make such a request for exclusion of certain judges.

The Petitioner also contended that the Petitioner has a right to request for an impartial bench and such a request should be permitted in terms of **Article 13(3)** of the Constitution as he is entitled to a fair trial.

The Petitioner drew our attention and relied upon a speech made by Hon. Sir Gerard Brennan, AC KBE, Chief Justice of Australia on Judicial Independence at the Australian Judicial Conference on 2nd November, 1996 wherein Sir Brennan opined,

> *"Justice is administered by human institutions; they can be fallible, but they should never be perverse. Being human institutions, continual vigilance is needed to ensure that they are isolated from impermissible influences and strengthened by the pressure of a peer group devoted to impeccable standards of independence".*

Mr. Kodithuwakku also referred to the case of **Centre for Environmental Justice (Guarantee Ltd) V. Mahinda Rajapakse SC/FR/109/2021 S.C.M. 01-12-2021** wherein it was opined that *"the Attorney General is the guardian of public interest and should represent the public interest with complete objectivity and detachment and must act independently of*

any express pressure" and submitted that the Attorney General has a special duty with regard to enforcement of the law.

Whilst appreciating the submissions of the Petitioner, in relation to the observations made by this court in the aforesaid **Centre for Environmental Justice case** and the words of wisdom of Hon. Sir Gerard Brennan, relevancy of such sentiments to the matter in issue is a factor that should be borne in mind in determining the instant application.

The specific issue that is before us at this juncture, is not the merits of the alleged act of contempt as perceived by the Petitioner, but the preliminary objection raised by the learned Attorney General, *viz,* that the instant application *cannot be maintained before this court in view of the erroneous, offensive, slanderous nature of the application, which tantamounts to scandalizing the administration of justice and the very nature and authority of this court* and that the petition and the affidavit filed before court by the Petitioner which is replete with *flawed, misleading and false accusations, twisted and distorted legal contentions and suppression of material facts, creates mischief* and for that reason should be dismissed *in limine.*

Undoubtedly the Supreme Court is the highest and the final Superior Court of Record in the Republic of Sri Lanka constitutionally recognized by virtue of **Article 118** of our Constitution. Thus, making false representations before the Supreme Court, knowing it to be false, undisputedly amounts to contempt of the court and is a direct interference with the administration of justice.

Upon perusal of the application filed before this court, *viz*, the petition, the affidavit and the motion and specifically the phrases highlighted and emphasized earlier in this Order, it is amply clear and there is not an iota of doubt, that the Petitioner's principal contention is that the Respondent is *'charged for contempt of court'* for a contemptuous act, *i.e.*, the Respondent is *'charged for the criminal offence of contempt of court'*.

Is such contention of the Petitioner correct or is it false?

The submission of the learned Attorney General appearing as *Amicus* before this court is that the afore stated statement is a blatant lie. He submits, that the statement is not only an absolute falsehood but that the papers filed are flawed and erroneous, offensive and slanderous and scandalizes the very foundation of the Supreme Court.

The Petitioner on the other-hand contends, that the use of said phrases *i.e., 'charged', 'summoned'* and *'corrupt'* is correct as it is the truth. He further states, that he is at perfect liberty to use such phrases in his pleadings and repeatedly allege, that the Respondent is *'charged'* for contempt, since the Petitioner has complained to the CIABOC about the conduct of the Respondent, by the communique **X15** dated 04th October, 2017.

Can a complaint made to the CIABOC by the Petitioner be equated to being 'charged' for contempt by a competent court or tribunal? If not, is the Petitioner misleading or deceiving this court by such a statement? Will such a statement undermine the dignity of this court? Will

it interfere with its independence? Is it likely to erode the public confidence in the administration of justice? Will such a statement bring the due process of law into disrespect and disregard? Will it diminish or affect the authority of court, trust and comfort the citizens have in respect of the judicial system? Thus, by making such a statement, is the Petitioner slandering and scandalizing this court?

In my view, these are the threshold issues we have to examine in determining the preliminary objections raised before this court regarding the maintainability of the Petitioner's application.

CIABOC or the Commission to Investigate Allegations of Bribery or Corruption was established by Act No 19 of 1994. Functions of the CIABOC is referred to in **section 3** of the said Act.

The said section reads as follows:

> "3. *The Commission shall subject to the others provisions of this Act, investigate allegations, contained in **communications** made to it under section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act […], direct the institution of proceedings against such person for such offence in the appropriate court."* (emphasis added)

Elaborating the functions of the CIABOC further, **section 4(2)** of the Act goes onto state,

> *"Upon receipt of a **communication** under section 4(1) Commission, if it is satisfied that such communication is genuine and that the **communication** discloses material upon which an investigation ought to be conducted, shall conduct investigations as may be necessary for the purpose of deciding upon […]*
>
> *(a) prosecution or other suitable action under the Bribery Act […] or*
>
> *(b) prosecution under any other relevant law."* (emphasis added)

Thus, it is axiomatic that upon receipt of a communication or a complaint, the Commission has to be first satisfied that it is genuine and discloses material upon which an investigation ought to be conducted. Thereafter, only an investigation is launched and a decision is made as to what steps need be taken to charge or prosecute the person against whom the communication or the complaint is made. Thus, it is a three step process.

Complaint → Commission to be satisfied of its genuineness → investigation → decision made to charge or prosecute.

In the matter in issue, the Petitioner complained to the CIABOC against the then Attorney General (*i.e.* the Respondent), the Speaker, the Prime Minister and all the Members of the then Parliament **X15**. However, the Petitioner has not divulged the outcome of such communication. The Petitioner has failed to indicate whether any investigation took place based upon the communication in the first instance. The Petitioner has also failed to

demonstrate whether a prosecution or a charge was framed by a competent court or tribunal against any of the said persons named in **X15**.

In the aforesaid and in view of the paucity of such material information and the failure of the Petitioner to establish whether any proceedings were instituted against such persons, and especially in the absence of an averment in the petition that a charge has gone out against the Respondent, the appropriateness of using the word *'charged'* and specifically the phrase *'the Chief Justice who is charged for the criminal offence of contempt of court for a contemptuous act committed by him in September 2017'* as specifically indicated in the petition, *prima facie* appears to be perverse, flawed and erroneous.

Thus, the submission of Mr. Rajaratnam that the said statement is a blatant lie and that the petition is founded upon distorted and erroneous facts and surmises, in my view has merit which demand rejection of the petition *in limine*.

The provisions of the CIABOC Act as discussed earlier, clearly indicate that upon receipt of a 'communication', the Commission will investigate the allegation and only where such investigation discloses the committing of an offence, a direction will be made to initiate proceedings and 'charge' or 'indict' a person.

The word 'charged' is defined in simple language as to accuse somebody formally of a crime so that there can be a trial in court, whereas the word 'complaint' is defined as a statement that something is wrong or not good enough and the word 'communication' as imparting or exchanging of information by writing or speaking or using some other medium. [Oxford Dictionary] From the foregoing, it is imperative to note, that there is a world of difference between the said terms, 'charged', 'complaint' and 'communication'.

CIABOC Act as discussed earlier, in **section 3** refers to a 'communication' i.e., excharge of information.

The *'communication'* of the Petitioner **X15** made in October, 2017 is against a hosts of persons, including the Respondent. A complaint or a communication as stated earlier is only the 1st step. CIABOC has to be first satisfied of the genuineness of the complaint or communication. Thereafter only an investigation is launched. That is the 2nd step. Based on the report of the investigation only a decision will be made by CIABOC to 'charge' or 'prosecute' a person. That is the 3rd step in the process. From the foregoing it is abundantly clear that the communication **X15** itself cannot be considered *'charging'* a person as contended by the Petitioner. Such contention goes against the basic tenants of the rule of law. The Petitioner cannot *'charge'* a person. It has to be done only by a competent court of law or a tribunal.

The underlying principle in 'charging' a person, is that an independent judicial mind is required to assess the sufficiency of the material against a person even before summons or warrant is issued in the first instance and in any event, before a charge is formed or indictment is sent. This is salutary and fundamental. It is to protect the liberty of a subject. Our Criminal Procedure Code is founded upon such hallowed principles.

Thus, the allegation of the Petitioner that the Respondent is *'charged'* is fundamentally flawed. In my view, use of the said term, undermines the public confidence in the administration of justice. It attacks the very foundation of this institution. It scandalizes the court. This court frowns upon such machinations and the repeated use of such phrase by the Petitioner against the Respondent. Such conduct willful or otherwise, by the Petitioner, not only shatters the public confidence in the legal system and the rule of law, it tarnishes the image of the high office held by imminent dignitaries and persons and should not be permitted, tolerated nor condoned. Such scurrilous statements in my view, scandalizes this court, the highest and final superior court of record of the Republic.

This court founded in 1801 by Royal Charter has stood tall for the last two centuries. It has withstood the weather. It is our bounden duty to safe guard this institution and not allow it to be slandered or scandalized in any manner.

From the foregoing it is beyond doubt, the contention of the Petitioner that the Respondent the incumbent Chief Justice is *'charged'* for the criminal offence of contempt of court is factually incorrect, perverse and is offensive. I am firmly of the view that the use of the word 'charged' scandalizes the very nature of this court.

Hence, the petition of the Petitioner should not be allowed to stand and should be dismissed *in limine* as it undermines the dignity and authority of this court. It erodes the public confidence in the judicial system and the administration of justice. Moreover, it disrespect and disregard the due process of the law and the rule of law in particular.

Mr. Rajaratnam appearing as *Amicus curiae* also took offensive of the term *'Attorney General being summoned to Parliament'* referred to in paragraph 15 of the petition of the Petitioner. The context in which the said term was used by the Petitioner was that the Respondent, the incumbent Chief Justice, prior to his elevation to this august office, whilst holding the post of Attorney General, was *'summoned'* to Parliament and that thereafter he tendered a legal advice *'circumventing the legislative process for personal benefit'*.

The contention of Mr. Rajaratnam, was that the said term *'summoned'* was also grossly wrong which tarnishes the image of the post of Chief Justice and scandalizes the Supreme Court. Mr. Rajaratnam further contended that the matter referred to in the petition, where the Petitioner alleges, the Respondent was *'summoned'* to Parliament is an incident that occurred in September 2017, (i.e., five years prior to filling of this contempt of court application), when the Respondent was functioning as the Attorney General and performing a constitutional function. It was the position of Mr. Rajaratnam, that the Attorney General has a constitutional duty to advice the Parliament with regard to Bills being presented to Parliament, and the legal advice **X12** was tendered in such capacity. He further contended that the Respondent in his previous capacity holding the office of the Attorney General was never *'summoned'* to Parliament, as alleged to in the petition by the Petitioner.

The word 'summoned' is defined as 'to call with authority; to command to appear, especially in court; an authoritarian call; a call to surrender [Webster's Dictionary] and to cite a defendant to appear in court to answer a suit; to notify the defendant that an action has been instituted against him. [Black's Law Dictionary]

From the foregoing definitions, it is clearly seen that the use of the word 'summoned' denotes a 'command', an 'authoritarian call' and not a 'duty' or a 'request' to be present.

In the matter in issue, the Petitioner alleged that the Respondent in his previous capacity as the Attorney General was *'summoned'* to Parliament *i.e.*, commanded to appear in Parliament.

The role of the Attorney General with regard to Bills presented to Parliament is enumerated in **Article 77** of the Constitution.

It reads as follows:

> *"77 (1) It shall be the duty of the Attorney General to examine every Bill […];*
> *(2) If the Attorney General is of the opinion […] he shall communicate such opinion to the President;*
> *Provided that in the case of an amendment proposed to a* ***Bill in Parliament****, the Attorney General shall communicate his opinion to the* ***Speaker at the stage when the Bill is ready to be put to Parliament for its acceptance****."* (emphasis added)

Thus, it is amply clear, that the Attorney General has a constitutional duty in respect of Bills presented to the Parliament. *Firstly,* to examine the Bill and tender advice to the President. *Secondly*, if and when an amendment is proposed to a Bill in Parliament to submit his opinion to the Speaker at the stage when the Bill is ready to be put to Parliament *viz*, the second reading and/or when the Bill is referred to the committee of the whole Parliament.

Hence, I accept the submission of Mr. Rajaratnam, that the Respondent in his capacity as the then Attorney General, tendered the advice **X12,** being the opinion of the Attorney General, in performing a duty enshrined in the Constitution. Thus, the contention of the Petitioner, that the Respondent was *'summoned'* to Parliament is palpably wrong and misconceived. It creates mischief and diminishes and tarnish the role of the Attorney General. Moreover, high lighting the aforesaid in December 2022, five years after the passing of the Bill and crystalizing same as a contemptuous act to *'charge'* the incumbent Chief Justice for the *'criminal offence of contempt of court'*, in my view could only be considered as an act of scandalizing the Supreme Court and the Chief Justice and bringing the Supreme Court into disrepute in the eyes of the public and the world over.

In the aforesaid, I see much merit in the submissions of Mr. Rajaratnam, that the instant application should be rejected upfront.

The learned Attorney General also drew our attention to another factor, which he argued was offensive and repulsive and thereby scandalizes the court. It is the motion filed by

the Petitioner, together with the petition and the affidavit, wherein a request is made to list this application before *'judges who have not been made respondents in the judicial corruption case SC/Writ/2/2021'.*

As discussed earlier, the Petitioner is relying upon a case filed by the petitioner and purportedly termed by the petitioner as a '*judicial corruption case' (i.e., SC/Writ/2/2021)* **which a divisional bench of this court dismissed *in limine*** way back in May 2021. The Order made in the said case denote that this court did not consider it a fit and proper case to even issue notice on the Respondents.

In my view, constantly harping upon a case which was rejected summarily and dismissed, is like the proverbial 'beggars wound', an 'ever festering wound of a beggar which never heals'.

Can the Petitioner rely on such a case wherein he had purportedly named certain judges as Respondents, which was dismissed *in limine* and move for elimination of such judges to hear and determine cases filed by the Petitioner? Can the Petitioner make an application in the instant case specifically in this manner to keep out named judges? Doesn't such conduct of the Petitioner, scandalize the court and undermine the dignity and interfere with its independence?

In my view, it does and for that reason and that reason alone the motion filed, should be rejected.

In any event, what does the Petitioner mean by 'judicial corruption?'

Whilst the word 'judicial corruption' does not feature in any of the Acts and Laws of the Republic, the word 'corruption' is defined in **section 70** of the Bribery Act No 11 of 1954 as amended by Act No 9 of 1980 as follows:

> *"70. Any public officer who, with intent to cause wrongful or unlawful loss to the Government, or to confer a wrongful or unlawful benefit, favour or advantage on himself or any person. [....]*
> *(a) does, or forbears to do, any act, which he is empowered to do by virtue of his office as a public officer,*
> *[....]*
> *shall be guilty of the offence of corruption [....]"*

The Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994 in **section 28** the interpretation section, defines the word 'corruption' to have the same meaning as in **section 70** of the Bribery Act

It is patently clear that there is not an iota of evidence of 'corruption', leave alone 'judicial corruption' before any court, tribunal or institution against any of the named Respondents in SC/Writ/2/2021, the so called *'judicial corruption case'*. Thus, in my view the purported '*judicial corruption case'* is nothing but a figment of the Petitioner's imagination.

In any event as stated earlier, the purported '*judicial corruption case*' was dismissed *in limine* on 4th May 2021, without even notice being issued on the Respondents.

In the aforesaid, the statement of the Petitioner that the instant application should be taken up before a special bench of judges *'who have not been made respondents in the judicial corruption case'*, in my view is grossly incorrect, erroneous, slanderous and scandalizes the Supreme Court. Hence, I see merit in the submissions of Mr. Rajaratnam, that the instant application should be dismissed *in limine*, in view of the wrongful, repulsive and offensive statements contained in the papers filed before this court. The actions of the Petitioner, in my view tantamounts to *forum shopping* and impairs upon the fair and efficient administration of justice.

From the foregoing it is crystal clear that the words *'charged'* and *'summoned'* conspicuously and freely used in the petition and affidavit by the Petitioner against the Respondent, namely, the incumbent Chief Justice, creates a general displeasure, disrespect and dissatisfaction against judicial authority and its decisions and determinations and erodes the public confidence in the administration of justice and the due process of the law.

Can a petition and affidavit filed in court consist of erroneous and or slanderous statements of this magnitude? What is the duty of a pleader towards court? In my view, it is to speak the truth and nothing but the truth and uphold the rudiments of law.

At this juncture, I wish to digress from the discussion on offensive and standerous phrases, to look at the judicial dicta and pronouncements made by this court, regarding the duty of a pleader.

In the matter of proceedings against an Attorney-at-Law for contempt of court [1983]1 Sri LR 243 at page 250 it was observed "a pleader has a duty to the court to see that the case is fairly and honestly conducted. A pleader must not mislead the court".

In **Jayasinghe v. The National Institute of Fisheries and Nautical Engineering (NIFNE) and others [2002] 1 Sri.L.R. 277 at 286** this court held:

> *"Any party who misleads Court, misrepresents facts to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court. […] Court will not go into the merits of the case in such situations."*

Similarly, In **Hee Jung Kim alias Kim Hee Jung V. Hoiryong Poonglin Iwant and another SC/Contempt/03/16 S.C.M. 15.07.2021** it was opined, "a pleader owes a duty to court, not to intentionally make false statements in his pleadings. When a person misleads court, it amounts to interference with the due course of justice by attempting to obstruct the court from reaching a correct conclusion."

Furthermore, the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988 refers to the duty of a pleader in the following manner: -

"Rule 50 - An Attorney-at-Law owes a duty to Court, Tribunal or other institution created for the Administration of Justice before which be appears to assist in the proper administration of justice without interfering with the independence of the Bar.

Rule 51- An Attorney-at-Law shall not mislead or deceive or permit his client to mislead or deceive in any way the Court or Tribunal before which he appears."

If an Attorney-at-Law is in breach of his duty to court, to assist in the proper administration of justice and also if an Attorney-at-Law misleads or deceives court, the aforesaid Supreme Court Rules provide, to deal with such an Attorney-at-Law for professional misconduct or take any other action which the court deems fit depending on the facts and circumstances of each case.

Undisputedly, the Supreme Court Rules provide for the aforesaid action, to prevent undue interference with the administration of justice and in the interest of the public. Thus, when a petition filed before court is replete with flawed and erroneous statements, which create dissatisfaction in the eyes of the public and erode the public confidence in the adjudication process, such conduct in my view, amounts to scandalizing the court.

In the instance case, the petition filed by the Petitioner is replete with offensive and slanderous statements against the Supreme Court, the highest and final court of record in this country and specifically against the Respondent, the incumbent Chief Justice.

The alleged statement made against the Respondent namely, that the '*Respondent is charged, for the criminal offence of contempt of court'* and was *'summoned'* to Parliament in my view is p*rima facie* slanderous, perverse, vexacious and made to embarrass this court.

Filing of this application at this juncture and highlighting a Legal Advice **X12** that was tendered by the Respondent, when the Respondent Chief Justice was holding the post of Attorney General, half a decade ago and moving to *'punish'* the Respondent, the incumbent Chief Justice for *'insulting and undermining the authority of the Supreme Court'* and to *'impose an appropriate sentence for defying the rule of law and bringing the court into disrepute'* as prayed for in the prayer to the instant application is beyond comprehension, baffling and inconceivable.

Such conduct by an Attorney-at-Law to say the least is despised and repugnant.

In the aforesaid and having considered the judicial pronouncements of this court, the submissions made by the Attorney General Mr. Rajaratnam and Mr. Kodithuwakku, we are convinced that the instant application p*rima facie* scandalizes this court and for the said reason and the said reason alone, this application should be rejected *in limine*.

We have also considered and examined the submissions made before us, the totality of the pleadings filed and all matters material to this application and for reasons adumbrated in this Order, we uphold the preliminary objections raised by the Attorney General Mr. Rajaratnam, that the instant application contains many an offensive and slanderous averments,

flawed and erroneous statements, and also grossly wrong and distorted facts. Thus, we see much merit in the submissions of the learned Attorney General that the totality of such factors tantamount to scandalizing the Supreme Court.

We are further of the view, in view of the vexatious nature of the instant application, that the dignity and authority of this court, the highest and final superior court of the country is undermined. Moreover, the public confidence in the administration of justice is eroded and the public perception of the due process of law is diminished.

In the aforesaid circumstances, we hold that this application is misconceived in law, perverse, ill-founded and creates mischief. Thus, we reject this application *in limine* and dismisses the instant case.

Application is dismissed.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree

Judge of the Supreme Court

A.H.M.D. Nawaz, J.
I agree

Judge of the Supreme Court

Janak De Silva, J.
I agree

Judge of the Supreme Court

Achala Wengappuli, J.
I agree

Judge of the Supreme Court

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

The matter of an application under and in terms of Article 126 read together with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Major Wengappuli Arachchige Samantha,
No. 644,
Thambiliyana,
Kuruwita.

SC/FR Application No. 100/2016

Petitioner

Vs.

1. Inspector Ranjan Samarasinghe
   Officer-in-Charge,
   Opanayake Police Station,
   Opanayake.

2. Hon. Duminda Mudunkotuwa
   Magistrate,
   Magistrate's Court,
   Balangoda,

3. Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Respondents

Before : **Murdu N. B. Fernando, PC. J**
Janak De Silva, J
K. Priyantha Fernando, J

Counsel	:	Saliya Pieris, PC with Anjana Rathnasiri with Sarinda Jayawardene for the Petitioner Sajith Bandara, SC for the 1st and the 4th Respondents
Argued on	:	13.06.2023
Decided on	:	11.08.2023

K. PRIYANTHA FERNANDO, J

1. The petitioner in this case is a Major serving in the Sri Lanka Army. He alleges that, the actions of the 1st respondent in arresting him without any legal basis and the actions of the 2nd respondent Magistrate in remanding him, has infringed the fundamental rights guaranteed to him under Articles 12(1), 13(1) and 13(2) of the Constitution. This Court granted leave to proceed for the alleged violation of fundamental rights under Article 12(1) and Article 13(1) by the 1st respondent.

2. **The Facts**
According to the petitioner, on 18.02.2016 he has left the *Naval Adi* Army Camp at about 7.00 a.m. to reach the *Boossa* Army Camp in order to make an appointment to meet the Divisional Commander. The petitioner has been accompanied by the driver (Army Private 479243, *R. A. J. U. Rathnakumara*) and an escort (Army Private 480265, *P. G. A. Chathuranga Wijeratne*).

3. The petitioner has been seated on the front passenger seat of the Army Jeep (Toyota Land Cruiser Mark II) bearing Registration No. ශ.භ 5427. The escort Private has been seated behind the petitioner on the rear seat facing sideways. In the course of their journey, while they were on the *Badulla-Colombo-Batticaloa* A4 Highway heading from *Balangoda* towards *Colombo*, the Army Jeep has collided with a three-wheeler bearing Registration No. WP QL 7480 which was headed from *Opanayake* towards *Balangoda* driving in the correct lane (left lane). The collision has taken place on the *Ratnapura-Balangoda* road near the *Uduwela Eerigasmulle* area between the 132nd and the 133rd mile posts.

4. The petitioner stated that, he was awake throughout the entire journey and engaged in conversation with the driver of the Army Jeep for most part of the journey. At or about *Uduwela*, the petitioner has looked down at his phone to search for a contact number in order to place a phone call. While the petitioner was searching for the contact number, he has felt that the vehicle was moving slightly off its course. Within seconds of him instinctively raising his head, the Army Jeep has collided with the said three-wheeler causing the three-wheeler to be thrown off the road and over the culvert. As a result of the collision, the Army Jeep has also hit the culvert and come to a halt. Thereafter, the petitioner has got off the Army Jeep and rushed to the assistance of the injured persons, who were the passengers and the driver of the three-wheeler. The petitioner along with the assistance of the villagers that gathered around the scene of the accident, has rushed the injured persons to the *Balangoda* hospital in a Lorry. The driver of the Army Jeep was also taken to the hospital along with the escort Private in a separate vehicle. Thereafter, the petitioner has also got himself admitted in the hospital as he was suffering from a chest pain after being knocked against the dashboard.

5. The passengers in the three-wheeler have suffered extensive injuries, and a five-year-old girl who was also a passenger in the said three-wheeler succumbed to her injuries, upon being admitted to the hospital. At about 5:30 p.m. on the same day, a Police Sergeant has recorded a statement from the petitioner while he was in the hospital.

6. On the next day (19.02.2016) at about 8.00 a.m. the Ward Doctor has informed the petitioner that he could be discharged after the Judicial Medical Officer (JMO) examines him. Thereafter, at about 10.00 a.m., the same police sergeant who recorded the first statement from the petitioner has recorded a further statement from him. At about 12.00 p.m. the JMO has examined the petitioner and he has been discharged. Subsequently, the petitioner has been informed by the Police Sergeant and the Inspector of Police that the Magistrate would be coming to the hospital to record a statement from the petitioner and the driver of the Army Jeep. The Magistrate has arrived at about 3:00 p.m. and recorded statements and made notes.

7. Thereafter, the Inspector of Police has informed the petitioner that according to the order of the Magistrate, he would be remanded till

23.02.2016 for aiding and abetting the driver of the said Army Jeep to cause the motor traffic accident. Then, the petitioner has been taken to the *Balangoda* Prison. The petitioner spent the night in prison.

8. On 20.02.2016, at about 12.00 p.m. the petitioner has been taken to the *Kuruwita* Prison and was admitted to the prison hospital, where he remained until 23.02.2016. Thereafter, on 23.02.2016 the petitioner has been produced before the Magistrate in the *Balangoda* Magistrate Court under case No. B/135/2016. Upon being produced before the Magistrate Court, the petitioner was released on a personal bond of Rs. 250,000 and was ordered to appear again on 01.03.2016 upon which it was fixed again on 14.06.2016.

9. **The summary of the B-Report No. 135/2016 [P-5A] filed by the 1st Respondent on 19/02/2016 is as follows,**

   The Army Jeep bearing Registration No. ශ.ඇ 5427collided with a three-wheeler bearing Registration No. WP QL 7480 head-on in the *Badulla-Colombo-Batticaloa* A4 highway, between the 131st and 132nd mile posts at the 132/4 km culvert, near the *Eeriyagasmulle amuna* having failed to take the left turn properly, causing the three-wheeler to be thrown off the culvert (page 2 of the B-Report).

   The passengers of the three-wheeler were, the driver of the three-wheeler, his 5-year-old daughter, his 3-and-a-half-year-old son, and his mother-in-law. They received injuries from the accident, and the 5-year-old daughter died upon admission to the *Balangoda* hospital (page 2 of the B-report).

   The two suspects have been produced before the Magistrate for committing offences punishable under the sections 298, 329,328 of the Penal Code and sections 149(1), 151(2), 151(3) and 234 of the Motor Traffic Act and sections 298 read with section 102 of the Penal Code (page 3 of the B-Report).

10. A summary of the statements of the witnesses and the observations of the police officer were also submitted with the B-Report, stating that, further statements of witnesses were to be recorded and that owing to this incident, there has been an unrest among the residents of the *Opanayake* area. Thereby, in order to maintain the peace in the area, the Officer in Charge has requested the

Magistrate to remand the two suspects (the driver of the Army Jeep and the petitioner) till 01.03.2016.

11. Upon the two suspects being produced before the Magistrate Court, the learned Magistrate has remanded the first suspect (the driver of the Army Jeep) till 01.03.2016 and the second suspect (the petitioner) till 23.02.2016. [P-5B]

12. In these circumstances, the petitioner alleges that, the actions of the respondents infringed Article 12(1) of the Constitution, which guarantees equality before the law and equal protection of the law and Article 13(1) of the Constitution, which guarantees freedom from being arrested except according to the procedure established by law.

13. **Alleged violation of Article 13(1)**
In his written submissions, the learned President's Counsel for the petitioner submitted that, the first requisite of Article 13(1) of the Constitution is that, an arrest must be made in accordance with the procedure laid down by law. Section 32(1) of the Code of Criminal Procedure Act and section 63 of the Police Ordinance relates to arrests without warrant. Therefore, the learned Presidents Counsel submits that, an arrest cannot be made on vague suspicion of an offence being committed.

14. The learned President's Counsel submitted that, it is another important requisite of Article 13(1) that, every person arrested shall be informed of the reason for arrest. However, at no point in the process of the investigation was the petitioner informed or made known that he has been arrested or given the reason for such arrest.

15. The learned President's Counsel further submitted that, the attempt by the 1st respondent to justify the illegal arrest of the petitioner by relying on section 169(1)(a) of the Motor Traffic Act is futile. The said section has no applicability in this instance, as it only relates to 'motor tricycle, van or motor coach or lorry' and the vehicle driven by the driver which was a 'Land Cruiser Mark II', does not fall within the description of any of the aforementioned types of vehicles according to the interpretations set out in section 240 of the Motor Traffic Act. Therefore, the requirement of sufficient rest to be given to the driver emphasized in section 169(1)(a) of the Motor Traffic Act was not violated.

16. It was further submitted that, although the 1st respondent has relied on section 169(1)(a) of the Motor Traffic Act in his affidavit, the 1st respondent has not even mentioned section 169(1)(a) of the Motor Traffic Act in the documents annexed by him to his affidavit or in the B-Reports that were filed. Therefore, it is submitted by the learned President's Counsel that it is a fabricated reason to justify the arrest of the petitioner.

17. It was submitted by the learned President's Counsel that, the petitioner in this case was not arrested for the purported violation of section 169(1)(a) of the Motor Traffic Act, but was arrested for aiding and abetting the driver of the Army Jeep in causing the fatal accident and injuries thereon. The petitioner states that, there was no material whatsoever before the police to show that the petitioner either instigated, conspired, or intentionally aided the driver of the vehicle in causing the said accident. The petitioner further states that, neither the Penal Code nor the Motor Traffic Act casts a legal duty upon the passengers to prevent an accident or to be vigilant while travelling.

18. It was further submitted by the learned President's Counsel that, the arrest of the petitioner by the 1st respondent cannot be justified by stating that there was an imminent threat to the petitioner's life. A person cannot be arrested for his or her own protection. Instead, the respondent should have eliminated the threat by providing protection and apprehending the perpetrators responsible for such threats. It is further submitted that, when the accident took place, the public in the area were very cooperative and assisted them in managing the crisis and there was no sign of acting in a negative or detrimental nature, nor was there any unpleasant or repulsive behaviour shown towards the petitioner by any of the friends or relations who visited the injured passengers of the three-wheeler. Therefore, it is submitted that the arrest of petitioner is against the procedure established by law, illegal, unreasonable, unfair, and violative of the fundamental rights guaranteed to the petitioner.

19. The learned State Counsel for the 1st respondent in his written submissions stated that, although the petitioner was not informed the reason for his arrest during the process of the investigation, the 1st respondent informed the petitioner the reason for arrest consequent to the investigation that was made by the police and therefore, the arrest of the petitioner would not be arbitrary. The learned State Counsel relied on the case of ***Joseph Perera Alias***

Bruten Perera v. AG **[1992] 1 Sri.L.R. 199** and stated that for an arrest, a mere reasonable suspicion or a reasonable complaint of the commission of the offence would suffice. And as this has been satisfied in the present case, there is no violation of Article 13(1) of the Constitution.

20. The 1st respondent in his affidavit dated 28.06.2017, in paragraph 12.3 stated that, as per section 169(1)(a) of the Motor Traffic Act, it explicitly requires that after every 4 ½ hours of driving, a driver should get a break of ½ an hour. It was stated that this provision has been violated by the petitioner at the time of the accident.

    Further, at the hearing of this application, the learned State Counsel contended that, the driver of the Army Jeep has not been provided adequate rest, and this violates section 169(1)(a) of the Motor Traffic Act.

21. The learned State Counsel for the respondent further submitted that, as the mother of the deceased child was a doctor attached to the *Balangoda* hospital to which the dead body of the child had been brought, and as there had been a chaotic situation in and around the hospital, the petitioner was arrested by the 1st respondent on the directions of his superior officers to ensure the security of the petitioner. Further, the 1st respondent in paragraph 12.7 of his affidavit also stated that, in the circumstances, he considered there to be an imminent threat to the lives of the petitioner and the driver.

22. In considering whether the fundamental rights guaranteed to the petitioner under section 13(1) of the Constitution have been violated, I will first consider the position of the respondent which attempts to justify the arrest of the petitioner based on abetment.

23. According to the B-Report filed by the 1st respondent [P5A], the petitioner in this case has been arrested by the 1st respondent for aiding and abetting the driver of the Army Jeep in causing the fatal accident and injuries thereon. In order to consider whether there existed reasonable suspicion to arrest the petitioner for the offence of abetment, one must first establish that, what the petitioner did or omitted to do is capable of being captured within the realm of the offence of abetment.
    Section 100 of the Penal Code defines abetment as;

    "A person abets the doing of a thing who-

Firstly- Instigates any person to do that thing; or
Secondly- Engages in any conspiracy for the doing of that thing; or
Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing."

When considering the above provision of the Penal Code, it is clear that, to be guilty of the offence of abetment, a person abetting the doing of a thing must either instigate, conspire, or intentionally aid by way of an act or illegal omission.

24. In case of ***The King v. Marshall 51 N.L.R. 157-159*** it was held that,

"It will, therefore, be seen that mere presence with the intention of giving aid to the principal offender is not enough. There must also be the doing of something, or the illegal omission to do something… "

It was held further,

"The aid given by an abettor must be intentional aid"

25. The case at hand is concerning a situation where the driver of the Army Jeep was arrested for causing a fatal accident and injuries, and consequently the petitioner (a passenger) was also arrested for aiding and abetting the driver of the Army Jeep in causing the said fatal accident and injuries as per the B-Report [P-5A]. According to the case *Marshall (supra)*, the mere presence of the petitioner when the offence was committed, in the absence of an act or omission is not sufficient to constitute abetment. There is no evidence of any act by the petitioner in this case, and since there is no duty imposed on a passenger of a vehicle to be vigilant while travelling or to avoid accidents that may be caused by a driver of a vehicle, an omission on the part of the petitioner is also absent.

26. The case of ***Ago Singhe, Appellant and De Alwis*** **46 N.L.R. 154,** was concerning a situation where a conductor of an omnibus was charged for overloading it, and the driver of the said omnibus was charged with aiding and abetting the conductor in the commission of that offence. It was held that, the driver, by his act of driving the omnibus, could not be said to have facilitated the commission of the offence and was, therefore, not guilty of abetment, in the absence of evidence of instigation or conspiracy.

In *Ago Singhe(supra)* it was held that,

> *"…the mere knowledge on the part of the driver that the omnibus is overcrowded cannot, in my opinion, make him liable for abetting the offence, for he has in no way facilitated the commission of the offence."*

27. Therefore, even in the presence of an act or omission, if the evidence of the existence of one of the three alternative requirements of instigation, conspiracy, or intention to aid are absent, it would not constitute abetment. In the circumstances of this case, there seems to be no abetment whatsoever by the petitioner as there is no evidence of an act or omission, nor is there any instigation, conspiracy, or anything to say that the petitioner intentionally aided the driver of the Army Jeep in causing the accident. Further, there is no possibility for the petitioner to have knowledge that the said accident would occur and even if he did have such knowledge, according to *Ago Singhe (supra)* it would not suffice. I bear in mind that a police officer is not expected to go into the material particulars of an offence or the ingredients of the offence in order to arrest a suspect. However, to arrest a person and to move for incarceration where there exists no reason whatsoever to even suspect of the commission of an offence would be arbitrary. Hence, as there is no evidence to state that the petitioner abetted the driver of the Army Jeep in causing the accident in any of the notes or observations [1R1, 1R2, 1R3] or in the statements that were recorded, there seems to be no legal basis for the arrest of the petitioner by the 1st respondent.

28. Secondly, I will consider the position of the 1st respondent in his affidavit. His position was that, the arrest was carried out due to non-compliance with the requirement of sufficient rest set out in section169(1)(a) of the Motor Traffic Act. When analyzing this position, one must first look into the provision itself.

Section 169

> "*(1) No person shall drive, or cause or permit any person employed by him or subject to his orders to drive, any* ***motor tricycle van or motor coach or lorry****-*
>
> *(a) for any continuous period of more than four and a half hours; or*
>
> *(b) so that the driver has not at least ten consecutive hours for rest in any period of twenty-four hours*

calculated from the commencement of any period of driving."

[Emphasis mine]

29. As clearly set out in the above provision, the application of section 169(1)(a) of the Motor Traffic Act is limited to *'motor tricycle van or motor coach or lorry'*. However, the vehicle driven by the driver which was a 'Land Cruiser Mark II', does not fall within the description of any of the aforementioned types of vehicles according to the interpretations set out in section 240 of the Motor Traffic Act.

Section 240

"motor tricycle van" means a motor vehicle designed to travel on three wheels, and having a tare which does not exceed four hundred and fifty kilograms, and which is constructed or adapted wholly or mainly for the carriage of goods;

"motor coach" means a motor vehicle, not being a motor ambulance or motor hearse, constructed or adapted for the carriage of more than nine persons (including the driver) and their effects, and includes a trailer so constructed or adapted;

"lorry" means a motor vehicle constructed or adapted wholly or mainly for the carriage of goods and includes a trailer so constructed or adapted and a tractor but does not include a land vehicle or a motor tricycle van;

30. Therefore, the position that the arrest of the petitioner was carried out by relying on section 169(1)(a) of the Motor Traffic Act is also futile. The said section has no applicability in this instance as it only relates to 'motor tricycle, van or motor coach or lorry'. Thus, the arrest carried out is contrary to Article 13(1) of the Constitution as it was not carried out according to a procedure established by law. It is also pertinent to note that, although the 1st respondent has relied on section 169(1)(a) of the Motor Traffic Act in his affidavit stating that a proper break was not given, in the written submissions filed on behalf of the 1st respondent, this position (the violation of section 169(1)(a) of the Motor Traffic Act) has not been relied on.

31. Further, when perusing the statement made by the driver of the Army Jeep to the police [1R1] it is clear that the driver of the Army Jeep has had an entire night's rest as his duties ended at around 7:30 p.m. on 17.02.2016 and the journey started at around 7:00

a.m. on 18.02.2016. The vehicle has also been stopped passing *Bandarawela* for utility purposes. Further, the vehicle was once again stopped for tea. Therefore, even if the Army Jeep did fall under the types of vehicles specified in section 169(1)(a) of the Motor Traffic Act, it is clear that the driver of the Army Jeep has had sufficient rest. Thus, the arrest of the petitioner based on non-compliance of the requirement of sufficient rest cannot be relied upon by the 1st respondent and therefore, the arrest of the petitioner cannot be justified on that basis. It is also noteworthy that, as the 1st respondent has not even mentioned section 169(1)(a) of the Motor Traffic Act in the documents annexed by him to his affidavit or in the B-Reports filed, this clearly seems to be an afterthought in order to justify the arrest of the petitioner.

32. Thirdly, I will consider the position of the 1st respondent in attempting to justify that the petitioner was arrested for the petitioner's own safety and security. The circumstances following the accident as portrayed by the 1st respondent were such that, the mother of the deceased child was a doctor of the *Balangoda* hospital to which the dead body of the child had been brought. It was also stated that there had been a chaotic situation in and around the hospital. The 1st respondent alleges that it was in these circumstances that the petitioner was arrested by him on the directions of his superior officers to ensure the security of the petitioner as he considered there to be an imminent threat to the lives of the petitioner and the driver.

33. Although the petitioner stated that there was no unpleasant or repulsive behaviour shown towards him by anyone of the friends or relations who visited the injured party, it is certainly plausible that, in the pretext of a fatal accident such as this, where the victims were severely injured and which caused the death of a 5-year-old child solely due to the negligence of the driver of the Army Jeep and the 5-year-old child who succumbed to the injuries being the daughter of a doctor attached to the hospital to which the body was brought, it is probable that there would have been a public outcry. In a pretext such as this, it is plausible that there may have been an imminent threat to the life of the petitioner. In such a situation, the respondent would be allowed to act in order to render protection to the petitioner.

34. However, it must be noted that, arresting the petitioner in order to provide him protection is a notion that is extremely absurd and far-

fetched. The arrest of the petitioner without any evidence or reasonable suspicion cannot be justified by stating that there was an imminent threat to his life. A person cannot be arrested for his or her own protection. A position such as this would seriously transgress the fundamental rights guaranteed by the constitution opening doors to violations of fundamental rights to take place.

35. It is also questionable as to why a remand order has been requested from the Magistrate Court if the 1st respondent was merely arresting the petitioner for his own safety. Further, the B-Report also does not contain anything relating to this contention by the 1st respondent. It can also be noted that there is no evidence available in the notes nor is there any mention about a superior officer authourising the arrest of the petitioner in the B-Report. Therefore, it is clear that this position that the petitioner was arrested for his own safety is simply an afterthought and portrays malice on the part of the respondent.

36. At this juncture, it must be pointed out that a Magistrate in the exercise of his judicial power, should consider the facts of each case carefully before making an order of remand where there exists no evidence whatsoever to even suspect that a person has committed an offence.

37. A Magistrate should not make orders merely upon the application of investigators. Before acting on an application, the Magistrate must be satisfied that the application is justified. Observations to this effect were also made in case of ***Dayananda v. Weerasinghe and Others*** **[1983] 2 Sri.L.R. 84 at 92** where His Lordship *Ratwatte,* J stated,

> *"It must be remembered that when a person is remanded he is deprived of his personal liberty during the duration of the rem and period and a person who is remanded is entitled to know the reasons why he is so remanded. Magistrates should be more vigilant and comply with the requirements of the law when making remand orders and not act as mere rubber stamps."*

38. In case of ***Mahanama Tilakaratne v. Bandula Wickramasinghe*** **[1999] 1 Sri. L.R. 372 at 382 (S.C/FR No. 595/98)** where the Magistrate issued a warrant without sufficient grounds, His Lordship *Dheeraratne,* J said that,

"Issuing a warrant is a judicial act involving the liberty of an individual and no warrant of arrest should be lightly issued by a Magistrate simply because a prosecutor or an investigator thinks it is necessary. It must be issued, as the law requires, when a Magistrate is satisfied that he should do so, on the evidence taken before him on oath. It must not be issued by a Magistrate to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor."

39. Finally, I will consider the legality of the arrest that was carried out by the 1st respondent based on suspicion.

    Article 13(1) of the Constitution sets out that, "*No person shall be arrested except according to procedure established by law, any person arrested shall be informed of the reason for his arrest."*

40. Article 13(1) consists of two limbs. First, when an arrest is made, it must only be carried out according to the procedure established by law. Second, any person subject to arrest shall be informed the reason for his arrest.

41. According to the first limb under Article 13(1) an arrest must be made according to the procedure established by law. The learned President's Counsel relied upon what was held by this court in case of ***Ponsuge Sanjeewa Tisera and another v. Singappulige Deeptha Rajitha Jayantha and Others SC/FR Application No. 368/2016*** decided on 30.05.2023, in light of arrest that is made on reasonable suspicion.

42. In case of ***Joseph Perera alias Bruten Perera v. The Attorney General and Others*** **[1992] 1 Sri.L.R. 199** it was stated that, for an arrest, there need not be clear and sufficient proof regarding the commission of the alleged offence. A reasonable suspicion based on an objective standard would be sufficient to show that the respondents have acted in good faith if they had reasons to suspect that the petitioners have committed the alleged offence.

    Their Lordships further referred to the provisions of the U.K. law which reflects the interpretation of the above position has been duly explained by citing what Lord *Scott L.* J stated in the case of ***Dumbell v. Roberts*** **[1944] 1 ALL ER 326**

    "*the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That*

requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for convicting ... The duty of the police ... is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty ... The police are required to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who has ex hypothesi aroused their suspicion ... (escaping) ... they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries. I am not suggesting a duty on the police to try to prove innocence; that is not their function; but they should act on the assumption that their prima facie suspicion may be ill founded."

43. In ***Ponsuge Sanjeewa Tisera and another (supra)*** it was held,

"In light of the 'reasonable suspicion to arrest', I do concede that a certain degree of discretion must necessarily be awarded to the police for the due performance of their duties and maintenance of public order. However, allowing the police to arrest on suspicion where it is not reasonable would create room for violations of liberty to take place. Therefore, the discretion granted should not extend to the extent where it would amount to an arbitrary violation of liberty and should be strictly where there exist reasonable grounds for such arrest. Even in such a situation, the police must always be mindful that their assumptions may be incorrect."

44. Thus, an arrest can be made on suspicion, provided that such suspicion is reasonable. It cannot be based on mere vague suspicion. In this case, when perusing the facts submitted before court and the statements of the witnesses included in the B-Reports that were filed [P-5A] and [P-5C], there exists no evidence to show that there was reasonable suspicion to arrest the petitioner. Further, not even the statement by the accused (driver) disclose any evidence that would give rise to a reasonable suspicion to arrest the petitioner.

45. Citing the case of ***Joseph Perera (supra)*** the learned State Counsel has submitted that for an arrest, a mere reasonable suspicion, or the mere reasonable complaint of the commission of an offence would suffice. As it is explained in detail above, for the respondent to arrest the petitioner or to request for the remand of the petitioner, there existed no material to form a reasonable suspicion of committing any offence by the petitioner. Further, neither was there any complaint made against the petitioner.

46. At the hearing of this application, the case of ***Channa Pieris and Others v. Attorney-General and others (Ratawesi Peramuna Case)*** **[1994] 1 Sri.L.R. 1** was brought to the attention of the Court by the learned State Counsel for the respondent.

In ***Channa Pieris (supra)*** **at pages 44,45,46** it was said that;

> *"…Suspicion can take into account matters that could not be put in evidence at all. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. … What the officer making the arrest, needs to have are reasonable grounds for suspecting the persons to be concerned in or to be committing or to have committed the offence. …*
>
> *A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources."*

47. The above case refers to an instance where the petitioners were arrested on suspicion of conspiracy to overthrow the government. The police officers who carried on the arrest had overheard the petitioners engaging in such conspiracy. The facts and circumstances of this case are completely different and has no relevance to the case at hand.

48. Thus, when considering the facts and circumstances of this case, it is my view that the arrest of the petitioner is against the procedure established by law, illegal, unreasonable, unfair, and violative of the fundamental rights guaranteed to the petitioner under section 13(1) of the Constitution.

49. <u>Alleged violation of Article 12(1)</u>
The petitioner states that, he believes that the motivation of the police in having him arrested and remanded was to appease what

the police perceived to be a disgruntled public at the expense of the Petitioners rights guaranteed under the constitution.

50. The petitioner further states that he verily believes that he was deliberately targeted by the police since he was an army officer.

51. The petitioner alleges that his arrest and remand is grossly unreasonable and unfair and exposes every passenger of a vehicle to the danger of being arrested, remanded, and charged in the event of a road traffic accident.

52. The learned State Counsel for the respondent in his written submissions stated that, Article 12(1) of the constitution was not infringed by the activities of the respondents in relation to the arrest carried out by the 1st respondent as he conducted the investigations lawfully. The 1st respondent in paragraph 13 of his affidavit, states that, at all times material to this case he performed his duties impartially and to the best of his ability and therefore, did not infringe the rights of the petitioner.

53. Article 12(1) sets out that "all persons are equal before the law and are entitled to the equal protection of the law."
While it remains probable that the petitioner was deliberately targeted by the police as he was an Army Officer, the same could also be probable if it is stated that the petitioner was deliberately targeted as the mother of the deceased child was doctor in the same hospital to which the body of the child was brought. However, nothing in the evidence or the facts and circumstances of this case suggests that the petitioner has been deliberately targeted by virtue of his office as an Army Officer. Therefore, this position should not be acted upon.

54. However, it must be noted that the 1st respondent, by arresting the petitioner who was simply a passenger, for aiding and abetting the driver of the Army Jeep, without reasonable suspicion, thereafter causing the remand of the petitioner and acting maliciously on afterthoughts, has violated Article 13(1) of the constitution. This has been discussed above in detail. While a violation of Article 13(1) of the Constitution does not automatically make it a violation of Article 12(1) in every instance, in the circumstances of this case, the manner in which Article 13(1) has been violated has also deprived the petitioner of the '*equal protection of the law*' as guaranteed by section 12(1) of the Constitution.

55. Thus, in light of the observations made above, it is my view that the arrest of the petitioner was not made on reasonable suspicion as required by law, and therefore is unlawful, arbitrary and in violation of the fundamental rights that have been guaranteed to the petitioners under Articles 13(1) and 12(1) of the Constitution.

56. Declarations and Compensation

In the above premise, I declare that the fundamental rights that have been guaranteed to the petitioner under Articles 13(1) and 12(1) of the Constitution has been violated. As per Article 126(4) of the Constitution, the Supreme Court is empowered to grant such relief as it may deem just and equitable in the circumstances in respect of any petition referred to it under Article 126(2). Therefore, in the circumstances of this case, considering the suffering which the petitioner had to undergo due to the arbitrary acts of the 1st respondent, I order the 1st respondent to pay a sum of Rs.100,000/- as compensation to the petitioner out of his personal funds.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU N. B. FERNANDO, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA

I agree

JUDGE OF THE SUPREME COURT

SEPTEMBER

2023

JUDGMENTS

SEPTEMBER INDEX

1.	SC/APPEAL/75/2016	1954
2.	SC/APPEAL/15/2021	1962
3.	SC/APPEAL/57/2016	1980
4.	SC/APPEAL/97/2012	2019
5.	SC/APPEAL/19/2021	2037
6.	SC/APPEAL/237/2017	2051
7.	SC/APPEAL/119/2021	2067
8.	SC/APPEAL/66/2013	2088
9.	SC/APPEAL/189/2014	2098
10.	SC/APPEAL/74/2017	2106
11.	SC/FR/172/2017	2116
12.	SC/FR/405/2018	2219
13.	SC/MISCELLANEOUS/	2248
14.	SC/FR/126/2022	2257

15.	SC/SPL/LA/100/2019	2266
16.	SC/CHC/APPEAL/69/2013	2283
17.	SC/CHC/APPEAL/25/2015	2301
18.	SCC/APPEAL/47/2015	2318
19.	SC/REVISION/10/2016	2333
20.	SC/APPEAL/42/2015	2343
21.	SC/APPEAL/21/2021	2361
22.	SC/FR/52/2015	2377

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

1. Ranthatidurage Selestina (Deceased)
1(a). Namminnage Mahathun,
1(b). Namminnage Saradiyel,
1(c). Namminnage Ariyasena,
2. Namminnage Babasingno (Deceased)
3. Namminnage Karunawathie (Deceased)
3(a). Namminnage Manjula Kumari,
All of Udahena, Idama, Kolonna.
Defendant-Appellant-Appellants

SC APPEAL NO: SC/APPEAL/75/2016
SC SPL LA NO: 232/2015
CA NO: CA/1010/1996 (F)
DC AMBILIPITIYA NO: 3902/L

Vs.

Leelaratne Illesinghe (Deceased)
Shanthi Sirima Illesinghe of No. 62,
Kumbuka West, Gonapola Junction,
Horana.
Substituted Plaintiff-Respondent-Respondent

Before: Buwaneka Aluwihare, P.C., J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Chatura Galhena with Manoja Gunawardena for the Defendant-Appellant-Appellants.
Srihan Samaranayake for the Substituted Plaintiff-Respondent-Respondent.

Argued on : 05.02.2021

Decided on: 05.09.2023

Samayawardhena, J.

The Plaintiff filed this action against the three Defendants in the District Court of Embilipitiya seeking a declaration of title to the land described in the schedule to the plaint, the ejectment of the Defendants therefrom and damages. The Defendants filed answer seeking the dismissal of the Plaintiff's action and a declaration of title to the land described in the schedule to the answer. After trial, the District Court entered Judgment for the Plaintiff except for damages. The Court of Appeal affirmed the Judgment of the District Court and dismissed the Defendants' appeal. This appeal with leave obtained is from the Judgment of the Court of Appeal.

In summary, this Court granted leave to appeal on two main questions of law: (a) has the Plaintiff established that he is the owner of the land described in the schedule to the plaint? and (b) has the land described in the schedule to the plaint been properly identified? It is common ground that if the answers to both or one of them is in the negative, the Plaintiff's action shall fail. At the argument, learned Counsel for the Defendants placed special emphasis on (b) above, i.e. failure to identify the land.

The land the Plaintiff claims title to, as described in the schedule to the plaint, is as follows:

> *The land called and known as Lunulandahena situate at Kolonna in the Kolonnagam Pattu of Kolonna Korale in the District of Ratnapura of the Sabaragamuwa Province bounded on the North by Heendeniya, South by Heena, East by Watumandiya and West by Divulgahawatta in extent of forty Kurunis of Kurakkan sowing area.*

Although it is not decisive, according to traditional Sinhala land measurements (as cited in *Ratnayake v. Kumarihamy* [2002] 1 Sri LR 65 at 81), in general terms, one *Laha* or *Kuruni* of Kurakkan sowing area is equivalent to one acre and one *Laha* or *Kuruni* of Paddy sowing area is equivalent to ten perches. The Plaintiff claims title to a portion of land in extent of forty *Kurunis* of Kurakkan sowing area. This means, the Plaintiff in the plaint claims a portion of land in extent of about forty acres.

On what basis does the Plaintiff claim title to this land? He traces title to the land to a decree entered in favour of his father on 11.02.1944 by the Court of Requests of Ratnapura in case No. 1845 marked P5. But the land described in the said decree is not identical to the land described in the schedule to the plaint. The land described in the decree is as follows:

> *The land called and known as Lunulandehena situate at Kolonna bounded on the North by Meedeniya* [not Heendeniya as claimed by the Plaintiff], *South by Heenna, East by Watumandiyahena* [not Watumandiya as claimed by the Plaintiff] *and West by Divulgahawatta in extent of forty Seers* [not forty Kurunis as claimed by the Plaintiff] *of Kurakkan sowing area.*

Learned Counsel for the Plaintiff submits that "*Kuruni*" instead of "*Seers*" in the description of the extent of the land in the plaint is a typographical error and the variance in the northern boundary from "Meedeniya" to "Heendeniya" may be due to the lapse of time. Learned Counsel is silent

about the discrepancy in the eastern boundary. In my view, this is not the stage to correct typographical errors or explain discrepancies in the boundaries. Those matters ought to have been addressed at the trial Court and not in the final Court. No explanation on this has been given by the Plaintiff in his evidence before the District Court.

Even assuming "*Kuruni*" instead of "*Seers*" is a typographical error, according to the same source cited above, one *Kuruni* is equivalent to four Seers. Forty Seers then means ten acres.

However, the Plaintiff in his evidence says the land he claims is approximately two acres. This is manifestly irreconcilable. It is difficult to understand how a forty-acre land or ten-acre land reduces to a two-acre land. There is no explanation forthcoming from the Plaintiff.

How does the Plaintiff describe the land in his evidence? The Plaintiff does not properly describe the boundaries of the land. He says the four boundaries are now different from the description of the land in the schedule to the plaint. He speaks of only two boundaries: North by a ditch and East by a road and live fence, which are incompatible with the boundaries given by him in the schedule to the plaint. He also says "*towards the Defendants' land lies Watumandiya*." (Page 39 of the Brief) This answer lends support to the Defendants' position that the Defendants are in possession of a different land because Watumandiya is the eastern boundary of the Plaintiffs' land as described in the schedule to the plaint.

Making confusion worse confounded, the Plaintiff in the document marked P2 says the land in suit is also known as Watumandiyahena (not Watumandiya). P2 describes the land as Lunulandehena alias Watumandiyahena. It may be recalled that in the decree marked P5, Watumandiyahena is the eastern boundary of Lunulandehena. In other

words, Lunulandehena and Watumandiyahena cannot be the same land but are two adjoining lands. Further, according to P3 marked by the Plaintiff, the land is also known as Watumandiya and Maiyaundage Idama. P3 says Lunulandehena alias Watumandiya alias Maiyaundage Idama.

It is also relevant to note that the Plaintiff in his evidence states at one stage that Lunulandehena comprises several lands. (Page 42 of the Brief)

The Defendants claim a different land by name, boundaries and extent. It is described in the schedule to the answer as follows:

> *The land called and known as Dunlandagawattahena situate at Kolonna in the Kolonnagam Pattu of Kolonna Korale in the District of Ratnapura of the Sabaragamuwa Province bounded on the North by Ditch and Live Fence, East by Road and Live Fence, South and West by Live Fence in extent of about two acres.*

In my view, the Plaintiff in his evidence claimed two acres of land because the land claimed by the Defendants in the answer is a land in extent of about two acres. Also the Plaintiff vaguely gave boundaries such as "*North by Ditch; and East by Road and Live Fence*" in contradiction to the boundaries given in the plaint because these are the boundaries given by the Defendants in their answer describing the land they claim.

This approach of the Plaintiff is unacceptable in a vindicatory action such as this. The Plaintiff in a vindicatory action cannot come to Court in anticipation of proving his case with the material provided by the Defendant. Nor can the Plaintiff in such an action strengthen his case by highlighting the weaknesses of the Defendant's case. The Defendant in a vindicatory action has no burden to discharge until the Plaintiff proves his title. It is only after proof of the Plaintiff's title that the burden shifts to the Defendant to prove on what right he is in possession of the land.

However, I must add that proof of title without proper identification of the land is futile. Title shall be proved in respect of a properly identified portion of land which forms the subject matter of the dispute. If identification of the corpus fails, the action must fail. There is no need to go into the question of title.

The plaint is not accompanied by a plan to identify the land as required by section 41 of the Civil Procedure Code; nor did the Plaintiff take out a commission to prepare a plan after the institution of the action.

Section 41 of the Civil Procedure Code reads as follows:

> *When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only.*

If the land the Plaintiff claims title to cannot be identified on the ground with precision, in the event the Plaintiff succeeds in the action, how can the Fiscal eject the Defendants and hand over possession of the land to the Plaintiff when the Defendants have taken up the position that they are not in possession of the land described in the schedule to the plaint? The delivery of possession in such circumstances is not possible. *Vide David v. Gnanawathie* [2000] 2 Sri LR 352, *Gunasekera v. Punchimenika* [2002] 2 Sri LR 43.

It was held in *Peeris v. Savunhamy* (1951) 54 NLR 207 that a Plaintiff in a *rei vindicatio* action must not only prove *dominium* to the land but also the boundaries of it, by evidence admissible in law.

In *Hettiarachchi v. Gunapala* [2008] 2 Appellate Law Recorder 70 at 79, it was held that if the Plaintiff fails to identify the land he claims *dominium* to with the land on the ground, his action must fail.

Marsoof, J. in *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 378 expressed the same in greater detail:

> *The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision.*

The Defendants have disputed the identification of the corpus in the answer and also raised it by way of an issue. Issue No.16 raised by the Defendants is as follows: "*Is the land described in the schedule to the plaint a separate one different from the land described in the schedule to the answer?*" The learned District Judge, without analysing the evidence, perfunctorily answered this issue in the negative and the Court of Appeal affirmed it.

There is real confusion about the identification of the land the Plaintiff claims in terms of name, boundaries and extent. The Plaintiff has failed to identify the land in suit, which is of paramount importance to succeed in this action. Both the District Court and the Court of Appeal failed to address this vital issue, which goes to the root of the case, in its proper perspective. I answer question (b) upon which leave was granted in favour of the Defendants.

In view of the above finding, there is no necessity to go into the question whether the Plaintiff proved title to the land in suit.

The Judgments of both the District Court and the Court of Appeal are set aside and the appeal of the Defendant-Appellants is allowed. The plaintiff's action in the District Court shall stand dismissed. On the facts and circumstances of this case, I make no order as to costs.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.
I agree.

Judge of the Supreme Court

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

Captain M.B.A. Dissanayake,
No. 126/5A,
Old Puttalam Road,
Tisa Wewa,
Anuradhapura.
Petitioner

SC APPEAL NO: SC/APPEAL/15/2021
SC LA NO: SC/SPL/LA/147/2019
CA APPLICATION NO: CA/WRIT/299/2013

Vs.

1. General Jagath Jayasooriya,
   Chief of Defence Staff,
   Block 05, BMICH,
   Colombo 07.
2. Lieutenant General R.M.D. Ratnayake,
   Army Headquarters,
   Colombo 03.
3. Brigadier D.D.U.K. Hettiarachchi,
   Army Headquarters,
   Colombo 03.
4. Colonel S.S. Waduge,
   Army Headquarters,
   Colombo 03.

5. Colonel H.G.P.M. Kariyawasam,
   Office of Chief of Defence Staff,
   Block 05, BMICH,
   Colombo 07.
   Respondents

AND NOW BETWEEN

Captain M.B.A. Dissanayake,
No. 126/5A, Old Puttalam Road,
Tisa Wewa, Anuradhapura.
Petitioner-Appellant

Vs.

1. General Jagath Jayasooriya,
   Chief of Defence Staff,
   Block 05, BMICH,
   Colombo 07.
2. Lieutenant General R.M.D. Ratnayake,
   Army Headquarters,
   Colombo 03.
3. Brigadier D.D.U.K. Hettiarachchi,
   Army Headquarters,
   Colombo 03.
4. Colonel S.S. Waduge,
   Army Headquarters,
   Colombo 03.
5. Colonel H.G.P.M. Kariyawasam,
   Office of Chief of Defence Staff,
   Block 05, BMICH,
   Colombo 07.
   Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Faisz Musthapha, P.C., with Ranil Samarasooriya, Thushani Machado, Didula Rajapaksha and Madhava de Alwis for the Petitioner-Appellant.
Chaya Sri Nammuni, D.S.G., for the Respondent-Respondents.

Argued on: 20.06.2022

Written submissions:
by the Petitioner-Appellant on 09.08.2022.
by the Respondent-Respondents on 15.06.2022.

Decided on: 05.09.2023

Samayawardhena, J.

Factual matrix

The Appellant was a captain in the Sri Lanka Army attached to the 5th Sri Lanka National Guard at the time material to this appeal. Some members of the 12th Gajaba Regiment of the Sri Lanka Army were reportedly involved in the illegal activity of removing a large quantity of gold from a safe in the Puthukudirppu area in the Northern Province during humanitarian operations in March 2009. The Appellant was indirectly implicated in this act. He is alleged to have been given some gold in recognition of his knowledge of the illegal transportation of the said gold on a subsequent occasion. The Appellant totally denies this.

A Court of Inquiry comprising the 3rd-5th Respondents as members had been appointed to inquire into this matter and report. They found eight Army personnel including the Appellant involved in this illegal activity.

At last, the Court of Inquiry recommended that a complaint be made to the Special Investigation Bureau of the Criminal Investigation Department of the Sri Lanka Police to conduct a formal investigation into this matter and to produce suspects in Court to deal with them under the normal law.

Thereafter, the 2nd Respondent, the Commander of the Army, upon the evidence led before the Court of Inquiry, made the order dated 13.08.2012 that the Appellant (along with others involved in the act) be decommissioned and disciplinary action be taken.

The Appellant filed an application in the Court of Appeal dated 01.10.2013 naming the Chief of Defence Staff, the Commander of the Army, and the three members of the Court of Inquiry as the 1st to 5th Respondents respectively, seeking to quash the aforesaid determination of the Commander of the Army dated 13.08.2012 marked P3 by a writ of certiorari.

The Respondents filed a statement of objections dated 20.07.2015 stating *inter alia* that the Commander of the Army sent his opinion and recommendation dated 18.10.2013 for the withdrawal of the commission to the secretary of the Ministry of Defence to be communicated to the President (R14); the commission of the Appellant was withdrawn by the President by letter dated 28.11.2013 (R15); in terms of section 9(1) of the Army Act, No. 17 of 1949, as amended, the officers shall be appointed by commissions under the hand of the President; in terms of section 10 of the Army Act, every officer shall hold his appointment during the President's pleasure; in view of R15, the application to quash P3 is futile; and the President has immunity under Article 35(1) of the Constitution. On this basis, they sought dismissal of the Appellant's application.

After hearing, the Court of Appeal dismissed the application of the Appellant with costs.

The main basis of the judgment of the Court of Appeal is that "*although the 1st Respondent has in P3 dated 13.08.2012 directed that the commission of the Petitioner be withdrawn, no further action has been taken thereon. Hence the question of quashing P3 by way of a writ of certiorari does not arise*." As I will demonstrate below, this finding of the Court of Appeal is erroneous.

Thereafter the Court of Appeal stresses the "pleasure principle" embodied in section 10 of the Army Act and concludes that in view of R15 since the President has approved the withdrawal of the commission of the Appellant, an order to quash P3 by a writ of certiorari is futile.

This Court granted leave to appeal against the Judgment of the Court of Appeal on the following questions of law:

(a) Did the Court of Appeal fall into substantial error by failing to consider that the decision contained in P3 could not have been made on the basis of the findings of the Court of Inquiry?
(b) Did the Court of Appeal err by failing to appreciate that the withdrawal of the commission of the Appellant stems from the decision contained in P3?
(c) Did the Court of Appeal fail to appreciate that the determination R15 made by the President does not preclude the grant of relief prayed for by the Appellant?
(d) Did the Court of Appeal err in the application of the pleasure principle inasmuch as the withdrawal of the commission had been effected for cause in pursuance of the findings of the Court of Inquiry?

The scope of the Court of Inquiry

The Army Courts of Inquiry Regulations of 1952 made by the subject Minister in terms of section 155 of the Army Act are found in Chapter 357 in the Subsidiary Legislation of Ceylon 1956.

Regulation 2 thereof reads as follows:

> *A court of inquiry means an assembly of officers, or, of one or more officers together with one or more warrant or non-commissioned officers, directed to collect and record evidence and, if so required, to report or make a declaration with regard to any matter or thing which may be referred to them for inquiry under these regulations.*

Regulation 16 states:

> *Every court of inquiry shall record the evidence given before it, and at the end of the proceedings it shall record its findings in respect of the matter or matters into which it was assembled to inquire as required by the convening authority.*

In terms of Regulation 15, there is no necessity to require the officer under investigation to be present when proceedings are in progress and also to allow the witnesses to be cross-examined unless such inquiry affects the character or reputation of the officer. Regulation 15(1) reads as follows:

> *Whenever an inquiry affects the character or the military reputation of an officer or soldier, the officer or soldier concerned shall be afforded the opportunity of being present throughout the inquiry. He shall also be allowed to make a statement, to adduce evidence on his behalf and to cross-examine any witnesses whose evidence is likely to affect his character or his military reputation.*

One cannot deny that this inquiry relates to the character and reputation of the Appellant. Learned President's Counsel for the Appellant submits that, out of the seven witnesses who testified before the Court of Inquiry, three witnesses testified implicating the Appellant but the Appellant was allowed to cross-examine only one witness and it was also confined to only three questions.

There is no dispute that a Court of Inquiry is nothing but a fact-finding inquiry. It is part of the investigation process. There is no accused tried on a charge sheet before a Court of Inquiry. Hence a person cannot be found guilty and punished either by the Court of Inquiry or upon the recommendations or findings of the Court of Inquiry by another. *Vide Boniface Perera v. Lt. General Sarath Fonseka and Others* [2009] BLR 44 at 46, *Lokuhennadige v. Lt. General Sarath Fonseka and Others* [2010] 2 Sri LR 85 at 93-94, *Colonel Fernando v. Lt. General Fonseka and Others* [2010] 2 Sri LR 101, *Lt. Harischandra v. Commander of the Army and Others* [2012] 1 Sri LR 416.

The true nature of the proceedings before the Court of Inquiry is discernible when one reads the recommendation made by the Court of Inquiry at the end of the proceedings. After identifying the officers who have been involved in the illegal activity based on the evidence presented before it, the final recommendation of the Court of Inquiry reads as follows:

> සමස්ථයක් වශයෙන් මෙම මුපළ සඳහා ඉදිරිපත් වී ඇති සියලුම සාක්ෂි අනුශංගික ලේඛන සහ වක්‍රකාර සාක්ෂි සියල්ල අධ්‍යනය කිරීමේදී මෙම වංචාව දැනට හඳුනාගෙන ඇති ප්‍රමාණයට වඩා බෙහෙවින් බරපතල විය හැකි බවත්, මෙම වංචාවෙන් රජයට හෝ ජාතියට අහිමි වී ඇති ස්වර්ණාභරණ, මුදල් හෝ දේපල අතුරින් මෙතෙක් කිසිවක් සොයා ගැනීමට නොහැකි වී ඇති බවද, යන කරුණු සැලකිල්ලට ගෙන මෙම වංචාව සබැඳිව විදිමත් පරීක්ෂණයක් සිදුකර වුදිතයින් අධිකරණය වෙත ඉදිරිපත් කිරීම සඳහා මෙම වංචාවට අදාළ කරුණු අපරාධ විමර්ශන දෙපාර්තමේන්තුවේ විශේෂ විමර්ෂණ ඒකකය වෙත පැමිණිල්ලක් ලෙස ඉදිරිපත් කිරීම වඩාත් සුදුසු බවට මණ්ඩලය වැඩිදුරටත් නිර්දේශ කරයි.

This conclusion of the Court of Inquiry itself indicates that no regular and complete investigation was conducted by them.

The decision of the Commander of the Army is *ultra vires*

Upon receipt of the recommendation, what did the Commander of the Army do? He ordered (not recommended or opined) *inter alia* that the commission of the Appellant be withdrawn and disciplinary action be taken. I must stress that this he did purely on the evidence led and the findings made by the Court of Inquiry and not on any other basis.

> 12. **මුපදා වෙත ඉදිරිපත් වී ඇති සාක්ෂි සමස්තය සලකා බැලීමේදී** පහත නම් සඳහන් නිලධාරීන්/සෙනින් විසින් මහජනතාවට අයත් අනාරක්ෂිතව තිබූ විශාල වටිනාකමකින් යුක්ත දේපලක් තමන් සන්තකයට ගෙන කිසිදු වගකිවයුතු නිළධාරියෙකුට හෝ උසස් මුලස්ථානයකට දන්වා ඒ සබැඳි සුදුසු ඉදිරි ක්‍රියාමාර්ග නොගෙන තම අභිමතය පරිදි සිවිල් අයවළුන්ට විකුණා මුදල් ලබාගෙන ඒවා තම පෞද්ගලික කාර්යන් සඳහා යෙදවීමෙන් වරදක් සිදුකර ඇත. වන්නි මානුෂිය මෙහෙයුම සමයේ යුද්ධ හමුදා සාමාජිකයන් හට සිවිල් වැසියන් තුළ තිබූ ගෞරවාදරය අහිමි වන අන්දමේ ක්‍රියාවන් සිදුකිරීම මගින් තත් නිලධාරීන්/සෙනින් විසින් යුද්ධ හමුදාව අපකීර්තියට පත්වන ආකාරයේ වරදක් සිදුකිරීම සබැඳිව **මෙහි පහත නම් සඳහන් නිලධාරීන් අධිකාරියෙන් ඉවත් කළ යුතු බවත් සෙනින් ගේ සේවය අනවශ්‍ය හේතූන් මත යුද්ධ හමුදාවෙන් ඉවත් කළ යුතු බවට විධානය කරමි**.
>
> 13. **මීට අමතරව ඉහත නම් සඳහන් නිලධාරීන්/සේනින්ට එරෙහිව විනය පියවර ගත යුතු බවට ද විධානය කරමි**.

He cannot take such a decision on the evidence led and the findings made by a fact-finding mission. This decision is *ultra vires* because the decision maker did not have legal authority to make the decision.

The Army Commander's letter to the Secretary to the Ministry of Defence

What did the Commander of the Army write to the secretary of the Ministry of Defence to be communicated to the President by R14? The relevant part of the letter (paragraphs 2 and 3) reads as follows:

2. This Officer was found guilty of fraudulently acquiring gold jewellery belonging to internally displaced persons at Puthukkudiyiruppu area while serving in 5 Sri Lanka National Guard. A Court of Inquiry had been appointed to inquire into the said incident and as per the findings of the Court of Inquiry dated 13 August 2012 it is recommended that the Officer's Commission be withdrawn.

3. Considering the above facts, I am of the opinion that further employment of this Officer in service would not be in the best interest of the Army. Therefore, as the Commander of the Army, I am compelled to seek the direction of His Excellency the President regarding the further employment of this Officer in service in terms of the Army Discipline Regulations 1950.

It is a misrepresentation of facts to state that the Appellant was found guilty of fraudulently acquiring gold jewellery belonging to internally displaced persons at Puthukudirppu area while serving in the 5th Sri Lanka National Guard. He was never found guilty of such an offence. He could not have been found guilty without charges being framed against him.

The President's decision is predicated on the Commander's letter

It is based on this letter that the President decided to withdraw the commission of the Appellant. The relevant portion of the letter sent by the secretary of the Ministry of Defence to the Commander of the Army marked R15 reads as follows:

This has reference to your letter of even No. dated 18.10.2013.
His Excellency the President has approved the withdrawal of commission of the following officer from the Sri Lanka Army Volunteer Force with effect from 22.07.2010.

As stated on the face of the document, the President's decision was entirely predicated upon the contents of the letter of the Commander of the Army marked R14 quoted above. It was not an independent decision of the President but purely an approval of the decision made by the Commander of the Army. For all intents and purposes, the withdrawal of commission was done by the Commander of the Army and the President merely approved it.

The Pleasure Principle has no applicability

I agree with learned President's Counsel for the Appellant that the Court of Appeal was not correct when it applied the pleasure principle to the facts of this case. Although section 10 of the Army Act states that every officer shall hold his appointment during the President's pleasure, it is crystal clear that the President did not exercise his discretion on that basis.

Regulation 2 of the Army Discipline Regulations and the discretion of the Commander

Learned Deputy Solicitor General in drawing attention to Regulation 2 of the Army Discipline Regulations of 1950 (Chapter 356) found in the Subsidiary Legislation of Ceylon 1956 which states that "*The Commander of the Army shall be vested with general responsibility for discipline in the army*", contends that the Commander was well within his powers when he made the recommendation to the President regarding the service of the Appellant and withdrawal of his commission. In this regard, the learned Deputy Solicitor General strongly relies on the judgment of this Court in *Major K.D.S. Weerasinghe v. Colonel G.K.B. Dissanayake and Others* (SC/FR/444/2009, SC Minutes of 31.10.2017), which was cited by the Court of Appeal in the impugned judgment. Learned President's Counsel for the Appellant strenuously submits that the said judgment of

this Court is clearly distinguishable as the petitioner in that case unlike in the instant case had pleaded guilty to all charges he faced in the summary trial. I am inclined to agree with the learned President's Counsel.

It is also important to note that the above-mentioned case was not a writ application but a fundamental rights application whereby an officer of the Army complained of violation of his fundamental rights guaranteed under Articles 12(1) and 13(3) of the Constitution on the discharge of the said officer from service by the Commander of the Army after a Court of Inquiry. Malalgoda J. (with the agreement of Wanasundera J. and Aluwihare J.) held:

> *Regulation 2 of the Army Disciplinary Regulations 1950 provides that "the Commander of the Army shall be vested with the general responsibility for discipline in the Army" and in the case in hand the Commander acting under the above provision had sought a direction from His Excellency the President regarding the further retention of Petitioner. As revealed before us, the above conduct of the Commander of the Army when seeking a directive from His Excellency the President was an independent act and was done for the best interest of the Army in order to maintain the discipline of the Army.*

It is on that basis Malalgoda J. held that there was no violation of Articles 12(1) and 13(3) of the Constitution.

However, in the instant case, as I have already stated, the decision P3 was made on findings of the Court of Inquiry, not in the proper invocation of Regulation 2 of the Army Disciplinary Regulations. The direction sought from the President by R14 was not an independent act of the

Commander but intrinsically interconnected with the findings of the Court of Inquiry.

For completeness, let me also add that although Regulation 2 of the Army Discipline Regulations of 1950 states that the Commander of the Army shall be vested with general responsibility for discipline in the army, there is no unfettered, untrammeled and unbridged discretion in the modern administrative law. Our system of government is founded on the rule of law, and unfettered discretion cannot exist where the rule of law reigns. Discretion is subject to judicial review.

In *Premachandra v. Major Montague Jayawickrema and Another* [1994] 2 Sri LR 90 at 105, G.P.S. De Silva C.J. held:

> *There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.*

In the case of *Munasinghe v. Vandergert* [2008] 2 Sri LR 233 at 232, Bandaranayake J. (later C.J.) observes:

> *Considering the present day administrative functions, there is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless, such discretionary authority cannot be absolute or unfettered as such would be arbitrary and discriminatory, which would negate the equal protection guaranteed in terms of Article 12(1) of the Constitution.*

Further in *Rajavarothiam Sampanthan and Others v. Attorney General and Others* (SC/FR/351-356, 358-361/2018, SC Minutes of 13.12.2018), H.N.J. Perera C.J. held at 67:

> *A related principle is that our Law does not recognize that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power.*

Lord Wrenbury in the celebrated House of Lords decision in *Roberts v. Hopwood* [1925] AC 578 at 613 articulated this in the following manner:

> *A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.*

Lord Denning, M.R. in *Breen v. Amalgamated Engineering Union* [197I] 2 Q.B. 175 at 190 stressed the importance of the public authority exercising discretion being focused on considerations only relevant to the matter at hand without being strayed into irrelevant considerations. Exercising discretion in good faith alone is not sufficient. Discretion must be exercised according to law.

> *The discretion of a statutory body is never unfettered. It is a discretion which has to be exercised according to law. That means at least this: the statutory body must be guided by relevant consideration and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless, the decision will be set aside. That is established by Padfield v. Minister of*

> *Agriculture, Fisheries and Food [1968] A.C. 997 which is a landmark in modern administration law.*

Professor Paul Craig, in *Administrative Law* (4th Edition, 1999) at page 507 explains how the Courts can shape the proper exercise of discretion by public bodies.

> *First, the courts can impose controls on the way in which the discretion is exercised, with the objective of ensuring that there has been no failure to exercise the discretion. Limitations on delegation, and on the extent to which an authority can proceed through policies or rules, are the two main controls of this type. Secondly, constraints can be placed upon an administrative authority in order to ensure that there has been no misuse of power. The judiciary can impose substantive limits on the power of an administrative body on the ground that it is thereby ensuring that the body does not act illegally, outside the remit of its power. Thirdly, the court can develop principles to make sure that administrative authority does not misuse its power by acting irrationally, thereby placing substantive limits on the power of that authority.*

Is the President's decision a stumbling block to grant relief to the Appellant?

The main argument of learned Deputy Solicitor General is that, in view of the President's decision contained in R15, the Appellant's application must be dismissed on futility because even if P3 and R14 are declared null and void, R15 will survive. I am unable to agree with this argument on several reasons.

What is the relief sought by the Appellant from the Court of Appeal? The Appellant sought only to quash P3 by a writ of certiorari. Even if R14 and

R15 survive, there is no impediment for the Court to quash P3 by way of a writ certiorari.

In *Flying Officer Ratnayake v. Commander of Air Force and Others* [2008] 2 Sri LR 162, after a Court of Inquiry, the Commander of the Air Force recommended that the commission of the petitioner who was an officer of the Air Force be withdrawn, and the President approved it. The petitioner filed an application in the Court of Appeal seeking to quash the recommendation by certiorari and to compel the respondents by mandamus to hold a Court Martial in respect of the charges levelled against him. De Abrew J. with the agreement of Sripavan J. (later C.J.) quashed the recommendation by certiorari since a recommendation to withdraw the commission of the petitioner could not have been made upon findings of a Court of Inquiry but declined to issue mandamus.

Rights of the parties shall be determined at the commencement of the action

Firstly, it is well settled law that rights of the parties shall be determined at the time of the institution of the action. The Appellant filed the application in the Court of Appeal on 01.10.2013 seeking to quash the decision of the Commander of the Army contained in P3. Subsequent to the filing of this application, the Commander of the Army wrote R14 to the secretary of the Ministry of Defence on 18.10.2013. Based on R14, the decision contained in R15 dated 28.11.2013 was taken by the President. R14 and R15 came into being after the Appellant had filed the application in the Court of Appeal.

Decision as a deterrence

Secondly, if a decision of a public authority is plainly *ultra vires*, even if quashing it would not give any relief to the suiter, but would only be an academic exercise, the Court would not act in vain by formally quashing

the said decision by certiorari as it would *inter alia* impress upon the other bodies who discharge functions of public nature that the same fate will befall on them if they also behave in the same manner. It will act as a deterrence.

Clive Lewis in *Judicial Remedies in Public Law* (2nd Edition, London Sweet & Maxwell, 2000) at page 342 states:

> *Even if there is no point in granting remedies such as certiorari, so far as the particular applicant is concerned, there may still be a need to clarify the law or give guidance for decision-makers in the future. A court may grant a declaration setting out the true legal position, or may give judgment clarifying the law but without making a formal declaration.*

In the case of *Sundarkaran v. Bharathi* [1989] 1 Sri LR 46, the petitioner-Appellant filed an application seeking certiorari and mandamus after being denied a liquor license for the year 1987. However, by the time the matter reached the Supreme Court, it had become purely academic since the year 1987 had already passed. Nonetheless, whilst allowing the appeal, Amarasinghe J. took the view that "*The court will not be acting in vain in quashing the determination not to issue the licence for 1987 because the right of the petitioner to be fully and fairly heard in future applications is being recognised*." Similar conclusion was reached by Sripavan J. (later C.J.) in *Nimalasiri v. Divisional Secretary, Galewela* [2003] 3 Sri LR 85.

Are recommendations amenable to writ jurisdiction?

Learned Deputy Solicitor General further submits that R14 contains a recommendation and not a decision, and recommendations are not amenable to writ jurisdiction. The Court of Appeal has also held that "*In any event, R14 is only a recommendation which is not subject to a writ of*

certiorari." As I have already stated the decision in R15 is based on the misleading recommendation contained in R14.

In *Flying Officer Ratnayake v. Commander of Air Force and Others (supra)*, De Abrew J. with the agreement of Sripavan J. (later C.J.) quashed the recommendation of the Commander of the Air Force to the President by a writ of certiorari.

In *Captain Nawarathna v. Major General Sarath Fonseka and Others* [2009] 1 Sri LR 190 at 202, Ratnayake J. (with S.N. Silva C.J. and Tilakawardane J. agreeing) upheld the decision of the Court of Appeal to issue writs of certiorari to quash the recommendations:

> *I note that the Court of Appeal had decided to grant partial relief by issuing writ of certiorari to set aside the recommendation made by the 1st Respondent to withdraw the commission and discharge the Petitioner from the army and a writ of certiorari to quash the recommendation to dismiss the Petitioner, which decisions will stand.*

The frontiers of the administrative law have expanded over the years. Hence even recommendations of public authorities can be subject to writ jurisdiction provided they make serious inroads into the rights of the people.

In *Sri Lanka Telecom Ltd. v. Human Rights Commission of Sri Lanka* [2020] 1 Sri LR 212, the Supreme Court held that recommendations of the Human Rights Commission attract writ jurisdiction. In the course of the Judgment, De Abrew J. at page 220 declared:

> *If a recommendation of a public body affects the right of an individual, Superior Courts, in the exercise of their writ jurisdiction,*

have the power to quash such a recommendation by issuing a writ of certiorari.

In furtherance of this positive development in law, it was held in *David Raja v. Minister of Fisheries and Aquatic Resources Development and Others* [2020] 1 Sri LR 310 at 314 that:

if a recommendation of a public body protects the rights of an individual, the superior Courts, in the exercise of writ jurisdiction, have the power to compel the enforcement of such a recommendation by issuing a writ of mandamus, if the Court is satisfied that the recommendation is made on compelling grounds.

Conclusion

I answer the questions of law on which leave to appeal was granted in the affirmative and set aside the judgment of the Court of Appeal dated 25.03.2019. The decision of the Commander of the Army contained in P3 dated 13.08.2012 is quashed by a writ of certiorari. The petitioner is entitled to costs of this Court and the Court of Appeal.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.
I agree.

Judge of the Supreme Court

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

Weerappulige Piyaseeli Fernando,
No. 37, Yagamwela, Dummalasooriya.
Plaintiff

SC APPEAL NO: SC/APPEAL/57/2016
SC LA NO: SC/HCCA/LA/461/2013
HCCA KURUNEGALA NO: NWP/HCCA/KUR/84/2007 (F)
DC KULIYAPITIYA NO: 11189/L

Vs.

1. Rathugamage Mary Agnes Fernando,
   'Reinland Estate', Yagamwela,
   Dummalasuriya (Deceased).

1A. Mihidukulasuriya Sudath Harison Pinto (also named as 1B1),

1B. Mihidukulasuriya Victor Pinto (Deceased),

1C. Mihidukulasuriya Sarath Asinas Pinto (also named as 1B2),
All of 'Reinland Estate', Yagamwela, Dummalasuriya.

2. Chithranganee Ratnamali Merlin De Soyza,
   No. 9, Fonseka Place, Colombo 05.
3. Anusha Chithra Mawli Geetal De Soyza,
   No. 4A, Keenakele Watta, Marawila.

4. Francis Dilini Anusha De Silva,
   No. 50, Ele Bank Road, Colombo 05.
5. Ranil De Soyza,
   No. 50, Ele Bank Road, Colombo 05.
6. Malani De Soyza, No. 50, Ele Bank Road, Colombo 05.
7. Siri Nanayakkara,
   No. 798, Galle Road, Molligoda, Wadduwa.

   Defendants

AND BETWEEN

Weerappulige Piyaseeli Fernando,
No. 37, Yagamwela, Dummalasooriya.
Plaintiff-Appellant

Vs.

1. Rathugamage Mary Agnes Fernando,
   'Reinland Estate', Yagamwela, Dummalasuriya (Deceased).

1A. Mihidukulasuriya Sudath Harison Pinto (also named as 1B1),

1B. Mihidukulasuriya Victor Pinto (Deceased),

1C. Mihidukulasuriya Sarath Asinas Pinto (also named as 1B2),
All of 'Reinland Estate', Yagamwela, Dummalasuriya.

2. Chithranganee Ratnamali Merlin De Soyza,
   No. 9, Fonseka Place, Colombo 05.
3. Anusha Chithra Mawli Geetal De Soyza,
   No. 4A, Keenakele Watta, Marawila.
4. Francis Dilini Anusha De Silva,
   No. 50, Ele Bank Road, Colombo 05.
5. Ranil De Soyza,
   No. 50, Ele Bank Road, Colombo 05.
6. Malani De Soyza, No. 50, Ele Bank Road, Colombo 05.
7. Siri Nanayakkara,
   No. 798, Galle Road, Molligoda, Wadduwa.

   Defendant-Respondents

AND NOW BETWEEN

1A. Mihidukulasuriya Sudath Harison Pinto (also named as 1B1),
Reinland Estate, Yagamwela,
Dummalasuriya.
Defendant-Respondent-Appellant

1B. Mihidukulasuriya Victor Pinto (Deceased),

1C. Mihidukulasuriya Sarath Asinas Pinto (also named as 1B2) (Deceased),

1C(a). Samarakoon Mudiyanselage Wimalawathi,

1C(b). Sawinda Pranith Mihindukulasuriya,
Both of 'Reinland Estate', Yagamwela, Dummalasuriya.
1C(a), 1C(b) Substituted Defendant-Respondent-Appellants

Vs.

Weerappulige Piyaseeli Fernando,
No. 37, Yagamwela, Dummalasooriya.
Plaintiff-Appellant-Respondent

2. Chithranganee Ratnamali Merlin De Soyza,
   No. 9, Fonseka Place, Colombo 05.
3. Anusha Chithra Mawli Geetal De Soyza,
   No. 4A, Keenakele Watta, Marawila.
4. Francis Dilini Anusha De Silva,
   No. 50, Ele Bank Road, Colombo 05.
5. Ranil De Soyza,
   No. 50, Ele Bank Road, Colombo 05.
6. Malani De Soyza, No. 50, Ele Bank Road, Colombo 05.
7. Siri Nanayakkara,
   No. 798, Galle Road, Molligoda, Wadduwa.

2-7 Defendant-Respondent-Respondents

Before: Jayantha Jayasuriya, P.C., C.J.
A.H.M.D. Nawaz, J.
Mahinda Samayawardhena, J.

Counsel: Jacob Joseph for the 1A Defendant-Respondent-Appellant.
Dr. Sunil Coorey with Sudarshani Coorey for the Plaintiff-Appellant-Respondent.

Argued on : 17.10.2022

Written submissions:
by the 1A Defendant-Respondent-Appellant on 29.04.2016 and 02.01.2023
by the Plaintiff-Appellant-Respondent on 19.09.2016 and 29.11.2022

Decided on: 11.09.2023

Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Kuliyapitiya seeking a declaration of title to, ejectment of the defendant from, the two allotments of land described in the schedule to the plaint, and damages. The plaintiff relied on deed No. 3016 to claim title to the said allotments. The 1st defendant filed answer seeking dismissal of the plaintiff's action on the basis that the 1st defendant came into possession of the land upon making some advance payments to the vendors of deed No. 3016 well before the execution of this deed. After trial, the District Court dismissed the plaintiff's action accepting the defendant's version. On appeal, the High Court of Civil Appeal of Kurunegala set aside the judgment of the District Court and entered judgment for the plaintiff. Hence this appeal by the 1st defendant. This Court granted leave to appeal mainly on three questions of law:

(a) Did the High Court err in law in not considering that in a *rei vindicatio* action the burden is on the plaintiff to establish title pleaded and relied on by him and the defendant need not prove anything?

(b) Did the High Court err in law in not considering that the title deed of the plaintiff only conveys undivided 7/8 shares of the property and therefore the plaintiff failed to establish title as held in *Hariette v. Pathmasiri* [1996] 1 Sri LR 358?

(c) Did the High Court err in law in not considering that the plaintiff was a speculative buyer who knew the land was possessed by the defendant, possession having been given to the defendant by the same vendors?

Burden and standard of proof in a *rei vindicatio* action

At the commencement of the trial before the District Court admissions were recorded. The third and fourth admissions are that at one point of time the 2nd defendant was the owner of the land in suit and she (the 2nd defendant) executed the aforementioned deed of transfer No. 3016 in favour of the plaintiff. The 1st defendant has no paper title to the land. Learned counsel for the 1st defendant in his post-argument written submission admits this when he says "*The defendant had an actual exclusive possession of the land with the intention of becoming the owner.*" In the plaint the plaintiff has taken up the position that the 1st defendant came into possession of the land on the leave and licence of the plaintiff's vendors. This has not been accepted by the District Judge. Despite the above admissions, the District Judge has held that by deed No. 3016 what has been transferred is only 7/8 shares but not the full title as claimed by the plaintiff. The plaintiff does not challenge this finding of the District Judge. Based on these findings, learned counsel for the 1st defendant argues that this being a *rei vindicatio* action, the plaintiff has

failed to prove title to the land as pleaded in the plaint and therefore the plaintiff's action must fail. I will deal with this in greater detail since the burden of proof and the standard of proof in *rei vindicatio* actions are overwhelmingly shrouded in misconceptions, misconstructions and misunderstandings.

In order to succeed in a *rei vindicatio* action, first and foremost, the plaintiff shall prove his ownership to the property. If he fails to prove it, his action shall fail. This principle is based on the Latin maxim "*onus probandi incumbit ei qui agit*", which means, the burden of proof lies with the person who brings the action. Section 101 of the Evidence Ordinance is also to a similar effect.

Macdonell C.J. in *De Silva v. Goonetilleke* (1960) 32 NLR 217 at 219 stated:

> *There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action rei vindicatio plaintiff must have ownership actually vested in him". (1 Nathan p. 362, s. 593.)....The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie.*

In *Pathirana v. Jayasundera* (1955) 58 NLR 169 at 172, Gratiaen J. declared:

> *"The plaintiff's ownership of the thing is of the very essence of the action." Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

In *Mansil v. Devaya* [1985] 2 Sri LR 46, G.P.S. De Silva J. (as he then was) stated at 51:

> *In a rei vindicatio action, on the other hand, ownership is of the essence of the action; the action is founded on ownership.*

In *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 352, Marsoof J. held:

> *An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title.*

Having said the above, it needs to be emphasised that the plaintiff in a *rei vindicatio* action has no heavier burden to discharge than a plaintiff in any other civil action. The standard of proof in a *rei vindicatio* action is on a balance of probabilities.

Professor George Wille, in his monumental work *Wille's Principles of South African Law*, 9th Edition (2007), states at page 539:

> *To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her ownership in the property. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof. In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration.*

In *Preethi Anura v. William Silva* (SC/APPEAL/116/2014, SC Minutes of 05.06.2017), the plaintiff filed a *rei vindicatio* action against the defendant seeking a declaration of title to the land in suit and the ejectment of the defendant therefrom. The District Court held with the plaintiff but the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to prove title to the land. The plaintiff's title commenced with a statutory determination made

under section 19 of the Land Reform Law in favour of his grandmother, who had bequeathed the land by way of a last will to the plaintiff, with the land being later conveyed to the plaintiff by way of an executor's conveyance. No documentary evidence was tendered to establish that the last will was proved in Court and admitted to probate in order to validate the said executor's conveyance. The District Court was satisfied that the said factors were proved by oral evidence but the High Court found the same insufficient to discharge the burden that rests upon a plaintiff in a *rei vindicatio* action, which the High Court considered to be very heavy. The Supreme Court reversed the judgment of the High Court and restored the judgment of the District Court, taking the view that the plaintiff had proved title to the land despite the purported shortcomings. In the course of the judgment, Dep C.J. (with De Abrew J. and Jayawardena J. agreeing) remarked:

> *In a rei vindicatio action, the plaintiff has to establish the title to the land. Plaintiff need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title. This case being a rei vindicatio action this court has to consider whether the plaintiff discharged the burden on balance of probability.*

What is the degree of proof expected when the standard of proof is on a balance of probabilities? This is better understood when proof on a balance of probabilities is compared with proof beyond a reasonable doubt.

On proof beyond a reasonable doubt, in *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning declared at 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.*

In relation to proof on a balance of probabilities, it was stated at 374:

> *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.*

In consideration of the degree of proof in a *rei vindicatio* action, we invariably refer to the seminal judgment of *Pathirana v. Jayasundara* (1955) 58 NLR 169. In that case the plaintiff sued the defendant on the basis that the defendant was an overholding lessee. The defendant admitted the bare execution of the lease but stated that the lessors were unable to give him possession of the land. He averred that the land was sold to him by its lawful owner (not one of the lessors) and that by adverse possession from that date he had acquired title by prescription. The plaintiff then sought to amend the plaint by claiming a declaration of title and ejectment on the footing that his rights of ownership had been violated. The Supreme Court held:

> *A lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligation as lessee is not entitled to amend his plaint subsequently*

> *so as to alter the nature of the proceeding to an action rei vindicatio if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title.*

In the course of the judgment the Court distinguished an action for declaration of title (based on the contractual relationship between the plaintiff and the defendant) from an action *rei vindicatio* proper. In general terms, in both actions, a declaration of title is sought – in the former, as a matter of course, without strict proof of title, but in the latter, as a peremptory requirement, with strict proof of title. H.N.G. Fernando J. (as he then was) at page 171 explained the distinction between the two in this way:

> *There is however the further point that the plaintiff in his prayer sought not only ejectment but also a declaration of title, a prayer for which latter relief is probably unusual in an action against an overholding tenant. I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title through the operation of a rule in estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee would not preclude the lessor-owner from choosing to proceed against him by a rei vindicatio. But this choice can I think be properly exercised only by clearly setting out the claim of title and sounding in delict.*

The term "strict proof of the plaintiff's title" used here does not mean that the plaintiff in a *rei vindicatio* action shall prove title beyond a reasonable doubt or a very high degree of proof. The term "strict proof of the plaintiff's title" was used to distinguish the standard of proof between a declaration of title action based on a contractual relationship between the plaintiff and the defendant such as lessor and lessee, and a *rei vindicatio* action proper based on ownership of the property. In a *rei vindicatio* action, if the plaintiff proves on a balance of probabilities that he is the owner, he must succeed.

The distinction between an action for declaration of title and ejectment and a *rei vindicatio* action was also emphasised by Wigneswaran J. in *Luwis Singho and Others v. Ponnamperuma* [1996] 2 Sri LR 320 at 324:

> *Though due to procedural steps introduced by the Civil Procedure Code there may appear no real difference today in Sri Lanka between an action rei vindicatio and an action for declaration of title and ejectment it may not be correct to equate them as co-extensive in scope and content.*

Professor G.L. Peiris, in his treatise *Law of Property in Sri Lanka*, Vol I, makes it clear at page 304:

> *It must be emphasized, however, that the observations in these cases to the effect that the plaintiff's title must be strictly proved in a rei vindicatio, cannot be accepted as containing the implication that a standard of exceptional stringency applies in this context. An extremely exacting standard is insisted upon in certain categories of action such as partition actions.…It is clear that a standard characterized by this degree of severity does not apply to the proof of a plaintiff's title in a rei vindicatory action.*

(Justice) Dr. H.W. Tambiah opines in "*Survey of Laws Controlling Ownership of Lands in Sri Lanka*", Vol 2, International Property Investment Journal 217 at pages 243-244:

> *In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant. See de Silva v. Gunathilleke, 32 N.L.R. 217 (1931); Abeykoon Hamine v. Appuhamy, 52 N.L.R. 49 (1951); Muthusamy v. Seneviratne, 31 C.L.W. 91 (1946). Once title is established, the burden shifts to the defendant to prove that by adverse possession for a period of 10 years he has acquired prescriptive title. Siyaneris v. Udenis de Silva, 52 N.L.R. 289 (1951). In rei vindicatory action once the plaintiff proves he was in possession but then he was evicted by the defendant, the burden of proving title will shift to the defendant. In Kathiramathamby v. Arumugam 38 C.L.W. 27 (1948) it was held that if the plaintiff alleges that he was forcibly ousted by the defendant the burden of proving ouster remains with the complainant. As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property.*

The view of Dr. Tambiah "*As a practical matter, the burden of proof in a rei vindicatio action is not burdensome. The plaintiff must prove only that he is the probable owner of the property*" shall be understood in the context of his view expressed at the outset that "*In a vindicatory action, the plaintiff must prove that he is the owner of the property which is in the possession of the defendant.*"

The recent South African case of *Huawei Technologies South Africa (Pty) Limited v. Redefine Properties Limited and Another* [2018] ZAGPJHC 403 decided on 29.05.2018 reveals that the burden of proof cast on a plaintiff in a *rei vindicatio* action is not unduly onerous. In this case it was held

that what the plaintiff in a *rei vindicatio* action needs to prove is that he is the owner of the property (which the Court stated could be done by producing his title deed) and that the defendant is holding or in possession of the property. Once this is done, the onus shifts to the defendant to establish a right to continue to hold against the owner. Cele J. declared:

> *The rei vindicatio is the common law real action for the protection of ownership. C.P. Smith, Eviction and Rental Claims: A Practical Guide at p. 1-2; Graham v. Ridley 1931 TPD 476; Chetty v. Naidoo 1974 (3) SA 13 (A). It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner. The owner, in instituting a rei vindicatio, need do no more than allege and prove that he is the owner and that the defendant is holding or in possession of the res. The onus is on the Defendant to allege and establish a right to continue to hold against the owner. Chetty v. Naidoo (supra) at 20 A–E. A court does not have an equitable discretion to refuse an order for ejectment on the grounds of equity and fairness. Belmont House v. Gore NNO 2011 (6) SA 173 (WCC) at para [15]. In the case of eviction based on an owner's rei vindicatio, the owner has only to prove his ownership which can be done by producing his title deed indicating that the property is registered in his name. Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd [1999] ZASCA 208; 1993 (1) SA 77 (A) at 82 A–C.*

In *De Vos v. Adams and Others* [2016] ZAWCHC 202 decided on 06.12.2016, Davis J. stated:

> *Turning specifically to the rei vindicatio it is clear that there are three requirements which the owner must prove on a balance of*

> *probabilities, in order to succeed with the particular action. Firstly, the applicant must show his or her ownership in the property. In the case of immovable property it is sufficient as a result to show the title in the land is registered in his or her name. Secondly, the property must exist, be clearly identifiable and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the property at the time that the action is instituted.*

The requirement of proof of chain of title which is the norm in a partition action is not applicable in a *rei vindicatio* action. If there is no challenge to the title deed of the plaintiff on specific grounds, the plaintiff can prove his ownership to the property by producing his title deed. This view was expressed by Professor Wille (op. cit. at page 539) when he stated that "*In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name*."

When the standard of proof is on a balance of probabilities, the Court is entitled to consider whose version – the plaintiff's or the defendant's – is more probable.

Banda v. Soyza [1998] 1 Sri LR 255 was a *rei vindicatio* action filed by a trustee of a temple seeking a declaration of title, the ejectment of the defendant and damages. The Court of Appeal set aside the judgment of the District Court and the plaintiff's action was dismissed on the ground that the plaintiff had failed to establish title to the subject matter of the action or even to identify the land in suit. But the Supreme Court set aside the judgment of the Court of Appeal and restored the judgment of the District Court on the basis that there was "*sufficient evidence led on behalf of the plaintiff to prove the title and the identity of the lots in dispute*." G.P.S. de Silva C.J. laid down at page 259 the criterion to be

adopted in a *rei vindicatio* action in respect of the onus of proof in the following manner:

> *In a case such as this, the true question that a court has to consider on the question of title is,* ***who has the superior title?*** *The answer has to be reached upon a consideration of the totality of the evidence led in the case.*

Dr. H.W. Tambiah (op. cit. at p. 244) refers to proof of superior title by the defendant as a defence to a *rei vindicatio* action.

> *In a vindicatory action, the defendant has numerous defenses, which include: denial of the plaintiff's title; establishment of his own title, in the sense of establishing a title superior to that of the plaintiff; prescription; a plea of res judicata; right of tenure under the plaintiff – for example usufruct, pledge or lease of land; the right to retain possession subject to an indemnity from the plaintiff under peculiar conditions; a plea of exception rei venditae et traditae; and, ius tertii.*

The Full Bench of the Supreme Court in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 adverted to **superior title** and **sufficient title** and held that the plaintiff in a *rei vindicatio* action shall prove that he has title to the disputed property and that such title is superior to the title, if any, put forward by the defendant, or that he has sufficient title which he can vindicate against the defendant.

The plaintiff in *Jinawathie*'s case filed a *rei vindicatio* action against the defendants relying upon a statutory determination made under section 19 of the Land Reform Law, No. 1 of 1972. The defendants sought the dismissal of the plaintiff's action on the basis that the alleged statutory determination did not convey any title on the plaintiff and that in the absence of the plaintiff demonstrating dominium over the land, the plaintiff's action shall fail. Both the District Court and the Court of

Appeal held with the plaintiff and the Supreme Court affirmed it. Ranasinghe J. (as he then was) with the agreement of Sharvananda C.J., Wanasundera J., Atukorale J., and Tambiah J., whilst emphasising that in a *rei vindicatio* action proper, the plaintiff's ownership of the land is of the very essence of the action, expressed the view of the Supreme Court in the following terms at page 142:

> *This principle was re-affirmed once again by Gratiaen J. in the case of Palisena v. Perera (1954) 56 NLR 407 where the plaintiff came into court to vindicate his title based upon a permit issued under the provisions of the Land Development Ordinance (Chap. 320). In giving judgment for the plaintiff, Gratiaen, J. said: "a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser had prevented him from entering upon the land does not afford a defence to the action."*
>
> *In a vindicatory action the plaintiff must himself have title to the property in dispute: the burden is on the plaintiff to prove that he has title to the disputed property, and that such title is superior to the title, if any, put forward by the defendant in occupation. The plaintiff can and must succeed only on the strength of his own title, and not upon the weakness of the defence.*
>
> *On a consideration of the foregoing principles – relating to the legal concept of ownership, and to an action rei vindicatio – it seems to me that the plaintiff-respondent did, at the time of the institution of these proceedings, have, by virtue of P6 [statutory determination], "sufficient" title which she could have vindicated against the defendants-appellants in proceedings such as these.*

In the Supreme Court case of *Khan v. Jayman* [1994] 2 Sri LR 233 the plaintiff sued the defendant for ejectment from the premises in suit and damages on the basis that the defendant was in forcible occupation of the premises after the termination of the leave and licence given to the defendant. The defendant claimed tenancy. The District Court dismissed the plaintiff's action on the basis that the plaintiff failed to establish that the defendant was a licensee and the Court of Appeal affirmed it. On appeal, the Supreme Court held that the plaintiff shall succeed since the defendant failed to establish a "better title" to the property after the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title. Kulatunga J. with the agreement of G.P.S. De Silva C.J. and Wadugodapitiya J. stated at page 235:

> *The plaintiff did not pray for a declaration of title or raise an issue on ownership, presumably because no challenge to his ownership was anticipated. Indeed the defendant's answer did not deny the plaintiff's title. At the trial, the plaintiff established his title and the defendant in his evidence admitted the plaintiff's title to the premises in suit. This action is, therefore, a vindicatory action i.e. an action founded on ownership. Maasdorp's Institutes of South African Law Vol. II Eighth Edition page 70 commenting on the right of an owner to recover possession of his property states –*
>
> *"The plaintiff's ownership in the thing is the very essence of such an action and will have to be both alleged and proved …"*
>
> *He also states –*
>
> *"The ownership of a thing consists in the exclusive rights of possession … and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession*

> *from anyone who cannot set up a **better title** to it and warn him off the property, and eject him from it".*

The argument of the defendant that he was prejudiced in his defence as the plaintiff did not sue the defendant as the owner of the premises was rejected by the Supreme Court. Kulatunga J. stated at 239:

> *Learned Counsel for the defendant-respondent also submitted that in view of the fact that this was not a case of the plaintiff suing as owner simpliciter and in the absence of an issue on ownership, the defendant would not have known the case he had to meet and was prejudiced in his defence. I cannot agree. As stated early in this judgment, the plaintiff pleaded his ownership and clearly set out his case, including the fact that the defendant was in occupation of a room of the premises in suit by leave and licence. The defendant too set out his case in unambiguous terms viz. that he was a protected tenant from 1971. In the end, the plaintiff proved his case whilst the defendant failed to establish a better title to the property. As such, the question of prejudice does not arise.*

When the paper title to the property is admitted or proved to be in the plaintiff, the burden shifts to the defendant to prove on what right he is in possession of the property.

In *Siyaneris v. Udenis de Silva* (1951) 52 NLR 289 the Privy Council held:

> *In an action for declaration of title to property, where the legal title is in the plaintiff but the property is in the possession of the defendant, the burden of proof is on the defendant.*

In *Theivandran v. Ramanathan Chettiar* [1986] 2 Sri LR 219 at 222, Sharvananda C.J. stated:

> *In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession.*

This was quoted with approval by G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227 at 229 and reiterated in *Candappa nee Bastian v. Ponnambalam Pillai* [1993] 1 Sri LR 184 at 187. *Vide* also *Wijetunge v. Thangarajah* [1999] 1 Sri LR 53, *Gunasekera v. Latiff* [1999] 1 Sri LR 365 at 370, *Jayasekera v. Bishop of Kandy* [2002] 2 Sri LR 406 and *Loku Menika v. Gunasekara* [1997] 2 Sri LR 281 at 282-283.

The right to possession is an essential attribute of ownership. The owner of the land has the right to exclude others from its use.

Maasdorp's Institutes of South African Law, Vol II, 8th Edition (1960), p. 27) states the rights of an owner are *"comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition".* He goes on to say that *"these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time".*

As stated in K.J. Aiyar's Judicial Dictionary, 11th Edition (1995), page 833, it is not possible to give a comprehensive definition to the rights of ownership. Traditionally, those rights include:

> *Jus utendi* – the right to use of the thing
> *Jus possidendi* – the right to possess a thing

Jus abutendi – the right to consume or destroy a thing
Jus despondendi vei transferendi – the right to dispose of a thing or to transfer it as by sale, gift, exchange etc.
Jus sibi habendi – the right to hold a thing for oneself
Jus alteri non habendi or *Jus prohibendi* – the right to exclude others from its use

In general, in a *rei vindicatio* action the plaintiff's case is based on his paper title whereas the defendant's case is based on prescriptive title. Prescriptive title commences and endures through adverse possession, not lawful possession. When the Court declares that title by prescription is established, it transforms illegality into legality. As stated by Udalagama J. in the Supreme Court case of *Kiriamma v. Podibanda* [2005] BLR 9 at 11 "*considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action.*" This was quoted with approval by Chithrasiri J. in *Sumanawathie v. Sirisena* (CA/830/98(F), CA Minutes of 10.03.2014) and Salam J. in *Fathima Naseera v. Mohamed Haris* (CA/818/96(F), CA Minutes of 11.07.2012).

Defendant's evidence in a *rei vindicatio* action

Whilst emphasising that (a) the initial burden in a *rei vindicatio* action is on the plaintiff to prove ownership of the property in suit and (b) the standard of proof in a *rei vindicatio* action is proof on a balance of probabilities, if the plaintiff in such an action has "sufficient title" or "superior title" or "better title" than that of the defendant, the plaintiff shall succeed. No rule of thumb can be laid down in what circumstances the Court shall hold that the plaintiff has discharged his burden. Whether or not the plaintiff proved his title shall be decided upon a consideration of the totality of the evidence led in the case.

In making a determination in this regard, the Court is entitled to consider evidence of all parties, including the evidence of the defendant. The oft-quoted dicta of Herat J. in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167 that "*The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.*" should not be misconstrued to imply that the Court is precluded from taking the defendant's evidence into consideration in arriving at the final conclusion in a *rei vindicatio* action.

The dicta of Herath J. in *Wanigaratne v. Juwanis Appuhamy (supra)* is eminently relevant to the facts of that particular case but has no universal application to all *rei vindicatio* actions. Since it is a one-page brief judgment, the facts are not very clear. However, as I understand, the plaintiffs in that case had filed a *rei vindicatio* action against the defendant on the basis that the defendant was a trespasser notwithstanding that he (the defendant) had been in occupation of some portions of the land for a considerable period of time. From the following sentence found in the judgment, "*In this case, the plaintiffs produced a recent deed in their favour and further stated in evidence that they could not take possession of the* ***shares purchased by them*** *because they were resisted by the 1st defendant"*, it is clear that the plaintiffs, if at all, had only undivided rights in the land. It is also clear from the judgment that whether or not the defendant also had undivided rights was not clear to Court. It is in that context Herat J. states "*The learned District Judge, in his judgment expatiates on the weakness of the defence case; but unfortunately has failed to examine what title, if any, has been established by the plaintiffs.* ***No evidence of title has been established by the plaintiffs in our opinion***."

It may be noted that in *Wanigaratne's* case, the finding of the Supreme Court is that "*No evidence of title has been established by the plaintiffs*". The facts are totally different in the instant case. In the instant case, by way of the 3rd admission recorded at the trial, the 1st defendant admitted that the 2nd defendant transferred the land to the plaintiff by deed No. 3016 marked at the trial as P3. The title of the plaintiff in the land was never challenged by the defendant; nor did the defendant ever make a claim for title to the land. The defendant is in unlawful occupation as he has manifestly failed to prove any legal basis for his occupation of the land of which the plaintiff is the paper title holder.

As this Court held in *Wasantha v. Premaratne* (SC/APPEAL/176/2014, SC Minutes of 17.05.2021), the Court can in a *rei vindicatio* action consider the evidence of the defendant in arriving at the correct conclusion:

> *Notwithstanding that in a rei vindicatio action the burden is on the plaintiff to prove title to the land no matter how fragile the case of the defendant is, the Court is not debarred from taking into consideration the evidence of the defendant in deciding whether or not the plaintiff has proved his title. Not only is the Court not debarred from doing so, it is in fact the duty of the Court to give due regard to the defendant's case, for otherwise there is no purpose in a rei vindicatio action in allowing the defendant to lead evidence when all he seeks is for the dismissal of the plaintiff's action.*

This Court took the same view in *Ashar v. Kareem* (SC/APPEAL/171/2019, SC Minutes of 22.05.2023).

Actio rei vindicatio* and action *in rem

In *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 173 Gratiaen J. states:

> *A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.*

The fact that a *rei vindicatio* action is identified as an action *in rem* has unmistakably contributed to the expectation of a high degree of proof of title from a plaintiff in such an action. Is this thinking correct?

The phrase "*in rem*" requires an explanation rather than a definition. The Latin term "*in rem*" derives from the word "*res*", which means "*a thing or an object*" whether movable or immovable. Actions *in rem* were originally used as a means of protecting title to movables, especially slaves, because land was not at first the object of private ownership – Buckland and McNair, *Roman Law and Common Law Comparison* (Cambridge University Press, 1936) p. 6. Also, *in rem* jurisdiction is invoked in maritime cases where a party could bring an action *in rem* against a ship instead of the owner of the ship. It is the ship that suffers the consequences in an action *in rem*. The owner suffers the consequences if it is an action *in personam*.

Maasdorp (op. cit., Vol II, 8th Edition (1960), p.70) states "*The form of action for the recovery of ownership was under the Roman law called vindicatio rei, which was an action in rem, that is, aimed at the recovery of the thing which is in the possession of another, whether such possession was rightfully or wrongfully acquired, together with all its accretions and fruits, and compensation in damages for any loss sustained by the owner through having been deprived of it.*"

Black's Law Dictionary, 11th edition, defines the term "*in rem*" as "*Latin 'against a thing' – Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing*." It defines the term "*in personam*" as "*Latin 'against a person' – Involving or determining the personal rights and obligations of the parties. (Of a legal action) brought against a person rather than property*."

The following passage of Dr. H. W. Tambiah (op. cit. p. 242) explains why *rei vindicatio* is an action *in rem*.

> *The primary remedy granted to an owner against the person who disputes his ownership is rei vindicatio. This Roman-Dutch Law remedy has been adopted by the courts in Sri Lanka. Since the owner, as dominus, has a right of possession, occupation and use of the land, this action is in the nature of an action in rem. See Vulcan Rubber Ltd. v. South African Railways and Harbours, 3 S.A. 285 (1958); Hissaias v. Lehman, 4 S.A. 715 (1958). In this type of action, the owner of land whose title is disputed and who has been unlawfully ejected, may bring an action for a declaration of title and ejectment. If the owner has not been ejected but his title is disputed he is entitled to bring a declaratory action to dismiss any disputes to his title. Where an owner is unlawfully ejected he may bring an action for declaration of title for mesne profits, damages and ejectment.*

In the case of *Allis Appu v. Endris Hamy* (1894) 3 SCR 87, Withers J. categorised *rei vindicatio* both as an action *in rem* and action *in personam*:

> *Certain actions of an analogous nature apart, the action rei vindicatio is allowed to the owner and to him alone. Lesion to the right of property is of the very essence of the action and in that respect constitutes it an action in rem. Lesion to the personal right of*

the true proprietor properly constitutes a claim to compensation for the produce of which he has been deprived by the possessor and in that respect constitutes it an action in personam.

In classical Roman Law although *actio rei vindicatio* is classified as an action *in rem* as opposed to an action *in personam*, the term "action *in rem*" shall not be understood in the popular sense that we conceive it in contemporary society. An action *in rem* means an action against a thing whereas an action *in personam* means an action against a person. A partition action is considered an action *in rem* in that the judgment in a partition action has a binding effect on all persons having interests in the property whether or not joined as parties to the action. It transcends the characteristic of an *inter partes* action and assumes the characteristic of an action *in rem* resulting in title good against the world. The scheme of the Partition Law is designed to serve that purpose. But the entire world is not bound by the judgment in a *rei vindicatio* action. The judgment in a *rei vindicatio* action binds only the parties to the action and their privies. In modern-day legal jargon, *rei vindicatio* is not an action *in rem* but an action *in personam*.

The fact that *rei vindicatio* is not an action *in rem* in the popular sense is reflected in the dicta of Dep C.J. in *Preethi Anura v. William Silva (supra)* where in reference to the standard of proof in a *rei vindicatio* action it was stated "*The plaintiff's task is to establish the case on a balance of probability. In a partition case the situation is different as it is an action in rem and the trial judge is required to carefully examine the title and the devolution of title.*"

In *Sithy Makeena v. Kuraisha* [2006] 2 Sri LR 341 at 344, Imam J. with Sriskandarajah J. in agreement stated "*It is well-settled law that only the parties to a rei vindicatio action are bound by the decision in such a case,*

as a rei vindicatio action is an action in personam and not an action in rem."

In the Supreme Court case of *Mojith Kumara v. Ariyaratne* (SC/APPEAL/123/2015, SC Minutes of 29.03.2016), the plaintiff filed action seeking declaration of title to the land in suit, ejectment of the defendants therefrom and damages. It was a *rei vindicatio* action proper. The defendants sought dismissal of the plaintiff's action. The plaintiff relied on a decree entered in his favour in a previous *rei vindicatio* action filed against a different party, but in respect of the same land. The District Court dismissed the plaintiff's action on the basis that the defendants before Court were not parties to the previous action and therefore they are not bound by that judgment. On appeal, the High Court set aside the judgment of the District Court and held that the plaintiff can claim ownership to the land on the strength of the previous decree apparently on the basis that *rei vindicatio* is an action *in rem*. The Supreme Court held that the previous *rei vindicatio* action is an action *in personam* and not an action *in rem* and therefore third parties are not bound by that judgment. Chitrasiri J. with the agreement of Aluwihare J. and De Abrew J. held:

> *A decree in a case in which a declaration of title is sought binds only the parties in that action. Such a proposition is not applicable when it comes to a decree in rem which binds the whole world. Effects and consequences of actions in rem and actions in personam are quite different. Action in rem is a proceeding that determines the rights over a particular property that would become conclusive against the entire world such as the decisions in courts exercising admiralty jurisdictions and the decisions in partition actions under the partition law of this country. Procedure stipulated in Partition Law contains provisions enabling interested parties to come before courts and to*

join as parties to the action even though the plaintiff fails to make them as parties to it. Therefore there is a rationale to treat the decrees in partition cases as decrees in rem.

Actions in personam are a type of legal proceedings which can affect the personal rights and interests of the property claimed by the parties to the action. Such actions include an action for breach of contract, the commission of a tort or delict or the possession of property. Where an action in personam is successful, the judgment may be enforced only against the defendant's assets that include real and personal or movable and immovable properties. Therefore, a decree in a rei vindicatio action is considered as a decree that would bind only the parties to the action. In the circumstances, it is clear that the plaintiff cannot rely on the decree in 503/L to establish rights to the property in question as against the defendants in this case are concerned.

The greater includes the less

It may be recalled that in *Preethi Anura v. William Silva (supra)* Chief Justice Dep stated that a plaintiff in a *rei vindicatio* action need not establish the title in the property "*with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case*." In a *rei vindicatio* action the plaintiff need not strictly adhere to the exact manner in which he has pleaded title in the plaint. For instance, if the plaintiff in the plaint pleads title relying on one deed but at the trial marks several other deeds that are duly listed to fortify his case, the Court need not mechanically dismiss the plaintiff's action or disallow the plaintiff to mark those deeds on the basis that the plaintiff in a *rei vindicatio* action must prove title strictly in the same manner which he has pleaded in the plaint. Even in a criminal case or partition case such stringent procedure is not adopted. This does not mean that the plaintiff in a *rei vindicatio* action can present

a different case at the trial from what he has pleaded in his pleadings. Suffice it to say, even that is possible, if issues are raised in that direction and accepted by Court, for the case is tried not on pleadings but on issues.

Stemming from the misconception that the plaintiff in a *rei vindicatio* action shall strictly prove title exactly as pleaded in the plaint, a popular argument mounted is that, if the plaintiff in a *rei vindicatio* action had come to Court seeking a declaration of title to the entire land and ejectment of a trespasser from the whole or part of the land, but later if the Court decides that the plaintiff is only a co-owner who is entitled to undivided rights of the land, the Court shall dismiss the action since the plaintiff came before the Court as the sole owner of the land.

If the plaintiff in a *rei vindicatio* action seeks a declaration of title to the entire land, but at the end of the trial, if the Court finds that the plaintiff is not entitled to the entire land but only to a portion of it, the Court need not dismiss the action *in toto*. It is a recognised principle that when a plaintiff has asked for a greater relief than he is actually entitled to, it should not prevent him from getting the lesser relief which he is entitled to. *Non debet cui plus licet quod minus est non licere*, also known as, *Cui licet quod majus non debet quod minus est non licere*: the greater includes the less. This is a well-established principle in law and also in consonance with common sense. *Vide King v. Kalu Banda* (1912) 15 NLR 422 at 427, *Rodrigo v. Abdul Rahman* (1935) 37 NLR 298 at 299, *Police Sergeant, Hambantota v. Simon Silva* (1939) 40 NLR 534 at 538, *Ibralebbe v. The Queen* (1963) 65 NLR 433 at 435, *Abeynayake v. Lt. Gen. Rohan Daluwatte and Others* [1998] 2 Sri LR 47 at 55, *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 260-261, *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 at 409.

The finding that the plaintiff is entitled to a portion of the land means he is a co-owner of the land. It is well-settled law that a co-owner can sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land. This the plaintiff can do by way of a *rei vindicatio* action.

In *Hevawitarane v. Dangan Rubber Co. Ltd.* (1913) 17 NLR 49 at 53 Wood Renton A.C.J. declared:

> *Any co-owner, or party claiming under such a co-owner, is entitled to eject a trespasser from the whole of the common property. (Unus Lebbe v. Zayee (1893) 3 SCR 56, Greta v. Fernando (1905) 4 Bal. 100) Moreover, prima facie evidence of title is all that is required in such an action.*

In the same case, Pereira J. stated at page 55:

> *As regards the rights of owners of undivided shares of land to sue trespassers, I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land (see section 12, Civil Procedure Code; Unus Lebbe v. Zayee (1893) 3 SCR 56; Greta v. Fernando (1905) 4 Bal. 100; Arnolisa v. Dissan 4 NLR 163).*

In *Hariette v. Pathmasiri* [1996] 1 Sri LR 358 at 362 the Supreme Court quoted the said principle of law with approval. This was reiterated in several decisions including *Rosalin Hami v. Hewage Hami and Others* (SC/APPEAL/15/2008, SC Minutes of 03.12.2010) and *Punchiappuhamy v. Dingiribanda* (SC/APPEAL/4/2010, SC Minutes of 02.11.2015).

Learned counsel for the defendant submits that since the plaintiff filed this action *rei vindicatio* seeking a declaration of title to the lands described in the schedules to the plaint and ejectment of the defendant therefrom as the sole owner of the lands, but as conceded later, the plaintiff is only entitled to 7/8 shares of each land, the plaintiff's action must fail. Learned counsel says that this view was taken by the Supreme Court in the case of *Hariette v. Pathmasiri (supra).* I am not inclined to agree with this submission. As I have already explained, the plaintiff can be granted the lesser relief. In any event, as I will explain below, the Supreme Court in *Hariette's* case did not take such a view.

In *Meera Lebbe Cassy Lebbe Marker v. Kalawilage Baba* (1885) 7 SCC 97, Dias J. held:

> *If the plaintiffs can establish their rights even to less than what they claim, they may have a judgment for that reduced share. Though a plaintiff cannot recover more than he claims, there is nothing to prevent him recovering less.*

Gunawardana J. in the case of *Allis v. Seneviratne* [1989] 2 Sri LR 335 at 337 observed:

> *The fact that the appellant has asked for a larger relief than he is entitled to, should not in my view prevent him from getting the lesser relief which he is entitled to.*

In *Chandrasiri Fernando v. Titus Wickramanayake* [2012] BLR 344 Gooneratne J. at 346 quoted this with approval.

In the Supreme Court case of *Punchiappuhamy v. Dingiribanda (supra)* the plaintiffs filed action seeking a declaration of title to the whole land and ejectment of the defendant therefrom. The District Court granted both reliefs. On appeal, the High Court reversed the judgment of the

District Court. Whilst dismissing the appeal on ejectment, Wanasundara J. remarked: "*I am of the view that the Judges of the Civil Appellate High Court should have granted a declaration of title only to 11/24th share of the co-owned land of Belinchagahamula Hena to the Plaintiffs instead of dismissing the action altogether. I hold that the Appellants are only entitled to that relief and no more. Since it was not proved that the Defendant was a trespasser, he cannot be ejected by the Plaintiffs*."

Applicability of *Hariette v. Pathmasiri*

In actions *rei vindicatio*, defendants tend to rely on *Hariette v. Pathmasiri (supra)* to argue that when a plaintiff in a *rei vindicatio* action seeks a declaration of title to the entire land, his action must fail if he fails to prove that he is the sole owner of the entire land. This in my view is a misinterpretation of the judgment. In *Hariette's* case the Supreme Court held at pages 362-363 as follows:

> *However, it has to be borne in mind that our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land. In the case of Hevawitarana v. Dangan Rubber Co. Ltd 17 NLR 44 at 55, Pereira, J. stated as follows:-*
>
> *"I have always understood the law, both before and after the coming into operation of the Civil Procedure Code, to be that the owner of an undivided share of land might sue a trespasser to have his title to the undivided share declared and for ejectment of the trespasser from the whole land, the reason for this latter right being that the owner of the undivided share has an interest in every part and portion of the entire land".*
>
> *In this case the Plaintiff is not seeking a declaration of title to her undivided share in the land described in schedule 1 and for the*

> *ejectment of the Defendant from that land. She has pleaded that she possessed the land described in schedule 2 for and in lieu of her undivided share and seeks the ejectment of the Defendant from that land. Therefore the case for the Plaintiff cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and the acquisition of prescriptive title by ouster in respect of the smaller land described in schedule 2.*

Since the prescriptive title to schedule 2 had not been proved, the Supreme Court affirmed the judgment of the Court of Appeal and dismissed the appeal.

If I may repeat for emphasis, in *Hariette's* case the plaintiff sought to eject the defendant from the portion of land described in the second schedule to the plaint (which was part of the larger land described in the first schedule to the plaint) on the basis that she possessed the portion of the land described in the second schedule to the plaint in lieu of her undivided shares described in the first schedule to the plaint. The Supreme Court held that the plaintiff failed to establish that she acquired prescriptive title to that portion of land by ouster and therefore the plaintiff's action cannot succeed.

Hariette's case was followed by the Supreme Court in *Attanayake v. Ramyawathie* [2003] 1 Sri LR 401 where facts were similar. The Supreme Court at page 403 summarised the issue in that case in the following manner:

> *It was agreed by both counsel at the hearing, that the only issue that has to be gone into is whether a co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to*

maintain the action if he instituted action as the sole owner of the premises.

This question was answered emphatically in the affirmative. Bandaranayake J. (as she then was) stated at page 409:

I am of the firm view that, if an appellant had asked for a greater relief than he is entitled to, the mere claim for a greater share in the land should not prevent him, having a judgment in his favour for a lesser share in the land. A claim for a greater relief than entitled to should not prevent an appellant from getting a lesser relief. However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence.

In such circumstances the question raised by the counsel for the appellant is answered in the following terms. A co-owner of a land who sues a trespasser for a declaration of title and ejectment is entitled to maintain the action even if he instituted the action as the sole owner of the land and premises. The fact that an appellant has asked for greater relief than he is entitled to, should not prevent him from getting the lesser relief which he is entitled to.

However, as in *Hariette's* case, the Supreme Court was not inclined to grant relief to the plaintiff-appellant because the plaintiff failed to prove that he was entitled to the land described in schedule B to the plaint. The reason was that the plaintiff sought a declaration of title and ejectment of the defendant from the land described in schedule B to the plaint.

The facts in the present case are very much similar to that of Harriette's case. As referred to earlier in the instant case the appellant (the original plaintiff) had instituted action in the District

> *Court for a declaration of title and for ejectment from the land morefully described in the Schedule B to the plaint of the respondent therefrom. [page 406] However, it is necessary that the appellant adduces evidence of ownership for the portion of land he is claiming for a declaration of title. It is amply clear that the appellant in the instant case has not been able to adduce such evidence. [page 409]*

Learned counsel for the defendant contends that the High Court was wrong when it stated that *Hariette v. Pathmasiri* has no application to the instant case. I cannot agree.

The *ratio decidendi* in one case cannot be mechanically applied to decide another case unless facts are similar. A principle of law laid down in a decision must be understood in the light of facts and circumstances of that particular case.

There are two schedules in the plaint of the instant action. However, unlike in *Hariette's* case (and *Attanayake's* case), in the instant case, the plaintiff sought declaration of title and ejectment from both lands which are two separate allotments – lot 6 in plan No. 467 in the first schedule and lot 7 in the same plan in the second schedule. Hence the High Court was correct in holding that *Hariette's* case has no direct applicability to resolve the instant case.

These two judgments (*Hariette v. Pathmasiri* and *Attanayake v. Ramyawathie*) unequivocally admit that a co-owner is entitled to:

(a) file an action seeking a declaration to his undivided rights of the land and ejectment of a trespasser from the whole land; and
(b) successfully sue a trespasser for a declaration of title and ejectment notwithstanding that he instituted the action as the sole owner of the premises. This is based on the common-sense principle that the greater includes the less.

If a co-owner of a land as the plaintiff can successfully sue a trespasser for ejectment from the whole land notwithstanding that he initially instituted the action as the sole owner of the land based on the common-sense principle that the greater includes the less, the plaintiff's action cannot and should not be dismissed if he seeks to eject a trespasser from an identified portion of the whole land on the basis that he filed the action as the sole owner of the identified portion of the land but he is in fact a co-owner of that identified portion of the land. In such an event, the Court can declare that the plaintiff is a co-owner of the whole land or of that identified portion of the land and eject the trespasser on that basis.

Vendor's duty to put the purchaser in possession

It is admitted that the owner transferred the property to the plaintiff by deed No. 3016. The defendant does not have a deed of transfer in his name. However, it is the position of the defendant that the owner placed the defendant in possession prior to the execution of the said deed in favour of the plaintiff. Hence learned counsel for the defendant argues that the immediate cause of action accrued to the plaintiff is to seek a refund of the purchase money and damages from the vendor. Learned counsel for the defendant in his written submissions cites two authorities in support – *Babaihamy v. Danchihamy* (1913) 16 NLR 245 and *Don Seneris Appuhamy v. Guneris* 1 Balasingham Reports 8.

The real dispute in those two cases was between the vendee and the vendor, not between the vendee and a third party in possession.

In *Appuhamy v. Appuhamy* (1880) 3 SCC 61 the Full Bench of the Supreme Court presided over by Cayley C.J. held:

> *The execution and delivery of a conveyance of land, the property of the vendor, if in conformity with the Ordinance of frauds, transferred the title to the land to the purchaser, although no corporeal delivery*

> *or actual possession of the land had followed. And that by virtue merely of the title so created, the purchaser might maintain an action seeking for a declaration of title against a third party in possession without title or under a weaker title.*

In *Punchi Hamy v. Arnolis* (1883) 3 SCC 61 the Full Bench of the Supreme Court presided over by Burnside C.J. held:

> *A purchaser of land who has a conveyance from his vendor, but has never had any possession, may maintain an action to eject from the land a third party claiming title adversely to the vendor.*

This position has been followed in *Latheef v. Mansoor (supra)* wherein Marsoof J. held at 352:

> *The action from which this appeal arises is not one falling within these special categories, as admittedly, the Respondents had absolutely no contractual nexus with the Appellants, nor had they at any time enjoyed possession of the land in question. Of course, this is not a circumstance that would deprive the Respondents to this appeal from the right to maintain a vindicatory action, as it is trite law in this country since the decisions of the Supreme Court in Punchi Hamy v. Arnolis (1883) 5 SCC 160 and Allis Appu v. Edris Hamy (1894) 3 SCR 87 that <u>even an owner with no more than bare paper title (nuda proprietas) who has never enjoyed possession could lawfully vindicate his property subject to any lawful defence such as prescription.</u>*

In *Andris v. Siman* (1889) 9 SCC 7 it was observed that, in an action *rei vindicatio*, if the plaintiff seeks ejectment of the defendant on paper title, "*title lies in deed only, and possession is not necessary to perfect it*". Burnside C.J. held "*if the plaintiff having failed to prove possession and ouster, had relied on his paper title only to entitle him to possession, then*

the question to be determined would have been whether the plaintiff had succeeded in establishing a good paper title to the land as against the defendants, whose actual possession was sufficient until the plaintiff had proved good title."

The Full Bench of the Supreme Court presided over by Hutchinson C.J. in *Ratwatte v. Dullewe* (1907) 10 NLR 304 held "*Where the question is between a purchaser and a third party, the delivery of the deed of transfer is sufficient to entitle the purchaser to maintain an action, as owner, against such third party.*" Middleton J. stated at page 309:

> *It seems to be good and settled law (Appuhamy v. Appuhamy (1880) 3 SCC 61 following Don Andris v. Illangakoon (1857) 2 Lor. 49) that the execution and delivery of conveyance of land in conformity with the Statute of Frauds confers the dominium on the purchaser, and so gives him title to maintain an action against a third party in possession without or under a weaker title.*
>
> *I have no doubt therefore that if the plaintiff [purchaser] here and accepted the conveyance tendered by the defendant [vendor], he might maintain his action against Dullewe [third party] for declaration of title, and might have called upon his vendor to warrant and defend the title conferred.*

As held in *Luwis Singho and Others v. Ponnamperuma (supra)* by Wigneswaran J. at 324-325:

> *But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that;*
>
> *(i) the Plaintiff is the owner of the land in question i.e. he has the dominium* ***and****,*

(ii) *that the land is in the possession of the Defendant (Voet 6:1:34)*

Thus even if an owner never had possession of a land in question it would not be a bar to a vindicatory action.

It is true that it is the duty of the vendor to deliver possession of the property to the vendee at the time of the sale, and warrant and defend the title when a third party challenges the title of the vendee. However, merely because the vendor does not deliver possession of the property to the vendee at the time of the sale, the sale does not become ineffective or unenforceable against third parties, nor does the vendee become a speculative buyer. The vendee can either sue the vendor seeking rescission of the sale and a refund of the purchase price together with damages or sue the trespassers for a declaration of title and ejectment, and defend his title with the assistance of the vendor.

Conclusion

I answer the questions of law upon which leave to appeal was granted in the negative. I affirm the judgment of the High Court of Civil Appeal and dismiss the appeal with costs.

Judge of the Supreme Court

Jayantha Jayasuriya, P.C., C.J.
I agree.

Chief Justice

A.H.M.D. Nawaz, J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal to the Supreme Court from the judgment dated 14th of February 2012, of the Court of Appeal in case No. CA Appeal No. 237/2007 under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 97/2012

SC (SPL) LA No. 61/2012

CA No. 237/2007

HC No. 300/2001

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

Vs.

Parana Liyanage Chaminda

ACCUSED

And Between
Parana Liyanage Chaminda

ACCUSED-APPELLANT

Vs.

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

RESPONDENT

And Now Between

Parana Liyanage Chaminda
(Presently at the Welikada Prison, Colombo)

ACCUSED-APPELLANT-PETITIONER

Vs.

The Honourable Attorney General,

Attorney General's Department

Colombo 12.

RESPONDENT-RESPONDNET-RESPONDENT

Before: Buwaneka Aluwihare PC J

Shiran Gooneratne J

Arjuna Obeyesekere J

Counsel: Saliya Pieris, PC with Susil Wanigapura for the Accused-Appellant-Petitioner-Appellant.

V. Hettige, SDSG for the Attorney General.

Written Submissions: Written submissions of the Accused-Appellant-Petitioner-Appellant 09.07.2012.

Written submissions of the Respondent-Respondent 24.08.2012.

Argued on: 04.05.2022

Decided on: 13.09.2023

JUDGMENT

Aluwihare PC. J,

(1) The Accused-Appellant-Petitioner-Appellant [Hereinafter referred to as the 'Accused'] was indicted along with another before the High Court for the murder of one Kodagodage Sunil Jayaweera [Hereinafter referred to as the 'Deceased'] on or about 9th May 1998.

(2) The trial before the High Court had proceeded only against the Accused as the Attorney-General withdrew the indictment against the other accused who was indicted along with the Accused-Appellant in the present case.

(3) At the conclusion of the trial, the learned High Court judge found the Accused guilty as indicted, and accordingly the death sentence was imposed on him. The Accused, aggrieved by the said judgement, moved by way of an appeal to the Court of Appeal. By its judgement dated 14.02.2012, the Court of Appeal dismissed the appeal, affirming the conviction and sentence imposed on the Accused.

(4) The instant appeal arises out of the said judgement of the Court of Appeal. This court granted special leave to appeal on the questions of law which are referred to in sub-paragraphs (b), (e), (h), (j) and (k) of Paragraph 11 of the Petition of the Accused-Appellant which are reproduced below;

(b) *Whether their Lordships in the Court of Appeal have failed to consider that in rejecting the evidence of the defence and accepting the version of the prosecution witness, the learned High Court judge had required of the defence the same burden of proof as required by the prosecution?*

(e) *Whether their Lordships in the Court of Appeal and the learned High Court Judge have failed to fairly and properly evaluate the Defence evidence?*

(h) *Whether their Lordships in the Court of Appeal and the learned High Court Judge have failed to consider the inconsistencies of the evidence of the prosecution witnesses?*

(J) *Whether their Lordships in the Court of Appeal and the learned High Court judge have failed to consider the evidence of the existence of a sudden fight?*

(k) *Whether in all the circumstances of the case the petitioner should have been acquitted of the count of murder or have been convicted of the lesser offence of culpable homicide not amounting to murder?*

(5) Before the legal issues raised are addressed, it would be pertinent to lay down the factual background to the incident that resulted in the death of the deceased.

(6) In the course of the evidence led at the trial, it transpired that the deceased, was living as a tenant, with his family in a small wattle and daub house belonging to the father of the Accused.

(7) Sometime before the incident, the accused had got married and he had wanted the deceased to vacate the premises as the accused intended to move in there with his wife. It appears that the deceased had wanted three months to find alternative accommodation.

(8) The deceased had not, however, moved out and on the day prior to the incident on which the deceased died, the Accused had come to the house of the deceased

accompanied by another person and had caused damage to the structure of the house when the deceased was out at work.

(9) Consequently, the deceased had complained to the police and who had inquired into the Complaint. As no settlement could be reached between the parties, the police had referred the matter to the Mediation Board but had permitted the deceased to attend to the necessary repairs to damaged house.

(10) On the day following, whilst the deceased was engaged in attending to the re-building of the damaged house, the Accused had arrived at the scene and had attacked the deceased with a 'Manna' knife and as a result he had succumbed to the injuries.

(11) According to Dr. Dahanayake who carried out the autopsy, he had observed a deep cut injury on the back of the neck, 25 cm in length which had completely severed the brain stem and the Atlas vertebra, and the injury had been 10cm in depth. The doctor has expressed the opinion that the injury referred to is one that is necessarily fatal.

The Version of the Accused

(12) The Accused testifying under oath, in his examination-in-chief itself, admitted that he attacked the deceased with a knife and that the deceased sustained an injury as a result. According to the Accused, the deceased had been residing there for about 13 years and about a year prior to the incident, he had asked the deceased to vacate the house as he wished to move in there after his marriage, however, the deceased had not acceded to his request.

(13) The accused also had admitted that, on the day before the incident he visited the deceased and demanded vacant possession of the house. However, the deceased again was not agreeable. Infuriated by this response the accused had kicked the walls of the house, and as a result the walls had collapsed. Then, both parties had gone to the police. As the police could not resolve the dispute, they had referred the matter to the Mediation Board and had told the feuding parties that the deceased should be permitted to continue occupying the premises until such time the matter is inquired into by the Mediation Board. It is also significant to note that the deceased had sought permission to re-erect the walls and the accused said in his evidence that he agreed to allow the deceased to repair the damage.

(14) In switching to an incident out of sequence, the Accused had said in his testimony that the deceased suddenly grabbed a mamoty and as he got frightened, in order to protect himself he picked a knife that was kept on the roof of a nearby chicken coop and attacked the deceased. Then he says he fled the area through fear and later surrendered to the police through his relatives.

(15) Under cross examination it was elicited, that the Accused had gone in the direction where the deceased was living the day after the parties went to the police over the housing dispute. The Accused had said that he saw the deceased engaged in the process of re-building the house but had observed that the new construction was larger than the one that existed, and he questioned the deceased why so, having walked up to him. The deceased had been kneading clay at the time. The accused, in his examination-in-chief, had said that the deceased grabbed the mamoty and due to fear, he picked the knife and attacked the deceased.

(16) The daughter of the deceased, Nilusha who had been a girl of 13 years at the time had testified to the effect that both the Accused and another person had come to their house on the previous day and toppled the posts that supported

the structure of the house and it collapsed. Her father had been out at work at the time. On the day her father died, the family members were engaged in the process of rebuilding. At one point, after kneading clay, her father had squatted complaining that he is exhausted. She had also seen the Accused hovering in the vicinity looking in the direction of the construction that was going on. At one point, the accused had approached her father from behind and having pulled out a knife which was tucked under his shirt, had dealt a blow on the neck of her father. Apart from a solitary omission highlighted by the defence, Nilusha's testimony is free from any contradictions or any other infirmities.

(17) The wife of the deceased Vinitha had also testified, but she had not witnessed the attack on her husband as she had gone to fetch water and only had rushed to the scene on hearing the cries of distress of her daughter Nilusha.

The Issues raised on Behalf of the Accused

(18) It was contended on behalf of the Accused that both the learned High Court Judge as well as the Court of Appeal failed to consider the applicability of special exceptions to the Section 294 of the Penal Code, namely grave and sudden provocation and/or sudden fight. It was the contention of the learned President's Counsel that there was evidence emanating from the testimony of the prosecution witnesses of a sudden fight.

(19) It was further contended that the learned High Court Judge failed to consider the omission in the testimony of the sole eyewitness, Nilusha, who testified on behalf of the prosecution. It was pointed out that, although Nilusha in her evidence had stated that the accused pulled out a knife that was tucked behind his shirt, she had not stated this fact either in her statement to the police or the depositions she made at the non-summery inquiry.

(20) Considering the fact that the witness [Nilusha] was a child of 13 years at the time she made the statements, it is possible that due to her tender age, she may not have been mature enough to appreciate the significance of that fact, at the time she made the statements. In addition, she would have been a distressed child having lost her father. In this context, I am of the view that the omission referred to is not of such gravity to discredit the testimony of Nilusha. As referred to earlier, other than this omission, her evidence had been consistent and remains un-impugned.

The Questions of Law

(21) Before dealing with the questions of law, it is necessary to bear in mind the Constitutional provision embodied in the proviso to Article 138(1) which reads;

"Provided that ***no judgement*** *decree or order of any court* ***shall be reversed or varied*** *on account of any error, defect or irregularity, which has* ***not*** *prejudiced the substantial rights of the parties or* ***occasioned a failure of justice".*** [Emphasis added]

(22) In view of the constitutional provision referred to, which is in mandatory terms, the duty cast on the Court of Appeal would be to consider the appeal within the scope of the proviso and, this court in turn, would be required to consider whether the Court of Appeal and/or the High Court were in error in coming to the conclusions, notwithstanding that the Accused had satisfied that his substantial rights have been prejudiced or the error or the defect relied on by the Accused had occasioned a failure of justice.

(23) Similar thresholds are found in the proviso to Section 334(1) and Section 436 of the Code of Criminal procedure Act No.15 of 1979 which stipulate that notwithstanding the fact that the point raised in appeal might be decided in

favour of the Appellant, the court can dismiss the appeal if it is of the opinion that "no substantial miscarriage/failure of justice" has in fact occurred.

(24) The legal effect of these two provisions which are applicable to criminal appeals, in my opinion, would be that, in order to succeed in his appeal, it is not sufficient for an accused to merely impress upon court that the issue raised might be decided in favour of the Accused. The accused must also satisfy court that a substantial miscarriage of justice has in fact occurred or that the decision had occasioned a failure of justice.

(25) In relation to the question of law referred to in sub-paragraph (b) of paragraph 11 of the Petition of the Accused, it was submitted that the Court of Appeal failed to consider the fact that the learned High Court judge had placed the same burden of proof on both the prosecution as well as the defence. It was pointed out that the burden on the prosecution to establish the charges is beyond reasonable doubt whereas as it is not so in case of the defence.

(26) In explaining the conduct of the Accused, in the course of the submissions, it was pointed out that the situation was such that the Accused acted in self-defence. In considering the defence raised on behalf of the Accused, the learned trial judge had referred to the applicable legal principles on the burden of proof cast on an accused in a criminal case in relation to establishing a 'defence' [Page 8 of the judgement]. The Trial Judge had gone on to state that the burden [on an accused] is on a 'balance of probability' and also had referred to the fact that even in instances where the defence raised fails to reach that threshold, if a reasonable doubt arises from the prosecution case, the accused would be entitled to the benefit of the doubt. The learned trial judge had also referred to the fact that, even if the defence version is totally rejected, still the prosecution cannot succeed, unless it proves the case beyond reasonable doubt.

(27) The relevant portion is produced in verbatim below;

"මෙහි ඉදිරිපත් වූ සාක්ෂි අනුව මෙම නඩුවේ චූදිත විසින් සුනිල් ජයවීර ඔහු හට උදැල්ලකින් පහර දීමට තැත් කළ නිසා තම ආත්මාරක්ෂාව මත එම ස්ථානයේ තිබූ මන්නා පිහියකින් පහර දුන් බවට සාක්ෂියක් විත්තිය වෙනුවෙන් ලබා දී ඇත. විත්තියට එම කරුණ ඔප්පු කිරීමට වගකීම ඇත්තේ වැඩි බර සාක්ෂි මත වන අතර, එම කරුණ ඔප්පු කිරීමට නොහැකි වන අවස්ථාවක දී වුවද, සැකයක් මතුවන්නේ නම් එහි සැකයේ වාසිය විත්තියට ලබා දිය යුතු අතර, විත්තියේ ස්ථාවරය ප්‍රතික්ෂේප කරනු ලැබූවද පැමිණිල්ල විසින් නඟා ඇති චෝදනාව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමේ වගකීම සෑම විටම පැමිණිල්ල මත රඳා පවතී."

(28) The passage in the judgement referred to above not only demonstrates that the learned trial judge had been alive to the relevant principles on burden of proof and this court wishes to observe that the learned trial judge had not erred in that regard, particularly in relation to the burden of proof cast on an accused in establishing a special exception under Section 294 of the Penal Code.

(29) Considering the above, it cannot be said that the learned High Court Judge had placed the same burden of proof on both the prosecution and the defence. When the question of law raised on behalf of the Accused is viewed in the light of the observations made by the learned High Court Judge referred to above, I answer the question of law referred to in sub-paragraph (b) of paragraph 11 of the petition in the negative.

(30) The next question of law [sub paragraph (e) of paragraph 11] on which special leave was granted was whether the Court of Appeal and the High Court failed to evaluate the defence version 'properly and fairly'.

(31) As referred to earlier, there is no dispute that the injury that resulted in the death of the deceased was inflicted by the Accused. The only question that this

court has to address is whether the injury was caused at a time the accused was deprived of the power of self-control due to grave and sudden provocation offered by the deceased.

(32) From the evidence led in the course of the trial, it is quite evident that the deceased had acted with considerable restraint throughout the incident, in the context of what he faced at the hands of the Accused. In his absence, his house where he lived with his young family was demolished by the accused and another. This was not denied by the Accused either.

(33) The only action the Deceased took was to seek the assistance of the law enforcement by lodging a complaint with the police, an action any law-abiding citizen would resort to in the face of an adversary of this nature. At the police inquiry he requested that he be given permission to rebuild his house, the request which the Accused acceded to.

(34) The following day, the deceased with the help of his family members were engaged in the process of rebuilding the damaged house, and even when they saw the Accused hovering in the vicinity, there is nothing to say that the deceased acted in any manner that would have provoked the Accused.

(35) According to the Accused's own evidence, it was he who approached the Deceased and questioned him. The fact remains that the deceased had had no dealings with the Accused, the reason being it was the father of the Accused who was the landlord, he had not interfered with the peaceful occupation of the premises.

(36) In the backdrop of the events that took place on the previous day, which ended with the Deceased and the Accused having to attend the police station, the Accused ought not to have disturbed the deceased who was in the process of rebuilding his house and if he had any issue with the way the house was being

put up by the deceased, the Accused could easily have lodged a complaint with the police rather than confronting him.

(37) The gravamen of the argument of the learned President's Counsel was that the learned Trial Judge failed to consider whether the Accused acted under grave and sudden provocation and in addition, the Trial Judge ought to have considered whether the deceased sustained the injury in the course of a sudden fight.

(38) The Accused did say in his evidence that when he questioned the Deceased as to why he was putting up a building that was larger than the one that was destroyed, the deceased became abusive and he supposed to have retorted;

"I do not do things the way you want. I will build the house the way I want."

[කොට ඕනෑ විදිහට මම වැඩ කරන්නේ නැහැ. මට ඕනෑ විදිහට මම ගෙය හදනවා].

(39) In addition to the mitigatory exception of grave and sudden provocation, the learned President's Counsel also argued that both the learned High Court Judge and the Court of Appeal failed to consider the special exception 4 of Section 294 of the Penal code, namely whether the act of causing the fatal injury was committed in a sudden fight. The President's Counsel argued that the evidence unfolded in the course of the trial provided the existence of circumstances to bring the case within the ambit of the two exceptions referred to.

(40) In view of the contrasting versions of the prosecution and the defence, as to how the attack on the deceased took place, it would be necessary to consider the 'legal burden' cast on the accused to establish his version, if he is to succeed in his mitigatory defences referred to above.

(41) Section 105 of the Evidence Ordinance delineates the burden of proving the existence of circumstances bringing a case within the ambit of special exceptions of the Penal Code and states;

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The illustration (b) of that section sheds further light as to the burden of proof and reads;

"A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A."

(42) In the case of ***James Chandrasekera v. The King*** **44 NLR 97**, seven judges of the Court of Criminal Appeal considered this issue in depth and held,

"*Where, in a case in which any general or special exception under the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is not entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.*"

(43) The majority of the judges, [de Kretser J dissenting], in the case of ***Chandrasekera*** [*supra*] held that, in a case where a general or special exception under the Penal Code is pleaded, a reasonable doubt being created in the minds of the jury, as to the applicability of the exception, does not render the accused entitled to its benefit. **Dr. G.L. Peiris** expresses the view that "*the relevant provisions of the Evidence Ordinance, read with the majority judgment in James Chandrasekera [supra] have the effect that the plea of grave and sudden provocation is required to be established by the accused on a balance of*

probability" [**Offences under the Penal Code of Ceylon, first edition at pgs., 102-103**].

(44) Thus, the law as it stands today is that, where in a case in which any general or special exception under the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the court affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is not entitled to relief if, upon a consideration of the evidence as a whole, a reasonable doubt is created as to whether he is entitled to the benefit of the exception pleaded.

(45) Along with the decisions of ***King v. Coomaraswamy*** **41 NLR 289**, ***King v. Kirigoris*** **48 NLR 407** and ***Regina v. Piyasena*** **57 NLR 226** relied on by the learned President's Counsel, the decision in the case of ***James v. The Queen*** **53 NLR 401** was also considered. The main issue that confronts us in the instant case is, even if the version of the accused is believed [which the learned High Court Judge had rejected] would the alleged provocation, satisfy the objective norms postulated by the law. In the case of ***James*** [*supra*] the Court observed that;

> "*He [accused] must in addition, establish that such provocation, objectively assessed, was "grave and sudden enough to prevent the offence from amounting to murder". That depends upon the actual effect of the provocation upon the person provoked and upon the probability of its producing a similar effect upon other persons*".
>
> In the same case Justice Gratiaen went on to state;
> "*On grounds of public policy, the Legislature which enacted Exception 1 to section 294 designedly denies the mitigatory plea of "grave and sudden provocation" to a prisoner whose reaction to provocation in any particular case falls short of the minimum standard of self-control which can*

reasonably be expected from an average person of ordinary habits, placed in a similar situation, who belongs to the same class of society as the prisoner does".

(46) In the context of the case, I find the Accused cannot benefit from the mitigatory defence of provocation due to two reasons;

Firstly, even assuming the deceased uttered the alleged provocative words, still they do not meet the objective norms of the exception.

Secondly, the benefit of the exception is denied to a person who seeks provocation or where the offender voluntarily provokes, as an excuse for the retaliation.

(47) The facts of the case, in my view did not warrant the consideration of either the exception of provocation or sudden fight and in the circumstances the questions of law referred to in sub-paragraph (e) [evaluation of defence evidence], sub-paragraph (j) [failure to consider evidence of the existence of a sudden fight] and the consequential question of whether in the circumstances of the case the accused should have been convicted of the lesser offence of culpable homicide not amounting to murder, referred to in sub-paragraph (k) of paragraph 11 of the Petition are also answered in the negative.

(48) The learned President's Counsel also argued that the learned High Court Judge had failed to consider the inconsistencies of the evidence of the prosecution witnesses. [Question of law referred to in sub paragraph (b) of Paragraph 11 of the Petition]. Apart from the omission relating to the act of the Accused pulling out the knife tucked under his shirt, there are no major inconsistencies in the testimony of the sole eyewitness Nilusha. I have dealt with the testimony of Nilusha in detail in paragraphs (19) and (20) of this judgement and I do not wish to refer to my findings again.

(49) It was pointed out on behalf of the Accused that the wife of the deceased was contradicted by a statement she made at the inquest which was indicative of a sudden fight which was not considered by the learned Trial judge. Witness Vinitha was categorical in her evidence that she saw the Accused in the vicinity, but she did not see the Accused speaking to the deceased. She also rejected the suggestion put to her that her husband spoke to the Accused in a provocative manner. It was pointed out, however, that at the inquest proceedings she had said "then he [meaning the accused] was talking to my husband". The eyewitness Nilusha was also cross examined as to whether there was an exchange of words between the Accused and the deceased to which she answered in the negative. I am of the view that when the contradictory statement referred to is considered with the rest of the evidence, it would not be possible to draw the inference that there was an exchange of words that led to a sudden fight. Accordingly, I answer this question of law [Sub paragraph (b)] also in the negative.

(50) Having considered the evidence led at the trial, I am of the view that the learned High Court Judge was justified in accepting the evidence of witness Nilusha and acting on the same. When one considers the totality of the evidence of this case, the accused had failed to discharge the evidentiary burden cast on him in terms of Section 105 of the Evidence Ordinance to bring his case within the ambit of the special exceptions to Section 294 of the Penal Code and the learned High Court Judge cannot be faulted for not acting on the evidence of the Accused.

(51) I am further of the view that the grounds urged on behalf of the Accused are not sufficient to mitigate the conviction of murder to that of culpable homicide not amounting to murder, and I hold that neither the learned High Court Judge nor the Court of Appeal erred in arriving at the conclusion that the accused was guilty of the offence of murder.

Accordingly, the conviction and the sentence imposed on the Accused is affirmed and the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Shiran Gooneratne J

I agree

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal from the Judgement pronounced on 08.02.2018 by the High Court of the North Western Province Holden in Kurunegala in High Court Appeal No. 48/2012 in terms of Section 9 (a) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 154P of the Constitution and the Supreme Court Rules 1990

SC. Appeal No.19/2021

SC/Spl./L.A Case No. 55/2018

HC Kurunegala Appeal No 48/2012

MC Mahawa Case No. 54127

1. M. Jagath Keerthi Bandara
   Public Health Inspector/Authorized
   Officer
   Nanneriya
   Complainant

Vs.

1. Nilanthi Distributors
   Yapahuwa Junction
   Mahawa

2. Coca-Cola Beverages Company
   Tekkawatta
   Biyagama
   Accused

2024

AND BETWEEN

Coca-Cola Beverages Sri Lanka Ltd
Tekkawatta
Biyagama

2nd Accused- Appellant

Vs.

1.M.Jagath Keerthi Bandara
Public Health Inspector/Authorized
Officer
Nanneriya
Plaintiff Respondent

Hon. Attorney General
Attorney General's Department
Colombo 12
Respondent

AND NOW BETWEEN

Coca – Cola Beverages Sri Lanka Ltd
Tekkawatta
Biyagama
2nd Accused-Appellant-Petitioner

Vs.

1.M. Jagath Keerthi Bandara
Public Health Inspector/Authorized
Officer
Nanneriya

Complainant-Respondent- Respondent

Hon. Attorney General
Attorney General's Department
Colombo 12
Respondent-Respondent

Nilanthi Distributors
Yapahuwa Junction
Mahawa
1st Accused-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC., J
A.H.M.D Nawaz, J
Mahinda Samayawardhena, J

COUNSEL: Gamini Marapana, PC., with Navin Marapana, PC., Uchitha Wickremasinghe and Thanuja Meegahawatta for the 2nd Accused Appellant-Appellant

Ms. Induni Punchihewa, SSC for the Respondent

ARGUED ON: 08.07.2021

DECIDED ON: 13.09. 2023

2026

Judgement

Aluwihare, PC., J

1) The 2nd Accused -Appellant -Petitioner Appellant [hereinafter referred to as the 2nd Accused] was charged before the magistrate's court of Mahawa for having manufactured and distributed to the 1st Accused -Respondent-Respondent [herein after the 1st Accused] a bottle of 'Coca-Cola' containing impurities and/or foreign matter, in violation of Section 2(1)(b) read with Section2(1)(a) of the Food Act No.26 of 1980 as amended, an offence punishable under Section 18(1)(a) read with Section 14(1)(a) of the said Act.
2) The 2nd accused was found guilty by the learned magistrate after trial and accordingly a fine of Rs.10,000/-was imposed with a default sentence of 6 months imprisonment.
3) Aggrieved by the conviction and the sentence, an appeal was lodged before the High Court and the learned High Court Judge delivered judgement affirming the conviction and the sentence and dismissed the appeal.
4) The 2nd Accused sought special leave to appeal from this court against the judgement of the High Court and special leave was granted on the following question of law;

   "Has the learned High Court Judge erred in failing to consider that the Mahawa Magistrate's Court is not vested with the jurisdiction to hear and determine the case against the 2nd accused appellant-petitioner?"

Factual Background

5) On 01.03.2009, Public Health Inspector [of Nan-Neriya] detected a [sealed] bottle of Coca-Cola, a product of the 2nd Accused establishment, containing impurities and/or foreign matter. After attending to the preliminary investigations, the bottle of Coca -Cola was forwarded to the Government Analyst. The Analyst, upon analyzing the contents, had detected foreign matter, which has been referred to as **'කලු පැහැති ලප සහිත සුදු පැහැති අවලම්බිත ආගන්තුක ද්‍රව්‍යය'** suspended impurities in the liquid and had expressed the opinion that the contents were not fit for human consumption. It should be noted that what led to the detection was the

information provided by a person in charge of running a canteen who had observed that the bottle, which had been supplied to her by the distributor of Coca-Cola in the area, had some foreign matter in it.

6) After the investigations, both the distributor of Coca-Cola [the 1st accused] and the producer [the 2nd Accused] were charged before the magistrate's court. The 1st accused pleaded guilty, whereas the 2nd accused contested the charge.

7) The only legal issue that came up for consideration before us was whether the Magistrate's Court of Mahawa had jurisdiction to hear and determine the charge against the 1st Accused.

8) The learned President's Counsel argued that the charge against the 2nd Accused was, for manufacturing a bottle of Coca-Cola that contained impurities. It was pointed out that the manufacturing of the bottle of Coca-Cola concerned, took place at Biyagama Thekkawatte, which is not within the local limits of the magistrate's Court of Mahawa. The State did not dispute this contention; thus, it was common ground that Biyagama, Thekkawatte, was not within the local limits of the Mahawa Magistrate's court.

9) It was the contention on behalf of the 2nd Accused that the evidence led at the trial had clearly established that the seal of bottle of Coca-Cola was intact and the evidence showed that it had not been opened. Thus, it was argued that no consequences of the offending act alleged, flowed to the local jurisdiction of the Mahawa Magistrate's Court. It was further contended by the learned President's Counsel that Section 129 of the Code of Criminal Procedure Act No. 15 of 1979 as amended [hereinafter the 'CPC'] would have applied if the bottle of Coca-Cola was opened and consumed, as one could argue that the consequences of the act of manufacturing had ensued or flowed to the 'act of consuming' thereby, by operation of law, jurisdiction to try the offence would have vested with both; the magistrate's court within the local limits of which the act of manufacturing took place and also with the magistrate's court within whose jurisdiction such consequence has ensued .

This can be easily gleaned from the illustration (a) to Section 129 of the CPC;

A is wounded within the local limits of the jurisdiction of the Magistrate's court of X and dies within those of the Magistrate's Court of Z; the offence of culpable Homicide of A may be inquired into by the Magistrate's Court of ***either X or Z.*** [emphasis added]

The contention of the learned President's Counsel, in my view, is correct and Section 128 of the CPC requires the offence to be inquired into and tried by the court within the local limits of whose jurisdiction it was committed. The learned State Counsel also did not dispute this position. The learned President's Counsel in his submission relied on Section 9(a) and Section 128(a) of the CPC and argued that a Magistrate's Court shall only try offences committed wholly or in part within its local limits.

10) The principal issue before this court, however, is whether the lack of jurisdiction on the Mahawa Magistrate's Court to try the offence, as argued by the learned President's Counsel, is 'patent' or 'latent'. In determining the issue, it would be necessary to consider the submission made by the learned President's Counsel regarding the territorial jurisdiction of a Magistrate's Court, in the backdrop of the applicable provisions of the CPC in conjunction with the jurisprudence.

11) The contention of the learned State Counsel was that, ordinarily the offence with which the 2nd accused was charged, is one that is triable by a magistrate and as such there was no lack of patent jurisdiction, and the ***issue of latent jurisdiction*** must be decided by the application of the legal principles and the relevant statutory provisions.

12) The contention of the learned President's Counsel, on the other hand, was that the Mahawa Magistrate's Court lacked patent jurisdiction. The learned President's Counsel also relied on an observation made by the Supreme Court in the case of **King vs. Perera** 19 N.L.R.310. The Court observed [at pg. 312]

"Another objection was taken to the ruling of the District Judge, namely, that the accused, having pleaded in the District Court, could not afterwards take objection to the jurisdiction in consequence of the provisions of section

73 of the Courts Ordinance. I think that this contention is not sound in the present case. The Criminal Procedure Code by section 12 provides that no District Court shall take cognizance of any offence, unless the accused person has been committed for trial by a Police Court duly empowered in that behalf, or unless the case has been transferred to it from some other Court for trial by order of the Supreme Court".

(13) **King vs. Perera** [Supra] was a case where the District Court tried the accused on a committal by the Police Court, and the issue was if the committal was not made by a competent Police Court, whether the District Court could have assumed jurisdiction. In view of the specific wording in Section 12 of the then Criminal Procedure Code, the Supreme Court held that for the District Court to assume jurisdiction, the committal must be from a 'Police Court duly empowered to commit' an accused. I am of the view that the observation of their Lordships in the case of **Perera** [supra] has no application to the instant case for the reason that none of the provisions considered by the Supreme Court in that case would be applicable to the instant case before us, but statutory provisions altogether different to that of Section 12 of the earlier CPC, which provisions I have referred to later, in this judgement.

14) Quoting an observation made by his Lordship Justice Drieberg in **King vs. Ludowyke** 36 NLR 397 at p. 398, the learned President's Counsel sought to establish that the learned Magistrate of Mahawa lacked the territorial jurisdiction to hear this case. An extract, however, of the quoted judgment at p. 398 must be highlighted.

"*Every offence must ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed… A departure from this rule should only be permitted in exceptional circumstances.*"

Therefore, it necessarily must be understood from his Lordship Justice Drieberg's observation that exception may be permitted, that he too, was

aware of the fact that even if the original court lacked territorial jurisdiction, such defect is not fatal in all instances.

The learned President's Counsel also referred to the observation made by Justice Middleton in the case of **Halliday v. Kandasamy** 14 N.L.R 493;

Per Middleton J.-" This application of section 423 must by no means be considered to obviate the requirements of the law that criminal proceedings should be originally instituted in the Court having proper and competent local jurisdiction."

(15) In the case of **Halliday** [supra] the court, while affirming the conviction, held that the Police Court of Nuwara Eliya had no jurisdiction to try the case. The conviction was affirmed as the accused was not prejudiced in his defence.

(16) In the case before us, neither party had disputed the fact that the Magistrate's court is vested with the jurisdiction to try the impugned offence, nor was the issue of jurisdiction raised in the course of the proceedings before the magistrate.

(17) **Therefore, the question which warrants determination is: If an accused is tried for an offence before a forum which is vested with 'forum jurisdiction' to try such an offence but if such offence had taken place outside the local limits of that forum, would the judgement be a nullity?**

(18) It is trite law that an objection to the jurisdiction of a court must be raised by a party at the earliest possible opportunity. It would be pertinent at this point to consider the applicable provisions of the law.

(19) Section 39 of the Judicature Act states that; -

"*Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court but such court shall be taken and held to have jurisdiction over such, proceeding or matter;*

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally

and with previous knowledge of the want of jurisdiction of such court, the judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

(20) Section 39 of the Judicature Act must be examined in the light of patent and latent want of jurisdiction. In his monumental work, **The Law of Evidence, [Volume 1, 2nd Edition, 2012, Pages 131 & 132]** E.R.S.R. Coomaraswamy, relating to Section 39 of the Judicature Act states as follows;

"*Can a party by admitting expressly or by implication the jurisdiction of a court confer Jurisdiction on the court where none exists? Spence Bower and Turner say that not even plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal, and the same results cannot be achieved by conduct or acquiescence by the parties. These cases are described as cases of a total or patent want of Jurisdiction.*

On the other hand, where nothing more is involved than a mere irregularity of procedure or for example, non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that if one of the parties be allowed to waive the defect, or to be estopped by conduct from setting it up, no new Jurisdiction is thereby impliedly created and no existing jurisdiction extended beyond its existing boundaries, the estoppel will be maintained and the court will have jurisdiction. These are cases of partial or latent want of jurisdiction…. In Sri Lanka also, this distinction between a patent want of jurisdiction and a latent want of jurisdiction has been drawn.

…. It is submitted that ***the disability laid down by section 39 can only be availed of in case of partial or latent want of jurisdiction and not of a total or patent want of jurisdiction, though the section appears to be absolute in its terms.***" [Emphasis added].

(21) It was held in the case of **Don Tilakaratne vs. Indra Priyadarshanie Mandawala** (2011) 2 SLR 260-

"…*even on restrictive interpretation of section 39 of the Judicature Act, the petitioner is estopped in law from challenging the jurisdiction of the Magistrate Court as the petitioner has conceded the jurisdiction of the Court and his failure to object at the earliest possible opportunity implies a waiver of any objections to jurisdiction.*"

(22) These observations indicate that Section 39 of the Judicature Act refers only to instances where there is a latent want of jurisdiction, which can be cured by the waiver, acquiescence, or inaction of the parties.

(23) A similar opinion was expressed in the case of **Navaratnasingham vs. Arumugam** (1980) 2 Sri. L.R.1- and the court observed; "*where a matter is within the plenary jurisdiction of the Court if no objection is taken, the court will then have jurisdiction to proceed on with the matter and make a valid order.*"

(24) Our courts have drawn a distinction between patent want of jurisdiction and latent want of jurisdiction.

(25) In **P. Beatrice Perera vs. The Commissioner of National Housing** 77 NLR 361 at page 366, the distinction between patent and latent want of jurisdiction was discussed as follows,

"…. Lack of competency may arise in one of two ways. A court may lack jurisdiction over the cause or the matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the court. Both are jurisdictional defects; The first mentioned of these is commonly known in the law as 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit the parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new

jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction…"

(26) This means that if a court labours under a patent want of jurisdiction, any objection to the assumption of such jurisdiction can be raised before a higher court (either in Appeal or Revision), even if the party raising that objection has failed to do so in the first instance. (**Kandy Omnibus Co Ltd vs. T.W. Roberts** (1954) 56 NLR 293)

(27) However, "*Where a latent lack of jurisdiction exists, a party must raise these procedural defects at the earliest opportunity as acquiescence, waiver or inaction on the part of the party will estop that party from raising the objections in later proceedings.*" – **Koraburuwane Hetitiarachchige Siri Bandula vs Koraburuwane Hetitiarachchige Kithsiri Mahinatha and others**. CA (PHC)152/2013 at page 7.

28) The territorial Jurisdiction of the Magistrate's Court is referred to in Section 128 of the Criminal Procedure Code, which stipulates;

(1) *Every offence shall ordinarily be inquired into and* ***tried by a court within the local limits of whose jurisdiction it was committed.***

(2) *Any Magistrate's Court within the local limits of the jurisdiction of which an accused may be or be found shall have jurisdiction respectively in all cases of offences otherwise within their respective jurisdictions which have been committed on the territorial waters of Sri Lanka.*

(3) *An offence committed on the territorial waters of Sri Lanka to which subsection (2) is not applicable or an offence committed on the high seas, or on board any ship or upon any aircraft may be tried or inquired into by the Magistrate's Court of Colombo if it otherwise has jurisdiction or on indictment by High Court.*

29) It is settled law that the lack of territorial jurisdiction of a court is a latent lack of jurisdiction. In the case of **Colombo Apothecaries Ltd. and Others vs Commissioner of Labour** (1998) 3 SLR 320, it was held that "*The lack of territorial jurisdiction of court is a latent lack of jurisdiction curable by waiver or conduct of the party seeking to attack the order of court on lack of jurisdiction.*"

30) **Spencer Bower on the Law Relating to Estoppel by Representation** – 1966, 2nd Edition, page 308, states;

"*So too when a party litigant , being in a position to object to that the matter in difference is outside the local, pecuniary or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberately elects to waive the objection , and to proceed to the end as if no such objection existed , in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties.*"

31) On the other hand, for an accused to succeed in appeal, the illegality or the irregularity relied upon must be of a nature which meets the threshold laid down in the proviso to Article 138 (1) of the Constitution, which states; that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice. In **Sunil Jayarathna vs. Attorney General** (2011) 2 Sri LR 91, the Supreme Court, in applying the proviso to Article 138 (1) of the Constitution observed that;

"*Unless there is some grave miscarriage of justice it would not be appropriate to interfere with the judgment of the trial judge who enters judgment after careful consideration of the first-hand evidence put before her to which the Judges of the Appellate Court would not have the ability to witness.*"

32) This principle, particularly in relation to territorial jurisdiction, is reflected in Section 434 of the Criminal Procedure Code which reads ;

"***Any judgment of any criminal court shall not be set aside*** *merely on the ground that the inquiry, trial, or other proceedings in the course of which it was passed* ***took place in the wrong local area*** *unless it appears that such error occasioned a failure of justice."*

33) If a Magistrate is empowered by law to try an offence but the Court lacks territorial jurisdiction to entertain the action, then it amounts to latent lack of jurisdiction as it is a procedural error. In such an instance it is then open for the accused to raise an objection at the earliest possible opportunity. If he fails to do so, the court will assume jurisdiction. The accused cannot succeed by raising an objection with respect to territorial jurisdiction on appeal, unless it is satisfied that the thresholds laid down either in Article 138 (1) proviso to the constitution *[prejudiced the substantial rights of the parties or occasioned a failure of justice*] or Section 434 of the CPC [*error occasioned a failure of justice*] are met.

34) It does not seem not possible to tie up the want of territorial jurisdiction with a court's failure to administer justice. It is difficult to make a convincing argument that there has been a miscarriage of justice because the action was instituted in a Magistrate's Court in the local limits of which the offence was NOT committed. As observed in **Sunil Jayarathna vs. Attorney General** [supra], a trial judge makes a decision after careful consideration of the first-hand evidence put before him. This is even more evident in the case of a Magistrate who plays an active role in a criminal trial to ascertain the truth.

35) Therefore, an argument brought up at a later stage of the action or even on appeal that a Magistrate's Court did not have the territorial jurisdiction to entertain the action cannot lead to the setting aside of a judgment delivered after careful deliberation by a Magistrate empowered by law to try that particular offence. The failure to comply with procedural law and the institution of an action in a court empowered by law to adjudicate the issue although it does not have territorial jurisdiction to entertain it, amounts only to latent lack of jurisdiction. If no objection is raised, as in the case before us, at the earliest possible opportunity, then it is deemed to have been waived and the court will assume jurisdiction.

For the reasons set out above, I answer the question of law in the negative and accordingly the appeal is dismissed.

Appeal Dismissed

JUDGE OF THE SUPREME COURT

A.H.M.D NAWAZ J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMMAYAWARDHENA J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal from the Judgment of the Civil Appellate High Court Case No. WP/HCCA/COL/115/2011 [F] of the Act No. 54 of 2006.

Fathima Meroza Jazeel,
No. 212/3,
Galle Road,
Mount Lavinia.

SC APPEAL 237/2017
SC (HCCA) LA No. 213/2016

Plaintiff

PHC APPEAL
No. WP/HCCA/COL 151/2011 (F)

District Court of Colombo
Case No. 115/08/DLM

Vs.

Dhammika Dahanayake,
No.34, Panchikawatte Road,
Colombo 10.

Defendant

AND BETWEEN

Fathima Meroza Jazeel,
No. 212/3,
Galle Road,
Mount Lavinia.

Plaintiff-Appellant

Dhammika Dahanayake,
No. 34, Panchikawatte Road,
Colombo 10.

Defendant-Respondent

AND THEN BETWEEN

Fathima Meroza Jazeel,
No 212/3,
Galle Road,
Mount Lavinia.

Plaintiff-Appellant-Petitioner

Dhammika Dahanayake,
No.34, Panchikawatte Road,
Colombo 10.

Defendant-Respondent-Respondent

AND NOW BETWEEN

Fathima Meroza Jazeel,
No 212/3,
Galle Road,
Mount Lavinia.

Plaintiff-Appellant-Petitioner-Appellant

Dhammika Dahanayake
(now deceased),
No.34, Panchikawatte Road,
Colombo 10.

Defendant-Respondent-Respondent-Respondent

1. Poorna Ranga Dahanayake,
2. Tharanga Dahanayake,

Both of;
No.32/7,
Dharmadasa Weerarathne
Mawatha,
Kandy.

Substituted Defendants-Respondents-Respondents-Respondents

Before : **S. Thurairaja, PC, J**
Kumudini Wickremasinghe, J
K. Priyantha Fernando, J

Counsel :

H. Withanachchi with Shantha Karunadhara for the Plaintiff - Appellant – Appellant.

J. A. J. Udawatta with Anuradha N. Ponnamperuma instructed by V. W. Kularathne Associates for the Substituted – Defendants – Respondents – Respondents – Respondents.

Argued on : 18.07.2023

Decided on : 14.09.2023

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Appellant-Appellant in this case (hereinafter referred to as the appellant) instituted action against the Defendant-Respondent-Respondent (hereinafter referred to as the respondent) claiming that the respondent is a trespasser in the premises owned by the appellant. The main contest between the parties is whether the respondent is a trespasser

of the premises in suit as claimed by the appellant, or a lawful tenant of the premises as claimed by the respondent.

2. At the hearing of this appeal, this Court granted leave to appeal on the questions of law (i)-(viii) set out in paragraph 15 of the petition dated 06.05.2016. However, when the matter was taken up for hearing, this Court observed that some of the questions of law were in repetition. Both Counsel submitted that, they will be satisfied if the questions of law set out in paragraph 15(ii), 15(iv) and 15(vi) would be decided by this Court.

Facts in Brief

3. The appellant *Fathima Meroza Jazeel* is the owner of the property to which the action relates. The property is situated at *No. 34, Panchikawatta road, Colombo 10*. According to deed No. 3526 dated 24.11.1947 [P-1], the property has been owned by the grandfather of the appellant. Thereafter, the grandfather has transferred the property to the appellant's grandmother preserving life interest, by deed No. 3691 dated 30.03.1951 [P-2]. The grandmother has transferred the property to the mother of the appellant reserving life interest. Thereafter, by deed No. 150 dated 03.02.1964 [P-3], the grandmother has renounced the property from the life interest and the mother of the appellant has become the absolute owner of the property. Thereafter, by deed No.2975 dated 09.10.1988 [P-4] attested by *N.M. Thaha* Notary Public, the property has been transferred to the appellant. The father of the appellant *M.H.M. Dean* has been managing the property in question ever since he was married to the appellant's mother and even after the property was transferred to the appellant, the father *M.H.M. Dean* has continued to manage the premises. *Dean* has passed away on 07.07.2008 [P-5].

4. When *Dean* was sick, the appellant has got an anonymous phone call stating that the caller is a friend of the appellant's father and has informed that the premises owned by the appellant is being occupied unlawfully. The appellant has instituted action to evict the respondent from the premises, stating that she is not a tenant of the appellant and therefore is unlawfully occupying the premises. Following this, action has been filed by the appellant in the District Court of *Colombo*. The appellant states that, she has never visited the

premises. However, after the death of her father, when she had passed by the premises, she had seen the name *'Asoka Digicom Private Limited'* affixed in the premises [P-6].

5. The respondent, *Dhammika Dahanayake* has stated that, she has been running a communication center in the premises. The premises has been originally taken on rent by the father-in-law of the respondent in 1968. He has taken it on rent from the father of the appellant (*Dean*). After the death of the father-in-law of the respondent, the husband of the respondent has succeeded to the tenancy of *Dean* and paid rent to *Dean*. He has carried on the business under the name *'Asoka Communication'* which was later converted into a Private Limited Company. Thereafter, the husband of the respondent has passed away on 05.10.2007 and the respondent has become the tenant of *Dean*. The appellant's father, *Dean*, has also attended the funeral of the respondent's husband. After the death of her husband, the respondent has succeeded to the tenancy and has continued to pay the rent of the premises to the bank account of *Dean* upon his request. The payment receipts have been produced ['V-36' – 'V-47']. The respondent has been unaware of the death of *Dean* up until action was instituted against her by the appellant.

6. The Respondent alleges that the company is the lawful tenant to the premises, and the company is being run by her. The letter ['P-8'] has been sent on 25.03.2008 by the appellant through an Attorney-at-Law, which was addressed to the respondent stating that the appellant is the owner of the said premises, it was unlawful for the respondent to occupy the premises and requesting the respondent to vacate the premises and surrender peaceful and vacant possession. The respondent has not replied to the said letter.

7. The plaint ['X-1'] has been filed by the appellant in the District Court on 30.04.2008 seeking a declaration that the appellant is the owner of the premises, a declaration for the ejectment of the respondent from the said premises and damages together with interests until possession was handed over.

8. The learned Judge of the District Court, delivering the judgment ['X-6'] on 23.09.2011 held in favor of the respondent stating that, the respondent was the tenant of the premises

and that the respondent's tenancy had not been terminated in accordance with the provisions of the Rent Act.

9. Being aggrieved by the judgment of the District Court, the appellant appealed to the Civil Appellate High Court of the Western Province holden in *Colombo* (Case No. WP/HCCA/COL 151/2011/F). The Civil Appellate High Court by judgment dated 28.03.2016 ['Z'] dismissed the appeal of the appellant.

10. Being aggrieved by the decision of the Civil Appellate High Court of *Colombo*, the appellant preferred the instant appeal. This Court will address the questions of law set out below, as mentioned before in paragraph No. 2 of this judgment.

15(ii) - Did the Courts below err in law by failing to take into account that the tenancy created by the father without a title to the premises in suit, was not binding on the plaintiff?

15(iv) - Did the Courts below err in law by not following the legal consequences flowing from the failure of the defendant to respond to letter 'P8'?

15(vi) – Whether the Courts below err in law by the finding that the tenancy of the defendant would continue notwithstanding the repudiation of the presumed conduct by her, after the receipt of 'P8'?

Written submissions on behalf of the Appellant

11. The learned Counsel for the appellant submitted that, since the appellant's title to the property in question has been established, the burden was on the respondent to prove her right to occupy the premises.

12. The learned Counsel submitted that, the question of validity of the letting done by the father without any right, title or interest in the property and the question whether the title of the appellant was in derivative title from the original landlord, are matters that arise in this appeal. Reference was made to the case of ***Imbuldeniya v. D. De Silva [1987] 1 Sri. L.R. 367*** which dealt with an identical situation where it was stated that, *"…the tenancy which Gunawardena granted to the Defendant will not bind the Plaintiff who at all relevant times was the true owner of the premises; the plaintiff would be*

entitled to an order evicting the Defendant who is a trespasser as against her."

13. The learned Counsel further submitted that, although the case of *Imbuldeniya(supra)* was brought to the notice of the Civil Appellate High Court, there was no reference as to why the ratio in that case would not apply to the present case or could be distinguishable on facts.

14. It was further submitted that, the Civil Appellate High Court erred in taking the view that the appellant was not entitled in law to seek eviction, when the tenancy of the respondent with *Dean* was intact. Since the appellant's title was not derived from the father, she was not bound by the tenancy created by the father and there could not have been an automatic succession to the position of landlord, in the manner found in the Civil Appellate High Court on the strength of ***Izadeen Mohamed v. Singer Sewing Machine [1962] 64 N.L.R. 407*** and ***Bhojraj v. Abdulla [1998] 1 Sri.L.R. 1*** which dealt with distinguishable situations where new purchasers would be compelled to accept sitting tenants.

15. The learned Counsel for the appellant further submitted that, the respondent asserting lawful tenancy under the father of the appellant, did not bother to reply and/ or dispute the contents of the said letter ['P-8'] which was sent by an Attorney-at-Law on instructions. This being a business and/ or an official letter challenging the right of the recipient to occupy the property in suit, it is incumbent on the recipient to dispute the facts therein. Reference was made to the case of ***Saravanamuttu v. De Mel [1948] 49 N.L.R. 529*** where it was held that, the failure or silence of the recipient of a business letter indicating that a certain state of facts exists, amounts to an admission of the truth of the allegations contained in that letter. The inference drawn from the silence is that, the contents of the letter were true and that the respondent did not assert any tenancy under the appellant.

16. The learned Counsel further submitted that, although the notice['P-8'] did not contain a request by the appellant to the respondent asking her to attorn the appellant as the landlord, the respondent could have availed herself of the opportunity to attorn, in which event the appellant would have to elect

either to accept attornment to treat the respondent as a tenant or to deny attornment to treat the defendant as a trespasser.

17. It was further submitted by the learned Counsel that, even after the receipt of the letter ['P-8'] the respondent had deposited money in a Bank of Ceylon account in favour of *Dean* from April 2008 to October 2008 [receipts marked 'V-41'-'V-46']. According to the case of ***Violet Perera v. Asilin Nona [1996] 1 Sri.L.R. 1*** depositing rent in favour of *Dean* after the receipt of the letter ['P-8'] cannot be treated as a proper payment made to the landlord, as the appellant has held out that she is the owner of the premises in suit.

18. The learned Counsel further submitted that, if the respondent was confronted with a situation in which she was in doubt as to whom the payment should be made, the simplest thing should have been to reply to ['P-8'] asking for more particulars and attorned to the appellant by offering to pay rent to her.

19. It was further submitted that, the appellant cannot be faulted for sending the said letter ['P-8'] as she was not bound by the contract of tenancy created by the father, and it was incumbent on the respondent to indicate her position coupled with an offer to pay rent to the appellant. The conduct of a reasonable person under normal circumstances would have been to send a reply asking for further details. Further, the fact that the address indicated in the notice['P-8'] being similar to the address of *Dean* [receipts D15-D16 at pages 272,273 of the appeal brief] is an additional reason for the respondent to have responded to the notice ['P-8'].

20. The learned Counsel for the appellant further submitted that, the respondent should not be allowed to insist on the privity with *Dean* by keeping silent as the respondent has not acceded to the demand in ['P-8'] and continued to occupy the premises when the contract of tenancy was being challenged by the contents of letter ['P-8'].

21. The learned Counsel further submitted that, assuming but not conceding that the letter ['P-8'] was not a notice to attorn, the contents as indicated by a legal professional on instructions, should not have been ignored on the basis that the appellant was not entitled to send such notice.

22. It was further submitted that, although a presumed contract of tenancy was created when the respondent was confronted with the demand of vacation on the letter ['P-8'] and the respondent continued to occupy the premises, the said presumed contract of tenancy was set in nought by the conduct of the respondent in failing to indicate that she was a lawful tenant and/ or in tendering rent to the appellant. Mere deposit of rent in favour of the father without bothering to verify, could not have resulted in sustaining the said presumed contract of tenancy.

Written submissions on behalf of the Respondent.

23. The learned Counsel for the respondent submitted that, the principal matter that has to be decided by this Court is whether the respondent was in unlawful occupation of the premises. The title of the premises has been admitted in favour of the appellant.

24. It was submitted by the learned Counsel that, the appellant in cross examination on 14.07.2010 (pages 85-88 of the appeal brief) by admitting the signature of the rent receipts to be that of her father's [marked 'V-1'-'V-14'] corroborates the position of the respondent that she was not a trespasser but was occupying the premises as a tenant of *Dean*.

25. It was further submitted that, according to the evidence of the appellant (at pages 65, 66, 67 and 93 of the appeal brief), her father, *Dean,* has been managing the premises in suit on behalf of the appellant with her implied agreement in the capacity of an agent. An agency is implied from the special circumstances of this case, and the appellant as the principal was bound by the contracts entered into by her agent. Therefore, a valid tenancy existed between the appellant's father and the respondent and the appellant was bound by the contract of tenancy created by her father though he was not her predecessor in title.

26. The learned Counsel further submitted that, even after being aware that a business was in operation for 20 years in the premises, the appellant by not raising her concerns has acquiesced the same (pages 69 and 70 of the appeal brief).

27. It was submitted by the learned Counsel that, the case of ***Imbuldeniya v. D. De Silva [1987] 1 Sri. L.R. 367***, has no bearing to the facts of the instant case as the facts are quite different.

28. The learned Counsel further submitted that, as the lawful tenancy that existed between the appellant's father and the respondent was not terminated in law, the appellant upon assuming control over the premises in suit has to first notice the respondent to accept her as a tenant upon attornment. If no such notice is given, the original tenancy subsists. Reference was made to the case of ***Izadeen Mohamed v. Singer Sewing Machine Co. [1962] 64 N.L.R. 407.*** Where it was held that, "*If the purchaser fails to give notice of election to the tenant, the contract of tenancy between the vendor and the tenant subsists and it is only the vendor who is competent to terminate that contract of tenancy".*

29. It was further submitted that, the said notice to quit cannot be considered in law as a notice to attorn. Reference was made to the meaning of the term attornment as described in ***Wille, Principles of South African Law 4th edition at page 176***. Accordingly, it occurs when there is an agreement between the owner, the intended transferee, and agent to the effect that the agent is from then on to hold the thing for the transferee. It was submitted that no such agreement existed between the parties as no evidence was led to that effect by the landlord *Dean*, requesting the respondent to attorn the tenancy to the appellant and to consider the appellant as the new landlord.

30. The learned Counsel further submitted that, the respondent's continued occupation in the premises in suit, following the receipt of the notice dated 25.03.2008 ['P-8'] would create a privity of contract between the appellant and the respondent if and only if the said letter consists of a notice of the appellant's election to recognize the respondent as a tenant. Reference was made to the case of ***Seelawathie v. Ediriweera [1989] 2 Sri.L.R. 170***. However, the aforesaid notice to quit did not consist of an intention of the appellant to recognize the respondent as a tenant, but that the respondent was in unlawful and illegal occupation of the premises in suit.

31. It was submitted by the learned Counsel that, the failure on the part of the respondent to reply to the letter ['P-8'] does not give rise to an adverse inference against the respondent, as she was unaware of the change in ownership of the premises and bona fide accepted *Dean* as her landlord. Further, there was no necessity for the respondent to reply to a letter sent by a complete stranger.

32. It was further submitted that, in the case of ***Saravanamuttu v. De Mel [1948] 49 N.L.R. 529***, exceptions to the rule requiring a person who does not agree with the contents of a letter to dispute the assertions have been set out. *"... .For example, failure to reply to mere begging letters when the circumstances show that there was no necessity for the recipient of the letter to reply can give rise to no adverse inference against the recipient."*

33. The learned Counsel made reference to the case of ***Disanayake Mudiyanselage Chandrapala Meegahaarawa v. Disanayake Mudiyanselage Samaraweera Meegahaarawa*** **SC Appeal No. 112/2018, S.C. min. 21.05.2021**, where the impact of the failure to reply to a letter was discussed and where it was stated that, the impact of the failure to reply would depend on the facts and circumstances of each case.

34. It was further submitted by the learned Counsel that, the said quit notice cannot be considered in law as a notice to attorn since the said letter does not consist of a notice of the appellant's election to recognize the respondent as a tenant.

35. The learned Counsel for the respondent further submitted that, the learned High Court Judges in affirming the judgment of the learned District Judge, has carefully arrived at the conclusion that the document marked ['P-8'] cannot in any conceivable sense be considered as a notice of attornment. In any event, by the time the letter ['P-8'] was sent, the defendant was not in illegal occupation of the premises.

36. The learned Counsel further submitted that, according to the document marked ['P-5'] (at page 215 of the appeal brief) as at the date the letter marked ['P-8'] was sent, and at the time action was instituted, *Dean* had been alive. It was submitted by the learned Counsel that, a valid contract of tenancy was in

subsistence between the respondent and *Dean* even at the time of filing action.

37. It was further submitted that, the appellant could not have instituted the instant action against the respondent, without having repudiated the contract of tenancy that existed between her father and the respondent.

38. I will first answer the question of law set out in Paragraph 15(ii) of the petition.
Did the Courts below err in law by failing to take into account that the tenancy created by the father without a title to the premises in suit, was not binding on the plaintiff?

39. When considering the testimony of the appellant, the appellant in cross examination on 14.07.2010 (at pages 85-88 of the appeal brief) has admitted the signature of the rent receipts [marked 'V-1'-'V-14'] to be that of her father's. Therefore, it can be established that a valid contract of tenancy subsisted between the father of the appellant and the respondent.

40. Further, according to the evidence of the appellant, she has consistently stated that her father *Dean,* has been managing the premises in question ever since he got married to the appellant's mother. Accordingly, when considering the circumstances of this case, an agency can be inferred as the appellant has allowed her father to continue to manage the premises even after her mother transferred the property to her. It can be stated that, the father of the appellant was acting as an agent of the appellant under the implied agreement of the appellant. Where an agency is inferred, when the agent (father of the appellant) enters into a contract with the respondent, the principal (appellant) would be bound by such contract. Therefore, in the circumstances of this case, as a valid tenancy existed between the appellant's father and the respondent, the appellant being the principal will be bound by the contract of tenancy created by her father.

41. The learned Counsel for the appellant submitted that, the case of *Imbuldeniya(supra)* dealt with a similar situation, however, although this case was brought to the attention of the Civil Appellate High Court, reference has not been made as to why

the case of *Imbuldeniya(supra)* is not applicable to the instant case.

42. However, the learned Counsel for the respondent pointed out that, the case of *Imbuldeniya(supra)* has no bearing to the facts of the instant case, as the facts of it are different to the instant case.

43. When considering the facts of the case of *Imbuldeniya(supra),* the father of the plaintiff has let out the premises to the defendant and appropriated the rent for himself. He has done so for his own benefit without the authority from the plaintiff. At the time the property was let out, the plaintiff was not aware that she was the absolute owner. Further, when the father rented the premises to the defendant, he was not acting as her agent. The father had no right or any authority to rent out the premises to the defendant. The plaintiff neither acquiesced in or adopted the letting by her father to the defendant.

44. Thus, as the case facts of *Imbuldeniya(supra)* are not similar to the instant case, the finding of that case cannot be applied to the instant case where the evidence leads to the inference that an agency was present between the appellant and the father of the appellant and even after knowing the appellant was the absolute owner, she continued to let her father manage the property in suit.

45. With regard to the first question of law that has been raised, it is my view that, in light of the evidence and the facts and circumstances of the instant case, the courts below have not erred in law and have correctly come to the conclusion that the tenancy created by the father of the appellant is binding on the appellant.

46. Now I will consider the second question of law that has been set out in paragraph 15(iv) of the petition.
Did the Courts below err in law by not following the legal consequences flowing from the failure of the defendant to respond to letter 'P8'?

47. The learned Counsel for the appellant by relying on the case of ***Saravanamuttu v. De Mel [1948] 49 N.L.R. 529*** took the

position that, as the respondent did not reply or dispute the contents of the letter ['P-8'] it amounts to an admission of the truth of the allegations contained in that letter.

48. The respondent took the position that, the case of *Saravanamuttu(supra),* sets out exceptions to the rule requiring a person who does not agree with the contents of a letter to dispute the assertions. *"… .For example, failure to reply to mere begging letters when the circumstances show that there was no necessity for the recipient of the letter to reply can give rise to no adverse inference against the recipient."*

49. Further, in the case of ***Disanayake Mudiyanselage Chandrapala Meegahaarawa v. Disanayake Mudiyanselage Samaraweera Meegahaarawa*** **SC Appeal No. 112/2018, S.C. min. 21.05.2021**, it was stated,

> *"However, I must add that although it is a general principle that failure to answer a business letter amounts to an admission of the contents therein, this is not an absolute principle of law. In other words, failure to reply to a business letter alone cannot decide the whole case. It is one factor which can be taken into account along with other factors in determining whether the Plaintiff has proved his case. Otherwise, when it is established that the formal demand, which is a sine qua non for the institution of an action, was not replied, judgment can ipso facto be entered for the Plaintiff. That cannot be done. Therefore, although failure to reply a business letter or a letter of demand is a circumstance which can be held against the Defendant, it cannot by and of itself prove the Plaintiff's case. The impact of such failure to reply will depend on the facts and circumstances of each case."*

50. Further, in the case of ***Wickremasinghe v. Devasagayam [1970] 74 N.L.R. 80*** *Weeramantry J* stated that, although the failure to reply to a letter is a circumstance which may be urged against the defendant, it cannot by itself prove the plaintiff's case.

51. Thus, in light of the findings in the above cases, it is my view that, when considering the facts and circumstances of the

instant case, the failure of the respondent to reply to the letter ['P-8'] would not in itself amount to an admission of the truth of the contents of that letter.

52. Therefore, it is my view that, the Courts below have not erred in law when deciding on the legal position following the respondent's failure to reply to the letter ['P-8'].

53. Thirdly, I will answer the final question of law set out in paragraph 15(vi) of the petition.
Whether the Courts below err in law by the finding that the tenancy of the defendant would continue notwithstanding the repudiation of the presumed conduct by her, after the receipt of 'P8'.

54. The appellant took up the position that, although a presumed contract of tenancy was created when the respondent continued to occupy the premises even after the letter ['P-8'] demanding vacation, this contract was repudiated when the respondent failed to indicate that she was a lawful tenant and failed to pay rent to the appellant.

55. It was brought to the attention of this Court that, according to the document marked ['P-5'] (page 215 of the appeal brief), the father of the appellant had been alive when the said letter ['P-8'] was sent by the appellant to the respondent. The letter ['P-8'] was sent on 25.03.2008 and the death of the appellant's father had occurred on 07.07.2008 ['P-5']. Further, action has also been instituted on 30.04.2008 [plaint 'X-1'] which is before the death of the appellant's father. Therefore, a valid contract existed between *Dean* and the respondent at the time the letter ['P-8'] was sent, and also at the time action was instituted by the appellant.

56. Thus, as the appellant was not entitled to send the letter ['P-8'] while her father was alive, it is my view that, the Courts below have not erred in law by finding that the tenancy of the respondent would continue even after the receipt of the letter ['P-8'].

Declaration.

57. As all three questions of law have been answered in the negative, I hold that the respondent is not a trespasser but a lawful tenant. I affirm the judgments of the District Court and the Civil Appellate High Court of *Colombo*. The appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE KUMUDINI WICKREMASINGHE.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application for special leave to appeal under and in terms of the High Court of the Province (Special Provisions) Act No.19 of 1990 as amended or the Industrial Disputes Act No. 32 of 1990 made in respect of Order dated 31st May 2019 of the High Court of the Western Province Holden in Colombo.

SC APPEAL 119/2021

SC/SPLA/LA 238/2019

HCALT 43/2018

LT No. 2/565/2015

Lushantha Karunarathna,

No. 112,

D.S. Wijesinha Mawatta,

Katubadda, Moratuwa.

APPLICANT

vs.

Asia Broadcasting Corporation (Pvt) Ltd,

Level 35 and 37, East Tower

World Trade Center,

Colombo 01.

RESPONDENT

AND NOW

Asia Broadcasting Corporation (Pvt) Ltd,

Level 35 and 37, East Tower

World Trade Centre,

Colombo 01.

RESPONDENT-APPELLANT

vs.

Lushantha Karunarathna,

No. 112,

D.S. Wijesinha Mawatta,

Katubadda, Moratuwa.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Lushantha Karunarathna,

No. 112,

D.S. Wijesinha Mawatta,

Katubadda, Moratuwa.

APPLICANT-RESPONDENT-PETITIONER

vs.

Asia Broadcasting Corporation (Pvt) Ltd,

Level 35 and 37, East Tower

World Trade Centre,

Colombo 01.

RESPONDENT-APPELLANT-RESPONDENT

BEFORE : **B. P. ALUWIHARE, PC, J**

S. THURAIRAJA, PC, J

K.P. FERNANDO, J

COUNSEL : Isuru Lakpura for the Applicant-Respondent-Petitioner

Manoj Bandara with Ms. Thamali Wijekoon instructed by Sudath Perera Associates for the Respondent-Appellant-Respondent.

WRITTEN SUBMISSIONS: Written submissions on behalf of the Applicant-Respondent-Petitioner on 16th March 2022.

Written submissions on behalf of the Respondent-Appellant-Respondent on 22nd October 2022.

Further Written submissions on behalf of the Applicant-Respondent-Petitioner on 13th June 2023.

Written submissions on behalf of the Respondent-Appellant-Respondent on 30th June 2023.

ARGUED ON : 23rd May 2023

DECIDED ON : 14th September 2023

S. THURAIRAJA, PC, J.

The instant case concerns the termination of the employment of the Employee Applicant-Respondent-Petitioner namely Lushantha Karunarathna (hereinafter and sometimes referred to as the "Applicant") by the Employer Respondent-Appellant-Respondent Company namely Asia Broadcasting Corporation (Pvt) Ltd (hereinafter sometimes referred to as the "Respondent") based on the alleged charges levelled against him in relation to a hoarding site situated on Maya Avenue, Wellawatte, on grounds of gross misconduct in the form of negligence in executing his obligations as the Senior Manager of Promotions of Shaa FM. Upon application to the Labour

Tribunal by the Applicant, the Learned President of the Labour Tribunal by Order dated 16th March 2018 pronounced the aforesaid termination by the Respondent to be unjustifiable and inequitable, whereby the Applicant was awarded Rs. 936,000 as compensation. This decision was overturned by the High Court by Order dated 31st May 2019, where the Learned High Court Judge held in favour of the Respondent company. Being aggrieved by the decision of the High Court, the Applicant has now preferred this appeal by way of Petition dated 28th June 2019 praying that the Order dated 31st May 2019 of the High Court be set aside and the Order of the Labour Tribunal dated 16th March 2018 be restored.

When the instant case was considered for leave to appeal before the Supreme Court on 13th December 2021, the Court granted special leave to appeal on the following two questions of law.

> *"(i) Did the High Court consider whether the findings of the Labour Tribunal were perverse?*
>
> *(ii) If the findings of the Labour Tribunal were not perverse, did the High Court err in law by allowing the appeal preferred by the Employer Respondent?"*

Facts

The Respondent company is the owner and the operator of several media channels in Sri Lanka including Hiru TV, Hiru FM, Shaa FM, Suriyan FM, Gold FM and Sun FM. The Applicant first joined the Respondent company as a Junior Executive Officer of Promotions on or around 09th August 1999, and, on or around 09th June 2008 while holding the position of Assistant Manager of Promotions, the Applicant had resigned to be employed elsewhere. More recently, the Applicant was re-employed at Shaa FM on 18th September 2012, and was thereafter promoted to the position of Senior Manager of Promotions, which was the position the Applicant held at the time of the termination of employment. As the Senior Manager of Promotions, the Applicant was

required to attend to all promotional activities of the Respondent Company, including the installation and maintenance of hoarding sites of the Respondent Company. The hoardings were owned by the third-party advertising companies, and the Respondent would obtain such hoarding on the basis of an annually renewable contract.

The instant case concerns a hoarding site installed at Maya Avenue, Wellawatta upon the instructions of the Chairman of the Respondent company on or around 19th October 2012, in respect of which the Respondent entered into a contract with Regee Advertising (hereinafter sometimes referred to as the "advertising company"), which was overseen by the Applicant. The Respondent company had an established standard practice in respect of the installation and maintenance of hoarding sites which has been acknowledged by both parties during the cross examination and has been summarised by the Learned President of the Labour Tribunal in the following manner. (vide pg.227 of the High Court brief).

> *"..... එම පරිචය නම් advertising ආයතන තමා සතු ප්‍රචාරණ අවස්ථා ආයතනයට දැන්වීමෙන් පසු ආයතනයේ අවශ්‍යතාවය මත එකී ස්ථාන මිලදී ගන්නවා ද යන්න තීරණය කිරීමට පෙර ඒ පිළිබඳව යම් ගවේෂණයක් සිදු කර ඉන්පසු මිල ගණන් කැඳවා ස්ථානීය පරීක්ෂණයෙන් පසුව ප්‍රවර්ධන නිලධාරියා පත්වන අවස්ථාවක එය සභාපතිතුමාගේ අවධානයට යොමු කර මිලදි ගැනීම සිදු කරයි. එසේත් නැත්නම්, තව ප්‍රචාරක දැන්වීම් පුවරුවක් සවි කිරීම සිදුකරයි."*

I have provided an approximate and unofficial translation of the above extract below.

> *"The practice is that after the advertising agency informs the Respondent Company of its advertising opportunities, and before deciding whether to buy the site, the Respondent company conducts some research to determine whether it would suit the needs of the company, and thereafter calls for quotations, after which, an on-site inspection takes place allowing the relevant manager of the Respondent company to present it to the Chairman of the Respondent company for approval for purchase. If approval is*

received, the parties proceed with the purchase. If not, other hoarding sites will be considered."

Witness for the Respondent company, namely Dilanka de Soysa (hereinafter referred to as the "Witness for the Respondent") gave evidence and during the cross-examination, stated that he was asked by the Chairman of the Respondent company to inspect the hoarding site in question. Having inspected the same, the Witness for the Respondent had not taken photographs of the site, although he had admitted that generally when conducting routine inspections, he would take photographs of the respective sites. In respect of the hoarding site in question, he was asked to inspect the site for the purpose of affirming whether any disturbances were caused to the hoarding site, and he had been given pictures by the Human Resources Department for comparison purposes (vide pg.41-42 of the High Court Brief.)

ප්‍ර: තමාට සභාපතිවරයා යම්කිසි කාර්යභාරයක් දුන්නා ද මේ සම්බන්ධයෙන් යම්කිසි ක්‍රියාමාර්ගයක් ගන්න කියලා?

උ: බලන්න කිව්වා.

ප්‍ර: බලන්න කියලද කිව්වේ ?

උ: ඔව්.

ප්‍ර: තමා එය ඡායාරූප ගත කළාද?

උ: නැහැ.

ප්‍ර: භෞතිකවම පරීක්ෂණ කළාද?

උ: ඔව්.

ප්‍ර: පසුව තමාට මෙම ස්ථානයේ ඡායාරූප ලැබුණා ද?

උ: ඔව්.

ප්‍ර: ඒවා ගත්තේ කවුද?

උ: මානව සම්පත් අංශයට ලැබිලා තිබෙනවා.

ප්‍ර: තමා ඡායාරූප ගත කිරීමක් කළාද?

උ: නැහැ.

ප්‍ර: තමාට ඡායාරූප බලන්න එවලා තිබුණා ද?

උ: ඔව්.

Though the usual practice was to take photographs during inspections, he had not done on that occasion, but instead, used the photographs provided by the Human Resources Department of the Respondent Company to ascertain whether there was an obstacle caused to the hoarding site. Upon arrival at the site, he observed minor disturbances to the hoarding site caused by buildings and trees. The witness also stated that any disturbance resulting from overgrown vegetation could be removed by informing the relevant advertising agency. Further, he states that, as the person who inspected the alleged disturbance to the hoarding, he was not asked to testify before the domestic inquiry held within the Respondent company in relation to this matter.

The Applicant testified before the Labour Tribunal stating that the said hoarding site was selected by the Chairman of the Respondent Company and was instructed to obtain it for advertising and was done so having followed the established standard practice followed by the Respondent company. The hoarding site was initially obtained in the year 2012 and subsequently the contract was extended for another year with the approval of the Chairman of the Respondent Company. In the two years that the hoarding site was in use, there were no concerns raised either by the Respondent Company, or its chairman regarding the visibility of the hoarding site. The issue with the visibility of the hoarding site was raised for the first time when the contract was scheduled to be extended for a second time, and further questions arose as to another hoarding board at the vicinity of the hoarding site in question. The Applicant stated that he had tried to convince the Chairman by using photographs taken from time to time that the so-called new hoarding board had always been there and that it was not

a newly erected one. Not being convinced by the explanation of the Applicant, the Respondent had issued the Petitioner with a Charge sheet, and after having conducted a domestic inquiry, the employment of the Applicant was terminated.

At the end of the inquiry before the Labour Tribunal, both parties filed their respective written submissions together with marked documents. The Learned President of the Labour Tribunal pronouncing the order on 16th March 2018, ordered the Respondent company to pay 12-months' salary as compensation based on the findings that the Respondent Company had unreasonably terminated the services of the Applicant. Among such other findings, the Labour Tribunal stated that though the Chairman of the Respondent company had made such allegations against the Applicant, the Chairman was not available as a witness before the Labour Tribunal, that the witness who testified on behalf of the Respondent before the Labour Tribunal had not been called to testify at the domestic inquiry, that the witness had failed to submit a report with photographs thereby failing to adhere to the standard practice followed when conducting such inspections, that as admitted by the Respondent witness, any disturbances caused by the overgrowth of vegetation could have been cured by informing the advertising company as it was a matter beyond the control of the Applicant.

The Respondent in challenging the Order made by the Labour Tribunal, preferred an appeal before the Provincial High Court of the Western Province holden in Colombo. The Respondent states that the Chairman had merely suggested to the Applicant that there should be a hoarding site in the area and that it was the Applicant's duty to go and inspect the site and determine whether a hoarding would be suitable for advertising, and if so, to proceed to install such a hoarding. It thereafter had come to the attention of the Respondent that the said hoarding was partially obstructed by trees growing from a private property and a light pole, and the Applicant without having considered these obstructions and without notifying the Chairman, has renewed the contract with Regee Advertising up until 10th January 2015.

The matter was argued before the Learned High Court Judge on 26th April 2019, and the question of law arose as to whether the Respondent Company has proved to the satisfaction of the court the negligence of the Applicant with regard to the renewal of the contract of the hoarding site in question. By Order dated 31st May 2019, the Learned High Court Judge found that in light of the facts and circumstances of the instant case the Respondent was right to have terminated the employment of the Applicant, giving emphasis to the importance of a hoarding site to a company such as the Respondent company, and also noted that the Applicant had failed to inspect and maintain the site after its installation which fell within the ambit of the Applicant's scope of the work as the Senior Manager of Promotions. The Learned High Court Judge also observed that the Applicant had failed to disclose in the show cause letter dated 27th January 2015, and failed to tender evidence before the Labour Tribunal as to what he ought to have done to rectify the issue of visibility caused by the overgrowth of vegetation. It was further held that the Labour Tribunal when exercising its just and equitable jurisdiction must ensure that such an order rendered is just and equitable to both parties to the application.

Therefore, the Learned High Court Judge found that in light of the facts and circumstances of the instant case the Respondent was right to have terminated the employment the Applicant, setting aside the Order of the Labour Tribunal.

Being aggrieved by the decision of the Learned High Court judge, the Applicant by Petition dated 28th June 2019 has made an application before this Court praying that the Order of the Labour Tribunal dated 16th March 2019 be restored and the Order of the High Court dated 31st May 2019 be set aside. On 13th December 2021, the Supreme Court granted special leave to appeal on the two questions of law as stated above.

Analysing the existing legal position relevant to the instant case

As statutorily encapsulated within the Industrial Disputes Act No. 43 of 1950 as amended (hereinafter sometimes referred to as the "Industrial Disputes Act"), s.31D (2) provides as follows.

*"An order of a labour tribunal shall be **final** and **shall not be called in question in any court**."*

[Emphasis added]

However, s.31D(2) does not render is impossible for an aggrieved party to prefer an appeal to another court, as this rule is subject to s.31D(3) of the Industrial Disputes Act which reads as follows.

*"Where the workman who, or the trade union which, makes an application to a labour tribunal, or the employer to whom that application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal from that order on a **question of law**, to the High Court established under Article 154P of the Constitution, for the Province within which such Labour Tribunal is situated"*

[Emphasis added]

In **Kotagala Plantations Ltd. and Lankem Tea and Rubber Plantations (Pvt) Ltd. v Ceylon Planters Society [(2010) 2 Sri LR 299]** by Chief Justice J.A.N de Silva as to what would constitute a question of law for the purposes of s.31D of the Industrial Disputes Act, whereby His Lordship held at page 303 as follow:

*"An appeal lies from an order of a Labour Tribunal only on [a] question of law. A finding on facts by the Labour Tribunal is not disturbed in appeal by an Appellate Court unless the decision reached by the Tribunal can be considered to be perverse. It has been well established that **for an order to be perverse the finding must be inconsistent with the evidence led or that the finding could not be supported by the evidence led** (vide Caledonian Estates Ltd. v. Hillman 79 (1) NLR 421)"*

[Emphasis added]

Further, in **Jayasuriya vs Sri Lanka State Plantations Corporation, (1995) 2 SLR 379** Justice Amarasinghe held that being "perverse" in this context can have a broader meaning than its natural meaning. His lordship held;

> "*"Perverse" is an unfortunate term, for one may suppose obstinacy in what is wrong, and one thinks of Milton and how Satan in the Serpent had corrupted Eve, and of diversions to improper use, and even of subversion and ruinously turning things upside down, and, generally, of wickedness. Yet, in my view, in the context of the principle that the Court of Appeal will not interfere with a decision of a Labour Tribunal unless it is "perverse", it means no more than that the court may intervene if it is of the view that, having regard to the weight of evidence in relation to the matters in issue, the tribunal has turned away arbitrarily or capriciously from what is true and right and fair in dealing even handedly with the rights and interests of the workman, employer and, in certain circumstances, the public. The Tribunal must make an order in equity and good conscience, acting judicially, based on legal evidence rather than on beliefs that are fanciful or irrationally imagined notions or whims. Due account must be taken of the evidence in relation to the issues in the matter before the Tribunal. Otherwise, the order of the Tribunal must be set aside as being perverse.*"

Justice Amarasinghe went on to recognise several grounds on which the appellate courts have intervened with the orders of the labour tribunal and set them aside, which demonstrate the scope of the concept of perversity. These grounds were summarized by Justice Arjuna Obeysekara in the recent unreported case of **R.A. Dharmadasa v Board of Investment of Sri Lanka, (SC Appeal No 13/2019 decided on 16th June 2022)** whereby the findings of a Labour Tribunal were subject to review if it was,

> "• ***wholly unsupported by evidence*** *(Ceylon Transport Board v. Gunasinghe [(1973) 72 NLR 76], Colombo Apothecaries Co. Ltd v. Ceylon*

Press Workers' Union [(1972) 75 NLR 182], Ceylon Oil Workers' Union v. Ceylon Petroleum Corporation [(1978-9) 2 Sri LR 72]), or

- ***which is inconsistent with the evidence and contradictory of it*** *(Reckitt & Colman of Ceylon Ltd v. Peiris [(1978-9) 2 Sri LR 229]), or*

- ***where the Tribunal has failed to consider material and relevant evidence*** *(United Industrial Local Government & General Workers' Union v. Independent Newspapers Ltd [(1973) 75 NLR 529]), or*

- ***where it has failed to decide a material question*** *(Hayleys Ltd v. De Silva [(1963) 64 NLR 130]), or*

- ***misconstrued the question at issue and has directed its attention to the wrong matters*** *(Colombo Apothecaries Co. Ltd v. Ceylon Press Workers' Union [supra]), or*

- ***where there was an erroneous misconception amounting to a misdirection*** *(Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya [(1964) 65 NLR 566]), or*

- ***where it failed to consider material documents or misconstrued them*** *(Virakesari Ltd v. Fernando [(1965) 66 NLR 145]), or*

- ***where the Tribunal has failed to consider the version of one party or his evidence*** *(Carolis Appuhamy v. Punchirala [(1963) 64 NLR 44], Ceylon Workers' Congress v. Superintendent, Kallebokke Estate [(1962) 63 NLR 536]), or*

- ***erroneously supposed there was no evidence*** *(Ceylon Steel Corporation v. National Employees' Union [(1969) 76 CLW 64]) …"*

[Emphasis added]

It has come to my attention that several facts which were admitted by the witness on behalf of the Respondent during the cross-examination have not been taken into

consideration by the Learned President of the Labour Tribunal in his Order, which have been summarized below. First, the charges against the Applicant were raised by the Chairman of the Respondent Company, who was not called as a witness before the Labour Tribunal to testify on behalf of the Respondent. Second, the witness who did testify on behalf of the Respondent was not called to testify at the domestic inquiry held by the Respondent. Third, in determining whether the termination of the Applicant was justifiable, what ideally should have been considered was whether termination was the right course of action on the part of the Respondent instead of construing whether the Applicant was at fault. Even so, the President of the Labour Tribunal held that the Applicant was not negligent in his duties and thereby his termination of employment was unjustified and inequitable.

I am in agreement with the decision of the Labour Tribunal to compensate the Applicant for the termination of employment. However, I do not agree with the finding that the Applicant was not negligent. Had the aforementioned facts been taken into consideration and had the Chairman of the Respondent Company been called to testify before the Labour Tribunal, the Labour Tribunal would have found the Applicant's failure to rectify any disturbances caused to the hoardings to amount to negligence of his part. On this factual point alone, I agree with the findings of the Learned High Court Judge. However, I do not agree with the final decision of the High Court to not compensate the Applicant. Thus, the findings of the Labour Tribunal would be construed as partially perverse on this particular fact on the grounds that the Labour Tribunal has misconstrued the question at issue and had failed to consider the views of the Respondent Company, which falls within the meaning of perversity as summarized by my brother Judge in **R.A. Dharmadasa v Board of Investment of Sri Lanka, (supra)**.

Yet, the length and breadth of the two questions of law cannot be answered if one was to limit the instant case to the question of the alleged perversity of the findings of the Labour Tribunal. Thus, it is my view that the questions of law in instant case can be

addressed in light of the following two factual observations which provides a larger and clearer picture to the issues at hand. First, I find that the Applicant has in fact acted negligently in executing his duties as the Senior Manager of Promotions, since advertising is vital to a company operating in the media industry, and this falls directly within the Applicant's scope of work, which has been to a certain extent identified and elaborated by the Learned High Court Judge. Secondly, I am also of the view that despite the Applicant being negligent, termination of his employment is far too disproportionate a punishment considering the circumstances of the instant case, thereby agreeing with the final decision of the Labour Tribunal that the Applicant should be compensated. The above two factual observations have been expounded on below.

A. Negligence on the part of the Applicant

For the purposes of clarity, I wish to reiterate that the charge of negligence against the Applicant is that the Applicant had failed to properly inspect the hoarding site in question prior to the renewal of the contract with the advertising company to extend the same until 10th January 2015 which has allegedly caused the Respondent company a loss of Rupees Three-hundred thousand (Rs.300,000/-). If the Applicant had in adhering to his obligations as the Senior Manager of Promotions had gone to inspect the hoarding site prior to the renewal, the Respondent states that he would have observed the disturbances caused to the hoarding site in question by the overgrowth of vegetation, and ideally should have notified the advertising company to rectify this issue, which the Applicant had also failed to do.

The facts of the instant case indicate that the Applicant was responsible for ensuring that the hoarding sites within Colombo were installed and maintained, including the hoarding site in question, and further, to ensure that the said sites were visible to passers-by without any disturbance. This has been testified by the Applicant himself during the cross examination on 08th February 2018 (vide pg. 139 of the High Court Brief)

"ප්‍ර: මේ නාම පුවරුව නියම ආකාරයෙන් ප්‍රදර්ශනය වෙනවාද කියල බලන්න වගකීම තිබෙන්නේ කාටද?

උ: මට. (Lushantha)

ප්‍ර: රෙජී ආයතනයෙන් නාම පුවරුව සවිකිරීමෙන් පසුව ඔබගේ රාජකාරිය තමයි එය නියම ආකාරයෙන් තිබෙනවාද කියල බැලීම?

උ: ඔව්.

ප්‍ර: එම නාම පුවරුව දර්ශනය වෙන බවට ආදාළ කාලයේ පරීක්ෂා කිරීමට වගකීම තිබුනේ කාටද?

උ: කොළඹ ඇතුලත තිබුනේ මට.

ප්‍ර: "හිරු මගේ පන වගේ" කියන නාම පුවරුව සම්බන්ධයෙන් දර්ශනයවීම බලන්න වගකීම තිබුනේ ඔබට?

උ: ඔව්. "

In lieu of this, I draw attention to pg.4-5 of the High Court Order of the instant case dated 31st May 2019 (vide pg.236-237 of the High Court brief), whereby the Learned High Court Judge held as follows.

"The Respondent Company needs people's attraction. Therefore, object of installing of hoardings is to attract more viewers. The Applicant who was the Senior Manager (Promotions) has a duty cast on him to promote the business of the institution, which include installing and maintaining of hoardings and monthly inspections. When the Chairman informed him with regard to the visibility of the hoardings what are the steps taken by the Applicant should be consider. For this purpose, this Court has to peruse the evidence of the Applicant and the document marked A1. Though the place was recommended by the Chairman in 2012, 2 years later chairman informed him that the said hoarding did not have the proper visibility at the location where it was installed. As a Senior Manager, has he taken steps to inform the relevant authority to ensure the proper visible condition of the hoardings.

This could have been avoided if the Applicant had visited the seen regularly This is his main duty. Before I analyse the evidence of the Applicant, I am mindful of this following judgment.

In ***Gilbert Weerasinghe Vs. People's Bank - S.C Appeal No. 81/2006 , Decided On:- 31st July 2008*** *J.A.N. De Silva.- held that*

"The Labour Tribunal should act in a just and equitable manner to both parties and not award any relief on the basis of sympathy. Just and equitable order must be fair to all parties. It never means the safeguarding of the interest of the workman alone. Legislature has not given a free licence to a President of a Labour Tribunal to make award as he may please." "

I am in agreement with the above finding of the Learned High Court Judge. As observed above, the Chairman had suggested a hoarding should be installed down Maya Avenue, and it was the responsibility of the Applicant to suggest to the Chairman of a suitable site, whether it be the hoarding site in question or another site down Maya Avenue. The standard procedure within the Company is for the Senior Manager of Promotions to analyse the location of the hoarding sites and to consider several options prior to making a final decision of the most suitable hoarding site, after taking into account the approval or disapproval of the Respondent's Management. The Respondent claims that if it had been notified of the disturbances prior to initially entering into the contract with Regee Advertising or even at the point of renewal, it would have given instructions to not proceed with the contract, or even if they did proceed with the contract, to discontinue the contract, depending on the circumstances. Furthermore, the primary charge against the Applicant in respect of the hoarding site in question is that as the Chairman has raised the issues of visibility and the disturbances caused by the overgrowth of vegetation, the Applicant should have in the least attempted to rectify the issue by notifying Regee Advertising instead of attempting to justify that there are no such disturbances. This was within his ambit of duties as the Senior Manager of Promotions.

Therefore, in considering the first factual observation, the Applicant has been negligent in executing his duties as the Senior Manager of Promotions. However, this does not justify the termination of his employment as will be elaborated further under the second factual observation.

B. Termination of employment was too disproportionate in the given circumstances.

In framing the allegations against the Applicant, the Respondent had failed to take note of the fact that this is an isolated act of negligence, and while it does concern advertising which is of importance to the Respondent, it is not something which ought to be construed as misconduct which would require termination of the employment of the Applicant.

In the Indian case of **Hind Construction & Engineering co. Ltd v Their Workmen [1965] (1) LLJ 462** the employer used to grant a holiday on the next day where a holiday fell on a Sunday. In this case the employer refused to grant a holiday due to pressure of work but promised to do on a later date. Certain workmen who were absent on the day following that Sunday in question were dismissed, and the punishment imposed was held to be one which no reasonable employer would have imposed. **S. Egalahewa** in **'Labour Law'** [Second edition (2020)] states that the courts in fact have jurisdiction to intervene where the termination of the employment is disproportionate to the conduct of the employee, whereby at page. 640 it reads as follows.

> *"Where the punishment awarded by the employer is shockingly disproportionate in the light of the particular conduct and the workman's past record or is such that no reasonable employer would impose in similar circumstances, a court would be justified in drawing an inference of victimization by the employer."*

Thus, in **Sri Lakshmi Saraswathi Motor Transport co. v Labour Court [1966-67] 31 FJR 54** a workman with seventeen years of service and a clean record was dismissed as he was guilty of one day's delay in transmitting a parcel of documents from a branch office to the head office of the employer. The workman was an office bearer of the union. He admitted the lapse but pleaded forgetfulness in mitigation. It was held that his dismissal was so grossly disproportionate to the offence that the tribunal was justified in concluding that the employer had made the incident a pretext to dismiss the workman in view of his union activities.

Further, in the Sri Lankan Shop and Office Employees Act No. 19 of 1954 gives a list of misconducts in a different context. In terms of the **Shop and Office Employees (Regulations of Employment and Remuneration) Regulations 1954**, under **Regulation 18**, employers are authorized to deduct any fines imposed on employees for certain acts of misconduct and these acts of misconduct are listed in the said Regulation, which includes *inter alia* absence from and late attendance at work without reasonable excuse, causing damage to, or causing the loss of goods or articles belonging to the employer, such damage or loss being directly attributable to negligence, wilfulness or default of the employee, Slacking or negligence at work, Wilful failure on the part of the employee to comply with any lawful order given to him in relation to his work. This provides an understanding of what the Sri Lankan legal jurisdiction construes as misconduct, all the while bearing in mind that even the aforementioned acts are not acts which warrant termination of employment. **S. R. De Silva** in **'Law of Dismissal'** [The Employers' Federation of Ceylon, Monograph No. 8, Revised Edition 2004] commenting on the necessity of considering the negligence in light of the relevant context states as follows.

> *"It is not every act of negligence, or even one act of negligence, which would always justify termination. The negligence must either be habitual (vide **Andhra Scientific Co. Ltd. vs. Heshagiri Rao, 1961 (2) LLJ 117**), or else*

sufficiently grave (vide ***Jupiter General Insurance Co., Lid. vs. Shroff, (1937) 3 All ER 67****)."*

[Emphasis added]

It must be noted that the Applicant was issued a Letter of Suspension dated 12th January 2015, whereby several charges were levelled against him, and the Applicant was required by letter dated 19th January 2015 to submit a Show Cause letter, which in fact the Applicant has complied with by submitting the Letter dated 27th January 2015 (vide pg. 210-212 of the High Court brief). It must also be noted that there were no deductions to his salary or other monetary benefits in lieu of the charges levelled against the Applicant nor was his monthly salary discontinued during the term of suspension from 12th January 2015 to the date of termination 12th June 2015.

At present, it is my view that the questions of whether the domestic inquiry was held in a proper manner or what alternative action could have been taken by the Respondent is not relevant to the instant case. The instant case is framed to determine whether the termination of the Applicant could be justified in light of this isolated incident of negligence, and if not, whether the Applicant could be compensated for such a termination. For the purposes of clarity, I wish to emphasize that this Court is not disregarding the negligent conduct of the Applicant as has been previously established but is construing only whether the reparation of termination is too disproportionate in the instant case.

Thus, in answering the second factual observation, I conclude that the termination of the employment of the Applicant is unjustified on the grounds that it was disproportionate in light of the circumstances of the instant case as it was an isolated incident of negligence, and the Applicant could have been reprimanded in a different way such as suspension and/deduction to his salary. It is my view that the termination being the first course of action was unwarranted for.

Decision

In having regard to the facts and the law discussed above, I now turn to consider the questions of law to which leave has been granted by the Supreme Court on 13th December 2021 which have been cited above. In considering the circumstances of the instant case, these questions cannot be answered with a simple yes or no.

In answering the first question of law, pursuant to the definition of "perverse" as set out by Justice Amarasinghe in **Jayasuriya vs Sri Lanka State Plantations Corporation (supra)**, the finding of the Labour Tribunal that the Applicant was not negligent thereby his termination was unjustified and inequitable, would amount to being perverse in the present context. While I agree that the Employee Applicant should be awarded compensation as held by the Learned President of the Labour Tribunal, the reasoning for awarding the same should have ideally been that the termination of the employment of the Employee Applicant was disproportionate to the conduct of the Applicant, thereby amounting to an unjustifiable and inequitable termination of employment. Therefore, only part of the order of the Labour Tribunal would be perverse. It must also be noted that while it has not been provided for under the first question of law, the decision of the High Court judge not to compensate the Applicant would amount to being perverse, and therefore, it can be said that part of the High Court Judgement also can be construed as perverse.

In answering the second question of law, as it is only a single factual finding that the Labour Tribunal has failed to identify, thereby making the Order only partially perverse, an appeal should have been allowed only in relation to this single finding and not the case in its entirety. Even having considered the entire case, the Learned High Court Judge having identified that the Applicant to be negligent, has rectified the lapse in the Labour Tribunal order. Thus, I accept the finding of the Learned High Court Judge that the Applicant was negligent. However, the final decision arrived at by the High Court not to compensate the Applicant is what would render the High Court judgement as perverse. Therefore, while I understand that the second question of law

requires this Court to consider whether the High Court erred in allowing this appeal, in the present context, the High Court did not err in allowing an appeal of the factual finding regarding the negligence of the Applicant but has erred in dismissing the instant case without awarding the Applicant any compensation.

In conclusion, I set aside the Judgement of the Learned High Court Judge and restore the decision of the Labour Tribunal subject to alterations. I am in agreement with the quantum of compensation which has been awarded by the Labour Tribunal. Therefore, the total amount of Nine hundred and thirty-six thousand Rupees (Rs. 936,000.00) is awarded as compensation payable to the Applicant by the Respondent within three months of this Judgement. If money is already deposited at the Labour Tribunal, this amount along with accrued interest, if any, is to be released to the Applicant. If not, the total amount of Nine hundred and thirty-six thousand Rupees (Rs. 936,000.00) plus legal interest applicable is payable to the Applicant.

Appeal Allowed subject to alterations.

JUDGE OF THE SUPREME COURT

B. P. ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

K.P. FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against a judgment of the Court of Appeal.

SC Appeal No. 66/2013

SC (Special Leave) Application No. 28/2013

CA Writ Application No. 878/2007

Neville Anthony Keil,
50, Jambugasmulla Mawatha,
Nugegoda.

PETITIONER

Vs.

1. Maharagama Urban Council,
   Maharagama

2. Kanthi Kodikara,
   Chairman,
   Maharagama Urban Council,
   Maharagama

RESPONDENTS

AND NOW BETWEEN

Neville Anthony Keil,
50, Jambugasmulla Mawatha,
Nugegoda.

PETITIONER- APPELLANT

Vs.

1. Maharagama Urban Council,
   Maharagama

2. Kanthi Kodikara,
   Chairman,
   Maharagama Urban Council,
   Maharagama

RESPONDENT-RESPONDENTS

Before : **P. PADMAN SURASENA, J**
YASANTHA KODAGODA, PC, J
MAHINDA SAMAYAWARDHENA, J

Counsel : Shiral Lakthilaka for Petitioner-Appellant
S. M. S. Jayawardena for Respondent-Respondent

Argued on : 13-02-2023

Decided on : 15-09-2023

P Padman Surasena J

The Petitioner-Appellant filed a petition before the Court of Appeal praying *inter alia*, a Writ of Certiorari to quash the decision of the Maharagama Urban Council contained in item No. 10 of the Local Government Notice published in Gazette No. 1461/ 2006 dated 01-09-2006. The said Notice published in the afore-stated Gazette was to vest a by-lane in the Maharagama Urban Council (1st Respondent-Respondent) in terms of Sections 50 and 52 of the Urban Councils Ordinance. The said by lane has been depicted in the sketch produced marked **P 5(c)** which was annexed to the petition filed in the Court of Appeal. As per the said sketch, the said by-lane commences from the property bearing the Assessment No. 48 in Jambugasmulla Mawatha in Nugegoda and runs up to the property bearing the Assessment No. 50. The properties bearing the Assessment Nos. 48/1, 48/2 and 48/3 are on one side of that by-lane and the properties bearing the Assessment Nos. 52, 52/1 50/1 and 50 are on the other side of the by-lane.

At the outset, I must state that the Petition dated 16-10-2007 filed by the Petitioner in the Court of Appeal which had sought the above Writ, has not set out any legal basis upon which the Court of Appeal could have acted in order to consider issuing the writ prayed for by the Petitioner-Appellant.

When filing a writ application any petitioner is obliged to state in its petition the legal basis upon which he/she seeks the writs prayed for in its petition. This is necessary because the court is required to consider such application by applying the relevant law applicable to the legal basis stated in such application. For example, some of such bases which could be cited in such petitions are illegality, irrationality and procedural impropriety etc. whatever such basis would be, it must be clearly discernible from the petition filed by such petitioner in Court. This is because Article 140 of the Constitution has only empowered the Court of Appeal to grant and issue, **according to law**, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against any public authority. The law applicable to one ground differs from another and that is why the compliance of the requirement to clearly state the legal basis in a petition is necessary.

There is another important reason as to why this should be so. The public authorities who have been made respondents to such writ applications are required to defend themselves against the allegations that may have been levelled against them. They generally conduct their defences with the help of legal assistance from lawyers. Thus, it is of paramount importance not only for any such respondent in such writ application, but also for his/ her lawyers who would appear for such respondent, to know exactly the legal basis upon which a writ has been sought from court against such respondent under Article 140 of the Constitution. Any petition which does not comply with the afore-said requirement at least remotely, would therefore be a petition which is misconceived in law.

A closer look at the Petition filed by the Petitioner-Appellant, shows that the several averments in the Petition only contain the sequence of events of certain incidents. They merely have set out the factual background of a dispute to the relevant by-lane that had existed between the Petitioner-Appellant and certain other parties who are residents of some of the afore-mentioned plots of land situated by the side of the relevant by-lane. Having considered the several averments of the Petition filed by Petitioner-Appellant in the Court of Appeal, I am of the view that the said Petition is a petition misconceived in law as it does not set out any legal basis upon which the Court of Appeal could have considered the prayers for the issuance of writs.

I also have to observe at this juncture the followings: the Petitioner-Appellant has not made any of those persons who were involved in the above dispute, parties to the writ application he had filed in the Court of Appeal; some of the said parties had in fact subsequently filed an application to intervene in to the case filed by the Petitioner-Appellant in the Court of Appeal; the Petitioner-Appellant had objected to their intervention in the Court of Appeal; the Court of Appeal by order dated 07-03-2008 had upheld this objection and refused permission for those parties to intervene in this case. I observe that one such party that sought intervention in this case was Gamini Jayaweera Fernando who is admittedly the owner of the soil rights of this by-lane.[1]

In my view, it is not reasonable for the Petitioner-Appellant to take such high ground to ensure the exclusion of the afore-stated relevant persons involved in this dispute from these proceedings. In as much as the Petitioner-Appellant has agitated for some grievance, the afore-stated parties are also interested in placing their side of the story before court. This is particularly because, this is basically a dispute between two parties rather than a dispute between the Petitioner-Appellant and the relevant Urban Council. Indeed, the Urban Council has taken steps to publish the impugned Gazette notification produced marked **X 3**[2] (in the Petition to this Court dated 24-02-2012), only at the request of the afore-stated parties who made such request in **X 10** in the Petition to this Court dated 24-02-2012. For the above reasons, I am of the view that the Petitioner-Appellant had failed to add necessary parties to his petition filed before the Court of Appeal and that would be fatal to his case.

The Petitioner-Appellant relies on the Deed No. 416 attested on 01-04-1993 by Singappuliarachchige Don Susil Premajayanth Nortary Public[3], to assert his right to the disputed by-lane. However, both according to the Petitioner-Appellant's Deed and his Pleadings, he has only acquired a servitude of a Right of Way over the relevant disputed by-lane. Thus, his interest to the relevant by-lane in the circumstances of this case, must be viewed only as an interest of a person who has acquired such servitude of right of way over that by-lane.

The 1st Respondent-Respondent in his statement of objections dated 04-04-2008 filed before the Court of Appeal[4], has taken up the position that afore-stated Gamini Jayaweera Fernando who enjoys the soil rights of the relevant by-lane, together with several others occupying the

[1] The Petitioner-Appellant had admitted this fact in para 9 of his petition dated 16-10-2011.

[2] Also produced marked **P 2** in the Petition to the Court of Appeal dated 16-10-2007.

[3] Produced **X 4** in the Petition to the Supreme Court dated 24-02-2012 and **P 1** in the Petition to the Court of Appeal dated 16-10-2007

[4] Produced marked **X 9** in the Petition to the Supreme Court dated 24-02-2012.

afore-stated several other plots of lands situated by the side of this by-lane, by the document produced marked **R 2**[5] (in the Court of Appeal) had requested the Urban Council to develop and maintain this by-lane. **R 2** is dated 21-09-2002 and signed by: Gamini Fernando (Owner of Assessment No. 50/1, 50/A and 50/B); D. S. Weerasuriya (Owner of Assessment No. 52); R. P. P. A. Samarasinghe (Owner of Assessment No. 48); S. J. P. A. Samarasinghe (Owner of Assessment No. 48/2); and S. P. A. Samarasinghe (Owner of Assessment No.48/3).

According to Deed No. 1596 attested on 14-09-1996[6], the original owner Jayaweerage David Fernando who is the father of Jayaweerage Gamini Fernando had gifted the properties bearing Assessment Numbers 50 and 50/1 and the relevant by-lane to said Jayaweerage Gamini Fernando. The three plots of land above mentioned, appear to have been depicted in plan No. 2470 dated 30-01-1990 prepared by D. C. Hettige Licensed Surveyor. The two plots of land bearing assessment Nos. 50 and 50/1, are Lot Numbers 1 and 2 depicted in that plan and the by-lane is depicted as Lot 2 in the said plan. The Petitioner-Appellant has not produced this plan in Court. According to deed No. 1596, Lot 2 is a road reservation dedicated for common use. Be that as it may, as per the Second Schedule of the Deed No. 1596 dated 14-09-1996 attested by S. R. Kalurathna Notary Public, Gamini Fernando has soil rights over the strip of land (in dispute) in extent of A0: R0: P0630 which is the by-lane relevant to this case. However, the Petitioner-Appellant's entitlement is only limited to the use of it as a right of way.

Since the Urban Council has acted under Sections 50 and 52 of the Urban Councils Ordinance, let me at this juncture reproduce those two sections here for convenience.

Section 50 of the Urban Councils Ordinance:

Power of Urban Council to construct new, and improve existing, thoroughfares.

The Urban Council of each town may within that town—

(a) lay out and construct new roads, streets, bridges, or other thoroughfares;

(b) widen, open, or enlarge any street or other thoroughfare (not being a principal thoroughfare);

[5] Also produced marked **X 10** in the Petition to the Supreme Court dated 24-02-2012 and produced marked **Z** in the Counter Objections filed by the 1st to the 5th intervenient Petitioners in the Court of Appeal on 14-02-2008.

[6] Produce marked **R 1** in the statement of objections filed before the Court of Appeal on 04-04-2008.

> *(c) turn, divert, discontinue, or stop up, whether in whole or in part, any public street or other thoroughfare (not being a principal thoroughfare),*
>
> *making due compensation to the owners or occupiers of any property required for such purposes, or any person whose legal rights are thereby infringed.*

Section 52 of the Urban Councils Ordinance:

> *Gifts of land required for diversion or enlargement of thoroughfares.*
>
> *If in connexion with the turning, diversion, widening, opening, enlargement or improvement of any thoroughfare, it becomes necessary for any Urban Council to take possession of the land of any person for public use, and if the person claiming to be the owner of the land desires to make a free gift of the land to the Council for such purpose and to renounce all claim to compensation therefor, a record in writing to that effect duly signed by such person in the presence of the Chairman or of a person authorized by the Chairman in writing in that behalf shall be sufficient to vest the land in the Council. No such record shall be deemed to be invalid or of no effect in law by reason only that the requirements of section 2 of the Prevention of Frauds Ordinance have not been complied with as to attestation by a notary public and by witnesses.*

According to Section 52 of the Urban Councils Ordinance when the owner of the land makes a free gift of his land, to the Council for the purpose of developing it as a roadway, renouncing all his claims for compensation thereto, it would be sufficient for such land to be vested in the Council. The only other requirement under the above section is that such gift must be in writing, duly signed by such person in the presence of a Chairman or a person authorized by the Chairman in writing. The above requirements can be broken down to four distinct items to facilitate its convenient analysis. They are as follows:

1. The owner of the land who desires to make a free gift of the land must make a record in writing of his desire to make a free gift of the land to the Council for such purpose.
2. He must renounce all claims to compensation thereto.
3. He must duly sign such record by himself.
4. The signing must be done in the presence of the Chairman or of a person authorized by the Chairman in writing in that behalf.

Another important factor which needs specific attention is that the said section has also relaxed the application of Section 2 of the Prevention of Frauds Ordinance, which is the requirement of such writing to have been attested by a Notary Public and witnesses. Thus, such record will not be invalid for non-compliance of Section 2 of the Prevention of Frauds Ordinance. In other words, according to Section 52 of the Urban Councils Ordinance, the requirements of attestation by a Notary Public and making such record in the presence of witnesses are not mandatory requirements for a valid vesting as per that section.

Let me now consider the letter (produced marked **X 10**) written by said Gamini Fernando, gifting the relevant soil rights to the 1st Respondent Council has complied with the above requirements. It is this document that the 1st Respondent-Respondent relies on, to convince this Court that the 1st Respondent Urban Council had complied with the provisions in Section 52 of the Urban Councils Ordinance.

Let me consider the afore-stated first requirement. The first requirement is the presence of a record in writing, and this is satisfied by the letter produced marked **X 10** by the Respondents-Respondents. In the letter **X 10**, the signatories clearly and unconditionally request Maharagama Urban Council (the 1st Respondent-Respondent) to take steps to acquire this by-lane and develop it as a tarred public roadway. They also request the 1st Respondent-Respondent to fix streetlamps for the common benefit of all users. This letter by itself is evidence that the first of the afore-stated requirements has been complied with.

The second requirement is a renunciation of compensation by those who gift it to the Urban Council. What is required according to Section 52 is a record in writing to that effect. Looking at **X 10** as a whole, it is clear that those who had gifted the by-lane to the Urban Council have not sought any compensation in that regard from the Urban Council. They have not even made any such remote indication that they anticipate any compensation when the by-lane is vested in the Urban Council. For those reasons, I hold that there has in fact been a renunciation of compensation for the land by those who had gifted it to the Urban Council. Therefore, I hold that the second of the above requirements has also been complied with.

Thirdly, since the owner of the soil rights who made this free gift to the Council is a signatory to the letter **X 10**. Thus, the third requirement that the record must be signed by the maker of such free gift has also been complied with.

The fourth requirement is the signature of the Chairman, or an individual appointed by the Chairman in writing. On the face of it there is no record to establish that the letter **X 10** was signed before either the Chairman of the Urban Council, or an individual appointed by the Chairman.

The letter **X 10** has been directly addressed to Chairman Maharagama Urban Council which has been received by it according to the stamp placed thereon by Maharagama Urban Council).

The letter **X 10** indicates that it has been copied to R. H. Ranjith, a Member of Maharagama Urban Council.

The letter dated 10-02-2003 addressed to the Chairman Maharagama Urban Council by R. H. Ranjith (the member of the Maharagama Urban Council) has also made the same request to the 1st Respondent-Respondent. The Chairman of Maharagama Urban Council who stands as the 1st Respondent-Respondent in this case has never ever challenged the fact that the free gift has in fact been made as per the letter **X 10** by its signatories. Indeed, the position taken up by the 1st Respondent-Respondent is that Maharagama Urban Council set the rest of the procedure in motion as per the request in letter **X 10**. The said procedure was to have the by-lane vested in the Maharagama Urban Council in terms of Section 52 of the Urban Councils Ordinance. The Petitioner-Appellant himself, had admitted that the relevant vesting of the by-lane had been initiated upon a proposal presented to Maharagama Urban Council by one of its Member[7].

While the 1st Respondent-Respondent or its Chairman has never ever challenged the letter **X 10**, the fact remains that they had indeed acted and relied upon **X 10**.

It is also of paramount importance that the 1st Respondent-Respondent Maharagama Urban Council, had even proceeded to conduct an inquiry before it had acted on the request made in **X 10**. This inquiry was conducted in view of the objection raised by the Petitioner-Appellant to the proposed vesting. It is relevant to note that even the Petitioner-Appellant has admitted that it was upon his request for an inquiry that the 1st Respondent-Respondent had summoned all parties to the dispute and proceeded to hold an inquiry. The Petitioner-Appellant had admittedly placed all material facts before this inquiry.[8]

On the other hand, it is not the position of the Petitioner-Appellant in the Court of Appeal, that **X 10** was invalid because it did not comply with the aforementioned 4th requirement. I find no trace of anything even remotely connected to non-compliance of Section 52 has ever been agitated as a ground for claiming the Writ of Certiorari in the Petition filed by the Petitioner-Appellant in the Court of Appeal. Therefore, that ground appears to be an afterthought entertained by the Petitioner-Appellant after conclusion of the case in the Court of Appeal. The Respondents have had no opportunity to meet or answer such ground when they had presented their case in the Court of Appeal. This appeal has been lodged against the Court of Appeal decision pronounced in respect of the case it had heard. Therefore, this Court cannot permit the Petitioner-Appellant to advance a case materially different to what was presented before the original court. It is trite law that no person in the course of hearing the

[7] Paragraph 17 of Petition dated 16-10-2007 filed in the Court of Appeal.

[8] Paragraph 11 of Petition dated 16-10-2007 filed in the Court of Appeal.

Appeal, can advance a case materially different to what was presented before the original court.

For the above reasons, I am not inclined to hold that the vesting of the by-lane in Maharagama Urban Council through the process that the 1st Respondent had followed, is bad in law merely because one could not find any writing on the face of letter **X 10** to the effect that it was signed in the presence of the Chairman or of a person authorized by Chairman in writing in that regard. This is particularly because the authenticity of **X 10** was never in issue before the Court of Appeal.

Perusal of the Petition presented to the Court of Appeal by the Petitioner-Appellant produced marked **X 2** in this case, shows clearly that the main ground on which the Petitioner-Appellant had presented his case to the Court of Appeal is that the primary court of Gangodawila in an application filed before it under Section 66 of the Primary Courts Procedure Act, had made an order on 12-09-1996[9] that Premasiri Gamage (owner of assessment No. 52 Jambugasmulla Mawatha), had no right to use the right of way over this by-lane. The Petitioner-Appellant had also highlighted the fact that the High Court of Colombo upon an Application for Revision filed in that regard by said Premasiri Gamage, had affirmed the aforesaid primary court Order[10]. It was the position of the Petitioner-Appellant in the Court of Appeal that aforesaid Premasiri Gamage who had claimed a right of way in the aforesaid Primary Court case, has gained improper advantage due to this vesting despite a Primary Court ruling against him. With regard to this argument, suffice it to state here that any entitlement or non-entitlement for a servitude of Right of Way under Section 66 of the Primary Courts Procedure Act cannot hinder such person using a public road even if it is the same roadway which had earlier stood as a private road. Therefore, in my view this is not a valid ground for the Court of Appeal to issue a Writ of Certiorari which the Petitioner-Appellant had sought from it.

Although the Petitioner-Appellant in the Court of Appeal had stated that the 1st Respondent-Respondent had proceeded with the process of vesting without a proper technical report being obtained I see no merit or substance in such argument. This is because the identity of the by-lane was never in dispute between the parties and was clear in everyone's mind throughout the proceedings.

For the reasons set out above and having regard to the nature of the questions of law in respect of which this Court has granted Special Leave to Appeal I hold as follows:

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[9] Produced marked **P 7(b)** in the Petition to the Court of Appeal dated 16-10-2007 and produced marked **X 5** in the Petition to the Supreme Court dated 24-02-2012.

[10] Produced marked **P 8** in the Petition to the Court of Appeal dated 16-10-2007 and produced marked **X 6** in the Petition to the Supreme Court dated 24-02-2012.

I. The letter dated 21-09-2002 produced marked **X 10** can be taken as a "free gift" within the meaning of Section 52 of the Urban Councils' Ordinance.

II. the vesting of the disputed private roadway by the Gazette Notification No. 1461 dated 01-09-2006 (produced marked **X 3**) complied with the imperative requirements in Section 52 of the Urban Councils Ordinance.

III. The fact that the Petitioner-Appellant has not signed the letter dated 21-09-2002 **X 10** is not relevant as he does not have soil rights to the by-lane. His right of way can continue without any hindrance even after vesting the by-lane in the Urban Council as a public road.

I hold that the Court of Appeal has correctly held that in the circumstances of this case, there is no illegality or irrationality in the vesting. I also hold that the Court of Appeal has correctly held that if the Petitioner challenges the free gift of the said by-lane by said Gamini Fernando on the basis that he has no soil rights on the said strip of land it cannot be decided in this case as it involves disputed questions of facts.

I proceed to dismiss this appeal but without costs.

JUDGE OF THE SUPREME COURT

Yasantha Kodagoda PC J

I agree,

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 189/2014

HCCA of Galle Case No.
SP/HCCA/GA/93/2005 (F)
DC Balapitiya Case No. 1103/L

Thennakoon Mudiyanselage Leesin
L. S. Mawatha,
Uragasmansandiya.
(Deceased)
PLAINTIFF

Iddamalgoda Dissanayakalage Winson Ranasinghe
Magala South,
Karandeniya.
SUBSTITUTED PLAINTIFF

-Vs-

Akuraliya Liyanawaduge Piyadasa
No. 29,
New Road,
Ambalangoda.
DEFENDANT

AND THEN BETWEEN

Akuraliya Liyanawaduge Piyadasa
No. 29,
New Road,
Ambalangoda.

(Deceased)

DEFENDANT-APPELLANT

D. A. Piyaseeli
No. 29,
New Road,
Ambalangoda.

SUBSTITUTED DEFENDANT-APPELLANT.

-Vs-

Iddamalgoda Dissanayakalage Winson Ranasinghe
Magala South,
Karandeniya.

SUBSTITUTED PLAINTIFF-RESPONDENT

AND NOW BETWEEN

D. A. Piyaseeli
No. 29,
New Road,
Ambalangoda.

SUBSTITUTED DEFENDANT-APPELLANT-APPELLANT .

-Vs-

Iddamalgoda Dissanayakalage Winson Ranasinghe
Magala South,
Karandeniya.

(Deceased)

SUBSTITUTED PLAINTIFF-RESPONDENT- RESPONDENT

1B1. Ariyadasa Galappaththi

1B2. Deshika Nayomani Galappaththi

1B3. Lathika Ruwani Galappaththi

1B4. Sandali Bhagya Galappaththi
All of,
No. 45/1,
Magala - South,
Karandeniya.

1B5. Thennakoon Mudiyanselage Vijitha Nandani
Udyana Mawatha,
Uragasmansandiya.

SUBSTITUTED PLAINTIFF RESPONDENT-RESPONDENTS

BEFORE : **P. PADMAN SURASENA, J.**
KUMUDINI WICKREMASINGHE, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Mr. Rohan Sahabandu, PC with Ms. Chathurika Elvitigala and Ms. S. Senanayake for substituted Defendant-Appellant-Appellant.

Mr. Amrith Rajapaksa for the 1 B 5 substituted-Plaintiff- Respondent-Respondent instructed by Ms. G.S. Wijethunga.

ARGUED &

DECIDED ON: 19-09-2023.

P. PADMAN SURASENA, J.

The original Plaintiff in this case had filed plaint against the original Defendant praying *inter alia* :

i. for a declaration that the Plaintiff is the owner of the land relevant to this case.
ii. for an order ejecting the Defendant and his representatives from the relevant land.

The Defendant filing the amended answer has taken up the position that he had transferred this land by Deed No. 11763 dated 16-05-1980 to the Plaintiff as he was in an urgent need of money at or about the time he had executed that deed.

Indeed, it must be observed that in paragraph 5 of the answer, it is the position of the Defendant that he was in need of this money at the time of executing the deed or before the said execution. It was in following terms that the Defendant had averred that position in paragraph 5 of the answer:

" ඔප්පුව ලියා අත්සන් කරන ලද දිනයට හෝ එදිනට පෙරාතුව මෙහි විත්තිකරු හට ඉතාමත් හදිසි මුදල් අවශ්යතාවයක් ඇතිවූ බව මෙම විත්තිකරු ප්රකාශ කර සිටී"

The parties have recorded an admission that the Deed No. 11763 dated 16-05-1980 has been executed. It is by the said Deed No. 11763 that the Plaintiff had purchased the land from the Defendant. At the outset, it must be observed that the following issues have been raised by the Defendant.

Issue No. 05.

"සංශෝධිත උත්තරයේ 05 වන ඡේදයේ සඳහන් පරිදි 1980-05-16 දින හෝ තදාසන්න දිනයකදී පමණ විත්තිකරුට ඉතාමත් හදිසි මුදල් අවශ්යතාවයක් පැන නැගුනේද"

Issue No. 06.

"සංශෝධිත උත්තරයේ 06 වන ඡේදයේ සඳහන් පරිදි විත්තිකරු, පැමිණිලිකරුගෙන් රු. 10,000 ක මුදල් ණයට ලබාදෙන ලෙසට ඉල්ලා සිටින ලද්දේද"

Issue No. 07.

"සංශෝධිත උත්තරයේ 07 වන ඡේදයේ සඳහන් පරිදි පැමිණිලිකරු එම මුදල ලබා දීමට මෙම නඩුවට අදාළ ඉඩම ඇපයක් වශයෙන් තබන ලෙස ඉල්ලා සිටින ලද්දේද"

Since the above issues have been raised by the Defendant, one would expect the Defendant to have adduced evidence relevant to those issues. On the other hand, it is the Defendant who claims that there is a constructive trust in this case and that he did not intend to part the beneficial interest to the Plaintiff by the execution of the said deed. Therefore, the burden is on the Defendant to prove that there in fact exists a constructive trust.

It is the position of the Defendant that he had borrowed Rs. 10,000/- from the Plaintiff in order to purchase this land from Siripala. It is his evidence that he had collected Rs. 15,000/- from his garage and borrowed Rs. 10,000/- more from the Plaintiff and used the total sum of money i.e., Rs. 25,000/- to pay Siripala to purchase this land.

At the outset, it must be noted according to Deed No. 11634 that the Defendant had purchased a land from Siripala on 31-03-1980 for a sum of Rs. 25,000/-.

According to the Plaintiff's Deed No. 11763, the Plaintiff had purchased half of this land from the Defendant on 16-05-1980, which is two months after the date the Defendant had purchased the whole land from Siripala.

Therefore, the evidence of the Defendant in this regard taken alone, in our view, does not establish the fact that he had borrowed Rs. 10,000/- from the Plaintiff for the purpose he claims, as per the issues raised. However, since the court must consider all circumstances together in a case of this nature, we will proceed to consider the other aspects of the case as well.

Plaintiff has produced the document marked **P 5** signed by the Defendant. **P 5** is dated 29-03-1980. In **P 5**, the Defendant has stated that he has accepted Rs. 20,000/- from the Plaintiff agreeing to sell the relevant land to the Plaintiff. The words used in **P 5** are: **"ලීසින් මුදලාලි මහතාට විකිණීමට පොරොන්දු වී අද දින එම මහතාගෙන් ලංකාවේ වලංගු මුදලින් රු. 20,000 ඉල්ලා සම්පූර්ණයෙන් ගැන භාරගතිමි"**

Although the learned Counsel who appeared for the Defendant had stated to Court in the course of the trial, that this document must be marked subject to proof, we observe that the Defendant had admitted the fact that he has signed this document. However, it is the position of the Defendant that he had only signed a blank document. The Defendant had been content with the bare statement that he had only signed a blank document. He had failed to adduce any further proof in that regard. As opposed to that, since the Defendant had admitted the fact that he has signed this document, we cannot hold that the Plaintiff has not proved on a balance of probability, the document marked **P 5**.

We observe that the document **P 5** is dated 29-03-1980, which is a date two days before the date on which the Deed No. 11634 was executed for Rs. 25,000/-. (Deed No. 11634 was executed on 31-03-1980)

Indeed **P 5** establishes or corroborates the fact that the Plaintiff pursuant to **P 5**, had indeed proceeded to purchase on 16-05-1980, Lot 02 of Plan No. 838 dated 12-05-1980 prepared by D. G. Mendis Licenced Surveyor, from the Defendant for Rs. 10,000/-. It must be noted that what the Defendant had promised in **P 5** is to sell half of that land to the Plaintiff. Therefore, we do not see any discrepancy or contradiction between **P 5** or the making of **P 5** and the execution of the Deed No. 11763 on 16-05-1980 produced marked **P 3**. Thus, **P 5** is not sufficient to establish that the Defendant had not intended to part with his beneficial interest in the property to the Plaintiff. The presence of Plan No. 838 dated 12-05-1980 would also negate such a position.

Since the Defendant had only adduced his bare statement that he signed the blank document **(P 5)**, having regard to the totality of evidence adduced in the case, on a balance of probability, we are inclined to accept the evidence of the Plaintiff with regard to this aspect.

It was argued on behalf of the Defendant that the fact that the Defendant is still in possession, must be treated as an attendant circumstance in this case.

The fact that the Defendant is in possession of the relevant land is not disputed by the Defendant. However, learned counsel for the Plaintiff referred us to page 236 of the appeal brief to convince us that the Plaintiff appears to have permitted the Defendant directly or indirectly to continue to occupy the land as there was a friendship between them. We also observe that it is in evidence that the Plaintiff and the Defendant are not strangers to each other as the Plaintiff had taken his vehicles for the purpose of repair, to the garage run by the Defendant.

In view of such facts, we are not inclined to hold that the mere continuation of possession by the Defendant would itself amount to an attendant circumstance in this case.

Another feature that is present in this case is the fact that it was the Plaintiff who had paid the stamp fees and the fees of the Notary. Moreover, we also observe that the Plan No. 838 produced marked **P 1** has been prepared on 12-05-1980. It was pursuant to this plan that the Deed No. 11763 was executed by the Defendant on 16-05-1980. The payment of the stamp fees and the Notary's fees by the Plaintiff, taken together with the fact that the Plan No. 838 has been prepared just four days prior to the deed executed by the Defendant, in our view, is not in favor of establishing a constructive trust as claimed by the Defendant, but indicative of the fact that the Defendant had intended to part with his beneficial interest in the property to the Plaintiff.

Learned President's Counsel for the Defendant also submitted that there was a construction in the nature of a permanent structure which occupies both Lot 1 and Lot 2 in Plan No. 838 (**P 1**). Based on that fact, the learned President's Counsel for the Defendant sought to argue that this fact would be indicative of the fact that the Defendant may never have intended to part with Lot 2 to the Plaintiff as his garage was partly situated in Lot 2 as well.

However, according to the document produced by the Defendant marked **V 6** we observe that the said structure is not a permanent structure.

This court on the date the Leave to Appeal Application relevant to this appeal was supported, by its order dated 15-10-2014 has granted Leave to Appeal on the following question.

Do the facts and circumstances prove the existence of a trust?

For the foregoing reasons, we proceed to answer the question of law in respect of which this court has granted Leave to Appeal, in the negative.

We are of the view that both the learned District Judge and the learned Judge of the Provincial High Court of Civil Appeals had come to the correct conclusion. We proceed to affirm both the judgment dated 11-01-2005 pronounced by the learned District Judge and the judgment dated 10-07-2012 pronounced by the learned Judge of the Provincial High Court of Civil Appeals.

We proceed to dismiss this appeal without costs.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT.

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT.

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT.

AG/-

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

In the matter of an Appeal under Section 5 (C) of the High Court of the Provinces (Special Provisions) (Amendment Act) No. 54 of 2006 read with Article 128 of the Constitution of the Republic of Sri Lanka.

SC/Appeal No. 74/2017

SC/HCCA/LA/No. 412/2015

SP/HCCA/TA/16/2012F

D.C. Tangalle 2092/P

Jasin Basthiyan Arachchige
Chandrawathie **(Deceased)**,
Kudaheela, Beliatta.

PLAINTIFF

Thirimamuni Badra Wattegama
Godakumbura, Beliatta.

SUBSTITUTED PLAINTIFF

Vs.

1. Jasin Basthiyan Arachchige
   Karunawathie
   No. 5B, Palliya Road, Pelawatta,
   Battaramulla.

2. Jasin Basthiyan Arachchige
   Gunawathie
   Wadumaduwa, Thalalle North,
   Kekanadura.

3. Widana Pathiranage Sunny.
   (Deceased)

3A. Widana Pathiranage Seetha

Egodahawatta, Kambussawela,
Beliatta.

DEFENDANTS

And Then Between

3A. Widana Pathiranage Seetha
Egodahawatta, Kambussawela,
Beliatta.

3A DEFENDANT-APPELLANT

Vs.

Thirimamuni Badra Wattegama
Godakumbura, Beliatta.

SUBSTITUTED PLAINTIFF–RESPONDENT

1. Jasin Basthiyan Arachchige
Karunawathie
No. 5B, Palliya Road, Pelawatta,
Battaramulla.

1st DEFENDANT-RESPONDENT

2. Jasin Basthiyan Arachchige
Gunawathie
Wadumaduwa, Thalalle North,
Kekanadura.

2nd DEFENDANT-RESPONDENT

And Now Between

Thirimamuni Badra Wattegama
Godakumbura, Beliatta.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT

Vs.

1. Jasin Basthiyan Arachchige
   Karunawathie
   No. 5B, Palliya Road, Pelawatta,
   Battaramulla.

1st DEFENDANT-RESPONDENT-RESPONDENT

2. Jasin Basthiyan Arachchige
   Gunawathie
   Wadumaduwa, Thalalle North,
   Kekanadura.

2nd DEFENDANT-RESPONDENT-RESPONDENT

3A. Widana Pathiranage Seetha
Egodahawatta, Kambussawela,
Beliatta.

3A DEFENDANT-APPELLANT-RESPONDENT

BEFORE : **P. PADMAN SURASENA, J**
ACHALA WENGAPPULI, J &
K. PRIYANTHA FERNANDO, J

COUNSEL : W. Dayaratne, PC with Ms. R. Jayawardena, Ms. M. Dissanayake and Ms. G. Wickremarachchi for the Plaintiff-Respondent-Appellant instructed by Ms. C. Dayaratne.

Dr. Sunil Cooray with Ms. Sudarshani Cooray for the Defendant-Appellant-Respondent.

ARGUED &
DECIDED ON: 20th September 2023

P. PADMAN SURASENA, J

Court heard the submissions of the learned President's Counsel for the substituted Plaintiff-Respondent-Appellant and also the submissions of the learned Counsel for the substituted 3rd Defendant-Appellant-Respondent and concluded the argument of the case.

During the course of the hearing, it was brought to the notice of Court that the questions of law set out in Paragraph 31 (b), (c), (f) and (g) of the petition dated 06-12-2015, in respect of which this court had granted Leave to Appeal are not clear enough to proceed with the argument on the facts and circumstances prevailing in this case. This fact was admitted by the learned Counsel for both parties who urged the Court to reframe afresh, questions of law upon which the argument could effectively proceed. Accordingly, the Court decided that the question of law upon which the argument should proceed to be as follows.

"Whether the 3rd Defendant in the present partition action has prescribed to the corpus of the instant partition action?

Learned Counsel for both parties agree that the corpus relevant to the instant case is Lot 2 in Plan No. 1730 dated 21-01-1962 which is the Final Plan in the Partition Action bearing No. DC Tangalle P 376.

By virtue of the said Final Partition Decree (dated 19-03-1962) in DC Tangalle case No. P 376, four persons namely; the Plaintiff Jasin Bastian Arachchige Chandrawathie; the 1st Defendant

Jasin Bastian Arachchige Karunawathie; the 2nd Defendant Jasin Bastian Arachchige Gunawathie; and another person by the name of Jasin Bastian Arachchige Betin Nona; had become entitled to said Lot 2 in the Final Plan No. 1730 dated 21-01-1962.

Subsequently said Jasin Bastian Arachchige Betin Nona by virtue of Deed No. 2051 dated 16-12-1975, had transferred her entitlement (i.e., ¼ share of Lot 02) to the 3rd Defendant Vidana Pathiranage Sunny.

It was on the above basis that the Plaintiff in this case had filed the Plaint against the afore-mentioned three Defendants praying for an order of Court to partition the corpus relevant to this case amongst them in equal shares.

Let me now refer to Lot No. 3 in that plan. It must be noted that Lot 2 and Lot 3 are adjoining lots in the Final Plan No. 1730 dated 21-01-1962. By virtue of the same Partition Decree in DC Tangalle case No. P 376, Lot No. 3 in that plan had been allotted in DC Tangalle case No. P 376, to the 3rd Defendant of the present action and to another. Thus, the 3rd Defendant had become a co-owner of Lot 3 since 1963 (by virtue of the said Partition Decree in DC Tangalle case No. P 376) and a co-owner of Lot 2 since 1975 (by virtue of Deed No. 2051 dated 16-12-1975).

Subsequent to the partition decree being entered, the Fiscal is reported to have handed over the possession of Lot 2 to the afore-mentioned four persons who became entitled to that Lot in 1963 (i.e., by virtue of the Partition Decree in DC Tangalle case No. P 376). Thus, by the year 1963, each of those persons who became entitled to Lot 2 by virtue of the partition decree in DC. Tangalle Case No. P 376 had become entitled to shares of Lot 2.

The 3rd Defendant (Vidana Pathiranage Sunny) in the present action in his Statement of Claim had taken up the position that he had prescribed to the corpus (Lot 2) in the instant Partition Action. However, the learned District Judge by her judgment dated 06-03-2012 had ordered the partition of the corpus.

Being aggrieved by the said Judgment pronounced by the District Court, the 3rd Defendant had appealed to the Provincial High Court of Civil Appeals holden at Tangalle. The Provincial High Court of Civil Appeals by its judgment dated 29-10-2015 had concluded that the 3rd Defendant has prescribed to the corpus and it was on that basis that the Provincial High Court

of Civil Appeals had proceeded to direct that the action of the Plaintiff be dismissed. The Plaintiff-Respondent-Appellant in this appeal has challenged the said judgment pronounced by the Provincial High Court of Civil Appeals.

As has already been mentioned above, although this Court had earlier granted Leave to Appeal in respect of four questions of law, in the course of the hearing, with the concurrence of the learned Counsel for both parties, Court has now formulated the question as to whether the 3rd Defendant in the present partition action has prescribed to the corpus of the instant partition action. Thus, that is the sole question we have to decide in this case.

At the outset, it must be noted that the Plaintiff had only led the evidence of one witness. The said witness is the daughter of the original Plaintiff who now stands as the substituted Plaintiff.

From the evidence adduced in this case, it is not the case of the Plaintiff that they had ever been in possession of the corpus of this action. To the contrary, the witnesses for the Plaintiff under cross examination has admitted that neither she nor her mother was permitted to enter into the corpus and indeed were prevented by the 3rd Defendant since March 1963. She also has admitted that her mother (the original Plaintiff) had attempted to take the possession of the corpus from the 3rd Defendant through some previous litigations. Therefore, it is clear that the Plaintiff has never been in possession of this land since 1963. This is after the Fiscal had handed over the possession of this land to the four persons who became entitled to that land in 1963 by virtue of the Partition Decree in DC Tangalle case No. P 376.

Learned President's Counsel for the Plaintiff relied on an averment in the answer filed in a different case (Case No. L/1189) by the 3rd Defendant in the instant case. It transpired during the hearing that the original plaintiff Chandrawathi had executed a lease for three years in favour of Thanthirige John in respect of the corpus of this case and it was said Thanthirige John who had filed the afore-said case No. L/1189 against the 3rd Defendant seeking to recover the possession of the corpus of the present action in his capacity as the lessee. According to the Paragraph 3 of the Plaint of Thanthirige John in case No. L/1189, this Deed of Lease No. 10518 had been executed on 29-10-1963.
The following averment No. 3) could be found in the afore-said answer filed in that case (Case No. L/ 1189) by the 3rd Defendant in the instant case.

> *"answering Paragraph 3 of the plaint the Defendant denies that Chandrawathi referred to therein has any right to lease both lots 1 and 2 as she is entitled to*

> *1/4th share of lot 2 only and without paying the sum of Rs. 88 due to this Defendant and his wife as compensation in partition case No. P/376 of this Court."*

Mr. W. Dayaratne, PC for the Plaintiff advanced the argument that the above averment No. 3 in Case No. L/ 1189, amounts to an admission of ownership of the Plaintiff made by the 3rd Defendant.

I observe that the learned District Judge had concluded that the 3rd Defendant had maintained an uninterrupted possession of Lot 2 adverse to the Plaintiff and 1st and 2nd Defendants since 1963. However, the learned District Judge had refused to accept that the 3rd Defendant had prescribed to Lot 2 because the 3rd Defendant had thereafter proceeded to purchase 1/4th share of Lot 2 from Jasin Bastian Arachchige Betin Nona by virtue of Deed No. 2051 dated 16-12-1975.

However, Dr. Sunil Cooray appearing for the 3A Defendant (3A Defendant was substituted in place of the 3rd Defendant upon the demise of the 3rd Defendant during the pendency of the trial in the District Court) relying on the judgment of this Court in Silva Vs. Zoysa[1] argued that any subsequent purchase of title by a party claiming prescription to the same land, does not negate the prescriptive title acquired by such party to such land.

In Silva Vs. Zoysa, both the learned Judges who heard the case had pronounced two separate judgments. However, both the learned Judges had come to the same conclusion. Thus, I would reproduce below, one excerpt each from both the said judgments.
Macdonell C.J. in that case has held as follows,

> *This, it seems to me, would be the inference to be drawn from the conveyance of September 9, 1925, even if it stood alone. But it does not; there was the other conveyance which the notary drew but which remained unexecuted because of Sahabandu's departure. It was, then, a conveyance that was to be executed by him at the instance of the second defendant. Then it is a warrantable inference that it was a conveyance making over to the second defendant the legal estate in the land which it was at last in Sahabandu's power to make over now that he had got a conveyance of it from the administratrix*

[1] 32 NLR 199.

vendor. Then every detail in the "act" of the second defendant in regard to these two conveyances is referable to the sale of September, 1916, and to the title the second defendant acquired thereby "adverse to and independent of that of the administratrix vendor and that of Sahabandu; it was an "act" to perfect his own "existing right", and if so it cannot well have been an "acknowledgement of a right existing in some other person". Then it was no "interruption" of his possession of the land in dispute which had commenced some time in 1916. As no other "interruption" has been suggested, that possession matured into a prescriptive title in favour of the second defendant some time in 1926, that is to say, over two years before the conveyance from Sahabandu of June 13, 1929, under which the first defendant claims. The second defendant then has made good his title to the land in dispute, and the plaintiff, his lessee, is entitled to be restored to possession under the lease.

In the same case, Garvin S.P.J. in his judgment has stated as follows,

The argument, as I understand it, is that when the second defendant caused the execution of the deed by the administratrix in Sahabandu's favour he did an act acknowledging the "right" of Sahabandu within the meaning of section 3 of Ordinance No. 22 of 1871.

The words in parenthesis in section 3 - "that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person can fairly and naturally be inferred" have been held to be a definition of "adverse possession". The phrase "by any other act" must I think be read ejusdem generis with "payment of rent or produce or performance of service or duty" and as meaning an act which indicates that the possession is not adverse to but is acknowledged to be subordinate to the right of another to possession of the land. What the second defendant did was to take a step with a view to gathering into his hands the legal title from persons who on the facts proved in this case were under a legal obligation to vest in him the title to the land of which he was in possession and claimed to be in possession as of right. It was not an act done in acknowledgment of any right in them or either of them to the possession of this land but an assertion of his right to be clothed with the legal title as well.

This principle was followed by this Court in Mallika Achchillage Ranhamy Vs. Wellera Achchillage Singha Appuhamy.[2]

In any case, when a person through an overt act claims a possession adverse to its owner, the admission of the ownership at some point of time by the party who is maintaining such adverse possession does not dilute the quality of either the overt act or the possession adverse to its owner if such party had fulfilled the necessary requirements set out in law namely section 3 of the Prescription Ordinance to establish his or her prescriptive title.

As far as the afore-said averment in Paragraph 3 of the answer filed in case No. L/1189 by the 3rd Defendant is concerned, it must be borne in mind that it is an averment in the answer filed in a different case to state that Chandrawathi was entitled to ¼ share of Lot 2 as at 07-11-1966 which is the date of the said answer. On the other hand, the partition decree giving ¼ share of Lot 2 to Chandrawathi coupled with the fact of handing over the possession by fiscal in January 1963, there is no dispute that the plaintiffs became entitled to Lot 2 as at that date. The 3rd Defendant had commenced his possession adverse to the plaintiffs in March 1963. I observe that the Plaintiff had filed the plaint of the instant action on 23-07-1980. Thus, by the time the Plaintiff had filed the plaint in the instant action, the 3rd Defendant had completed his adverse uninterrupted possession for more than 10 years. Similarly, by the time the Plaintiff had thereafter proceeded to purchase 1/4th share of Lot 2 from Jasin Bastian Arachchige Betin Nona by virtue of Deed No. 2051 dated 16-12-1975 also, the 3rd Defendant had completed his adverse uninterrupted possession for more than 10 years. This is because the 3rd Defendant had commenced possessing this land since 1963 which is not in dispute in this case. Thus, in view of these facts, even if the said averment No. 3 in Case No. L/1189 amounts to an admission that Chandrawathi was entitled to ¼ share of Lot 2 by the 3rd Defendant, it makes no difference. It must also be noted that Thanthirige John in Case No. L/1189 in his plaint has stated that it was the 3rd Defendant in the present action who was in possession of Lot 2 at that time. Indeed, said Thanthirige John had filed that action to recover possession of Lot 2 from the 3rd Defendant.

Thus, the above facts show clearly that the learned Judges of the Provincial High Court of Civil Appeals on the available evidence in this case, had come to the correct conclusion that the 3rd Defendant has prescribed to the corpus of the action. Therefore, the learned Judges of the

[2] 46 NLR 279.

Provincial High Court of Civil Appeals had not erred when they directed the dismissal of the action. For the foregoing reasons, I answer the above question of law in the affirmative.

I proceed to dismiss this appeal without costs.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree,

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an Application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Vavuniya Solar Power (Private) Limited
Level 04, Access Towers,
No. 278, Union Place,
Colombo 2.

Petitioner

Vs.

SC FR Application 172/2017

1. **Ceylon Electricity Board**
   No. 50, Sir Chittampalam A.
   Gardiner Mawatha,
   Colombo 02.

2. **Sri Lanka Sustainable Energy Authority**
   Block 05, 1st Floor, 3G-17, BMICH,
   Bauddhaloka Mawatha,
   Colombo 7.

3. **W.B. Ganegala**
   Former Chairman,
   Ceylon Electricity Board

3A. **Rakhitha Jayawardene**
Former Chairman,
Ceylon Electricity Board

3B. **Wijitha Herath**
Chairman,
Ceylon Electricity Board

4. **A.K. Samarasinghe**
Former General Manager
Ceylon Electricity Board

4A. **S.D.W. Gunawardena**
Former General Manager
Ceylon Electricity Board

4B. **Keerthi Karunaratne**
Former General Manager
Ceylon Electricity Board

4C. **N.W.K. Herath**
General Manager
Ceylon Electricity Board

5. **H.A. Vimal Nadeera**
Former Director General
Sri Lanka Sustainable Energy
Authority

5A. **Labuna Hewage Ranjith Sepala**
Former Director General
Sri Lanka Sustainable Energy
Authority

5B. **Asanka Rodrigo**
Director General
Sri Lanka Sustainable Energy
Authority

6. **Dr. B.M.S. Batagoda**
Former Secretary,
Ministry of Power & Renewable
Energy

6A. **Wasantha Perera**
Secretary,
Ministry of Power & Renewable
Energy, No. 72, Ananda
Coomaraswamy Mawatha,
Colombo 07.

7. **Honourable Attorney General**
Attorney General's Department,
Colombo 12.

<u>Respondents & Added Respondents</u>

Before : **E.A.G.R. Amarasekara, J.**
Yasantha Kodagoda, P.C., J.
A.H.M.D. Nawaz, J.

Appearance: Faiz Musthapha, P.C. with Chanaka De Silva, P.C., Ms. Faisza Markar and Ms. T. Machado for the Petitioner.
Sanjay Rajaratnam, P.C., Solicitor General (as he then was, and presently the Honourable Attorney General) with SSC Rajitha Perera for the Respondents.

Argued on: 4th March, 2021

Decided on: 20th September, 2023

Yasantha Kodagoda, P.C., J.

This judgment relates to an Application filed by the Petitioner in terms of Articles 17 read with Article 126 of the Constitution. Following the Application being supported, the Supreme Court granted leave to proceed in terms of Articles 12(1) and 14(1)(g) of the Constitution.

1. Introduction

Through this Application, the Petitioner – Vavuniya Solar Power (Pvt.) Ltd. complained to this Court that its fundamental rights guaranteed under Article 12(1) of the Constitution – *the right to equality and equal protection of the law*, and Article 14(1)(g) of the Constitution – *the freedom to engage in any lawful occupation, profession, trade, business or enterprise*, were infringed by the 1st and 2nd Respondents.

Albeit brief, the complaint of the Petitioner is that in April 2012 it presented to the 2nd Respondent – Sri Lanka Sustainable Energy Authority (hereinafter sometimes referred to as "the SLSEA"), an Application seeking approval to commission and operate a solar power electricity generation plant in Vavuniya. In May 2016, provisional approval for the project was granted by the 2nd Respondent. However, subsequently, as a result of a 'Letter of Intent' not being granted by the 1st Respondent – Ceylon Electricity Board (hereinafter sometimes referred to as "the CEB") indicating its intent to purchase electricity generated from the proposed plant, the Petitioner company did not receive the permit applied for from the 2nd Respondent. The Petitioner's position is that in view of the 'provisional approval' it received from the 2nd Respondent, it entertained a 'legitimate expectation' that it will receive a 'Letter of Intent' from the 1st Respondent (as it had previously obtained 'grid interconnection concurrence' from the 1st Respondent and had complied with all the other conditions laid down in the 'provisional approval') and thereafter, a permit be issued in terms of section 18 of the Sri Lanka Sustainable Energy Authority Act, to enable it to proceed with the project, commission the electricity generation plant in order to provide electricity to the national grid by selling such electricity to the CEB, and thereby secure its commercial objectives.

The position of the 1st Respondent – CEB is that in view of an amendment introduced to the Sri Lanka Electricity Act in 2013, it became no longer possible to issue a 'Letter of Intent' to the Petitioner.

Thus, it is to be noted that this is a matter that relates directly to the 1st Respondent – CEB and the 2nd Respondent – SLSEA. Though not a Respondent, this matter also indirectly relates to the functioning of the Public Utilities Commission of Sri Lanka (hereinafter sometimes referred to as "the PUCSL").

2. Applicable legislative framework and legal principles

Particularly as the area of statutory law relevant to this matter argued before the Supreme Court is not frequently referred to in judgments of this Court, this judgment will commence upon a consideration of the applicable provisions of the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007 (hereinafter sometimes referred to as "the SLSEA Act") and the Sri Lanka Electricity Act, No. 20 of 2009 (hereinafter sometimes referred to as "the SLE Act") as amended by Act No. 31 of 2013.

2.1 Sri Lanka Sustainable Energy Authority Act

The Sri Lanka Sustainable Energy Authority Act No. 35 of 2007, came into operation on 1st October 2007. The SLSEA is a body corporate that has been established under the SLSEA Act, No. 35 of 2007.

The SLSEA has been vested by the Act with the objects of *inter-alia* (i) identifying, assessing and developing renewable energy resources with a view to enhancing energy security and thereby deriving economic and social benefits to the country, and (ii) by promoting security, reliability and cost-effectiveness of energy delivery to the country by development and analysis of policy and related information management.

The SLSEA Act is an important statute aimed at creating necessary legal infrastructure for the purpose of harnessing and regulating the use of the available renewable energy resources in the country, and thereby enhancing and protecting energy security of Sri Lanka. That objective is sought to be achieved by the development and optimal utilization of renewable energy resources in the country, enabling sustainable development of energy generation, which is a much-needed essential resource not only for daily living, but for economic development of the country, as well.

With the view to achieving the objectives of the SLSEA Act, the SLSEA has been vested with certain powers and functions. In terms of section 13, the Authority has been vested with the responsibility of conserving and managing all renewable energy resources in Sri Lanka, and to take all necessary measures to promote and develop renewable energy resources, with the view to obtaining the maximum economic utilization of those resources.

The management and the administration of the SLSEA (2nd Respondent) has been vested by the Act in its Board of Management [vide section 3(1)]. The Board has been vested with the powers, duties and functions of *inter-alia* developing a conducive environment for encouraging and promoting investments in renewable energy development in the country, including the (i) development of guidelines on renewable energy projects and disseminating them among prospective investors, and (ii) development of guidelines in collaboration with relevant state agencies, on evaluation and approval of on-grid and off-grid renewable energy projects [vide section 5(c)]. In pursuance of that duty conferred on the SLSEA in terms of section 5(c) to create awareness and issue guidelines, the Authority has *inter-alia* issued a publication entitled *"A guide to the project approval process for on-grid renewable project development"* with the description *"Policies and procedures to secure approvals to develop a renewable energy project to supply electricity to the national grid"*. A copy of this publication was produced by the Petitioner marked "P2C".

The Board has also been empowered to entertain Applications for carrying on on-grid and off-grid renewable energy projects [vide section 5(c)(iii)]. A template (prescribed form) of the Application Form to be submitted in this regard to the SLSEA has been issued by the Minister in terms of section 67 of the Act, and published in Government *Gazette* No. 1599/6 dated 27th April 2009 (produced by the Petitioner marked "P2A").

This template has been amended by *Gazette* No. 1705/22 dated 10th May 2011 (produced by the Petitioner marked "P2B").

The SLSEA Act stipulates that no person shall engage in or carry on an on-grid renewable energy project or the generation and supply of power within a 'Development Area' (the entire country has been declared a 'Development Area'), except under the authority of a permit issued in that behalf by the SLSEA [vide section 16(1)]. Thus, generation of electricity through an on-grid renewable project such as the project proposed by the Petitioner can be carried out only with the legal entitlement emanating from a permit issued by the 2nd Respondent in terms of section 18(2)(a) of the Act.

A person who is desirous of engaging in and carrying out an on-grid renewable energy project within a 'Development Area', is required to submit an Application to the Director-General of the SLSEA in the prescribed form, together with certain documents specified in the Act [vide section 16(2)]. At the time relevant to this Application, the prescribed form of the Application to be submitted was contained in the *Gazette* notification dated 10th May 2011 issued by the Minister of Power and Energy in terms of section 16(2) ("P2B"), which has amended the previous format of the Application form contained in the *Gazette* notification issued by the Minister, dated 27th April 2009 ("P2A").

Following the receipt of a perfected Application from a project proponent seeking a permit to commission an electricity generation plant using renewable energy, the Act requires the Director-General of the SLSEA to register the Application and issue a registration number [vide section 16(3)]. Further, the SLSEA shall carry out preliminary screening, and in consultation with the CEB, submit the Application to the Project Approving Committee (hereinafter sometimes referred to as 'the PAC').

The practice followed by the SLSEA is that prior to submitting an Application to the PAC, the SLSEA obtains grid concurrence of the CEB. This stage is referred to as the stage where the SLSEA obtains from the CEB, 'grid interconnection concurrence'. This process involves the CEB examining the proposed project and considering whether it would be technically feasible for the CEB to receive into the national electricity grid, electricity generated by the project. It is important to note that the 1st Respondent – CEB is represented at the PAC and hence is in a position to take cognizance of the submission of an Application by a project proponent and also submit its views at a meeting of the PAC towards the decision of the 2nd Respondent – SLSEA on whether or not 'provisional approval' should be granted to a particular applicant.

The PAC is an entity recognized by the Act and in terms of section 10, comprises of a number of *ex-officio* officials, including the General-Manager of the CEB and representatives of several other statutory bodies of the State performing functions relevant to renewable energy projects. It is the PAC that is empowered to, on behalf of the SLSEA grant 'provisional approval' and 'final approval' to an Application seeking authorization (a permit) to commission a renewable energy based on-grid electricity generation plant.

Should the PAC decide to grant 'provisional approval' for a particular project, it may require the applicant to submit within 6 months 'such documents and other information as shall be prescribed for the purpose'. The afore-stated period of 6 months granted to comply with this requirement can upon a request being made by the applicant, be extended by the Director-General of the SLSEA up to a maximum of a further 6 months [vide section 17(3)]. If within the initial period of 6 months or the extended period of 1 year from the original grant of provisional approval, the documents and other information referred to above (referred to above as 'conditions and information' and

contained in the provisional approval) are not submitted, the provisional approval granted shall stand automatically cancelled [vide section 17(4)].

Once such conditions have been fulfilled by a project proponent, the PAC may grant 'provisional approval' to such an Application seeking authorization (a permit) to implement an on-grid renewable energy project, which decision shall be communicated to the applicant by the Director General of the SLSEA [vide section 17(2)(a)]. Once the necessary documents (including the authorizations specified in the provisional approval) referred to above are obtained by the applicant and submitted to the Director-General of the SLSEA, he shall forthwith place such material before the PAC, enabling the committee (PAC) to consider granting final approval for the proposed project [vide section 18]. In terms of section 18(2), the PAC is empowered to either approve or refuse the Application for a permit. It is only if the PAC approves the Application, that the SLSEA shall issue a permit to the applicant. If issued by the SLSEA, a permit will be initially valid for a period of 20 years. This would be, provided the developer commences the project and generates electricity within two years of being issued with the permit [vide section 18(4)].

2.2 Sri Lanka Electricity Act

There is another law, the provisions of which are equally relevant to this matter. That is the Sri Lanka Electricity Act, No. 20 of 2009. This law has been enacted for the regulation of the generation, distribution, transmission and supply of electricity. The provisions of the SLE Act relate to all types of electricity generation plants, including those powered by (i) non-renewable energy sources from which electricity may be generated, such as petroleum, and (ii) renewable energy sources from which electricity may be generated such as water, solar, wind and bio-mass. In terms of section 2(1) of the SLE Act, the administration of the provisions of the Act shall vest in the PUCSL.

An examination of the provisions of the SLE Act reveals that, a permit issued by the SLSEA in terms of section 18 of the SLSEA Act by itself would not confer sufficient legal authorisation for a project proponent to commission an on-grid renewable energy project and commence generating electricity. A project proponent needs to obtain an electricity generation license from the PUCSL (referred to as a 'generation license'), which the PUCSL is entitled to issue in terms of section 7(1) of the SLE Act. However, it is important to note that, in so far as renewable energy-based electricity generation plants are concerned, a condition precedent to applying to the PUCSL seeking an electricity generation license, is the obtaining of a permit from the SLSEA, issued under section 18 of the SLSEA Act. Thus, it would be seen that the law contemplates a two-tiered process for the grant of approval for an on-grid renewable energy-based electricity generation project. First, approval by the SLSEA and a permit. Secondly, approval by the PUCSL and a license. As was shown earlier, the CEB is involved in the grant of 'provisional approval' and 'final approval' and a permit by the SLSEA under section 18 of the SLSEA Act. As would be seen hereinafter, the CEB becomes once again involved in the grant of a generation license by the PUCSL. Thus, approval by the CEB is critical.

According to section 7(1) of the SLE Act, no person shall (a) generate, (b) transmit, (c) supply and or (d) distribute electricity for the purpose of giving a supply to any premises or enabling a supply to be given to any premises, unless he is authorized to do so by virtue of a license granted under the Act or is exempted from obtaining a license under section 10. Section 9 stipulates the category of persons who is entitled to apply for a license. However, in terms of section 9(2) of the Act, only the CEB shall be eligible to apply for and obtain a license for the transmission of electricity. In that regard, the CEB is referred to as the sole 'transmission licensee'. Further, section 9(1) *inter-alia* provides who would be entitled to apply for an electricity generation license. Similarly, in terms

of section 9(3), only the CEB and three other categories are entitled to apply for and obtain a license for the distribution of electricity.

In terms of section 13 of the SLE Act, it is the PUCSL that is empowered to grant electricity generation, distribution and transmission licenses. However, as prescribed by sections 9 (1A) and 10 of the Act, the PUCSL may exempt certain persons or categories of persons from the requirement of obtaining a license to generate or distribute electricity. Upon an Application being made to it, having taken into consideration the manner in which or the quantity of electricity likely to be generated or distributed by such person or category of persons, the PUCSL may grant an exemption to such person or category.

Section 43 of the SLE Act provides a statutory scheme to be adhered to in relation to the procuring or operating a new electricity generation plant or the extension of electricity generation capacity of an existing electricity generation plant.

Section 43 of Act No. 20 of 2009 was amended by section 13 of the Sri Lanka Electricity (Amendment) Act No. 31 of 2013. It repealed the original section and caused the substitution therefor a new section. It is pertinent to note that in terms of section 21 of the SLE (Amendment) Act, No. 31 of 2013, the amendments made to the principal enactment by the amending Act shall be deemed for all purposes to have come into force, on 8th April, 2009. That is the date on which the principal enactment (SLE Act, No. 20 of 2009) had following its enactment been certified by the Speaker and thereby came into operation. Thus, the amendments introduced by provisions of Act No. 31 of 2013 including the amendment to section 43 (which is described in detail below), should be deemed to have been in force right from the beginning of Act No. 20 of 2009 having come into operation.

[I am acutely conscious that by the SLE (Amendment) Act No. 16 of 2022, the once amended section 43 was re-amended. Act No. 16 of 2022 was certified by the Speaker and came into operation on 15th June, 2022. However, as that amendment has no relevance to the manner in which the Application presented by the Petitioner for a solar power electricity generation permit was processed by the 1st and the 2nd Respondents, I do not propose to deal with provisions of Act No. 16 of 2022 for the purpose of determining the lawfulness or otherwise of the impugned conduct of the Respondents. [The said amendment does not have a bearing on the findings reached by this Court or to the reliefs ordered.]

According to the original section 43 of the Sri Lanka Electricity Act, subject to section 8, no person shall procure or operate a new electricity generation plant or extend the electricity generation capacity of any existing plant, except as authorized by the PUCSL [Section 43(1)]. According to section 43(2), with the approval of the PUCSL, a transmission licensee, shall in accordance with its license and guidelines relating to the procurement of electricity as may be prescribed by the PUCSL, call for tenders to provide a new electricity generation plant or to extend the generation capacity of an existing generation plant, as specified in a notice calling for tenders. According to section 43(3), a transmission licensee shall with the consent of the PUCSL, from amongst the persons who have submitted technically acceptable tenders in response to such notice, select a person to provide at least cost, the new generation plant or to extend the generation capacity of an existing generation plant specified in that notice.

As stated above, Act No. 31 of 2013, amongst others repealed section 43 of Act No. 20 of 2009, and substituted therefor a new section. In terms of section 43 (as introduced by Act No. 31 of 2013), no person shall proceed to procure or operate a new electricity generation plant or engage in the expansion of the electricity generation capacity of an existing plant, otherwise than in accordance with provisions of that section. In terms of

section 43(1) read with section 43(2), to proceed with the procuring or operating of any new electricity generation plant or to expand the electricity generation capacity of an existing plant, a transmission licensee shall submit a proposal to that effect to the PUCSL, for its written approval. The proposal should be based on the future demand forecast of electricity as specified in the 'Least Cost Long-term Generation Expansion Plan' (as defined in section 43(2) of the Act) of such transmission licensee. However, in terms of the proviso to section 43(2), acting in terms of the afore-stated requirement contained in section 43(2) shall not be necessary, where on the day prior to the date of the coming into force of Act No. 31 of 2013 (that being 8th April 2009) - (a) the Cabinet of Ministers had granted approval for the development of a new generation plant or to expand the generation capacity of an existing plant, or (b) the SLSEA had issued a permit in terms of section 18 of the SLSEA Act to generate electricity through renewable energy resources, and as a consequence, the development of a new generation plant or expansion of an existing plant has become necessary. In these two situations, the transmission licensee will be entitled to obtain the approval from the PUCSL, without complying with section 43(2) of the SLE Act (as amended).

In terms of section 43(4) (as amended) of the SLE Act, after obtaining the approval of the PUCSL under section 43(2), the transmission licensee (CEB) shall in accordance with the conditions of its license and applicable rules made by the Commission relating to procurement, call for tenders by notice published in the *Gazette* to develop the envisaged new generation plant or for the expansion of the generation capacity of an existing plant. However, in terms of the proviso to section 43(4), subject to section 43(6), this requirement of calling for tenders shall not be applicable in respect of any new generation plant or to the expansion of any existing plant that is proposed to be developed, which falls into one of the following situations:

(a) in accordance with the 'Least Cost Long-Term Generation Expansion Plan' duly approved by the Commission and which has received the approval of

the Cabinet of Ministers on the date preceding the date of the coming into operation of the Act and is required to be operated at least cost, or

(b) on a permit issued by the SLSEA and required to be operated at the standard tariff and is governed by a 'Standardised Power Purchase Agreement' (as defined in section 43(8) of the Act) approved by the Cabinet of Ministers, or

(c) in compliance with the 'Least Cost Long Term Generation Expansion Plan' duly approved by the Commission for which the approval of the Cabinet of Ministers has been received on the basis of - (i) an offer received from a foreign government to the Government of Sri Lanka for which the approval of the Cabinet of Ministers has been received, or (ii) to meet any emergency situation as determined by the Cabinet of Ministers during a national calamity or a long term forced outage of a major electricity generation plant, where a protracted bid inviting process outweigh the potential benefit or procuring emergency capacity required to be provided by any person at least cost.

The procedure to be followed after calling for tenders is provided for in section 43(5). It would be noted that the procedure contained in section 43 of the SLE Act, entails the following of a competitive procedure and the transmission licensee (CEB) recommending to the PUCSL the person best capable of developing the new generation plant or the expansion of the generation capacity of an existing plant, selling electrical energy or electricity generation capacity at least cost, and meeting the requirements of the 'Least Cost Long Term Generation Expansion Plan' of the transmission licensee (CEB). This recommendation should be made along with the draft 'Power Purchase Agreement'.

Section 43(6) provides that, (a) notwithstanding an exemption from the submission of a tender is granted to any person under section 43(4), or (b) a new electricity generation

plant or an extension of an existing plant is being developed in accordance with the 'Least Cost Long Term Generation Expansion Plan' by a person who has obtained the approval of the Cabinet of Ministers (which approval was in force at the time of the coming into force of the Act), the transmission licensee shall engage in negotiations with such person and upon satisfying itself of the competence of such person to develop a generation plant and sell electricity at least cost, forward its recommendations along with the draft power purchase agreement to the PUCSL.

According to section 43(7), upon receipt of a recommendation either in terms of section 43(5) or 43(6) of the Act, the Commission shall grant its approval at its earliest convenience, provided it is satisfied that the recommended price for the purchase of electricity meets the principle of least cost and the requirements of the Least Cost Long Term Generation Expansion Plan and accepted technical and economical parameters of the transmission licensee.

2.3 Legitimate Expectations

In view of the importance placed by learned counsel for the Petitioner on the doctrine of 'legitimate expectations' and the response thereto displayed by the learned Solicitor General for the Respondents, incorporating into this judgement a somewhat detailed description of the doctrine is in my view necessary. The need to do so is augmented by some degree of ambiguity that seem to permeate across certain judgments of our Courts regarding the nature, scope, applicability and limitations of the doctrine of legitimate expectations and more particularly pertaining to the judicial response to a claim for relief based on the sub-doctrine of 'substantive legitimate expectations'. Thus, I propose to devote the following lengthy description of the doctrine, mainly for the purpose of highlighting the importance of the doctrine as a ground on which injustice emanating from unfairness and abuse of power can be remedied and as a legal justification for this

judgment. The expansion of the length of this judgment to what it is, should therefore be justifiably excused.

2.3.1 Introduction to the doctrine of Legitimate Expectations and the underlying policy

The doctrine of legitimate expectations is founded upon the principle that an expectation generated due to representations made by or regular practices (procedures) of a public body, should be respected by such public body, and it should conduct itself in accordance with such representations made by itself and its own practices. Justice demands that a public authority be prevented from frustrating an expectation generated by it occasioned either by sudden changes to its governing policy or due to extraneous or collateral reasons. This concept also relates to the extent to which a public authority's administrative power and discretionary authority may be limited by law for the purpose of ensuring fairness. The imposition of such limitations would be justifiable due to (a) the representations made by a public authority to the public at large and more particularly to the persons who seek to either be regulated by or transact with such public authority, as to how it will act in the future, and or (b) its own previous related practices or procedures. In other words, the doctrine of legitimate expectations is a means of keeping a public body bound by its own representations and practices.

The recognition of this doctrine is founded upon the policy of the law of recognizing and protecting legitimate expectations, arising out of a public authority having undertaken expressly or impliedly, through representations made by itself or by its own practices, to take decisions and or conduct itself in a particular manner in the future. In effect, this doctrine requires public authorities to comply with its own undertakings, the failure of which gives rise to judicial review resulting in judicial pronouncements being made requiring the public authority to conduct itself in the prescribed manner, decide

as directed by court and or sanctions being made for having frustrated legitimate expectations.

In ***R v. Secretary of State for Home Department, ex parte Behluli*** *[(1998) Imm. AR 407, at 415]* Beldam LJ, observed that *"although legitimate expectation may in the past have been categorized as a catchphrase not be elevated into a principle, or as an easy cover for a general complaint about unfairness, it has nevertheless achieved an important place in developing the law of administrative fairness. It is an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way".*

Protecting expectations generated by public authorities through the doctrine of legitimate expectations and judicial insistence that expectations so generated be complied with by the relevant public authority is also fundamental to good governance. In the long-term, it would be dangerous to permit public authorities to freely renege on their undertakings, as it would pave the way to public authorities functioning in an unreasonable or arbitrary manner, or otherwise abusing power conferred on them. The public's trust and confidence in public authorities can be protected by requiring public authorities to comply with their own undertakings.

The doctrine of public trust *inter-alia* requires that public authorities who have been vested with statutorily conferred power to discharge public functions vested in them for the benefit of the sovereign of the Republic – the public at large, and for no other purpose. Public authorities must discharge such functions in accordance with the law and they must abide by the expectations generated by their own representations and practices. In a Republic, the trust conferred by the sovereign public on public authorities must be respected, unless there are justiciable reasons developed objectively, diligently and in good faith for the purpose of giving effect to wider public interests, that

necessitate deviating from the previous policy based upon which the previous representations had been made.

The rationale of the doctrine of legitimate expectations is also that if a public authority has induced a person to rely upon its representations or practices on the premise that such reliance was a real possibility and would bear fruit, it is under a fiduciary duty to act in such a way that the reliance placed by such person will not result in detrimental outcomes to such person, who in good faith had placed reliance on the representations of a public authority and its practices. Public authorities must be required by law to honour expectations created by its own representations and practice. If unable to do so, the public authority concerned should compensate the person affected by having placed reliance on such representations and practices.

From the perspectives of the all-important and fundamental feature of our Republican Constitution – the *rule of law*, for the following reasons, recognition and the enforcement of the doctrine of legitimate expectations make good sense:

(i) Respect for an expectation created by a public authority makes the exercise of discretion by such authority more predictable. The *rule of law* presupposes the enforcement of formal equality. Without formal equality, the enforcement of the law can become arbitrary, unreasonable, unfair and uncertain. Thus, like cases must be decided upon in a like manner, by the correct and consistent application of the law.

(ii) The *rule of law* also presupposes a certain measure of consistency and uniformity in the application and the enforcement of the law. The law should provide for administrative action that is based upon a mix of short-term exigencies and long-term considerations. An individual's planning and preparation becomes difficult, if not impossible, if policy and procedure are changed too often or abruptly, and public authorities conduct themselves in

an inconsistent manner and contrary to their own representations, undertakings and previous conduct.

(iii) The *rule of law* also demands that a person's legitimate expectation should not be frustrated without a justiciable cause generated by the desire to serve wider public interests.

Thus, from the perspective of the *rule of law*, recognition of the doctrine of legitimate expectations gives rise to predictability and certainty through consistency and uniformity, formal equality, reasonableness, fairness, and non-retroactivity, which as I have stated above are features of the *rule of law*. Therefore, this doctrine supports the recognition and enforcement of the *rule of law*.

However, it must also be noted that public authorities must be vested with discretionary authority with regard to the exercise of power vested in them. Without discretion, public authorities would not be able to successfully exercise power for the purpose for which such power has been vested in them. Exercise of discretion may entail changes to the applicable policy and criteria and the procedure to be followed in the exercise of power. In the circumstances, the exercise of discretion which results in certain changes to be made to policy and procedure, can create tension between 'administrative autonomy' and 'legal certainty'. There can be situations where a public authority may have to frustrate an expectation it has generated, due to justiciable reasons which are in the wider public interest. In such situations, it would be the duty of the public institutions to explain reasons for the deviation from the expectation it had generated and proceed to satisfy court regarding the lawfulness of the change and its justiciability. Prior to the change in policy, criteria and procedure, the relevant public authority should have informed those who may have by that time had a legitimate expectation that the previous policy, criteria and procedure would be applied, of the intended change, and afforded them an opportunity of being heard. Public authorities

must bear in mind that, as held by Justice Dr. A.R.B. Amerasinghe in ***Dayarathna and Others v Minister of Health and Indigenous Medicine and Others*** *[(1999) 1 Sri L.R. 393],* although the Executive ought not in the exercise of its discretion be restricted to cause a change of policy, a public authority is not entirely free to overlook the existence of a legitimate expectation it has created.

The importance of legal certainty is for the benefit of not only the individual to whom the representation has been made, but also to the public at large. Further, maintenance of legal certainty is in the interest of public institutions as well, as it would generate public confidence in such institutions.

Representations by public authorities may create expectations regarding the criteria that would be applied and the manner in which it would apply such criteria when exercising discretionary authority. Representations by public authorities may also relate to assurances of specific outcomes. Respect to such expectations makes the exercise of discretion and its outcome predictable, thus, creating a degree of certainty with regard to possible outcomes.

Recognizing the doctrine of legitimate expectations is also a means of ensuring administrative fairness. It curtails the opportunity public authorities would otherwise have, to decide on matters subjectively, or in an arbitrary, capricious or unreasonable manner. Therefore, the exercise of administrative discretion is required by law to be subject to the legal duty cast on public authorities to honour legitimate expectations generated by it through its own representations and practices.

The principle of legitimate expectations is also supportive of administrative efficacy and legitimacy of the exercise of administrative power. The enforcement of statutorily conferred power is likely to be perceived as being legitimate, thus justifiable and in

public interest, if exercised in a way that recognizes legitimate expectations. Thus, the recognition of the principle of legitimate expectations is in the best interests of not only individuals who transact with such public authorities and the general public, but also of the administration, itself.

2.3.2 Evolution of the doctrine of legitimate expectations and its present status

Though the actual origins of the doctrine of legitimate expectations can be traced to the 20th century developments of German administrative law, the formal recognition of this doctrine by English administrative law can be traced back to ***Schmidt and Another v. Secretary for Home Affairs*** *[(1969) 1 All ER 904]*. In that case, Lord Denning MR responding to an allegation that the Home Secretary had, without affording a student a fair hearing, refused an extension of a temporary permit previously granted to him to remain in the United Kingdom, observed that, the question of being entitled in law to a hearing prior to a decision being taken, depends on whether or not the claimant had some right or interest or a 'legitimate expectation' that a fair hearing would be afforded before a decision was taken. He further observed that, it would not be fair to take a decision without affording the person concerned a formal and fair hearing enabling him to make representations on his behalf. However, in his judgment, Lord Denning did not define the scope of the doctrine of legitimate expectations and the basis for it. Lord Denning also did not distinguish the doctrine from the right to a fair hearing (compliance with the rules of natural justice) pertaining to a right or a protectable interest.

In ***Regina v. Liverpool Corporation Ex Parte Liverpool Taxi Fleet Operators' Association and Another*** *[(1972) 2QB 299],* the Queen's Bench held that it was unfair to increase the number of taxi licenses without consulting the Taxi Fleet Operators' Association, as it was contrary to the earlier practice adopted by the Liverpool Corporation. In ***Attorney General of Hong Kong v. Ng Yuen Shiu*** *[(1983) 2 AC 629],* the

Privy Council quashed a deportation order issued on a purported illegal immigrant on the footing that, taking the impugned decision without affording the immigrant an opportunity to present his case, was not in the 'interests of good administration'. In this matter too, the Court considered the need for the public authority to have afforded a fair hearing, independent of the duty to comply with the rules of natural justice.

In the leading case of ***Council of Civil Service Unions and others v. Minister for the Civil Service,*** *[(1985) AC 374],* famously known as the *'GCHQ Case'*, the issue confronted by the House of Lords, was whether the claimants were entitled to a 'legitimate expectation' of consultation, prior to a decision being taken by the Prime Minister to withdraw the entitlement of GCHQ employees to be members of national trade unions. It was not in dispute that prior to the impugned decision being taken, such a consultation process did not take place, notwithstanding on previous occasions such consultations having taken place.

Lord Fraser observed that a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. It is the latter criterion that was held to be applicable to the instant case. In the circumstances, Lord Fraser proceeded to hold that the test to be applied is whether the practice of prior consultation with regard to significant changes to the conditions of service of the employees was so well established by 1983, that it would be unfair or inconsistent with good administration for the government to have departed from that practice in this case. Lord Fraser noted that ever since the establishment of the GCHQ in 1947, prior consultation had been an invariable rule. Thus, if there was no question of national security involved, the appellants would have had a legitimate expectation that the Prime Minister accords them a consultation before changing the conditions of employment.

Lord Diplock observed that to qualify for judicial review, the impugned decision must have consequences which affect some person other than the decision-maker, though it can affect the decision-maker as well. It must affect the other person (claimant), either (a) by altering rights or obligations of that person which are enforceable by or against him in private law, or (b) deprive him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately be expected to be permitted to continue until some rational ground for withdrawing it had been communicated to him, and he had been given an opportunity to comment, or (ii) he has received an assurance from the decision-maker that the benefit or advantage will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. [It is category (b) that can be referred to as giving rise to an 'legitimate expectation'.]

In ***R v Secretary of State for Home Department ex parte Khan*** *[(1985) 1 All ER 40],* the court indirectly recognized the sub-doctrine of substantive legitimate expectations. It held that, the Secretary of State should not be allowed to frustrate the applicant's legitimate expectation that, upon fulfillment of the stipulated conditions discretion would be exercised in his favour, without a hearing being given, unless there is an overriding public interest to have changed the policy.

Therefore, it is observable that it is the sub-doctrine of procedural legitimate expectations that was first recognized and developed in English Law. According to what has been developed by courts under this sub-doctrine, where a public authority has, acting in terms of the law, given an assurance to the claimant that it will afford him a hearing before a policy is changed as regards a matter that affects him, or made known its policy with regard to that matter or has an established practice of affording a hearing before a change of policy is effected, that claimant will entertain a procedural

legitimate expectation that the public authority will give him reasonable and adequate opportunity to make representations and be heard before it changes its policy. A court may, by judicial review, enforce such a legitimate expectation other than in limited circumstances such as in instances where considerations of national security override the expectation of being consulted or heard [such as in the *GCHQ* case].

The sub-doctrine of substantive legitimate expectations on the other hand, emerged and developed more recently in English Law. In ***R v Secretary of State for the Home Department ex parte Ruddock and others*** *[1987) 2 All ER 518],* upon considering a long line of English cases, the court concluded that the need to ensure fairness had resulted in the recognition of a doctrine of substantive legitimate expectations. Justice Taylor's words in this regard were as follows:

> *"…I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. While most of the cases are concerned…with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course, such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power."*

In ***R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*** *[(1995) 2 All ER 714],* the court adopted the approach taken by Justice Taylor in ***ex parte Ruddock***, and held that the sub-doctrine of substantive legitimate expectations enabled a court to uphold a substantive legitimate expectation on broader grounds, than being confined to determining whether a public authority's decision to change its policy was unreasonable in the *Wednesbury* sense. Justice Sedley held as follows:

> *"…The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusion. Where the policy is for*

the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern."

However, the case of ***R v Secretary of State for the Home Department and another, ex parte Hargreaves and others*** *[(1997) 1 All ER 397],* is said to have cast the existence of substantive legitimate expectations into doubt. It was held that the discretionary power of the Secretary of State to change his policy decision could not be challenged by judicial review, as it would amount to a fettering of discretion. It was held that it was not for the court determine the fairness of the Secretary of State's actions, as doing so would amount to looking into the merits of his decision. It was further held that the act of weighing and balancing between individual and public interest is for the decision-maker and that the court could only intervene where it could be shown that the Secretary's decision was unreasonable or perverse in the *Wednesbury* sense.

The sub-doctrine of substantive legitimate expectations once again gained momentum following the Court of Appeal decision in ***R v North and East Devon Health Authority ex parte Coughlan*** *[(2000) All ER 850].* In recognizing the sub-doctrine of substantive legitimate expectations, it was held that *"where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too, the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power".*

It was also held that once it is recognized that conduct which is an abuse of power is contrary to law, its existence must be for the court to determine, and that review in such instance is not limited to the test of *Wednesbury* unreasonableness. ***Ex parte Coughlan*** is regarded as a welcome development in settling the controversy over substantive legitimate expectations in English law. The subsequent decisions have followed this case in determining matters pertaining to substantive legitimate expectations.

The developments in English law on the doctrine of legitimate expectations have influenced the Sri Lankan administrative law jurisprudence on legitimate expectations. For instance, the earliest cases on legitimate expectations such as ***Dayaratne v Bandara*** *[(1983) BLR vol. 1, part 1 p.23],* ***Sundarkaran v Bharathi*** *[(1989) 1 Sri.LR 46],* ***Dissanayake v Kaleel*** *[(1993) 2 Sri.LR 135]* and ***Multinational Property Development Ltd v Urban Development Authority*** *[(1996) 2 Sri.LR 51]* have recognized and ensured the protection of procedural legitimate expectations.

With the increased recognition in English Law of the sub-doctrine of substantive legitimate expectations, our courts also have recognized the protection of substantive legitimate expectations. The first direct reference in Sri Lanka to 'legitimate expectations' of a substantive character is seen in the judgment of Sharvananda CJ in ***Mowjood v. Pussadeniya*** *[(1987) 2 Sri LR 287]* where the court held that the Petitioner – Appellants have a legitimate expectation that they would not be evicted from their present houses except after following the procedure stipulated in the Act and the grant of 'proper' alternate accommodation (as opposed to mere alternate accommodation). Court approached judicial review of the notification issued by the Commissioner of National Housing from the perspective of abuse of power. Court recognized that the Petitioner – Appellant had both a legitimate expectation as regards the procedure the Commission would follow as well as the nature of the decision he would take, thus, recognizing both procedural and substantive legitimate expectations.

A more progressive approach towards substantive legitimate expectations was adopted by this Court in the case of ***Dayarathna v Minister of Health and Indigenous Medicine*** *[(1999) 1 Sri.LR 393],* which followed the English case of ***R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*** In his judgment, Justice Amerasinghe expressed the view that "*although the executive ought not in the exercise of its discretion to be restricted so as to hamper or prevent change of policy, yet it is not entirely free to*

overlook the existence of a legitimate expectation. Each case must depend on its circumstances". Justice Amerasinghe further observed that "*the Court's delicate and sensitive task is one of weighing genuine public interest against private interests and deciding on the legitimacy of an expectation having regard to the weight it carries in the face of the need for a policy change … The change of policy, in the circumstances, may nevertheless affect the future, having regard to the fact that the legislature and executive are free to formulate and reformulate policy; however, it is the duty of this Court to safeguard the rights and privileges, as well as interests deserving of protection such as those based on legitimate expectations, of individuals."*

In ***Sirimal and others v Board of Directors of the Co-operative Wholesale Establishment and others*** *[(2003) 2 Sri.LR 23],* Justice Weerasuriya, while recognizing the fact that "*the frontiers of legitimate expectations in Administrative law have been greatly expanded in recent years to admit of a substantive content",* followed the narrow approach taken in the English case **of *R v Secretary of State for the Home Department and another, ex parte Hargreaves and others,*** and expressed the view that the protection of a substantive legitimate expectation has to be sought on the more traditional approaches of English Law, i.e. protection in terms of *Wednesbury* Unreasonableness. He further expressed the view that it is for the decision-maker and not for the court to judge whether that expectation should be protected or whether broader public interest is so strong as to override that expectation. It was held in that case that the court would only intervene if the decision-maker's judgment was perverse or irrational. However, it must be noted that Justice Weerasuriya did not consider the more recent developments in the English Law's jurisprudence on legitimate expectations such as the principles contained in ***ex parte Coughlan,*** thus, compelling me to distance myself from the views expressed by Justice Weerasuriya as to the criteria based upon which substantive relief should be granted by court.

In the more recent case of ***M.R.C.C. Ariyarathne and others v N.K. Illangakoon, Inspector General of Police and others*** *[SC FR 444/2012, SC Minutes of 30.07.2019],*

Justice Prasanna Jayawardane adopted the wider approach taken in ***Dayarathna*** case. His Lordship was of the view that a court is not confined in cases of substantive legitimate expectations, to reviewing the public authority's decision on the traditional test of unreasonableness described in the *Wednesbury* case. His Lordship identified that the test of *Wednesbury* unreasonableness is adequate in a case where there is a single exercise of power by a public authority. However, in a case where the petitioner claims a substantive legitimate expectation, there is a dual exercise of power and that his case is linked to both exercises of power. If a court confined itself to the test in *Wednesbury*, Justice Jayawardena expressed the view that the court would only be reviewing the second exercise of power, by asking whether it is unreasonable in the *Wednesbury* sense. He held that a court considering judicial review must consider and evaluate both competing interests, i.e. the assurance which created the expectation, and the reasons for the public authority's change of policy or decision which resulted in the negation of that expectation. His view was that considering only one of the two competing interests, would place the court in *'abhorrent realm of inequity'*.

The decision in ***Ariyarathne*** was followed in the subsequent decisions of this Court on legitimate expectations including in the cases of ***Chanaka Harsha Talpahewa v Prasad Kariyawasam, Secretary to the Minister of Foreign Affairs and others*** *[SC FR 378/2017, SCM 21.06.2022]*, and ***Werage Sunil Jayasekera and others v B.A.P. Ariyaratne, General Manager, Department of Railways*** *[SC FR 64/2014, SCM 05.04.2022].*

Therefore, it is seen that the criteria based upon which substantive relief is granted is no longer limited the instances where the claimant can successfully establish that the change of policy on the part of the concerned public authority is so very unreasonable that it satisfies the degree of unreasonableness contemplated in the *Wednesbury's* case.

2.3.3 Nature of the representation that should have been made or the practice of the public authority that would entitle a person to claim, founded upon the doctrine of legitimate expectations:

In order to obtain relief through judicial review on the footing that a legitimate expectation had arisen, the nature of the representation that should have been made by the public authority should be a promise or an undertaking or its own previous practice, both of which should meet the following principles:

(i) As held in ***The United Policyholders Group and Others v. The Attorney General of Trinidad and Tobago*** *[(2016) UKPC 17],* the representation should be clear, unambiguous and devoid of qualifications.

(ii) As observed by this Court in ***Pavithra Dananjanie De Alwis v. Anura Edirisinghe, Commissioner General of Examinations and 7 Others*** *[(2011) 1 Sri L.R. 18]*, the undertaking given by the public authority need not be in written form, and it would be sufficient if the undertaking could be inferred through the surrounding attendant circumstances.

(iii) As held in the ***GCHQ Case*** the decision-maker must have made a specific announcement, or given an express promise or a specific undertaking, or impliedly generated a promise or undertaking by its unambiguous and consistent past practice.

(iv) If the representation was in the form of an announcement, promise or an undertaking, it should take the form of (a) a general representation made in rem (to the world at large) or to a specific class of persons, or (b) a specific representation addressed to the claimant or to a group of persons including the claimant who fall into the same category.

(v) A general representation can take the form of a formal announcement, a circular letter, or a statement of policy issued by the public authority concerned. It can also take the form of a publication containing the manner in which it proposes to deal with persons in the category of the claimant, or

containing previous decisions or extra-statutory concessions that have been made in the past and will be granted in the future.

(vi) The representation relied upon by the claimant need not have been personally made to him. However, it should relate to the category of persons to whom the claimant belongs. Similarly, the past practice of the public authority need not necessarily be aimed at the claimant. However, the past practice should relate to the category of persons to whom the claimant belongs.

(vii) The claimant should belong to the class of persons to whom the representation made by the decision-maker was reasonably be expected to apply. Whether or not a particular representation by a public authority is to give rise to a legitimate expectation or not, is not to be decided based on the intention of the decision-maker. The question to be determined is whether the representation may reasonably have induced a person within the class of persons to whom it was addressed, to rely on it. It is the context of the representation that is important as opposed to the specific contents thereof.

(viii) The representation should relate to an undertaking or promise of a benefit or an advantage the public authority is expecting to give or a course of action it is expecting to take that would be in the interest of the claimant.

(ix) If the representation was specific to the claimant, it should have been in response to a full and accurate disclosure by the claimant. Thus, the claimant should have received the undertaking or promise after his having made a full and accurate disclosure of all the relevant facts.

(x) As held in ***Vasana v. Incorporated Council of Legal Education*** *[2004 (1 SLR 154)]*, the representation made by the public authority, should not be based on a mistake of facts by itself.

(xi) As held in ***R v. Secretary of State for the Home Department ex parte Ruddock and Others*** *(referred to above)* the representation should have been made by

officials on behalf of the public authority who had actual or ostensible legal or administrative authority to make such representation.

(xii) A public authority is generally not liable to give effect to unauthorized or unlawful representations made by its officials. If the claimant either knew or had reason to believe that the official who had made the representation did not have authority to make such a representation, or in the circumstances he ought to have known so, the public body will not be bound by such representation.

2.3.4 Detrimental reliance

When a public authority makes representations containing its policy or conducts itself in a particular manner, it is natural that persons who engage with such authority or have dealings relevant to such representations or conduct, would fashion their own conduct placing reliance on such representations or conduct, as the case may be. In that backdrop, when the public authority changes its policy, it may result to the detriment of those who placed reliance on the previous representations or conduct of such public authority. This would result in the frustration of the expectations of those who placed reliance. In other words, placing reliance has been to the detriment of the person who placed such reliance. This is referred to as 'detrimental reliance'. In most cases, it is such detrimental reliance which causes grievance to the claimant, resulting in his complaining to court that he had developed a legitimate expectation founded upon representations made or the past practices of a particular public authority, which was later frustrated by it.

However, in the case of ***Attorney General of Hong Kong v. Ng Yuen Shiu*** *(referred to above)*, the Court held that a legitimate expectation may arise even in the absence of a detrimental reliance. Thus, detrimental reliance is not a *sine qua non* for legitimate expectations to be enforced. Actually, a detrimental reliance can arise only if the

claimant knew of representations made or previous practice of the public authority, and if he acted upon the belief that it would continue to be applied. However, if he had no knowledge of previous representations made or past practices of the public authority, the issue of detrimental reliance would not even arise. Nevertheless, it must be borne in mind that by establishing detrimental reliance, the case for 'frustration of a legitimate expectation' can be strengthened and the court will then be more receptive to the claimant. This is seen in ***Wickremaratne v Jayaratne and another*** *[(2001) 3 Sri L.R. 161],* where Justice U. De Z. Gunawardane held as follows:

> *"…In this case the petitioner's interest lay in some ultimate benefit which he hoped to attain or possibly retain… It is felt that acting to one's detriment in reliance upon a promise or undertaking given by a public authority or anyone else can strengthen or add to the weight of the legitimate expectation induced thereby, in such a situation, therefore, the counterbalancing public interest should be weightier than in a case where there had been no such detrimental reliance…"*

Implications of the representation

In order to successfully claim relief on the basis of a legitimate expectation that has been frustrated, the claimant must establish that the representation made by the public authority or its past conduct generated an 'expectation' which is justiciable in the eyes of the law. As recognized in ***Desmond Perera and Others v. Karunaratne, Commissioner of National Housing and Others*** *[(1994) 3 Sri L.R. 316],* it was observed by the Court of Appeal that establishing that the claimant entertained a 'hope' or 'reasonable hope' was insufficient to successfully claim relief through the doctrine of legitimate expectation. I find myself in agreement with that view. The claimant must establish that he entertained or was entitled to entertain a well-founded expectation justiciable in law.

In ***R. v. Department of Education and Employment, ex parte Begbie*** *[(2000) 1 WLR 1115]*, court observed that as the representations cited by the claimant had been made by certain politicians who were not officials of the relevant public authority, and though such representations would have given rise to an 'expectation' as claimed by the claimant, such expectation cannot be recognized as a 'legitimate expectation' which can be protected by law, and therefore, relief cannot be granted founded on the doctrine of legitimate expectations. Quoting from the *GCHQ* judgment, the court held that *"legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue".*

In ***Siriwardana v Seneviratne and others*** *[(2011) 2 Sri.LR 1],* Chief Justice Shirani Bandaranayake cited the following extract from the Indian case of ***India v Hindustan Development Corporation*** *[(1993) 2 SCC 499]* to hold that a mere expectation does not amount to it being legally protected:

> *"However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertible expectation and a mere disappointment does not attract legal consequences…The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in natural and regular consequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiable, legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense."*

It would thus be seen that, embodied in the doctrine of legitimate expectations, are three key variables. They are -

(i) a public authority having through representations made by it or by its conduct generated an expectation,

(ii) legitimacy of that expectation, and

(iii) the protection conferred by law on the expectation that had been generated.

As to legitimacy of the expectation arising out of a representation made or past practice of a public authority, the law is concerned only of the expectation the person concerned is entitled to develop, as opposed to the subjective expectation actually entertained in the mind of such person. Thus, the question to be asked is, what was the expectation the person concerned was **entitled by law** to develop in his mind by the representation or the conduct of the public authority concerned. Once the court identifies the legitimacy of the expectation generated by the public authority, the court needs to identify how that expectation needs to be protected, having regard to the competing interests of protecting discretionary freedom of the public authority versus maintaining legal certainty of its decisions.

2.3.5 Expectations generated through lawful & unlawful representations and practices of public authorities

Expectations attributed to representations and practices of public authorities can relate to two distinct situations. They are, expectations generated through (i) lawful presentations and practices, and (ii) unlawful representations and practices.

2.3.5.1 Expectations generated through lawful representations and practices

When a public authority has generated expectations through lawful representations or practices (which is a reference to situations where the representations or conduct cited by the claimant are lawful / intra-vires the powers of the relevant public authority), whether or not the claimant is entitled to claim a legitimate expectation will be governed by legal principles discussed in the other parts of this judgment under the title 'doctrine of legitimate expectations'.

2.3.5.2 Expectations generated through representations or practices which are unlawful and / or ultra-vires the powers of the public authority

Such expectations may relate to two situations:

(i) Where officials of the public authority concerned who generated the expectation through representations made by them had acted ultra-vires the authority conferred on them by the public authority, made representations which are unlawful, and the public authority now wishes to act intra-vires its legal authority;

(ii) where the public authority had itself acted ultra-vires its authority and made unlawful representations.

A public authority arguing that it did not have lawful authority to make the representations it did (which has given rise to the expectations of the claimant) is unattractive. Allowing a public body to avoid being bound by its own previous representations on that footing seems to be unfair. However, a court cannot compel a public body to do what it is not legally empowered to do. In ***Rowland v. Environment Agency*** *[2005 Ch 1]* , ***R (Bibi) v. Newnham London Borough Council*** *[(2002) 1 WLR 237]* and ***R (Bloggs 61) v. Secretary of State for the Home Department*** *[(2003) 1 WLR 2724]*, court made it abundantly clear that the doctrine of legitimate expectations cannot operate so as to extend the powers of a public authority, by rendering enforceable, acts or decisions which are ultra vires the authority of the body itself. In ***Rowland v. Environment Agency*** *(referred to above)* it was held that the fundamental principle is that, a legitimate expectation can only arise on the basis of a lawful promise.

Court cannot order public authorities to fulfil promises which are beyond their powers or unlawful. In the event a court recognizes that a public body has made certain representations which are ultra vires its powers, which have given rise to an expectation, it will not recognize the existence of an enforceable substantive legitimate

expectation and therefore will not require the public authority to act contrary to law. Such approach is founded on the following three reasons:

(i) a public body cannot enlarge its powers by making *ultra vires* representations. Thereby, the principle of legality is respected and thereby, the *rule of law*;

(ii) requiring a public body not to be bound by its own unlawful representations would facilitate the public body not acting contrary to law. Also, the public body will thereby not be forced to act contrary to law;

(iii) by not requiring a public body to act contrary to law, wider public interests are protected.

However, some amount of protection to unlawfully generated promises may be possible for *bona-fide* claimants. While a public body cannot be required to do what is legally impossible, it can be required by court to exercise its powers benevolently, so as to respect, as far as legally possible, the expectation generated (engendered) by it. (This is referred to as the 'doctrine of benevolent exercise of power'.) Compensation in lieu of the fulfilment of the unlawfully generated expectation, is one option available. By this approach, on the one hand, public interests in not compelling a public body to do what it is not empowered to do or to act contrary to law, is protected. On the other hand, the private interests of the claimant based on the doctrine of fairness is recognized and protected by ordering the payment of compensation.

2.3.8 Procedural and Substantive Legitimate Expectations

Based on the nature of the representation made or practices and conduct of public authorities and the expectations generated by them, the law recognizes two types of legitimate expectations. They are 'procedural legitimate expectations' and 'substantive legitimate expectations'. If what can be inferred by the representation made or the practices of the public authority is adherence to a particular procedure to be followed when taking a decision, then the court may, through the recognition of the doctrine of

'procedural legitimate expectation', require the public authority concerned to adhere to such procedure that was undertaken to be followed. The expectation generated by a public authority can also take a substantive character, in the nature of the public authority having through its representations or practices, given rise to a legitimate expectation that a particular outcome or benefit would be awarded. That situation is recognized as having given rise to a 'substantive legitimate expectation', and thus, the court can require the relevant public authority to respect the expectation that was generated by it, and grant to the claimant the expected outcome.

2.3.8.1 Procedural Legitimate Expectations

Generally, a court would protect an individual's expectation by requiring a fair procedure to be followed before the public authority makes the relevant decision. If the claimant expected procedural fairness, this approach of court would fulfil the claimant's expectation. Procedural fairness may also be conferred by court in a situation where even though the claimant expected a particular substantive outcome, the court has concluded that, when preserving discretionary freedom of the public authority, the authority should be required to adhere to procedural fairness (only), and that compliance with such procedural fairness would be sufficient. In situations where the court recognizes only procedural fairness, the public authority would be entitled to arrive at a lawful decision (having adhered to procedural fairness), though such decision may be contrary to the expectation of the claimant.

The duty to act fairly and procedural protection arising out of legitimate expectations are similar, yet, not identical. The duty to act fairly is a flexible concept based on the rules of natural justice. Its precise meaning and the manner in which *audi alteram partem* of the rules of natural justice must be given effect to, depend on the context. Thus, different situations will require different levels of fairness and procedure to be adopted. The principle of legitimate expectations can influence the degree of fairness and the

exact nature of the procedure to be adopted. The existence of a legitimate expectation may require the public authority to confer on the claimant a more detailed (generous) and specific form of procedural fairness in line with previous practice of and representations made by the public authority, than what he would be entitled to if there was no legitimate expectation and the claimant sought only compliance with *audi alteram partem*. Therefore, should the claimant insist on the public authority having followed a detailed or specific procedure (in excess of what the rules of natural justice would require), he would need to establish that he had a procedural legitimate expectation in that regard. Such expectation may arise out of representations made or previous practices of the relevant public authority.

A frustration of procedural legitimate expectations can arise in the following situations:

(i) claimant relied on a policy or norm of general application, which had changed, and therefore applied differently;

(ii) the claimant relied on a declared policy or norm, which was not changed, but did not apply to the claimant;

(iii) the claimant received a promise or representation, which was not honoured in respect of the claimant, due to a change in policy or a norm pertaining to procedure;

(iv) the claimant received a promise or representation, which was dishonoured in respect of the claimant, not due to a general change in policy, but because the decision-maker has in the particular instance changed his mind.

In ***Attorney General of Hong Kong v. Ng Yuen Shiu*** *(referred to above)* while recognizing the doctrine of procedural legitimate expectation, the Privy Council held that when a public body has promised to follow a particular procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long as the implementation does not interfere with its statutory duties.

In ***Sundarkaran v. Bharathi and Others*** *[(1989) 1 Sri LR 46],* the Petitioner – Appellant had a liquour license for the two preceding years, and applied for a license for the following year (1987). He was required by the relevant authorities to pay the license fee. When he attempted to do so at the office of the Government Agent, he was informed that a license could not be issued to him as he had failed to obtain the consent of all the Members of Parliament of the area, which was a requirement in terms of a circular issued in 1986 (which became applicable for the first time). He moved for a writ of Mandamus from the Court of Appeal, and having failed, appealed to this Court. This Court observed that the Respondents had failed to give the Petitioner a fair hearing of meeting the objections raised by the Members of Parliament. Court also held that, it has been repeatedly recognized that no man is to be deprived of his property without having an opportunity of being heard. The Supreme Court rejected the argument that the Petitioner was merely 'hoping against hope' of being granted a renewal of his license and held that he had a legitimate expectation of success, and therefore a right to a full and fair opportunity of being heard.

In ***M.R.C.C. Ariyarathne and Others v. N.K. Illangakoon, IGP and Others*** *(referred to above),* where a group of Development Assistants attached to the Police Department claimed that they had a legitimate expectation of being absorbed to the Sri Lanka Police Force or to one of its specialized units, Justice Prasanna Jayawardena provided the following general description of procedural legitimate expectations:

> *"Where a public authority, acting intra vires, has given an assurance that it will hear a person before it changes its policy with regard to a matter which affects him or has stated or otherwise made known its policy with regard to that matter or has an established practice of holding a hearing before a change of policy is effected, that person will have a procedural legitimate expectation, that the public authority will give him notice and a reasonable and adequate opportunity to make representations and be heard before it decides whether to change its policy with regard to the matter which will affect him. A*

court will, by way of judicial review, enforce such a procedural legitimate expectation, other than in limited circumstances such as, for example, where considerations of national security override that expectation of being consulted or heard."

2.3.8.2 Substantive Legitimate Expectations

As the Petitioner in this matter is seeking relief on the premise that his substantive legitimate expectation to receive a 'Letter of Intent' from the 1st Respondent – CEB and a permit from the 2nd Respondent – SLSEA had been frustrated, I propose to deal with this area of law in some detail.

Recognition of 'substantive legitimate expectations' is an instance which enables court to review the decision which the public body was required to take (based on the expectations it had generated through its own representations and past practices), as opposed to procedure it should have followed when taking the decision. Thus, it goes beyond the traditional scope of judicial review of examining procedural propriety and enters into the controversial area of reviewing merits of the impugned decision.

After a period of uncertainty regarding the question as to whether the English law recognizes the doctrine of 'substantive legitimate expectations' as opposed to 'procedural legitimate expectations', in ***R. v. North and East Devon Health Authority ex parte Coughlan*** *(referred to above),* the Court of Appeal of England cleared the doubt recognizing the non-justiciable frustration of substantive legitimate expectation as a distinct ground for judicial review, resulting in the grant of relief aimed at quashing the impugned decision of the public authority, as opposed to the procedure adopted by it when arriving at the decision. This would result in the court being able to consider the grant of substantive relief.

Lord Justice Laws in ***R (Niazi) v. Secretary of State for the Home Department*** *[(2008) EWCA Civ. 755],* held that, a substantive legitimate expectation arises only if there has

been a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance had been assured. He held that, a substantial legitimate expectation would arise when an individual or a group who have substantial grounds to expect that the substance of the relevant policy will continue to be in force for their particular benefit: not necessarily forever, but at least for a reasonable period of time, to provide a cushion against the change. In such situation, a change cannot lawfully be made, certainly not made abruptly, unless the authority notifies and consults those who would be adversely affected by such change.

The recognition of a substantive legitimate expectation offers not mere procedural protection. It provides a degree of legal certainty about the nature and the merits of the decision of the public authority which results in a particular outcome. The existence of a procedural legitimate expectation imposes a requirement on the decision-maker to take the decision in a particular manner. It does not impose a limitation on the exercise of discretion on the decision to be taken or on the decision itself. (It is a restriction on how to arrive at a decision and not a restriction on the decision itself.)

It must be noted that the recognition by court of substantive legitimate expectations has an impact on the exercise of discretion by public authorities. It can give rise to the decision-maker having to realize (give effect to) or honour the substantive expectation of the person who entertained such expectation. Thus, the expectation of the claimant would have to be realized. It may limit or completely take away discretion of the decision-maker. Some may even argue that, judicial enforcement of a substantive legitimate expectation of a claimant can result in the judiciary usurping the Executive's role. That is an argument *sans* merit, because when a court recognizes a substantive legitimate expectation, it does not require the public authority to give effect to the court's opinion on the matter. It merely requires the public authority to honour the expectation it generated by its own representations or past practice.

The concept of legal certainty provides a major justification for the recognition and enforcement of substantive legitimate expectations. As stated earlier, legal certainty is a component of the *rule of law*. The legal protection of expectations through the application of principles of administrative law such as the doctrine of legitimate expectations is a way of giving expression to the requirements of predictability, certainty, formal equality, fairness and consistency, which are all facets inherent in the *rule of law*, thus, its importance. However, legal certainty should be balanced with wider public interest. What will ultimately be sanctioned by court is what is in public interest.

The sub-doctrine of substantive legitimate expectations arises in the following two situations:

(i) A person who had been enjoying a benefit or advantage over a period of time, claims that such advantage or benefit had been withdrawn in frustration of his substantive legitimate expectation that the advantage or benefit will continue. In this instance, the recognition of the substantive legitimate expectation will preclude the decision-maker from exercising discretionary authority and changing the outcome legitimately expected by the party which entertained the expectation.

(ii) A person who is not presently enjoying a particular benefit or an advantage, claims that while he rightfully expected such benefit or advantage to be granted, in frustration of his expectation, the benefit or advantage he had applied for has been denied. In this instance too, the recognition of the substantive legitimate expectation will force the decision-maker to grant the particular benefit or advantage that was rightfully expected by such party. [The instant case falls into this category.]

Since the ***Coughlan*** case, the intensity with which courts have considered whether there existed a substantive legitimate expectation, has decreased. There exists only a very small category of cases where the stringent proportionality / balancing test applies. In those cases, the public authority can (is entitled to) frustrate the substantive legitimate expectation it created, only if the court is satisfied that the public interest in doing so (deviating from the undertaking given) outweighs the unfairness that will thereby be occasioned to the individual concerned. In such cases, a decision to frustrate a substantive legitimate expectation will be held to be lawful provided the decision-maker has (i) taken the expectation into account as part of its decision-making process, (ii) reached a reasonable conclusion concerning the balance between the public and private interests at stake, and (iii) respected any relevant conditions precedent, such as having given due notice where it would be unfair not to do so. Unless these grounds are satisfied, the public authority concerned will be required by court to honour its own undertaking / representations and its part practices.

However, in the cases that were decided after the decision in ***Coughlan*** which include the cases of ***R (Nadarajah) v. Secretary of State for the Home Department*** and ***R v Secretary of State for Education and Employment ex parte Begbie*** *(both cited above)*, the court's view was that the test enumerated in ***Coughlan*** should be narrowly construed by court. While accepting the test in ***Coughlan,*** the subsequent cases identified that stringent criteria should be applied for the recognition by court of a substantive legitimate expectation. Courts will look for the existence of an individualized promise or a specific promised given to a small group, rather than a representation containing a general statement of policy. Thus, there should be a specific undertaking or other representation by the public authority to the claimant, such as in the nature of a specific promise or a contractual undertaking.

In ***R (Nadarajah) v. Secretary of State for the Home Department*** *[(2005), EWCA Civil 1363],* it was held that, a public body's promise or past practice as to future conduct may be denied, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

In ***United Policyholders Group v. Attorney General of Trinidad and Tobago*** *(referred to above),* Lord Carnwath while approving the tests in ***Coughlan****,* held that a claim for substantive legitimate expectations should be honoured only where the claimant can establish the following:

(i) That there was a promise or representation which is clear, unambiguous and devoid of relevant qualification;

(ii) The promise was given to an identifiable, defined person or to a group by a public authority;

(iii) The promise was given by the public authority for its own benefit, either in return for action by the relevant person or group or on the basis of which the person or group has acted to its detriment;

(iv) The authority cannot show good reasons, judged by the court to be proportionate, to resile from the promise.

2.3.8.4 Approach to be taken by Court when a claim of substantive legitimate expectation is raised and established

When a claim of the existence of a substantive legitimate expectation is raised, as observed in ***R. v. North and East Devon Health Authority, ex parte Coughlan***, court may arrive at one out of the following three findings:

(i) though it has been submitted that the petitioner was entitled to a substantive legitimate expectation of some benefit being awarded or not withdrawn, what he was in fact entitled to was a procedural legitimate expectation (as opposed to a substantial legitimate expectation) such as the granting of a fair hearing or consultation before the impugned decision was taken. That is on the footing that the criterion of legitimacy requires only procedural protection. In other words, it is that all what the petitioner was legitimately entitled to was procedurally fair treatment [e.g. ***R. v. Secretary of State for the Home Department, ex parte Khan***];

(ii) by holding that while the petitioner was entitled to a substantive legitimate expectation (such as a conferral of a benefit or non-withdrawal of it), that expectation should be protected only by requiring a fair procedure being followed. That amounts to procedural protection of a substantive legitimate expectation. This approach is adopted when there are countervailing factors which necessitate the court to only insist on procedural fairness. This is when the public interest favours the exercise of discretionary freedom;

(iii) situations where the court recognize the existence of an actual substantive legitimate expectation, which is what the petitioner expected, and is entitled to expect – namely a particular substantive and legitimate outcome. This results in the court requiring the decision-maker to confer on the petitioner a particular benefit. In this situation, the discretionary freedom of the decision-maker must give way to the principle of legal certainty. This will result in the

decision-maker's discretion being removed completely. Thus, courts are cautious in applying this approach.

As stated previously, it is important to note that judicial thinking seems to recognize the importance of limiting the circumstances in which substantive legitimate expectations may arise. In the case of ***Ariyarathne***, Justice Prasanna Jayawardane, expressing his agreement with the views taken in ***R. v. Department of Education and Employment, ex parte Begbie*** and ***R (Nadarajah) v. Secretary of State for the Home Department*** (*both referred to above),* held the following view:

"*…In my view, these factors could make the doctrine of substantive legitimate expectation an unruly wayward horse if it is left to be guided only by the distinctly 'general' guidelines set out in* ***Hamble (Offshore) Fisheries Ltd, Dayarathna*** *and* ***Coughlan****."*

In conclusion, it would be pertinent to note that, the essence of jurisprudence on this matter supports the view that, in a case of substantive legitimate expectations, the test of reviewing the decision of a public authority is no longer limited to the criteria of *Wednesbury* unreasonableness. The court's task is to weigh genuine public interest that would be protected by accommodating the personal interest of the claimant, and decide on the legitimacy and the weight of the expectation of the claimant in comparison with the reasons given by the public authority for the change of policy on its part which it would invariably claim to also be in public interest. The court must grant substantive relief, if in the opinion of the court, the public authority having changed its policy is lawful and in wider public interest. That is not a means of directing public institutions on what their policy ought to be. The approach of the court is a means of preventing abuse of power by public authorities, and thereby, protecting public interests, which is the bounden duty of courts.

3.8.5 Does the frustration of a legitimate expectation constitute an infringement of Article 12(1)?

The totality of the judicial precedent cited in this judgment and the available jurisprudence both in this country and found in English Law pertaining to the doctrine of legitimate expectations (both procedural and substantive) points towards one direction. That is the conceptual basis for judicial review of the impugned decision, that being the rationale that permitting the impugned decision to stand would be inconsistent with *rule of law,* overlooking an instance of abuse of power, allowing an unreasonable, arbitrary or capricious decision to stand, and contrary to the very foundation of the law – that being fairness. Time and again, this Court has observed that the recognition of the equal protection of the law – the right to equality would necessitate this Court to rule that such legally flawed decisions which are contrary to the *rule of law*, signify an instance of abuse of power, are irrational, capricious or arbitrary or are so fundamentally unfair that the very foundations of justice and the conscience of the court would be shockingly shaken, would amount to an infringement of that fundamental right recognized by Article 12 of the Constitution. Thus, the frustration of a legitimate expectation does amount to infringement of Article 12 and specifically Article 12(1). This view on the impact of the frustration of a legitimate expectation is recognized amongst others in ***Suranganie Marapana v. The Bank of Ceylon and Others*** *[(1997) 3 Sri L.R. 156],* ***Dayarathna and Others v. Minister of Health and Indigenous Medicine and Others*** *(referred to above),* ***Gunawardena v. Ceylon Petroleum Corporation and Others*** *[(2001) 1 Sri L.R. 231],* ***Weerasekara v. Director-General of Health Services and Others*** *[(2003) 1 Sri L.R. 295],* ***Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others*** *(referred to above),* ***Fernando and Others v. Associated Newspapers of Ceylon Ltd and Others*** *[(2006) 3 Sri L.R. 141],* and ***M.R.C.C. Ariyarathne and Others v. N.K. Illangakoon, IGP and Others*** *(referred to above).* Thus, it is now necessary to conclude that the 'frustration of a procedural or substantive legitimate expectation' is a *sui generis* ground to hold that

an infringement of the fundamental right recognized by Article 12(1) of the Constitution has occurred.

3. Position of the Petitioner

Vidullanka PLC is a public company incorporated in Sri Lanka, registered with and approved by the Board of Investment, and is listed in the Colombo Stock Exchange. Vidullanka PLC is engaged in the business of generation of electrical power through renewable energy resources and selling such electricity to the 1st Respondent – CEB. The company has, directly and through subsidiary companies successfully completed implementing several mini-hydropower projects and one project using biomass. It claims without contest from the Respondents that it plays a significant role in the development of the renewable energy generation capacity in Sri Lanka and significantly contributing to the national electricity grid. On 14th May 2012, Vidullanka PLC incorporated the Petitioner company - Vavuniya Solar Power (Private) Limited, as a subsidiary. The purpose of incorporating this company was to carry out a solar energy-based electricity generation project in Vavuniya, in the Northern Province of Sri Lanka.

On 20th April 2012, the Petitioner had submitted an Application to the 2nd Respondent – SLSEA for the purpose of obtaining approval for a solar energy-based electricity generation plant (also referred to as a 'photovoltaic plant') to be commissioned in Vavuniya. The expectation of the Petitioner was to obtain a permit under section 18 of the SLSEA Act, to commission the electricity generation plant, and commence generating electricity to be supplied to the national grid.

The project proposed by the Petitioner was to commission an electricity generation plant (using solar energy) at the cost of the Petitioner, and for the electricity generated by the plant to be supplied to the 1st Respondent – CEB to be distributed via the national grid. The 1st Respondent was to pay an agreed amount for electricity supplied to it by the

Petitioner. For that purpose, the Petitioner was to enter into an agreement with the CEB for the sale / purchase of electricity generated by the plant.

Learned President's Counsel for the Petitioner submitted that prior to the submission of this Application, a pre-feasibility study had been conducted and the Application for a permit was submitted to the SLSEA, as it was deemed to be a viable project. Learned President's Counsel also submitted that the Application ("P3A") had been submitted to the SLSEA in terms of section 16 of the SLSEA Act. The Application had been in conformity with (a) provisions of the SLSEA Act, (b) the 'On-grid Renewable Energy Projects Regulations' of 2009 ("P2A"), (c) the Regulations of 2011 promulgated by the Minister of Power and Energy in terms of section 67 read with 16(2), 17(2)(a) and 17(a)(2) of the SLSEA Act ("P2B"), and (d) the Guidelines issued by the SLSEA titled "*A Guide to the Projects approval process for On-Grid Renewable Energy Project Development*" ("P2C").

Following the registration of the Application in terms of section 16(3) of the SLSEA Act (Registration No. R 125550) and a preliminary screening of it by the SLSEA, by letter dated 18th May 2012 ("P3B") the Director General of SLSEA (5th Respondent) wrote to the General Manager of the CEB (4th Respondent) bringing to his attention information pertaining to 23 Applications received by the SLSEA seeking approval for renewable energy (solar) power projects, which included the project submitted by the Petitioner. While seeking information regarding the availability of 'grid capacity' on the part of the CEB (given the intended locations of the respective proposed electricity generation projects), he sought the concurrence of the CEB to table the Applications pertaining to the proposed projects at the forthcoming meeting of the PAC.

Learned President's Counsel for the Petitioner submitted that the afore-stated letter amounted to the 5th Respondent having sought from the CEB a 'grid interconnection

concurrence' for several proposed projects, including the project for which the Petitioner had sought approval.

Subsequently, the Petitioner had been informed by the SLSEA that the CEB requires the project for which the Petitioner sought approval to contain a 'battery storage system'. Therefore, the Petitioner had made necessary changes to the proposed project, and by letter dated 19th November 2012 ("P3C") informed the Deputy General Manager (Energy Purchases) of the CEB, the Petitioner's willingness to include a '8 megawatts battery backup system' as a solution to the problem highlighted by the CEB. The problem was supposedly the short-term power variation in electricity generated by the proposed project. That problem was sought to be resolved by the addition of a battery system to ensure smooth power output at the grid end, so that sudden power drops could be avoided. Through the said letter, the Petitioner had requested the CEB to provide the 'grid interconnection concurrence' for the project proposed by the Petitioner. Receiving such concurrence would have enabled the SLSEA to consider granting 'provisional approval' for the project. By letter dated 21st November 2012 ("P3D"), without making any adverse comment, the Deputy General Manager (Energy Purchases) of the CEB has brought this matter to the attention of the Deputy General Manager (Transmission & Generation Planning) of the CEB. The Petitioner claims that notwithstanding the Petitioner having in November 2012 undertaken to amend the project specifications as required by the CEB to include a 'battery backup system' and several reminders having been submitted to the CEB, till 2016 the CEB failed to grant the 'grid interconnection concurrence' to the intended amended project of the Petitioner (Reminders sent to the CEB in this regard were produced by the Petitioner marked "P3F", "P3G" and "P3H").

On 15th February 2016, the SLSEA wrote to the CEB seeking 'grid interconnection approval' to the modified project proposed by the Petitioner. The modification (as proposed by the Petitioner) was to transfer a minimum of 25% of energy generated

during the daytime to the night peak period via a battery storage system ("P4A"). By letter dated 9th May 2016, the CEB informed the SLSEA that having taken into consideration the innovative nature of the amended project, it has no objection for the consideration of the project for the issue of a 'provisional approval' by the SLSEA as a 'pilot project' ("P4B"). Learned President's Counsel for the Petitioner submitted that this letter amounted to the CEB having granted 'grid interconnection concurrence' for the Petitioner's project. Learned Solicitor General for the Respondent did not object to that contention.

Sequel thereto, on 19th May 2016, the SLSEA notified the Petitioner that in terms of section 17(2)(a) of the SLSEA Act, No. 35 of 2007, the PAC of the SLSEA had granted 'provisional approval' to the Petitioner to develop a '10 megawatts Solar PV Project with a battery storage system' to be located within the area coming within the Divisional Secretariat of Vavuniya South. The Petitioner was required within 6 months from the date of that notification, to submit the documents and information mentioned under items "A" and "B" of Annexure I to the said notification, which were the conditions of the provisional approval ("P5A"). For the provisional approval to be upgraded to the final or full approval and the grant of a permit under section 18 of the Act, these conditions had to be satisfied by the proponent of the project, (being the Petitioner). The notification contained a caution that provisional approval will stand automatically cancelled if the afore-stated requirements were not complied within 6 months or within a further period of 6 months which could be obtained by presenting a request to the SLSEA. The afore-stated 'conditions' of the provisional approval granted to the amended project proposed by the Petitioner contained *inter alia* a requirement that the Petitioner obtains from the 1st Respondent a "Letter of Intent" which would indicate its willingness to purchase electricity generated by the proposed project. That had been an administrative general and imperative requirement imposed by the SLSEA to all project proponents.

In view of the foregoing, the Petitioner applied for the issue of the several approvals stipulated as conditions of the 'provisional approval' issued by the SLSEA. On 26th July 2016, the Petitioner requested the CEB to issue a "Letter of Intent" ("P7A"). As the 1st Respondent did not respond, two further requests were made on 29th August and 7th November 2016 ("P7B" and "P7C"). As there was no response from the CEB notwithstanding reminders being sent, by letter dated 14th September 2016 ("P8A") the Petitioner requested the Minister of Power and Renewable Energy to intervene in the matter and advice the CEB to expedite the issuing of the 'Letter of Intent'. Since there was no positive outcome even from the Minister, yet another letter dated 10th November 2016 ("P8B") had been sent by the Petitioner. Sequel thereto, the Minister had by letter dated 18th November 2016 ("P8C") advised the CEB to expedite the issuing of the 'Letter of Intent' and the 'Electricity Purchase Agreement'. Nevertheless, there had been no positive response from the CEB notwithstanding the Minister's intervention.

As there was a delay in obtaining necessary approvals, including the 'Letter of Intent' from the CEB, by an Application to the SLSEA, the Petitioner had obtained an extension of the validity period of the provisional approval, up to 18th May 2017 ("P5B").

Learned President's Counsel submitted that the 'provisional approval' granted to the project by the SLSEA was a clear indication that the CEB had granted 'grid interconnection concurrence' and an indication that the CEB being the 'electricity transmission and bulk supply licensee' had been satisfied of its ability to accept electricity generated by the project proposed by the Petitioner. In terms of clause 2.3 of the Guidelines, such a decision would have been taken by the CEB upon a careful evaluation of technical factors such as the systemwide impacts, network typology and system stability, in addition to more commonly understood constraints such as local transmission grid limitations and limitations in capacity at the grid sub-station.

Subsequently, the Petitioner had obtained all the required approvals as contained in Annexure I of "P5A", except the "Letter of Intent" from the CEB. The Petitioner produced marked "P6A" to "P6H" the other approvals obtained by the Petitioner, as per the conditions contained in the 'provisional approval' issued by the SLSEA. Thus, the only requirement that stood in the way towards the Petitioner obtaining the final approval (a permit under section 18 of the SLSEA Act) from the SLSEA, was the "Letter of Intent" to be issued by the CEB.

In the meantime, in November 2016, at a meeting held with the 1st Respondent, it had been intimated to the Petitioner that the project would be accepted if the project is changed to its original form (i.e. solar power electricity generation without a battery storage system). The Petitioner agreed to do so. The CEB has not given any reason for the change in the technical requirement previously sanctioned by it. Consequently, by letter dated 17th November 2016 ("P9"), the Petitioner informed the SLSEA of the change of position by the CEB and requested the SLSEA to grant an 'extension as per the original Solar PV Application made'. The SLSEA refused to change the 'provisional approval' without a direction from the CEB. Therefore, by letter dated 1st December 2016 ("P10A"), the Petitioner requested the CEB to issue a directive to the SLSEA to issue an amended 'provisional approval' from a 'Solar PV with a Battery Storage System' to a 'Solar PV System' (which amounted to the original project proposal submitted by the Petitioner – a system without a battery backup). By letter dated 1st December 2016, the CEB informed the SLSEA that it has no objection to the project type being changed to a 'Solar PV project' ("P10B"). Sequel thereto, by letter dated 20th December 2016 ("P11"), the SLSEA notified the Petitioner the grant of an amended 'provisional approval' from a 'Solar PV with battery storage' to a 'Solar PV (without a battery storage system)' project.

By letter dated 26th December 2016 ("P12"), the Petitioner wrote to the CEB seeking a 'Letter of Intent' for the further revised project (original project proposal – a system

without a battery backup). Since there was no response from the CEB, on 16th February 2017, the Petitioner in partial compliance with the conditions contained in the 'provisional approval', submitted the requisite approvals that were available (other than the 'Letter of Intent' to be issued by the CEB) to the SLSEA. This submission ("P13") contained a request that the 'final approval' for the project be issued along with a 'permit' in terms of section 18 of the SLSEA Act. While the 2nd Respondent did not issue a 'permit' to the Petitioner, by letter dated 1st March 2017 ("P14") addressed to the General Manager of the CEB (at the time the 4th Respondent), the SLSEA requested the CEB to issue a 'Letter of Intent' for the project of the Petitioner. As there was no response from the CEB, on 7th March 2017, the Petitioner once again urged the 4th Respondent to issue a 'Letter of Intent' ("P15"). In the said letter, the Petitioner sought reasons if any, for the delay in issuing the 'Letter of Intent'. In response, the Chairman of the CEB by letter dated 22nd March 2017 ("P16") informed the Petitioner that the Minister of Power and Renewable Energy had appointed a committee headed by the Secretary to the Ministry of Power and Energy to review and report on suitable decisions to be taken with regard to all matters pertaining to Applications for 'provisional approvals' and 'Letters of Intent' that are being processed either at the CEB or at the SLSEA, and that in the circumstances the project of the Petitioner would come within the scope of that committee. The Chairman of the CEB (3rd Respondent) had undertaken to revert to the Petitioner 'as soon as a direction is issued by the Ministry'.

The Petitioner claims that neither the said committee nor the CEB had thereafter informed the Petitioner of any reasons for the non-issuance of the 'Letter of Intent'. It is the Petitioner's position that there is no valid reason for the non-issuance of the said letter.

As opposed to the position taken up by the 1st Respondent (CEB) regarding the reason for the non-issuance of the 'Letter of Intent', the Petitioner has asserted that, in terms of section 6 of the Guidelines ("P2C") issued by the 2nd Respondent (SLSEA) there exists a

'Standardised Power Purchase Agreement (SPPA)' for renewable energy projects of the approved types, with an installed capacity of up to 10 MW. The SPPA is a standardised and non-negotiable Agreement that the CEB enters into with project proponents which stipulates the price at which the CEB will purchase electricity from the project proponent. This tariff has been approved by the PUCSL. The Petitioner's position is that the project proposed by the Petitioner comes within the scope of that Agreement. Therefore, the Petitioner's position is that, as the capacity of the Petitioner's project is 10 MW, there is no requirement to negotiate the terms and tariffs according to which electricity generated from the project is to be purchased by the 1st Respondent (CEB) as they are regulated in terms of the Standardised Power Purchase Agreement. Thus, the Petitioner claims that the 1st Respondent (CEB) does not have any discretion in the matter of granting the 'Letter of Intent' to the Petitioner, who had already obtained 'provisional approval' founded upon the 1st Respondent (CEB) issuing 'grid interconnection concurrence'.

4. Position of the Respondents

2nd Respondent – Sri Lanka Sustainable Energy Authority - According to the 5th Respondent (in his capacity as the Deputy Director General (Operations) of the Sri Lanka Sustainable Energy Authority – 2nd Respondent, in terms of section 13 of the Act, it is the Authority that is responsible for the development of all renewable energy resources in Sri Lanka, with the view to obtaining maximum economic utilization of those resources. With this objective, the Authority has published Regulations ("P2A" and "P2B") and Guidelines ("P2C") to regulate the procedure for application and the granting of approvals for renewable energy projects. In terms of section 16 of the Act, the Director General of the Authority is required to accept Applications for development of renewable energy projects and submit them to the PAC for its consideration. Up until 2018, the Authority had successfully achieved targets pertaining to sustainable energy projects, based on the 'least cost long-term generation expansion plan' of the government, which has been approved by the Cabinet of Ministers. When

developing renewable energy projects, there are special considerations to be given by balancing environmental factors and social benefits. According to the SLSEA, it is awaiting 'grid concurrence' from the CEB for a number of Applications it had received.

The 5th Respondent has presented marked "2R1", minutes of the PAC meetings held on 19th May and 23rd June 2016. According to "2R1", at the meeting of the Committee held on 19th May 2016 (at which M.C. Wickramasekara, the then General Manager, CEB was present), the 'Solar PV Project with Battery Storage System' with a capacity of 10 megawatts submitted by the Petitioner has been approved for the issuance of a 'provisional approval'. At the subsequent meeting of the PAC held on 23rd June 2016, no decision had been taken pertaining to the project proposal submitted by the Petitioner.

According to the 5th Respondent, the 6th Respondent – Secretary to the Ministry has by letters dated 4th May 2016 ("2R2") and 20th July 2017 ("2R3") issued certain directives to the Authority. By "2R2" the Secretary has informed the Authority that the government has given high priority for the development of renewable energy envisaged for the future development of the country. He has highlighted the need to identify suitable methodologies to fast-track the development process. He has asserted the need to streamline the project approval process and immediate intervention of the Authority to speed up implementation of projects. By "2R3", the Secretary has notified the Authority that the Ministry intends to amend the SLE Act to enable the development of renewable energy projects under the SLSEA Act, and pending such action being taken, approval has been granted in terms of section 17(c) of the SLE Act to implement certain electricity generation programmes (specified in that letter).

1st Respondent – Ceylon Electricity Board - According to the 4th Respondent (General Manager, CEB), in terms of the SLE Act, the sole authority to offer the "Standardised

Power Purchase Agreement" is the CEB, and the right to purchase generated electricity also lies solely with the CEB, which is recognized as the sole 'transmission licensee'.

Referring to the Application submitted by the Petitioner on or about the 20th April 2012 under section 16 of the Act, the 4th Respondent has asserted that the Petitioner has not complied with the requirement set-out in section 16 of the Act and in *Gazette* notifications bearing Nos. 1599/6 and 1705/22 (pertaining to 'on-grid Renewable Projects') dated 27th April 2009 and 10th May 2011, respectively. That is on the footing that as at the date of the Application, the Petitioner had not been incorporated as a company and thus was not in existence. Instead, the Application contained a reference to the fact that the company was 'in the process of incorporation'. According to the Certificate of Incorporation, the Petitioner company had been incorporated on 14th May 2012. Thus, the Petitioner had submitted an 'irregular Application'. Further, when the applicant is a company, it is incumbent on the company to tender a 'Resolution' of the company authorizing the applicant to submit an Application. This requirement had also not been complied with.

The 4th Respondent admits that, following the 1st Respondent issuing the 'Grid Interconnection Concurrence' in respect of the Application submitted by the Petitioner, on or about 19th May 2016, the 2nd Respondent issued the 'provisional approval' to the project of the Petitioner. The 4th Respondent agrees with the position taken up by the Petitioner that the grant of 'final approval' was contingent upon the submission of certain documents and information stipulated in Annexure I of the document containing the 'provisional approval'. Of such requirements, one was obtaining the 'Letter of Intent' from the 1st Respondent, and tendering it to the 2nd Respondent within 6 months from the issuance of the 'provisional approval'. If the requirements attached to the 'provisional approval' were not satisfied and submitted to the 2nd Respondent or the requirements contained in the 'provisional approval' were not satisfied at all, in

terms of section 17(c) of the SLSEA Act, the 'provisional approval' will automatically stand cancelled at the end of the 6th months period, or a further 6 months period, which may be obtained upon a request being made in that regard. This position is also contained in page 12 of the *"Guidelines to On-Grid Renewable Energy Development Projects"* ("P2C"). The Petitioner is deemed to have been fully aware that the final approval and the permit will be contingent upon his obtaining *inter-alia* a 'Letter of Intent' from the 1st Respondent, which the Petitioner had failed to obtain.

On application by the Petitioner, the time period originally granted by the 2nd Respondent to comply with the requirements was extended by another 6 months, and the extended period was to expire on 18th May 2017. Three days prior to the expiry of the said period, on 15th May 2017 the Petitioner filed the instant Fundamental Rights Application in the Supreme Court in order to prevent the extended period of the 'provisional approval' granted by the 2nd Respondent from automatically lapsing.

The appropriate cause of action where a party fails to obtain a 'Letter of Intent' is to bring the matter to the attention of the 1st Respondent. The 4th Respondent admits that the Petitioner had done so by way of submitting a letter, to which the 1st Respondent had responded by letter dated 22nd March 2017, stating that the Minister of Power & Renewable Energy had appointed a committee to take a decision on the matter. The matter pertaining to the Petitioner was pending deliberation by the Committee as at the time the instant Application was filed. In terms of section 22(1)(b) of the SLSEA Act, any person aggrieved by a refusal to grant final approval to an Application may within one month of the receipt of such communication, appeal against the refusal to the Board of Management. Furthermore, in terms of section 28 of the Act, the Petitioner could have presented an appeal to the Board. By instituting this action, the Petitioner has circumvented the proper forum to obtain redress and has petitioned the Supreme Court, without seeking administrative relief.

In response to the allegation pertaining to the non-granting of the 'Letter of Intent' to the Petitioner, the 4th Respondent has taken up the following positions:

(i) Due to technical reasons that are common or specific to Solar PV and Wind Power electricity generation plants, the 1st Respondent has stopped issuing 'Letters of Intent'. There are constraints in interconnection of these power plants to the transmission system. Therefore, in 2012, the 1st Respondent did not issue to the 2nd Respondent (SLSEA) concurrence for grid interconnection in respect of the project of the Petitioner. However, with grid and system expansion, these constraints can be relaxed or changed.

(ii) The 1st Respondent (CEB) stopped issuing 'Letters of Intent' to wind and solar projects until the grid connection limitations and effects on the system were studied. A study in this regard was conducted by the 1st Respondent and its report is contained in the "Integration of non-conventional renewable energy-based generation into Sri Lanka Power-Grids". ("4R1") According to this study, only 10 MW solar projects have been considered viable for Vavuniya.

(iii) Following the amendment to the SLE Act by Act No. 31 of 2013, procurement of electricity should be done on a competitive basis. This encourages lower electricity cost, ultimately helping customers and the national economy.

(iv) The Ministry of Power and Renewable Energy has decided on a policy of calling for tenders for wind and solar power projects.

(v) No 'Letter of Intent' has been issued since August 2013, except for one project, that being a joint venture between a private project proponent and the CEB.

According to the 4th Respondent, (a) the 1st Respondent did not initially issue a 'grid connection concurrence' for the project of the Petitioner, since there was an issue of 'technical infeasibility in connecting', (b) the 1st Respondent thereafter issued the 'grid

connection concurrence' as the technology was changed to 'battery storage' and as the 'system had expanded', and (c) the 1st Respondent did not issue the 'Letter of Intent' as (i) there were 'further issues to be reviewed in the technical matters with regard to the grid connections', (ii) due to the 'policy decision to go for tendering in solar power projects' and (iii) due to 'legal issues relating to the SLE Act'.

The 4th Respondent has taken up the position that in terms of the SLE Act, the sole authority for offering a 'Standardised Power Purchase Agreement' is the 1st Respondent (CEB). He further emphasizes that the right to purchase electricity lies solely with the electricity transmission licensee, being the CEB.

5. Submissions made on behalf of the Petitioner

Learned President's Counsel submitted that following certain preliminary work such as conducting a pre-feasibility study, on 20th April 2012 the Petitioner had submitted an Application to the Director General of SLSEA (5th Respondent) seeking approval for an on-grid electricity generation project. This Application had been in conformity with all the stipulations of the applicable provisions of the law and requirements contained in the guidelines.

Following a preliminary screening of the Application, the 2nd Respondent (SLSEA) in consultation with the 1st Respondent (CEB) registered the Application submitted by the Petitioner, and issued a registration number, being R 125550. This was in terms of section 16(3) of the SLSEA Act. He submitted that, this showed clearly that the Application submitted by the Petitioner was prima-facie valid and acceptable to the 2nd Respondent. On or about 18th May 2012, on behalf of the 2nd Respondent, the 5th Respondent (Director General, SLSEA) requested the 1st Respondent to provide 'grid interconnection concurrence' for the project proposed by the Petitioner and for several other projects. To facilitate the consideration of the Application for the issue of 'grid

interconnection concurrence' and 'provisional approval' for the project, the 2nd Respondent had submitted the Application of the Petitioner to the PAC of the SLSEA. Contingent upon the 1st Respondent granting 'grid interconnection concurrence' to the project (which is an indication of the CEB's ability to accept to its grid, the electricity generated by the project), the project was to receive 'provisional approval'. Learned President's Counsel drew the attention of Court to section 2.3 of the afore-mentioned Guidelines ("P2C"), which provides that as the 'transmission and bulk supply licensee', the CEB will have to (based on a careful evaluation of system wide impacts, network topology and system stability, in addition to the more commonly understood constraints such as local transmission grid limitations and grid substation capacity limitations), be satisfied with the ability of the CEB to accept electricity produced by the proposed project.

He further submitted that the PAC comprises of several government officials (as specified in section 10 of the SLSEA Act), and includes the General Manager of the 1st Respondent -CEB.

Learned President's Counsel further submitted that, the original proposal was for the establishments of a *Solar PV Power Generation Project.* Following a response received from the 2nd Respondent, the Petitioner having consulted its technical partner, had converted the proposed project into a *Solar PV Power Generation Project with a Battery Storage System.* The Petitioner had verily believed that if the project was converted in that manner (i.e. the enhancement of the project to contain a battery storage system), approval would be given for the project. That the Petitioner would amend the proposed project to include a battery storage system was conveyed to the 1st Respondent by letter dated 19th November 2012 ("P3C").

Notwithstanding the Petitioner making a number of representations to the 1st Respondent, till 2016, no meaningful action was taken by the 1st Respondent. The post-argument written submissions of the Petitioner contain an allegation that notwithstanding the project proposal submitted by the Petitioner having been the only Solar PV power project proposal received by the 2nd Respondent for the Northern Province and ranked 'number one' in the Northern Province for grid interconnection, instead of granting grid interconnection concurrence for the project of the Petitioner, the 1st Respondent had granted approval for a solar - thermal project of 10 MW capacity for the Vavuniya district submitted by another applicant. After a long delay in processing the Application, and no reasons being given for the delay, on 9th May 2016 ("P4B") the 5th Respondent (on behalf of the CEB - 1st Respondent) informed the Director General of the SLSEA - 4th Respondent that the CEB had no objection for consideration of the project for the issue of 'provisional approval' which was understandably subject to the Petitioner complying with certain conditions. This amounted to the CEB - 1st Respondent granting 'grid interconnection concurrence' to the amended project submitted by the Petitioner. Accordingly, by letter dated 19th May 2016 ("P5A") the SLSEA - 2nd Respondent granted 'provisional approval'. As 'provisional approval' was granted, the Petitioner verily believed that upon satisfaction of the conditions attached to the 'provisional approval' the 1st and 2nd Respondents would give approval for the project. Originally, a period of 6 months was given to the Petitioner to comply with the requirements, and on request by the Petitioner, another period of 6 months was given.

It was contended on behalf of the Petitioner that in terms of section 6 of the Guidelines ("P2C"), a 'Standardised Power Purchase Agreement' (SPPA) is available for the renewable energy generation projects which have received approval, with an installed capacity of up to 10 megawatts. The proposed project of the Petitioner belongs to this category. This SPPA is standardised and non-negotiable, and is valid for 20 years from the date of the commencement of commercial operations. Such projects are also eligible

to be paid under the Small Power Purchase Tariff (SPPT). The SPPT is an approved tariff published by the PUCSL.

Learned President's Counsel for the Petitioner submitted that where the capacity of a proposed electricity generation project (such as the project proposed by the Petitioner) is equal or less than 10 megawatts, there is no requirement to negotiate the terms and tariffs of the Standardised Power Purchase Agreement (SPPA). He further submitted that this position was evident by section 6 of the Guidelines ("P2C") which relates to 'Power Purchase Agreements and Tariffs'. Further, with the approval of the Cabinet of Ministers (approval granted on 7th March 2015) following the enactment of the SLE (Amendment) Act, No. 31 of 2013), a standardised tariff for solar power purchases under a Non-conventional Renewable Energy Tariff has been published by the 1st Respondent – CEB. Since the grid interconnection concurrence was given by the 1st Respondent – CEB to the Petitioner prior to the issuance of the 'provisional approval' by the 2nd Respondent – SLSEA, the 1st Respondent does not have in fact and in law a discretion in providing the 'Letter of Intent'. He further submitted that there is no Standardised Power Purchase Agreement for renewable energy generation projects which generate in excess of 10 megawatts, and thus, for those projects following a competitive bidding process based on the normal procurement policies is necessary.

It was submitted that the conduct of the Respondents coupled with the communications received from the Respondents and the Guidelines ("P2C"), gave rise to a legitimate expectation that the Petitioner would be entitled to receive a 'Letter of Intent' from the CEB – 1st Respondent, upon the Petitioner securing all the other approvals. It was therefore submitted that, even after fulfilling all the requirements contained in the 'provisional approval' ("P5A") (i.e. obtaining all the approvals listed as conditions to be satisfied in "P5A", other than the 'Letter of Intent') and the Petitioner having on 26th July 2016 ("P7A") requested the 1st / 4th Respondents to issue a 'Letter of Intent' (and

thereafter having sent two reminders), the failure on the part of the 1st Respondent to issue the 'Letter of Intent' constitutes a breach of the legitimate expectation of the Petitioner.

He further submitted that under section 43(4) proviso (b) of the SLE Act (as amended by Act No. 31 of 2013), it was not necessary for the 1st Respondent – CEB to call for tenders with regard to projects in respect of which a permit has been issued under section 18 of the SLSEA Act. He also drew the attention of the Court to the contents of section 43(7) and 43(8) of the SLE Act (amended by Act No. 31 of 2013), which recognize a 'Standardised Power Purchase Agreement'.

In view of the foregoing, learned President's Counsel for the Petitioner submitted that, there was 'absolutely no restriction' for the 1st Respondent under the SLE Act (as amended) to purchase electricity from a developer approved under the SLSEA Act, as there is no legal requirement for tenders for such projects.

Learned President's Counsel for the Petitioner summed up his submissions by stating that the non-issuance of the 'Letter of Intent' to the Petitioner was wrongful and without justifiable reason. Learned President's Counsel reiterated that the conduct of the Respondents coupled with the communications received from the Respondents gave rise to a legitimate expectation that the Petitioner would be entitled to receive a 'Letter of Intent' upon the Petitioner securing all the other approvals. Learned President's Counsel submitted that the continuing failure which amounts to a refusal to issue the 'Letter of Intent' to the Petitioner is arbitrary, capricious, unreasonable and discriminatory. In the circumstances, he submitted that the Petitioner has been denied the equal protection of the law as envisaged by Article 12(1) of the Constitution. Thus, he submitted that the fundamental right guaranteed in terms of Article 12(1) had been infringed by the 1st Respondent.

6. Submissions made on behalf of the Respondents

On behalf of the Respondents, it was submitted by the learned Solicitor General that the instant Application alleging an infringement of the Fundamental Rights of the Petitioner, had been filed prematurely. He submitted that, initially a period of six months was given by the SLSEA for the Petitioner to comply with the conditions that were attached to the 'provisional approval' (which was issued on 19th May 2016). Subsequently, on a request made by the Petitioner, this period of time was extended by another six months. Accordingly, the extended period granted to the Petitioner to comply with the requirements was to end on 18th May 2017. Had the Petitioner failed to satisfy the conditions that were attached to the 'provisional approval' at the time of the expiry of this extended period, in terms of section 17(4) of the SLSEA Act, the 'provisional approval' granted to the Petitioner would have lapsed. This Application has been submitted to the Supreme Court on 15th May 2017, three days before the extended period was to have lapsed. Learned Solicitor General submitted that the Petitioner resorted to this move, in order to prevent the 'provisional approval' from lapsing. Therefore, he submitted that the instant Application had been filed to prevent the provisional approval from automatically lapsing and was also premature.

Learned Solicitor General also submitted that as the Petitioner has been unsuccessful in obtaining the 'Letter of Intent' from the CEB, he should have brought that matter to the attention of the CEB. That the Petitioner has done. The CEB responded explaining the reason which prevented the CEB from granting the 'Letter of Intent', i.e. the Minister of Power and Renewable Energy has appointed a committee headed by the Secretary to the Ministry of Power and Energy to determine the said matter. In terms of section 22(1)(b) of the SLSEA Act, any person who is aggrieved by a refusal to grant final approval to an Application may, within one month of the receipt of such communication informing him of such refusal, appeal against such refusal to the Board of Management of the SLSEA. This step has not been taken by the Petitioner. Thus,

learned Solicitor General submitted that due to the afore-stated reasons, the instant Application is premature and should be dismissed.

Learned Solicitor General submitted that in 2012, it was due to 'grid interconnection issues' that concurrence for grid interconnection was not given by the 1st Respondent - CEB to the 2nd Respondent - SLSEA in respect of the Petitioner's project. The CEB stopped giving 'Letters of intent' to wind and solar projects until the grid connection limitations and effects on the system were studied. According to a study conducted by the CEB, only 10 MW solar projects had been considered viable for Vavuniya. He further submitted that with grid expansion and system expansion, these constraints can be relaxed or changed.

Learned counsel for the Respondents also submitted that, following the amendment to the SLE Act introduced by Act No. 31 of 2013, in terms of amended section 43 and in particular sub-sections 43(3) and 43(4), procurement of electricity by the CEB with regard to projects above 5 MW has to be done on a competitive basis by calling for tenders. He explained that the process of competitive bidding encourages lower electricity cost, which ultimately helps consumers and also the national economy. In the circumstances, the Ministry of Power and Renewable Energy had decided on a policy of calling for tenders for wind and solar electricity generation projects. Accordingly, tenders had been called for two 10 megawatts wind projects and contracts had been awarded. Tenders for sixty 10 megawatt solar projects had been called and award of tenders were being considered. Since 2013, no 'Letters of Intent' had been issued except for a single joint venture. It is the position of the Respondents that according to "4R2", with regard to projects which are to generate over 5 megawatts of electricity, project development has to take place through a tender process. Thus, a 'competitive bidding process' must be adhered to. As evident from "4R1", the Honourable Attorney General has expressed the opinion that when new electricity generation plants are required, in

terms of the amended law, the price at which electricity is to be purchased by the CEB (in its capacity as the 'transmission licensee') must be determined by competitive bidding. In terms of section 43(3) of the Act, the selection of a person to provide electricity should be on the basis of least cost.

Learned Solicitor General submitted that the Application of the Petitioner was submitted to the SLSEA on 20th April 2012, well before Act No. 31 of 2013 amended section 43 of the Act. He stressed that though on 19th May 2016, 'provisional approval' was granted for the project proposed by the Petitioner, "*the CEB was well within the scope of the said Amendment and the opinion expressed by the Honourable Attorney General to scrupulously adhere to the provisions of section 43(4) and not issue the letter of intent*". He further submitted that the 'sole reason' for not issuing the 'Letter of Intent' was that amended section 43(4) of the Act required competitive bidding to take place prior to entering into an agreement between the CEB and the project proponent. He concluded his submission by asserting that "*the CEB cannot be faulted or censured for obeying the law, as any contravention of it would entail legal sanctions and implications for the CEB'. There was no malicious intent on the part of the CEB in denying the Petitioner of the letter of intent. It was the supervening event of the law being amended, that prevented the CEB from performing the role envisaged by the Petitioner*".

7. Analysis of the evidence, application of the law and conclusions

7.1 Would the Petitioner be disentitled to any relief on the footing that as at the time the Application for a permit was submitted to the SLSEA by the petitioner, it had not been incorporated as a company?

Section 16 of the SLSEA Act which provides for the submission of an Application to the SLSEA by a person who is desirous of engaging in and carrying on an on-grid renewable energy project, does not specify that such an applicant should be a company incorporated under the Companies Act. Thus, there is no statutory requirement to that

effect, though the 4th Respondent has made such an assertion. However, *Gazette* notifications Nos. 1599/6 ("P2A") and 1705/22 ("P2B") dated 27th April 2009 and 10th May 2011, respectively, titled 'On-grid Renewable Energy Projects Regulations, 2009' issued by the Minister of Power and Energy under section 67 read with sections 16(2), 17(2)(a) and 18(2)(a) of the of the SLSEA Act, are relevant in this regard. Schedules A, B, C, and D of "P2A" issued in April 2009 had been replaced by four schedules contained in "P2B", which had been issued in May 2011. Thus, it would be "P2A" read with "P2B" that would be relevant to the instant matter. Regulation 2 of "P2A" provides that "*an application for engaging in or carrying on of an on-grid renewable energy project within a Development Area, shall be submitted to the Director-General in such form as specified in Schedule "A" to these Regulations …*". Schedule A of the said Regulations contain a template of the Application to be submitted. In item 4(ii) of Schedule A of "P2A", the applicant is required to disclose the "*Company Name (if applicable)*". In item 3 of "P2B" the applicant is required to disclose "*If the applicant is a Company: Name, Registration No., Name of Directors of the Company, Address, Telephone Numbers, Email*". It is thus apparent that the applicant being an incorporated company at the time of the submission of the Application is not an essential requirement imposed by law or through Regulations issued under the Act. Furthermore, Clause 2.1 of the guidelines issued by the SLSEA titled "*A Guide to the Project Approval Process for On-grid Renewable Energy Project Development*" ("P2C") provides that "*Any person (an individual or a company) may apply for a renewable energy project anytime …*". According to section 9(1)(c) of the SLE Act, a generation licensee is required to be an incorporated company, only if the project is to generate more than 25 megawatts of electricity. It is also pertinent to observe that, notwithstanding the alleged disqualification asserted to on behalf of the 1st Respondent – CEB and referred to in the submissions of the learned Solicitor General, the SLSEA had entertained the Application submitted by the Petitioner and processed it. Further, this objection was not raised by the 2nd Respondent – SLSEA, which not only accepted the Application, but processed it as well, and referred it to the PAC. Furthermore, in

any event, even though the Petitioner had not been incorporated as a company as at the date on which the Application was submitted by it to the SLSEA (i.e. 20th April 2012), as apparent by "P1A" (Certificate of Incorporation), by 14th May 2012 it had been incorporated as a company. In fact, the Petitioner has revealed in the said Application ("P3A") that the company was 'in the process of incorporation'.

7.2 Would the Petitioner be disentitled to any relief on the footing that the Application submitted by the Petitioner to the SLSEA was not accompanied by a Resolution adopted by the Board of Directors of the Petitioner authorizing the person who submitted the Application, to submit it on behalf of the company?

Section 16 of the SLSEA Act does not impose a statutory requirement that if the applicant is a company, the Application should be accompanied by a Resolution adopted by the Board of Directors authorizing the person submitting the Application to the SLSEA to submit such an Application on behalf of the company. However, "P2B" contains the following: *"Company resolution authorizing the applicant to submit the application (pls. attach)"*. As stated above, as at the time the Application was submitted, the Petitioner – company had not been incorporated. It was under incorporation. Thus, complying with the afore-stated requirement was not possible. "P2B" has been issued by the Minister under section 67 (power conferred on the Minister to make Regulations), read with section 16(2) (which provides that an Application should be in the prescribed form). While compliance with the requirements contained in these Regulations is necessary, acquiescence with a possible non-compliance will thereby prevent the party which acquiesced from subsequently raising any objection to the alleged non-compliance. As referred to above, it is seen that the 2nd Respondent – SLSEA has accepted the Application presented by the Petitioner ("P3A") and processed it. The 1st Respondent – CEB (which raised the objection referred to in this paragraph) took part in the further processing of the said Application and supported the granting of the 'provisional approval' to the Application. Thus, the 4th Respondent is disentitled

in law to object to the Application submitted to the SLSEA by the Petitioner on the footing that the Application was 'irregular'.

Conclusions with regard to questions "7.1" and "7.2"

It is to be noted that, even according to the 4th Respondent, that the Petitioner was not issued with a permit under section 18 of the SLSEA Act, was not due to the alleged submission of an 'irregular Application'. Furthermore, in none of the correspondence either the 1st Respondent – CEB or the 2nd Respondent – SLSEA has had with the Petitioner, has either of the Respondents referred to the Petitioner having submitted an 'irregular Application'. At no point prior to this Application being filed in the Supreme Court has the 4th Respondent raised the issue that the Application presented to the 2nd Respondent - SLSEA was defective. In fact, it is astonishing that the 4th Respondent who served in the PAC which granted 'provisional approval' to the Petitioner did not raise this issue at that stage. In all these circumstances, it is my view that the afore-stated two objections raised on behalf of the 1st Respondent - CEB by the 4th Respondent are without merit, and must be ruled as futile attempts not made in good faith, to prevent the instant Application presented to this Court being adjudicated upon based on its merits and the applicable substantive law. In the circumstances, I must reject *in-limine* the assertions made by the 4th Respondent and the corresponding submissions made by the learned Solicitor General that the instant Application should be dismissed on the footing that the Application submitted to the SLSEA was an 'irregular Application'.

7.3 Did the Petitioner file the instant Application before the Supreme Court prematurely, without having sought administrative relief prior to filing the Application?

The extended period of the 'provisional approval' granted on 19th May 2016 by the SLSEA to the application for a permit under section 18 of the SLSEA Act, was to have lapsed on 18th May 2017. Prior to the said date, on 15th May 2017 the Petitioner filed the instant Application in this Court. On behalf of the 1st Respondent – CEB the 4th

Respondent alleges that on the one hand the instant Application was filed to prevent the extended period of the 'provisional approval' from lapsing and on the other hand without having recourse to administrative reliefs provided for in sections 22(1)(b) and 28 of the SLSEA Act.

Section 22(1)(b) of the SLSEA Act provides that *"any person who is aggrieved by a refusal to grant final approval to an application … may, within one month of the receipt of the communication informing him of such refusal …, appeal against such refusal … to the Board"*. It is necessary to emphatically observe that, in the instant case, at no time did the SLSEA inform the Petitioner that it had taken a decision to refuse to grant final approval to the Application submitted to it by the Petitioner. Thus, the need to seek administrative relief in terms of section 22(1)(b) did not arise. In fact, the last communication received from the SLSEA ("P14" letter dated 1st March 2017 addressed to the General Manager of the CEB and copied to the Petitioner) gives a positive impression, in that the only requirement to be satisfied by the Petitioner to be issued with the final approval was the 'Letter of Intent' to be issued by the CEB, and requesting the CEB to issue such a letter in favour of the Petitioner. In the circumstances, the Petitioner had no reason to believe that the SLSEA had taken a decision or was going to 'refuse' to grant final approval to the Application submitted by the Petitioner seeking a permit under section 18 of the SLSEA Act. Thus, there is no basis in law to fault the Petitioner for not having sought administrative relief under section 22(1)(b) of the SLSEA Act.

Section 28 of the SLSEA Act provides as follows:

"(1) Any person who is aggrieved by – (a) the refusal of the Committee to grant a permit for an off-grid renewable energy project; or (b) the cancellation under section 27 of a permit issued, may appeal against such decision to the Board.

(2) Any person who is aggrieved by the decision of the Board on any appeal made under subsection (1), may appeal against such decision to the Secretary to the Ministry of the Minister, whose decision thereon shall be final."

It is clearly observable that, the mechanism of addressing an administrative appeal provided for in section 28 pertains and is restricted to the two situations referred to in paragraphs "*(a)*" and "*(b)*" above. The instant Application presented by the Petitioner to the SLSEA pertains to an 'on-grid' renewable energy electricity generation project and not to an 'off-grid' project. Furthermore, the matter complained of to this Court by the Petitioner does not relate to a cancellation of a permit issued under section 27 of the SLSEA Act.

In the circumstances, I conclude that, there is no basis for the 4th Respondent whatsoever to complain that the Petitioner had filed the instant Application without having recourse to the administrative relief mechanisms provided in sections 22(1)(b) and 28 of the Act. I must express concern as to how such an objection entered the affidavit of the 4th Respondent, without legal scrutiny, which if took place, would not have resulted in permitting the 4th Respondent to take up such position.

Indeed, the Petitioner has filed the instant Application 3 days prior to the extended period of the 'provisional approval' from lapsing. That in my opinion is perfectly within the legitimate entitlement of the Petitioner. In a matter that has administratively dragged on since April 2012 up to May 2017, the Petitioner was perfectly within his entitlement to have preferred the instant Application on the date it did. The Petitioner has filed this Application sequel to the last communication received from the 1st Respondent CEB on 22nd March 2017 ("P16"), from which it appears that the Petitioner formed the view that, given the previous developments, no useful purpose would be met by pursuing any further, the administrative route to obtain a permit under section 18 of the SLSEA Act. Thus, there is no basis to allege that the Application has been filed prematurely. Therefore, I see no merit in that objection as well.

7.4 Did the 1st Respondent - CEB encounter technical reasons (technical difficulties) which justified the CEB refusing to grant the 'Letter of Intent'?

The 4th Respondent has on behalf of the 1st Respondent – CEB, cited several purported 'technical reasons' as to why the 1st Respondent – CEB was unable to grant the 'Letter of Intent' to the Petitioner. I have referred to those technical reasons in detail earlier in this judgment. Those reasons may be summarized as follows:

(i) problems arising due to constraints in the interconnection of electricity generated by renewable energy power plants to the transmission system (grid);

(ii) the need to refrain from granting the 'Letter of Intent' pending the study of grid connection limitations and effects on the system;

(iii) according to a study conducted, only 10 MW projects were viable for Vavuniya.

Though the 4th Respondent has on behalf of the 1st Respondent – CEB chosen to raise these technical issues as one justification for the non-issue of the 'Letter of Intent' to the Petitioner, the evidence placed before this Court reveals the following:

(a) the first two out of the three technical reasons were of generic character possibly applicable to all on-grid renewable energy-based electricity generation projects. As at April 2012 when the Application of the Petitioner was being tendered to the SLSEA, the CEB had not made a public announcement of such difficulties. Thus, the Petitioner had no basis to entertain a well-founded belief that the application for a permit under section 18 of the SLSEA Act will not be entertained positively due to such technical reasons. If in fact there were such technical reasons which necessitated the CEB not to grant 'grid interconnection concurrence' and 'Letter of Intent' to project proponents, it was incumbent on the CEB to have made an announcement to that effect;

(b) in this regard, the following paragraph in the Guidelines ("P2C") is of great relevance.

"As the single buyer of electricity produced by the NRE project, CEB Transmission and Bulk Supply Licensee will have to be satisfied with its ability to accept electricity produced by the proposed project. This will be based on careful evaluation of system wide impacts, network typology and system stability, in addition to the more commonly understood constraints such as local transmission grid limitations and grid substation capacity limitations. SEA will consult CEB in this regard upon receiving a complete application, before presenting it to the PAC for Provisional Approval. Hence the absence of the concurrence of CEB to grid connect the proposed project will result in refusal of provisional approval." (Section 2.3, 'Concurrence of the CEB', page 8 of "P2C")

On 18th May 2012 ("P3B") the 5th Respondent acting on behalf of the 2nd Respondent – SLSEA wrote to the 4th Respondent – General Manager of the CEB, providing information pertaining to 23 Applications received by the SLSEA, which included the Application submitted by the Petitioner. He sought information from the CEB regarding the availability of 'grid capacity' pertaining to the proposed projects. He also sought the concurrence of the CEB to table the corresponding Applications before the PAC for the grant of 'provisional approval'. It was the contention of the learned President's Counsel for the Petitioner that this letter amounted to the 2nd Respondent – SLSEA seeking 'grid interconnection concurrence' for the Petitioner's proposed project from the 1st Respondent. Learned Solicitor General for the Respondents did not express disagreement with that contention. In response to "P3B", the 1st Respondent required the Petitioner to change the design of the proposed project to include a 'battery storage system' due to 'short-term power variation in electricity generated by the proposed project'. This shows that at this stage itself, the 1st Respondent – CEB had addressed its mind to 'technical aspects' pertaining to the project proposed by the Petitioner. Furthermore, the Petitioner changed the

design of the proposed project to include a 'battery storage system'. The Petitioner has adverted to the fact that this would ensure smooth power output at the grid end so that sudden power drops could be avoided. The Respondents have not countered this position. The amenability of the Petitioner to change the technical design of the proposed solar energy electricity generation plant to suit the requirement of the CEB was conveyed by the Petitioner to the 2nd Respondent – SLSEA, and the SLSEA informed the CEB in 2012 itself. From 2012 till 2016, the 1st Respondent – CEB remained silent. By "P4A" by letter dated 15th February 2016, the SLSEA wrote to the CEB specifically requesting from the latter, 'grid interconnection approval' for the Petitioner's project. Finally, by letter dated 9th May 2016 ("P4B", which has also been produced marked "P6J"), the CEB wrote to the SLSEA indicating that it had no objection to the SLSEA considering the Petitioner's Application for the grant of 'provisional approval'. Counsel agreed that this letter ("P4B") amounted to the CEB granting 'grid interconnection concurrence' to the Petitioner's project. Therefore, it concludes that certainly by May 2016, the 1st Respondent – CEB had cleared all possible technical concerns it may have entertained as regards the Petitioner's project.

It was in this backdrop that in May 2016, the PAC decided to grant 'provisional approval' to the project proposed by the Petitioner (a 10 megawatts Solar PV Project with a battery storage system). Learned President's Counsel for the Petitioner submitted that a decision to grant 'provisional approval' would have been taken upon a careful evaluation of technical factors such as the systemwide impacts, network typology, system typology, system stability, local transmission grid limitations and limitations in capacity at the grid end sub-station. Learned Solicitor General did not counter this submission. It is noteworthy that the General Manager of the CEB was a constituent member of the PAC, and hence if

there were genuine technical reasons, he could have raised those reasons at the PAC and objected to the grant of 'provisional approval'.

Neither the 4th Respondent nor the learned Solicitor General explained to this Court reasons for that technical turn-around. Nor was this Court informed as to why even in November 2016, the CEB continued to indicate to the Petitioner of the possibility of proceeding with the project, if certain technical modifications were given effect to. If the two technical reasons cited by the 4th Respondent genuinely prevented to 1st Respondent – CEB from issuing the 'Letter of Intent' to the Petitioner, it could have raised such technical difficulties with the SLSEA and with the Petitioner well before such factors were raised in the pleadings filed in this Court.

Thus, the position taken up in the affidavit of the 4th Respondent is totally unacceptable.

(c) Letters issued by the 1st Respondent – CEB with regard to the Application submitted by the Petitioner for a permit, namely "P3D" dated 21st November 2012, "P6J" dated 9th May 2016, "P10B" dated 1st December 2016, and "P16" dated 22nd March 2017 make no reference to any of the purported technical difficulties cited by the 4th Respondent. The 4th Respondent has not taken up the position that Petitioner was not informed of the afore-stated purported technical difficulties, as reasons for the non-issue of the 'Letter of Intent'.

(d) Learned President's Counsel for the Petitioner submitted that the grant of the 'provisional approval' by the 2nd Respondent - SLSEA was a clear indication of the issue of 'grid interconnection concurrence' by the 1st Respondent – CEB. That such concurrence being issued is a clear indication that no technical difficulty

exists with regard to the proposed project of the Petitioner. Learned Solicitor General for the Respondents did not counter this position.

(e) In terms of the findings of the study commissioned by the 1st Respondent – CEB ("4R1"), *"… only 10 MW solar had been considered viable for Vavuniya."* As stated above, the project proposed by the Petitioner was a renewable energy project which had the potential of generating 10 megawatts. Thus, the generation capacity of the proposed project of the Petitioner matched this requirement contained in the findings of the study. The affidavit of the 4th Respondent does not contain any reason why under the afore-stated circumstances the project proposed by the 4th Respondent was technically unsuitable.

In view of the foregoing circumstances, this Court is of the opinion that the 'technical reasons' cited by the 4th Respondent were in fact not the actual reason for the refusal on the part of the 1st Respondent – CEB to issue the 'Letter of Intent' to the Petitioner. The conduct of the CEB in granting 'grid interconnection concurrence' in May 2016 clearly shows that by that time the CEB had cleared whatever technical issues there may have been and the proposed project of the Petitioner was of such nature that electricity generated by it could be supplied to the national grid without encountering any technical glitch. Thus, the said purported 'technical reasons' cannot be accepted as valid grounds to refuse granting any relief to the Petitioner.

7.5 Do the provisions of section 43 of the Sri Lanka Electricity Act as amended by Act No. 31 of 2013 impose a legal compulsion on the CEB to call for tenders prior to issuing a 'Letter of Intent' to a solar powered electricity generation project which would generate up to 10 megawatts of electricity?

Paragraph 23(c) of the affidavit of the 4th Respondent – Aruna Kumara Samarasinghe, the General Manager of the CEB reads as follows:

"Following the amendment to the Electricity Act (Act No. 31 of 2013) procurement of electricity has to be done on a competitive basis. This process of utilizing competitive bidding encourages lower electricity cost, ultimately helping customer and national economy." [Emphasis added.]

Thus, the position of the 1st Respondent – CEB is that following the amendment introduced to the SLE Act by Act No. 31 of 2013, it became imperative for the CEB as a transmission licensee (the sole transmission licensee) to procure electricity from a person entitled to generate electricity and supply it to the national grid, based on the selection of such person on a competitive basis.

The learned Solicitor General submitted that the enactment of Act No. 31 of 2013 was a 'supervening event' which prevented the 1st Respondent – CEB from issuing a 'Letter of Intent' to the Petitioner. Referring to an opinion expressed by the 7th Respondent - Honourable Attorney General (AG) to the 6th Respondent – Secretary to the Ministry of Power and Energy ("4R1"), the learned Solicitor General submitted that the AG had expressed the view that where new electricity generation plants are required, the amended law stipulates that the selection of licensees to operate new electricity generation plants or for the expansion of existing generation plants and the price at which electricity is to be purchased from such electricity generation plants is to be determined by the selection of suitable persons based on competitive tenders to be submitted by them.

In view of the position taken up on behalf of the 1st Respondent – CEB in this regard, it is necessary to examine the law, prior to the enactment of Act No. 31 of 2013, and the changes introduced by the afore-stated amendment.

Section 43 (original section, prior to it being amended by Act No. 31 of 2013) of the SLE Act, No. 20 of 2009 provided as follows:

"43

(1) Subject to section 8, no person shall operate or provide any new generation plant or extend any existing generation plant, except as authorized by the Commission under this section.

(2) Subject to the approval of the Commission, a transmission licensee shall, in accordance with the conditions of the transmission license and such guidelines relating to procurement as may be prescribed by regulation and by notice published in the Gazette, ***call for tenders*** *to provide new generation plant or to extend existing generation plant, as specified in the notice.*

(3) A transmission licensee shall with the consent of the Commission, ***select a person to provide at least cost****, the new generation plant or to extend the existing generation plant specified in the notice published under subsection (2), from amongst the persons who have submitted technically acceptable tenders in response to such notice."*
(Emphasis added).

[Section 8 provides as to who would be entitled to participate in a bidding process for the generation of electricity. Section 9 elaborates that position with regard to those who shall be eligible to apply for issue of a generation license with a generation capacity of 25 megawatts or more.]

Section 43 of the SLE Act (the original section) or any other provision of that Act (prior to the amendment introduced by Act No. 31 of 2013) does not exclude the applicability of section 43 to electricity generation plants which use renewable energy sources. Neither party presented evidence which shows that the PUCSL had exempted electricity generation projects which use renewable energy from provisions of the SLE Act. Nor did learned Counsel who appeared for the Petitioner and the Respondent took up the position that section 43 (in its original form) did not apply to electricity generation plants which use renewable energy. Nor do the provisions of the SLSEA Act exclude the application of the SLE Act to electricity generation plants which use

renewable energy. Therefore, the inference to be drawn is that the provisions of the SLE Act (prior to the amendment) applied equally to electricity generation plants which use both renewable energy and non-renewable energy.

It would thus be seen that well before the enactment of Act No. 31 of 2013 (which amended provisions of the SLE Act, No. 20 of 2009 including section 43 thereof), the original law itself provided for a competitive bidding process to be followed to select project proponents of new electricity generation plants or to extend existing generation plants (generation licenses), enabling the transmission licensee to purchase electricity at the least cost from selected generation licensees. Thus, it would be incorrect to refer to the methodology of 'competitive bidding through the calling of tenders' as a 'supervening event' introduced to the law by Act No. 31 of 2013, as the original law itself provided for that methodology.

Neither the 1st or the 2nd Respondents refer as to why the competitive bidding methodology through the calling of tenders (which obviously is aimed at the CEB – sole transmission licensee purchasing electricity from electricity generation licensees at the least cost) was not embedded in the *'Guide to the project approval process for on-grid renewable energy projects development'* ("P2C") issued by the 2nd Respondent – SLSEA and why such a procedure was not embedded in the procedure to be followed by project proponents who were interested in obtaining a permit under section 18 of the SLSEA Act to operate on-grid renewable energy based electricity generation projects.

From the evidence placed before this Court by the Petitioner and the 4th and 5th Respondents on behalf of the 1st and 2nd Respondents, respectively, the only inference this Court can arrive at, is that the 1st and 2nd Respondents have erroneously proceeded on the footing that section 43 of the SLE Act (prior to being amended in 2013) had no application to on-grid electricity generation plants which would utilize renewable

energy sources. As I propose to explain shortly, it appears that the 1st and 2nd Respondents have proceeded with the same mindset till this Application was filed by the Petitioner, notwithstanding the Honourable Attorney General in November 2013 ("4R1 – Attachment - 2") (which opinion had been issued after Act No. 31 of 2013 came into operation) having expressed his opinion that *"the Sri Lanka Electricity (Amendment) Act No. 31 of 2013 while repealing section 43 of the Principle Enactment, by section 43(4) of the Amending Act, maintains the general principle that the purchase of electricity by the Transmission licensee from new generation plants (and extensions thereto) shall be determined by way of open competitive bidding, by way of tender"* [Emphasis added]. It would be seen that by the use of the terminology *"… maintains the general principle …"* the Attorney General has also noted that even prior to the amendment of section 43 by Act No. 31 of 2013, the principle of *"… open competitive bidding by way of tender …"* had been in existence.

I will now deal with the position advanced on behalf of the Petitioner, that following the amendment to the law introduced by Act No. 31 of 2013, section 43(4) read with section 43(2) does not require the 1st Respondent – CEB to call for tenders and cause competitive bidding for the purpose of purchasing electricity from those to whom an electricity generation license would be issued by the PUCSL and who would generate electricity not exceeding 10 megawatts utilizing renewable energy sources such as solar power. I propose to also deal with the other submission made on behalf of the Petitioner that there was no need for the 1st Respondent – CEB to negotiate the price at which electricity was to be purchased from the Petitioner, as there was a Standardised Power Purchase Agreement (SPPA) and a Small Power Purchase Tariff (SPPT) which had been approved by the PUCSL and which specified the price at which electricity should be purchased by the 1st Respondent – CEB.

In this regard, it would be necessary to consider the provisions of section 43 of the SLE Act, as amended by Act No. 31 of 2013. For ease of reference, the relevant provisions of section 43 are reproduced below:

"(1) Subject to the provisions of section 8 of this Act, no person shall proceed with the procuring or operating of any new generation plant or the expansion of the generation capacity of an existing plant, otherwise than in the manner authorized by the commission under this section.

(2) A transmission licensee shall, based on the future demand forecast as specified in the Lease Cost Long Term Generation Expansion Plan prepared by such licensee and as amended after considering the submissions of the distribution and generation licensees and approved by the Commission, submit proposals to proceed with the procuring of any new generation plant or for the expansion of the generation capacity of an existing plant, to the Commission for its written approval:

Provided however where on the day preceding the date of the coming into force of this Act:-

(a) an approval of the Cabinet of Ministers had been obtained to develop a new generation plant or to expand the generation capacity of an existing generation plant ; or

(b) a permit had been issued to generate electricity through renewable energy resources by the Sri Lanka Sustainable Energy Authority established by the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007 under section 18 of that Act, as a consequence of which the development of a new generation plant or the expansion of the generation capacity of an existing plant, has become necessary,

the approval obtained or the permit issued, as the case may be, shall be referred to the Commission for its approval. The Commission shall, having considered the request made along with any supporting documents annexed thereto and on being satisfied that the necessary Cabinet approval has been obtained or a permit had been issued by the Sustainable Energy Authority, as the case may be, prior to the coming into force of this Act, grant

approval to the transmission licensee to proceed with the procuring of the new generation plant or the expansion of the generation capacity of its existing plant, as the case may be.

(3) Where a person who is issued with a licence under section 13 of this Act to generate electricity of less than 25MW in capacity, proposes to expand its generation capacity of its generation plant as a consequence of which the generation of electricity would exceed 25MW in capacity, the approval of the Commission under subsection (1) for such proposal shall not be granted, unless such person is a person who is qualified under subsection (1) of section 9 of this Act, to be issued with a generation licence.

(4) Upon obtaining the approval of the Commission under subsection (2), the transmission licensee shall in accordance with the conditions of its transmission licencee shall in accordance with the conditions of its transmission licence and in compliance with any rules that may be made by the Commission relating to procurement, call for tenders by notice published in the Gazette, to develop a new generation plant or to expand the generation capacity of an existing generation plant, as the case may be, as shall be specified in the notice:

Provided however, subject to the provisions of subsection (6) of this section, the requirement to submit a tender on the publication of a notice under this subsection shall not be applicable in respect of any new generation plant or to the expansion of any existing generation plant that is being developed –

(a) in accordance with the Least Cost Long Term Generation Expansion Plan duly approved by the Commission and which has received the approval of the Cabinet of Ministers on the date preceding the date of the coming into force of this Act and is required to be operated at least cost;

(b) on a permit issued by the Sri Lanka Sustainable Energy Authority, established by the Sri Lanka Sustainable Energy Authority Act No. 35 of 2007 under section 18 of that Act for the generation of electricity through renewable energy sources and required to

be operated at the standardized tariff and is governed by a Standardized Power Purchase Agreement approved by the Cabinet of Ministers; or

(c) *in compliance with the Least Cost Long Term Generation Expansion Plan duly approved by the Commission having received the prior approval of the Commission, for which the approval of the Cabinet of Ministers has been received on the basis of : -*

(i) an offer received from a foreign sovereign Government to the Government of Sri Lanka, for which the approval of the Cabinet of Ministers have been obtained ; or

(ii) to meet any emergency situation as determined by the Cabinet of Ministers during a national calamity or a long term forced outage of a major generation plant, where protracted bid inviting process outweigh the potential benefit or procuring emergency capacity required to be provided by any person at least cost.

(5) *Upon the close of the tender, the transmission licensee shall through a properly constituted tender board, recommend to the Commission for its approval, the person who is best capable of –*

(a) Developing the new generation plant or the expansion of the generation capacity of an existing generation plant, as the case may be, as specified in the notice published in the Gazette under subsection (4), in compliance with the technical and economic parameters of the transmission licensee:

(b) Selling electrical energy or electricity generating capacity at least cost; and

(c) Meeting the requirements of the Least Cost Long Term Generation Expansion Plan of the transmission licensee duly approved by the Commission,

along with the draft Power Purchase Agreement, describing the terms and conditions of such purchase.

(6) *Notwithstanding the fact that: -*

(a) An exemption from the submission of a tender is granted to any person under paragraphs (a), (b) or (c) of the proviso to subsection (4); or

(b) A new generation plant or an expansion of the generating capacity of an existing generation plant is being developed in accordance with the Least Cost Long Term Generation Expansion Plan duly approved by the Commission, by a person who had obtained the approval of the Cabinet of Ministers and which approval is in force on the date of the coming into operation of this Act,

the transmission licensee shall be required to negotiate with the person concerned to satisfy itself, that such person is capable of developing the new generation plant or the expansion of the generating capacity of an existing generation plant, as the case may be, in compliance with the technical and economical parameters of the transmission licensee and is capable of selling electrical energy or electricity generating capacity at least cost, and forward its recommendations for approval to the Commission, along with the draft Power Purchase Agreement or the draft Standardized Power Purchase Agreement, as the case may be, describing the terms and conditions of such purchase.

(7) *The Commission shall be required on receipt of any recommendations of the transmission licensee under subsection (5) or subsection (6), as the case may be, to grant its approval at its earliest convenience, where the Commission is satisfied that the recommended price for the purchase of electrical energy or electricity generating capacity meets the principle of least cost and the requirements of the Least Cost Long Term Generation Expansion Plan and that the terms and conditions of such purchase is within the accepted technical and economical parameters of the transmission licensee.*

(8) *For the purpose of this section –*

"Least Cost Long Term Generation Expansion Plan" means a plan prepared by the transmission licensee and amended and approved by the Commission on the basis of the submissions made by the licensees and published by the Commission, indicating the future electricity generation capacity requirements determined on the basis of least economic cost and meeting the technical and reliability requirements of the electricity

network of Sri Lanka which is duly approved by the Commission and published in the Gazette from time to time; and

"Standardized Power Purchase Agreement" means an agreement entered into by the transmission licensee for the purchase of electrical energy or electricity generation capacity, generated using renewable energy resources under a permit issued by the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007, under section 18 of that Act."

From a plain reading of the section, it is clear that section 43 of the SLE Act *inter-alia* applies to (i) the procuring of a new electricity generating plant or the expansion of an existing plant by the transmission licensee (the CEB), and (ii) the operation of a new electricity generation plant or the expansion of an existing plant by a generation licensee. It is also apparent that, section 43 applies to both electricity generation plants using non-renewable energy sources as well as to those using renewable energy sources. Section 43(2) provides that the process of procurement of electricity by the transmission licensee (the CEB) shall commence with the latter preparing a 'Least Cost Long-Term Generation Expansion Plan' and getting it approved by the Commission. Procurement of electricity by the transmission licensee from a generation licensee shall be in accordance with such plan. Thus, it is evident that the procurement of electricity shall be based on the national need for electricity and the requirement of the transmission licensee to service that demand as provided in the Least Cost Long Term Generation Expansion Plan. Further, this plan should facilitate the purchase of electricity by the transmission licensee at the least cost, enabling the transmission licensee to provide electricity to consumers also at least cost. However, as stipulated in the proviso to subsection 43(2), following the afore-stated methodology shall not be necessary in the following two situations:

(i) instances where on the day preceding the date of coming into operation of the Act, an approval had been obtained from the Cabinet of Ministers to develop either a new electricity generation plant or to expand the generation capacity of an existing plant;

(ii) instances where on a day preceding the date of coming into operation of the Act, a permit had been issued by the SLSEA under section 18 of the SLSEA Act to generate electricity through renewable energy resources.

As stated earlier, in terms of section 21 of Act No. 31 of 2013, the amendments made to the principal enactment (SLE Act, No. 20 of 2009) by provisions of the amending Act shall be deemed for all purposes to have come into force on 8th April 2009. Therefore, the two exemptions stated above contained in the proviso to section 43(2) with regard to the requirement to follow the legislative scheme contained in section 43(2) would not be applicable, only if either the approval by the Cabinet of Ministers or a permit issued under section 18 of the SLSEA Act had been obtained prior to 8th April 2009. In the instant case, as at 8th April 2009, neither the approval of the Cabinet of Ministers nor a permit under section 18 of the SLSEA Act had been obtained for the project proposed by the Petitioner. Therefore, the proviso to subsection 43(2) would have no applicability to the instant case. Thus, it was incumbent on the transmission licensee – CEB to have complied with the procedural requirement contained in subsection 43(2). Neither party has placed before this Court any evidence in that regard. Nor has either party alleged that the 1st Respondent – CEB had failed to comply with subsection 43(2) of the SLE Act.

It would be seen that subsection 43(3) has no applicability to this case, as this instant case does not relate to the expansion of the electricity generation capacity of an existing plant.

In terms of section 43(4), after obtaining the approval from the PUCSL under section 43(2), the transmission licensee (CEB) is required to in accordance with the conditions of the transmission licence call for tenders by notice published in the *Gazette*. However, subject to the provisions of subsection (6), this requirement of calling for tenders shall not be applicable in three instances. One such instance is if the new electricity

generation plant or the expansion of an existing plant is being developed on a permit issued by the SLSEA established under section 18 of the SLSEA Act for the generation of electricity through renewable energy sources and required to be operated at the standardized tariff and is governed by a Standardised Power Purchase Agreement approved by the Cabinet of Ministers. [paragraph (b) of the proviso to subsection 43(4)] However, notwithstanding that exemption, under subsection 43(6)(a), the transmission licensee is required to negotiate with the generation licensee for the purpose of satisfying itself of the capability of such person to develop the new generation plant in compliance with the technical and economical parameters of the transmission licensee and regarding its capability to sell electricity at least cost.

As pointed out by learned President's Counsel for the Petitioner, section 6 of the Guidelines ("P2C") issued by the SLSEA is of significance. Section 6 contains 3 parts. The first and third parts relate to projects which generate up to 10 megawatts of electricity (as in the case of the project proposed by the Petitioner). The second part relates to projects which generate electricity in excess of 10 megawatts, and thus is irrelevant in so far as the Petitioner's project is concerned. The first and third parts of section 6 are reproduced below:

> "***For projects up to 10 MW:*** *SEA and CEB offer a Standardised Power Purchase Agreement (SPPA) for renewable energy projects of the approved types, with an installed capacity up to 10 MW. The SPPA is standardized and non-negotiable, and is valid for twenty years from the commercial operation date. Projects eligible for the SPPA are also eligible to be paid under the Small Power Purchase Tariff (SPPT).*
>
> ***Small Power Purchase Tariff:*** *For renewable energy projects up to 10 MW, the standardized tariffs would apply. The tariff for projects that would enter into an SPPA is published at any given time, typically at the end of each calendar year. There will be a tariff review process conducted by the Public Utilities Commission of Sri Lanka typically once a year, where the following will be considered;*

(a) *Types of projects to be offered the standardized tariffs (whether any new types of projects have matured to an adequate level to be included in the tariff schedule.*

(b) *Tariffs to be offered to Developers entering into an SPPA in the coming year."*

Thus, it would be seen that the Guidelines envisage the CEB entering into an Agreement with a person who generates electricity (mobilizing a renewable energy source) not exceeding 10 megawatts. The Agreement will be founded upon a uniform template which is referred to as the 'Standardised Power Purchase Agreement' (SPPA). The price at which electricity generated by the project will be purchased by the CEB will be governed by the clauses of the 'Small Power Purchase Tariff' (SPPT), which has received the approval of the PUCSL.

Therefore, had the SLSEA issued a permit to the Petitioner under section 18 of the SLSEA Act (following the CEB having issued a 'Letter of Intent' to the Petitioner), the situation of the Petitioner would have come under paragraph (b) of the proviso to section 43(4) of the SLE Act (as amended). In the circumstances, it would not have been necessary for the transmission licensee (the CEB) to have called for tenders for the development of a new electricity generation plant and for the Petitioner to have submitted a tender in response, prior to issuing a 'Letter of Intent' to the Petitioner.

In view of the foregoing, I hold that, in the circumstances of this case, provisions of section 43 of the SLE Act as amended by Act No. 31 of 2013 do not impose a legal compulsion on the CEB to call for tenders prior to issuing a 'Letter of Intent' to a solar powered electricity generation project which would generate up to 10 megawatts of electricity, if such person who proposes to commission a renewable energy-based electricity generation plant has received a permit under section 18 of the SLSEA Act.

Had the 1st Respondent – CEB (transmission licensee) have issued to the Petitioner a 'Letter of Intent' signaling its intention to procure electricity from the Petitioner at the Small Power Purchase Tariff after entering into a Standardised Power Purchase Agreement, that would have enabled the 2nd Respondent – SLSEA to issue a permit under section 18 of the SLSEA Act to the Petitioner, which would have in turn enabled the 1st Respondent to comply with subsections 43(6) and 43(7) of the SLE Act (as amended).

7.6 Is the Petitioner entitled in fact and in law to entertain a legitimate expectation that the CEB would have issued a 'Letter of Intent' and the SLSEA would have issued a permit to the Petitioner in terms of section 18 of the SLSEA Act, and have such legitimate expectations been frustrated by the CEB and the SLSEA?

In this regard, the Petitioner's claim for relief founded upon an alleged frustration of a substantive legitimate expectation is said to have been generated by the 1st Respondent – CEB and the 2nd Respondent – SLSEA. In order to establish that certain representations were made by the two Respondents which were relied upon by the Petitioner, he has based his case founded upon four sets of documents. They are –

(i) A publication containing a set of guidelines issued by the 2nd Respondent - SLSEA entitled *"A Guide to the Project Approval Process for On-grid Renewable Energy Project Development"* (hereinafter referred to as "the Guide") with the sub-title *"Policies and procedures to secure approvals to develop a renewable energy project to supply electricity to the national grid"* of July 2011 – "P2C"

(ii) Regulations dated 22nd April 2009 made by the Minister under and in terms of sections 67 read with sections 16(2), 17(2)(a) and section 18(2)(a) of the SLSEA Act - "P2A"and the amended Regulations dated 6th May 2011 – "P2B"

(iii) Correspondence the Petitioner has had with the 1st and 2nd Respondents, with special attention to letters received by the Petitioner from the 1st and 2nd Respondents. – "P3C", "P3E", "P3F", "P3G", "P3H", "**P4A**", "**P5A**" "**P5B**",

"P7A", "P7B", "P7C", "P9", "P10A", "**P11**", "P12", "P13"and "P15". [Printed in bold are letters received by the Petitioner.]

(iv) Correspondence between the 1st and 2nd Respondents pertaining to the Application presented by the Petitioner seeking a permit under section 18 of the SLSEA Act, to which the Petitioner has been privy to. – "P3B", "P3D", "P4B/P6J", "P10B", and "P14".

An examination of the Guide ("P2C") and its application to this matter reveal the following:

(a) The Guide had been issued by the 2nd Respondent – SLSEA in July 2011. There is no evidence placed before this Court that the Guide was amended after its original publication or that it was amended and re-published following the enactment of the SLE (Amendment) Act No. 31 of 2013.

(b) The Guide is aimed at several distinct groups of persons, which include those intending to develop and invest in projects for the generation of on-grid electricity generation projects using renewable energy. The Petitioner belongs to that category of persons to whom the guidelines issued by the 2nd Respondent – SLSEA relate;

(c) The Guide is also aimed at serving as a reference to institutions that would be reviewing Applications from investors seeking permits and approvals. The 1st Respondent – CEB is one such institution.

(d) The Guide is intended to provide a detailed explanation regarding the process to be followed as prescribed in the 'On-grid Renewable Energy Projects Regulations 2009' ("P2A"). The Petitioner claims to have followed the procedure contained in the Regulations ("P2A" and "P2B") and the Guide ("P2C").

(e) The Guide contains a set of detailed guidelines regarding the manner in which Applications seeking a permit under and in terms of section 18 of the SLSEA Act should be perfected, the method of submitting the Application to the SLSEA, and the manner in which it will be processed. There is a detailed reference in the

guidelines to the two-tiered process of initially processing the Application and granting 'provisional approval', and upon conditions contained in the 'provisional approval' being satisfied by the applicant, the manner in which final approval and the permit will be granted. The scheme contained in the Guide is compatible with provisions of the SLSEA Act. Up to the stage where the 1st Respondent – CEB refrained from issuing a 'Letter of Intent' to the Petitioner, the procedure followed by the 2nd Respondent – SLSEA had been in compliance with the step by step approach contained in the Guide. Furthermore, up to that point of time when the 1st Respondent – CEB by implication refused to issue a 'Letter of Intent' it (the CEB) had also participated in this process in compliance with the provisions contained in the Guide. In this regard, I have given my particular attention to the 1st Respondent – CEB's participation in the grant of 'grid interconnection concurrence' and his having participated in the grant of 'provisional approval' to the Petitioner. Furthermore, under the title "Grant and Refusal of Provisional Approval" is a reference to the fact that all Applications received by the SLSEA will in consultation with the CEB be evaluated to ascertain the possibility of securing grid connection. Documentary evidence placed before this Court clearly reveals that the CEB did even after the enactment of the SLE (Amendment) Act No. 31 of 2013 act in terms of the Guide towards granting 'grid interconnection concurrence' and 'provisional approval' to the Application of the Petitioner. Thus, I conclude that through acquiescence, the 1st Respondent has also endorsed the Guide.

(f) Clause 2.2 of Appendix 4 of the Guide (at page 28) titled 'Letter of Intent' states that it will be issued by the CEB and signifies an assurance that the electricity generated by the project will be procured by the CEB. It further states that an application to the CEB to obtain a 'Letter of Intent' could yield one of the following two standard responses:

   a. that the CEB is willing to purchase electricity from the project as per attached grid connection proposal;

b. that the CEB is willing to purchase electricity from the project, but the grid proposal will be provided within one month.

The Guide does not contain any reference to the project proponent having to engage in a competitive bidding process for the purpose of obtaining the 'Letter of Intent' or the requirement to engage in any negotiation with the CEB pertaining to the tariff at which the electricity generated by the project will be sold to the CEB, provided however the output of electricity generated by the project does not exceed 10MW.

(g) As stated in a previous part of this judgment, under the title "Power Purchase Agreements and Tariffs" (page 16) there is reference to the fact that for projects up to 10 MW, the SLSEA and the CEB offer a 'Standardised Power Purchase Agreement'. This position is reiterated in clause 4.3 of Appendix 4 of the Guide (at page 30). The provisions of the relevant Agreement are standardized and non-negotiable and such projects are entitled to apply for the Small Power Purchase Tariff. Once a year there will be a review process of the applicable tariffs conducted by the PUCSL and published typically at the end of each calendar year. Thus, it is manifestly clear that the 'Letter of Intent' by the CEB to purchase electricity generated by the project' (referred to by the parties as well as in this judgment as a 'Letter of Intent') will for projects aimed at generating up to 10MW and no more (as in the case of the project of the Petitioner) be founded upon the standard power purchase tariff stipulated from time to time by the PUCSL. This scheme is in consonance with not only the status of the law prior to the enactment of the SLE (Amendment) Act No. 31 of 2013, but with the statutory scheme contained therein as well.

(h) Clause 4.1 of Appendix 4 of the Guide (at page 29) clearly states that following the obtaining of a 'provisional approval' by the project proponent and the satisfaction of all the conditions contained therein (which is clearly a reference to obtaining

approvals from relevant external agencies and obtaining a 'Letter of Intent' from the CEB, the permit will be issued under and in terms of section 18 of the SLSEA Act sequel to a decision to be taken by the PAC. ["*Once all other approvals are secured by a project developer, the PAC grants a 20 years permit (extendable by a further 20 years after successful operation of the project during the initial 20 year period) to the developer allowing him to use the resource under several conditions.*"] Thus, it is clear that, following the Petitioner having received the 'provisional approval' from the 2nd Respondent – SLSEA, the only condition the petitioner was required to satisfy for the purpose of obtaining a permit under and in terms of section 18 of the SLSEA Act, was a 'Letter of Intent' from the 1st Respondent – CEB.

I have examined the Regulations promulgated by the Minister under the SLSEA Act contained in "P2A" and "P2B", and have found nothing therein contrary to the contents of the Guidelines ("P2C").

I have also considered the contents of the letters sent by the 1st Respondent – CEB and 2nd Respondent (SLSEA) to the Petitioner and the correspondence between the 1st and 2nd Respondent pertaining to the Application of the Petitioner seeking a permit under and in terms of section 18 of the SLSEA Act, to which the Petitioner had been privy. It primarily reveals the following sequence of key events: By Application dated 20th April 2012 submitted by the Petitioner to the SLSEA ("P3A"), he sought a permit under section 18 of the 2nd Respondent - SLSEA to commission an on-grid renewable energy (solar) based electricity generation plant with an output not exceeding 10MW. The Application was in accordance with the provisions of the SLSEA Act, Regulations and the several clauses of the Guide, and was thus accepted by the 2nd Respondent. By letter dated 18th May 2012 ("P3B"), the 2nd Respondent sought the concurrence of the 1st Respondent – CEB to place the afore-stated Application before the PAC. Prior to granting its concurrence, the 1st Respondent – CEB required the project proponent (the

Petitioner) to alter the technical design of the proposed project, which requirement was promptly accepted by the Petitioner ("P3C" dated 19th November 2012, "P3E" dated 24th November 2015 and "P3G" dated 1st December 2015). By letter dated 15th February 2016 ("P4A"), the 2nd Respondent – SLSEA once again sought from the 1st Respondent – CEB 'grid interconnection concurrence' to the Petitioner's project ("P4A"). Finally, by letter dated 9th May 2016 ("P4B"), the 1st Respondent – CEB granted its concurrence to the 1st Respondent – SLSEA to place the Petitioner's Application before the PAC of the SLSEA. By letter dated 19th May 2016 ("P5A"), the PAC of the SLSEA (which comprised of *inter-alia* the Director General of the PUCSL and the Deputy General Manager (Energy Purchase) of the 1st Respondent – CEB) granted 'provisional approval' to the on-grid renewable energy-based electricity generation project proposed by the Petitioner.

Upon a careful consideration of the four categories of material referred to above ["(i)" to "(iv)"] and the applicable law, I have arrived at the following conclusions:

1. The Guide ("P2C") prepared and published by the 2nd Respondent – SLSEA contains lawful and *intra-vires* representations of the SLSEA pertaining to *inter-alia* on-grid renewable energy-based electricity generation projects aimed at generating not more than 10 MW of electricity. The Guide contains unambiguous and specific content amounting to representations aimed at a specific group of persons, i.e. project proponents who propose to obtain a permit under and in terms section 18 of the SLSEA Act for the purpose of commissioning an on-grid renewable energy-based electricity generation project with an electricity output not exceeding 10MW. The 1st Respondent has by acquiescence with provisions of the Guide exhibited its willingness to abide by the provisions of the Guide pertaining to the CEB, and by its letters sent to the Petitioner (referred to above) impliedly represented to the Petitioner that following the Petitioner complying with the provisions of the Guide ("P2C"), it will issue a 'Letter of Intent' to the

Petitioner company enabling it to obtain a permit under and in terms of section 18 of the SLSEA Act.

2. The 2nd Respondent – SLSEA has by the several correspondence sent to the Petitioner and letters exchanged with the 1st Respondent – CEB relating to the Petitioner's Application (to which the Petitioner was privy) has *inter-alia* generated an expectation in the mind of the Petitioner that upon the Petitioner satisfying the conditions contained in the 'provisional approval' issued by the SLSEA to the Petitioner (of which the only outstanding one is the 'Letter of Intent' to have been issued by the CEB), a permit will be issued to the Petitioner under and in terms of section 18 of the SLSEA Act.
3. The 1st Respondent – CEB has through its acquiescence with the provisions of the Guide ("P2C"), correspondence it had with the Petitioner and correspondence with the SLSEA pertaining to the Petitioner's Application (which the Petitioner was privy to) made implied representations to the Petitioner and thereby generated an expectation that following the Petitioner having obtained 'provisional approval' from the SLSEA (which was following the re-design of the project to suit the technical requirements of the 1st Respondent – CEB), it will grant a 'Letter of Intent' to the Petitioner, enabling the Petitioner to obtain a permit under and in terms of section 18 of the SLSEA Act.
4. In view of provisions of the contents of the Guide ("P2C") and the correspondence the 1st Respondent – CEB had with the Petitioner (even up to letter dated 1st December 2016 ("P10B") wherein the Petitioner was asked to revert to the original technical design of the project (to which the Petitioner promptly agreed), it is evident that at no previous time did the 1st Respondent – CEB make any representation to the Petitioner that the Petitioner had to engage in a competitive bidding process (by submitting a tender) for the purpose of obtaining a 'Letter of Intent' from the CEB. Through implication, the 1st Respondent – CEB also intimated to the Petitioner that if he were to comply with

the several applicable clauses of the Guide ("P2C"), he will be entitled to obtain a 'Letter of Intent' from the 1st Respondent – CEB.

As explained by me in Part 7.5 of this judgment, for an on-grid electricity generation project using renewable energy with an electricity output not exceeding 10MW, it is not necessary for the CEB to call for tenders and for project proponents to submit tenders or to negotiate and agree on the price at which electricity generated by the project is to be sold to the CEB. Therefore, the reason cited by the 1st Respondent – CEB for having refused to issue a 'Letter of Intent' to the Petitioner is not justiciable, as the position taken up by the 1st Respondent – CEB is not in accordance with the law. Thus, the expectation entertained by the Petitioner to follow the path contained in the Guide ("P2C") and obtain a 'provisional approval', 'Letter of Intent' and a 'permit under and in terms of section 18' in that sequence, is legitimate, as it is in accordance with the law.

Due to the foregoing reasons, I hold that the expectation entertained by the Petitioner that it will be issued with a 'Letter of Intent' by the 1st Respondent – CEB and thereafter a permit under and in terms of section 18 of the SLSEA Act by the SLSEA are expectations the Petitioner was entitled in law and through the representations and conduct of the 1st and 2nd Respondents to entertain. By their very nature, the said expectations are not mere procedural expectations, but substantive expectations. The evidence placed before this Court clearly reveals that the afore-stated legitimate expectations of the Petitioner have been frustrated by the 1st Respondent – CEB initially by its inordinate delay and thereafter its refusal to issue the 'Letter of Intent', and by the 2nd Respondent – SLSEA by its inability to obtain the 'Letter of Intent' for the Petitioner on behalf of the Petitioner and by the non-issuance of the permit. In the circumstances of this case, the substantive legitimate expectations of the Petitioner should in my view be protected through relief granted by this Court.

7.7 Is the Petitioner entitled to any relief and if so, what reliefs should the Petitioner be entitled to?

Where a substantive legitimate expectation of a claimant has been frustrated by a decision-maker for a reason that is not in wider public interest justiciable, and the impugned decision is either perverse or irrational, the Court will and should not refrain from intervening in granting substantive protection to the claimant. Relief of substantive character should be granted in instances where the impugned decision has been taken contrary to expectations the public authority has generated and is therefore unlawful, and thus amounts to an abuse of power. It would also be available in instances where the change in policy, applicable criteria and procedure is not objectively and rationally aimed at serving wider public interests and is not proportionate to the intended goal of serving public interests.

Substantive relief will be granted by court for the purpose of protecting the substantive legitimate expectation of the claimant, as it is necessary to do so not only because doing so is in the interest of the claimant, but in public interests as well. As held by Justice Amerasinghe in ***Dayarathna and Others v. Minister of Indigenous Medicine and Others*** *(referred to above),* when taking a decision on whether or not substantive relief as opposed to procedural relief should be granted, the court should weigh genuine public interest against private interests, and decide on the legitimacy of the expectation of the claimant, having regard to the weight it carries in the face of the need for a change of policy which may also be in public interest.

It is in this regard necessary for me to observe that the belated position taken up by the 1st Respondent – CEB is contrary to law. The Respondents have not shown this Court any basis to conclude that the non-grant of either the 'Letter of Intent' or the permit to the Petitioner is in the wider interests of the public. In what is undoubtedly in public interest was for the 1st and 2nd Respondents to have expeditiously processed the

Application of the Petitioner and grant the permit sought by the Petitioner. Both Respondents have unlawfully and miserably failed in the performance of their duty towards the public in encouraging project proponents to harvest green energy sources such as solar energy for the purpose of generating electricity which would be environmentally friendly. This case is a case study in itself exemplifying how two State agencies have floundered in the performance of their public duties.

The repercussions of the 1st Respondent - CEB and the 2nd Respondent - SLSEA in not having encouraged and facilitated entrepreneurs to, through private enterprise, generate electricity by tapping renewable energy sources and feed such electricity to the national grid, was only too evident in the year 2022, when the country and her people had to suffer severely due to the insufficiency of electricity generation and the over-dependency on petroleum as a means of generating electricity. This situation resulted in power outages of long duration, which affected the daily lives of the public at large and resulted in serious consequences to trade, industry and commerce. At the time of writing this judgment, the critical importance of generating electrical energy using sustainable and renewable energy resources available in abundance in Sri Lanka, and the devastating consequences that have arisen out of the failure on the part of agencies of the State to voluminously and efficiently mobilize new renewable energy generation projects for the generation of electricity using solar and wind power, and other renewable energy resources is felt unlike ever before. The incident referred to in this judgment is an unfortunate testament to the root causes of the prevailing situation to which I find the 1st and 2nd Respondents having to bear responsibility.

8. **Orders of Court**

For the reasons enumerated above, I hold that the Petitioner is entitled to the following reliefs:

(i) Due to the reasons set out in this judgment, I hold that in processing the Application submitted by the Petitioner for a permit under section 18 of the SLSEA Act, the 1st and 2nd Respondents have not acted in terms of the law. I note that the culpability of the 1st Respondent – CEB far exceeds the culpability of the 2nd Respondent - SLSEA. In the circumstances, I declare that the 1st and 2nd Respondents acting jointly have infringed the fundamental right of the Petitioner to the equal protection of the law guaranteed by Article 12(1) of the Constitution.

(ii) In view of the detailed analysis of the facts and the law contained in this judgment, it would not be necessary for me to delve in detail into the consequences arising out of the conduct of the 1st and 2nd Respondents to the fundamental right of the Petitioner to engage *inter-alia* in the lawful business which he had chosen, planned and applied for, namely the generation of solar powered electricity, providing such electricity to the national grid, and thereby generating income which would include profit. In the circumstances, I hold that the 1st and 2nd Respondents have jointly infringed the fundamental right of the Petitioner guaranteed by Article 14(1)(g) of the Constitution, which infringement had financial implications to the Petitioner.

(iii) The 1st Respondent – CEB shall forthwith issue a 'Letter of Intent' to the Petitioner in accordance with the law and the provisions of the Guide ("P2C").

(iv) Upon the Petitioner submitting to the 2nd Respondent – SLSEA proof of the satisfaction of the conditions contained in the 'provisional approval' including the afore-stated 'Letter of Intent', the 2nd Respondent shall within one month of the submission of such material, process the Application of the Petitioner in accordance with the law and the relevant provisions of the Guide ("P2C"), and issue a permit to the Petitioner under and in terms of section 18 of the SLSEA Act.

(v) I am acutely conscious that this infringement would have resulted in considerable financial loss to the Petitioner, which this Court is regrettably though, compelled not to fully compensate. Providing reparation for loss of profit suffered by the Petitioner arising out of the infringement of fundamental rights would be quite justified in the circumstances of this case. However, I am sensitive to the fact that making such an order for full reparation will only result in the Consolidated Fund having to bear such burden, which would eventually result in the tax paying public having to suffer further hardships.

However, the attendant circumstances of this case require this Court to make an order for the payment of a significant amount of damages. Such an order should have a deterrent effect on not only the 1st and the 2nd Respondents, the state as well. Therefore, I direct that the 1st Respondent who has been primarily responsible for the infringement of the fundamental rights of the Petitioner, shall pay the Petitioner a sum of Rs. 1,000,000.00 as damages.

(vi) Since the 1st Respondent through its officials has been primarily responsible for the infringement of the fundamental rights of the Petitioner, it would be the responsibility of the state to identify such individual officials of the 1st Respondent – CEB, and take appropriate action against them. This is a matter

in respect of which I would have ordinarily ordered the payment of punitive damages by the individual officers who had been instrumental in the infringement of the fundamental rights of the Petitioner guaranteed by Articles 12(1) and 14(1)(g) of the Constitution, provided their identities transpired through the evidence placed before Court.

Accordingly, the Secretary to the Ministry of Power and Energy is hereby directed to cause the conduct of an investigation into this matter and take action according to law against those identified for having infringed the fundamental rights of the Petitioner. The findings and the action taken should be reported to this Court.

The Registrar of this Court is directed to forward copies of this Judgement to the Honourable Attorney General and to the Secretary to the Ministry of Power and Energy.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Case No. S.C (F/R) 405/ 2018

Ganeshan Samson Roy,

No. 84. /90,

Nawala Road,

Colombo 05

PETITIONER

Vs.

1. M.M. Janaka Marasinghe

Police Inspector

Officer in Charge

Special Investigation Unit 11

Criminal Investigation Department

Colombo 01

2. A.S Sudasinghe

Sub Inspector of Police

Investigation Officer

Criminal Investigation Department

Colombo 01

3. H.G.C.P. Priyadharshana (87254)

Police Constable
Investigating Officer
Criminal Investigation Department
Colombo 01

4. Shani Abeysekera
Senior Superintendent of Police
Director
Criminal Investigations Division
Colombo 01

5. Pujith Jayasundara
Inspector General of Police
Police Headquarters
Colombo 01

5A. C.D. Wickremaratne
Inspector General of Police
Police Headquarters
Colombo 01

6.M.M Saveen Chathuranga Gunaratne

No.259/14, Pamunuwa Gardens
Pamunuwila
Gonawila

7. Officer in Charge

Remand Prison, Mahara

8. The Honourable Attorney General

Attorney General's Department

Hulftsdorp

Colombo 12

RESPONDENTS

BEFORE: B.P Aluwihare, PC, J.

A.H.M.D. Nawaz, J.

Mahinda Samayawardhena, J.

COUNSEL: Senany Dayarathne with Eshanthi Mendis for the Petitioner

Induni Punchihewa, SC for the 01st to 03rd, 05A and 8th Respondents

Migara Kodithuwakku instructed by Ruskshan Aravinda Gamage for the 06th Respondent

ARGUED ON: 10.02.2023.

WRITTEN SUBMISSIONS: Petitioner on 03.09.2019

01st, 03rd, 05A and 8th Respondents on 17.06.2020

DECIDED ON: 20.09.2023

Aluwihare, PC, J.

The Petitioner, an employee of George Steuart (Pvt) Limited, complained that his Fundamental Rights enshrined in Articles 11, 12(1), 13(1) and 13(2) of the Constitution were violated by the Respondents. The 6th Respondent is a private party, and the Petitioner alleges that the 6th Respondent lodged a false complaint against him with the Criminal Investigation Department, which the Petitioner claims, led to his arrest. On 01.02.2019, this Court granted Leave to Proceed for the alleged violations of the Fundamental Rights of the Petitioner under Articles 12(1), 13(1) and 13(2) of the Constitution.

The Factual Background

According to the Petitioner, he had been acquainted with a certain Rehana Marian Sebastian [Hereinafter referred to as Rehana] for a long time. Sometime later, Rehana introduced the Petitioner to her sister, presently, his wife, Stephanie Sylvia Sebastian. The Petitioner's relationship with the 6th Respondent resulted from his acquaintance with Rehana. The Petitioner states that the 6th Respondent and Rehana had entered into a loan agreement for a sum of Rupee Fifty-Three Million whereby Rehana had agreed to pay back the principal with an interest of 12% per annum, to the 6th Respondent. The Petitioner's position was that he was totally oblivious to this transaction between the 6th Respondent and Rehana, at the time the incident central to the present application took place. At some point Rehana had approached the Petitioner, stating that she was receiving money from a friend, namely the 6th Respondent and had requested the Petitioner to facilitate the said transaction by permitting that money to be credited to his bank account and provided a letter (Marked P 13) which states that she was to receive money from a friend as a loan on interest and that she does not have a bank account with the Sampath Bank PLC. This request, that is to allow her friend to deposit the said money to the Petitioner's account, appears to have been made purely for their convenience. The Petitioner had agreed because of his close relationship with Rehana and this conduct on the part of

the Petitioner does not appear to be unusual given the fact that Rehana was his sister -in- law to be.

Sometime after this request was made, a sum of Rupees seven million Rupees 7,000, 000 /- was deposited to the Petitioner's account in several tranches, which the Petitioner had withdrawn and handed over to Rehana. Rehana's position was that she repaid the amount borrowed, with interest, however, the 6th Respondent had threatened her, which had prompted her to write to the Officer-in-Charge of Keselwatte Police on 02.05.2018. Her sister, Stephanie also had made statements at the Narahenpita Police and Keselwatte Police on 04.05.2018 and 18.05.2018 respectively, stating that her sister Rehana had repaid all the monies borrowed and had submitted documents and bank slips to the police as proof of the repayment.

On 07.05.2018 the 6th Respondent had visited the Petitioner's house in his absence, and had intimated to his father that he had deposited the money to the bank account of the Petitioner and that he will be compelled to complain to the Criminal Investigation Department if the Petitioner fails to repay him. The 6th Respondent also provided his mobile phone number to the father with instructions for the Petitioner to phone the 6th Respondent. The Petitioner as requested had phoned him on the very day itself. The Petitioner's position was that, as he felt the conduct of the 6th Respondent was dubious, therefore, he took precautions to record the conversation he had with the 6th Respondent.

The Petitioner had, along with the petition, filed a transcript of this conversation. Throughout the conversation the Petitioner denies knowledge of any transaction between the 6th Respondent and Rehana. Moreover, the 6th Respondent provided several unrelated and convoluted reasons for depositing the money to the Petitioner's account and had threatened to have a complaint lodged at the FCID. Importantly, throughout the conversation, there is no mention whatsoever by the 6th Respondent regarding any agreement or an arrangement between the Petitioner, Rehana and himself to import two BMW vehicles for his use. The significance of this omission will be apparent later. The very next day i.e., 08.05. 2018, the Petitioner had lodged

a complaint against the 6th Respondent at the Narahenpita police, alleging criminal intimidation.

On 01.06.2018 the 6th Respondent had lodged a complaint with the Criminal Investigation Department [Hereinafter the CID] complaining that the Petitioner and Rehana defrauded the 6th Respondent of seven million rupees [Rs.7.0 million] by agreeing to import two BMW vehicles on behalf the 6th Respondent. He further claimed that the Petitioner and Rehana are avoiding the 6th Respondent. No documentation is available before this Court as proof of the existence of this purported Agreement or any communications between the Petitioner and the 6th Respondent to indicate such an arrangement or agreement was negotiated between the parties. The only documents produced by the 6th Respondent are the bank slips indicating that seven million Rupees were deposited into the account of the Petitioner in several transactions. The Petitioner, however, has not denied the receipt of the money but has explained that the money was received to facilitate the transaction between the 6th Respondent and Rehana, which was referred to earlier. It is also important to note that, as referred to earlier, nowhere during the phone conversation on 07.05.2018, between the 6th Respondent and the Petitioner, the 6th Respondent refers to any agreement to import vehicles, although several unrelated accusations had been made by the 6th Respondent against the Petitioner. Thus, the basis of the complaint to the CID, which was made three weeks after the telephone conversation, appears to be an entirely new accusation made by the 6th Respondent.

The objections filed by the Respondent CID officers, do not give details of the investigations and/or steps taken by the CID in pursuance of the 6th Respondent's complaint. What is more shocking is that, after the complaint was made against the Petitioner, no attempt appears to have been made by the CID officers to notice the Petitioner of the complaint made against him nor had independently verified the truth of the allegation. Instead, the 2nd Respondent claims that the Petitioner was absconding. In the B Report dated 19.09.2018 (which is more than four and a half months after the complaint) filed by the CID officers marked "2R 1" it is stated that

there is reliable information that the Petitioner was attempting to travel abroad to evade justice and on that basis a travel ban under Section 51C (1) of the Immigrants and Emigrants Act (as amended) was sought from the Learned Magistrate of the Wattala and it was issued on the same day. No document was produced as proof of any notice being issued to the Petitioner. The Petitioner on the other hand had produced taxi bills as evidence of his travels he made from his residential area as proof that he was very much in the area where he lived and had made no attempt to abscond.

Oblivious to all these events, the Petitioner had planned to travel overseas to China and Malaysia on holiday in November 2018, which was five months after the initial complaint. On arrival at the Bandaranaike International Airport on 15.11.2018 to board a flight scheduled to depart, he was informed at the Immigration Counter that he was charged with an offence, and a travel ban is in operation. The Petitioner states that this was the first time he was informed of any allegation or charge against him by the authorities. According to the Petitioner, he was arrested by a CID officer. The arrest notes marked "2R 3" indicate that the Petitioner was arrested at 23:20 hours. According to the Petitioner, despite making several inquiries to ascertain information about the offence he had allegedly committed, the only information divulged was that it was related to the financial fraud of seven million Rupees.

Some officers of the CID had arrived from Colombo and had taken over the custody of the Petitioner. Once in Colombo, he was informed that he had misappropriated and/or defrauded money at the behest of one Rehana. The Petitioner was further informed that he was arrested on a complaint made by one Maheepala Saveen Chathuranga Gunaratne, (the 6th Respondent), for defrauding or misappropriating seven million Rupees. The said complaint alleges that the Petitioner committed criminal breach of trust by obtaining 7 million rupees on a promise to import two BMW vehicles on behalf of the 6th Respondent and that the Petitioner was introduced to the 6th Respondent by Rehana.

Subsequently, the Petitioner was produced by the 2nd Respondent before the Learned Acting Magistrate of the Wattala on 16.11.2018 who refused to enlarge him on bail, as the CID officers informed the court, that further time is required to conduct investigations. The Petitioner had been remanded until 19.11.2018 and on 19.11.2018, it was submitted that a statement had not yet been taken from the Petitioner and the Petitioner was further remanded till 23.11.2018, on which date Bail was finally granted, after having been incarcerated for 8 days.

Petitioner filed the present petition on 13.12.2018 seeking relief and during the pendency of this matter, the Hon. Attorney General on 23.07.2019 had forwarded an indictment in terms of Section 400 of the Penal Code against the Petitioner.

I shall now consider the alleged violations of the Fundamental rights of the Petitioner.

Alleged Violation of Article 13(2) of the Constitution

Article 13 (2) provides that; "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law" As held in ***Farook v Raymond and Others*** **[1996] 1 Sri L.R 217**,

"the object of Article 13(2) of the Constitution is to afford a person who has been deprived of his personal liberty by executive action, to have the benefit of placing his case before a neutral person - a judge - so that a judicial mind may be applied to the circumstances and an impartial determination made in accordance with the applicable law. The provision is designed to eliminate arbitrariness in depriving a person of his liberty, and this extends to the exclusion of arbitrariness on the part of a judge who orders that a person brought before him be further held in custody, detained or deprived of personal liberty. If in depriving a person of his liberty a

judge does not act according to procedure established by law, there is a contravention of the guarantee enshrined in Article 13(2) of the Constitution."

The procedure established by law in which a detainee is to be produced before a judge is contained in Section 36 and 37 of the Code of Criminal Procedure Act No. 15 of 1979. Sections 36 and 37 reads as follows;

"A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case"

"Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate"

It is apparent from the above Sections that a detainee should be produced within 24 hours before a Magistrate having jurisdiction in the case. Petitioner states that there was a deliberate attempt to delay in producing the Petitioner before a Magistrate. The arrest notes marked "2R 3" indicate that the Petitioner was arrested on 15.11.2018 at approximately 23:30 at the Airport. The Petitioner disputes the time of the arrest as 22:30, however, given that the Petitioner's flight was scheduled to depart at 00:25 hours on 16.11.2018, it is highly likely that the arrest took place between 22:30 and 23:30.

According to the Petitioner, he was produced before the Magistrate on 16.11.2018 approximately at 23:30 hours. If there was a deliberate attempt to delay the production of the Petitioner, it is highly likely that he would have been produced much later. The Petitioner was arrested on the 15.11.2018 and was produced before the Magistrate on 16.11.2018, according to the B Report marked "2R 4". Therefore, it appears that he had been produced before the magistrate within 24 hours. Hence, I hold that the Petitioner has failed to establish that the Respondents had violated his fundamental rights enshrined in Article 13(2).

Alleged Violation of Article 13(1) of the Constitution

The personal liberties of a person are protected from arbitrary arrest by Article 13(1) of the Constitution. Article 13(1) provides that "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." The procedure established by law for arresting a person without a Warrant is set out in Chapter IV B (Sections 32-43) of the Code of Criminal Procedure.

According to the 2nd Respondent's affidavit, it is stated [paragraph 6(c)] that "the Petitioner could not be found in his usual place of abode when the police visited his residence in order to record a statement". Thereafter, the facts were reported to the Learned Magistrate in the Magistrate Court of Wattala by way of a B report dated 19.09.2018 marked "2R 1" and a travel ban was sought and was issued by the Learned Magistrate on the same day. Subsequently, the Petitioner was arrested on 15.11.2018 at the Airport. Therefore, it is apparent that the Petitioner was arrested without a warrant.

The Respondents justify the arrest by resorting to Section 32(1)(b) of the Code of Criminal Procedure Code. Section 32(1)(b) provides that;

"(1) Any peace officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who in his presence commits any breach of the peace;

(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;"

Even to make an arrest under Section 32(1)(b) of the Code of Criminal Procedure, reasonable suspicion must exist of the suspect having been concerned with a

cognizable offence in the mind of the police officer effecting the arrest. The test is objective, and an arrest made purely on subjective grounds or on a general or vague suspicion would be arbitrary. What would amount to a reasonable suspicion? The requirement is limited and is not equated with prima facie proof of the commission of the offence. As stated, however, by His Lordship Justice Amarasinghe in ***Channa Pieris and Others v. Attorney General and Others*** **[1994] 1 Sri L.R 1 at p. 46**

"A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources."

Police officers cannot mechanically make an arrest upon a mere complaint received, without forming the opinion that the allegation is credible. Thus, a police officer is required to make necessary investigations, unless the facts are obvious, to verify whether the complaint is credible or whether the information provided is reliable. An arrest upon a general or vague suspicion would lead to significantly abridging the personal liberties guaranteed to a person by the Constitution. Therefore, an element of prudence is required from police officers before making an arrest to verify the allegation. This requirement, in my view, applies with greater force in 'white collar' crimes. The reason being, it needs to be ascertained whether the impugned transaction is purely a commercial transaction which had gone wrong or whether the suspect had the intent to defraud.

As held in ***Gamlath v Neville Silva and Others*** **[1991] 2 Sri L.R 267;**

"A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the Police Officer's own knowledge or on statements made by other persons in a way which justify him giving them credit."

Moreover, the principle laid by Lord Devlin in ***Shaaban Bin Hussien v Chong Fook Kam*** **[1969] 3 All ER 1626 at 1630** is relevant to the instant case. As a general rule, an arrest should not be made until the investigation is complete. Still, the legislature allows police officers to affect an arrest before the completion of the investigation in

certain circumstances; this is to avoid the investigation process being hampered and in order to maintain the law and order in the country. But to give the power to arrest on a reasonable suspicion does not mean that it should always be or even ordinarily be exercised. It means that there is executive discretion. In the exercise of such discretion, many factors must be considered. Besides the *strength of the case*, the possibility of escape, obstruction of the investigation, prevention of further crimes, and the threat of the accused to the public are some of the factors a police officer may consider. Thus, it appears the 'strength of the case' is a critical factor in making an arrest. In the words of Lord Devlin;

"It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar."

When one considers the material that was available at the point of arrest, it cannot be said that the Respondents had a reasonable suspicion that the Petitioner committed an offence. The Respondents purely acted on the complaint made by the 6th Respondent, which is evident by the B report dated 19.09.2018 marked "2R 1". There is no material before this court indicating that the CID officers had conducted any investigations to verify the allegation and only had bank receipts provided by the 6th Respondent as evidence, which merely indicated that money was deposited into the Petitioner's account. It is clear that the officers of the CID had acted on the complaint without making any attempt to verify the complaint independently or attempting to verify whether the complaint of the 6th Respondent was creditworthy.

At best, the CID officers could have suspected a commercial transaction existed between the 6th Respondent and the Petitioner to import vehicles, and there is

nothing illegal in engaging in a commercial transaction of that nature. On an objective assessment, investigating officers would require additional credible information to form the opinion of a reasonable suspicion of a commission of an offence. Evidence nor any material to form such a suspicion was placed before this Court.

Moreover, the Court cannot accept that the CID officers had reasons to believe that the Petitioner was evading justice. The Petitioner was in the country for a period of more than five months from the initial date of the complaint, and even after a travel ban was sought, the Petitioner was in the country for nearly two months. It was pointed out that, if the Petitioner wished to evade justice, he could easily have made an attempt to travel to a country with a visa-on-arrival concession was available, instead of making arrangements to travel to China and Malaysia, two countries that require prior visa approval. Every person is entitled to enjoy the freedom of movement within and without the country, a fundamental right guaranteed under Article 14(1) (h) of the Constitution, and as delineated by Article 4(d) of the Constitution, it is the duty of the State and its agencies, not to act in a manner to abridge, restrict or deny such right. This Constitutional duty cast must be respected and adhered to by all persons concerned without an exception. In this backdrop, when seeking a judicial order preventing a person travelling overseas, such an order can only be sought in situations where the officer concerned is possessed of credible information that the suspect is likely to flee the country and not otherwise.

Necessity to Inform the Reason for the Arrest of the Petitioner

Article 13(1) requires a person to be informed of the reason for the arrest. Justice Sharvananda states the purpose of this requirement in his treatise, "Fundamental Rights in Sri Lanka" on page 141 as;

"Meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for

the arrested person to know exactly what allegation or accusation against him is so that he can consult his attorney-at-law and be advised by him."

Further, Section 23(1) of the Code of Criminal Procedure requires that the person making an arrest to inform the person to be arrested of the nature of the charge or allegation upon which he is arrested. This requirement aims to ensure that the person arrested is afforded the opportunity to challenge the arrest at the earliest opportunity. A particular form is not required for the notification, nor does it require a complete detailed description of the charges against the suspect. The requirement is for the arrested person to be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest at the earliest reasonable opportunity. Justice Sharvananda in his treatise (supra), on page 141 in this regard, went on to state that;

"*All the material facts and particulars which form the foundation of the arrest must be furnished to the arrested person because they are the reasons or grounds for his arrest to enable the arrested person to understand why he has been arrested.*"

"*Further, it is important that the communication of the reasons should be in a language that the arrestee understands. The adequacy of the reasons for arrest require that they are: (a) such as to prima facie warrant arrest and (b) based upon information which is considered reliable*"

The Petitioner contends that at the time of the arrest, the CID officer that arrested him at the Airport merely informed him that he was arrested on a charge that was related to the financial fraud of seven million rupees. Meanwhile, the arrest note marked "2R 3" produced by the 2nd Respondent states that;

"මෙම ගුවන් මගියාට අපරාධ පරීක්ෂණ දෙපාතර්මේන්තුවේ විශේෂ විමශර්ණ අංශ 11 මගින් සිදු කරනු ලබන විමශර්නයකට අදලව වත්තල ම/ඵ බී 1505/18 අදලව ලබාගෙන ඇති ගුවන් තහනම් නියොග ප්‍රකාරව කරුණු පහද දී පැය 2320ට නො 84/90, නාවල පාර, නාරාහෙන්පිට ලිපිනයේ පදිංචි ගණේෂන් රොයි සම්සන් යන අය අත්ඩංගුවට ගන්නා ලදි."

It is pertinent to observe that even the arrest note produced does not state the substance of the allegation or charge against the Petitioner and only provides a vague statement that the reasons for the arrest were given. Informing that the Petitioner was arrested on a complaint related to the financial fraud of seven million Rupees is not sufficient for the Petitioner to understand the legal and factual grounds for his arrest. The requirement is to ensure that the arrested person is aware of the reasons relied on to deprive his liberty. In the present case, the information divulged was insufficient in our view for the Petitioner to appreciate the allegation or accusation against him.

On the other hand, even if the CID officer that arrested the Petitioner stated the allegation or charge against him, the allegation must be one that is be based on information well founded. Section 32(1)(b) of the Code of Criminal Procedure provides for the arrest of a person concerned with a cognizable offence without a warrant if there is a reasonable complaint, credible information or reasonable suspicion against such person. Therefore, a person cannot be arrested on a vague allegation. It must be based on information well-founded, and only if the allegation or charge against a person is well-founded can the accused be produced before a Magistrate as per Section 114 of the Code of Criminal Procedure Code. Otherwise, the accused has to be released on an execution of a bond.

Parroting a vague allegation to the Petitioner cannot excuse the Respondent's liability under Article 13(1) of the Constitution. If the allegation was vague, then there were no reasons for the arrest. If there were no reasons for the arrest to begin with, then there was no charge or allegation to inform the Petitioner. The right to arrest and the duty to submit are correlative. A person having lawful authority to deprive the liberty of another person must know the reasons for the arrest, otherwise, it will constitute false imprisonment. As held in ***Christie and Another v Leachinsky*** **[1947] 1 All ER 567 at 579**

"*The omission to tell a person who is arrested at, or within a reasonable time of, the arrest with what offence he is charged cannot be regarded as a mere irregularity.*

Arrest and imprisonment, without a warrant, on a charge which does not justify arrest, are unlawful and, therefore, constitute false imprisonment, whether the person making the arrest is a policeman or a private individual"

The Court held further at page 580 that;

"*I find it impossible to suppose that the law will hold the arrest good if it subsequently appears that the officer had in his own mind an unexpressed suspicion that a felony had been committed.*"

Similarly, the arresting officers could not have arrested the Petitioner if the allegation was not well founded. Consequently, the arrest was defective from the inception. Hence, even if reasons are given by the arresting officer, such reasons were also defective. Therefore, I declare that the Petitioner's rights under Article 13(1) are infringed.

Alleged Violation of Article 12(1) of the Constitution

Article 12(1) of the Constitution guarantees that "All persons are equal before the law and are entitled to the equal protection of the law". The essence of Article 12(1) is to ensure that a person is protected from arbitrary, capricious, irrational, unreasonable, discriminatory, or vexatious, executive or administrative actions. Delivering the judgement in the case of ***Rajapaksha v Rathnayake and Ten Others*** **Sri L.R 1 [2016] 119 at p. 130,** His Lordship Justice Sisira de Abrew stated that;

"When the 1st Respondent arrested the petitioner without any reasons and fabricated a false charge against him, can it be said that he got equal protection of law and that the 1st Respondent applied the principle that 'all persons are equal before the law' to the petitioner? This question has to be answered and is answered in the negative. It is now proved that the petitioner was arrested and detained in the police station without any reasons and the charge framed against him was a fabricated charge. Thus, the principle that 'all persons are equal before the law and are entitled to the equal protection of the law' has not been applied to the petitioner by the 1st Respondent."

It is explicit that the power of arrest cannot be exercised arbitrarily. It would deny the equal protection of the law to the Petitioner. In the present case, the arrest was made, merely on the complaint without any verification of the allegation made. Moreover, the Respondents had ample opportunity to check the veracity of the allegation since the arrest was made after five months from the initial complaint. The 6th Respondent had provided the telephone number of the Petitioner to the CID when the initial complaint was made. In the objections filed on behalf of the 1st to the 8th Respondents, which are 'sparse' to say the least, it is averred that the 'Petitioner could not be found in his usual place of abode when the police visited his residence'. The objections do not disclose the date and time they visited the residence of the Petitioner and how many such attempts were made. If he was not at his residence, did they leave the contact number of the investigating officer with any inmate of his residence, requesting the Petitioner to contact the CID? What prevented them from acting under Section 109(6) of the Criminal Procedure Code, a provision which all law enforcement agencies regularly resort to, in order to compel persons to attend the office of the law enforcement agency, in the instant case the CID. What prevented CID officers, from calling the Petitioner on his telephone as the number was available to the CID? If any of these steps were taken, in all probability they would have secured the presence of the Petitioner and would have provided the CID officers with an opportunity to question and verify the complaint and the Petitioner could have directed the CID officers to the police complaints made to the Keselwatte Police and Narahenpita Police Station on numerous instances, thereby allowing him the opportunity to purge any suspicion.

The credibility of the 6th Respondent's version is also suspect and appears to be low. It is unlikely for a person to import high-end luxury vehicles without entering into some agreement, which provides for the particulars of the transaction, before parting with money. It is common knowledge that unlike any other merchandise, when placing an order for a vehicle the specifications of the vehicle matters. The engine configuration, the options the buyer would want the vehicle to be equipped with, the colour and the list goes on. In addition, the mode of liability, method of

payment are all factors that any reasonable party will consider before entering into a similar transaction, therefore, parties are bound to leave behind a paper trail. Whether such a 'high end' vehicle can be imported for a sum of Rs.7.0 million is also questionable. In the complaint of the Petitioner, he does not disclose the cost it would incur to import each vehicle.

According to the 'complaint' made by the 6th Respondent to the CID, he states that somewhere in 2017, at the residence of Rehana, he had met both Rehana and the Petitioner regarding the importation of two BMW vehicles, which the petitioner had denied. The arrangement, according to the 6th Respondent, was for Rehana to import a BMW X5 and the Petitioner to import a BMW 318i. Accordingly, he had credited Rs. 23.4 million to Rehana and Rs. 7.0 million to the Petitioner in July and August 2017, expecting the vehicles to arrive in December 2017. The vehicles, however, had not arrived according to the 6th Respondent. Going by the version of the 6th Respondent, it was a joint arrangement of both Rehana and the Petitioner to source the two vehicles. Strangely, the 6th Respondent had lodged a complaint only against Rehana leaving out the Petitioner and subsequently followed it up by lodging a separate complaint against the Petitioner. The complaint against the Petitioner had been made on the 1st June 2018, however the date of the complaint against Rehana is not available to the court.

In spite of the fact that the vehicles had not arrived even by December as alleged, the 6th Respondent had given a loan of Rupees fifty-three million [RS.53.0 million] to Rehana in December 2017, at 12% interest payable in three months. The loan agreement, a notarially attested document has been produced marked "P12".

According to the Petitioner, the 6th Respondent had visited his house at a time when he was not at home and had instilled fear in his father to the effect that he would get the Petitioner remanded for 3 months as he has lodged a complaint with the CID. The 6th Respondent also had said that he credited Rs.7.0 million to the petitioner's account and had left his telephone number with his father.

The Petitioner states that, as he has had no previous interactions with the 6th Respondent, he phoned him up straight away and took the precaution to record the conversation. The transcript of the conversation has been produced marked "P19". It is clear from the transcript that there is no mention whatsoever regarding an arrangement for importation of vehicles. In the course of the telephone conversation, the 6th Respondent clearly says that he credited to the Petitioner's account as requested by Rehana as she required money to place an order to import ointments. It is also clear from the transcript that this was the first conversation between the Petitioner and the 6th Respondent and that they had not known to each other before.

From the above, along with other material produced by the respective parties to this application, it is clear that the version of the 6th Respondent is bereft of any credence, and his complaint appears to be a concocted one.

After the telephone conversation, as referred to earlier, the Petitioner had lodged a complaint against the 6th Respondent at the Narahenpita police on the very next day, i.e. on 08.05.2018, alleging criminal intimidation. The Respondents, however, in particular the 1st to the 3rd Respondents, had not considered any of these material facts and merely acted on the word and on the Bank slips provided by the 6th Respondent. I wish to reiterate that, especially in cases where financial fraud is alleged, it is incumbent on the investigating agency to ascertain whether it is purely a transaction commercial in nature or whether a criminal element is present. As far as this incident, was concerned, this aspect was an essential part of the investigation, which the CID officers had to carry out before proceeding to place the Petitioner in custody. In the circumstances I hold that the arrest of the Petitioner is arbitrary, irrational, and unreasonable and had deprived the Petitioner the equal protection of the law guaranteed to him under the Constitution. Thus, I declare that the 1st to the 3rd Respondents had infringed the Petitioner's fundamental right under Article 12(1) of the Constitution.

<u>Liability of the 6th Respondent</u>

The 6th Respondent was absent and unrepresented when this application was supported for leave to proceed, nor was he represented when this matter was taken up for argument, although notice was issued to him, on no less than four occasions. After the arguments were concluded, however, in the interest of justice, the Court took the additional step of issuing notice on the 6th Respondent for the fifth time, through the Officer-in-Charge of the Sapugaskanda Police Station. On 23.03.2023 he was represented by Counsel and sought permission to file objections on behalf of the 6th Respondent, which was permitted.

As per the statement of objections filed by the 6th Respondent, he states as per paragraph 5(f) and 5(g) that;

"*That the petitioner although has taken money never took steps to import one BMW 318i car as agreed and just passed time making various excuses and thereafter never answered the phone. The said Rehana who also had taken 23 million from the 6th Respondent did not take steps to import BMW 5 car as agreed and ceased all contacts with the 6th Respondent"*

That thereafter the 6th Respondent made separate complaints against the said Rehana and the Petitioner at the CID. The 6th Respondent handed over the original deposit slips to the CID during the investigation regarding the said complains and the Petitioner has also admitted that he received money"

The complaint made by the 6th Respondent against the Petitioner is certainly false. This can be gleaned from the background facts. During the phone conversation between the Petitioner and the 6th Respondent on 07.05.2018 as said earlier, there is no mention of any agreement to import vehicles, by the 6th Respondent. Parties are likely to negotiate in depth any commercial arrangement, but no evidence was forthcoming from the 6th Respondent as proof of such an agreement. Hence, considering the material that is available at this point of time, the inference that can be drawn is that the complaint made by the 6th Respondent is false and bereft of any truth.

The entire process that culminated in the arrest of the Petitioner was instigated by the 6th Respondent and consequently resulted in the breach of the Petitioner's fundamental rights. I am of the opinion that this is a fit matter to apply the principle laid down in the case of ***Faiz v Attorney General and Others*** **Sri L.R 1 [1995] 372.** In the case of **Faiz** [supra], his Lordship Justice Mark Fernando stated;

"Article 126 speaks of an infringement by executive or administrative action; it does not impose a further requirement this action must be by an executive officer. It follows at the act of a private individual would render him liable, if in the circumstances that act is "executive or administrative". The act of a private individual would be executive if such act is done with the authority of the executive such authority; ***transforms an otherwise purely private act into executive or administrative action****; Such authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation and the like (including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest ratification or adoption. While I use concepts and terminology of the law relating to agency, and vicarious liability in delict, in my view responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility. The executive, and the executive officers from whom such authority flows would all be responsible for the infringement.* ***Conversely, when an infringement by an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby****. In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim."* [emphasis added]

As we have concluded that the arrest of the Petitioner was arbitrary and unreasonable and that the arrest was a direct consequence of the instigation on the

part the 6th Respondent by making a complaint which was false, the 6th Respondent cannot avoid liability. In the process of protecting the Fundamental Rights of the citizenry, the Court cannot condone private parties instigating the executive to use its powers to achieve their ulterior motives unreasonably and/or in an arbitrary manner. Permitting such conduct would lead to a breakdown of the Rule of Law and erode public confidence, as such, infractions should be frowned upon by this Court.

The Decision to Indict the Petitioner.

When this matter was taken up, on 12.11.2011, the Court inquired from the learned State Counsel whether the transcript of the telephone conversation dated 07.05.2018, between the Petitioner and the 6th Respondent was considered before forwarding the indictment. Requested by the Court, the learned State Counsel produced the file pertaining to the Petitioner containing the decision to forward the indictment against him. Upon perusal of the said file by the Court, it was observed that;

1. The material relating to the telephone conversation between the Petitioner and the 6th Respondent had not been considered by the Learned State Counsel before deciding to forward the indictment.

2. Other than the bare statement stating that the Complainant had deposited a sum of Rupees Seven Million in the Bank Account of the Petitioner no other material whatsoever had been considered by the Learned State Counsel to establish the requisite ingredients, in particular the requisite mental element of the offence of cheating

3. Further, the Learned State Counsel had paid scant regard as to whether the facts relating to this case makes out an offence of cheating and whether the material is sufficient to establish the offence.

Neither a declaration nor any relief was sought in relation to the indictment against the Petitioner. The Court, however, cannot ignore the scant regard the Learned State

Counsel had paid when forwarding the indictment. I am reminded of the dicta of his Lordship Justice Sansoni in the case of ***The Attorney General vs. Sivapragasam et al***, **60 NLR 468 at p. 471,**

"***The prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor feel pride or satisfaction in the mere fact of success .... His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result"***

Similar views were echoed by His Lordship Justice Mark Fernando in the case of ***Victor Ivon vs. Sarath N. Silva, Attorney General and Others*** **[1998]1 Sri. L.R. 340 at p. 344**. The Attorney General has a statutory discretion and the decision to file an indictment; however, this discretion is subject to certain limitations. Any executive discretion should be exercised on constitutionally permissible factors. If a suspect is indicted by the Attorney General when the evidence was plainly insufficient, it would be prima facie arbitrary or capricious. In the words of His Lordship Justice Mark Fernando;

"***If a person complains that he was criminally defamed at a public meeting, at which he was not present, and the only witness he has, as to the actual words spoken, is a person who is quite hard of hearing, could sanction be granted, without any further investigation, and without the statement of the accused having been recorded? A decision to prosecute in such circumstances would be, prima facie, arbitrary and capricious, and so would the grant of sanction."***

No doubt, the Attorney General enjoys unfettered discretion in almost all aspects of criminal processes; institution of criminal proceedings, conduct of prosecutions as well as discontinuing of proceedings and is not obliged to explain why a particular decision was taken either to indict or not to indict an individual. Prosecutorial discretion is an essential element of our criminal justice system and is also critical to the fair and efficient administration of criminal justice. However, the right to a fair

administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed at the altar of expediency.

The decision to prosecute is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care. Many common law jurisdictions apply a two- stage test in deciding whether or not to initiate a prosecution; that is evidential sufficiency and the public interest. In assessing the sufficiency of evidence, the prosecutor should consider, the admissibility, the reliability and the credibility of the material. The evidence of the defence and any argument which might be put forth should be weighed before asking whether it is more likely than not a court would convict the accused. There must be a rigorous examination of the case to ensure that indictments are not made prematurely. Before indictments are filed, the Attorney General should consider if there are reasonable grounds to suspect that the person to be indicted has committed the offence, or if further evidence can be obtained to provide a realistic prospect of conviction, or if the seriousness or the circumstances of the case justifies the making of an immediate decision to file indictments or if it is in the public interest to file indictments against the suspect.

In the instant case, the indicting State Counsel had only to consider the statement made by the Petitioner along with the transcript of the telephone conversation to assess the truthfulness of the complaint, which unfortunately had not happened.

The complaint itself is fraught with improbabilities. The version of the Petitioner, the telephone conversation, and the fact that the 6th Respondent had given Rs.53.0 million to Rehana in December, which was five months after the purported vehicle transaction as alleged [by the 6th Respondent] that both the Petitioner and Rehana were jointly involved, negates any criminal intent on the part of the Petitioner.

It is regrettable neither the indicting State Counsel nor the officer who supervised and sanctioned the indictment, had failed in their duty to consider the facts objectively before taking the decision to indict the Petitioner.

The two decisions [**Sivapragasam and Victor Ivan**] referred to above and the jurisprudence of this court has spelt out that the discretion vested in the Attorney General, as a public prosecutor, is constitutionally protected and this discretion had been reviewed by this court, thus the jurisprudence permits this court to consider any challenge to the exercise of the prosecutorial discretion statutorily vested with the Attorney General.

Although the discretion of the Attorney General regarding forwarding of indictments is reviewable, the circumstances in which the Court will intervene are rare. Prosecutorial powers are entrusted to identified officers and no other authority can exercise them or make judgments; it is not within the Courts' constitutional function to assess the merits of the polycentric character of official decision-making in such matters. The Court will only intervene when the decision is prima facie, arbitrary, capricious, or unlawful.

Needless to state that the mental trauma one must undergo in facing criminal charges and for that matter an incitement before the High Court would be considerable. The impact of it would be greater if the person charged was of some social standing.

Conclusions

We are of the opinion that the Petitioner has been successful in establishing that his Fundamental Rights enshrined in Article 12(1), and 13(2) of the Constitution had been violated by the Respondents and the court proceeds to make a declaration to that effect.

When one considers the chain of events, it would be reasonable to draw the conclusion that the 6th Respondent had made a false complaint, as far as the matters impugned in these proceedings and had taken advantage of the mechanism of the criminal justice system to achieve his dubious objectives.

I agree with the view expressed by Justice Mark Fernando in the case ***Faiz v. The Attorney General*** [supra] when his Lordship said; *"….. when an infringement by*

an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby. In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim" [at page 383].

As stated earlier, the facts amply demonstrate that the whole process that triggered the action of the 1st to the 3rd Respondents which led to the infringement of the Petitioner's fundamental rights was instigated by the 6th Respondent.

Accordingly, this Court declares that the 1st 2nd and 3rd Respondents had violated the fundamental rights of the Petitioner under Articles 12(1) and 13(2) of the Constitution. The violations aforesaid was either induced or instigated by the 6th Respondent, who therefore is also responsible for the violations.

His Lordship Justice Kulatunga in the case ***Shaul Hameed and Another v Ranasing***he **1990 1 SLR 104**, observed; [at page 119]

"*This Court has the power to make an appropriate order even against a respondent who has no executive status where such respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights or even otherwise, where in the interest of justice it becomes necessary to deprive a respondent of the advantages to be derived from executive acts violative of fundamental rights e. g. an order for the payment of damages or for the restoration of property to the petitioner. Article 126 (4) provides that The Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) or this Article.....". The power of this Court to grant relief is thus very wide. Such power has been expressly conferred to make the remedy under Article 126 (2) meaningful.*"

I agree with the observation made by Justice Kulatunga referred to above and I am of the view that the Petitioner should be entitled to compensation for the violations aforesaid.

I am also of the opinion that we are bestowed with great latitude in terms of granting relief under Article 126 of the Constitution and when this Court orders compensation for the violation of a Fundamental Right it is awarded by way of acknowledgement of regret and a *solatium* for the hurt caused by the violation. As held by His Lordship Justice Amarasinghe in ***Saman v Leeladasa*** **Sri L.R 1 [1989] 1 at p. 42**;

"When, in an appropriate case, compensation is awarded for the violation of a Fundamental Right, it is, I think, by way of an acknowledgement of regret and a solatium for the hurt caused by the violation of a fundamental right and not as a punishment for duty disregarded or authority abused."

I am also of the view that the 6th Respondent, being a private party, should also be ordered to pay compensation. The 6th Respondent's actions had led to considerable disruption of the Petitioner's life; his plans to embark on a holiday came to an abrupt halt and had to suffer incarceration in remand custody followed by an indictment on a charge of cheating. All these events, no doubt, would have impacted adversely on his life and possibly would have tarnished his reputation as well. This Court would be failing in its bounden duty if we were to ignore the grievance caused to the Petitioner or condone the conduct of the 6th Respondent.

I must also add that although His Lordship Justice Amarasinghe opined in ***Saman v Leeladasa*** **[supra]** that deterrence should not be considered as a relevant element in the assessment of compensation, those opinions were limited to State liability, as the depths of the State coffers is vast, and the burden of large awards will inevitably pass to the taxpayer. But in my opinion deterrence is a relevant element when the Fundamental Rights violation is a result of instigation by a private party. Private parties should be deterred from instigating the executive to use its powers to achieve their ulterior motives unreasonably and/or in an arbitrary manner.

In this regard I am guided by the judgement of ***Dumbell v Roberts*** **[1944] 1 All ER at pg. 330**, where it was held that no person should be arrested by the police except on grounds which in the particular circumstances of the arrest justify the entertainment of a reasonable suspicion. And that, English Law has recognized that is in the public interest that sufficient damages should be awarded in instances of false imprisonment in order to give reality to the protection afforded by the law. The court went on to observe that;

"The more high-handed and less reasonable the detention is, the larger may be the damages; *and, conversely, the more nearly reasonable the defendant may have acted and the nearer he may have got to justification on reasonable grounds for the suspicion on which he arrested, the smaller will be the proper assessment. The whole of the facts will, of course, be taken into account on the new trial in order to arrive at a proper figure."*

Although the judgement was concerned with appeal from an action for false imprisonment, I believe the instance case is one that is apt to apply the principle enunciated in ***Dumbell v Roberts*** [supra], as the spectrum of unlawful arrests and false imprisonments are wide, and the compensations should reflect the events and bereavements of the Petitioner.

However, I am inclined to include a word of caution. The quantum of compensation reflected by the final Order of this Court should not be construed as the rule. It is very much the exception, especially when making an order regarding payment of compensation against a private party as oppose to the state and it should be done only upon carefully weighing the facts and circumstances of each case. The Court is mindful not to unleash a pandora's box. Hence, the compensation granted by the Court is reflected by the circumstances of this case.

Taking into account the facts and circumstance that led to the violation of the Petitioners' fundamental rights, this Court makes order as follows;

1. 1st Respondent is directed to pay a sum of Rs. 75,000.00 as compensation to the Petitioner.

2. Each of the 2nd and 3rd Respondents are directed to pay a sum of Rs, 25,000/- as compensation to the petitioner.

3. The 6th Respondent is directed to pay a sum of Rupees three million [Rs.3.0 million] to the Petitioner as compensation.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ J.

I agree

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA J

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal under and in terms of Section 15(11) of the National Gem and Jewellery Authority Act No. 50 of 1993 and the Supreme Court Rules.

SC Miscellaneous 02/2013

Sudu Hakuruge Sarath Kumara

Pathkada,

Kuruwita.

APPELLANT

Vs.

1. National Gem and Jewellery Authority,
   No. 25, Galle Face Terrace.
   Colombo 03.

2. Prasad Galhena,
   Chairman,
   National Gem and Jewellery Authority,
   No. 25, Galle Face Terrace.
   Colombo 03.

RESPONDENT

And Now Between

Sudu Hakuruge Sarath Kumara

Pathkada,

Kuruwita.

APPELLANT-APPELLANT

Vs.

1. National Gem and Jewellery Authority,
   No. 25, Galle Face Terrace.
   Colombo 03.
2. Prasad Galhena,

2a. Asanga Welegedera

2b. Aruna Gunawardena
2c. Amitha Gamage
2d. Thilak Weerasinghe
Chairman,
National Gem and Jewellery Authority,
No. 25, Galle Face Terrace.
Colombo 03.

RESPONDENT-RESPONDENTS

3. B.M.U.D. Basnayake,

3a. Udaya Senevirathna

3b. Dr. Anil Jasinghe

Secretary,
Ministry of Environment,
"Sampathpaya".
No. 82, Rajamalwatta Road,
Battaramulla.

4. M.M.S. Anushka Dharmasiri,
Delgamuwa,
Kuruwita.

5. A.B. Jayantha Rajapaksha,
Kahangama,
Kosgala.

RESPONDENTS

6. Kamal Neel Sidantha Ratwatte

6A. Jayasundera Mudiyanselage
Migara Jayasundera

Basnayake Nilame, Saman
Devalaya,Rathnapura.

Intervenient-Respondent

Before: Buwaneka Aluwihare PC J.

A.H.M.D. Nawaz J.

Kumudini Wickremasinghe J.

Counsel: Chatura Galhena for the Appellant-Appellant.

Yuresha de Silva, DSG for the 1st to 3rd Respondents.

Ruwantha Coorey for the 4th and 5th Respondents.

C. Wanigapura for the Intervenient-Petitioner.

Written Submissions: Written submissions of the Appellant-Appellant on 21.11.2016.

Written submissions of the 1st to 3rd Respondent-Respondents on 03.01.2017.

Argued on: 11.10.2022

Decided on: 20.09.2023

JUDGMENT

Aluwihare PC. J,

(1) The Appellant-Appellant [Hereinafter referred to as the Appellant] invoked the jurisdiction of this Court in terms of Section15(11) of the National Gem and Jewellery Authority Act No.5 of 1993 [Hereinafter the Act] challenging the decision made by the 3rd Respondent, the Secretary of the Ministry of Environment.

(2) The gravamen of the Appellant was that the 3rd Respondent, in arriving at his findings has relied on extraneous material that was not part of the inquiry that was conducted before him.

(3) If one is to trace back the history of the dispute;

(a) The Appellant applied for a Gemming Licence [Hereinafter referred to as the 'Licence'] to the 1st Respondent, the National Gem and Jewellery

Authority [hereinafter referred to as the Authority], which is the issuing authority of such licences, in respect of a land called 'Galamune Kumbura'.

(b) The 4th and 5th Respondents also had made similar applications in respect of another land known as Dikwelagawa Arawa, which appears to be contiguous the land the Appellant was interested.

(c) Several other parties had intervened and participated in the inquiry that was conducted by the Authority and the application for the licence had been turned down.

(4) Consequently, the Appellant had appealed against the said refusal of the Authority to the 3rd Respondent, Secretary to the Ministry of Environment [hereinafter referred to as the 'Secretary'] in terms of Section 15(8) of the Act.

(5) Along with the Appellant the 4th and 5th Respondents also had appealed to the Secretary, in respect of the refusal to grant the licence to them by the Authority. The Secretary thereupon had consolidated both applications and had held a common inquiry in respect of both the appeals which had been held on the 12.09.2012.

(6) The learned Counsel for the Appellant contended that, at the said inquiry, representations on behalf of the 4th and 5th Respondents [the two other parties who were seeking licence], the Land Reform Commission and Basnayake Nilame of the Sabaragamuwa Maha Saman Devalaya [hereinafter referred to as the 'Devalaya"] were entertained.

(7) Accordingly, the Secretary by his letter dated 21.01.2013, had communicated his decision [A4] regarding the two appeals by the Appellant and the 4th and 5th Respondents. The Secretary had come to a finding that the land named Galamune Kumbura Dikwelagawa Arawa, are one and the same land and had

recommended issuing of a licence to the 4th and 5th Respondents, however, the application of the Appellant was not allowed.

(8) It was argued on behalf of the Appellant that, in arriving at the decision, the Secretary had relied heavily on the contents of a letter submitted by the Basnayake Nilame of the Devalya. It was pointed out that the said letter had been submitted long after the inquiry and the date granted to the parties to tender written submissions. The impugned letter is dated 13.01.2013 and had been submitted four months after the inquiry was concluded.

(9) The learned Counsel for the Appellant argued that none of the parties were privy to the contents of the said letter and furthermore, the position taken by the Basnayake Nilame in the said letter is contrary to the position he took at the inquiry.

(10) Although Basnayake Nilame was not a party to the instant Appeal, this court allowed the application of the Basnayake Nilame to intervene and was added as a party by its order dated 06.03.2017 and consequently was cited as the 6th intervenient Respondent.

(11) Among other grounds, the main thrust of the argument on behalf of the Appellant was that the findings arrived at, by the Secretary upon the inquiry cannot stand, as there was a blatant violation of rules of natural justice and that, not only the 3rd Respondent had relied on extraneous matters to arrive at his conclusions but also none of the parties were given an opportunity to respond to the representations made by the Basnayake Nilame way after the conclusion of the inquiry.

(12) On behalf of the 1st to the 3rd Respondents, the learned Deputy Solicitor General submitted that, although 4th and 5th Respondents were issued with a gemming licence, it was only for a period of one year as it remained suspended in view of the present case. It was further submitted that, as the said licence has lapsed,

the present appeal is now academic and granting of substantive relief prayed by the Appellant would be futile.

(13) The written submissions filed on behalf of the said Respondents, however, is silent on the main ground of appeal referred to earlier, namely the consideration of extraneous material by the 3rd Respondent in arriving at his findings. The 3rd Respondent has neither refuted the contention of the Appellant that he considered the contents of the letter submitted by the Basnayake Nilame after the inquiry nor justified his action.

(14) Sub Sections (8) to (11) of Section 15 of the Act read as follows;

(8) Where the Authority;

(a) refuses an application for a licence made under subsection (3) ;

(b) revokes a licence under subsection (7),

(16) *the applicant or the licensee may before the expiry of a period of thirty days from the date of such refusal or revocation, as the case may be, appeal to the* **Secretary to the Ministry of** *the Minister (hereinafter referred to as the Secretary)*

(9) The Secretary may, on any appeal made to him under subsection (8)

(a) allow the appeal and direct the Authority to issue or renew the licence; or

(b) disallow the appeal.

(10) The Authority shall comply with any direction issued to it under subsection (9).

(11) An applicant or licensee dissatisfied with a decision of the Secretary disallowing, under subsection (9), as appeal made to such Secretary under subsection (8), may appeal from such decision of the Secretary, to the Supreme Court, within thirty days of the date on which such decision is communicated to him.

(15) The statutory provisions referred to above are unambiguous and the Secretary's mandate in exercising the powers vested in him by virtue of Section 15 (9) of the Act is to sit in appeal and review the decision of the Authority in refusing the licence and to decide whether the refusal of the licence on the material placed before the Authority is justified or not.

(16) In reviewing the decision of the Authority, the Secretary may permit the parties to make representation on their behalf, however, as a matter of rule, has to rely on the material considered by the Authority in refusing the grant of licence. In exceptional situations, however, may permit fresh material.

(17) In the instant case the reason for the refusal of the licence was twofold;

(1) The land in question was part of the corpus in a partition case [DC Rathnapura 20008/P] and that the court was yet to deliver the final judgement.

(2) The Authority was not in a position to clearly identify the respective lots claimed by the parties. [Vide letter issued by the Authority to the parties dated 16.03.2012]

(18) The Secretary only had a mandate to consider whether the Authority was justified in refusing the licences to the applicants on the ground referred to above. The Secretary, however, in upholding the decision of the Authority in refusing the licence sought by the Appellant had come to a finding that there is no distinct land called Galamune Kumbura. In doing so, the Secretary had made a distinct reference to the assertion made by the Basnayake Nilame of the Devalaya regarding the impugned lands, in the letter the Basnayake Nilame sent to the Secretary more than three months after the inquiry was concluded.

(19) The Appellant's main contention was that the Secretary ought not to have relied on the contents of the said letter of the Basnayake Nilame without first affording an opportunity to the Appellant to respond to the said assertions of the Basnayake Nilame therein. The Secretary on the other hand had overturned the decision of the Authority in refusing the licence to the 4th and 5th Respondents and had directed the Authority to issue a licence to the 4th and 5th Respondents.

(20) I am of the view that the rules of natural justice required the Secretary to afford an opportunity to the Appellant and other parties to respond to the impugned letter if the Secretary were to act on it, which the Secretary did not do.

(21) As Dr. Sunil Cooray points out [Principles of Administrative Law in Sri Lanka 4th Edition, page 477], "*The traditional view was that the rules of natural justice applied only to decisions making process which the courts classified as 'judicial' and 'quasi-judicial'. Today, that is not quite the idea"*. Quoting Justice U de Z Gunawardena in **Geeganage v. Director General of Customs** [2001] 3 SLR 179, Dr. Cooray states; "that, the theory is obsolescent if not obsolete. Phrases that have come into use more recently in this context are the 'duty of fair play' 'duty of fairness' and 'acting fairly'. Justice Mark Fernando remarked, in the case of **Wijayapala Mendis v. Perera** [1999] 2 SLR 110 at 148 "natural justice is fairness in action".

(22) In the case of **Wijayapala Mendis v. Perera** [supra], the Court observed that *"the proceedings of the Commission were not strictly adversarial in nature; the Commissioners had a duty to ascertain the facts themselves. In several instances, the Commission refrained from calling important witnesses*". This duty to summon and examine important witnesses, is not a separate duty, but part of the duty to hear, which is the "*audi alteram partem"* rule.

(23) I find the Secretary fell into error when he decided to act on the contents of the letter of the Basnayake Nilame without ascertaining the veracity of its contents and/or the stand the Appellant took regarding the same. In the circumstances

aforesaid I am of the view that the decision of the Secretary which is impugned in these proceedings cannot be allowed to stand. Accordingly, the decision of the Secretary [3rd Respondent] A6 dated 18.01.2013 is hereby quashed, and we direct the incumbent Secretary to reconsider the appeal of the Appellant on its merits, in terms of Section 15(9) of the Act.

Appeal allowed

JUDGE OF THE SUPREME COURT

A.H.M.D. Nawaz J.

I agree

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe J.

I agree

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALISTREPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 17 & 126 of the Constitution.

Case No: SC/FR/126/2022

1. Jayaweerage Sumedha Jayaweera,
Principal's Bungalow,
St Paul's Girls' School,
Milagiriya,
Colombo 05.

PETITIONER

Vs.

1. Dinesh Gunawardana,
Minister of Education,
Ministry of Education,
Isurupaya, Battaramulla.

1. Ramesh Pathirana,
Minister of Education,
Ministry of Education,
Isurupaya, Battaramulla.

1(B). Hon. Susil Premajayantha,
Minister of Education,
Ministry of Education,
Isurupaya, Battaramulla.

2. Prof. K. Kapila C.K. Perera
The Secretary Ministry of Education,
Ministry of Education,

Isurupaya, Battaramulla.

2(A). M.N. Ranasingha,
The Secretary Ministry of Education,
Ministry of Education,
Isurupaya, Battaramulla.

3. W.M.N.J. Pushpakumara,
Additional Secretary Education Services,
Ministry of Education,
Isurupaya, Battaramulla.

4. R.A.A.K. Ranawaka
Secretary Ministry of Lands,
Ministry of Lands,
"Mihikatha Madura", Land Secretariat,
No. 1200/6,
Rajamalwatha Rd, Battaramulla.

5. E.W.L.K. Egodawela,
Additional Secretary (School Affairs),
Ministry of Education,
Isurupaya, Battaramulla.

The 2nd, 4th and 5th Respondents, Members of Interview Panel.

6. H.M.C.K. Seneviratne
11/3, Samagi Mawatha,
Depanama, Pannipitiya.

7. Hon. Jagath Balapatabendi
Retired Judge of the Supreme Court,
(Chairman)
Public Service Commission.

8. Indrani Sugathadasa,
(Member)

9. Dr. T.R.C. Ruberu
(Member)

10. Ahamod Lebbe Mohamed Saleem
(Member)

11. Leelasena Liyanagama
(Member)

12. Dian Gomes
(Member)

13. Dilith Jayaweera
(Member)

14. W.H. Piyadasa
(Member)

15. Sundaram Arumainayagam
(Member)

All Members of the Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

16. M.A.B. Daya Senarath
(Secretary)
Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

17. Mr. G.S. Withanage
Chairman – Education Service Committee,
Public Service Commission.

18. Dr. Mrs. Damitha de Zoysa
(Member)

19. Mr. S.U. Wijerathna
(Member)

Members of the Education Service Committee
Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

20. Mr. A.W.R. Wimalaweera
Secretary-Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

21. Hon. Attorney General
Attorney Generals Department,
Colombo 12.

RESPONDENTS

BEFORE : **BUWANEKA ALUWIHARE, PC. J**
P. PADMAN SURASENA, J
JANAK DE SILVA, J

COUNSEL : Ikram Mohamed PC with R. Hettiarachchi and
Anuradha Abeysekere for the Petitioner.

Sanjeewa Jayawardena PC with Charitha Rupasinghe and Ms. Ridmi Beneragama for the 6th Respondent

Kanishka de Silva Balapatabendi DSG. With R. Gooneratne, SC for all the Respondents except the 6th Respondent.

ARGUED ON : 13-09-2023

DECIDED ON: 20-09-2023

Order relating to preliminary objection

Both the Petitioner and the 6th Respondent had applied for the post of Principal (Sri Lanka Education Administrative Service Grade I) responding to the notice produced marked **F1** by which the Secretary of the Ministry of Education had called for applications from suitable candidates to fill thirty-one vacancies which existed at thirty-one National Schools in the year 2021. Subsequent to the selection process, the 6th Respondent has been appointed as principal of Visaka Vidyalaya Colombo with effect from 24-01-2022. The Petitioner having failed to secure that appointment from the said selection process, has challenged in this application the appointment of the 6th Respondent to the post of Principal of Visaka Vidyalaya Colombo. The Petitioner in her petition has prayed for four main reliefs:

1. A declaration that the marking scheme of Sri Lanka Education Administrative Service class I officers to Grade I schools – 2021 produced marked **F3** has violated the Petitioner's fundamental rights guaranteed by the Constitution,
2. A declaration that the Petitioners fundamental rights guaranteed by Article 12(1) of the Constitution has been violated by the appointment of the 6th Respondent to the post of Principal Visaka Vidyalaya with effect from 18-01-2022 and/or by not awarding the Petitioner more marks than the 6th Respondent and/or by not appointing the Petitioner to the said post,
3. A declaration that the appointment of the 6th Respondent to the post of Principal Visaka Vidyalaya is null and void in law and to make an order directing the Respondents to appoint the Petitioner to the post of Principal Visaka Vidyalaya with effect from 18-01-2022.

At the outset, both the learned Presidents' Counsel who appeared for the 6th Respondent and the learned Deputy Solicitor General who appeared for all the other Respondents (other than the 6th Respondent), raised a preliminary objection that the Petitioner has filed this Petition after the 01-month period permitted by Article 126(2) of the Constitution and therefore the

application is out of time. The Court proceeded to hear the submissions of all parties and reserved its order.

According to the Respondents, it is the marking scheme of Sri Lanka Education Administrative Service class I officers to Grade I schools - 2021 produced marked **F3** which the Petitioner has complained as having violated her fundamental rights guaranteed by the Constitution. The Petitioner herself has applied responding to the notice calling for application (**F1**). The list of vacancies expected to be filled through this appointment process has been produced marked **F2**. The marking scheme relied on to award marks to the candidates has also been produced marked **F3**. Admittedly, the marking sheet **F3** has been published right from the beginning in the website. The closing date for the submission of the application was 12-10-2021. Petitioner has filed this application on 05-04-2022. There is no dispute that the Petitioner was aware of the said published marking scheme (**F3**) at the time she had forwarded her application for this post. Thus, the Petitioner has filed the instant application more than six months after the aforesaid alleged act of infringement.

The Petitioner has stated that she had made a complaint to the Human Rights Commission and therefore her application cannot be out of time as per Section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 which reads as follows:

> "Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."

Mr. Sanjeewa Jayawardena PC who appeared for the 6th Respondent argued that the Petitioner has failed to prove that the inquiry into her complaint is pending before the Human Rights Commission. However, we do not need to go that far because Section 13 (1) of the Human Rights Commission of Sri Lanka Act requires the Petitioner to pass a more preliminary threshold. That is the requirement for the Petitioner to have made her complaint to the Human Rights Commission within one month of the alleged infringement. According to the receipt issued by the Human Rights Commission produced by the Petitioner marked **O-1**, the Petitioner had made the complaint to the Human Rights Commission on 15-02-2022. Therefore, it is clear that the Petitioner had made her complaint to the Human Rights Commission very much after the one-month time allowed by Section 13 (1) of the Human

Rights Commission of Sri Lanka Act No. 21 of 1996. Therefore, irrespective of the fact that the inquiry into the Petitioner's complaint is pending before the Human Rights Commission or not, the Petitioner's case cannot come under Section 13 (1) of the Human Rights Commission of Sri Lanka Act for the purpose of computing the period of one month referred to in Article 126 (2) of the Constitution.

Therefore, we hold that the Petitioner's application in so far as the challenge made to the marking scheme **F3** is out of time.

However, Mr. Ikram Mohommed PC submitted before us that he has sought other relief which are not out of time as per Article 126(2) of the Constitution. He complained that , in certain instances the Petitioner has been deprived of the marks which are legally due to her. Let us proceed to consider that aspect of the case.

According to the marking scheme **F3**, marks to the candidates have been awarded under nine categories. They are as follows:

1. Service experience
2. Educational qualifications
3. English language proficiency
4. Computer literacy
5. Service evaluation
6. Research and publication relevant to education
7. Presentation
8. Case study
9. Overall skills and personality at interview

Mr. Ikram Mohommed PC, contended that the Petitioner's complaint is that she has not been awarded marks to the qualifications and experience she had possessed in respect of the first four categories (i.e., Service experience; Educational qualifications; English language proficiency; Computer literacy) because the Marking Scheme has no such provision to entertain and award marks to those qualifications. In particular, the Petitioner complains that unlike the 2015 marking scheme, the marking scheme **F3**, used in this instance does not permit award of marks to the qualifications and experience she had possessed in respect of the third and fourth categories (i.e., English language proficiency; Computer literacy) because the present Marking Scheme has no such provision to entertain and award such marks to those qualifications. Thus, in effect, it is clear that the Petitioner is challenging the Marking Scheme (**F3**) in respect of the award of marks under those four categories. Therefore, the Petitioner's complaint in respect of the first four categories (i.e., Service experience; Educational qualifications; English language proficiency; Computer literacy) is also out of time.

In respect of the marks awarded under the 7th, 8th and 9th categories, (i.e., presentation, case study and overall skills and personality at the interview), it is the complaint of the Petitioner that she had performed better than the 6th Respondent in relation to the performance under those three categories and therefore she should have been awarded more marks than she has been awarded. We are of the view that we cannot get into the shoes of the panelists who evaluated the applicants and proceed to consider and evaluate afresh, the performance of the candidates by us. Therefore, we are unable to entertain the said complaint made in relation to 7th, 8th and 9th categories.

What remains to be considered are the complaints made by the Petitioner in relation to the 5th category service evaluation, and the 6th category research and publication relevant to education.

The complaint of the Petitioner with regard to service evaluation is that the Respondents could not, in any event, have appointed the 6th Respondent according to the eligibility criteria referred to in the Service Minute (produced marked **Q**) with the counter affidavit of the Petitioner dated 28-11-2022. According to the table at page 13A of the Gazette No. 1928/28 dated 21st August 2015, for any applicant to be eligible to be appointed for the post of Principal, he/she should be an officer in Grade I/II/III of the S.L.E.A.S. (General Cadre). While the Petitioner claims that she is an officer in General Cadre, she asserts that the 6th Respondent was not in General Cadre but in Special Cadre. However, as pointed out by both Mr. Sanjeewa Jayawardena, PC and Mrs. Kanishka Balapatabendi DSG, at page 2A of the same Gazette in clause 6.1 all Grade I officers must necessarily be in General Cadre. This is because all officers in Grade I are classified under 'General cadre' and there is no 'Special Cadre' in Grade 1. Therefore, the 6th Respondent who is a Grade I officer must necessarily belong to the General Cadre. Thus, we see no merit in this argument either.

With regard to the 6th category i.e., research and publication relevant to education, it is the position of the Petitioner that the Respondents had arbitrarily deprived her of due marks while arbitrarily awarding undue marks to the 6th Respondent. In this regard we observe that both the Petitioner and the 6th Respondent had been awarded three marks each (identical marks) under this category. The total marks obtained by the Petitioner is 60 marks; the total marks obtained by the 6th Respondent is 67 marks. Thus, the difference in <u>total marks</u> obtained by the Petitioner and the 6th Respondent is seven marks;. The maximum mark any applicant could obtain under this category (Research and publication relevant to education) is 05 marks. Therefore, even if the Petitioner's argument that the Respondents had arbitrarily deprived her

of due marks is accepted, the Petitioner can only score 02 more marks which will make her total only 62 marks. Similarly, even if the argument of the Petitioner that the Respondents had arbitrarily awarded undue marks to the 6th Respondent is accepted, the 6th Respondent's marks can be reduced only by 03 marks making the 6th Respondent's total marks 64. Thus, we observe that the Petitioner cannot succeed on this ground as well because the 6th Respondent is still ahead of the Petitioner.

For the foregoing reasons Leave to Proceed is refused and the Petition is dismissed without costs.

BUWANEKA ALUWIHARE PC, J

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

JUDGE OF THE SUPREME COURT

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

In the matter of an application for special leave to appeal to the Supreme Court under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Dr. Sena Yaddehige,
Level 22,
Crescat Resdiencies,
Colombo 03.

Petitioner

SC/SPL/LA Application No. 100/2019

CA (Writ) Application No. 417/2017

Vs.

1. Securities and Exchange Commission of Sri Lanka.

2. Dr. Tilak Karunaratne,
Chairman,
Securities and Exchange Commission of Sri Lanka.

2A. Ranel T. Wijesinha,
Chairman,
Securities and Exchange Commission of Sri Lanka.

Substituted Respondent

3. D. N. R. Siriwardena

4. Ranel T. Wijesinha

4A. Jayantha Fernando

Substituted Respondent

5. S. R. Attygalle

6. Marina Fernando

6A. Jagath Perera

7. Dilani Gayathri Wijemanne

7A. Manjula Hiranya de Silva

Substituted Respondent

8. Rajeev Amarasuriya

9. Suresh Shah

9A. Arjuna Herath

Substituted Respondent

10. C. J. P. Siriwardena

Members,
Securities and Exchange Commission
of Sri Lanka.

11. Vajira Wijegunawardena
Director General,
Securities and Exchange Commission
of Sri Lanka.

All of Securities and Exchange
Commission of Sri Lanka,
Level 28 and 29,
East Tower,
World Trade Centre,
Echeleon Square,
Colombo 01.

Respondents

AND NOW BETWEEN

Dr. Sena Yaddehige
Level 22,
Crescat Resdiencies,
Colombo 03.

Petitioner - Petitioner

Vs.

1. Securities and Exchange Commission of Sri Lanka.

2. Dr. Tilak Karunaratne,
   Chairman,
   Securities and Exchange Commission of Sri Lanka.

2A. Ranel T. Wijesinha,
   Chairman,
   Securities and Exchange Commission of Sri Lanka.

Substituted Respondent - Respondent

3. D. N. R. Siriwardena

4. Ranel T. Wijesinha

4A. Jayantha Fernando

Substituted Respondent - Respondent

5. S. R. Attygalle

6. Marina Fernando

6A. Jagath Perera

7. Dilani Gayathri Wijemanne

7A. Manjula Hiranya de Silva

Substituted Respondent – Respondent

8. Rajeev Amarasuriya

9. Suresh Shah

9A. Arjuna Herath

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10. C. J. P. Siriwardena

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Director General,
Securities and Exchange Commission of Sri Lanka.

All of Securities and Exchange Commission of Sri Lanka,
Level 28 and 29,
East Tower,
World Trade Centre,
Echeleon Square,
Colombo 01.

Respondents - Respondents

Before : Priyantha Jayawardena PC J
E.A.G.R. Amarasekera, J
Achala Wengappuli, J

Counsel : Dr. Romesh De Silva PC with Chanaka de Silva, Manjuka Fernandopulle, Niran Ankitell and Harith de Mel for the Petitioner - Petitioner.

Susantha Balapatabendi PC, Additional Solicitor General with Rajitha Perera Deputy Solicitor General for the 1st, 3rd, 4A, 6A, 7A, 8th, 9A and 11th Respondent – Respondents.

Argued on : 21st July, 2023

Decided on : 20th September, 2023

Priyantha Jayawardena PC J

Facts of the case

On the 9th of June 2017, the Securities and Exchange Commission of Sri Lanka (hereinafter referred to as the "Respondent") issued a letter to the petitioner in the instant application (hereinafter referred to as the "Petitioner") calling him to show cause as to why no action should be taken against him for trading on shares of Kegalle Plantations PLC during the period between the 30th of June and 10th of July 2015, whilst being in possession of unpublished price sensitive information relating to those securities, in contravention of section 32 of the Securities and Exchange Commission of Sri Lanka Act, No. 36 of 1987, as amended (hereinafter referred to as the "SEC Act").

The said letter further alleged that the Petitioner had knowingly furnished false and misleading information, and concealed material facts during the course of the investigation conducted by the Respondent, in contravention of sections 46A (4) and 51 (1) (b) of the SEC Act.

At a meeting of the Respondent held on the 26th of October 2017, the counsel for the Petitioner was permitted to make representations on behalf of the Petitioner with respect to his innocence and as to why the Respondent should consider compounding the alleged offence.

After considering the representations made by the Petitioner to the Respondent, the Respondent issued a 'notice of action' dated the 1st of November 2017 informing the Petitioner that he had failed to satisfy the Respondent that no legal action should be taken against him.

The Petitioner thereafter filed a Writ Application in the Court of Appeal on the 8th of December 2017 alleging that, *inter alia*, the conduct of the Respondent, including the refusal to compound the offence, was arbitrary, irrational and unreasonable.

Further, the Petitioner prayed for, *inter alia*:

(a) Issue Notice upon the Respondents;

(b) Call for and inspect the records and / or files of the 1st Respondent relating to this matter, including the purported Inspection Report referred to in "P4", "P8" and "P9";

(c) Issue an interim order restraining the Respondents from initiating any enforcement action against the Petitioner in respect of the alleged offences set out in "P4" pending the hearing and final determination of this matter;

(d) Issue an interim order restraining the Respondents from initiating any enforcement action against the Petitioner in respect off the alleged offences set out in "P8" pending the hearing and final determination of this matter;

(e) Issue an interim order restraining the Respondents from initiating any enforcement action against the Petitioner in respect off the alleged offences set out in "P9" pending the hearing and final determination of this matter;

AND / OR

(f) Issue an interim order restraining the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in "P4" pending the hearing and final determination of this matter;

(g) Issue an interim order restraining the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in "P8" pending the hearing and final determination of this matter;

(h) Issue an interim order restraining the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in "P9" pending the hearing and final determination of this matter;

(i) Issue a mandate in the nature of a writ of certiorari quashing "P4" and the decisions contained therein (show cause);

(j) Issue a mandate in the nature of a writ of certiorari quashing "P8" and the decisions contained therein (show cause);

(k) Issue a mandate in the nature of a writ of certiorari quashing "P9" and the decisions contained therein (show cause);

(l) Issue a mandate in the nature of a writ of certiorari quashing "P7" and the decisions contained therein (compounding);

(m) Issue a mandate in the nature of a writ of prohibition preventing the Respondents from initiating any enforcement action against the Petitioner in respect of the alleged offences set out in "P4" and / or "P8" and / or "P9";

AND / OR

(n) Issue a mandate in the nature of a writ of prohibition preventing the Respondents from initiating action against the Petitioner in terms of section 136 of the Criminal Procedure Code in respect of the alleged offences set out in "P4" and / or "P8" and / or "P9".

Whilst the said Writ Application was pending before the Court of Appeal, the Respondent instituted proceedings in the Magistrates' Court of Colombo on the 25th of February 2019 against the Petitioner and another in terms of the SEC Act.

Thereafter, the Magistrates Court issued summons on the Petitioner and another named as accused in the said case.

The learned President's Counsel for the Petitioner had then supported the said Writ Application for notice and interim relief before the Court of Appeal. Having heard the parties to the said Writ Application, the Court of Appeal has delivered the order dated the 22nd of March 2019 declining to grant the interim relief prayed for by the Petitioner. Further, in the said Order, the Court of Appeal had directed the parties to file written submissions with regard to issuing notices on the Respondents in the said application.

Being aggrieved by the said order of the Court of Appeal, the Petitioner filed an application for Special Leave to Appeal dated the 28th of March 2019 and sought Special Leave to Appeal from this Court.

Preliminary objection raised by the Respondent

When this application was taken up for support on the 21st of July 2023, the learned Additional Solicitor General raised a preliminary objection on the maintainability of the application for Special Leave to Appeal on the basis that the affidavit dated the 28th of March 2019 tendered in support of the petition of Special Leave to Appeal to the Supreme Court was not in conformity with the Consular Functions Act, No. 4 of 1981, as amended (hereinafter referred to as the "Consular Functions Act").

It is however pertinent to note that the Petitioner tendered the original affidavit to this Court, which was certified on behalf of the Ambassador of Sri Lanka in Japan, by way of a motion dated the 3rd of June 2019 in the Supreme Court.

Submissions of the Respondent

The learned Additional Solicitor General for the respondents submitted that Rule 2 read together with Rule 6 of the Supreme Court Rules 1990 mandatorily requires that a petition in an application for Special Leave to Appeal be supported by an affidavit.

He further submitted that foreign affidavits tendered to court are not automatically recognized as valid unless it conforms to the applicable laws. Moreover, in terms of section 3 (i) of the Consular Functions Act, a foreign affidavit would only be recognized as valid in the courts of Sri Lanka, if the document was certified by a diplomatic or consular officer, who is *ex officio* deemed to be a Justice of the Peace for Sri Lanka.

Accordingly, it was submitted that the affidavit filed by the petitioner purported to have been executed before a Notary Public in Japan cannot be recognized as a valid affidavit under our law as it has no consular authentication or validation by the Embassy of Sri Lanka in Japan.

Submissions of the Petitioner

The learned President's Counsel for the Petitioner submitted that the preliminary objection raised by the Respondent cannot be sustained, because an affidavit in support of a petition in an Application for Special Leave to Appeal is not mandatory. Rules 2 and 6 of the Supreme Court Rules of 1990 stipulates that a petition must be filed together with a supporting "affidavit or document" only where the application contains allegations of fact which cannot be verified by reference to the judgment of the Court of Appeal. The learned President's Counsel further submitted that in the instant application, the allegations of fact can be verified from the impugned Order, and therefore the instant application does not require an affidavit or other documents.

Without prejudice to the aforementioned submission, the learned President's Counsel further submitted that given the urgency of the matter, it would be frivolous and highly technical to insist that all steps pertaining to the certification of a foreign affidavit be carried out at the point of filing the petition for Special Leave to Appeal within the prescribed time frame.

The learned President's Counsel further submitted that, in any event, out of an abundance of caution the affidavit had been certified by the Sri Lankan Embassy in Japan and subsequently been tendered to this court.

Consideration of the preliminary objection

There are three main aspects to be considered in the instant application:

(a) Whether it is mandatory under Rules 2 read with 6 of the Supreme Court Rules of 1990 to tender an affidavit in support of a petition in a Special Leave to Appeal Application;

(b) Whether non-compliance with the Consular Functions Act can subsequently be cured; and

(c) Whether the Petitioner has tendered a valid affidavit to court in support of the petition.

Is it mandatory to tender an affidavit under Rule 2 read with Rule 6 of the Supreme Court Rules 1990 in a Special Leave to Appeal Application?

Rule 2 of the Supreme Court Rules of 1990 reads as follows:

> *"Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and a certified copy, or uncertified photocopy, of the judgement or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits, documents and judgment or order shall also be filed;"*
>
> [Emphasis added]

Rule 6 further provides as follows:

> *"Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of*

such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit."

[Emphasis added]

Rule 2 read with Rule 6 of the Supreme Court Rules of 1990 shows that an affidavit is needed to be filed together with a Petition of Appeal for Special Leave, in order to support the allegations of facts in the petition that cannot be verified by reference to the judgment or order in respect of which Special Leave to Appeal is sought.

Accordingly, a Petition of Appeal for Special Leave not containing allegations of facts which could be considered by reference to a judgment or order of the Court of Appeal, can be considered by the court even in the absence of a supporting affidavit.

However, an affidavit would be mandatory if the allegations of facts contained in the Petition of Appeal for Special Leave cannot be verified by referring to the impugned judgment or order of the Court of Appeal.

A careful consideration of the impugned Order shows that the instant application can be supported without an affidavit as the Petitioner is relying purely on questions of law arising out of the impugned Order of the Court of Appeal dated the 22nd of March 2019.

It is further pertinent to note that the Petitioner had tendered an affidavit sworn overseas along with the Application for Special Leave to Appeal. Moreover, the Petitioner had obtained certification from the embassy of Sri Lanka in Japan as required in terms of the Consular Functions Act, after the said objection was raised by the Respondents.

Furthermore, the proviso to Rule 2 of the Supreme Court Rules 1990 permits the court to deem compliance of the Rules where a petitioner is unable to tender such materials with the application, provided the Petitioner has set out the circumstances for his failure to do so in the petition and the said reasons are acceptable to court.

The proviso to Rule 2 reads as follows:

"Provided that <u>if the petitioner is unable to obtain any such affidavit</u>, document, judgment or order, as is required by this rule to be tendered with his petition, <u>he shall set out the circumstances in his petition, and shall pray for permission to tender the same</u>, together

with the requisite number of copies, as soon as he obtains the same. If the court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule."

[Emphasis added]

The above proviso to Rule 2 has therefore conferred wide discretion on the Supreme Court to allow a petitioner to file an affidavit, if the petitioner has reserved his right to file an affidavit, document, impugned judgment, order or certified copy of the case record.

However, I am of the view that even if the Petitioner has not reserved the right to file such materials, the Supreme Court has a wide discretion to grant permission to a petitioner to file such materials if the circumstances warrant granting such permission in the interest of justice.

A similar view was expressed **in Priyani Soysa v Rienzie Arsecularatne [1999] 2 SLR 179,** where Wijetunga J in his dissenting judgement held that even the failure of the petitioner to obtain permission of the court to tender a valid affidavit would not necessarily dismiss a case unless there is a compelling reason to do so.

"Even assuming, though not agreeing, that the affidavit filed by the petitioner under Rule 6 was inadequate and that certified copies of the record of the Court of Appeal should have been submitted with the original application, the only lapse then on the part of the petitioner would be that she did not obtain the permission of the Court to tender the same, under the proviso to Rule 2, and that she tendered only 3 copies to Court. Having regard to the purpose of the Rules pertaining to special leave to appeal, it appears that non-compliance of this nature would not necessarily deprive a party of the opportunity of being heard on the merits at the threshold stage, unless there is some compelling reason to do so."

[Emphasis added]

Further, in **Kiriwanthe and Another v Navaratne and Another** [1990] 2 SLR 393, Fernando J held:

"The weight of authority thus favours the view that while all these Rules must be complied with the law does not require or permit an automatic dismissal of the application or appeal

of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule."

[Emphasis added]

Can non-compliance with the Consular Functions Act subsequently be cured?

Section 3 (i) of the Consular Functions Act reads as follows:

"Upon the application of, a person who is a citizen of Sri Lanka or any other person, a diplomatic or consular officer may

(i) certify, attest, authenticate or do any other such act to validate any document"

[Emphasis added]

Further, section 4 (i) of the Consular Functions Act reads as follows:

"Every diplomatic or Consular Officer shall be deemed to be ex officio a Justice of the peace for the Republic of Sri Lanka and accordingly may administer any oath or affirmation or take any affidavit and such oath or affirmation or such affidavit shall be deemed to have been administered or take, as the case may be, in Sri Lanka."

[Emphasis added]

As stated above, consular certification by the Sri Lankan Embassy in Japan has been obtained after the Preliminary Objection was raised and the same was tendered to this Court. In the aforesaid circumstances, it is necessary to consider whether an affidavit for which an objection has been raised in terms of the Consular Functions Act can be cured.

Section 9 of the Oaths and Affirmation Ordinance reads as follows:

"No omission to take any oath or make any affirmation, no substitution of anyone for any other of them and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceedings or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

[Emphasis added]

In **Mohamed Rauf Mohamed Facy v Mohamed Azath Sanoon Sally** (SC/Appeal No. 04/2004), BASL Law Journal 2006 page 58 in considering the impact of technical defects in an affidavit, the court observed that section 9 of the Oaths and Affirmations Ordinance is a salutary provision which was intended to remedy such maladies.

In **Senok Trade Combine Ltd. v K.H.S. Pushpadeva** (SC/HC/LA Application No. 02/2014) SC Minutes dated 4th September 2014 it was held as follows:

> *"Infirmities and irregularities in the affidavit of the petitioner referred to by the Respondent are technical in nature that can be cured by application of Section 9 of the Oaths Ordinance and therefore do not impact on the validity the affidavit."*
>
> [Emphasis added]

In several other instances, the courts have held that the defects in affidavits are of a mere technical nature and allowed the litigants to seek redress from the justice system.

It is also worth placing on record that requiring certification, attestation, authentication or any other such act to validate any document in terms of section 3 of the Consular Functions Act, No. 4 of 1981 is not practical in urgent circumstances due to the geographical size of certain countries and the need to travel great distances to reach the embassy of Sri Lanka in certain countries. Thus, the courts should take such circumstances into account when considering objections as to the validity of such documents and allowing any defects in those documents to be rectified.

In this regard, it is useful to refer to instances where the courts accept proxies sent by fax from overseas and allow the original to be filed in courts when the original is available in Sri Lanka. Further, if there are defects in proxies, the courts allow the parties to rectify the defects if they are of a technical nature. The approach of the modern courts is to depart from dismissing cases based on mere technicalities and to allow the parties to present their respective cases for proper adjudication of facts by the courts in order to meet the ends of justice.

A similar view was expressed as far back as 1936 by Abrahams CJ in **Vellupille v Chairman, Urban District Council [1936] 39 NLR 464** who held *"this is a Court of Justice, it is not an Academy of Law."*

Further, no prejudice whatsoever has been caused to the Respondents as a result of the alleged default and the smooth functioning of the court has not been interrupted.

Conclusion

In the aforesaid circumstances, I am of the view that:

(a) for the reasons stated above, the instant application can be supported in court even without an affidavit in terms of Rule 2 read with Rule 6 of the Supreme Court Rules of 1990;
(b) in any event, the Petitioner has obtained consular certification and rectified the defect in the affidavit filed along with the Petition to Appeal for Special Leave and the court accepts the said affidavit as a valid affidavit to support the averments in the Petition.

Hence, the preliminary objection is over-ruled.

No costs.

Judge of the Supreme Court

Achala Wengappuli, J

I agree.

Judge of the Supreme Court

E. A. G. R Amarasekera, J

I had the opportunity of reading the order written by His Lordship Justice Priyantha Jayawardena PC in its draft form. I totally agree with his Lordship that when Supreme Court Rules 2 and 6 are read together, an application for special leave to appeal containing allegations of fact which can be verified by reference only to the judgment or order, can be considered by Court even in the absence of a supporting affidavit. In other words, if the questions of law can be ascertained on the face of the judgment or order, there is no need of a supporting affidavit. So, I totally agree with the view taken by His Lordship Justice Jayawardena PC that the instant application can be

supported in court even without an affidavit in terms of Rule 2 read with Rule 6 of the Supreme Court Rules of 1990 to point out questions of law arising out of the impugned order itself.

Supreme Court Rules do not say that the affidavits mentioned in the said rules should be sworn or affirmed in Sri Lanka or that the affidavits referred to in the said rules preclude affidavits executed in foreign countries. Sections 437 and 438 of the Civil Procedure Code clearly identify the possibility of executing affidavits in a country outside Sri Lanka before a person qualified to administer oath or affirmation according to the law of that countries. The question is how a court in Sri Lanka recognizes the person who administers oath or affirmation as a qualified person to administer oath or affirmation in the relevant country. If the opposite party does not challenge the qualification of the person who has administered oath or affirmation in the relevant case, there may not be an issue, but when there is a challenge, it may have to be established that it was done before a person qualified to administer oath or affirmation in the relevant country. Even with regard to an affidavit executed within the country, one can raise an objection that the oath or affirmation was not administered before a Justice of Peace or Commissioner of Oaths recognized by our law. Once it is established that the Justice of Peace or the Commissioner of Oaths had the authority to administer oath or affirmation, the affidavit is valid from the date it was made.

The objection was raised in terms of the Sections 3(1) and 4(1) of the Consular Functions Act No.4 of 1981. Other than that, no provision that states the making of an affidavit in a foreign country makes it ipso facto invalid or inadmissible in evidence has been brought to our notice. Further, no other defect with regard to formalities in making of an affidavit has been brought to our notice.
Section 4(1) of the Consular Functions Act considers Diplomatic/ Consular officers as Justices of Peace and enables them to act as a Justices of Peace in administering oath or affirmations. Affidavits made before them are deemed to be made in Sri Lanka. This is only an enabling provision and it does not invalidate or make inadmissible other affidavits sworn or affirmed before a person qualified to administer oath or affirmation in terms of the law of the relevant country. If it is so interpreted to say that other affidavits sworn or affirmed in foreign countries are not valid before our courts, the relevant parts of sections 437 and 438 of Civil Procedure Code become redundant. On the other hand, if this is to disregard other affidavits made in foreign countries, litigants living abroad or in foreign countries at a given time, who have to tender affidavits within time limits, may have to face serious repercussions if there is no diplomatic/consular office within a close distance. The law does not expect to do impossible things. So, my view is that the said Section 4(1) has no relevance to the matter at hand. Our attention has not been brought to any

provision which states that the affidavit must be sworn or affirmed only before a consular or diplomatic officer if it is a foreign affidavit.

If there is any relevance, it is Section 3(1) of the said Consular Functions Act. It is questionable whether an affidavit falls within the term 'any document' contained therein as per the interpretation given to the said term in the interpretation section of the said Act. However, certain parts contained or attached to the affidavit to show that the person who administered the oath/affirmation is a qualified person may need verification by a proper authority.

In my view, the validation contemplated in Section 3(1) is not to certify the truth of the contents of a document which the officer is not the author. Even if the officer certifies the truth of the contents, it becomes hearsay. Thus, the validation contemplated there is to certify, attest or authenticate the genuineness or the authenticity of the document to the effect that it has originated from the correct or lawful source. However, it does not create a bar to accept foreign affidavits. It only provides for Sri Lankan citizens or any other person a mode to meet challenges to foreign documents on the basis of authenticity, legality etc. The Consular Functions Act does not say that such certification, attestation or authentication must always accompany with the document when it is tendered. It does not prevent one to provide the said certification or authentication when the authenticity or genuineness or legality is challenged. In this matter as His Lordship has mentioned in the draft judgment, certification has been tendered after the objection was raised. Now any doubt to the authenticity has been removed as per the law. Now there is no hindrance to accept the affidavit from the day it was sworn or affirmed.

In my view, there is nothing wrong with the affidavit per se as far as the formalities are concerned or regarding its validity except for the doubt created by the objection whether it was sworn or affirmed before a qualified person as per the laws of the relevant country. Such doubt cannot be sustained after a copy with the certification is tendered.

In other words, there was no defect in the affidavit in its making to reject or cure with amendments but the challenge to the validity created through objections cannot hold water from the moment the certification is tendered. Thus, I hold that there is a valid affidavit even to support the averments in the petition.

Thus, I agree with His Lordship's decision to overrule the preliminary objection.

Judge of the Supreme Court

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

In the matter of an appeal to the Supreme Court in terms of Sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code.

S.C. (C.H.C) Appeal No. 69/2013

S.C.HC.LA. No. 74/2012
Case No. HC (Civil) 4/2010/MR

Shahla Cassim,
No. 14, Sulaiman Avenue,
Colombo 05.
PLAINTIFF

Vs.

Sri Lanka Savings Bank,
No. 110 D.S. Senanayake Mawatha,
Colombo 08.
DEFENDANT

AND NOW BETWEEN

Shahla Cassim,
No. 14, Suleiman Avenue,
Colombo 05.
PLAINTIFF-APPELLANT

Vs.

Sri Lanka Savings Bank,
No.110, D.S. Senanayake Mawatha,
Colombo 08.
DEFENDANT-RESPONDENT

Before: **P. Padman Surasena J**
A.L. Shiran Gooneratne J
Arjuna Obeyesekere J

Counsel: Rozali Fernando instructed by F.J. & G. De Saram for the Plaintiff-Appellant.
Dulna De Alwis with Kamal Dissanayake for the Defendant-Respondent.

Argued on: 08.02.2022

Decided on: 22.09.2023

P. Padman Surasena J:

The Plaintiff-Appellant instituted action relevant to the instant case in the District Court of Colombo against the Defendant-Respondent praying *inter alia,* for Specific Performance of the Agreement of Sale bearing No. 749 dated 28.06.2002 produced marked **P 1** (hereinafter sometimes referred to as the Agreement) and an order directing the Defendant-Respondent to execute a Deed of Transfer to have the land which is the subject matter in the Agreement **(P 1**) transferred to the Plaintiff-Appellant. With the establishment of the Commercial High Court, the proceedings of the case were later transferred to the Commercial High Court.

After the conclusion of the trial, the learned Commercial High Court Judge by his judgment dated 30th May 2013, had concluded that the contract entered into by the parties as per the Agreement of Sale bearing No. 749 dated 28.06.2002 (**P 1**) has come to an end due to the impossibility of performance or frustration. The learned Commercial High Court Judge has further held that the Defendant-Respondent is entitled to receive from the Defendant-Respondent, a sum of Rs. Four Million (Rs.4,000,000/-) which is the sum of money paid as the advance payment by the Plaintiff-Appellant as per the Agreement (**P 1**) with the legal interest thereon since 01.11.2002. Being aggrieved by the judgment of the learned Commercial High Court Judge, the Plaintiff-Appellant has lodged the instant appeal to this Court seeking to set aside the judgment of the Commercial High Court dated 30th May 2013.

Before I proceed any further, let me briefly set out the background facts of the case. The Plaintiff-Appellant on 28th June 2002, had entered into the Agreement of Sale (**P 1**) with Pramuka Savings and Development Bank Ltd. (hereinafter sometimes referred to as Pramuka Bank) to purchase the land (belonging to Pramuka Bank) described in the schedule thereto, for a price of Thirty-Five Million Rupees (Rs.35,000,000/-). At the time of execution of the said Agreement the Plaintiff-Appellant had paid a sum of Four Million Rupees (Rs. 4,000,000/-) as an advance payment. As per the Agreement, the Plaintiff-Appellant had undertaken to pay the remainder on or before 30.10.2002.[1]

On 25.10.2002 the Monetary Board of the Central Bank of Sri Lanka (CBSL) had issued an order directing Pramuka Bank to forthwith suspend its business. CBSL by the said order prohibited carrying out any business transactions by Pramuka Bank with immediate effect. This is evident by the letter dated 25th October 2002 produced marked **V 2(a)**. Subsequently, in the year 2007, by press release dated 31.07.2007 marked **P 13** it is apparent that the Government had established a state bank by the name of 'Sri Lanka Savings Bank Limited' (the Defendant-Respondent in the instant appeal) to take over the business of Pramuka Bank. The order vesting the business of Pramuka Bank in the Defendant-Respondent with effect from 01.08.2007 has been produced marked **P 14.**

The Plaintiff-Appellant claims that by virtue of the vesting order marked **P14** all rights and obligations of Pramuka Bank was assigned to the Defendant-Respondent. It is the position of the Plaintiff-Appellant that all rights and obligations including those under the Agreement of Sale (**P 1**) stand transferred to the Defendant-Respondent as the Defendant-Respondent has become 'the successor and/or permitted assign' of Pramuka Bank in terms of the Agreement of Sale. It was in the above backdrop that the Plaintiff-Appellant had taken up the position that the Defendant-Respondent being the successor of Pramuka Bank must be compelled to carry out the specific performance in terms of Clause 6 of the Agreement of Sale.

The Clause 6 of the Agreement of Sale is as follows.

Clause 6

> *"If upon the Purchaser duly observing and performing the terms and conditions set forth in this Agreement and on the part of the Purchaser to be duly observed and*

[1] Paragraph 5 of the Agreement of Sale bearing No. 749 dated 28.06.2002 (**P 1**).

performed and if the Owner shall wilfully refuse to execute a Deed of Transfer in favour of the Purchaser in terms of Paragraph 5 hereof the Purchaser shall be entitled to enforce specific performance of this Agreement, or in the alternative the Purchaser would be entitled to receive his advance of Rs,4,000,000/- together with interest thereon and a further sum of Rs.4,000,000/- not as a penalty but as liquidated damages from the Owner." [2]

Clause 6, by itself, has subjected the entitlement conferred on the purchaser for the specific performance of the Agreement of Sale to three conditions. These conditions are embedded in Clause 6 itself and could be identified as follows:

i. The Purchaser should have duly observed and performed the terms and conditions set forth in the Agreement.
ii. The owner should have wilfully refused to execute a Deed of Transfer in favour of the Purchaser in terms of Paragraph 5.
iii. The entitlement for the specific performance has not been conferred on the purchaser as of a right as a right to an alternative remedy has also been given to the Purchaser namely, an entitlement to receive his advance of Rs. 4,000,000/- together with interest thereon and a further sum of Rs.4,000,000/- not as a penalty but as liquidated damages from the owner.

As there is a reference to Clause 5 in the second condition above, it would also be necessary to look at Clause 5 of the Agreement of Sale. It is as follows.

Clause 5

"The purchase shall be completed on or before the Thirtieth day of October Two Thousand and Two (2002) by the Purchaser tendering the balance purchase price of Rs. 31,000,000/- (Rupees Thirty One Million) of lawful money of Sri Lanka to the Owner and the Owner executing a valid and effectual Deed of Transfer in favour of the Purchaser."

As regards the third condition, it is the position of the Plaintiff-Appellant that damages in lieu of specific performance would not be adequate as obtaining an alternative land, even if considered as substantially equivalent of the promised performance would not only be difficult

[2] Emphasis is mine.

and inconvenient but also be 'undeniably impossible'. The Plaintiff-Appellant has attributed this to the significant increase of the value of the property within the area, over the time. It is on that basis that the Plaintiff-Appellant has insisted on the specific performance as per Clause 6 of the Agreement of Sale.

Be that as it may, the first condition above is a mandatory condition to be fulfilled by the purchaser. In other words, the availability of the remedy of specific performance in terms of that clause is available only when the Plaintiff-Appellant has fulfilled her obligations by tendering the balance purchase price of 31 million Rupees on or before 30th October 2002. This is because the Plaintiff-Appellant relies on Clause 6 of the Agreement, to seek an order for specific performance against the Defendant-Respondent. Having considered the material adduced in this case, I am of the view that this appeal could be disposed of only by considering at the outset, the question whether the Plaintiff-Appellant has fulfilled her obligations by tendering the balance purchase price of 31 million Rupees on or before 30th October 2002.

Indeed, it is the aforesaid first condition which is couched in the first issue raised jointly by both the Plaintiff-Appellant and the Defendant-Respondent. The said issue No. 01 (in verbatim) is as follows:

a) *Was the Plaintiff ready and willing to complete the sale on or before 30.10.2002 by tendering the balance purchase price of Rs. 31,000,000 to Pramuka Savings and Development Bank Limited?*
b) *Was the same accordingly informed to Pramuka Savings and Development Bank Limited through the plaintiff's Lawyer by letter dated 28.10.2002?*
c) *Did Pramuka Savings Development Bank Limited by writing dated 28.10.2002, fax to Plaintiff's lawyer its reply and confirm their Agreement to proceed with the sale of the said Property?*

As there are three limbs in Issue No. 01 let me first consider its limb (a) i.e., whether the Plaintiff-Appellant was ready and willing to complete the sale on or before 30.10.2002 by tendering the balance purchase price of Rs. 31,000,000 to Pramuka Bank. The Plaintiff-Appellant had sought to prove this fact by stating that by 30.10.2002, she had raised the required funds by selling the property in which her mother had resided and was ready to tender the balance purchase price. The Plaintiff-Appellant had sought to substantiate the above fact by relying on the Deed of Transfer produced marked **P3**.

The Deed of Transfer (**P3**) had been produced in the course of the trial 'subject to proof'. That was because of the objections raised by the Counsel for the Defendant-Respondent both at the time of producing it and at the time of closing the Plaintiff-Appellant's case. In the presence of the issues No. 04 and 05, one can understand the underlying reason behind the afore-stated objection to the Deed of Transfer (**P3**) raised by the Counsel for the Defendant-Respondent. The said issues No. 04 and No.5 (in verbatim) are as follows:

d) In terms of the averments contained in paragraph 9 to the Plaint did the Plaintiff enter into the aforesaid Agreement of Sale No. 749 to the purchase for the said property with the specific intention of using the said property for the Plaintiff's residential purposes?

e) In terms of the averments contained in paragraph 10 of the Plaint, on or about 21.10.2002, were the residential premises owned by the Plaintiff's mother Gulnar Saleem sold in order to raise funds to complete the transaction under the Agreement of Sale No. 749.

The above questions have stood as issues to be answered by the Trial Judge. Before I consider this aspect any further, let me at this stage consider briefly, the applicable law in this regard.

Section 154 of the Civil Procedure Code deals with tender of documents in evidence in the course of a trial. The explanation given at the end of that section would have some relevance with regard to this matter. It is as follows:

Explanation to Section 154 of the Civil Procedure Code.

If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.
If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-

- *Firstly, whether the document is authentic- in other words, is what the party tendering it represents it to be; and*
- *Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.*

The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.

Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it ; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it.

Let me at this stage consider whether the Deed of Transfer (**P3**) constitutes legally admissible evidence as against the party who is sought to be affected by it even if it is assumed to be authentic. The Deed of Transfer (**P3**) is a document which is required by law to be attested. Therefore Section 68 of the Evidence Ordinance applies in relation to its proof. According to that section, such document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive, and subject to the process of the court and capable of giving evidence.

The Plaintiff-Appellant has neither called at least one attesting witness to give evidence to establish the proof of the execution of **P3** nor adduced any evidence regarding the availability/non-availability of such witnesses. Such evidence is necessary to ascertain: whether the attesting witnesses are alive or have passed away; whether they could be subjected to the process of the court if they are alive; whether they are capable of giving evidence in Court. Thus, in that sense, the Plaintiff-Appellant has not proved the Deed of Transfer (**P3**) according to section 68 of the Evidence Ordinance.

However, the above conclusion is not complete unless and until section 154A of the Civil Procedure Code is also considered in that regard. This is because that section too would apply for such instance. That section is reproduced below for easy reference.

Section 154A of the Civil Procedure Code.

1) *Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, it shall not be necessary to adduce formal proof of*

the execution or genuineness of any deed, or document which is required by law to be attested, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless-

a) in the pleadings or further pleadings in an action filed under regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or

b) the court requires such proof

Provided that, the provisions of this section shall not be applicable in an event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.

2) The provisions of subsection (1), shall mutatis mutandis apply in the actions on summary procedure under this Code.

3) Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or appeal pending on the date of coming into operation of this Act –

a)

i. if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or

ii. if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence, the court shall admit such deed or document as evidence without requiring further proof;

b) if the opposing party objects or has objected to it being received as evidence, the court may decide whether it is necessary or it was necessary as the case may be, to adduce formal proof of the execution or genuineness of any such deed or document considering the merits of the objections taken with regard to the execution or genuineness of such deed or document.

I observe that during the course of the Plaintiff-Appellant's evidence, when the Plaintiff-Appellant marked and produced the relevant Deed of Transfer bearing No. 1456 attested by

Mohamed Cassim Mohamed Muneer the learned counsel who appeared for the Defendant-Respondent in the Commercial High Court had informed court that the documents P3, P6, P7, P8, P9, P10, P11, P12, P15, and P16 must be marked subject to proof.

However, the Plaintiff-Appellant had not taken any step to prove the Deed marked **P3** (that is the document which is relevant for the instant discussion). Moreover, the learned Counsel for the Defendant-Respondent, when the Plaintiff-Appellant closed his case, had informed court that the said documents (P6, P7, P8, P9, P10, P11, P12, P15, P16 and P17) were not proved in terms of the Evidence Ordinance. The record indicates that the learned Counsel who appeared for the Plaintiff-Appellant had been content only by replying to the aforesaid submission of the learned Counsel for the Defendant by saying:

> *"those documents have already been proved and I make the relevant submissions at the end of the trial."*

Thus, it is clear that the Plaintiff-Appellant according to the applicable law set out above had not taken any step to prove the Deed marked **P3**. This is despite the fact that Defendant-Respondent had objected to **P3** being received as evidence and also objected at the close of the Plaintiff's case to the Deed marked **P3** being read in evidence. Therefore in terms of Section 154A of the Civil Procedure Code, the court cannot admit P3 as evidence without requiring further proof.

Let me now consider whether it is necessary in the circumstances of the case at hand, to adduce formal proof of the execution or genuineness of the Deed marked **P3** in the light of the merits of the objections taken by the Defendant-Respondent with regard to the execution or genuineness of the said deed. In this regard let me first ascertain the extent to which the Defendant-Respondent has challenged the Deed marked **P3** in the course of the trial.
To start with, I observe that the Plaintiff-Appellant answering the questions posed to him in the course of the cross examination, has taken up the following positions:

i. She was not an account holder or a depositor of Pramuka Bank.
ii. She was only a bona fide buyer of the relevant property.
iii. She went to purchase the property through a broker.
iv. She went to the bank with her husband.
v. She cannot remember who she met at the Bank.

vi. She had signed the Sales Agreement in front of two Directors, a Company Secretary and the witnesses who were there.

vii. She was living at Duplication Road which she had to sell, the sale of which she concluded through Deed No. P3.

viii. She is now aware that the Deed No. 1275 dated 27.07.1999 (document P1) has been challenged in another case in court.

ix. The Agreement for Sale was entered into in Colombo at Pramuka Bank in their Board Room in Kolpetty, Colombo 3 and the said agreement was not entered into in Wattala.

x. She got to know the suspension of activities of Pramuka Bank on the morning of 28.10.2002 and she had finished the sale of the House at Duplication Road, coincidentally on the same day.

In my view, the nature of the above positions taken up by the Plaintiff-Appellant clearly cast very serious doubts about the authenticity of the impugned transaction. That is not the only factor. The fact whether the consideration mentioned in the Deed **P3** had in fact passed, is another question which cries out for proof. In this regard, I observe that according to the attestation on **P3** the consideration relevant to the said Deed of Transfer which is Rs.35,140,000 (Rupees Thirty-Five Million Hundred and Forty Thousand) had been paid by the purchaser at the execution of the deed in the following manner:

By cash	Rs. 5,000,000/-
By Pay order Commercial Bank of Ceylon Limited dated 11th October 2002 bearing No. 699679	Rs. 6,000,000/-
By Pay order Nations Trust Bank dated 16th October 2002 bearing Nos. 002356 for 002406 for	Rs. 7,640,000 Rs. 12,000,000
By Pay order Commercial Bank of Ceylon Limited dated 21st October 2002 bearing No. 699708	Rs. 4,500,000
Total	Rs. 35,140,000/=

Thus, it is clear that the major part of the consideration has been paid by three pay orders of banks. It is relevant to note that the Plaintiff-Appellant's evidence reveals some relevant and startling facts in this regard. The said evidence has been quoted below which is self-explanatory.

> *"Q: In other words, the money was found only after the suspension order made on the 25th of October 2002?*
> *A: No, "P3" that Deed showing that we sold our house, was completed on the 21st of October 2002. After that we have got the money.*
> *Q. Your position is you got the money on the 21st of October 2002? How did you get that money, you got it in cash?*
> *A. Rs. 5 million in cash, there was a pay order form Commercial Bank, it is all listed in the Deed. All the monies are here. There are three pay orders and cash.*
> *Q. It was Friday?*
> *A. I don't know the day.*
> *Q. You said that you found the money on the 24th of October 2002?*
> *A. 21st of October 2002*
> *Q. How did you get that money, you got it by way of cheque or cash?*
> *A. We had cash and we had three pay orders.*
> *Q. Pay orders?*
> *A. Yes.*
> *Q. You should have deposited those pay order into your account?*
> *A. They would have been deposited because we had to get all the monies realized for us to complete the transactions on or before the 30th.*
> *Q. I am asking now you got the money as pay orders?*
> *A. Yes.*
> *Q. Are you said that you got on the 21st of October 2002?*
> *A. Yes.*
> *Q. When was it encashed?*
> *A. We were ready and willing to sign on that date on the 28th, we got all these monies and put into the bank, they got it that is why between the 21st, there was a few days to get it all together and we were signing on the 28th, with the money intact.*
> *Q. I suggest to you, you are deliberately lying on this issue?*

A. No, I am not telling lie, I don't have the place to live. My identity card gives the same address.

Q. You were not ready with the money even prior to the date of 25th of October 2002?

A. No, I was ready with the money, I can get the Bank confirmation to say that the monies were all realized, were all deposited and it was ready.

Q. Having failed to complete the transaction on or before the 25th of October 2002, 28th of October 2002, you made all the arrangements to write a…"

A closer look at the above evidence shows that the Plaintiff-Appellant had failed to prove to the satisfaction of Court that the consideration had in fact passed through pay orders as claimed by the Plaintiff.

From the answers the Plaintiff-Appellant had given to the questions posed to him by the learned Counsel who appeared for the Defendant-Respondent during the cross-examination, it is clear that the Defendant-Respondent had very seriously and in an unambiguous manner challenged continuously, the authenticity of the Deed of Transfer **P3** and the actual happening of the whole transaction which the Plaintiff-Appellant had claimed to have happened. The place of Agreement which the Plaintiff-Appellant says is not the place mentioned in the relevant document. The Plaintiff-Appellant merely says it is a typographical error. As has already been revealed, there is no adequate proof that the relevant consideration also has passed.

The Plaintiff-Appellant's assertion that the Deed of Transfer **P3** was executed on the same date that she got to know about the suspension of activities of Pramuka Bank by the Central Bank, is also a strange coincidence. Courts are not bound to believe such fanciful stories however much the witnesses harp on them. Further, such evidence must be evaluated in the light of the other infirmities of the evidence of the Plaintiff-Appellant and the very suspicious background in which this transaction had taken place. These suspicious transactions have been more fully revealed in the course of this judgment in the next few pages.

Additionally, certified copies of the Deed of Transfer **P3** have not been submitted and there is no proof of **P3** having been registered at the land registry. There is also no specific date on which the Purchaser had signed that Deed of Transfer. These factors merely add on to increase the questionable circumstances surrounding **P3**.

Thus, having considered the positions taken up by both parties at the trial in relation to the authenticity of the Deed of Transfer **P 3**, I am of the view that the Plaintiff-Appellant is obliged in law to take necessary steps to ensure that the Deed of Transfer (**P3**) is proved. The Deed of Transfer (**P3**) is a notarially executed document; therefore, in the above circumstances, section 68 of the Evidence Ordinance would apply with regard to the proof of **P3**. That is necessary to prove the fact that the residential premises owned by the Plaintiff's mother Gulnar Saleem was sold in order to raise funds to complete the transaction under the Agreement of Sale No. 749.

As stated in the explanation to Section 154 of the Civil Procedure Code the Plaintiff-Appellant has not proved the authenticity of the Deed of Transfer at **P3** even after the learned Counsel for the Defendant-Respondent had objected to the production of the said document.

For the above reasons, I hold that the Plaintiff-Appellant has failed to prove the Deed of Transfer produced marked **P3** and thereby failed to prove that by 30.10.2002, she had raised the required funds by selling the property in which her mother had resided in Duplication Road and was ready to tender the balance purchase price.

Let me next consider limb (b) of Issue No. 01 i.e., whether the Plaintiff-Appellant has proved that she had informed Pramuka Bank by writing dated 28.10.2002, her agreement and readiness to proceed with the execution of the Deed of Transfer to effect the sale of the said Property.

Plaintiff-Appellant has relied on the letter dated 28th October 2002 which has been produced marked **P4** in the Commercial High Court, to prove that she had fulfilled her obligations as per the Agreement (**P1**) by the deadline i.e., 30.10.2002 (vide Clauses 5 and 6 of the Agreement). It would be necessary to read through this letter to ascertain whether the Plaintiff-Appellant had in fact confirmed her agreement and readiness to complete the sale on or before 30.10.2002 by tendering the balance purchase price of Rs. 31,000,000 to Pramuka Bank. The operative paragraphs of the letter **P4** are reproduced below.

> "*….. I write with reference to the Sales Agreement No.749 dated 28th June 2002 entered into between your bank and my client Mrs. Shahla Cassim of No. 7, Dickmans Lane, Duplication Road, Colombo 5 whereby the bank agreed to transfer the aforesaid property to my client on or before the Thirtieth day October*

Two Thousand and Two, in consideration of a sum of Rupees Thirty Five Million (Rs. 35,000,000/-) of which said sum of Rs. 35,000,000/- a sum of Rs. 4,000,000/- was paid to your bank as an advance by my client on 28th June 2002, the balance sum of Rs. 31,000,000/- to be paid at the time of execution of the deed of transfer.

It was agreed between the parties to execute the deed of transfer on the 28th of October 2002 at 2.30 p.m as per the conversation had with your Assistant General Manager Corporate Secretarial & Legal Mr. Surein J.S Peiris. Subsequently my client came to know through media reports that the Central Bank of Sri Lanka had suspended the business of the bank with immediate effect for a maximum period of sixty (60) days thereby placing a legal impediment on the bank to enter into a valid contract.

I wish to state that my client is willing ready and prepared to fulfill her obligations under the aforesaid Sales Agreement No. 749 and expects to and holds the bank responsible, in turn to fulfil the obligations of the bank under the said Agreement.

My client seeks an early resolution to the problem that has risen by the legal impediment placed on your bank to execute a valid contract and requests you to obtain written permission from the Central Bank of Sri Lanka to complete the said transaction.

My client proposes that in view of the circumstances arisen beyond her control that she has be given written notice by Pramuka Savings & Development Bank/ Central Bank as to the date on which the Central Bank lifts the suspension order on the Pramuka Savings & Development Bank to carry out banking activities and that a mutually agreeable date be fixed to sign and complete the aforementioned transaction and such date for signing be within 3-7 working days after receiving such notice.

My client and I await your urgent and earliest response, and an expeditious resolution of the matter. …. ″

A closer look at the letter **P4** shows that the Plaintiff-Appellant was aware that the Central Bank of Sri Lanka had suspended the business of the Defendant-Respondent with immediate effect at the time she had written **P4**. Moreover, there is only one general sentence stating that she was willing, ready and prepared to fulfill her obligations under the Agreement **P1**. However, the purpose and the focus of the letter cannot clearly be taken as a genuine endeavor to get the proposed transaction completed on or before 30th October 2002 by tendering the balance purchase price to the Defendant-Respondent. Indeed, one cannot find a specific assertion in the letter **P4** to the effect that the Plaintiff-Appellant was ready and willing to complete the sale on or before 30th October 2002 by tendering balance Rs. 31,000,000 to the Defendant-Respondent and complete the transaction. To the contrary, **P4** is a mere request made to the Defendant-Respondent urging it to inform her of the date on which the Central Bank would lift the suspension order and to fix a mutually agreeable date thereafter to sign and complete the proposed transaction within 3-7 working days after receiving such notice. This clearly means that **P4** is not a letter which confirms the Plaintiff-Appellants willingness to complete the proposed transaction on or before 30th October 2002. It also does not inform the Defendant-Respondent that the Plaintiff-Appellant has raised the balance purchase price of Rs. 31,000,000 as per the Agreement. Although the learned Commercial High Court Judge had chosen to answer the limb (b) of Issue No. 01 in the affirmative, having regard to the above facts, I am of the view that the letter **P4** should not have been taken as sufficient proof of limb (b) of Issue No. 01. For the above reasons, I hold that the Plaintiff-Appellant has failed to prove to the satisfaction of Court that she had informed Pramuka Bank by writing dated 28.10.2002, her agreement and readiness to proceed with the execution of the Deed of Transfer to effect the sale of the relevant Property.

Let me next consider limb (c) of Issue No.1 i.e., whether Pramuka Bank by writing dated 28.10.2002, confirmed to the Plaintiff-Appellant, its agreement to proceed with the sale of the said Property.

The Plaintiff-Appellant had sought to prove that she had fulfilled her obligations as per the Agreement **P1** by the deadline (30.10.2002) set out in the Agreement relying on **P4** and **P5**. However, as has been mentioned above, the Plaintiff-Appellant at the time of writing the letter **P4,** was aware of the decision taken by the Central Bank as per the document produced marked **V2 (a)** and **V3**. It is appropriate to reproduce the operative part in **P5**, which is as follows:

"We refer to your fax dated 28th October 2002 on the above subject. We have noted the contents thereon and wish to confirm that the Pramuka Savings and Development Bank Limited agreed to same."

It is to be noted that the Monetary Board of the Central Bank of Sri Lanka (CBSL) on 25.10.2002, had issued an order directing Pramuka Bank to suspend its business. The said order had also prohibited it to carry out any business transactions with immediate effect. This is evident by the letter dated 25.10.2002 marked **V2 (a)**. The following paragraphs of **V2 (a)** would shed further light on the matter. They are as follows:

"2. On the basis of the return on capital adequacy submitted by PSDB for the quarter ending 31st March, 2002 and the examination conducted by officers of the Bank Supervision Department of the books and records of the PSDB, thereafter and the subsequent examination conducted consequent to the return for the month ending 30th September 2002 dated 15.10.2002 and the returns referring to in paragraph 1. I am satisfied that PSDB has a substantial negative net worth and around 80% of the bank's advances are non-performing. Even on the basis of the PSDB's subsequent letter of 21.10.2002, around 75% of the bank's advances are non-performing.

3. According to information obtained in the examinations conducted by the officers of the Bank Supervision Dept. and intimated to the PSDB and its Board of Directors from time to time the extremely weak financial situation of PSDB cannot be considered as a temporary phenomenon, because the deterioration of the financial position of PSDB has been continuing over a considerable period of time.

4. On the basis of the above-mentioned examinations and the information furnished by PSDB, I am satisfied that PSDB is insolvent and is likely to become unable to meet the demands of its depositors, and that its continuance in business is likely to involve loss to the bank's depositors and creditors. I have reported accordingly to the Governor of the Central Bank of Sri Lanka in terms of section 76 M (1) of the Banking Act No. 30 of 1988.

5. Having reviewed the facts and circumstances, the Monetary Board of the Central Bank of Sri Lanka has made an Order in terms of the provisions of the

said section 76 M (1) directing PSDB to forthwith suspend business, and has also directed me to take all measures as maybe necessary to prevent the continuation of business by PSDB.

6. The PSDB is hereby informed of the above-mentioned Order of the Monetary Board of the Central Bank of Sri Lanka and is required, in terms of the said Order, to suspend all its business with immediate effect. Accordingly, the PSDB is prohibited from carrying out any business transaction with immediate effect."

The afore-stated contents of **V2 (a)** would proceed to show that the action taken by the Monetary Board of the Central Bank of Sri Lanka was not a sudden action came as a surprise either to the Board of Directors or to the Secretary of Pramuka Bank. Copies of this communication have been sent not only to all the Directors but also to its secretary. Thus, in as much as the Plaintiff-Appellant was aware of this decision (as revealed by **P4**), the Directors and the Secretary of Pramuka Bank were also aware of the direction given by the Monetary Board of the Central Bank of Sri Lanka to suspend its business and cease to carry out all business transactions with immediate effect. The Agreement (**P1**) between the Plaintiff-Appellant and Pramuka Bank is no doubt questionable as both parties had entered into the said Agreement on the verge of the collapse of Pramuka Bank. Although the Plaintiff-Appellant had given evidence that she was prepared with the remainder of the purchase price by 21.10.2002, the Plaintiff-Appellant has failed to satisfy court as to why she waited until the suspension of the business of Pramuka Bank to make that fact known to the other party.

I also observe that the document marked **P4** by the learned Counsel of the Plaintiff-Appellant had been faxed to Pramuka Bank at 11.30 am.

The letter **P5** has been signed by *'Surein J.S. Peiris Assistant General Manager Corporate Secretarial & Legal'*. The letter **P5** does not assert that the author had any authority by the Board of Directors to communicate what it had communicated. **P5** is dated 28th October 2002 and the communication directing the suspension of the business of Pramuka Bank [**V2 (a)**] is dated 25th of October 2002. Therefore, in any case, neither the Board of Directors nor the author of **P5** could legally have written any such letter. I also observe that **P4** and **P5** are both dated on 28th October 2002; both have been faxed to each other giving no room for the Board of Directors to make a considered decision on the purported decision the Pramuka Bank claims to have been made according to the Plaintiff-Appellant as per **P5**. For those reasons, I

hold that the communication **P5** is not lawful communication and hence has no force or avail in law.

For the above reasons, I hold that the Plaintiff-Appellant has failed to fulfil her obligations under the Agreement of Sale (**P1**).

The law on contract is clear that if one party to a contract fails to fulfil his/her obligation said party would be in breach of the relevant contract. Accordingly, a party in breach of contract would not be entitled to an order for specific performance.

According to Clause 6 of the Agreement, which provides for the specific performance, such remedy is available only where the Plaintiff-Appellant had fulfilled her obligations by tendering the balance purchase price of 31 million on or before 30th October 2002.

In the instant case, the Plaintiff-Appellant has clearly breached her obligations under the Agreement of Sale (**P1**). Therefore, she is not entitled to the remedy of specific performance under Clause 6 of the Agreement.

For the foregoing reasons, I proceed to dismiss this appeal with costs fixed at Rs. 200,000/= payable to the Defendant-Respondent by the Plaintiff-Appellant.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne J

I agree,

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal in terms of Section 5(A) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006 read with Section 755 of the Civil Procedure Code.

Case no: SC/CHC/APPEAL/25/2015

Commercial High Court Case No: CHC/272/2009/MR

Sampath Leasing and Facturing Limited,

No 24A,

Ward Place,

Colombo 07.

Previous Address

No 110, Sir James Peiris Mawatha, Colombo 02.

PLAINTIFF

vs.

1. Mohomed Thawbeer Mohomed Haneez,
   No. 142,
   Himbiliyagahamadiththa,
   Uwa.

2. Arpin Mohomed Hameen

No. 96,
Mihindupura,
Meepilimana,
Nuwara-Eliya

3. Wahampurage Rukman Samaranayake,
"Happy Inn",
No. 35,
Unim View Road,
Nuwara-Eliya

DEFENDANTS

AND BETWEEN

An application under section 86(2) of the Civil Procedure Code

1. Mohomed Thawbeer Mohomed Haneez,
No. 142,
Himbiliyagahamadiththa,
Uwa

1st DEFENDANT-PETITIONER

Vs

Sampath Leasing and Facturing Limited,

No. 24A,

Ward Place,

Colombo 07.

Previous Address

No. 110, Sir James Peiris Mawatha,
Colombo 02.

PLAINTIFF-RESPONDENT

AND

2. Arpin Mohomed Hameen
   No. 96,
   Mihindupura,
   Meepilimana,
   Nuwara-Eliya

3. Wahampurage Rukman
   Samaranayake,
   "Happy Inn",
   No. 35,
   Unim View Road,
   Nuwara-Eliya

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Mohomed Thawbeer Mohomed
   Haneez,

No. 142,

Himbiliyagahamadiththa,

Uwa

1ST DEFENDANT-PETITIONER-APPELLANT

Vs

Sampath Leasing and Facturing Limited, No. 24A,

Ward Place,

Colombo 07.

Previous Address

No. 110, Sir James Peiris Mawatha, Colombo 02.

PLAINTIFF-RESPONDENT-RESPONDENT

AND

1. Arpin Mohomed Hameen
   No. 96,
   Mihindupura,
   Meepilimana,
   Nuwara-Eliya

2. Wahampurage Rukman
   Samaranayake,
   "Happy Inn",
   No. 35,

Unim View Road,

Nuwara-Eliya

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**

A.H.M.D. NAWAZ, J AND

K. P. FERNANDO, J

COUNSEL : M. D. J. Bandara for the 1st Defendant-Petitioner-Appellant

Kaushalya Nawaratne with Prabuddha Hettiarachchi for the Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS : 1st Defendant-Petitioner-Appellant on 1st September 2023

ARGUED ON : 6th July 2023

DECIDED ON : 22nd September 2023

S. THURAIRAJA, PC, J.

The 1st Defendant-Petitioner-Appellant, namely Mohomed Thawbeer Mohomed Haneez, (hereinafter sometimes referred to as the "Appellant") preferred this appeal against the order of the Commercial High Court dated 10th March 2015.

The Appellant had filed his Petition of appeal on 8th May 2015 and submitted as follows:

> *"7) Being aggrieved by the said Order of the Honourable High Court Judge of Commercial High Court of Colombo dated 10-03-2015 the 01st Defendant-Petitioner-Appellant humbly makes this appeal against the*

said Order to Your Lordship's Court on the following among other grounds that may be urged by his counsel at the hearing of this appeal.

a. *The said order is contrary to Law and against the weight of facts and circumstances in this case.*

b. *The Honourable High Court Judge has failed to consider the real Issues placed by the Appellant*

c. *The Honourable High Court Judge has failed to consider the fact that the Respondent has failed to prove that the summons have been properly served only Appellant by the Fiscal.*

d. *The Learned High Court Judge has failed to consider the legal entitlement of the Respondent and his order is totally contrary to the doctrine of undue enrichment.*

(Reproduced as it is) [sic]

This Court observes that there is no specific pleading of Questions of Law hence the Court inquired for the Counsel to submit his questions of law. After submissions, the Counsel submitted that he will be continuing his argument on paragraph 7(c) of the Petition and moves to accept the same as questions of law and grounds of application. The Counsel stated that he is not relying on (a), (b) and (d) of paragraph 7 as they are wide and uncertain. Accordingly, the Court will be considering the following question of law:

"c. The Honourable High Court Judge has failed to consider the fact that the Respondent has failed to prove that the summons have been properly served only Appellant by the Fiscal."

(Reproduced as it is) [sic]

This Court reluctantly observes and places on record that none of the Parties have filed written submissions. This was brought to the notice of both Counsel and they pleaded

that they be permitted to make submissions and the written submissions will be filed within two weeks, i.e. 20th July 2023. Unfortunately, up until 28th August 2023, neither party has filed the written submissions. The Counsel for the 1st Defendant-Petitioner-Appellant only filed his written submissions on 1st September 2023, more than a month after the written submissions were due to be filed. This Court is compelled to rely on their oral submissions and the materials available in the appeal brief.

To have a better understanding it will be preferable to have the facts of the case.

The Facts

1st Defendant-Petitioner-Appellant had obtained leasing facilities via Leasing agreement bearing No. V/0885/24/NUW dated 24th May 2006 from Plaintiff-Respondent-Respondent Company (hereinafter sometimes referred to as the "Plaintiff") to lease a Mitsubishi FE516BD Motor Lorry. In the said leasing agreement (**P2**), the 1st Defendant was to pay sixty monthly instalments of Rs. 61,056.74 to the Plaintiff-Respondent-Respondent. Two guarantors Arpin Mohomed Hameen (2nd Defendant) and Wahampurage Rukman Samaranayake (3rd Defendant) entered into Guarantee Agreement with the Plaintiff Company dated 24th May 2006 and guaranteed *inter alia* that the 1st Defendant-Petitioner-Appellant would make punctual payment of all rentals and all sums due and owing to the Plaintiff in terms of the said Lease Agreement.

The Appellant failed to pay the monthly Lease Rentals as stated in the agreement. The Plaintiff therefore issued Notice of Failure. As the 1st Defendant failed to remedy the substantial failure, the Plaintiff set out to terminate the Lease Agreement by letter dated 20th March 2007. Letters of demand were sent to 1st, 2nd and 3rd Defendants to pay the sum of Rs. 3,088,679.28 which was owed to the Plaintiff. Since there was no response, the Plaintiff Company filed an action at the Commercial High Court to recover the due amount. Summons were served on 3rd Defendant. He had appeared and filed his proxy and answer on or about 11th October 2009. It was reported that the

2nd Defendant has died during the pendency of the case in the Commercial High Court of Colombo.

Plaintiff Company claims that they have sent notices via Registered post and since there is no response, they have served notice through the Fiscal.

In the fiscal report dated 30th July 2009, the person who served summons affirmed and stated that

> *"සිතාසි බාරදෙන්නා වන M. සෙල්වම් නමැති මා... 2009 07 මස 21 වැනි දින 1, 2 විත්තිකරුවන් සාමාන්‍යයෙන් පදිංචිව සිටින මාගස්තොට, මිපිලිමාන පිහිටි ඔහුගේ ගෙදරට මා ගිය බවත් 1, වන විත්තිකරු වැලිමඩ ප්‍රදේශයේ සිටින බවත් 2 වන විත්තිකරු මියගොස් ඇති බවත් ගරු අධිකරණයට වාර්ථා කරමි"*

The unofficial translation of the above is given below for ease of reference.

> *"I, summons server, M. Selvam, inform the Honourable Court that on 21st July 2009, I went to his house at Magasthota, Mipilimana where the 1st and 2nd Defendants usually reside, and I am being informed that the 1st Defendant is residing in Welimada area and the 2nd Defendant is now deceased.* "

On the application made by the Plaintiff Company the Court ordered to serve the summons through substituted service, the same was effected by the fiscal on the given address i.e. No. 42/12, Gajabapura, Magastota, Nuwara Eliya.

The Fiscal of Nuwara Eliya reported with an affidavit stating that the notice was pasted on the doors of the given address and substituted service was duly complied with. Thereafter it was informed to Court that he is living elsewhere, namely, No. 142, Himiliyagahamadiththa, Uwaparanagama.

Once again, the notice was sent to the new address but the 1st Defendant-Petitioner-Appellant was not available and evading of receiving the notice. Once again it was served through substituted service and a report was filed in the Court.

A timeline of the events and the actions taken by the fiscals and the reports filed by them can be found below.

Fiscal report/affidavit of person who served summons dated 22nd June 2010 (**10B)** stated as follows:

> *"සිතාසි බාරදෙන්නා වන එම්. කලුබන්ඩා නමැති මා ... මෙහි නම් සඳහන් 1 විත්තිකරු මොහමඩ් තව්බීර් මොහමඩ් හනීස් නමැති ... 2010-05-31 සහ 2010-06-08 09 දී සිතාසියේ සඳහන් ලිපිනයේ දී සෙවූ බවත් සොයාගත නොහැකි වූ බවත් ය."*

An unofficial translation of the above can be found below.

> *"I, summons server M. Kalubanda, searched for the defendant Mohomed Thawbeer Mohomed Haneez ... on 31-05-2010, 08-06-2006 and 09-06-2010 at the address mentioned in the summons but could not find him."*

On the same report it was written that he went to the given new address to find the 1st Defendant in this case, (for 3 days), but then came to know that this Defendant is not available, absconding and evading the service of notice. Therefore, he reported to the Court that the summons cannot be served.

> *"මෙම නඩුවේ 1 විත්තිකරු සොයා, දී ඇති නව ලිපිනයට මා ගිය නමුත් (දින 3ක්), මෙම විත්තිකරු සැඟවන බව මා හට දැන ගැනීමට හැකි විය. එබැවින් සිතාසිය භාර නොකැල හැකි ඌ බව ගරු අධිකරණයට වාර්ථා කර සිටිමි."*

An unofficial translation of the above can be found below.

> *I am reporting to this Honourable Court that; I went in search of the defendant in this case for three days to the given new address. I understand that he is hiding hence I am unable to serve the summons on him*

On 15th November 2010, the Fiscal for the Welimada District Court reported as below:

"සිතාසි භාර දෙන්නා වන පියදාස නමැති මා ... මෙහි නම් කර ඇති සිතාසිය/ දැන්වීම එහි දෙවන පිටපතක් වර්ෂ 2010 නොවැම්බර් මස 8 වැනි දින උෟව පරනගම දී හනීස් චිත්ති ආදේශ ක්‍රමයට නිවසේ ඉදිරි දොරේ සිතාසි වාර්තාව අල්වන ලදී."

An unofficial translation of the above can be found below.

"I, summons server Piyadasa, am hereby reporting that on 8th November 2010, I went to 1st Defendant Haneez address given in the notice/ summons at Uwaparanagama, served the notice on substituted service by pasting the notice on the front door of the house."

On 25th May 2012, the fiscal report states as follows:

"සිතාසි භාර දෙන්නා වන S. රාජපක්ෂ නමැති මා 2012 මැයි මස 08 වැනි දින මොහොමඩ් තව්බීර් මොහොමඩ් හනීස් සාමන්‍යයෙන් පදිංචිව සිටින අංක 42/12, ගජබාපුර, මාගස්තොට, නුවරඑළියේ පිහිටි ඔහුගේ ගෙදරට මා ගිය බවත් චිත්තිකරු වැලිමඩ ප්‍රදේශයේ සිටින බවත් මොහොමඩ් හරීෆ් පවසයි. එබැවින් සිතාසිය දෙන්න බැරි වූ බව ගරු අධිකරණයට වාර්තා කරමි."

An unofficial translation of the above can be found below.

I, summons server S. Rajapakse, hereby report to the Honourable Court that on 8th May 2012 went to Mohomed Thawbeer Mohomed Haneez usual residence at 42/12, Gajabapura, Magasthota, Nuwara Eliya. He was not there and I was informed by Mohamad Harif that he is residing at Welimada.

The Precept to Fiscal to serve dated 17th May 2013 reads as follows:

"1 චිත්තිකරුගේ නව ලිපිනයට තීන්දු ප්‍රකාශය නොතිස් ආදේශ ක්‍රමයට නව ලිපිනයට භාර දී වාර්තා කරන්න"

An unofficial translation of the above can be found below.

"Serve the notice and judgement on the 1st Defendant's new address and report."

The Fiscal Report dates 30th May 2013

"සිතාසි භාර දෙන්න වන හෙට්ටිහේවා නමැති මා ... මෙහි නම සඳහන් මොහොමඩ් තව්බීර් මොහොමඩ් හනීස් නමැති අංක 142, හිඹිලියස්ගහමඩිත්ත, උඟව 2013.05.27 දී සෙවූ බවත් සොයා ගත නොහැකි වූ බවත්ය. විත්තිකරු කොළඹ සිටින බව විත්තිකරුගේ පියා කියා සිටි ගරු අධිකරණයට වාර්තා කරමි."

An unofficial translation of the above can be found below.

I, summons server Hettihewa, on 27th May 2013, hereby report to the Honourable Court that I searched for the defendant named Mohomed Thawbeer Mohomed Haneez at the address given as 142, Himbilyasgahamadiththa, Uwa, but he could not be found. Father of the defendant said that he is in Colombo.

The Fiscal report dated 28th June 2013 states as follows:

"සිතාසි භාර දෙන්නා වන හෙට්ටිහෙවා නමැති මා ... මෙම නම් කර ඇති සිතාසිය/ දැන්වීම එහි දෙවෙන පිටපතක් වර්ෂ 2013 06 මස 19 වැනි දින ලිපිනයේ දී තීන්දු ප්‍රකාශය ඉදිරිපස දොරේ අලවා භාර දෙන ලදී.

පිස්කල් අන කර එය ලිපිනයට ගොස් ආදේශ ක්‍රමයට් ඉදිරිපස දොරේ අලවා තීන්දු ප්‍රකාශය භාර දෙන ලදී."

An unofficial translation of the above can be found below.

"I, summons server Hettihewa on 19th June 2013 served the herein numbered second copy of the Notice/ summons by pasting the same on the front door.

I served the fiscal order via substituted service by pasting the judgment on the front door."

On 9th October 2013 the Plaintiff Company changed its name, and this was informed to the lawyers of the 1st and 3rd Defendants via registered post.

The Commercial High Court of Western Province being convinced of the service of summons, heard the case ex parte against the 1st Defendant and ordered in favour of the Company (Plaintiff-Respondent) on 16th December 2011.

When the company tried to proceed against the 3rd Defendant, the 1st Defendant-Petitioner-Appellant made an application under Section 86 (2) of the Civil Procedure Code to vacate the order. Section 86 (2) of the Civil Procedure Code has been reproduced below.

> *"Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."*

The Commercial High Court after hearing both sides, dismissed the application to vacate the ex parte order. Being aggrieved with the order of the Commercial High Court, 1st Defendant-Petitioner-Appellant preferred an appeal to this Court.

Analysis

It is to be noted that the written submissions, motions and petitions submitted by the parties have variations with regard to the names of the parties. Therefore, we will be referring to the Petition filed in this Court regarding the same.

The main issue raised by the Appellant is that the Commercial High Court Judge has failed to consider the fact that the Plaintiff-Respondent-Respondent Company has

failed to prove that the summons have been properly served on the Appellant by the Fiscal.

In **Wimalawathie and Others vs Thotamuna and Others (1998) 3 Sri LR 1**, Dr. Ranaraja, J held that

> *"The **affidavit filed by the Process Server is prima facie evidence of the fact that summons was duly served on the defendants** mentioned therein and **there is a presumption that summons was duly served**. Accordingly, the **burden shifts on to the defendants to prove that no summons had been served**."*
>
> *(Emphasis added)*

As affidavits have been filed by the process/summons servers, the 1st Defendant must present evidence to prove that no summons had been served, however, there has been no satisfactory evidence to prove the stance of the 1st Defendant. He keeps insisting that the Plaintiff-Respondent-Respondent Company has to prove the summons were served on him, although vide Dr. Ranaraja, J's judgement in the above mentioned case, once an affidavit has been signed, the burden of proof shifts to the 1st Defendant.

I discussed earlier that the Appellant was evading notice and not residing in the address stated on the Lease Agreement. As seen in the Commercial High Court Journal Entry No.10B, the Fiscal has got to know that the Appellant was "hiding/evading" from receiving summons. Journal Entry No. 14 dated 06th September 2010 states that the summons was pasted on the door of the previous address given on the Lease Agreement.

Now I draw my attention to the above mentioned lease agreement bearing No. V/0885/24/NUW dated 24th May 2006.

The address given by the Appellant was No. 42/12 Gajabapura, Magastota, Nuwara Eliya. If a party changes their address, it is mandatory for them to inform the other side

of their change of address. But if the party has a reasonable explanation for not doing so within a reasonable time, it can be considered according to the situation subjectively. In the given matter, the summons server got to know that the 1st Defendant was not residing in the address given in the lease agreement only after he went to serve summons on separate days. Even after the summons were served on the second address, the 1st Defendant was not present at the second address either. It was the 1st Defendant's father who informed the summons server that his son (the 1st Defendant) was residing in Colombo at the time. It must be highlighted that none of these address changes were informed to the Plaintiff-Respondent-Respondent Company at any point. The 1st Defendant has moved around the country but has not informed the Plaintiffs of his changes in addresses even at one instance. This is a clear evasion of receiving summons.

Further, I draw my attention to Article 30 of the lease agreement above mentioned which provides for service of notice. It says as follows:

> "***Article 30: Service of Notice***
>
> *Any notice summons or demand to be sent or given by either party or their duly authorised representative or their Attorneys-At-Law or by any Court or any Tribunal or any Arbitrator/s to the other* ***may be sent by registered post to the address of the other party as appearing herein or such other address as such party may from time to time have duly communicated to the other*** *and if so sent shall be* ***deemed to be served on the day following the date of posting****. In* ***proving service*** *of any notice, summons, demand or Arbitral award it shall be* ***sufficient to show that the letter containing the notice, summons, demand or Arbitral Award was properly addressed, stamped and posted under registered cover, or has been served to the address of the other party***

as appearing herein or such other address as such party may have from time to time duly communicated to the other party.

It is hereby agreed by and between the parties hereto that a notice, summons, demand or Arbitral Award so sent and/or served in terms of the foregoing by one party is deemed to have been received by the other party and no objection on grounds of non-receipt of notice can be taken by the party to where such notice, summons, demand or Arbitral Award was sent.

(Emphasis added)

It is clear that there is a contractual obligation between these two parties regarding service of notice. If a notice is sent to the given address, as per the above provisions of the contract, it will be sufficient.

In the present case however, the company had not only served notices to the given address through registered post but also served notices via Fiscal and substituted service. It had also informed the Defendants of change in the name of the Company. The Company and the fiscals have gone above and beyond their duty to serve the summons on the 1st Defendant. He therefore cannot rely on his evasion to claim that he did not receive summons and claim that the Learned Commercial High Court Judge erred in his judgement.

Section 60 of the Civil Procedure Code reads as follows:

"(1) The court shall, ***where it is reported that summons could not be effected by registered post or where the summons having been served and the defendant fails to appear, direct that such summons be served personally on the defendant by delivering or tendering to him the said summons through the Fiscal or the Grama Niladhari within whose division the defendant resides*** *or in any case where the plaintiff is a lending institution within the meaning of the Debt Recovery*

(Special Provisions) Act, No. 2 of 1990, through the Fiscal or other officer authorized by court, accompanied by a precept in form No. 17 of the First Schedule. In the case of a corporation summons may be served personally by delivering or tendering it to the secretary or like officer or a director or the person in charge of the principal place of business of such corporation.

(2) ***If the service referred to in the preceding provisions of this section cannot by the exercise of due diligence be effected, the Fiscal or Grama Niladhari shall affix the summons to some conspicuous part of the house in which the defendant ordinarily resides*** *or in the case of a corporation or unincorporated body, to the usual place of business or office of such corporation or such body and in every such case the summon shall be deemed to have been duly served on the defendant."*

(Emphasis added)

It is the Appellant's contention that the summons has not been served properly by the Fiscal. However, as per Section 60 (2) above, it is seen that if personal service has not been successful, then the Fiscal has the authority to fix the summons to some conspicuous part of the house in which the defendant ordinarily resides in, which is known as substituted service of summons. As evidenced by the Journal Entry No. 14 dated 06th September 2010, the summons was pasted on the door of the address given on the Lease Agreement, completing the substituted service of summons.

The summons and judgements have been served on the address mentioned in the lease agreement, and later at the second address. The 1st Defendant has not been present at any of the two addresses on the dates that the summons were served by the summons server. As proved by the journal entries and the fiscal reports mentioned above, it is safe to assume that the Defendant is within the country, although he has moved from place to place constantly.

Decision

Considering all above material before us, I turn to answer the question of law considered by this Court, as to whether the High Court Judge has failed to prove that summons have been properly served on the Appellant by the Fiscal. I answer in the negative and find that the learned High Court judge has **not** failed to consider the fact that the summons have been properly served on the Appellant by the Fiscal.

I state that the learned High Court Judge has made the correct order. There is no reason for us to interfere with said order. Accordingly, I dismiss this appeal with cost.

Appeal Dismissed with cost.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J

I agree.

JUDGE OF THE SUPREME COURT

K. P. FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

M.Y. Jezeema Beebi,
No. 166/8A, 166/8B,
Elvitigala Mawatha,
Colombo 05.

Plaintiff

SC Appeal No: 47/2015
SC/HCCA/LA No. 497/2014
WP/HCCA/COL/29/2009/F
DC Colombo No. 20654/L

Vs.

Gothanayagi,
No. 166/8,
Elvitigala Mawatha,
Colombo 05.

Defendant

AND THEN BETWEEN

M.Y. Jezeema Beebi,
No. 166/8A, 166/8B,
Elvitigala Mawatha,
Colombo 05.

Plaintiff-Appellant

Vs.

Gothanayagi,
No. 166/8,
Elvitigala Mawatha,
Colombo 05.

Defendant-Respondent

AND NOW BETWEEN

M.Y. Jezeema Beebi,
No. 166/8A, 166/8B,
Elvitigala Mawatha,
Colombo 05.

Plaintiff-Appellant-Petitioner

Vs.

Gothanayagi,
No. 166/8,
Elvitigala Mawatha,
Colombo 05.

Defendant-Respondent-Respondent

Before: **Justice P. Padman Surasena**

Justice A.L. Shiran Gooneratne

Justice Arjuna Obeyesekere

Counsel: Vishwa de Livera Tennekoon with Lilani Ganegama instructed by Nepataarachchi for the **Plaintiff-Appellant-Appellant.**

Heshan Thambimuttu with Prasanth Mahendran for the **Defendant-Respondent-Respondent.**

Argued on: 17/02/2023

Decided on: **22/09/2023**

A.L. Shiran Gooneratne J.

By Plaint dated 02/03/2005, the Plaintiff-Appellant-Appellant (hereinafter sometimes referred to as the "Plaintiff-Appellant") filed this Action No. D.C. Colombo 20654/L against the Defendant-Respondent-Respondent ("the Defendant-Respondent"), and sought a declaration that the Plaintiff-Appellant is entitled to Lot 1, 2, 3 and 4 bearing Assessment Nos. 166/8A and 166/8B, Elvitigala Mawatha, Colombo 5, depicted in Plan No. 2055 dated 07/10/2001, made by I.M.C. Fernando, Licensed Surveyor and a declaration that the Defendant-Respondent is not entitled to the said land.

In paragraph 1 of the said Plaint, the Plaintiff-Appellant states that her mother M.I.S.S. Beebi became entitled by Deed of Disposition No. 16007 dated 17/05/1995, attested by the Commissioner of Department of National Housing, to Lots 5 and 6 bearing Assessment Nos. 166/8A and 166/8B Elvitigala Mawatha depicted in Plan No. MF

46/76 dated 06/08/1976 made by I.M.C. Fernando Licensed Surveyor. The Plaintiff-Appellant claims entitlement to the said land by virtue of Deed of Gift No. 3 dated 01/01/1996 attested by P.D.R. Priyadharshani, Notary Public.

According to paragraphs 5 and 6 of the Plaint, on or about 1997, the Defendant-Respondent had forcibly entered the southern side of Lot 6 and the eastern side of Lot 5 depicted in the said Plan No. MF 46/76. The Plaintiff-Appellant claims that with the concurrence of both parties to this action, the said land was resurveyed and the boundaries were demarcated by the said Plan No. 2055 dated 07/10/2001, and further that Lots 5 and 6 depicted in Plan No. MF 46/76 were amalgamated, sub divided and depicted as Lots 2, 3 and 4 in Plan No. 2055. The Plaintiff-Appellant also claims Lots 2, 3 and 4 in the said Plan No. 2055, as land encroached by the Defendant-Respondent.

In Paragraphs 7 and 8 of the Plaint, the Plaintiff-Appellant states that, according to the said Plan No. 2055 dated 07/10/2001, the Defendant-Respondent has encroached zero decimal four two perches (0.42 perches) upon Lots 2, 3 and 4. The Plaintiff-Appellant relied on the said Plan No. 2055 to claim that, the Defendant-Respondent is using the encroached land unlawfully for construction purposes thereby causing mischief and irreparable loss to the Plaintiff-Appellant.

The Defendant-Respondent by amended answer dated 26/10/2005, denies any encroachment to the said land and states that she has acquired prescriptive title to Lot No. 4 in Plan No. MF 46/76 depicted as Lots Nos. 2, 3 and 4 in the resurveyed Plan No. 2055, for a period of over 30 years and prayed for a dismissal of the Plaint.

At the conclusion of the trial, the Additional District Judge by Judgment dated 16/01/2009, held *inter alia*, that the Defendant-Respondent has established uninterrupted possession of over 30 years to the said Lots Nos. 2, 3 and 4 in Plan No. 2055, and therefore acquired prescriptive title over the said land and accordingly, dismissed the action of the Plaintiff-Appellant.

Being aggrieved by the said Judgment, the Plaintiff-Appellant by Petition of Appeal dated 12/03/2009, appealed to the High Court of the Western Province exercising civil appellate jurisdiction holden in Colombo ("the Appellate Court"). The Appellate Court, after having also considered the question of the title by prescriptive possession acquired by the Defendant-Respondent to the relevant Lots, as in the District Court, by Judgment dated 22/08/2014, affirmed the said Judgment of the Additional District Judge dated 16/01/2009 and dismissed the appeal with costs.

The Plaintiff-Appellant, by Petition dated 03/10/2014 is before this Court, to set aside the said Judgment dated 22/08/2014, delivered by the Appellate Court.

By Order dated 04/03/2015, this Court granted leave to appeal on the following questions of law;

1. Has the Civil Appellate High Court erred in law in effectively failing to take into consideration the applicability of Section 15(2) of the Ceiling on Housing Property Law No. 1 of 1973 in this instance?

2. Has the Civil Appellate High Court misdirected itself in law by erroneously determining that the Respondent has established undisturbed, uninterrupted, and adverse possession, and therefore, has acquired prescriptive title to Lot No.'s 5B and 6B more fully depicted in Plan No. 424/2006 prepared by S. Rasappah, Licensed Surveyor having regard to Section 15(2) of the Ceiling on Housing Property Law No. 1 of 1973 and/or Section 15 of the Prescription Ordinance?

3. Has the Civil Appellate High Court erred in law by failing to determine that the Respondent had not acquired any prescriptive rights to Lot No.'s 2, 3 and 4 in Plan No. 2055, dated 7th October 2001, prepared by I.M.C. Fernando, Licensed Surveyor, subsequent to 17th May 1995 as envisaged in terms of Section 3 of the Prescription Ordinance?

In this action, the Plaintiff-Appellant claimed to be entitled to the land and premises marked Lots 5 and 6 depicted in Plan No. MF 46/76 dated 06/08/1976, made by I.M.C. Fernando, Licensed Surveyor, marked as 'P1'. The Plaintiff-Appellant further claimed that the said land was resurveyed by the same Licensed Surveyor, I.M.C. Fernando, and based on the said resurvey which amalgamated Lots 5 and 6 of Plan No. MF 46/76, the Plaintiff sought a declaration that she is entitled to Lots 1, 2, 3 and 4 in the resurveyed Plan No. 2055 dated 07/10/2001, 'P4' (marked subject to proof). Accordingly, the District Court was called upon to declare the rights of the Plaintiff-Appellant based on the Resurveyed Plan No. 2055.

The Plaintiff-Appellant contends that the Defendant-Respondent forcibly encroached upon the said Lots 5 and 6 in Plan No. MF 46/76, which were later depicted as Lots 1, 2, 3 and 4 in Plan No. 2055. The Plaintiff-Appellant alleges that the Defendant-Respondent is constructing a toilet in the encroached land and has caused damage to her land.

When this matter came up before the trial court, at the request of the Defendant-Respondent, the court appointed Surveyor S. Rasappah, who prepared Plan No. 424/2006 dated 18/08/2006, marked as 'X', and the Surveyor's Report marked as 'X1'. Both parties relied on the said Plan No. 424/2006 and the said Surveyor Report.

Surveyor Rasappah in his evidence stated that Plan 'X 'was prepared by superimposing Lot 4 (belonging to the Defendant-Respondent), and the said Lots 5 and 6 of Plan No. MF 46/76. Accordingly, the said Lot 4 is depicted as 4A and 4B, Lot 5 as 5A and 5B, and Lot 6 as 6A, 6B and 6C. Lot 4A is a building occupied by the Defendant-Respondent and Lot 4B is the right of way to the premises owned by the Defendant-Respondent. Lots 5A and 6A, consist of the building occupied by the Plaintiff-Appellant and Lot 5B is also made use of by the Defendant-Respondent as a right of way.

According to Surveyor Rasappah, Lot 6B is identified as the portion encroached by the Defendant-Respondent. He repeatedly stated to the trial court that he was not privy to the Resurveyed Plan No. 2055 marked 'P4', when preparing Plan 'X'.

According to the said survey report marked 'X1', the roadway depicted as Lot 5B, is used by the Defendant-Respondent without any disturbance or interruption by the Plaintiff-Appellant. The Surveyor has also observed that the permanent wall and the tin sheet wall separating Lots 6A and 6B, and the building constructed therein are over 20 years.

The Plaintiff-Appellant contends that the Defendant-Respondent has encroached upon Lot 5B, which is presently used as a roadway and the encroachment upon Lot 6B. It is in evidence that Lots 6A and 6B are separated by a permanent wall and a tin sheet fence which extends up to the disputed toilet used by the Defendant-Respondent.

The Plaintiff-Appellant did not call into question Surveyor Rasappah's assertion based on experience, that the said wall was in place for over 20 years nor placed any evidence to the contrary. The Plaintiff-Appellant also did not question the surveyor on the alleged encroachment to Lot 6B, which is used as a roadway by the Defendant-Respondent.

The Plaintiff-Appellant in her evidence admitted that the said wall demarcated the boundaries of the land owned by the respective parties and that the said wall was constructed by the Defendant-Respondent. Answering a question posed by Court, the Plaintiff-Appellant stated that she cannot remember the period when the tin sheet wall was constructed, however, at a later stage stated that the wall was constructed after 1995. The Plaintiff-Appellant did not place any further evidence to substantiate the said claim nor put in issue the encroachment to Lot No. 6B, used as a roadway by the Defendant-Respondent.

The Defendant-Respondent's position in brief is that she resides in the said premises since 1971 and the said wall existed prior to 1983 as a timber plank wall and thereafter, the present wall was constructed around 1984. Whilst admitting that Lots 5 and 6 in

Plan marked 'P1' belong to the Plaintiff-Appellant, the Defendant-Respondent completely disassociated herself with any knowledge of the existence of Plan No. 2055 or to the veracity of the boundaries depicted therein. Before parting with her cross examination, the learned Counsel for the Plaintiff-Appellant suggested to the Defendant-Respondent that Lots 5 and 6 (clearly in reference to Plan No. MF 46/76) belong to the Plaintiff-Appellant, to which the Defendant-Respondent answered in the affirmative. An issue raised by the Defendant-Respondent to establish uninterrupted possession of the toilet situated in the northern part of Lot 4 in Plan No. 46/76 shown as Lots 2, 3 and 4 of Plan No. 2055, for over 30 years, was decided in favor of the Defendant-Respondent.

The dispute between the parties to this action clearly arise from the boundaries to the land and premises depicted in Plan No. 2055. The Defendant-Respondent did not dispute the boundaries of the land and premises marked Lots 5 and 6 depicted in Plan No. MF 46/76 and accordingly, the trial court held that the Plaintiff-Appellant was entitled to Lots 5 and 6 in the said Plan No. MF 46/76.

As stated earlier, the Plaintiff-Appellant relied on Plan No. 2055 made by I.M.C. Fernando, Licensed Surveyor marked 'P4', for relief as prayed for. Surveyor I.M.C. Fernando was deceased at the time this case came up for trial and a survey report in respect of the said Plan No. 2055 is also not part of the record.

In the said Judgment dated 16/01/2009 in case No. D.C. Colombo 20654/L, the learned Additional District Judge *inter alia* held,

1) that the said Plan No. 2055 remains a document that has not been duly proved by the Plaintiff-Appellant,
2) that the land occupied by the Defendant is enclosed by a permanent wall and Tin roofing sheets for a period of over 20 years,
3) that no forced entry to the Plaintiff's land by the Defendant has been revealed in evidence.

The Court held that the Plaintiff-Appellant's claim that the Defendant-Respondent has encroached Lot 6 was not proved and accordingly, dismissed the action of the Plaintiff-Appellant.

As stated earlier, in its Judgment dated 22/08/2014, the Appellate Court *inter alia*, considered the undisturbed and uninterrupted possession of the Defendant-Respondent of the relevant Lots Based on Plan No. 424/2006 made by Rasappah Licensed Surveyor, the Appellate Court *inter alia*, held that the subdivided lot 5B is presently used by the Defendant-Respondent as a right of way and the subdivided lot 6B remains a part of the Defendant-Respondent's land attached to Lot No. 4.

The Appellate Court further held that;

"The very important factor reveals from the Surveyor's Report is that the said subdivided Lots 6A and 6B are partitioned and separated by the said permanent wall and the galvanized sheet fence and the said fence and wall runs up to the place where the defendant's latrine is situated. In terms of said plan and report the subdivided lots 5B and 6B are within the possession of the defendant" and declared that *"the defendant has prescribed to the sole possession of subdivided lots marked 4A, 4B, 5B and 6B in the said plan marked X".*

With regard to Plan No 2055, the Appellate Court, whilst commenting that it remains a document that has not been duly proved, stated that *"Plan Bearing No. 2055 does not show a latrine and a kitchen alleged to have been built by the Defendant in the Plaintiff's land".*

The Appellate Court, affirmed the Judgment of the learned trial Judge and dismissed the appeal with costs.

In this regard, it is observed that-

a) the Plaintiff-Appellant filed this action seeking a declaration that the Plaintiff-Appellant is entitled to Lots 1, 2, 3 and 4 depicted in Plan No. 2055 and a further declaration that the Defendant-Respondent is not entitled to the said land;
b) Plan No. 2055, dated 07/10/2001 was made by I. M. C. Fernando, the same surveyor who made the Original Plan No M.F. 46/76 dated 06/08/1976;
c) as commented upon earlier in this Judgment, the Commission Plan No. 424/2006, made at the request of the Defendant-Respondent, established that the Defendant-Respondent had encroached on to the Plaintiff-Appellant's land;
d) both courts below were of the view that the Defendant-Respondent had encroached on the Plaintiff-Appellant's land based on the said Commission Plan No. 424/2006, however, they decided that the Defendant-Respondent was entitled to prescriptive title to the encroached land, even though any relief was not claimed by the Defendant-Respondent to that effect;
e) In his evidence before the trial court, Surveyor Rasappah clearly stated that he was unaware of the existence of the said Plan No. 2055 and did not consider the said plan when making Plan No. 424/2006;
f) Surveyor Rasappah made use of the Original Plan No. M.F. 46/76 to prepare the said Plan No. 424/2006 and not Plan No. 2055 dated 07/10/2001, on which the Plaintiff-Appellant based her claim for relief;
g) The purported encroachment by the Defendant-Respondent on the Plaintiff-Appellant's land, as reflected in the Commission Plan No. 424/2006, is based on the Original Plan No. M.F. 46/76, dated 06/08/1976, with no reference to Plan No. 2055, which the Plaintiff-Appellant relied upon;
h) Even though the Appellate Court decided on the prescriptive rights of the Defendant-Respondent, and in her favour; the Defendant-Respondent did not pray for any relief, other than the dismissal of the said action.

The Plaintiff-Appellant's relief as prayed for in the Plaint dated 02/03/2005, is based on Plan No. 2055. The Defendant-Respondent consistently disputed and rejected Plan

No. 2055 on the basis that the said plan was not duly read in evidence and that a survey report thereon is not available.

Although the Plaintiff-Appellant's relief, was based on Plan No. 2055, the Plaintiff-Appellant failed to follow due procedure according to law to establish the death of the surveyor or to call a competent witness to read the said Plan in evidence. Plan No. 2055 was never shown to the Court appointed surveyor when he visited the land and there is no reference made to the said Plan in the Commission Plan/ Report tendered in evidence. Both the trial court and the Appellate Court has referred to the said Plan No. 2055 as a document which was not duly proved.

The Plaintiff-Appellant did not place any material before this Court to negate the said stand that Plan No. 2055 was not duly proved as contended by the Counsel for the Defendant-Respondent and upheld by the courts below.

The Plaintiff-Appellant came before the trial court seeking a declaration that she is entitled to Lots 1, 2, 3 and 4 depicted in Plan No. 2055, dated 07/10/2001. Accordingly, the trial court was called upon to decide on the Plaintiff-Appellant's rights based on Plan No. 2055.

In the aforesaid circumstances, this Court is of the view that Plan No. 2055 was not adequately proved to determine the rights of the Plaintiff-Appellant.

In discussing the duties and obligations of the Plaintiff-Appellant and the Defendant-Respondent respectively, in an action for declaration of title to land, (as in this instance), reference may be made to the following cases decided by our Appellate Courts.

a) ***Menikgama Arachchige Don Ananda Vs. Kollupitiye Mahinda Sangarakkitha Thero, Viharadhipathi and Trustee, Kelaniya Raja Maha Vihara, Kelaniya- CA 908/96 F, CA minutes dated 23/04/2012***

In the course of the Judgment in this case, the Court of Appeal,

I. stated that the Plaintiff sought to vindicate his title to the subject matter of the action, to wit, the land described in schedule 2 of the Plaint, which had been pleaded by the Plaintiff was as a portion of the land more fully set out in schedule 1, and that, *"From the issues suggested by the Plaintiff, it is quite clear that the Plaintiff has not made any attempt to identify the land described in schedule 2 of the Plaint as a portion of the larger land described in schedule 1".* The Court went on to state that *"It is common knowledge that without establishing title to the larger land described in schedule 1 of the Plaint, the Plaintiff cannot succeed in establishing his title to the land described in schedule 2 of the Plaint. It is of paramount importance in an action of this nature, to identify and establish the identity of the subject matter and the title by adducing clear evidence to obtain a declaration of title and ejectment of the Defendant;"*

II. stated that *"It is trite law that the burden in a rei vindicatio action is on the plaintiff to prove ownership to the subject matter of the action. More so when the defendant is in possession of the corpus;"*

III. referred to the case of ***Dharmadasa Vs. Jayasena (1997) 3 SLR 327***, which is mentioned in, b) below;

IV. stated that the Plaintiff failed to prove that the subject matter of the action was vested in him, and that *"he had given no evidence whatsoever to prove it;"*

and allowed the appeal of the Defendant-Appellant and set aside the Judgment of the District Judge in favour of the Plaintiff-Respondent.

b) ***Dharmadasa Vs. Jayasena (Supra)*** which states in the headnote that-

"The Plaintiff sued the Defendant for a declaration of title and ejectment. The Plaintiff based his claim on a Grant from the Urban Council, Anuradhapura.

Held: in a rei vindicatio action the burden is on the Plaintiff to establish the title pleaded and relied on by him. The Defendant need not prove anything. The Grant relied on by the Plaintiff was invalid. Hence the Plaintiff has failed to establish his title."

In the course of the Judgment in this case, the Supreme Court stated that *"The Authorities unite in holding that the Plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie"*. per Macdonell C.J., at page 219, in ***De Silva Vs. Goonetilleke (1931) 32 NLR 217***. The principle was lucidly stated by Herat J. in ***Wanigaratne Vs. Juwanis Appuhamy (1964) 65 NLR 167*** in the following terms *"The defendant in a rei vindicatio action need not prove anything, still less his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title. This, the plaintiff has failed to do, and his action must therefore fail."*

c) *Terrence Clinton Percival Thirunayake Vs. M George Anthony Fernando (SC Appeal No.18B of 2009) SC minutes dated 07/03/2014*

The Plaintiff instituted a rei vindicatio action in 1994, in the District Court of Kurunegala, *inter alia*, seeking a declaration of title that the Plaintiff is the owner of the land described in the second schedule to the Plaint and for an order ejecting the Defendant and his agents occupying a portion of the land. The District Judge gave Judgment, in 2001, in favour of the Plaintiff, against which the Defendant appealed to the Civil Appellate High Court.

The Civil Appellate High Court allowed the appeal and dismissed the Judgment of the District Judge on the basis that the land in dispute has not been precisely identified and the land described in the schedule to the Plaint is different in that the land is a larger land; against which order of the Civil Appellate High Court the Plaintiff filed an appeal to the Supreme Court.

In the course of the Judgment in this appeal, the Supreme Court –

I. citing the decision in ***Peiris Vs. Sinnathamby, 54 NLR 207***, stated that *".... in a rei vindicatio action claiming a declaration of title and ejectment it is a paramount duty on the part of the petitioner (appellant in this case) to establish correct boundaries in order to identify the Corpus."* Referring to the evidence produced by the Appellant the Court stated further, *"Therefore, it is obviously clear that the Appellant has failed to produce evidence to identify the land in dispute"* and that *"this being an action rei vindicatio there is a greater and heavy burden on the part of the Appellant to prove not only that he has a dominion to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title"* and

II. agreeing with the submissions of the Counsel for the Respondent, concluded that *"……. the land in dispute has not been precisely and definitely described in the schedule to the Plaint in terms of the Law…."* dismissed the Appeal, affirming the Judgment of the Civil Appellate High Court.

In view of the above and from what has been stated earlier in this Judgment, it is clear that the Plaintiff-Appellant has failed to fulfill the obligations and duties and duly discharge the burden of proof, which is required of a Plaintiff in a rei vindicatio action, which have been described above, particularly, in regard to the establishment of the identity of the property in respect of which declarations are sought in such a rei vindicatio action and the due establishment of the title of the Plaintiff thereto.

The Defendant-Respondent has also made extensive submissions in this regard, in the written submissions dated 03/07/2015 and 17/03/2023 filed in this Court, that the reliefs sought by the Plaintiff-Appellant are untenable in Law, with which I agree.

In the circumstances, this Court is of the view that, in deciding on this Appeal, the three questions on which leave to appeal to this Court have been granted and which have

been quoted earlier in this Judgment need not be considered and, with respect, I answer such three questions accordingly.

For these reasons, the Judgment dated 16/01/2009 of the Additional District Judge and the Judgment dated 22/08/2014 of the Appellate Court are hereby affirmed and this Appeal is dismissed. No order for Costs.

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

Arjuna Obeyesekere, J

I agree

Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for revision of order dated 8th August 2016.

SC Revision No. 10/2016

High Court Case No. HC (Civil) 177/2002

Sri Lanka Savings Bank Limited,
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

PLAINTIFF

Vs

1. De Croos Associates Limited,
   No. 826, Kotte Road,
   Athul Kotte,
   Kotte.

   Currently at
   No. 529, Kotte Road,
   Athul Kotte,
   Kotte.

2. Trehan Emmanuel Kumar De Croos,
   Sri Nikethan,

Kurana, Negombo.

DEFENDANTS

AND NOW

Ajith Dissanayake
No. 156/30,
Jayagath Uyana,
Maligagodaella Road,
Mulleriyawa New Town.

COURT COMMISSIONER, LICENSED AUCTIONEER AND VALUER- PETITIONER

Vs

Sri Lanka Savings Bank Limited,
No. 110, D. S. Senanayake Mawatha,
Colombo 08.

PLAINTIFF- RESPONDENT

Before : **P. Padman Surasena J**

Yasantha Kodagoda PC J

Mahinda Samayawardhena J

Counsel : Harith de Mel instructed by Akalanka Dias for the Court Commissioner - Licensed Auctioneer and Valuer - Petitioner.

Kamal Dissanayake with Sureni Amarathunga and Dulna de Alwis for the Plaintiff- Respondent.

Argued on : 03-12-2021

Decided on : 22-09-2023

P Padman Surasena J

The Plaintiff - Respondent, Sri Lanka Savings Bank Limited (Hereinafter sometimes referred to as the Plaintiff Bank), instituted action in the High Court by filing the plaint dated 9th August 2002 seeking to enforce a mortgage bond to recover a sum of money owed by the 1st and 2nd Defendants. Following a default in the settlement, the Plaintiff Bank had obtained an order for the sale of the mortgaged property.

The Court Commissioner, Licensed Auctioneer and Valuer - Petitioner (Hereinafter sometimes referred to as the Petitioner), claims that he had been directed by the Registrar of the High Court to submit a Valuation Report relating to the said mortgaged property. However, the Plaintiff Bank has taken up the position that no commission was issued to the Petitioner in regard to the said mortgaged property and no other auctioneer was appointed by Court to value the property and conduct the auction other than Mr. K. P. Nawanandana Silva.

The Petitioner on the 9th February 2016 has made an application to the Commercial High Court to recover a professional fee due to him from the Plaintiff Bank for a Valuation Report dated 5th October 2015 in respect of the mortgaged property which he states has been submitted to Court. It must be noted that the said Valuation Report has been referred to in the court proceedings, as the Valuation Report tendered by motion dated 2nd October 2015. However, it is the position of the Petitioner that the same was tendered on the 5th October 2015 and that it has been erroneously recorded as 2nd October 2015 in the Execution file maintained by the Registrar of the Commercial High Court.

Subsequently, the Commercial High Court upon consideration of the matter, by order dated 8th August 2016 has refused the said application for the recovery of professional fees claimed by the Petitioner. The Commercial High Court, in that order, had affirmed the position of the Plaintiff Bank that no commission was issued to the Petitioner. The order of the learned Judge of the Commercial High Court has been produced marked **P**. Thereafter, the Petitioner by the petition dated 20th December 2016 filed the instant Revision Application seeking *inter alia* to revise and

set aside the order dated 8th August 2016 of the learned Judge of the Commercial High Court marked **P**.

The primary issue this Court has to decide in the instant matter is whether this Court has jurisdiction to hear and determine this Revision Application. In other words, this Court has to first decide whether the Supreme Court has Revisionary Jurisdiction to entertain the instant application.

Accordingly, this Court on 3rd December 2021 heard and concluded the submissions of both learned Counsel for the Petitioner and the Plaintiff Bank regarding the preliminary issue whether this Court has Revisionary Jurisdiction to entertain the instant application of the Petitioner.

At the outset, I must mention here that when this application was taken up before this Court for argument, the learned Counsel who appeared for the Petitioner was unable to point to any specific legal provision which has enabled him, to file and maintain this application.

Although Court has granted time for the learned Counsel who appeared for the Petitioner to file written submissions to substantiate any possible argument in this regard, he has failed to tender any such written submission to Court. Thus, I am unable to ascertain exactly, the legal argument (if any), he was to advance in the expected written submissions.

Be that as it may, I would now proceed to consider whether the Petitioner is entitled to file the instant Revision Application in this Court.

The plenary jurisdiction of this Court is set out in Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka; it is as follows.

> *"127 (1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgment, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance."

Article 127 (2) sets out what this Court can do in the exercise of its appellate jurisdiction and therefore the said Article comes into operation only when it considers an appeal lawfully filed before it.

Article 127 (1) has specifically subjected itself to the other provisions of the Constitution. This is clear from the wording "*The Supreme Court shall, subject to the Constitution,..*" , found in that Article.

Thus, Article 127 (1) must be read with Article 128 of the Constitution. This is because Article 128 is another provision in the Constitution which has specified several channels through which any appeal can reach this Court. Article 128 of the Constitution as it was then,[1] is as follows.

"128 (1) An appeal shall lie to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings;

(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree, or

[1] A new sub paragraph was added as Article 128 (5) by the Twentieth Amendment to the Constitution which was certified on 29th October 2020.

sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.

(3) Any appeal from an order or judgment of the Court of Appeal, made or given in the exercise of its jurisdiction under Article 139, 140, 141, 142 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.

(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament.

Article 128 (1), (2), (3) refers only to appeals from orders or judgements of the Court of Appeal. The instant matter is neither an appeal nor against an order or judgement of the Court of Appeal. Thus, Articles 128 (1), (2), (3) have no relevance to the instant application. Article 128 (4) of the Constitution also refers only to appeals. Since the instant matter is not an appeal Article 128 (4) is also not relevant to this application.

In Martin Vs Wijewardena.[2] Jameel J (with Ranasinghe CJ and Amerasinghe J agreeing) stated that the right of appeal is a statutory right and must be expressly created and granted by statute.

In Mariam Beebee Vs. Seyed Mohamed,[3] Sansoni C.J. who delivered the majority decision of the Divisional Bench which heard that case stated that the power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of the Court.

[2] (1989) 2 Sri. L. R. 409.
[3] (1965) 68 NLR 36.

The above dicta were cited with approval by Soza J (with Sharvananda J, Wanasundera J, Wimalaratne J and Ratwatte J agreeing) in a Divisional Bench decision of this Court in Somawathie Vs. Madawela and others,[4] and later by Kulatunga J (with G P S De Silva CJ and Ramanathan J agreeing) in Gunaratne Vs. Thambinayagam and others.[5]

Revisionary Jurisdiction is not an inherent power of Court. Thus, Revisionary Jurisdiction must have been conferred on a Court to enable it to exercise such jurisdiction. It is then only that a party will be able to invoke such jurisdiction.

His Lordship Amerasinghe J in the case of Jeyaraj Fernandopulle Vs. Premachandra De Silva and Others,[6] stated that "*the Supreme Court is a creature of statute and its powers are statutory.*"

It is Article 138 of the Constitution which has conferred Revisionary Jurisdiction on the Court of Appeal and the Provincial High Courts. As Article 138 has conferred this jurisdiction subject to any law, this jurisdiction must be understood by reading it with High Courts of Provinces (Special Provisions) Act No. 19 of 1990 or Act No. 54 of 2006 depending on whether the relevant matter is civil or criminal. However, I find no such enabling provision in our law to enable the Supreme Court to exercise Revisionary Jurisdiction in respect of the instant application.

In the case of Mahesh Agri Exim (Pvt) Ltd Vs. Gaurav Imports (Pvt) Ltd. and others,[7] this Court had to consider the question whether this Court has Revisionary Jurisdiction against orders made by the Commercial High Court. I had the privilege of agreeing with His Lordship Justice Priyantha Jayawardena who stated in that case, the following.

> "*The Counsel for the Petitioner submitted that a grave prejudice has been caused to his client and therefore, the Supreme Court should intervene in this matter. He further submitted that this is a fit and proper case to exercise revisionary jurisdiction and/or inherent powers of this Court.*

[4] (1983) 2 Sri. L. R. 15.
[5] (1993) 2 Sri. L. R. 355.
[6] (1996) 1 Sri. L. R. 70.
[7] SC Revision No. 02/2013, decided on 30-07-2019.

We are of the opinion that this Court has no jurisdiction to entertain Revision applications arising from the orders made by the Commercial High Court. Further, the inherent powers of this Court cannot be entertained in this application."

Let me also have the indulgence to refer to the case of Udaya Saman Subhasinghe Vs. People's Merchant PLC.[8] The Petitioner - Respondent in that case (People's Merchant PLC) raised a preliminary objection to the maintainability of that appeal stating that there is no legal provision which provided a right of appeal for the Respondent-Appellant (Udaya Saman Subhasinghe) i.e., to file such an appeal to this Court without first obtaining the leave of the Supreme Court on a question of law, against the impugned order made by the High Court under section 31 (1) of the Arbitration Act. The learned counsel who appeared for the Respondent - Appellant in that case, conceded that the Respondent - Appellant had not first obtained the leave of the Supreme Court on a question of law in that appeal. However, he thereafter submitted that this Court nevertheless has jurisdiction to entertain this appeal both under Article 127 of the Constitution and in the exercise of revisionary powers of this Court. With the concurrence of Her Ladyship Murdu N. B. Fernando PC J and His Lordship A. H. M. D. Nawaz J, I took the view that this Court does not have revisionary powers to intervene and consider that appeal.

In the above circumstances and for the foregoing reasons, I am of the view that this Court does not have Revisionary Jurisdiction to intervene and consider the instant application. I proceed to dismiss this application.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA PC J

I agree,

JUDGE OF THE SUPREME COURT

[8] SC CHC Appeal No. 14/2014, decided on 23-06-2021.

MAHINDA SAMAYAWARDHENA J

I had the privilege of reading the draft judgment of Justice Surasena, and I regret very much that I find myself unable to agree with it.

The petitioner filed this revision application against the order of the Commercial High Court made against him dated 08.08.2016. He states that as he is not a party to the case, he has no right of appeal to this Court against the said order in terms of section 5 of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996, and therefore he has no alternative but to come before this Court by way of revision. If that is correct, there should be a place for the petitioner to challenge the order. That order cannot be considered both as the first and the final order.

The Court of Appeal has no appellate, revisionary or restitutio in integrum jurisdiction over the judgments or orders of the Commercial High Court.

It is significant to note that this revision application was supported for notice before this Court on 13.02.2017 and this Court, after hearing both parties, decided to issue formal notice on the respondent bank and allowed both parties to file objections, counter objections, written submissions, and fixed the matter for argument.

The case came before the present bench at the argument stage. If this Court did not have jurisdiction to entertain this revision application, the previous bench could not have issued formal notice and fixed the matter for argument.

The respondent bank does not take up a jurisdictional objection. The respondent bank moves to dismiss the application of the petitioner in limine on different grounds: failure to plead exceptional circumstances, failure to name necessary parties and failure to tender necessary documents.

This Court has entertained revision applications in the past. One such example is the case of People's Bank v. Ocean Queen Marine (Pvt) Ltd reported in [2016] 1 Sri LR 141.

If this Court is to dismiss the application for want of jurisdiction at this stage, in my view, both parties shall be given a full hearing. Subject to taking up a different position after a full hearing, I am unable to decide at this juncture that the Supreme Court does not under any circumstances

have revisionary jurisdiction or at least inherent jurisdiction to remedy an injustice committed by the Commercial High Court, especially when there is no right of appeal.

JUDGE OF THE SUPREME COURT

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

In the matter of a Leave to Appeal Application against the refusal to enforce an Arbitral Award by the High Court under and in terms of section 31(1) of the Arbitration Act No. 11 of 1995.

Orient Financial Services Corporation Limited,
No: 46, 48,
Dr, N.M. Perera Mawatha,
Kota Road,
Borella.

Petitioner

Supreme Court Case No:- SC/Appeal/42/2015

Commercial High Court Case No:- HC/ARB/55/2012

Vs

1. Ranepuradewage Upathissa
   No. 272/4,
   Himbutana Patugama
   Mulleriyawa,
   Angoda.

2. Ranepuradewage Bandula
   No. 37/11, Chappell Lane,
   Nugegoda.
   No. 23A,

Chappell Lane,
Nugegoda.

3. Kalinga Gamini Silva,
No. 105,
Mahinda Mawatha,
Wellampitiya.

4. Nakalandage Marvin
Perera,
No. 138/10,
Pamunuwila Road,
Gonawila.

Respondents

AND NOW

Orient Financial Services Corporation Limited,
No: 46, 48,
Dr, N.M. Perera Mawatha,
Kota Road,
Borella.

Petitioner-Appellant

Vs

1. Ranepuradewage Upathissa
No. 272/4,
Himbutana Patugama
Mulleriyawa,
Angoda.

2. Ranepuradewage Bandula
No. 37/11, Chappell Lane,
Nugegoda.

No. 23A,
Chappell Lane,
Nugegoda.

3. Kalinga Gamini Silva,
No. 105,
Mahinda Mawatha,
Wellampitiya.

4. Nakalandage Marvin Perera,
No. 138/10,
Pamunuwila Road,
Gonawila.

Respondents-Respondents

AND

Orient Financial Services
Corporation Limited,
No. 46, 46,
Dr. N. M. Perera Mawatha,
Kota Road,
Borella.

Petitioner

Supreme Court Case No:- SC/Appeal/46/2015

Commercial High Court Case No:- HC/ARB/55/2012

Vs.

1.Ranepuradewage Upathissa,
No. 272/4,
Himbutana Patumaga,
Mulleriyawa,
Angoda.

2. Ranepuradewage Bandula,
No. 37/11, Chappell Lane,
Nugegoda.

No. 23A,
Chappell Lane,
Nugegoda.

3. Kalinga Gamini Silva,
No. 105,
Mahinda Mawatha,
Wellampitiya.

4. Nakalandage Marvin Perera,
No. 138/10,
Pamunuwila Road,
Gonawala.

Respondents

AND NOW

Orient Financial Services
Corporation Limited,
No. 46, 48,
Dr. N. M. Perera Mawatha,
Kota Road,
Borella.

Presently known as

Orient Finance PLC,
No. 75, Arnold Rathnayake Mawatha,
Colombo 10

Petitioner-Appellant

Vs

1. Ranepuradewage Upathissa,
   No. 272/4,
   Himbutana Patugama,
   Mulleriyawa,
   Angoda.

2. Ranepuradewage Bandula
   No. 37/11, Chappell Lane,
   Nugegoda.

   No. 23A,
   Chappell Lane,
   Nugegoda.

3. Kalinga Gamini Silva,
   No. 105,
   Mahinda Mawatha,
   Wellampitiya.

4. Nakalandage Marvin Perera,
   No. 138/10,
   Pamunuwila Road,
   Gonawila.

Respondent-Respondent

Before : Priyantha Jayawardena PC, J
Kumudini Wickremasinghe, J
Mahinda Samayawardhena, J

Counsel : Nishkan Parathalingam with Upeka Sooriyapatabadige for the Petitioner-Appellant in SC/Appeal/42/2015 and SC/Appeal/46/2015 .

W. Madawalagama for the Respondent-Respondent in SC/Appeal/42/2015 and SC/Appeal/46/2015

Argued on : 29th March, 2023

Decided on : 25th September, 2023

Priyantha Jayawardena PC, J

The above appeals were taken up for hearing as the parties informed court that the questions of law where Leave to Appeal were granted by this court are identical. Hence, both parties agreed to consolidate and take up the two appeals and to have one judgment in respect of both appeals.

Facts of the case

These two appeals were filed to set aside the two Orders of the learned High Court Judge dated 2nd of December, 2012 which refused to enforce an arbitral award made against the respondents-respondents (hereinafter referred to as the "respondents").

The 1st and 2nd respondents had entered into a Master Finance Lease Agreement bearing Agreement No. ML 06175 dated 27th of September, 2006 with the petitioner-appellant (hereinafter referred to as the "appellant-company"), who has been engaged in lease financing business to obtain lease finances to purchase equipment/vehicles from time to time. In terms of the said

agreement, each vehicle obtained on a lease was added to it by a separate schedule made to the said agreement.

The 3rd and 4th respondents were the guarantors to the said Master Finance Lease Agreement and furnished an indemnity to secure the lease finance facilities given on the said agreement.

The said Master Finance Lease Agreement provided for the parties to enter into addenda to the said agreement when and where a vehicle is taken on a lease finance basis by the respondents. Such addenda were considered as part and parcel of the said Master Finance Lease Agreement.

Further, Clause 19 of the said agreement stated that, if the 1st and 2nd respondents fail to comply with the terms and conditions of the said agreement, the appellant-company may, *inter alia,* request the respondents to make all the payments due under the Master Finance Lease Agreement. Furthermore, if the said respondents fail to make payments, the appellant-company may terminate the said agreement.

Moreover, Article 36 of the said Master Finance Lease Agreement stated that in the event of a dispute arising from any default or non-observance of the terms and conditions contained in the said agreement by the 1st and 2nd respondents, including the default and/or delay in paying lease rentals, such disputes shall be submitted to arbitration.

The said the Master Finance Lease Agreement defined the term 'equipment schedule' as follows;

> *"The term of each equipment schedule hereto is subject to any and all conditions and provisions set forth herein as may from time to time be amended. Each equipment schedule be substantially in the form annex hereto and made part hereof shall incorporate therein all the terms and conditions as Lessor and Lessee have agree upon such equipment schedule is enforceable according to the terms and conditions therein. In the event of a conflict between the provisions of this Master Lease Agreement and any equipment schedule hereto the provisions of equipment schedule shall prevail with respect to that equipment."*
>
> [emphasis added]

Further, Clause 36 of the Master Finance Lease Agreement contained an arbitration agreement. It reads as follows;

"**Article 36: Arbitration Clause**

In the event of any default or non-observance by the Lessee of the terms and conditions contained in this Master Finance Lease Agreement including the default and/or delay in paying lease rentals or in any other case and in the event of any dispute, difference or question or matter which may from time to time and any time hereinafter arise or occur between Lessor and Lessee of their respective representatives or permitted assigns touching or concerning or arising out of, and in relation to or in respect of this Master Finance Lease Agreement or any provision matter or thing contained herein or the subject matter thereof, or the operation interpretation or construction hereof or of any clause hereof or as to the rights duties or liabilities of either party hereunder or in connection with the premises or their respective representatives or permitted assigns including all questions that may arise after the termination or cancellation of this lease, such disputes, differences or question or matter may, notwithstanding the remedies available under this Master Finance Lease Agreement or in law, be submitted for Arbitration by a sole Arbitrator to be appointed by the parties if such appointment is not practicable two arbitrators one to be appointed by the Lessor and the other by the Lessee and an additional Arbitrator to be appointed by the two Arbitrators and if either party refuses to appoint an arbitrator, by the sole arbitrator appointed by the other party."

[emphasis added]

After the parties entered into the said Master Finance Lease Agreement, at the request of the 1st and 2nd respondents, the appellant-company had purchased a Renault Prime Mover bearing registration No. 48–0044 described in the schedule (L 060263) to the Master Finance Lease Agreement for the purpose of leasing the same to the 1st and 2nd respondents.

Thereafter, on the following day, another lease finance facility was obtained by the 1st and 2nd respondents for the Tantri 40-foot trailer bearing chassis No. T–27737–06 under the said Master Finance Lease Agreement. In the second instance, the parties had executed an addendum to the said Master Finance Lease Agreement (L060273).

However, the respondents had failed and/or neglected to pay the monthly installments set out in the said Master Lease Financing Agreement in respect of both the equipment referred to in the

schedules to the Master Finance Lease Agreement. Hence, the appellant-company had sent several Letters of Demand to the respondents, requesting them to pay the arrears.

As the respondents did not pay the arrears set out in the said Master Finance Lease Agreement, the disputes that arose from the non-payment of installments were referred to two separate arbitrations in terms of Article 36 of the said agreement by the appellant.

Both references to arbitration were taken up separately for arbitration, and the 1st respondent had participated in both of the said arbitrations and had moved for time to settle the claims. Accordingly, the arbitrator had granted time for the 1st respondent to reach a settlement. However, as the parties could not reach a settlement in both arbitrations, both arbitrations had proceeded and the appellants had filed evidence by way of two separate affidavits in both arbitral proceedings in support of their claims against the respondents. Thereafter, the learned Arbitrator made two separate awards in favour of the appellant-company on the 15th of February, 2011. Further, the said arbitral awards had been delivered to the respondents in terms of the Arbitration Act No. 11 of 1995 (hereinafter referred to as the "Arbitration Act").

Subsequently, the appellant-company had filed two separate applications in the High Court against the respondents for the enforcement of the said arbitral awards. In both the said applications the appellant had filed copies of the Master Finance Lease Agreement entered between the appellant and the 1st and 2nd respondents, schedules No. L 0602273 and L 060263 to the said agreement (filed separately in the relevant application), Guarantee and Indemnity for the Master Lease Agreement bearing contract No. ML 060175, Letters of Demands sent to the respondents, Notices of arbitration sent to the respondents, Notice sent by the Arbitration Centre to the respondents along with the registered Article, arbitral proceedings of 22nd of November 2010 and 14th of December, 2010, the arbitral awards dated 15th of February, 2011, and the proof of posting of the arbitral awards to the respondents. All the aforementioned documents were certified by the claimant company and an Attorney-at-Law prior to them filing in court.

Thereafter, the 1st, 2nd and 3rd respondents have filed an Answer supported by an Affidavit to the said applications objecting to the enforcement of the arbitral awards.

Further, both the said applications for the enforcement of arbitral awards were taken up together for inquiry, and the parties had made oral submissions. Thereafter, they had tendered their respective written submissions. In the submissions, the respondents, *inter alia,* submitted that the applications for enforcement of arbitral awards should not be allowed as it was not possible to

have two arbitrations in respect of one arbitration agreement, and thus the arbitral awards made in the said arbitrations were against the public interest. Furthermore, the appellant-company had not filed a certified copy of the entire agreement between the parties along with the application for enforcement of the arbitral award. It is pertinent to note that both parties referred to the provisions of the Civil Procedure Code in support of their respective cases and requested the court to apply the provisions of the Civil Procedure Code in considering their cases.

Judgment of the High Court

Thereafter, the learned High Court Judge delivered one Order in respect of both the applications on the 2nd of December, 2013 refusing to enforce the arbitral awards on the basis that a copy of the arbitration agreement had not been filed in court by the appellant-company in terms of section 31(2)(b) of the Arbitration Act and two arbitrations had been held with respect to one agreement.

Questions of Law

Being aggrieved by the said Order of the learned High Court Judge, the appellant-company sought leave to appeal from this court, and this court granted leave to appeal on the following question of law:

> *"Has the learned High Court Judge erred in his order dated 02.12.2013 in holding that the Petitioner was obliged to file a complete contract under section 31(2)(b) of the Arbitration Act No. 11 of 1995 in enforcement proceeding."*

Further, the respondents raised the following the question of law;

> *"whether the Petitioner has filed an original or a duly certified copy of the arbitration agreement."*

The issues that need to be considered in the instant appeal are whether the appellant-company was required to file;

(a) the entire Master Finance Lease Agreement with schedules; or
(b) only the original arbitration agreement, or
(c) a certified copy of the arbitration agreement

under section 31(2)(b) of the Arbitration Act No. 11 of 1995 along with the applications for enforcement of the arbitral awards.

Enforcement and setting aside of Arbitral Awards

Section 2 of the Arbitration Act states that all arbitral proceedings that commenced in Sri Lanka after the appointed date are governed by the said Act.

Arbitral proceedings commence by a party giving notice of arbitration to the other party to the arbitration agreement and referring the alleged dispute to arbitration. Thereafter, one or more Arbitrators are appointed by the parties to the arbitration agreement depending on the arbitration clause. Upon the arbitral tribunal being constituted, the arbitration proceedings will commence by giving notice to the parties to the arbitration agreement. Further, the arbitration proceedings are concluded the Arbitrator/s should deliver the arbitral award in writing and signed by the Arbitrator/s of the arbitral tribunal. Further, a copy of the said award should be served on the parties. Furthermore, an arbitral award is final and binding on the parties subject to applications that may be made under sections 31 and 32 of the Arbitration Act.

In terms of section 31(1) of the Arbitration Act, a party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award.

Section 31(2) of the Arbitration Act states;

> *"An application to enforce the award shall be accompanied by –*
> *(a) The original of the award or a duly certified copy of such award; and*
> *(b)* ***the original arbitration agreement under which the award purports to have been made <u>or</u> <u>a duly certified copy of such agreement</u>****."*
>
> [emphasis added]

Accordingly, in terms of section 31(2)(b) of the Arbitration Act, when filing an application to enforce an arbitral award, the party seeking to enforce the arbitral award is required to file the original arbitration agreement **or** a duly certified copy of such agreement on which the arbitral award was made along with the said application.

Furthermore, section 32 of the Arbitration Act sets out the procedure for making an application to the High Court for setting aside an arbitral award. In that, it states such an application may be made within sixty days of the receipt of the award. Further, the said section sets out the grounds on which an award can be set aside.

Moreover, where applications for the enforcement of an arbitral award and also to set aside an arbitral award are filed in the High Court, section 35 of the Arbitration Act requires to consolidate such applications and to be taken up together for inquiry. The said section was considered in ***Trinco Maritime (PVT) Limited v Ceylinco Insurance Co. Limited*** **[2010] 1 SLR 163,** where it was held that the law contemplates consolidation of applications made to set aside and to enforce the award.

In this regard, it is important to note that it is mandatory to comply with the time frame stipulated in sections 31 and 32 of the Arbitration Act. A similar view was expressed in ***Airport and Aviation Services (Sri Lanka) Ltd. v Buildmart Lanka (Pvt) Ltd*** **[2010] 1 SLR 292,** where it was held;

> *"…… It is therefore quite clear that even on a plain reading of the section an application for the purpose of setting aside an arbitral award by the High Court must be made within a time period of sixty days and the said period is taken into account from the* ***receipt of the award by the party making such application to the High Court…"***
>
> [emphasis added]

Further, a similar view was expressed in ***Lanka Orix Leasing Company Limited v Weeratunga Arachchige Piyasad,*** **SC/Appeal/113/2014 (SC Minutes 5th of April, 2019)**.

However, prior to allowing an application for enforcement of an arbitral award, the court is required to satisfy that there is no cause to refuse the recognition and enforcement of the award, and the application is in conformity with the mandatory requirements set out in section 31(2) of the said Act. Further, a party who has been made a respondent to such an application is not precluded from drawing the attention of the court, if the petitioner has not complied with the mandatory requirements stipulated in the said section notwithstanding the fact that such a party has not filed an application to set aside the award in terms of section 32 of the said Act. In such instances, the court is required to take such matters into consideration when deciding the application for enforcement.

Has the appellant-company complied with section 31(2)(b) of the Arbitration Act?

In the instant appeal, the appellant-company has filed a copy of the arbitration agreement certified by an Attorney-at-Law on which notices of arbitration were given to the respondents along with the applications for the enforcement of the arbitral awards under consideration.

As stated above, appellant-company filed certified copies of the said Master Finance Lease Agreement and the relevant schedules (separately in each application), which contained the 'arbitration agreement' on which the dispute between the parties were referred to arbitration and the arbitral tribunal was established along with both the applications for enforcement of the awards. Particularly, Clause 36 of the aforesaid agreement contained the arbitration agreement where all the parties agreed to refer any disputes arising or concerning the said agreement settled by arbitration.

However, the learned High Court Judge had refused to allow the enforcement of both the arbitral awards on the basis that the entire agreement entered between the parties was not filed in court in terms of section 31(2)(b) of the Arbitration Act No. 11 of 1995 and two arbitrations cannot be held in respect of one arbitration Clause.

Section 31(2) of the Arbitration Act states*;*

> *"An application to enforce the award shall be accompanied by –*
>
> *(a) the original of the award or a duly certified copy of such award; and*
> *(b) the original arbitration agreement under which the award purports to have been* ***or*** *a duly certified copy of such agreement.*
>
> *For the purposes of this subsection a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if –*
>
> *(i) it purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified; or*
> *(ii) it has been otherwise certified to the satisfaction of the court."*
>
> [emphasis added]

It is pertinent to note that section 31(2)(b) of the Arbitration Act does not require a party to file the complete contract/agreement in which the arbitration Clause is included in an application for enforcement of an arbitral award. On the contrary, the said section only requires the petitioner to file either the original **arbitration agreement or** a duly certified copy of **such agreement**.

Section 3(1) of the Arbitration Act states:

> *"An arbitration agreement may be in the form of* ***an arbitration clause in a contract*** *or* ***in the form of a separate agreement."***
>
> [emphasis added]

Further, section 3(2) of the said Act states that an arbitration agreement should be in writing. In terms of the section 3(2), it shall be deemed to be in writing if it is contained in a document signed by the parties or in exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement.

Furthermore, section 12 of the Arbitration Act states;

> *"An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement when ruling upon the validity of that arbitration agreement for the purpose of determining the jurisdiction of the arbitral tribunal."*
>
> [emphasis added]

Hence, an arbitration Clause in an agreement or a contract is recognised as a separate contract, distinct and independent from the main contract. In the circumstances, section 31(2) of the Arbitration Act only requires to file either the original arbitration agreement or a duly certified copy of the arbitration agreement entered between the parties.

It is pertinent to note that in the matters under reference the parties did not enter into separate agreements/contracts for the purpose of obtaining the two lease financing facilities to purchase the prime mover and the trailer under reference. As stated above, there was one Master Finance Lease Agreement and two schedules to the said agreement which are part and parcel of the said agreement. Further, as stated above, the arbitration Clause was included in said Master Finance Lease Agreement and it was applicable to the entire agreement which include the said schedules to the agreement.

It is pertinent to note that, there can be circumstances where it is not possible to file the original arbitration agreement in court, including instances where there are multiple applications for enforcement of arbitral awards. Thus, the Arbitration Act has made provisions to cater to such instances by including a provision to file 'a duly certified copy' of the arbitration agreement with applications for the enforcement of arbitral awards. The phrase 'a duly certified copy' requires the court to satisfy itself that a copy of the original arbitration agreement has been filed in court. In the case of ***Kristley (Pvt) Limited v The State Timber Corporation*** **[2002] 1 SLR 228** the copies of the awards tendered with the claimant's application certified by an Attorney-at-Law were held as "duly certified copies within the meaning of section 31(2)(ii) of the Arbitration Act. It was further held that even in a case where the copy of the award filed with the application is not a duly certified copy, the application for enforcement may not be summarily rejected without giving an opportunity to tender duly certified copy as the word "accompany" in section 31(2) has been included in the said section purposively and thus, it should be interpreted widely. In that judgment, Fernando, J held at pages 239 and 240;

> *"The learned High Court Judge failed to give full effect to clause (ii) of section 31 (2). That clause unambiguously provides for a mode of certification additional to that prescribed by clause (i). But, for that clause certification by the Registrar of the Arbitration Centre would not have been acceptable. Clause (ii) requires the High Court in each case, having regard to the facts of the case, to decide whether the document is certified to its satisfaction. The learned Judge erred in laying down a general rule – founded on a virtual presumption of dishonesty – which totally excludes certification by an Attorney-at-Law regardless of the circumstances. The position might have been different if the application for enforcement had been rejected promptly on presentation, for then there might well have been insufficient reason to be satisfied that the copy was indeed a true copy: and that would have caused no injustice, as the claimant could have filed a fresh application. But, I incline to the view that even at that stage the application should not have been summarily rejected. The claimant should have been given an opportunity to tender duly certified copies interpreting "accompany" in section 31 (2) purposively and widely (as in Sri Lanka General Workers' Union v Samaranayake and Nagappa Chettiar v. Commissioner of Income Tax.) Undoubtedly, section 31 (2) is mandatory, but not to the extent that one opportunity, and one opportunity only, will be allowed for compliance. In the present case, however, the order was not*

made immediately, but only after the lapse of the period of one year and fourteen days allowed for an application for enforcement. By that time, the learned Judge had consolidated the proceedings: hence he could not have ignored the certified copies filed in the STC's application, which admittedly, were identical in all material respects to the copies tendered with the claimant's application. He had also to consider (even if he was not bound by it) the admission in the STC's statement of objections that those copies were "duly certified", as well as the fact that, by them, the claimant had also tendered copies certified in terms of clause (i). it was on all that material that the learned Judge had to decide whether the copies had been certified to his satisfaction. In deciding that issue, he was perfectly correct in noting that the Court had to ensure that it 'gave judgment according to the award" (cf section 31 (6)) : the object of section 31 (2) was to ensure that the High Court did have true copies of the award. It was not reasonable, on the facts of this case, to conclude that the copies initially filed were anything but true copies of the originals. There was not even the faintest suspicion or suggestion that they were inaccurate."

Furthermore, a careful consideration of section 12 of the said Act shows that the sole purpose of the requirement to file the arbitration agreement along with an enforcement agreement is to ascertain whether the arbitral tribunal had the jurisdiction to make the award sought to be conferred by the High Court.

Therefore, I am of the view that the learned High Court Judge erred in his Orders dated 2nd of December, 2013 when he held that the appellant-company is required to file the complete contract that contained the arbitration agreement in terms of section 31(2)(b) of the Arbitration Act when filing an application to enforce the arbitral award. Further, the learned High Court Judge erred in law and fact when he did not act on the certified copy of the arbitration agreement filed along with the application for enforcement by the appellant.

Is it possible to refer several disputes to arbitration based on one arbitration agreement?

Section 50 of the said Act defines the term "arbitration agreement" as follows;

> "*Arbitration Agreement" means an agreement by the parties to submit to arbitration* <u>*all*</u> ***or*** <u>*certain disputes*</u> <u>*which have arisen*</u> ***or*** <u>*which may arise*</u> *between them in respect of a defined legal relationship whether contractual or not."*
>
> [emphasis added]

A careful consideration of the said section shows that unlike civil actions filed in the District Court, the Arbitration Act provides a simple and flexible procedure to resolve disputes between the parties that are subject to the said Act. It is pertinent to note that the phrase "all ***or*** certain disputes which have arisen ***or*** which may arise between them" allows the parties to refer all or some of the disputes between them to arbitration. Further, the phrase "which have arisen ***or*** which may arise between them*"* allows the parties to refer disputes when and where they arise.

Thus, the appellant-company was entitled in law to refer the disputes arising from or concerning the arbitration Clause in the said Master Lease Financing Agreement jointly or separately to arbitration to resolve the disputes between the parties. In view of the above, I am of the view that the learned High Court Judge erred in law by holding that it is not possible to have multiple arbitrations based on one arbitration agreement.

Does the Arbitration Act No. 11 of 1995 allow to file an answer in enforcement of arbitral awards?

It is noteworthy to mention that in the instant appeals, the 1st, 2nd and 3rd respondents have filed an answer supported by an affidavit objecting to the enforcement of both arbitral awards. However, there is no provision in the Arbitration Act to file an answer in an application for enforcement of an arbitral award. As stated above, only objections can be filed by a respondent in such an application.

Conclusion

In the circumstances, I am of the view that the following questions of law should be answered as follows;

Has the learned High Court Judge erred in his order dated 02.12.2013 in holding that the Petitioner was obliged to file a complete contract under section 31(2)(b) of the Arbitration Act No. 11 of 1995 in enforcement proceeding.

Yes

Whether the Petitioner has filed an original or a duly certified copy of the arbitration agreement.

Yes, the appellant has filed a duly certified copy of the arbitration agreement.

Therefore, both appeals are allowed. I set aside the Orders of the learned High Court Judge dated 2nd of December, 2012 and grant the reliefs prayed for in the petitions No. SC/Appeal/42/2015 and No. SC/Appeal/46/2015 filed in the High Court.

Further, I direct the learned High Court Judge to enter decree in terms of section 31(6) of the Arbitration Act.

The Registrar is directed to send this judgment to the relevant High Court to act in terms of the law.

I order no costs.

Judge of the Supreme Court

Kumudini Wickremasinghe, J

I Agree

Judge of the Supreme Court

Mahinda Samayawardhena, J

I Agree

Judge of the Supreme Court

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

In the matter of an Appeal under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

SC/Appeal/ 21/ 2021
SC (Spl.) L.A. No 210/2019
CA Case No. 238-239/13
HC Kegalle Case No. 2438/06

COMPLAINANT

Vs.

1. Poththegodage Anula Chandralatha
2. Andawalage Nimal Sarath Kumara

ACCUSED

AND BETWEEN

1. Poththegodage Anula Chandralatha
2. Andawalage Nimal Sarath Kumara

ACCUSED-APPELLANTS

Vs.

Hon. Attorney- General,
Attorney-General'sDepartment
Colombo 12

COMPLAINANT- RESPONDENTS

AND NOW BETWEEN

Andawalage Nimal Sarath Kumara

2nd ACCUSED APPELLANT-APPELLANT

Vs.

Hon. Attorney- General,
Attorney-General'sDepartment
Colombo 12

COMPLAINANT- RESPONDENT-RESPONDENT

Poththegodage Anula Chandralatha

1ST ACCUSED- APPELLANT- RESPONDENT

BEFORE: **MURDU N.B. FERNANDO, PC, J.**
K.KUMUDINI WICKREMASINGHE, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL: Srinath Perera, PC with Miss. Angela and Rahul Jayathillake for the 2nd Accused- Appellant- Appellant.

Azard Navavi, DSG for the
Complainant-Respondent-Respondent.

WRITTEN SUBMISSIONS: Written Submissions by the 2nd Accused-Appellant- Appellant on 29.06.2021

ARGUED ON: 26.05.2022

DECIDED ON: 27.09.2023

K. KUMUDINI WICKREMASINGHE, J.

The application for special leave to appeal was preferred by the 2nd Accused Appellant Appellant (hereinafter referred to as the Appellant) against the judgment of the Court of Appeal dated 10.05.2014 affirming the convictions and the sentences imposed against the 1st and 2nd Accused Appellants and dismissing their Appeal. Aggrieved by which the 2nd Accused Appellant Appellant appealed to the Supreme Court.

Accordingly, this Court by order dated 22.02.2021 granted Special leave to appeal on the following questions of law:

1. That the Hon. High Court and the Hon. Judges of the Court of Appeal failed to take into consideration and properly evaluate the items of evidence led on behalf of the parties at the trial.
2. This being a case based on circumstantial evidence, the Hon. High Court Judge and the Hon. Judges of the court of appeal failed to properly consider and correctly apply the relevant principles applicable to such a case in order to arrive at a decision in the said case.
3. The Hon. High Court Judge and the Hon. Judges of the Court of Appeal failed to evaluate the evidence led against each accused in this case, separately, in arriving at a decision against each such accused.

Two Accused namely, Poththegodage Anula Chandralatha who was the 1st Accused (1st Accused Appellant Respondent) and Andawalage Nimal Sarath Kumara who was the 2nd Accused (2nd Accused Appellant Appellant) were indicted in the High Court of Kegalle under section 296 of the Penal Code read with section 32 of the Penal Code, for committing murder of one Ajith Kithsiri Ruwan Kumara. Both Accused, upon the charge in the indictment being read over and explained to them, pleaded not guilty to the said charge. Both Accused opted to try the case without a jury and the trial commenced on 25.11.2013. The

prosecution called 7 witnesses and closed its case after marking P1 to P6 as productions. When the defense was called both Accused gave dock statements denying the charge. After the conclusion of the trial, the Learned High Court Judge convicted both the Accused for committing murder as per the indictment and imposed the death sentence as required under section 296 of the Penal Code.

The facts of the case briefly are as follows,

As per the evidence given by Prosecution Witness Thilakarathna (PW1), on the date in question the witness had visited the house of the 1st Accused Appellant Respondent around 6:30 pm to consume illicit alcohol (Kasippu). The witness stated that he had seen the deceased who was the husband of the 1st Accused Appellant Respondent lying on a partially built wall in close proximity to the house of the 1st Accused Appellant Respondent. The witness claimed that when he inquired about the condition of the deceased, the 1st Accused Appellant Respondent replied asking him to mind his own business. The witness stated that the 2nd Accused Appellant Appellant was present a few feet away from the 1st Accused Appellant Respondent at that time and that both of them had asked the witness not to leave the premises. The witness stated that at around 9:00 or 9:30 pm he saw the 2nd Accused Appellant Appellant carrying the body of the deceased, closely followed by the 1st Accused Appellant Respondent. When questioned during the Examination in chief on what the witness had observed when the body of the deceased was carried by the 2nd Accused Appellant Appellant, the witness stated he had observed that the deceased's neck had been displaced and stated that "බල්ලෙල පැත්තකට වනේන තිබුණෙ". After which the two accused had proceeded to dispose of the body of the deceased into the toilet pit located at the premises of the 1st Accused Appellant Respondent. When the witness was questioned on the events that he had witnessed the witness stated in response that "මට හිතුනා බාසුන්නැහෙ මැරිලා තමයි කියා". Thereafter, the 2nd Accused Appellant Appellant had placed timber planks and laid fertiliser bags on top of the pit in order to cover the pit.

According to the evidence of the Investigative Officer J R Seneviratne (PW9) the 1st Accused Appellant Respondent had made a complaint to the Police that her husband had disappeared. The formal investigation into the incident commenced on 03.05.1999. The Investigating Officer claimed that on information received by informants and persons who visited the town, the property of the 1st Accused Appellant Respondent was searched. On the search of the property the officer made observations of a toilet pit, which was situated within the said property. The

officer stated that he commenced investigations regarding a toilet pit in the compound of the house where the deceased had lived with the 1st Accused Appellant Respondent, after a statement had been recorded from the 1st Accused Appellant Respondent. Following which, the body of the victim was discovered. A section 27 statement of the Evidence Ordinance has been led in evidence by the Prosecution which stated that "පුදුමයාගෙ මළ සිරුර දමා ඇති වැසිකිලි වල මට පෙන්වීමට පුළුවන්". The officer further stated that witness PW1 was arrested on suspicion but he was not named as an accused.

Dr. Prassana Bandara Dissanayake (PW7), the Judicial Medical Officer gave evidence with regard to the post-mortem examination of the body of the deceased, conducted by him. He observed that there were 10 injuries on the body of the deceased. The first injury was a stab injury which in his opinion was caused by an axle and that was fatal. He stated that the 3rd and 4th injuries could have been caused as a result of falling. He stated that there were serious injuries on the head that may have been caused by a blunt weapon like a stone.

According to the evidence of the S. I. Thilakaratne Nissanka (PW14), a stone had been recovered in terms of a section 27 statement of the Evidence Ordinance made by the 2nd Accused Appellant Appellant., stating that "ගල මට පෙන්නන්න පුළුවන්". However, the recovered stone has not been produced in evidence at the trial.

The Deceased and the 1st Accused Appellant Respondent's daughter K.V. Tharusha Chathurika Kithsiri (PW2) gave evidence. She stated that on the 16.04.1999 morning, she had asked her mother, the 1st Accused Appellant Respondent about the whereabouts of her father (the deceased) to which her mother had replied stating that he had gone for work. The witness stated that she did not observe anything along the footpath; however, she saw her mother removing some earth with red colour powder. The witness stated that she inquired from her mother what the red colour powder was and she stated that her father had left after having a row with her and hitting her with bricks.

Having considered at length the evidence of witness PW1, the evidence of the daughter witness PW2 and the evidence provided by the Police officers investigating the incident, the Learned High Court Judge decided against both the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant. Considering the conduct of the two Accused, the method thereof have adopted in disposing the body, to their conduct soon after, amount to the one and only

conclusion that can be arrived by court is that both of them have committed the murder of the deceased.

Being aggrieved by the judgement of the High Court, the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant had appealed to the Court of Appeal complaining inter alia that the Learned High Court Judge misdirected herself when admitting the evidence under section 27 of the Evidence Ordinance, the evaluation of the evidence given by PW1 is bad in law, the Learned High Court Judge misdirected herself by anticipating a reasonable explanation from the said Appellant when the prosecution had failed to establish a prima facie case against the 1st Accused Appellant Respondent, the Learned High Court Judge failed to evaluate the medical evidence against the sole eye witness testimony and the Learned High Court Judge has not properly considered and evaluated the evidence against the 2nd Accused Appellant Appellant.

The Honourable Judges of the Court of Appeal upon perusal of the evidence concluded that on the 1st ground of appeal that the evidence under section 27 of the Evidence Ordinance is unsafe to act upon. The Honourable Judges of the Court of Appeal thereafter considered the 2nd, 3rd, 4th and 5th grounds of appeal together as it was all in relation to the credibility of evidence given by witness (PW1). The Honourable Judges of the Court of Appeal observed that the Learned High Court Judge had placed a heavy reliance on the evidence provided by PW1 to hold the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant guilty. PW1 was initially a suspect in this case however, no evidence was provided on the circumstances that led to his arrest. The Learned Counsel for the Appellants questioned the belatedness of the statements given to the police by PW1. The Honourable Judges of the Court of Appeal observed that not a single question had been put forth towards the witness for the belatedness of making the said statement. The witness, however, in his evidence had offered an explanation as to why he could not make a statement to the Police soon after the incident had taken place, as the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant had repeatedly threatened him and asked him to refrain from giving any information about the incident. Further, PW1 had seen both the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant at the crime scene at or about the time the crime was committed, he observed that the dead body was held by the 2nd Accused Appellant Appellant who was closely followed by the 1st Accused Appellant Respondent and dumped into the toilet pit. PW1 has stood by this position in both the examination in chief and

cross-examination and the Honourable Judges of the Court of Appeal observed that there was no motive on part of PW1 to implicate the Appellants in this crime.

The Honourable Judges of the Court of Appeal upon evaluation of the evidence concluded that there was no inconsistency in the lack of credibility with regard to the evidence given by PW1 and that the Learned High Court Judge was correct in accepting the said evidence. The Honourable Judges of the Court of Appeal upheld the conviction and sentence of the Learned High Court Judge, dismissing the appeal.

Being aggrieved by the decision of the Court of Appeal, the 2nd Accused Appellant Appellant by Petition dated 17.06.2019 sought Special Leave to Appeal from this Court. Accordingly, this Court granted Special Leave to Appeal from the aforementioned judgement of the Court of Appeal.

The Learned Counsel for the 2nd Accused Appellant Appellant submitted that there were no eyewitnesses to this case and it was purely based on the circumstantial evidence. The witness PW1 had been arrested by the police as a suspect, however later on named as a witness of the prosecution. 4 contradictions had been marked on behalf of the Appellant during the cross-examination of the witness of PW1 but the Learned Trial Judge has failed to properly evaluate those contradictions. The Learned Counsel further submitted that even though evidence has been led by the Prosecution that several productions were recovered on the statement of the appellant, but failed to mark the said production in the course of the trial. No Government Analysis Reports were marked. Only a section 27 statement under the Evidence Ordinance has been marked in evidence against the Appellant without even the productions being produced.

The Learned Counsel for the 2nd Accused Appellant Appellant submitted that the only evidence available against the appellant is that he assisted in the disposal of the body and that a stone on which there is said to have been a few strands of hair had been recovered on a Section 27 statement however the stone or strands of hair had not been produced in court and there was no expert evidence placed before the court that the said strands recovered by the Police. The Learned Counsel for the 2nd Accused Appellant Appellant further submitted that the daughter of the 1st Accused Appellant Respondent, witness PW2 (K. V. Tharusha Chathurika Kithsiri) commenced giving evidence on 25.11.2013, at the conclusion of the proceedings she had been released on Rs.10,000/- bail and that this amounts to pressure/fear being put on the witness.

I will now proceed to address the first question of law namely that "The Learned High Court Judge and the Hon. Judges of the Court of Appeal failed to take into consideration and properly evaluate the items of evidence led on behalf of the parties at the trial"

In order to address and answer the first question of law I must first evaluate the evidence led at the trial. The evidence led included the testimony of the PW1 Thilakarathna and PW2 Chathurika Kithsiri, the testimony of the investigating Police Officers and the testimony of the JMO who conducted the Post Mortem Examination. The Learned High Court Judge had placed heavy reliance on the testimony of PW1 and PW2. PW1 in his testimony stated the manner in which the 2nd Accused Appellant Appellant along with the 1st Accused Appellant Respondent had disposed of the body of the deceased by putting the body into the toilet pit situated on the property of the 1st Accused Appellant Appellant. Based on the testimony of the investigating Police Officer (PW9), who stated that, the search of the property which led to the discovery of the body of the deceased in the toilet pit was initiated based on information that he received from informants. The testimony of evidence provided by the Police Officer (PW14) investigating the offense stated that following a statement made to him by the 2nd Accused Appellant Appellant that a stone had been discovered with strands similar to human hair seen on that stone. It is important to note however that this stone has not been produced to the court for the purposes of examination nor has any expert evidence been led on the ground that the strands of hair alleged to be caught on the stone came from the body of the deceased or of the fact if the hair on the stone was even human hair.

Based on the evidence of the Judicial Medical Officer (PW7) who conducted the post-mortem inquiry there were 10 injuries on the body, the 1st injury was most likely caused as a result of a stabbing and was fatal. He explained that there were other injuries that could have been caused either by a blunt object or as a result of falling. The Judicial Medical Officer further stated that there were serious injuries caused to the head of the deceased, he stated that it is difficult to adduce the extent of the injuries without conducting an examination of the brain however he testified that these injuries were grave injuries caused to the head most likely by a blunt object.

The Police Officer who investigated the incident (PW9) stated in his evidence that the investigation commenced on 03.05.1999 after 3 complaints were made to him by the 1st Accused Appellant Respondent regarding the disappearance of her

husband. PW9 in his testimony stated that based on information received by informants he became suspicious of the 1st Accused Appellant Respondent and decided to search her property. After which he observed a toilet pit covered with wooden planks and fertiliser bags stacked on top of it situated within the property belonging to the 1st Accused Appellant Respondent. The witness stated he became suspicious upon such observation and recorded a statement from the 1st Accused Appellant Respondent and based on her statement, the body of the deceased was recovered. However, the Honourable Justices of the Court of Appeal correctly observed that, the part of the statement that led to the discovery of the body is dated 05.04.1999 marked එ 1, which is almost one month prior to the date the investigation had been initiated as stated by PW9 in his testimony before court. The testimony of PW9 reflects the correct date of discovery of the body which he stated to be 03.05.1999. The true copy of the extract of the Information Book of Ruwanwella Police is dated 05.04.1999 which could be a typing error. However, I agree with the reasoning of the Learned Justices of the Court of Appeal for not acting upon the section 27 statement of the Evidence Ordinance (This could have been clarified by the Learned High Court Judge during the trial stage).

Thus, the main evidence that remains is the evidence led against the two Accused are the statements made by the Witnesses PW1 and PW2. Justice Jayasuriya in **Sumansena V Attorney General [1999] 3 Sri L.R. at 137** observed that "In *our law of evidence the salutary principle is enunciated that evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a court of law. Section 134 of the Evidence Ordinance sets out that no particular number of witnesses shall, in any case, be required for the proof of any fact*". Their Lordships in the above judgement are of the view that a person may be convicted even on the evidence of one witness.

In the case of the **Attorney General V. Sandanam Pitchi Mary Theresa [2011] 2 Sri LR 292** Supreme Court held; "*Credibility is a question of fact and not law. Appellate Judges have repeatedly stressed the importance of Trial Judges' observation of the demeanor of witnesses in deciding questions of fact. Demeanor represents the Trial Judges' opportunity to observe the witness and his deportmen*t." The Learned High Court Judge in her judgement states that she is convinced of the truthful nature of the witness's testimony of PW1, by observing the demeanor of and deportment of the witness despite being subjected to a long and protracted cross-examination.

In the case of **Kotuwila Kankanamalage Premalal Leonard Perera v Attorney General [SC/Appeal/220/2014] decided on 09.11.2018 at page 05** the Supreme Court observed that *"It is evident that a Magistrate will only act on the evidence of a witness if the witness is a credible witness and the credibility is tested mainly on the demeanor or deportment of a witness after applying several tests such as probability/ improbability, spontaneity, belatedness, consistency/ inconsistency, and/or interestedness/ disinterestedness/".* It is apparent that the Learned High Court Judge and the Honourable Judges of the Court of Appeal have carefully analysed, evaluated, and weighed the evidence that was led in the trial and was convinced that the testimonies of these two witnesses in Court were cogent and truthful in nature.

I am of the view that the prosecution has established a strong case with incriminating and cogent evidence against the Accused Appellants. Under these circumstances the evidence of the 2nd Accused Appellant Appellant (the dock statement denying any and all involvement in the incident) had failed to create any reasonable doubt in the prosecution case.

Now I will proceed to address the second question of law namely that "This being a case based on circumstantial evidence, the Learned High Court Judge and the Hon. Judges of the Court of Appeal failed to properly consider and correctly apply the relevant principles applicable to such a case in order to arrive at a decision in the said case".

The rule regarding circumstantial evidence and its effect, has been stated by Chief Justice Shaw in the American Case of **Commonwealth v Webster [1850] 5 Cush. 295, 59 Mass. 295** the following words which have been referred to in **Seetin v The Queen [1965] 68 NLR 316 at 322**. "*Where probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge*"

This view has been reiterated in the case of **King vs. Abeywickrama [1943] 44 NLR 254** where it was held that "*In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence*".

Based on the evaluation of the evidence, the prosecution case hinges entirely on the testimony of Thilkaratne (PW1) in which he stated that he witnessed the 2nd Accused Appellant Appellant followed by the 1st Accused Appellant Respondent dispose of the body of the deceased into the toilet pit.

In the case of **Bhojraj v Sita Ram [1935] AIR, 193 PC 60 at 62** Lord Roche set out the real test for accepting and rejecting a testimony of a witness based on testimonial trustworthiness stating that "*How consistent is the story with itself (consistency per se). How does it stand the test of cross-examination? (Stability under cross-examination) How far it fits in with the rest of the evidence and the circumstances of the case (inconsistency inter se)*." It is important to note that PW1 has maintained the same position in his testimony throughout the trial.

In order to convict an Accused person on the basis of circumstantial evidence it is the duty of the court to be satisfied that the facts proved are consistent with the guilt of the accused and that the facts proved exclude every other possibility other than the guilt of the accused. In the case of **Gunawardena v the Republic [1981] 2 SLR 315 CA** it was held that "*Each piece of circumstantial evidence is not a link in a chain for if one link breaks the chain would fail. Circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three stranded together may be quite sufficient.*"

In the case of **Hanumant vs State of M.P [1952] AIR SC 343; 1953 Cri LJ 129** have laid down the following conditions which must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

"(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, that should not be explainable on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be conclusive;

(iv) They should exclude every possible hypothesis except the one to be proved.

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

I am of the view that these conditions are fulfilled in the present case which is solely dependent on circumstantial evidence. The Prosecution has proved its case according to the aforesaid measurements which are used on a case based on circumstantial evidence. When considering the cumulative effect of the evidence led in the present case, such as; the witness PW1's testimony of how the 2nd Accused Appellant Appellant and the 1st Accused Appellant Respondent had disposed of the body of the deceased which indicates that the 2nd Accused Appellant Appellant played a participatory role, PW2 witnessed her mother removing some earth with some red powder-like substance from the footpath and the testimony of the PW14 where he discovered a stone with human-like hair attached to it are all strands of evidence when considered together are sufficient to ascertain guilt on part of the both the Accused as all of these actions amount to the concealment of the crime that they are accused of committing.

Now I will proceed to answer the third question of law, namely that "The Learned High Court Judge and the Hon. Judges of the Court of Appeal failed to evaluate the evidence led against each accused in this case, separately, in arriving at a decision against each such accused."

In terms of evidence led against each accused, the evidence that is most significant is the testimony of Thilakarathna PW1. The evidence given by PW2 the 1st Accused Appellant Respondents daughter corroborates certain aspects of the testimony provided by Thilakarathna. Further based on the statement provided by the 2nd Accused Appellant Appellant to the investigating Police Officer (PW14) a stone had been discovered with hair similar to human hair attached to it, however, no expert evidence regarding this stone uncovered by such statement had been led in the trial. Therefore, the relevancy of its contents cannot be given any evidentiary value.

Thus, as reiterated above the main evidence against each accused is the testimony of the two witnesses PW1 and PW2. It can be contended however that the testimony provided by PW2 does not imply guilt on part of the 2nd Accused

Appellant Appellant as she claimed that she only saw her mother (the 1st Accused Appellant Respondent) clearing what looked like a red earth-like substance from the pathway approaching the house. Therefore the main evidence inferring the involvement of the 2nd Accused Appellant Appellant of crime is the testimony of PW1.

It is important to note that even though witness PW1 had been arrested on suspicion he had never been charged with the commission of the offence and hence was never on the footing of an accomplice. This position has been reiterated in the testimony of the investigating Police Officer (PW9). Therefore the testimony of witness PW1 does not fall within the footing of section 133 of the Evidence Ordinance of Sri Lanka.

It has been raised by the Learned Counsel for the 2nd Accused Appellant Appellant that the witness PW1 was first arrested as a suspect but later named as a witness for the prosecution and that 4 contradictions have been marked in the testimony of the witness during the cross-examination on the witness and that the learned Trial Judge had failed to properly evaluate those contradictions. The Learned High Court Judge in her Judgement states that the accused was arrested as an accomplice and upon receiving a pardon has become a witness for the state. This contradicts the evidence provided by the Ruwanwella OIC Jayalath Ralalage Senivartane (PW9) in which he stated that the witness was arrested on suspicion but never named as an accused.

With regard to the contradictions marked in the testimony of the witness PW1, the Learned High Court Judge in her judgement stated that when a witness is giving evidence about an occurrence that took place in the year 1999 in 2013 there will be discrepancies as a witness is not expected to have a photographic memory. Even though there were contradictions and lacunas in the testimony of witness PW1 those contradictions are not material because his stance remained unchanged throughout the cross-examination process. Therefore, the Learned Judge of the High Court was of the opinion that there was no reasonable doubt raised on testimony provided by the witness. I am in agreement with the stance of the Learned High Court Judge.

In **C.D. Fields Law Relating to Witnesses 2nd Edition, on page 208** the Author observes as follows "*There is nothing in law to justify the proposition that evidence of a witness, who happens to be cognizant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be*

relied on to the same extent as an accomplice. The real question in such a case was the degree of credit to be attached to the testimony of such a witness and that depends on all the facts and circumstances of the particular case".

In the case of **Karunartne v Attorney General [2005] 2 Sri L R. 236,** Justice Jagath Balapatabendi observed that "*Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors"*. Such as the contradictions that were drawn from PW1 testimony which can be expected when a long period of time has elapsed since the incident and giving evidence in court.

It was also raised that the statement from the witness was belated. When questioned as to his delay in reporting to the Police the witness stated that he was repeatedly threatened by the 1st Accused Appellant Respondent and 2nd Accused Appellant Appellant to remain quiet and not to disclose what he saw to anyone. He has given a reasonable explanation for making a belated statement. In the case of **Gamage Prabhath Janaka Nayana Priyantha Perera v Attorney General [CA/107/2012] decided on 27.05.2016 at page 6,** Justice A.H.M.D Nawaz of the Court of Appeal observed that "*Why the witness did not reveal a dastardly act or otherwise is a fact for him or her to explain and in fact if the explanation is plausible and credible the Court must act on the testimony albeit belated. If the explanation offered for the delayed statement is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion made by the trial court for accepting the belated testimony"*.

The witness avowed that he had no relationship with the deceased. The witness claimed that he was acquainted with the 1st Accused Appellant Respondent as he would visit her premises to consume Kasippu. The witness claimed he was acquainted with the 2nd Accused Appellant Appellant whom he had met a few times at the house of the Accused Appellant Respondent when he called over to consume illicit alcohol (Kasippu). The Investigating Police Officer (PW9) avowed that the witness PW1 was never arrested on suspicion and was never named as an accomplice. In the absence of ill will towards the Accused Appellants or affection with the deceased the nature of the witness's statement albeit belated, I find that the reason given by the witness for belatedness plausible and acceptable.

The 2nd Accused Appellant Appellant in his defence at the trial made a dock statement saying "නිලකරත්න කිව්වේ අමුලික බොරුවක්. මම නිර්දෝෂියි". In

the case of **Rex v Cochrane and Others [1814] Gurney's Report 479**, the court held that "*No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.*"

In **Krishantha de Silva v The Attorney-General [2003] 1 Sri LR 162**, it was held that"…*a prima facie case was made against the accused. It is noted that even though the accused made a statement from the dock he was silent as to what happened after the deceased was placed on the bed. I am of the view that the statement of the accused that he did not know anything about the incident cannot be accepted. An accused person is entitled to remain silent but when the prosecution has established strong and incriminating evidence against him he is required to offer an explanation of the highly incriminating circumstances established against him*. "Accordingly, the court tends to apply Ellenborough dictum in such situations.

In The **King v Wickremasinghe [1941] 42 NLR 313**, it was held that "*in the absence of an explanation, the court was entitled to form the opinion that the accused was directly responsible*". There is a strong and prima facie case against the 2nd Accused Appellant Appellant in the present case. Nevertheless, the 2nd Accused Appellant Appellant has failed to adduce any evidence or to call any witnesses to prove his innocence. The only evidence adduced by the 2nd Accused Appellant Appellant is the dock statement claiming his innocence however, not provided any explanation nor evidence thereafter.

Thus, in my opinion, the evidence available against the 2nd Accused Appellant Appellant is strong and incriminating; incompatible and inconsistent with the innocence of the 2nd Accused Appellant Appellant and consistent with his guilt. There is consistent and cogent evidence against the 2nd Accused Appellant Appellant. The Honourable Judges of the Court of Appeal stated that there is no reason to doubt the evidence of PW1 as there is no inconsistency nor lack of credibility regarding the evidence. The cumulative effect of all the circumstantial evidence led at the trial is the guilt of the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant. Therefore, it is evident that the 2nd

Accused Appellant Appellant voluntarily participated in the disposal of the dead body of the deceased and played a participatory role as it is most unlikely for an innocent person to partake in the disposal of a dead body to which he has no connection whatsoever. Accordingly, the only conclusion that could be arrived at on such evidence is that the 2nd Accused Appellant Appellant is guilty of the offence charged.

Therefore, considering all of the above factors in this appeal of the 2nd Accused Appellant Appellant, I am of the view that the Learned High Court Judge and the Honourable Judges of the Court of Appeal had arrived at a correct conclusion that the prosecution had proved the case against the 1st Accused Appellant Respondent and the 2nd Accused Appellant Appellant beyond a reasonable doubt.

Accordingly, I answer the 1st, 2nd, and 3rd questions of law on which special leave to appeal has been granted in the negative. For these reasons, the Judgment of the Court of Appeal and that of the High Court of Kegalle are affirmed. The Appeal of the 2nd Accused Appellant Appellant is hereby dismissed.

Judge of the Supreme Court

MURDU N.B. FERNANDO, P.C., J.

I agree.

Judge of the Supreme Court

MAHINDA SAMAYAWARDHENA, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Republic.

1. K. L. I. Amarasekera,
   No. 2,
   Kuruppu Mulla Road,
   Panadura.

2. Jayasumana Munasinghe,
   No. 315/6,
   Vidyala Mawatha,
   Makol-South,
   Makola.

3. E. M. Premaratne,
   673/21,
   Bluemendal Road,
   Colombo 15.

4. D. M. Anura Jayaweera,
   20B, Liyanage-wagura,
   Kandy.

5. K. U. R. Upali,
   Kanthi Niwasa,
   Aladeniya,
   Werellagala.

Supreme Court Application No:
S.C. (F/R) 52/2015

PETITIONERS

Vs.

1. Sri Lanka Ports Authority,
   No. 19,

Chaithya Road,
Colombo 01.

2. Dr. Lakdas Panagoda (Chairman)

3. Capt. Asitha Wijesekera (Vice Chairman)

4. Mr. Jagath P. Wijeweera (Director)

5. Mr. Saliya Senanayake (Director)

6. Suresh Edirisinghe (Director)

7. Mr. Athula Bandara Herath (Director)

8. Capt. Nihal Keppetipola (Managing Director)

   The 2nd to 8th Respondents of; Board of Director, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 01.

9. L. H. R. Sepala,
   Chief Human Resource Manager,
   Sri Lanka Ports Authority,
   Kochchikade,
   Colombo 13.

10. Hon. Attorney General,
    Attorney General's Department,
    Hulftsdorp,
    Colombo 12.

RESPONDENTS

BEFORE : **PRIYANTHA JAYAWARDENA, PC., J.**
VIJITH K. MALALGODA, PC., J.
K.KUMUDINI WICKREMASINGHE, J.

COUNSEL : Pulasthi Hewamanna with Harini Jayawardhana instructed by Sanjeewa Kaluarachchi for the Petitioners.

Yuresha de Silva, SSC for the Respondents.

ARGUED ON : 24.11.2021

WRITTEN SUBMISSIONS : Petitioners on 27.07.2021 and 08.12.2021
Respondents on 03.08.2021 and 13.01.2022

DECIDED ON : 27.09.2023

K. KUMUDINI WICKREMASINGHE, J.

This is an Application filed under Article 126(1) of the Constitution by the Petitioners seeking, *inter alia*, for a declaration that their fundamental rights to equality before the law and equal protection of the law as guaranteed by Article 12(1) of the Constitution and freedom of occupation as guaranteed by Article 14(1)(g) have been violated, as a result of the arbitrary, capricious and/or irrational manner in which the Petitioners were deprived of their appointments to the rank of Assistant Security Officer, in contravention of established procedures and assurances of the Sri Lanka Ports Authority (hereinafter referred to as the 1st Respondent).

On 13.08.2015, having heard the Counsel for the Petitioners in support of this Application and the Learned DSG who appeared for the Respondents, this court granted leave to proceed under Article 12(1) of the Constitution.

The Petitioners, aged 53-56 years at the time of filing this Application, have joined the 1st Respondent between 1981 and 1986, as Security Guards. At the time of filing this Application, they were serving as Security Sergeants. They have been appointed to the said positions after a written examination and an interview.

The Petitioners have become aware of an internal notice dated 11.02.2013 calling applications for appointments of Assistant Security Officers, and have submitted the duly completed application forms as required, which have been then accepted by the 1st Respondent. The requisite application form at clause 11 specifically provided for applicants who were 50 years and above, to notify the 1st Respondent whether they would opt to sit for a written examination or not, to which all the Petitioners in their respective application forms opted not to face such written examination. The Petitioners state that the accepted practice at the 1st Respondent has been to permit applicants who are over 50 years of age who apply for internal appointments, to forego a written examination and have their internal appointments based solely on the interview process. They further state that approximately 30% of vacancies are, as a practice, set aside for such method of internal appointments. The Petitioners have later found out that such established practice is based on **Circular 16/2003** dated 28.05.2002.

However, the Petitioners state that they were asked by the officers of the management of the 1st Respondent to nominally sit for the said written examination, with the assurance that their appointments would be solely based on their performances at the interview. Accordingly, the Petitioners have nominally sat for the said written examination on or around 13.03.2014 on the said verbal assurance that their performances at the written examination would not be a deciding factor in being chosen for the appointments.

The results of the said written examination were released in or around July 2014, according to which the Petitioners have obtained average marks between 50 to 62, as against the pass mark of 40. Soon after, the Petitioners except the 1st Petitioner have been summoned for interviews. The said Petitioners have attended the said interview and later, on or around 22.09.2014, they have become aware that approximately 46 individuals, a majority of whom are junior to the Petitioners, have been appointed as Assistant Security Officers based on their performances at the written examination and interview. However, none of the Petitioners were included amongst the said appointments. Thereafter, the Petitioners have made several representations to the management of the 1st Respondent enquiring as to the prospects of their appointments to the said position, to no avail.

The Petitioners state that the assurances made to them by the 1st Respondent and/or its officers that the Petitioners need only nominally sit for the written examination, and the results thereon would not be a deciding factor in being appointed to the rank of Assistant Security Officer gave rise to a legitimate expectation that they would be considered for appointments

to the said positions, as the verbal assurances made to that effect were clear and unambiguous which were reasonable for the Petitioners to rely on. Moreover, they claim that the conduct and established practice of the said 1st Respondent of allocating 30% of vacancies to be filled by those above the age of 50 years, disregarding the written examination and based solely on the interview further engendered in them a legitimate expectation that such established practice would be followed in respect of the appointments of the Petitioners as well.

In the circumstances, the Petitioners plead that their fundamental rights guaranteed under Article 12(1) and Article 14(1)(g) of the Constitution have been violated by the Respondents for the reasons of acting contrary to publicly disclosed criteria as stipulated in **Circular 16/2003** and established practice pertaining to appointments of persons above 50 years of age, failing to disclose the number of vacancies for the rank of Assistant Security Officer and such being done for a collateral purpose, appointing officers junior to the Petitioners to positions senior to the Petitioners in violation of published criteria and established practice, and in breach of the principles of natural justice and legitimate expectations of the Petitioners.

Accordingly, this Court granted leave to proceed for the alleged infringement of fundamental rights of the Petitioners as guaranteed by Article 12(1) of the Constitution.

Thereafter, the Chairman of the 1st Respondent filed an affidavit dated 26.11.2015 and stated, *inter alia*, that the 3rd Petitioner was promoted to the post of Assistant Security Officer on 08.09.2015 with effect from 03.26.2015. He further stated that the application forms issued to some of the Petitioners, with the exception of the 5th Petitioner who had filled the correct application form, contained the option to indicate whether they opt to sit for a written examination or not. Such application forms were in fact old application forms, prepared based on the previous Scheme of Recruitment which was in place prior to the establishment of the presently applicable Scheme of Recruitment. Thus, he contended that **Circular 16/2003** is no longer in force, in view of the notice calling for applications dated 11.02.2013, which is the presently applicable Scheme of Recruitment. The said notice calling for applications contains the requirement to sit for a written examination. As such, the Chairman of the 1st Respondent in his affidavit further stated that it had been an inadvertence on part of the officers who issued the application forms as well as the officers who accepted the duly filled application forms.

He further stated that the Petitioners secured 27.94, 33.91, 24.60, 29.33, and 31.62 marks respectively, at the written examination and the 1st Petitioner was in fact unsuccessful at the said written examination.

The Chairman of the 1st Respondent also stated that the relevant notice calling applications for the positions of Assistant Security Officers filed by the Petitioners is incomplete as it contains only two pages as opposed to the actual notice which contained three pages. Therefore, the Petitioners have deliberately/mistakenly left out the actual page two of the said notice which discloses the necessity to sit for a written examination. He further claimed that pages of the said notice have not been numbered properly as both the second and third pages of the said notice have been numbered as page 2.

Moreover, he stated that the said notice was published on 11.02.2013 and the Petitioners cannot now claim that they were unaware of the requirement to sit for a written examination, and if they were aggrieved by the said requirement, they could have taken appropriate measures soon after. He further stated that the 3rd Petitioner was informed of the requirement to sit for a written examination, to which all the Petitioners subsequently complied.

He has denied the remaining averments which are inconsistent with what is stated above and stated that the Respondents have not violated fundamental rights of the Petitioners, they are not entitled to any of the reliefs sought and the Application should accordingly be dismissed.

The Petitioners in their Counter Objections stated that the letter of appointment of the 3rd Respondent had been issued after the filing of the instant Application and the said letter of appointment, in any event, affected his seniority since others similarly circumstanced as the Petitioners have been so appointed with effect from at least 10.09.2014. Further, the Petitioners stated that the notice they have submitted to Court was the notice that was available to them at the time of filing this Application. As such, the notice calling for applications submitted by the Chairman of the 1st Respondent in his Affidavit, marked **2R2**, was not the document available to the them. Moreover, the Petitioners claimed that the application forms that they submitted were in fact accepted by the 1st Respondent and they were never informed of any defect when the said applications were accepted.

The Petitioners stated that the Respondents acted contrary to the disclosed criteria in **Circular 16/2003** and have failed to disclose any change in such criteria. Therefore, such criteria are still in force and as such, **2R2** is *void ab initio.*

The Respondents in their further written submissions stated that by a joint-motion dated 08.12.2021, the Letters of Promotion of the 1st, 2nd, 4th and 5th Petitioners to the rank of Assistant Security Officer were tendered as directed by the Court. The said promotions were granted based on a Notification issued in 2017, applications submitted by the said Petitioners and based on interviews held in 2018, pursuant to the filing of this Application and tendering of Objections on behalf of the Respondents. The Respondents further stated that the Petitioners have now retired from service and therefore, the only remaining issue is with regard to the effective date of promotions to the 1st, 2nd, 4th and 5th Petitioners to the said posts.

Accordingly, the Respondents have submitted that the 1st, 2nd, 4th and 5th Petitioners were promoted as Assistant Security Officers based on a process which commenced subsequent to the filing of this Application and they were not eligible to be promoted to the said posts based on the process which commenced in 2013. Therefore, the Respondents have not infringed upon the fundamental rights of the Petitioners as guaranteed by Article 12(1) of the Constitution.

Before moving to determine the Application of the Petitioners upon its merits, I have to first consider the preliminary objection taken by the Respondents in their written submissions that the Petitioners Application is time barred and therefore, it should be dismissed as the Petitioners have failed to comply with the mandatory time limit requirement prescribed in Article 126(2) of the constitution.

Article 126(2) reads as follows;

"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement…"

The effect of Article 126(2) as stipulated above is that a Petition alleging an infringement or imminent infringement of fundamental rights should be filed within a period of one month of such alleged infringement or imminent infringement and failure to comply with this requirement would render such Petition time barred and unmaintainable.

Accordingly, the Respondents contend in their written submissions that the Application of the Petitioners is time barred for the reason that it was

preferred on 06.03.2015 challenging the purported new Scheme of Recruitment, marked **2R2**, introduced on 11.02.2013.

This Court has time and again held that the time limit stipulated in Article 126(2) is a mandatory requirement.

In the case of ***Demuni Sriyani de Zoysa and others v. Dharmasena Dissanayake and others*** **[SC (FR) 206/2008, SC Minutes of 09.12.2016]**, Prasanna Jayawardena, PC., J. observed that;

"The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution. Thus, in ***EDIRISURIYA Vs. NAVARATNAM [1985 1 SLR 100 at p.105- 106]****, Ranasinghe J, as he then was, stated "This Court has consistently proceeded on the basis that the time limit of one month set out in Article 126 (2) of the Constitution is mandatory.".*

In the above case, the Petitioners contended that failure of the Respondents to allocate marks in the selection process for Class II Grade II of the Sri Lanka Administrative Service for the period the Petitioners served on a supernumerary basis in the 'Supra Class' of the General Clerical Service and subsequently, in the Public Management Assistants' Service, amounted to a violation of their fundamental rights as guaranteed by Article 12(1) of the Constitution. The said selection process was based on the Combined Services Circular No. 01/2007 issued on 05.02.2007 by the Secretary of the Ministry of Public Administration and Home Affairs. The Petitioners had been well aware that in terms of the said Circular they would not be allocated marks for their period of service on a supernumerary basis. Since the Petition was filed on 05.06.2008, 16 months after the said Circular was issued, the Respondents contended that the Application of the Petitioners was time barred. Prasanna Jayawardena, PC., J., upholding the said preliminary objection, elucidated that;

"Therefore, it is clear that, the alleged infringement occurred on or soon after 05th February 2007 when the Circular marked "P9" was issued and made known to the Petitioners."'

Therefore, it was held in the above case that;

"The Petition has been filed on 05th June 2008 which is more than 16 months after the day the Petitioners themselves state the alleged infringement occurred. Therefore, the Petition is time barred and liable to be dismissed

unless the Petitioners can seek an extension of the time limit on grounds that, they were prevented from filing the Petition earlier."

The case of ***Dayaratne and others v. National Savings Bank*** **[2002] 3 SLR 116** is also important in this regard, where Mark Fernando, J. observed that;

"The first limb of the respondents' preliminary objection is that after the lapse of one month the petitioners were not entitled to challenge the scheme of promotion. The 1st respondent was entitled, from time to time, and in the interests of the institution, to lay down the basis on which employees would be promoted, and that became part of the contract of employment. The scheme of promotion published on 12.02.2001 was directly and immediately applicable to the petitioners, and became part of the terms and conditions of their employment. If they did not consent to those terms and conditions, as being violative of their rights under Article 12, they should have complained to this Court within one month. They failed to do so. Instead, they acquiesced in those terms and conditions by applying for promotion without any protest. I, therefore, uphold the objection."

However, as held by Mark Fernando, J. in the case of ***Gamaethige v. Siriwardena*** **[1988] 1 SLR 344**, that in exceptional circumstances this Court has the discretion to entertain an application not made within the stipulated time limit.

"While the time limit is mandatory, in exceptional cases on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."

A similar view was enunciated by Aluwihare, PC., J. in the case of ***K.H.G. Kithsiri v. Hon. Faizer Musthapha MP, Minister of Provincial Councils and Local Government and others*** **[SC (FR) 362/2017, SC Minutes of 10.01.2018],** as well.

"This court, however, in exceptional circumstances where the Petitioner was prevented, by reason beyond his control, from taking measures which would enable the filing of a Petition within one month of the alleged infringement and if there had been no lapse on the part of the Petitioner, has exercised its discretion in entertaining fundamental rights applications and had not hesitated to apply the maxim lex non cogit ad impossibilia."

Aluwihare, PC., J. further went onto state in the same case that;

"... the time limit of one month prescribed by Article 126 of the Constitution to invoke the fundamental rights jurisdiction for an alleged violation is mandatory. In a fit case, however, an application made outside the time limit of one month stipulated in Article 126 could be entertained where the delay had resulted due to a reason or reasons as the case may be that are beyond the control of the Petitioner or where the court is satisfied that the circumstances prevailed at the time relevant, it would have been impossible for the Petitioner to have invoked the jurisdiction within 30 days and to be more precise where the Principle lex non cogit ad impossibllia would be applicable."

The contention of the Respondents in this case is that the Petitioners have preferred this Application on 06.03.2015 challenging the purported new Scheme of Recruitment introduced on 11.02.2013, and as such this Application is time barred. Further, the Respondents have also submitted that the Petitioners have failed to establish that the reason they were unable to comply with the said time limit requirement as stipulated in Article 126(2) was due to circumstances beyond their control and therefore, this Application should be dismissed.

However, the Petitioners claim that Circular No. 16/2003 is still in force and a valid rule within the Authority. As such, it must be followed until such time it is duly changed. It is their submission that the document marked **2R2**, which the Respondents state as being the new Scheme of Recruitment, is an internal notice calling for applications and therefore, it does not have the power of overruling a Circular issued by the Chairman of the 1st Respondent.

Since the success of the preliminary objection taken by the Respondents is contingent on the submission that a change of rule has taken place in view of the document marked **2R2**, I will firstly move to consider the contentions of parties pertaining to the presently applicable Scheme of Recruitment in respect of the Petitioners.

In examining the material placed before this Court, it is apparent that the document marked **2R2** is not numbered properly. Although the first page has been numbered correctly as page 1, both the second and third pages have been numbered as page 2. This was also accepted as such by the Respondents themselves. Further, the application forms received by four out of the five Petitioners, with the sole exception of the 5th Petitioner, contained the option to indicate their preference as to whether they are willing to sit for the written examination or not. Thus, as pleaded by the Petitioners, an 80% of application forms in the given instance can be deduced as being based on **Circular 16/2003**.

Although it is submitted by the Respondents that the said Circular is no longer in force, the duly completed said application forms of the Petitioners were in fact accepted by officers of the 1st Respondent. The Chairman of the 1st Respondent stated in his Affidavit that it had been an inadvertence on part of the officers who accepted the duly filled application forms. The Petitioners state that thereafter, the officers of the management of the 1st Respondent have given assurances to the Petitioners that they need only nominally sit for the said written examination. Further, the Petitioners were never informed of the purported change in the said Scheme of Recruitment until this matter was brought before this Court.

Moreover, the document marked **2R2**, which the Respondents claim as being the presently applicable Scheme of Recruitment is a notice calling for applications signed by the Chief Human Resource Manager of the 1st Respondent as opposed to **Circular 16/2003**, which is signed by the then Chairman of the 1st Respondent.

Section 17(1)(a) of the **Interpretation Ordinance of Sri Lanka**, which I find as directly applicable and conclusive in this regard, provides the procedure for changing of rules as follows;

> *(1) Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules: -*
>
> *(a) any rule may be amended, varied, rescinded, or revoked by the same authority in the same manner by and in which it was made;*

Section 7(1)(e) of the **Sri Lanka Ports Authority Act** grants the 1st Respondent the power to *"make rules in relation to the officers and servants of the Authority"*, including, *inter alia,* their appointments and promotions. **Section 9** of the same Act holds the Chairman of the Sri Lanka Ports Authority as being responsible for the administration of the affairs of the said Authority.

Thus, I am of the opinion that **Circular 16/2003**, as a rule applicable to internal appointments issued in accordance with the aforesaid provisions will cease to have force, only if another Circular to that effect is issued by the Chairman of the said Authority himself, in light of **Section 7(1)(e)** and **Section 9** of the **Sri Lanka Ports Authority Act** read together with **Section 17(1)(a)** of the **Interpretation Ordinance of Sri Lanka.**

Therefore, after careful consideration of the law and discrepancies inherent in the submissions of the Respondents, I reject the argument of the Respondents that **Circular 16/2003** is no longer in force in view of the document marked **2R2,** and hold that **Circular 16/2003** is still in force and as such, it is the presently applicable Scheme of Recruitment in respect of the Petitioners.

Accordingly, I also reject the preliminary objection of Respondents that the instant Application is time barred as they have preferred the Application on 06.03.2015 while the purported new Scheme of Recruitment was introduced on 11.02.2013, as I have already held that **Circular 16/2003** is still in force and has remained in force during the entirety of the time period concerned and is in fact the applicable Scheme of Recruitment to the Petitioners.

As leave to proceed was granted under Article 12(1) of the Constitution, it is now necessary to analyze the relevant facts and material submitted before this Court to ascertain whether the decision of the 1st Respondent to depart from **Circular 16/2003** amounts to a violation of fundamental rights as aforesaid.

Article 12(1) of the Constitution reads as follows:

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

The Respondents in their written submissions have brought forth the contention that they have acted in good faith and in terms of the Scheme of Recruitment marked **2R2**. Thus, in order for the Petitioners to successfully plead that their right to equality as guaranteed under Article 12(1) of the Constitution has been violated, they must prove that they were in fact discriminated against other persons who were similarly circumstanced as them, which they were in fact not in the current situation at hand. However, the Petitioners, on the other hand, have contended that the concept of equality as guaranteed by Article 12(1) has since evolved and the violation of a rule laid down by an authority would also amount to an infringement of the right to equality, as the Court has in several Judgments, focused on the requirement of ensuring reasonableness as opposed to requiring arbitrariness to find an infringement of Article 12(1).

The former position taken up by the Respondents in respect of the right to equality was upheld in the case of ***Perera v. Jayawickrama*** **[1985] 1 SLR 285** by a Full Bench of this Court. The majority opinion delivered by Sharvananda, CJ. held that;

"This Article is violated both by unequal treatment of the equals and equal treatment of the unequals. The aim of the article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answers the same though the concept of equality does not involve the idea of absolute equality among human beings. Hence, equality before the law does not mean that things which are different shall be treated as they were the same. Thus, the principle of equality enacted under Article 12 does not absolutely prevent the State from differentiating between persons and things. The State has the power of what is known an "classification" on a basis of rational distinction relevant to the particular subject dealt with. So long as all persons failing into the same class are treated alike there is no question of discrimination and there is no question of violating the equality clause. The discrimination which is prohibited is treatment in a manner prejudicial as compared to another person in similar circumstances. Discrimination is the essence of classification; so long as it rests on a reasonable basis there is no violation of the constitutional rights of equality."

However, the latter view taken up by the Petitioners was endorsed by Wimalaratne, J., who delivered a dissenting opinion in the same case:

"In order to establish discrimination, it is not necessary for the Petitioner to show that correct procedure was applied in the case of others and that he has been singled out for the adoption of a different procedure. Nor is it necessary for him to show that no others were victims of the wrong procedure now applied for the first time, perhaps in his case."

An identical stance to that of the Respondents was followed by Sharvananda, CJ. in the case of ***C.W. Mackie and Company Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and others*** **[1986] 1 SLR 300**, where His Lordship held that;

"In order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis."

The requirement of proving unequal treatment was further emphasized by Dr. Shirani Bandaranayake, J., in the case of ***Farook v. Dharmaratne, Chairman, Provincial Public Service Commission and others*** **[2005] 1 Sri LR 133**, as follows;

"…. the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required

qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his fundamental rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act."

In the case of ***Thilak Lalitha Kumara v. S.S. Hewapathirana, Secretary, Ministry of Youth Affairs and Skills Development*** **[SC (FR) 451/2011, SC Minutes of 17.09.2015]**, Anil Gooneratne, J. dismissing an application claiming a violation of fundamental rights as guaranteed by Article 12(1), also held that;

"To survive equal protection attack the different treatment of two classes of persons must be justified by a relevant difference between them."

Similarly, in the case of ***Wasantha Disanayake and others v. Secretary, Ministry of Public Administration and Home Affairs and others*** **(SC (FR) 611/2012, SC Minutes of 10.09.2015)**, K. Sripavan, CJ. held that it is necessary to show unequal treatment and discriminatory action against the Petitioners in pleading a violation of right to equality;

"Article 12(1) of the Constitution contemplates the right to equality and states that, 'All persons are equal before the law and are entitled to the equal protection of the law'. What is meant here is that equals should be treated equally and similar laws and regulations should be applicable to persons who are similarly circumstanced. In reference to Article 12(1) of the Constitution, it would be necessary to show that there had been unequal treatment, and therefore, there exist discriminatory action against the Petitioners."

Further, in the more recent Judgment of ***R.M. Premil Priyalath de. Silva and others v. Akila Viraj Kariyawasam (M.P), Hon. Minister of Education and others*** **[SC (FR) 97/2015, SC Minutes of 20.02.2018]**, taking a similar stance, Vijith K. Malalgoda, PC., J. referring to the Judgment in the case of ***Samadi Suharshana Ferdinandis and another***

V. S.S.K. Aviruppola, Principal, Visakha Vidyalaya and others **[S.C. F.R. No. 117/2011]** held that;

"As referred to above in this judgment, the Petitioners have failed to place before this court any material to establish that they were treated differently by any of the above Respondents when they decide not to admit the 3rd Petitioner to Dharmashoka Vidyalaya, Ambalangoda. In the said circumstances I hold that Petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12 (1) of the Constitution had been violated by the Respondents."

However, the latter view taken up by the Petitioners with regards to right to equality is supported by the case of ***Jayasinghe v. Attorney General [1994]*** **2 SLR 74**, where Mark Fernando, J. took the view that the Court must take judicial notice in instances where the fundamental requirements of justice and fair play were not followed. It was further stated in the same case by Mark Fernando, J. that the Full Bench decision in the case of ***Perera v. Jayawickrama*** is doubtful as to laying down an inflexible principle of universal application and that the facts of each case must be considered in perusing a violation of Article 12(1):

"I doubt whether that decision must be regarded as laying down an inflexible principle of universal application: the facts of each case must be considered. If an employee alleges a denial of equal protection because he was compelled to participate in a disciplinary inquiry without ever being told what the charges against him were, would a Court demand evidence to prove at least one other contrary instance? I think not. The Court must take judicial notice, that ordinarily - and not merely in a few instances - charges are disclosed prior to inquiry."

Further, in the case of ***Wickremasinghe v. Ceylon Petroleum Corporation*** **[2001] 2 SLR 409**, while holding that a decision of the Respondent Corporation to terminate the dealership of the Petitioner is violative of his right to equality guaranteed under Article 12(1) of the Constitution, Sarath N. Silva, CJ. took the view that;

"The case of ***Perera v. Jayawickrema*** *demonstrates the ineffectiveness of the guarantee in Article 12(1) which results from the rigid application of the requirement to prove that persons similarly circumstanced as the Petitioner were differently treated. Such an application of the guarantee under Article 12(1) ignores the essence of the basic standard which is to ensure reasonableness as opposed to arbitrariness in the manner required by the basic standard."*

This position was further strengthened by the recent Judgment in the case of ***Wijerathna v. Sri Lanka Ports Authority*** **[SC (FR) 256/17, SC Minutes of 11.12.2020]**, where Yasantha Kodagoda, PC., J. held that;

"It is now well accepted that, the 'right to equality' covers a much wider area, aimed at preventing other 'injustices' too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement, and in the context of Sri Lanka a 'Fundamental Right', conferred on the people by the Constitution, for the purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law."

At p. 17 of the said Judgment, His Lordship further elaborated that the Court has since moved on from the decision of ***Perera v. Jayawickrema*** towards a more progressive definition of the concept of equality;

"Of course, since the pronouncement of the majority judgment in ***Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others****, the Supreme Court of Sri Lanka has somewhat distanced itself from the interpretations provided by Chief Justice S. Sharvananda to the concepts of 'equality' and 'discrimination', and provided an expansive and more progressive definition of the concept of equality, founded upon the concept of 'substantive equality', aimed at protecting persons from arbitrary, unreasonable, malicious and capricious executive and administrative action."*

The case of ***E.P. Royappa v. State of Tamil Nadu,*** **AIR 1974 SC 555**, from the Supreme Court of India, is enlightening in this regard, owing to the former Chief Justice of India P. N. Bhagwati's exceptional elucidation of the concept of equality;

"Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose J, 'a way of life', and it must not to be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional doctrinal limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14."

The Article 14 of the Constitution of India which recognizes equality before the law is remarkably similar to Article 12(1) of the Constitution of Sri Lanka and although it is *ex-facie* apparent that the latter Article is wider in scope compared to the former, whereas the jurisdiction of the Supreme Court of India pertinent to petitions and appeals claiming infringements of fundamental rights is wider than that of the Supreme Court of Sri Lanka, such divergences, as very correctly expounded by Yasantha Kodagoda, PC., J. in the Judgment of ***Wijerathna v. Sri Lanka Ports Authority***, at p. 18, *"should not debar Sri Lankan justices from where appropriate, taking persuasive cognizance of Indian jurisprudence relating to the interpretation of the substantive legal concepts embodied in the 'right to equality'."*

Therefore, after cautious perusal and contemplation of the law, the need for such law and the development of the concept of equality as discussed above, I am inclined to align myself with the interpretation that a Petitioner being discriminated against another person who was similarly circumstanced as the Petitioner is not the sole criterion for successfully pleading a violation of right to equality, as arbitrary, mala fide and unreasonable executive action is also seen as being inconsistent with the very concept of equality, thereby infringing upon the right to equality before the law as guaranteed under Article 12(1) of the Constitution.

Accordingly, I hold that the decision of the 1st Respondent to depart from the already established criteria for internal appointments in the form of **Circular 16/2003** in this instance is arbitrary, mala fide and unreasonable, and thereby violated the fundamental rights of the Petitioners as guaranteed by Article 12(1) of the Constitution.

I will now briefly examine whether the practice of the 1st Respondent of allocating 30% of vacancies to be filled by those above the age of 50 years, disregarding the written examination and based solely on the interview, and assurances made to the Petitioners by the 1st Respondent and/or its officers that the Petitioners need only nominally sit for the written examination and the results thereon would not be a deciding factor in selection for appointments, gave rise to a legitimate expectation.

In the case of ***Fernando v. Associated Newspapers of Ceylon Ltd.*** **[2006] 3 Sri LR 141**, Gamini Amaratunga, J. held that;

"The existence of a legitimate expectation, as opposed to a legally enforceable right, is a relevant factor in considering the just and equitable relief this Court may grant under Article 126 (4) of the Constitution when it is shown that the action of the executive which frustrates the legitimate expectation amounts to

a denial of the right to equal protection of the law guaranteed by the Constitution."

Moreover, Priyantha Jayawardena, PC., J. in the case of ***Nimalsiri v. Fernando*** **[SC (FR) 256/2010, SC Minutes of 17.09.2015]**, at p. 8, remarked on the Judgment of ***Dayaratne v. Minister of Health and Indigenous Medicine [1999] 1 SLR 393*** by Justice Amarasinghe, as follows;

"In ***Dayaratne v. Minister of Health and Indigenous Medicine [1999] 1 SLR 393****, Amarasinghe J, held that destroying of a legitimate expectation is a ground for judicial review which amounted to a violation of equal protection guaranteed by Article 12 of the Constitution."*

However, in the aforesaid case, Priyantha Jayawardena, PC., J. after analyzing all the relevant facts and circumstances dismissed the said Application holding that the Petitioner did not have a legitimate expectation to be enlisted in the Sri Lanka Army for a third time.

Dr. Shirani Bandaranayake, J., in the case of ***Lancelot Perera v. National Police Commission and others*** **[2007] 2 ALR 24**, expounded on the concept of legitimate expectation as follows;

"Legitimate expectation, as was stated by me in ***Anushika Jayatileka and others v. University Grants Commission [S.C. (Application) No. 280/2001 – S.C. Minutes of 25.10.2004]*** *derives from an undertaking given by someone in authority and such an undertaking may not even be expressed and would have to be known from the surrounding circumstances.*

Priyantha Jayawardena, PC., J., in the aforesaid Judgment of ***Nimalsiri v. Fernando***, also sheds light on the concept of legitimate expectation;

"The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority. However, the said criteria should not be considered as an exhaustive list as the doctrine of legitimate expectation has a potential to develop further. Legitimate expectation can be either based on procedural propriety or on substantive protection."

Therefore, the doctrine of legitimate expectation can be further divided into two aspects as procedural legitimate expectation and substantive legitimate expectation. Prasanna Jayawardena, PC., J. citing an extract from Prof. Paul

Craig's book Administrative Law 7th Edition in the case of ***M.R.C.C. Ariyarathne v. N.K. Illangakoon*** **[SC (FR) 444/2012, SC Minutes of 30.07.2019]**, has explicated on the said two aspects as follows:

"The phrase 'procedural legitimate expectation' denotes the existence of some process right the applicant claims to possess as the result of a promise or behaviour by the public body that generates the expectation …. The phrase 'substantive legitimate expectation' captures the situation in which the applicant seeks a particular benefit of or commodity, such as a welfare benefit or a license, as the result of some promise, behaviour or representation made by the public body."

Moreover, as stated by Priyantha Jayawardena, PC. J., in the Judgment of ***Nimalsiri v. Fernando***, the applicability of the doctrine of legitimate expectation depends on the facts and circumstances of each case;

"In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the said doctrine is based on the facts and circumstances of each case."

In the instant Application, the Petitioners argue that they had a procedural legitimate expectation based on the established procedure and practice of the 1st Respondent of allocating 30% of vacancies in internal appointments to be filled by those above the age of 50 years disregarding the written examination and based solely on the interview, as borne out by the **Circular 16/2003**. The Petitioners also argue that they had a substantive legitimate expectation in light of the substantive benefit of 30% of vacancies being set aside for such a method of internal appointments for those over 50 years of age in conformity with the same Circular.

The case of ***Lancelot Perera v. National Police Commission and others*** is important in this regard, where the Petitioner, a Senior Superintendent of Police, successfully claimed that the decision of the Respondents to not appoint him to the post of Deputy Inspector General of Police after being

called for interviews and being placed third in order of merit out of 52 candidates, amounted to a violation of his fundamental rights as guaranteed by Article 12(1) of the Constitution. Although the Police Commission had arbitrary decided not to allow the Petitioner to apply for further promotions, the Respondents had later decided to depart from the said position and directed the Petitioner to attend the said interview. Accordingly, the Petitioner claimed that the decision to call him for the said interview gave rise to a legitimate expectation on his behalf that he would be promoted to the post of Deputy Inspector General of Police if he becomes successful at the interview. Dr. Shirani Bandaranayake, J., after a thorough analysis of the interconnection between substantive legitimate expectations and the right to equality, held that;

"Considering all the circumstances, it is apparent that the application for the promotion and the invitation to attend the interview and by its successful completion the petitioner had a legitimate expectation that he would be promoted to the rank of Deputy Inspector General of Police."

Circular 16/2003 is unambiguous in respect of such practice and procedure, that 30% of vacancies will be allocated to applicants over 50 years of age who are excused from sitting for the written examination. The Respondents themselves have admitted in their Affidavit and written submissions that the past practice of the 1st Respondent was to have 30% of vacancies set aside in internal appointments for those over 50 years of age and to select such applications solely based on the interview process in accordance with the said Circular. I have already held that **Circular 16/2003** is still in force, and has been in force throughout the concerned period and remains as the applicable Scheme of Recruitment in respect of the Petitioners.

Further, the officers of the management of the 1st Respondent have given assurances to the Petitioners that they need only nominally sit for the written examination and the results of the said examination would not be a deciding factor in their selection for appointments to the posts of Assistant

Security Officer. The said assurances can be construed as a promise made by the 1st Respondent to the effect that the established practice would be followed in the situation at hand as well and 30% of the vacancies would be allocated for the said method of appointment.

Moreover, the relevant applications issued to all the Petitioners, with the exception of the 5th Petitioner, contained the option to indicate whether they opt to sit for a written examination or not and they have all opted not to sit for such written examination. Subsequently, the duly completed application forms of Petitioners have been accepted by the 1st Respondent. Further, the 1st Respondent has neither informed the Petitioners nor brought to their attention that the said Circular is no longer in force and a change of policy has taken place until proceedings were instituted before this Court.

Therefore, after careful perusal of the aforementioned facts and circumstances, I am inclined to hold that the Petitioners had justifiable reasons to form a legitimate expectation, both in terms of a procedural legitimate expectation and substantive legitimate expectation, that the established procedure and practice of allocating 30% of available vacancies to the said method of appointment would be followed by the 1st Respondent. As such, a legitimate expectation was in fact accrued to the Petitioners to such extent, which was subsequently violated by the Respondents owing to their failure to follow the established procedure for internal appointments for those over 50 years of age and allocate the said percentage of 30% of vacancies to such method of appointment, in accordance with the **Circular 16/2003**.

Since it is established as aforesaid that destroying of a legitimate expectation is a ground for judicial review which amounted to an infringement of right to equality as guaranteed by Article 12(1) of the Constitution, in the circumstances, I am of the opinion that the fundamental rights of the Petitioners guaranteed under Article 12(1) have been violated by the 1st Respondent.

Having examined the facts of the case and material placed before this Court, I allow the Application of the Petitioners and hold that their fundamental rights as guaranteed by Article 12(1) have been infringed upon by the acts of the 1st Respondent, owing to the arbitrary, capricious and irrational manner in which the Petitioners were deprived of their appointments to the rank of Assistant Security Officer, in contravention of established procedures and assurances of the 1st Respondent.

Therefore, in accordance with the powers vested in this Court to make an appropriate, just, and equitable order under Article 126 of the Constitution when an aggrieved party establishes a violation of their fundamental rights guaranteed under the Constitution, and in consideration of the fact that the Petitioners have now retired from service, I direct the 1st Respondent to backdate the promotions of the Petitioners to the post of Assistant Security Officers with effect from 10.09.2014.

The 1st Respondent is further directed to pay back wages up until the date of retirement to each Petitioner.

Application Allowed without costs.

Judge of the Supreme Court

Priyantha Jayawardena, PC., J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda, PC., J.
I agree.

Judge of the Supreme Court

OCTOBER

2023

JUDGMENTS

OCTOBER INDEX

1.	SC/APPEAL/121/2022	2400
2.	SC/APPEAL/190/2016	2407
3.	SC/APPEAL/89/2014	2422
4.	SC/APPEAL/75/2015	2439
5.	SC/APPEAL/30/2013	2453
6.	SC/APPEAL/121/2011	2473
7.	SC/APPEAL/174/2011	2485
8.	SC/APPEAL/47/2020	2500
9.	SC/FR/233/2018	2523
10.	SC/APPEAL/60/2013	2544
11.	SC/APPEAL/116/2015	2557
12.	SC/FR/169/2008	2572
13.	SC/FR/166/2017 with SC/FR/155/2017, 156/2017, 157/2017, 158/2017, 159/2017, 412/2017	2594

14.	SC/FR/100/2022	2651
15.	SC/EXPULSION/01/2022	2669
16.	SC/APPEAL/131/2011	2731
17.	SC/APPEAL/85/2016	2767
18.	SC/APPEAL/74/2021	2777
19.	SC/APPEAL/96/2010	2793
20.	SC/APPEAL/89/2019	2812
21.	SC/WRIT/07/2020	2825
22.	SC/CHC/APPEAL/37/2011	2837
23.	SC/APPEAL/232/2016	2867
24.	SC/EXPULSION/02/2021	2880
25.	SC/FR/311/2016	2893
26.	SC/FR/349/2014	2908
27.	SC/APPEAL/97/2011	2929

28.	SC/APPEAL/67/2021	2940
29.	SC/FR/112/2017	2955
30.	SC/APPEAL/64/2023	3020
31.	SC/RULE/06/2021	3027
32.	SC/FR/393/2010	3034
33.	SC/FR/91/2018	3059
34.	SC/FR/120/2019	3070
35.	SC/FR/221/2015	3082
36.	SC/APPEAL/69/2016	3102
37.	SC/APPEAL/128/2022	3116
38.	SC/FR/236/2013	3123
39.	SC/FR/238/2013	3138
40.	SC/FR/237/2013	3153
41.	SC/FR/556/2009	3168
42.	SC/APPEAL/45/2013, 44/2013	3202

43.	SC/FR/338/2011	3220
44.	SC/APPEAL/144/2019	3226
45.	SC/APPEAL/50A/2013	3247
46.	SC/FR/546/2012	3267
47.	SC/FR/192/2019	3291
48.	SC/APPEAL/02/2021	3220

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

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006, against a judgment delivered by the Provincial High Court exercising its jurisdiction under section 5A of the said Act.

SC APPEAL NO. 121/2022
SC HC CALA No. 154/2019
LA Application No.
WP/HCCA/GAM/LA/29/2018
D.C. Gampaha Case No. 3449/L

Upeksha Anuradha Dassanayaka of
No.131, Louise Avenue, Kelaniya.

And presently of No.3, Springfield Drive,
Narre Warren, North Victoria 3804,
Australia.

And appearing by her Power of
Attorney Wanasinghe Arachchige Indrani
Chandrika of No.131, Louise Avenue,
Kelaniya.

PLAINTIFF

Vs.

1. Anushka Maduranga Vithanagamage
of No.438/3, Kottawa Road, Athurugiriya.

And presently of No.3/103, Springfield
Drive, Narre Warren, North Victoria 3804,
Australia.

And appearing by his Power of Attorney
Senadheerage alias Polwattage Dona
Kanthi of No.438/3, Kottawa Road,
Athurugiriya.

2. Ayesh Niroshan Benedict de Saram
Of No. 695, Kulasevana Mawatha,
Kottawa, Pannipitiya.

DEFENDANTS

AND

2. Ayesh Niroshan Benedict de Saram
Of No. 695, Kulasevana Mawatha,
Kottawa, Pannipitiya.

2nd DEFENDANT-PETITIONER

Vs.

Upeksha Anuradha Dassanayaka of
No.131, Louise Avenue, Kelaniya.

And presently of No.3, Springfield Drive,
Narre Warren, North Victoria 3804,
Australia.

And appearing by her Power of
Attorney Wanasinghe Arachchige Indrani
Chandrika of No.131, Louise Avenue,
Kelaniya.

PLAINTIFF-RESPONDENT

1. Anushka Maduranga Vithanagamage
of No.438/3, Kottawa Road, Athurugiriya.

And presently of No.3/103, Springfield
Drive, Narre Warren, North Victoria 3804,
Australia.

And appearing by his Power of Attorney Senadheerage alias Polwattage Dona Kanthi of No.438/3, Kottawa Road, Athurugiriya.

1st DEFENDANT-RESPONDENT

AND NOW BETWEEN

2. Ayesh Niroshan Benedict de Saram
Of No. 695, Kulasevana Mawatha, Kottawa, Pannipitiya.

2nd DEFENDANT-PETITIONER-APPELLANT

Vs.

Upeksha Anuradha Dassanayaka of No.131, Louise Avenue, Kelaniya.

And presently of No.3, Springfield Drive, Narre Warren, North Victoria 3804, Australia.

And appearing by her Power of Attorney Wanasinghe Arachchige Indrani Chandrika of No.131, Louise Avenue, Kelaniya.

PLAINTIFF-RESPONDENT-RESPONDENT

1. Anushka Maduranga Vithanagamage
of No.438/3, Kottawa Road, Athurugiriya.

And presently of No.3/103, Springfield Drive, Narre Warren, North Victoria 3804, Australia.
And appearing by his Power of Attorney Senadheerage alias Polwattage Dona Kanthi of No.438/3, Kottawa Road, Athurugiriya.

1st DEFENDANT-RESPONDENT-RESPONDENT

BEFORE : **P. PADMAN SURASENA J.**
A.L. SHIRAN GOONERATNE J.
ARJUNA OBEYESEKERE J.

COUNSEL : M.C.Jayaratne PC with M.D.J. Bandara, Nishani H. Hettiarachchi for the 2nd Defendant-Petitioner-Appellant.
Ranjan Suwandaratne PC with Anil Rajakaruna for the Plaintiff-Respondent-Respondent.

ARGUED &
DECIDED ON : 02.10.2023.

P. PADMAN SURASENA J.

Court heard the submissions of the learned Counsel for the 2nd Defendant-Petitioner-Appellant and also the submissions of the learned President's Counsel for the Plaintiff-Respondent-Respondent and concluded the Argument.

The Plaintiff had filed in the District Court, the Plaint in the instant case against the 1st Defendant and the 2nd Defendant praying inter alia for:

i. a declaration that the Plaintiff is the owner of the property morefully set out in the schedule to the Plaint;
ii. a declaration that the 1st and/or the 2nd defendant hold that property as a constructive trust in favour of the Plaintiff.

The Plaintiff in the Plaint itself has prayed for an enjoining order in the first place and then for an interim injunction against the 2nd Defendant, to compel the 2nd Defendant to maintain the Status Quo relating to the relevant land.

Having considered the material adduced before Court, the learned District Judge by his order dated 17.09.2018, has granted the interim injunction as prayed for in the Plaint against the 2nd Defendant.

Turning albeit briefly to the facts of the case, the land relevant to this action was originally owned by the mother of the Plaintiff. The said mother had subsequently transferred it to her daughter (the Plaintiff). The 1st Defendant is the husband of the Plaintiff.

The Plaintiff had subsequently transferred this land to her husband (the 1st Defendant). Later, the 1st Defendant (Plaintiff's husband) had transferred it to the 2nd Defendant.

This Court has granted Leave to Appeal on the following two questions,

i. Did the Civil Appellate High Court err in Law by not taking into account, the fact that the Power of Attorney of the Plaintiff has no locus standi to institute the present action?
ii. Were the learned Civil Appellate High Court Judges in error by not taking into consideration, the specific purposes contained in the said Power of Attorney when the learned High Court Judges determined the question pertaining to the institution of this action on the said Power of Attorney against the Defendants?

The central question to be decided by this Court as per the said two questions of law is whether the Plaintiff was entitled to institute this action on the strength of the Power of Attorney given by the Plaintiff to her mother.

When this question was raised on behalf of the 2nd Defendant in the course of the inquiry pertaining to the issuance of the interim injunction before the District Court, after considering the material adduced before Court, the learned District Judge had not accepted that as a ground to refuse the interim injunction prayed for by the Plaintiff.

The Provincial High Court of Civil Appeals, when considering the appeal lodged by the 2nd Defendant against the said order of the District Court, also had not accepted the said ground raised by the 2nd Defendant as a ground not to issue the interim injunction prayed for by the Plaintiff.

In the course of the argument, it was revealed before this Court that the Defendants have not yet filed their answers before the District Court.

Mr. Ranjan Suwadarathne PC appearing for the Plaintiff-Respondent-Respondent agreed that there is no bar for the Defendants to raise this point as an issue in the course of the trial in which case, the learned District Judge would be able to fully consider and decide this issue according to law.

We have taken into consideration the fact that whatever the views mentioned in the orders of Court have been mentioned in the course of an inquiry pertaining to the issuance of the interim injunction at a very early stage of this case. This has been done at a stage where the Defendants had not filed their answers. Thus, issues to be decided by the District Court are yet to be framed. It would be thereafter that the District Court would fully go into the matter and decide the relevant issues. Depending on whether the decision pertaining to the issue would depend on facts, the District Court would decide the proper stage to decide the issue.

In view of the above, we are of the view that this Court should best avoid deciding this issue at this stage because, issues are yet to be framed and the trial is yet to be conducted before the District Court.

In view of the factual positions already set out above, we are of the view that there was material before the learned District Judge to justify granting the interim injunction at that stage.

For those reasons, we decide not to interfere with the impugned judgment of the Provincial High Court of Civil Appeals at this stage.

For those reasons, we are of the view that it is best not to consider this question at this stage. This question must be left for the District Court to decide in the trial. We decide to dismiss this appeal without costs.

JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE J.

I agree.

JUDGE OF THE SUPREME COURT

Mks

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

In the matter of an application for Leave to Appeal under Article 128 of the Constitution read along with Section 5(1) (C) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Liyana Athukoralalage Indrawathie,
1/418, Madugashandiya,
Mandawala.

S.C. Appeal No. 190/2016
SC/HCCA/LA No. 263/2015
WP/HCCA/AV/1206/2011(F)
D.C. Pugoda Case No. 831/L

Plaintiff

Vs.

1. Galolu Kankanamalage Dharmasena,
   Mee Ambawatte, Mandawala.

2. Gunarathna Arachchilage Don
   Linton Gunarathna, No. 208/A,
   Mahamera Road, Ihala Lunugama,
   Mandawala.

Defendants

AND

Liyana Athukoralalage Indrawathie,
1/418, Madugashandiya,
Mandawala.

Plaintiff-Appellant

Vs.

1. Galolu Kankanamalage Dharmasena,
   Mee Ambawatte, Mandawala.

2. Gunarathna Arachchilage Don
Linton Gunarathna, No. 208/A,
Mahamera Road, Ihala Lunugama,
Mandawala.

Defendant-Respondents

AND NOW BETWEEN

Liyana Athukoralalage Indrawathie,
1/418, Madugashandiya,
Mandawala.

Plaintiff-Appellant-Appellant

Vs.

1. Galolu Kankanamalage Dharmasena,
Mee Ambawatte, Mandawala.

2. Gunarathna Arachchilage Don
Linton Gunarathna, No. 208/A,
Mahamera Road, Ihala Lunugama,
Mandawala.

Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.

A. L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Dr. Sunil Coorey for Plaintiff-Appellant-Appellant

Seevali Amitrigala, PC with Pathum Wijepala for Defendant-Respondent-Respondents

Written Submissions:

06.02.2017 by the Plaintiff-Appellant-Appellant

09.03.2017, 27.12.2017 and 26.05.2023 by the Defendant-Respondent-Respondent

Argued on: 04.05.2023

Decided on: 02.10.2023

Janak De Silva, J.

The Plaintiff-Appellant-Appellant (Plaintiff) owns an undivided 1/3 share of land called Millagahawatta that is about R.2 P.3 in extent. The Appellant, by deed of transfer No. 5858 (P2) dated 14.12.2001 attested by M.A.N.A. Marasinghe, Notary Public, transferred an undivided 20 perches from the said land to the 1st Defendant-Respondent-Respondent (1st Defendant). On 27.05.2003, the 1st Defendant, by deed of transfer No. 105 (P3) attested by G.K. Gunasekera, Notary Public transferred the said portion to the 2nd Defendant-Respondent-Respondent (2nd Defendant).

On 31.07.2006 the Appellant instituted this action against the 1st and 2nd Defendants and sought a declaration that the 1st Defendant held the title to the said land subject to a constructive trust in favour of the Plaintiff, that deed No. 105 (P3) is null and void, or in the alternative that deed No. 5858 (P2) is null and void on the principle of *laesio enormis* and for the ejectment of the 2nd Defendant and those holding under him from the land described in the 2nd schedule to the amended plaint.

The case of the Plaintiff is that she sought a loan from the 1st Defendant in a sum of Rs. 50,000/= as she was in need of money. The 1st Defendant wanted her to bring a deed and agreed to reconvey the land once the loan was repaid with the interest. Accordingly, she obtained Rs. 40,000/= by executing deed No. 5858 (P2). The Plaintiff had repaid 7 instalments but failed to do so thereafter. The Plaintiff was not in a position to repay the loan when the 1st Defendant demanded repayment. Then the 2nd Defendant agreed to repay the outstanding loan to the 1st Defendant on behalf of the Plaintiff and accordingly deed No. 105 (P3) was executed. The 2nd Defendant agreed to retransfer the land upon the Plaintiff paying him back the loan with interest.

The versions of the 1st and 2nd Defendants are diametrically opposed to the case of the Plaintiff. They claimed that both deeds, i.e. Nos. 5858(P2) and 105(P3) were executed as outright transfers and that there was no agreement to reconvey.

The action was dismissed by the learned District Judge after trial, subject to costs. He primarily proceeded on the basis that deed No. 5858 (P2) was an outright transfer and that there was no express provision to be found, either in deed No. 5858(P2) or in deed No. 105(P3), regarding retransfer of the land to the Plaintiff.

Aggrieved by the judgment of the District Court, the Appellant appealed to the High Court of the Western Province (Civil Appeal) holden in Avissawella (High Court). The High Court dismissed the appeal subject to costs of Rs. 5000/=. The absence on the face of deed No. 5858(P2) or in deed No. 105(P3) about a loan and an agreement to reconvey also weighed heavily in the outcome.

Leave to appeal has been granted on the following questions of law:

1. Has the High Court failed to consider whether there were, and if so, what attendant circumstances there were, when deed No. 5858 was executed, from which it could be inferred that the Plaintiff did not intend to dispose of the beneficial interest on the interests conveyed by that deed?
2. Has the High Court and the District Court both erred in law by dismissing this action of the Plaintiff merely on the finding that there was no express provision to be found, either in deed No. 5858 or in deed No. 105, regarding retransfer of the land to the Plaintiff?
3. Whether the attendant circumstances having proved to establish a trust?

I will consider questions of law No. 2 and then No 1, in that order, as it examines the validity of the basis of the judgments of the District Court and High Court. Thereafter, I will examine question of law No. 3.

Question of Law No. 2

Issue Nos. 10, 11 and 12 read as follows:

(10) ඒ අනුව 1 වන විත්තිකරු අංක 5858 දරණ ඔප්පුවේ සඳහන් දේපළ පැමිණිලිකාරියගේ වාසියට වූ අනුමිත බාරයක් ලෙස දරා සිටින්නේද?

(11) මෙම නඩුවට අදාළ දේපළ 1 වන විත්තිකරු විසින් පැමිණිලිකාරියගේ වාසියට වූ අනුමිත බාරයක් ලෙස දරා සිටින අතරතුරදී එකී දේපළ අංක 105 හා 2003.05.27 දින දරණ පී. කේ. ගුණසේකර ප්‍රසිද්ධ නොතාරිස් තැනගේ ඔප්පුවෙන් 2 වන විත්තිකරුට පවරා ඇත්ද?

(12) 1 වන විත්තිකරු විසින් 2 වන විත්තිකරුට සිය දේපළ පවරන අවස්ථා වේදී 1 වන විත්තිකරු විසින් පැමිණිලිකාරියගේ වාසියට වූ අනුමිත බාරයක් ලෙස පැමිණිල්ලේ 2 වන උපලේඛනයේ සඳහන් දේපළ දරා සිටින බව 2 වන විත්තිකරු දැන සිටියේද?

It is evident that the Plaintiff's case was based on a constructive trust. Nonetheless, both the District Court and the High Court seem to have proceeded without fully comprehending the distinction between an express trust and a constructive trust.

Undoubtedly, Section 97 of the Trusts Ordinance declares that the duties, liabilities, and disabilities of a trustee under both an express and an implied trust are the same. There is no universal consensus on the meaning of express trust and constructive trust. Still, there is a distinction. The intention of the settlor to establish a trust is the foundation of an express trust. On the other hand, a constructive trust arises from the operation of law. As Birks states [Peter Birks, *An Introduction to the Law of Restitution* (Revised Ed. Oxford University Press, 1989, page 65)] "*[T]here is a fine but important distinction between [positive] intent conceived as creative of rights [for express trusts] … and [positive] intent conceived as a fact which, along with others, calls for the creation of rights [through a constructive trust]"*. Hence, although it may be a fine difference, there is nevertheless a difference between an express trust and a constructive trust which must be recognized by court.

Accordingly, it is appropriate to begin by examining the provisions of the Trust Ordinance, which deal with express and constructive trusts relating to immovable property.

Express Trust and Constructive Trust over Immovables

Section 5(1) of the Trusts Ordinance reads:

> *"Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed."*

Accordingly, subject to the provisions of Section 107, a trust in relation to immovable property is valid only where it is so declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed. This is the way in which an express trust can be established for immovable property.

Nonetheless, the Trust Ordinance acknowledges a number of exceptions to this rule.

Section 107 reads:

> *"In dealing with any property alleged to be subject to a charitable trust, the court shall not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist."*

Hence, notwithstanding the failure to comply with the formalities specified in section 5(1) of the Trust Ordinance, a charitable trust may be inferred by Court in relation to immovable property where it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist.

Nevertheless, this is not the only exception to Section 5(1) of the Trust Ordinance by which a trust can be held to be in existence in relation to immovable property notwithstanding the absence of a declaration in one of the documents referred to therein.

Section 5(3) contains another exception to Section 5(1) that reads:

> *"These rules do not apply where they would operate so as to effectuate a fraud."*

Thus, where the application of the rules in Section 5(1) would operate to effectuate a fraud, a trust over immovable property can be established notwithstanding the absence of a declaration by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.

Hence, in ***Valliyammai Achi v. Abdul Majeed*** **(45 N.L.R.169)** and ***Ehiya Lebbe v. Majeed*** **(48 N.L.R. 357)** it was held that a trust was proved over land notwithstanding the absence of a declaration within the meaning of Section 5(1) of the Trust Ordinance as to ignore the existence of a trust was, in the circumstances of the cases, to effectuate a fraud.

Moreover, Chapter IX of the Trusts Ordinance contains provisions dealing with the creation of constructive trusts. Section 83 of the Trust Ordinance reads:

> *"Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such properly for the benefit of the owner or his legal representative."*

It is evident from illustration (a) that constructive trusts can be formed over land. Therefore, Section 83 of the Trust Ordinance is an additional exception to the rule embodied in Section 5(1) of the Trust Ordinance. Thus, even where a deed does not expressly establish an express trust over immovable property, attendant circumstances can establish the creation of a constructive trust.

Thus, in ***Senadheerage Chandrika Sudarshani v. Muthukuda Herath Mudiyanselage Gedara Somawathi*** **(S.C. Appeal No.173/2011, S.C.M. 06.04.2017)** Prasanna Jayawardena J. noted (at page 11) that:

> "*… it is also a well-established rule that, parol evidence can be led to prove the existence of a Trust over a land which is the subject matter of what appears, on the face of it, to be a deed of transfer by which the land has been transferred.*"

Parol evidence was indeed led by the Plaintiff in order to establish a constructive trust. Nevertheless, both the learned trial judge and the judges of the High Court placed much emphasis on the absence on the face of the two deeds, i.e. deed Nos. 5858(P2) and 105(P3), any reference to a loan or undertaking to retransfer of the land to the Plaintiff on the payment of principal and interest.

No doubt, the contents of a deed of transfer is a matter which will have to be considered as one of the attendant circumstances from which it could be inferred whether beneficial interest did pass or not. Nevertheless, it is not the only matter. In ***Muttammah v. Thiyagarajah*** **(62 N.L.R. 559 at 571),** H. N. G. Fernando J. held:

> "*The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an 'attendant circumstances' from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on Section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only Section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory.* ***If for example 'attendant circumstances' in Section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in Trust unless indeed its terms are such as to create an express Trust***."
>
> (emphasis added).

This statement was quoted with approval in ***Dayawathie and Others v. Gunasekera and Another*** **[(1991) 1 Sri. L. R. 115 at 118]**.

As Ying Khai Liew states (Ying Khai Liew, *Constructive Trusts in Sri Lanka: A Model for an Expansive Approach*, Australian Journal of Asian Law, 2020, Vol 20 No 2, Article 2: 1-17, page 295 at 298), "*while an 'improper' manifestation of intention to create a trust may not be enforced qua an express trust, it may nevertheless constitute one among a number of other facts that give rise to a constructive trust*." However, both the District Court and the High Court fell into error by dismissing the action of the Plaintiff merely on the finding that there was no express provision to be found, either in deed No. 5858(P2) or in deed No. 105(P3), regarding retransfer of the land to the Plaintiff. By doing so they conflated an express trust identified in Section 5(1) with a constructive trust identified in Section 83 of the Trust Ordinance.

For the foregoing reasons, I answer question of law No. 2 in the affirmative.

Question of Law No. 1

The jurisprudence of Court has identified various circumstances which must be considered as attendant circumstances in terms of Section 83 of the Trust Ordinance in ascertaining whether the owner of immovable property intended to dispose of his beneficial interest. They are:

1. Whether transferor continued to remain in possession after the conveyance;
2. If the transferor paid the whole cost of the conveyance;
3. If the consideration expressed on the deed is utterly inadequate to what would be the fair, purchase money for the property conveyed;

   [*Ehiya Lebbe v. Majeed* (48 N.L.R. 357 at 359)]
4. The relationship between the parties;

   [*Valliyammai Achi v. Abdul Majeed* (45 NLR 169 at 191)]

L.J.M. Cooray in *The Reception in Ceylon of the English Trust: An Analysis of the Case Law and Statutory Principles Relating to Trusts and Trustees in Ceylon in light of the Relevant Foreign Cases and Authorities* (1971) at pages 129 – 130, appears to take the view that where the purchase price has not been repaid, it might point to the parting of beneficial interest.

He states:

> "*If there is a trust, the contractual rule that time is of the essence of the contract would be relevant and it would be unnecessary to insist that the purchase money should be tendered within the specified period. If this is so, a trust under 83 will also arise where a person has transferred property subject to a notarial agreement because the period has elapsed*. *But if within a reasonable period the purchase price has not been repaid it may be assumed that the transferor has no intention of exercising the right of repurchase and has therefore parted with the beneficial interest.*"

The Plaintiff testified that she remained in possession of the corpus notwithstanding the execution of deed Nos. 5858(P2) and 105(P3). Both the learned trial judge and the judges of the High Court did not evaluate this evidence.

Moreover, the Plaintiff testified that the value of one perch of land in the area at the time of execution of deed No. 5858(P2) was around Rs. 20,000/= to 30,000/=. According to that deed the consideration paid for an undivided 20 perches was Rs. 40,000/=. The Plaintiff also called a valuer, Jagath Liyanaarchchi, to testify to the value of the corpus at the time of the execution of deed No. 5858(P2). According to him, the value of a perch of the corpus at that time was around Rs. 20,000/=. The learned trial judge makes a superficial statement about the value of the corpus without analysing the valuer's evidence. It amounts to a failure to properly evaluate whether the consideration expressed on the deed is utterly inadequate to what would be the fair purchase price for the property conveyed.

Accordingly, both the learned trial judge and the judges of the High Court failed to consider whether there were, and if so, what attendant circumstances there were, when deed No. 5858(P2) was executed, from which it could be inferred that the Plaintiff did not intend to dispose of the beneficial interest on the interests conveyed by that deed.

For the foregoing reasons, I answer question of law No. 1 in the affirmative.

Question of Law No. 3

In view of the answers given to the above questions, I must strive to analyse the evidence in order to ascertain whether the attendant circumstances establish a trust. The learned trial judge did not have any greater advantage in this endeavor. He was limited to seeing and hearing the evidence of the 2nd Defendant. The Plaintiff, the valuer Jagath Liyanaarchchi and the 1st Defendant testified before his predecessor.

It is necessary to evaluate the evidence in this matter based on firmly established rules of evidence.

In ***Senadheerage Chandrika Sudarshani v. Muthukuda Herath Mudiyanselage Gedara Somawathi*** **(supra)** Prasanna Jayawardena J. noted (at page 15) that:

> "*It is clear that, the use of the words "it cannot reasonably be inferred consistently with the attendant circumstances" in Section 83, impose a requirement on the Court to satisfy itself that, the attendant circumstances clearly point to the conclusion that the owner did not intend to dispose of his beneficial interest. If the attendant circumstances unequivocally point to that conclusion, a Constructive Trust would have arisen. However, if the attendant circumstances fail to unequivocally establish that the owner did not intend to dispose of his beneficial interest or, in other words, there is a doubt as to the conclusion which can be drawn from the attendant circumstances, a Court should, usually, reject the claim that, a Constructive Trust exists.*
>
> *[…]*
>
> *...the burden of proof lies firmly on the person who claims a Constructive Trust to prove it. In this case, that is the plaintiff.*
>
> *Thus, if the plaintiff is to succeed in this appeal, she should have furnished evidence which satisfies the Court that, it cannot be reasonably inferred from the attendant circumstances that she intended to part with her beneficial interest in the land.*
>
> *[…]*

*[…] [T]he Court has to apply an **objective test** when determining this question. Accordingly, the Court has to **place more reliance on facts that can be ascertained from the evidence rather than unsubstantiated claims** made from the witness box. The Court has to keep in mind that, **a notarially attested deed of transfer should not be lightly declared to be a nullity**. The Court must also guard against allowing a false or belated claim of `Trust' made by a transferor who has transferred his property and then had second thoughts or seeks to profit from changed circumstances."*(emphasis added)

On the issue of possession, the Plaintiff maintained that she continued to be in possession of the corpus even after the execution of deed Nos. 5858(P2) and 105(P3). The 1st Defendant contested this and claimed that he had plucked the coconuts from the corpus. The 2nd Defendant claimed that he was in possession and that he started clearing the land to build a house in 2006 when the Plaintiff filed this action and obtained an enjoining order in the first instant. It was later dissolved.

In determining who was in possession of the corpus, an important fact that must not be overlooked is that it is part of a larger land that is co-owned property. As a co-owner, the Plaintiff sold an undivided 20 perches to the 1st Defendant.

No doubt both the 1st and 2nd Defendants claimed that what was sold to the 2nd Defendant was a divided and defined portion of land. This is untenable as a matter of law. There was no partition decree, deed of partition, or other method accepted in law that ended co-ownership. Hence, the corpus continued to be part of the co-owned property.

A co-owner's possession is in law the possession of all the other co-owners. Every co-owner is presumed to be in possession in his capacity as a co-owner. Therefore, even if the claim of the Plaintiff is accepted, she continued to possess as a co-owner and her possession is in law also the possession of the 1st and 2nd Defendants. I am therefore of the view that although the Plaintiff may be able to claim that she continued to be in possession of the corpus after deed Nos. 5858(P2) and 105(P3) were executed, her possession is also the possession of the 1st and 2nd Defendants.

In any event, the testimony of the Plaintiff of continued possession must be assessed in the context of the overall credibility of her evidence. She admitted knowledge of the transfer of ownership of the corpus to the 1st Defendant by deed No. 5858(P2). It was also admitted by the Plaintiff that M.A.N.A. Marasinghe, Notary Public who attested that deed was not informed of the alleged loan and arrangements to retransfer upon payment of principal and interest when the deed was executed.

Moreover, the Plaintiff claimed that the 2nd Defendant undertook to pay the amount due to the 1st Defendant from the Plaintiff. According to her deed No. 105(P3) dated 27.05.2003 was executed on that undertaking. The Plaintiff claimed that the 2nd Defendant informed her that she can pay him back in small sums over a period of 25 years. The 2nd Defendant denied this position and claimed that he bought the land to build a house for his son. It is inconceivable that the 2nd Defendant would agree to give the Plaintiff 25 years to pay back the debt. It is plausible if the parties were related. The Plaintiff and 2nd Defendants are not related.

No evidence has been led on whether the Plaintiff paid the whole cost of the conveyance for deed No. 5858(P2).

On the value of the land, there is the evidence of the valuer led on behalf of the Plaintiff. According to him, the value of a perch of the corpus at that time was around Rs. 20,000/=. However, he was not a valuer commissioned by Court and hence not an independent witness.

In ***Vandervell v. Inland Revenue Commissioners*** **[(1967) 1 All E.R. 1 at 7]** Lord Upjohn held:

> *"But if the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; the greater includes the less. X may be wise to secure some evidence that the beneficial owner intended him to take the beneficial interest in case his beneficial title is challenged at a*

later date but it certainly cannot, in my opinion, be a statutory requirement that to effect its passing there must be some writing under section 53(l)(c).”

Although this pronouncement was upon the necessity to comply with section 53 of the Law of Property Act 1925 of England, the principle enunciated is applicable to the instant case. Where it can be shown that the beneficial owner directed the trustee to transfer the legal interest in the trust to a third party so that the third party becomes both the beneficial and legal owner, no further documentation is needed secure the title of the third party. Any trust that existed as between the trustee and the beneficial owner ceases to exist and the third party becomes the absolute owner of the trust property.

In the instant case, the Plaintiff admitted that she signed as a witness to the execution of deed No. 105(P3) dated 27.05.2003 whereby title was passed on to the 2nd Defendant. However, she claimed that her signature was obtained on a blank paper. The Plaintiff alleged that the notary who attested it, G.K. Gunasekera, Notary Public, had told her to sign since she admitted to borrowing money. She claimed that she got to know about this deed only when the 2nd Defendant began clearing the land in July 2006.

Nevertheless, the Plaintiff did not make any complaint against the said notary to either the Police or any other body. In fact, a copy of that deed was obtained by her from the said G.K. Gunasekera, Notary Public. Moreover, the Plaintiff had sold another portion of land to one Ravindra Tissalal in 2002 by deed No. 6053 (V1) which was attested by M.A.N.A. Marasinghe, Notary Public who attested deed No. 5858(P2). It appears that the said land was reconveyed to the Plaintiff by deed No. 107(P6) dated 31.05.2003 attested by the very same G.K. Gunasekera, Notary Public who attested deed No. 105(P3).

It is inconceivable that the Plaintiff would go to the same notary, who allegedly obtained her signature on a blank paper, four days thereafter to execute deed No. 107(P6) dated 31.05.2003 to get title reconveyed to her by Ravindra Tissalal.

I am of the view that the fact that the Plaintiff signed as a witness to the execution of deed No. 105(P3) supports an inference that she intended to part with her beneficial interest in the land. Hence even assuming that there was a constructive trust as between the Plaintiff and the 1st Defendant, it ceased upon the execution of deed No. 105(P3).

In ***Senadheerage Chandrika Sudarshani v. Muthukuda Herath Mudiyanselage Gedara Somawathi*** **(supra)** it was held (at page 15) that:

> *"If the attendant circumstances unequivocally point to that conclusion, a Constructive Trust would have arisen. However, if the attendant circumstances fail to unequivocally establish that the owner did not intend to dispose of his beneficial interest or, in other words, there is a doubt as to the conclusion which can be drawn from the attendant circumstances, a Court should, usually, reject the claim that, a Constructive Trust exists."*

The Plaintiff has failed to establish unequivocally that she did not intend to dispose of her beneficial interest. Hence, I answer question of law No. 3 in the negative.

For the foregoing reasons, I dismiss the appeal. Parties shall bear their costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC Appeal No. 89/2014
SC Special L.A. No 56/2013
CA. Appeal No. 1196/A B/1996 (F)
D.C. Horana No. 2779/P

Watte Waduge Nalani Ranaweera,
6/13, Old Quarry Road,
Mt.Lavinia.

Plaintiff
Vs.

1. Govinda Waduge Mendis,
Udugammana, Anguruwatota.

2. Gonvida Waduge Darlin Nona,
Udugammana, Anguruwatota.

3. Govinda Waduge Arlin Nona,
Udugammana, Anguruwatota.

4. Loku Acharige Chandrasiri,
Udugammana, Anguruwatota.

5. Loku Acharige Wimalasiri,
Udugammana, Anguruwatota.

6. Govinda Waduge Jayasiri,
Udugammana, Anguruwatota.

7. Kalupahana Maithrige Maginona
Wickrematilaka,
Near Hotel Kalido, Kalutara North.

8. Rannulu Gilman Seneviratne,
Near the Police Station,
Anguruwatota (deceased)

8A. Rannulu Timesu Kanweera Seneviratne,
Maha Yala, Anguruwatota.

9. Kevitiyagala Liyanabadalge Martin Silva,
Udugammana, Anguruwatota. (deceased)

9A. P.W. Darlin Nona,
Udugammana, Anguruwatota.

10. Arumasinghe Punyawathie de Silva,
Ethagama, Kalutara.

11. Arumasinghe Kulawathie de Silva,
Pepiliyana Road, Nedimala.

12. K.D. Mahendra Lalith Perera,
13/6, Old Quarry Road,
Mt. Lavinia.

13. Kevitiyagala Liyanabadalge Kusumsiri,
Udugammana, Anguruwatota.

14. Bellana Mesthrige Siriwardena,
Udugammana, Anguruwatota.

15. Puwakdandage Loku Acharige Jayasena,
Udugammana, Anguruwatota.

Defendants

And

Watte Waduge Nalani Ranaweera,
6/13, Old Quarry Road,
Mt. Lavinia.

Plaintiff-Appellant

Vs

1. Govinda Waduge Mendis,
Udugammana, Anguruwatota.

2. Govinda Waduge Darlin Nona,
Udugammana, Anguruwatota.

3. Govinda Waduge Arlin Nona,
Udugammana, Anguruwatota.

4. Loku Acharige Chandrasiri,
Udugammana, Anguruwatota.

5. Loku Acharige Wimalasiri,
Udugammana, Anguruwatota.

6. Govinda Waduge Jayasiri,
Udugammana, Anguruwatota.

7. Kalupahana Maithrige Maginona
Wickrematilaka,
Near Hotel Kalido, Kalutara North.

8. Rannulu Gilman Seneviratne,
Near the Police Station,
Anguruwatota (deceased)

8A. Rannulu Timesu Kanweera Seneviratne,
Maha Yala, Anguruwatota.

9. Kevitiyagala Liyanabadalge Martin Silva,
Udugammana, Anguruwatota. (deceased)

9A. P.W. Darlin Nona,
Udugammana, Anguruwatota.

10. Arumasinghe Punyawathie de Silva,
Ethagama, Kalutara.

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Pepiliyana Road, Nedimala.

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13/6, Old Quarry Road,
Mt. Lavinia.

13. Kevitiyagala Liyanabadalge Kusumsiri,
Udugammana, Anguruwatota.

14. Bellana Mesthrige Siriwardena,
Udugammana, Anguruwatota.

15. Puwakdandage Loku Acharige Jayasena,
Udugammana, Anguruwatota.

Defendants- Respondents

AND NOW BETWEEN

Watte Waduge Nalani Ranaweera,
Presently of Udugammana,
Anguruwatota.

Plaintiff-Appellant-Petitioner/Appellant

Vs.

Ranulu Timesu Kanweera Seneviratne,
Maha Yala, Anguruwatota.

8A Defendant-Respondent-Respondent

Before: **B.P. Aluwihare PC. J.,**
M.N.B. Fernando PC. J. and
Yasantha Kodagoda PC. J.

Counsel: Dr. Jayatissa de Costa PC with Chanakya Ekanayake for the Plaintiff-Appellant-Appellant
R.C. Gooneratne for the 8A Defendant-Respondent-Respondent

Argued on: 07-02-2023

Decided on: 03-10-2023

Murdu N.B. Fernando, PC. J.,

The Plaintiff-Appellant-Appellant ("the plaintiff") preferred this appeal against the judgement of the Court of Appeal dated 28th January, 2013 and obtained leave from this Court on four questions of law.

This appeal stems from an action instituted by the plaintiff in the District Court of Horana in terms of the Partition Act No 21 of 1977 as amended.

The plaintiff in her plaint to the District Court, named eight defendants. Whilst the trial was proceeding seven others were added on as defendants totaling fifteen defendants. On 27th August, 1996 the learned District Judge delivered Judgement and allotted shares to the plaintiff and some of the defendants and further granted relief by way of entitlement to the cultivation for the plaintiff and certain defendants as morefully stated in the judgement.

Being aggrieved by the District Court judgement, the plaintiff and the 13th defendant preferred appeals to the Court of Appeal.

The Court of Appeal upheld the judgment of the District Court and dismissed the appeal of the plaintiff and a variation of allotment of shares were made regarding the appeal of the 13th defendant.

Being aggrieved by the aforesaid judgement of the Court of Appeal, the plaintiff came before this Court, naming only the 8A defendant-respondent-respondent ("the 8A defendant") as a party to this appeal.

Its observed that the 8A defendant was substituted in the room and place of the deceased 8th defendant whilst the trial was pending. In the plaint filed in 1985 the plaintiff categorically avers that the 8th defendant is only made a party to the partition action, as he has been disputing the possession of the plaintiff and has no entitlement to the land to be partitioned, namely 'Pathagewatta' alias 'Nikaketiyawatta', in extent approximately four acres, as more fully referred to in the schedule to the plaint.

Contrary to the said assertion of the plaintiff, the 8A defendant in his statement of claim took up the position that the 8th defendant is entitled to 4/35 shares of the land in issue, having purchased a portion of the said land at a fiscal sale in the year 1937 and obtained the fiscal conveyance in 1958 and has been in possession of the said land, in extent of approximately one acre (lot 2 of the preliminary plan) independent and undisturbed for a period in excess of 10 years against the plaintiff and others and also claimed prescriptive title to the said extent of land.

It is observed that by the plaint, the plaintiff in addition to partitioning of the land [prayer (a)], moved for injunctive relief against the 8th defendant [prayer (b)], preventing him from felling down trees and removing trees already cut down in the land in dispute and also an interim

injunction and an enjoining order. Thus, the plaintiff's main grievance is against the 8th defendant, though the plaintiff failed to disclose in the plaint, that a portion of the land (lot 2) was mortgaged to a 3rd party and subsequently sold by way of a fiscal sale to the 8th defendant. Nevertheless, the plaintiff in her evidence-in-chief admitted such fact.

Upon reading of the judgement of the learned District Judge, it is apparent, that the learned judge has considered the evidence led at the trial, examined the title in detail and made order allotting shares to the plaintiff, the 8th defendant and some of the other defendants.

Regarding the bone of contention between the plaintiff and the 8th defendant, the learned judge at the commencement of the judgement itself, had considered the events that led to the fiscal sale *i.e.*, one of the co-owners, Dinoris had mortgaged the property in issue (lot 2 of the preliminary plan) and on his failure to redeem the mortgage, the mortgagor instituted an action in the District Court of Kalutara, consequent to which the said allotment was sold by fiscal sale.

Thus, the District Court has come to the finding that the plaintiff who claims intestate title from Dinoris is not entitled to any right or title to such allotment of land, subsequent to the fiscal conveyance and exiting from the property *vis-â-vis* the 8th defendant, the purchaser of the allotment of land at the fiscal sale in 1937 and the subsequent fiscal conveyance executed in 1958.

It was also the finding of the District Court, *firstly*, that the plaintiff is entitled to the cultivation on the said allotment together with the other co-owners for the trees that are older than 35 years (standing on the land as well as the trees felled and disposed of and the money deposited in court) and *secondly*, the plaintiff has purchased the rights of other co-owners subsequent to a preliminary survey of the land in 1992 and has made improvements by way of an unauthorized construction (whilst the trial was pending and defying the order of court) and thus the plaintiff is not entitled to claim compensation for the two buildings standing on the disputed land. Nevertheless, the court directed, when partitioning the land to endeavor to allot land where the said buildings stand to the plaintiff.

Further, it was the finding of the District Court, that the plaintiffs entitlement to allocation of shares is based upon subsequent purchase of allotment of shares of the disputed land, i.e., after 1992, but not on intestate succession of her ancestor Dinoris, who lost his right and title to the disputed land, consequent to the fiscal sale.

In determining the relevant date for the change of status between the plaintiff and the 8th defendant, and the payment of compensation for the cultivation, the learned Judge correctly considered the date of execution of the fiscal conveyance *i.e.*, December 1958 and not the date of the fiscal sale in July 1937. It is observed that there had been a delay of approximately 21 years to obtain the fiscal conveyance, consequent to the fiscal sale and the learned judge has correctly added the said period to the entitlement of the plaintiff for the cultivation, by determining the age of trees to be older than 35 years.

The plaintiff appealed to the Court of Appeal against the judgement of the District Court on two grounds, namely, allocation of shares to the 8th defendant based upon the fiscal conveyance and entitlement to the cultivation for the trees which were younger than 35 years. The Court of Appeal dismissed the said appeal and upheld the findings of the District Court, subject to a minor varion in allotment of shares to the 13th defendant, based upon the 13th defendant's appeal to the Court of Appeal.

The plaintiff came before this Court against the judgement of the Court of Appeal and obtained leave on the following questions of law:-

a) that the Court of Appeal failed to make a determination in respect of the prescriptive title of Dinorishamy, which was claimed by the appellant and thereby misdirected in law;
b) that the Court of Appeal erred in law by affirming the judgement of the District Judge who held "that Dinorishamy had not acquired a valid prescriptive title to the undivided share that was the subject of mortgage", when the learned District Judge had failed to consider the oral evidence led at the trial, and specially the documentary evidence placed before court which affirmatively established that Dinorishamy had prescribed to the land;
c) that the Court of Appeal failed to consider the failure of the learned District Judge to determine that the transferee had no preferential rights over the judgement debtor who possessed the land until his death and thereafter his children when during the period July 1937 (mortgage sale) to 1965 the land had been possessed by Dinorishamy and his children and prescribed to 4/35 shares of the land; and

d) that the Court of Appeal failed to consider the failure of the District Court to hold that mandated provisions regarding delivery of possession in a hypothecary action had not been complied by the fiscal of court, thereby a distinct portion of the land was not given to the 8th defendant-respondent.

From the foregoing questions of law it is apparent, that the plaintiff/appellant's main contention is that the appellant's entitlement to the disputed land (lot 2) is based upon prescription against the 8th defendant/respondent, notwithstanding the fiscal conveyance, and in any event the delivery of possession of the land in dispute to the 8th defendant by the fiscal is not in compliance with the law governing hypothecary action.

Nevertheless, when this appeal was taken up for hearing before this Bench, the appellant's principle and only contention was that the judgement of the District Court was *per se* bad in law, as the learned District Judge failed to answer the issues raised before the District Court. The learned President's Counsel relied upon the judgements of Shirani Bandaranayake, J. (as she then was) and Marsoof, J. in the case of **Sopinona V. Pitipanaarachchi and two others** reported in **2010(1) Sri LR 87** to substantiate its argument.

In response the contention of the learned Counsel for the Respondent was, if in the judgement, the learned District Judge has explained his determination in detail then answering of the issues in the affirmative or negative is immaterial since the purpose of an issue is to come to a finding regarding the matter in issue or the point of contest.

Thus, I wish to consider the afore said submission raised before this Court, in the first instance. Namely, **the failure of the learned judge to answer the issues raised before the District Court in its judgement.**

Let me begin by examining the proceedings before the District Court.

The trial began on 03-03-1993 by calling the plaintiff to give evidence [vide-pages 155 to 167 of the brief] It is seen that no admissions were marked nor issues raised prior to the leading of evidence of the plaintiff. The title deeds, P1 to P14, 1D 1 to 1D 8, 13D 1, 2D 1 to 2D 4 and 8D 1 to 8D 6 were all led through the plaintiff to establish the title of all parties, to the land to be partitioned. Thus, there was no contest as far as the title was concerned, between the plaintiff and the 8th defendant. The plaintiff by specifically admitting the fiscal conveyance in her

evidence- in-chief (though not referred to in the plaint), accepted that the 8th defendant obtained title to the land in issue, *i.e.*, lot 2, in 1958.

The 2nd date of trial was 13-05-1993 [vide-pages 169 to 178 of the brief] on which date the plaintiff's evidence-in-chief was continued. Midway through leading of evidence, it is seen that the Counsels for the plaintiff and the 8th defendant moved court to raise issues or points of contest in relation to the cultivation and the improvements (*i.e.*, the construction of the two buildings) made to the disputed land and the court permitted raising of such issues at that juncture.

Whilst the plaintiff by way of three issues, claimed exclusive right to the cultivation and the improvements, *i.e.*, the trees and buildings standing on lot 2, the 8A defendant's five points of contest were that the 1st defendant, 8A defendant and heirs of another co-owner were entitled to the cultivation on the disputed land in equal shares; the two buildings on lot 2 should be demolished without payment of compensation; the 8th defendant is entitled to the money deposited in court in respect of the sale of felled trees; and the 8th defendant is entitled to the entire cultivation on lot 2 consequent to the fiscal sale.

Upon reading of the judgement of the District Court, it is apparent that the issues raised by the plaintiff and the 8A defendant have not been answered individually *i.e.*, one by one, by stating 'yes' or 'no' or 'does not arise' by the learned District Judge.

Nevertheless, the learned District Judge has considered in detail, the said points of contest in relation to the cultivation and the improvements *i.e.*, trees and buildings, and categorically held, *firstly*, that the buildings are unauthorized constructions put up defying a court order and therefore the plaintiff is not entitled to the said buildings and *secondly*, that the plaintiff is entitled only to the cultivation, namely the trees standing on the land and trees felled (and disposed off and money deposited in court) in so far as the trees are older than 35 years.

The learned judge has come to the finding on the age of the trees, having reckoned that the plaintiff was entitled to possess the land until 1958, at which point the fiscal conveyance was executed. Thus, the learned judge has not given credence to the year in which the fiscal sale took place but correctly considered the date of the execution of the fiscal conveyance and determined the age of the trees.

If I may digress at this juncture, the questions of law raised before this Court (which will be considered later in this judgement) revolves around the plaintiff and her ancestors rights and title to the disputed land upon prescription, *vis-â-vis* the rights and title of the 8th defendant based upon a fiscal sale. There is no contest between the parties relating to the final allotment of shares between the plaintiff and the 8th defendant.

Coming back to the one and only point of contest put forward at the hearing, *viz.*, the learned judge's failure to answer the issues raised individually, in the affirmative or in the negative, I now wish to consider the legal provisions relating to same.

Firstly, the provisions of the Civil Procedure Code.

Section 187 of the Civil Procedure Code reads thus:-

"187. The judgement shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision …."

In my view, the judgement of the District Court is in conformity with the above provision. The criteria and ingredients referred to therein are complied with. The judgement contains a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. The eight issues raised during the plaintiff's evidence-in-chief regarding the plaintiff's entitlement to cultivation and the improvements (consequent to the plaintiff's admission of the title) in my view, are the points for determination which have been examined and answered in detail in the body of the judgement. Moreover, it is apparent that the finding of the learned judge is substantiated with reasons.

Secondly, it is a matter of interest, that the main contention relied upon by the appellant before us *i.e.*, failure to answer issues, was neither taken up in the Court of Appeal nor challenged or referred to in the petition of appeal filed in the Court of Appeal or in this Court and appears to be an after thought.

The learned President's Counsel for the appellant, in formulating the primary contention pertaining to the learned District Judge's failure to answer issues, relied upon the pronouncements of this court in **Sopinona's case** referred to earlier. Thus, I wish to consider the said case now.

Sopinona's case was a partition action where the District Judge answered only the 1st issue raised by the plaintiff based on the pedigree tendered in her favour and refrained from answering any of the other 13 issues raised by the defendants upon the basis that they 'do not arise'. The defendants therein, being aggrieved by the said judgement appealed to the Court of Appeal. The appellate court set aside the said judgement and sent the case back for re-trial. Against the said Order, the plaintiff therein, appealed to this court and obtained special leave on three questions of law. The said questions of law are reproduced *in verbatim* below, as it would enable us to understand **Sopinona's** judgement in its correct perspective.

i) *Whether in law, there was **sufficient investigation of title of the parties** by the original court;*

ii) *Whether all issues need be answered by the District Judge **when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and prescription;** and*

iii) *Whether, if the answer to a single issue, in effect is a complete answer to all the contents in the action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues, specially, if in arriving at the answer to the issue the learned District Judge has considered and dealt with the matters raised in the other issues.* (emphasis added)

Thus, it is apparent the matter in issue or the points of contest as referred to in the said **Sopinona's case**, was in respect of the 'rights and title to the land' sought to be partitioned.

In the said background, Bandaranayake J., at page 97 determined as follows:-

> *"Accordingly, in a partition action, it would be **the primary duty of the trial judge to carefully examine and investigate the actual rights and titles to the land**, sought to be partitioned. In that process it would be **essential for the trial judge to consider the evidence led on points of contest and answer all of them**, stating as to why they are accepted or rejected"*
>
> *"..... it would be necessary for the District Court to take up this matter de novo to carefully **examine the devolution of title on the** basis of oral and documentary evidence on the allocation of shares and take steps to answer all*

the points of contest raised as issues, as otherwise there could be a miscarriage of justice." (emphasis added)

Marsoof J., too, in a separate judgement in the very same case, regarding, the 'duty to answer all issues' opined,

> *"The learned District Judge in this case has totally failed to discharge this duty by failing to even attempt answering all of the* ***very material issues*** *raised on behalf of the Respondents, and has also failed to explain why, in her view, it was not necessary to answer* ***the other very important issues****."* (page 125) (emphasis added)

The learned Counsel for the appellant also drew our attention to the judgement of **Juliana Hamine v. Don Thomas 59 NLR 121** to justify the importance of answering issues in a partition case by quoting the observations of L.W. de Silva J., in the following manner:-

> *"While it is indeed essential for parties to a partition action to state to the court the points of contest inter se and to obtain a determination on them, the obligation of the courts are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do"*

Whilst appreciating the aforesaid judicial dicta in respect of a partition action, which recognise the bounden duty of an original court judge to answer the issues raised before court and to investigate title in accordance with the provisions of section 25 of the Partition Act, I am of the view, that the facts of the instant case can be distinguished from the facts in the **Sopinona's case** and **Juliana Hamine's case** referred to above.

In the case in issue, the appellant has no qualms about the learned judge's determination relating to examining and investigation of the rights and title to the land and/or the allocation of shares between the parties and specifically between the plaintiff and the 8A defendant. The appellant's only grievance is regarding her entitlement to the cultivation and the learned judge's failure to give credit for the period 1958 onwards, *i.e.*, the appellant should have been given an exclusive entitlement or a preferential right to the cultivation, the trees which are even younger than 35 years standing on lot 2, as the appellant had prescribed to the property at a earlier point

of time vis-â-vis the 8th defendant, whose claim to the cultivation is based only on the 1958 fiscal conveyance.

In the instant case the devolution of rights and title is not the point of contest. The allocation of shares is also not the point of contest. The point of contest is only in respect of the cultivation and the improvements.

Therefore, in my view the judicial dicta relied upon by the appellant, which pronouncements opine, that the primary duty of the trial judge is to carefully examine and investigate the 'actual right and title to the land' sought to be partitioned and in the process, to consider the 'evidence led on points of contest' and answer them stating as to why they are accepted or rejected, is distinct to the matter in issue in the instant case. Thus, the said dicta cannot be applied in toto to this appeal and the said judicial dicta has to be considered in relation to the facts of the said cases.

In the appeal under consideration, no issues or points of contest were raised with regard to rights or title to the land to be partitioned nor devolution of rights on the plaintiff and the 8th defendant. Hence, it is apparent that the dicta in **Sopinona's case** and **Juliana Hamines case** (supra) cannot be blindly followed in this instance.

In the appeal under consideration, the eight issues or the points of contest were limited to appellant's entitlement to cultivation and to the buildings. In order to examine, whether the learned trial judge evaluated the core issues before the trial court, the issues raised in the District Court *in verbatim* are re-produced below:-

<u>By the plaintiff:</u>

1. මෙම නඩුවට ගොනු කර ඇති X පිඹුරේ පෙනෙන අංක 2 දරණ කට්ටියේ ඇති වගාව පැමිණිලිකාරියට අයිතිද?
2. එකී කට්ටියේ ඇති අංක 14 සහ 15 දරණ ගොඩනැගිලි පැමිණිලිකාරියට හිමි ද?
3. මෙම නඩුවේ බැරට පැමිණිලිකාරිය විසින් නඩුවට අදාල ඉඩමේ ගස් විකුනා තැන්පත් කර ඇති මුදල් ආපසු ලබා ගැනීමට පැමිණිලිකාරියට අයිතිවාසිකම් ඇද්ද?

   අ. එසේ නැතහොත්, 8 වෙනි විත්තිකරුට අයිතිවාසිකම් ඇද්ද?

By the 8th defendant

4. කට්ටි අංක 2 පිහිටා ඇති සියලු වගාව, X 1 වාර්තාවේ සඳහන් පරිදි, 1/3 ක් 1 වෙනි විත්තිකරුටත්, 1/3 ක් 8 වෙනි විත්තිකරුටත්, 1/3ක් එලිසහාමිගේ උරුමයටත් හිමි විය යුතුද?
5. මෙම ඉඩමේ අංක 14 සහ 15 දරණ ගොඩනැගිලි, මෙම නඩුවේ 1991.07.24 වෙනි දින නියෝගයට පටහැනිව සාදන ලද ඒවාද?
6. එසේ නම්, එකී ගොඩනැගිලි වන්දි රහිතව කඩා ඉවත් කල යුතු බවට නියෝගයක් ලැබිය යුතුද?
7. කට්ටි අංක 2 හි කපා ඇති වගාව සම්බන්දයෙන් අධිකරණයේ තැන්පත් කර ඇති මුදල් 8 වෙනි විත්තිකරුට ලැබිය යුතුද?
8. කෙසේ වෙතත් 8 වෙනි විත්තිකරුට පිස්කල් වෙන්දේසියේ ලබා ගත් අයිතිය උඩ එකී වගාවන් හිමි විය යුතුද?

Upon reading of the District Court judgement, it is pertinent to note that the learned judge had considered the said issues with regard to the cultivation and the improvements, examined the oral and documentary evidence led and had come to a correct finding on the points of contest. The learned District Judge may not have answered each and every issue individually and separately, but in the body of the judgement has given reasons as to why he arrived at the said findings.

Therefore, though it would have been prudent to have answered each and every issue individually, I am of the view, in the instant matter no miscarriage of justice has taken place. The finding of the learned judge is legally sound and is in accordance with the provisions of the law and specifically the law relating to improvements and cultivation.

In the said circumstances, the judgement of the learned District Judge upheld by the Court of Appeal, cannot be challenged merely on the dicta in **Sopinona's case**. In my view **Sopinona's case** has no relevance to the instant appeal and can be distinguished.

Thus, I see no merit in the argument of the learned President's Counsel for the appellant, that based on the judicial pronouncements in **Sopinona's case** alone, this appeal should be allowed. I am of the view that the appellant has failed to convince this Court, that the judgment

of the District Court is *per se* bad in law, only for the reason that the learned judge has failed to answer the issues raised individually.

As stated earlier in this judgement, the above discussed contention *i.e.*, the failure to answer issues, was the only argument put forword by the Appellant, at the hearing of this appeal before this Court to challenge the findings of the District Court. The said judgment was upheld by the Court of Appeal and the plaintiff's appeal was dismissed.

Therefore, I am of the view that the appellant has failed to establish that the judgment of the Court of Appeal should be set aside based upon the aforesaid contention. Hence, this appeal should stand dismissed on the said ground alone.

Nevertheless, in the interest of justice, I wish to consider the questions of law for which special leave was granted by this Court.

Questions (a) and (b) are in respect of prescriptive title of Dinoris which was claimed by the appellant. The specific question raised is that Dinoris acquired a valid prescriptive title to the undivided share that was subject to a mortgage.

Whilst highlighting that the plaintiff in her plaint, failed to indicate that a portion of the land to be partitioned was mortgaged in the year 1925 which subsequently led to a hypothecation action, a fiscal sale in 1937 and a fiscal conveyance in 1958, it's some what ironic that the appellant has now come before this Court claiming prescriptive title to the undivided share that was subject to a mortgage.

Furthermore, the appellant in the preliminary written submissions filed before this Court, refers to **Section 289** of the Civil Procedure Code and contends *"that although Dinoris did not have title from 1937 to the disputed land, that he and his successors i.e., the appellant, had acquired prescriptive title to lot 2 having possessed the said land for a period of 30 years uninterruptedly from 1937 to 1967 until the appellant left the land"*.

The appellant further contends in the said written submissions that *"the learned district judge has not considered the evidence relating to prescriptive possession of Dinoris and his successors, on the mistaken belief that the fiscal conveyance confers an absolute title to the purchaser, the deceased 8th defendant, completely ignoring that there was no bar to Dinoris*

and his successors to prescribe to lot 2 against the purchaser and other co-owners from 1937 to 1958"

The appellant did not pursue this argument at the hearing before us and possibly abandoned same. However, since the 1st and 2nd questions of law are based upon prescription, the submissions of the appellant in *verbatim* are quoted above, in order to appraise the questions of law raised.

As discussed earlier in this judgement, the plaintiff failed to aver in the plaint, that the land in issue *i.e.,* lot 2, was mortgaged by the plaintiff's predecessor and upon failure to redeem same, a hypothecalry action was filed which resulted in an auction and a fiscal sale and thereafter execution of a fiscal conveyance.

The plaintiff is now claiming prescriptive title for the said time period, when the disputed land was subjected to a mortgage. In my view, the plaintiff is approbating and reprobating.

Section 3 of the Prescription Ordinance unequivocally contemplates an 'overt act' for undisturbed and uninterrupted possession to begin to run. The plaintiff has failed to establish such a fact or lead any evidence in respect of an 'overt act' at the trial court. Without an overt act, a claim on prescription cannot stand.

In my view, the aforestated contention of the appellant referred to in the written submissions, is flawed and is against the rudiments of law. I do not wish to go into an academic exercise to discuss the pros and cons of such argument relating to prescription at this stage. Suffice is to state, that the contention of the appellant relating to the 1st and 2nd questions of law have no merit and therefore has to be answered in the negative.

The 3rd question of law raised before this Court is a consequential question to the 1st and 2nd questions and should also be answered in the negative.

The 4th question of law, pertaining to delivery of possession is a new proposition taken up before this Court. However, no submissions were made before us relating to such contention. Thus, the said question of law too, in my view has no merit and should be answered in the negative.

In the aforesaid circumstances, I answer all four questions of law for which leave was granted by this Court in the negative and dismiss the appeal.

Further, I see no merit whatsoever, in the principal contention of the appellant placed before this Court at the stage of the hearing, namely that the judgement of the District Court is *per se* bad in law.

The failure of the learned District Judge to answer the issues raised before the trial court in my view, does not create a miscarriage of justice when the overall picture of the case in issue is taken into account. The learned District Judge has discharged his duty holistically with regard to the material points of contest, correctly and fairly and in accordance with the law. Thus the said judgement cannot be challenged, whatsoever, on the aforesaid ground alone.

Hence, for reasons more fully adumbrated in this judgment, I uphold the judgement of the Court of Appeal dated 28th January, 2013 and dismiss the appeal of the Plaintiff-Appellant-Appellant with costs fixed at Rs. 25,000.

Appeal is dismissed with costs.

Judge of the Supreme Court

B.P. Aluwihare PC. J.,

I agree

Judge of the Supreme Court

Yasantha Kodagoda PC. J.,

I agree

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal.

1. Hatharasinghe Arachchige Amarasena,
2. Hatharasinghe Arachchige Karunawathie,

Both of Paluwatta, Kandurupokuna, Tangalle.

Complainants

SC Appeal No: 75/2015
SC (SPL) LA No. 67/2012
CA/PHC/20/2000
HC/Hambanthota/16/98

Vs.

1. Hatharasinghe Arachchige Ranjith Premalal,
2. Hatharasinghe Arachchige Gnanasiri,
3. Hatharasinghe Arachchige Amitha Kanthi,

All of Post 3, Bolana, Ruhunu Ridiyagama.

Respondents

AND

1. Hatharasinghe Arachchige Amarasena,
2. Hatharasinghe Arachchige Karunawathie,

Both of Paluwatta, Kandurupokuna, Tangalle.

Complainant-Petitioners

Vs.

1. Hatharasinghe Arachchige Ranjith Premalal,
2. Hatharasinghe Arachchige Gnanasiri,
3. Hatharasinghe Arachchige Amitha Kanthi,

All of Post 3, Bolana, Ruhunu Ridiyagama.

Respondent-Respondents

4. Commissioner of Agrarian Services, Office of the Agrarian Services, Hambantota.

5. M.P.N.P. Wickremasinghe, Former Commissioner of Agrarian Services, Office of the Agrarian Services, Hambantota.

Respondents

AND BETWEEN

1. Hatharasinghe Arachchige Ranjith Premalal,
2. Hatharasinghe Arachchige Gnanasiri,
3. Hatharasinghe Arachchige Amitha Kanthi,

All of Post 3, Bolana, Ruhunu Ridiyagama.

Respondent-Respondent-Appellants

1. Hatharasinghe Arachchige Amarasena,

1A. D.A. Kaluarachchi,

2. Hatharasinghe Arachchige Karunawathie,

2A. H.G. Piyadasa,

Both of "Singhagiri", Kandurupokuna, Tangalle.

Complainant-Petitioner-Respondents

4. Commissioner of Agrarian Services, Office of the Agrarian Services, Hambantota.

5. M.P.N.P. Wickremasinghe, Former Commissioner of Agrarian Services, Office of the Agrarian Services, Hambantota.

4th and 5th Respondent-Respondents

AND NOW BETWEEN

1A. D.A. Kaluarachchi,
2A. H.G. Piyadasa,

Both of "Singhagiri", Kandurupokuna, Tangalle

Substituted Complainant-Petitioner-Respondent-Petitioners

Vs.

1. Hatharasinghe Arachchige Ranjith Premalal,
2. Hatharasinghe Arachchige Gnanasiri,
3. Hatharasinghe Arachchige Amitha Kanthi,

Respondent-Respondent-Appellant-Respondents

Commissioner of Agrarian Services,
Office of the Agrarian Services,
Hambantota.

4th Respondent-Respondent-Respondent

Before: **Justice P. Padman Surasena**

Justice E.A.G.R. Amarasekara

Justice A.L. Shiran Gooneratne

Counsel: Rohan Sahabandu, PC with Chathurika Elvitigala for the **Substituted Complainant-Petitioner-Respondent-Appellants.**

W. Dayaratne, PC with Ranjika Jayawardena for the **1(A), 1(B), 1(C), 2nd and 3rd Respondent-Respondent-Appellant-Respondents** instructed by C. Dayaratne.

Yuresha De Silva, DSG for the **4th Respondent-Respondent-Respondent.**

Argued on: 15/05/2023

Decided on: **03/10/2023**

A.L. Shiran Gooneratne J.

The 1st and 2nd Complainants, presently, 1A and 2A Substituted Complainant-Petitioner-Respondent-Appellants (hereinafter referred to as the Complainant-Appellants) are the landlords of a paddy field known as Helambagahakumbura, in extent 10A, 3R and 4P. Hatharasinghe Arachchige Thomas was the tenant cultivator of 4A, 3R, 4P of the said paddy field and Gimara Dissanayake his wife, (hereinafter referred to as Thomas and Gimara respectively), was the tenant cultivator of the rest of the 6A of paddy land. The said Thomas and Gimara died in December 1992 and early 1993 respectively. After the death of the tenant cultivators, Hatharasinghe Arachchige Ranjith Premalal and Hatharasinghe Arachchige Gnanasiri, the 1st and 2nd Respondent-Respondent-Appellant-Respondents (hereinafter referred to as the 1st and 2nd Respondent-

Respondents), the two sons of the said tenant cultivators, continued to cultivate the said paddy land.

Having claimed that the said children of the tenant cultivators, namely the 1st and 2nd Respondent Respondents are not entitled in law to cultivate the said paddy land in question, the Original Complainant-Appellants by application dated 04/02/1994, complained to the 4th Respondent-Respondent-Respondent, the Assistant Commissioner of Agrarian Services (hereinafter referred to as the Assistant Commissioner) to conduct an inquiry in order to evict them from the said paddy land cultivated by the Respondent-Respondents, in terms of Section 14(1) and (2) of the Agrarian Services Act. It must be noted that the 3rd Respondent-Respondent-Appellant Respondent, the sister of the 1st and 2nd Respondent-Respondents, namely Amitha Kanthi (hereinafter referred to as the 3rd Respondent-Respondent) was not a party Respondent to the application made to the Assistant Commissioner by the original Complainants and they did not recognize her as a tenant cultivator or even as an occupier of the subject matter in their application dated 04/02/1994.

The Complainant-Appellants, in their application to the Assistant Commissioner contended that, the 1st Respondent-Respondent, Ranjith Premalal, presently is a tenant cultivator of a paddy field called Kohombagaha Kumbura in extent of 3A and also the permit holder of a paddy field in extent of 2A, belonging to the Mahaweli Authority and that the 2nd Respondent-Respondent, Gnanasiri, is presently a tenant cultivator of a paddy filed called Kohombagaha Kumbura South, in extent 2 1/2A, and the owner cultivator of a paddy filed belonging to the Mahaweli Authority. However, as per P6 and P7, they have placed evidence only to show that Ranjith Premalal was a tenant cultivator of a paddy field called Kohombagaha Kumbura in extent of 3A for 1994 and Gnanasiri was a tenant cultivator for 2A 2R in extent of Kohombagaha Kumbara for 1993.

Having considered the evidence led at the said inquiry, the Assistant Commissioner, by Order dated 25/11/1997 held that, the Respondent-Respondents were cultivating the

paddy field at the time their parents, Thomas and Gimara were cultivating the paddy land and also after their death, and therefore have established a connection with the Complainant-Appellants as landlord and tenant cultivators.

Being aggrieved by the said order, the Complainant- Appellants by Petition of Appeal dated 27/03/1998, appealed to the Provincial High Court holden in Hambantota, seeking a writ of *certiorari* to quash the said Order made by the Assistant Commissioner and a writ of *mandamus* to obtain possession of the said land. The Provincial High Court having considered the question of devolution of rights of a tenant cultivator, in terms of Section 4(1), 8(1) and 14(1) of the Agrarian Services Act (referred to as the said Act), by Order dated 27/10/1999, held that, only the 1st Respondent-Respondent was entitled to succeed to the tenancy in terms of Section 4(1) of the said Act, and that too, should be limited to in extent 5A. Accordingly, the Court issued a writ of *certiorari* to quash the Order of the Commissioner dated 25/11/1997 and a writ of *mandamus* to evict the rest of the Respondent-Respondents from the balance portion of the land in terms of Section 14(2) of the said Act.

Being aggrieved by the said Order, the Respondent-Respondents, by Petition of Appeal dated 09/12/1999, appealed to the Court of Appeal ("the Appellate Court"). The Appellate Court, *inter alia*, having taken into consideration documents marked 'V5' and 'V6', where it was found that the Complainant-Appellants had accepted the rentals from the Respondent-Respondents as tenant cultivators, held that, the Assistant Commissioner, by Order dated 25/11/1997, has correctly decided the issue before him, and that the learned High Court Judge's order to issue a writ of *certiorari* and *mandamus* on the basis that there was an error on the face of the record is erroneous. Accordingly, the Appellate Court, by Order dated 24/02/2012, set aside the Order of the learned High Court Judge dated 21/10/1999 and allowed the Appeal.

The Complainant-Appellants, by its Petition dated 02/04/2012, is before this Court to set aside the said Order dated 24/02/2012, delivered by the Appellate Court.

By Order dated 30/04/2015, this Court granted leave to appeal on the following questions of law.

1. Could the 1st to 3rd Respondents succeed to the tenancy rights of Thomas and Gimara in terms of the provisions in Section 8(1) of the Agrarian Services Act.
2. Is the Judgment of the Court of Appeal contrary to Section 14(1) and (2) of the Agrarian Services Act read together with Section 4 of the same Act.
3. Is there an illegality in the Judgment of the High Court for the Court of Appeal to set aside the same.
4. In the circumstances pleaded, is the Order of the Court of Appeal in terms of law.

In this action, the Complainant-Petitioners made an Application to the Assistant Commissioner under Section 14(1) and (2) of the Act, stating that;

a. they are the owners of a paddy field known as Helambagahakumbura, in extent 10A, 3R and 4P.
b. Thomas and Gimara, were their tenant cultivators, who died in 1992 and early part of 1993 respectively.
c. having no rights to cultivate the said paddy field, the 1st and 2nd Respondent-Respondents, Ranjith Premalal and Gnanasiri, the two sons of the tenant cultivators, continued to cultivate the said paddy field.
d. the said 1st and 2nd Respondent-Respondents are presently cultivating Kohombagaha Kumbura as tenant cultivators and paddy fields belonging to the Mahaweli Authority as a permit holder and as an owner cultivator respectively.
e. to hold an inquiry in terms of Section 14(1) and (2) of the Act, to evict the said Respondent-Respondents from the said paddy field.

In terms of Section 14 of the Act, where a tenant cultivator of any extent of land dies, no person who is not entitled under the said Act, to the rights of such tenant cultivator in respect of such extent, shall occupy and use such extent.

Therefore, as observed earlier, the Complainant-Appellants came before the Assistant Commissioner on the premise that the Respondent-Respondents had no rights under the said Act to cultivate the said paddy field after the death of previous tenant cultivators and sought an order of eviction of the Respondent-Respondents. Therefore, it is pertinent to note that the scope of the Application made by the Complainant-Petitioners before the Assistant Commissioner was to seek an order to evict the Respondent-Respondents from the paddy land in terms of Section 14(2), on the basis that the said persons were not entitled to any tenancy rights of the deceased tenant cultivators.

At the said Inquiry, witness Hewagamage Piyadasa, in cross examination stated that, the Respondent-Respondents cultivated the paddy filed jointly, as representatives of the tenant cultivators. This position was corroborated by the second witness called on behalf of the Complainant-Appellants. The said witnesses appear to be the present Substituted-Complainant-Appellants. All other witnesses stated that they cultivated separated/ different parts within the 10+ Acres.

The Original Complainants appear to have not given evidence before the Assistant Commissioner and as mentioned above, the present Substituted-Complainant-Appellants appear to be the witnesses for the Original Complainant-Appellants before the Assistant Commissioner and the said witnesses have denied that the 1st, 2nd and 3rd Respondent-Respondents were tenant cultivators of the subject matter. Since a relationship of that nature is an arrangement between the Landlord and the tenant cultivator, whether the Substituted Complainant-Appellants as witnesses at that time had any first-hand knowledge to deny that relationship is questionable. Anyhow, while giving evidence on behalf of the Original Complainants, willingness to give 5 acres to the 1st Respondent-Respondent for cultivation has been clearly stated even though the Original Complainants in their application had stated that the Respondent-Respondents have no right to the subject matter.

However, in the contrary, 1st, 2nd and 3rd Respondent-Respondents have given evidence to show that the 1st Respondent-Respondent worked in a separate portion as a tenant

cultivator even when their parents were living. The 3rd Respondent cultivated the portion worked by her father, Thomas, and the 2nd Respondent cultivated the portion worked by his mother, Gimara. A Grama Niladari by the name K.M. Nandasena has given evidence to show that the Respondent-Respondents were cultivating the paddy field in question, but he came to know the subject matter only since 1996. However, a tenant cultivator of a nearby paddy field by the name Lionel Liyana Patabendi has given evidence in favour of the Respondent-Respondents stand that they were cultivating even when their parents were among the living.

Having taken into consideration the evidence led before the inquiry, the Assistant Commissioner by Order dated 25/11/1997 stated, that the Respondent-Respondents had cultivated the said paddy field in the life time of the tenant cultivators, Thomas and Gimara, and after their death, continued to work as tenant cultivators thus, creating a landlord tenant relationship. In arriving at this decision, the Assistant Commissioner has taken into consideration, the evidence given by the respective witnesses and the documents marked 'P13' and 'P14', (the two letters written to the 1st Respondent-Respondent relating to nonpayment of rent), and documents marked as 'V5' and 'V6', which established paying of due rent by the Respondent-Respondents and the collection of such proceeds by the landlord, while accepting the Respondent-Respondents as tenant cultivators. The Assistant Commissioner further held that there is no material evidence to show that Ranjith Premalal or Gnanasiri had cultivated any other land in their capacity as tenant cultivator.

It was the submission of the learned Presidents Counsel appearing for the Respondent-Respondents that the Provincial High Court in its Judgment dated 27/10/1999, did not appreciate the significance of documents marked 'V5' and 'V6', and also failed to examine the Application before the Assistant Commissioner in the context of a Complaint filed under Section 14(1) and (2) of the Act, instead, considered Section 8(1) read with Section 4(1) of the Act, and decided that only the 1st Respondent-Respondent,

if at all, will be entitled to succeed to the tenancy, and limited the extent of the tenancy to 5 acres.

In arriving at the said conclusion, the High Court declared that, since Thomas died without a nomination, the land cultivated by him devolved on the surviving spouse Gimara and hence she became the tenant cultivator of the entire paddy filed in extent 10 acres. After the death of Gimara her rights devolved on the 1st Respondent being the eldest child of Thomas and Gimara, and in terms of Section 4(1) of the Act, the Court held, *"since the maximum extent of paddy land that could be cultivated by a tenant cultivator shall be five acres"* the 1st Respondent was the only tenant cultivator to succeed to the tenancy.

The learned High Court Judge was of the view that *"there is an error on the Order made on 25/11/1997"* and by its Judgment dated 27/10/1999, set aside the Order of the Assistant Commissioner dated 25/11/1997 and accordingly, issued a writ in the nature of *certiorari* to quash the order of the Commissioner, a writ of *mandamus* to comply with Section 14, and to evict the Respondent-Respondents from the land, leaving 5 acres for the 1st Respondent.

At this juncture it is pertinent to observe that Section 14(2) contemplates the eviction of occupants who are not entitled under the Act to the rights of the deceased tenant cultivator from the extent referred to in Section 14(1) which means the total extent occupied by the deceased tenant cultivator and not from certain parts of it. On the other hand, Section 4 and its subsections contemplate a different situation where a tenant cultivator, who generally has a right to occupy, cultivate in excess of the prescribed limit by law. Further Section 4 provides for the tenant cultivator's entitlement with the approval of the Commissioner to select the extent he is entitled in law to cultivate and vacate the rest and failing to exercise such entitlement, eviction of the tenant cultivator from the extent which is in excess of the prescribed limit. The said section also gives the landlord a right to cultivate the extent vacated by the tenant cultivator or to appoint one or more tenant cultivators to the extent so vacated by the tenant cultivator.

Thus, Section 14 applies to a situation where the paddy field is occupied by a person who does not have a right to occupy after the death of the tenant cultivator and Section 4 applies to a situation where a tenant cultivator cultivates more than the prescribed limit. The application before the Assistant Commissioner was based on the premise that the Respondent-Respondents had no right to the subject matter.

Even one considers that having the maximum limit in another paddy field under some other landlord is sufficient to apply Section 4 without making the other landlord a party, still the tenant cultivator may have an option to select his extent to cultivate. It appears that the learned High Court Judge failed to appreciate above differences between the situations and circumstances contemplated by said sections.

The learned High Court Judge also failed to appreciate that;

- Even though that Section 8 has some relevance in deciding who is entitled to occupy as possible successors to the deceased tenant cultivators, that the original application was not made to decide the successor or successors to the deceased tenant cultivator.
- As per the proviso to Section 4(1), even the extent cultivated by the spouse too is considered in deciding the ceiling prescribed by law and as such, if there was a cultivation exceeding the 5A limit, it was there from the commencement of tenancy by the parents of the Respondent-Respondents indicating that cultivation of the excess extent by children of the deceased tenant cultivators and acceptance of rent during the life time of the deceased tenant cultivators even for that excess extent and the evidence to say that 1st Respondent-Respondent cultivated a separate portion, favour the view that landlord and tenant cultivator relationship with 1st Respondent-Respondent commenced prior to the death of Respondent-Respondents' parents.
- Even if the payment of rent during the life time of the parents of the Respondent-Respondents were considered as payment of rent as agents of the deceased tenant

cultivators, in the above backdrop, accepting of rent from the Respondent Respondents naming them as tenant cultivators by 'V5' and 'V6' supports the view that there was a new relationship of landlord and tenant cultivators between the Original Complainant and the Respondent-Respondents and as such, the landlord cannot use Section 14 to evict his own tenant cultivators. Thus, the allegations contained in the application before the Assistant Commissioner was false/ misconceived.

In its Judgment dated 24/02/2012, the Appellate Court having considered documents marked 'V5' and 'V6' led in evidence before the Assistant Commissioner, held that;

"The above documents clearly demonstrate the falsity of the Complaint of Amarasena and Karunawathie. The said document further demonstrates the fact that Amarasena and Karunawathie had accepted Ranjith Premalal and Gnanasiri as their tenant cultivators."

The Appellate Court approached the Application filed before the Assistant Commissioner, as one, in terms of Section 14(1) and (2) of the Agrarian Services Act. In that context, the Court decided that there was no truth in the Complaint and that the Respondent-Respondents were the tenant cultivators of the paddy land in question. Furthermore, the said findings clearly identified the scope of the Complaint before the Assistant-Commissioner, as formed in terms of Section 14 of the Act. Thus, the Court of Appeal has correctly recognized the application made to the Assistant Commissioner as a false application made under Section 14 to evict the tenant cultivators.

Accordingly, I answer the questions of law on which leave to appeal has been granted to the Complainant-Appellant, (and which has been quoted earlier), as follows –

1. Since it was found that the Respondent-Respondents are tenant cultivators who have their own right to occupy, Section 8(1) of the Act, has no application to the instant Appeal and accordingly, is answered in the negative.

2. The Assistant Commissioner has a duty to decide the correctness of the application. The Court of Appeal correctly found the application was based on a wrong premise and the Respondent-Respondents are Tenant Cultivators on their own as found by the Assistant Commissioner. Thus, this question of law does not arise as correctly found by the Court of Appeal, the application before the Commissioner was based on false footing.
3. Answered in the affirmative as the learned High Court Judge failed in appreciating relevant aspects as explained above.
4. Answered in the affirmative.

For these reasons, this Appeal is dismissed; the Judgment of the Appellate Court is affirmed; and that of the Provincial High Court is set aside. No order for costs.

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

E.A.G.R. Amarasekara, J

I agree

Judge of the Supreme Court

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

In the matter of an application for Leave to Appeal in terms of Sec:5(c)(1) of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006

SC Appeal No. 30/2013

SC/HCCA/LA/380/2012

CP/HCCA/KAN No. 88/2009 [f]

DC Kandy Case No. P/14028

Manthree Aludeniya,
Karalliadde Walawwa,
Teldeniya.

PLAINTIFF

Vs.

1. Pearl Karalliadde, No. 74/2, Jaya Road, Udahamulla, Nugegoda.
2. Saddhatissa Bandara Karalliadde, No. 71, Rajapihilla Mawatha, Kandy.
3. Kawan Tissa Bandara Karalliadde, Madapola, Karalliadde, Teldeniya.
4. Karalliadde Walawwe Anula Karalliadde, Karalliadde, Teldeniya.
5. Swarna Kumarihamy Karalliadde, Karalliadde, Teldeniya.
6. Ekanayake Mudiyanselage Kande Walawwe Jayantha Karalliadde, Karalliadde, Teldeniya.

7. Ekanayake Mudiyanselage Kande Walawwe Ranjith Karalliadde, Karalliadde, Teldeniya.

8. Ekanayake Mudiyanselage Kande Walawwe Sarath Karalliadde, Karalliadde, Teldeniya.

9. Ekanayake Mudiyanselage Kande Walawwe Lalinda Karalliadde, Karalliadde, Teldeniya.

10. Sriyani Kularatne

11. Sarath Kularatne
    Both of Teldeniya, Karalliadde

1st to 11th DEFENDANTS

AND BETWEEN

Ekanayake Mudiyanselage Kande Walawwe Jayantha Karalliadde, Karalliadde, Teldeniya.

6th DEFENDANT APPELLANT

Vs.

Manthree Aludeniya,
Karalliadde Walawwa,
Teldeniya

PLAINTIFF RESPONDENT

1. Pearl Karalliadde, No. 74/2, Jaya Road, Udahamulla, Nugegoda.

2. Saddathissa Bandara Karalliadde, No. 71, Rajapihilla Mawatha, Kandy.

3. Kawan Tissa Bandara Karalliadde, Madapola, Karalliadde, Teldeniya.

4. Karalliadde Walawwe Anula Karalliadde, Karalliadde, Teldeniya.

5. Swarna Kumarihamy Karalliadde, Karalliadde, Teldeniya.

7. Ekanayake Mudiyanselage Kande Walawwe Ranjith Karalliadde, Karalliadde, Teldeniya.

8. Ekanayake Mudiyanselage Kande Walawwe Sarath Karalliadde, Karalliadde, Teldeniya.

9. Ekanayake Mudiyanselage Kande Walawwe Lalinda Karalliadde, Karalliadde, Teldeniya.

10. Sriyani Kularatne

11. Sarath Kularatne
    Both of Teldeniya, Karalliadde

DEFENDANT RESPONDENTS

AND

Manthree Aludeniya,
Karalliadde Walawwa,
Teldeniya

PLAINTIFF RESPONDENT PETITIONER

Vs.

Ekanayake Mudiyanselage Kande Walawwe Jayantha Karalliadde, Karalliadde, Teldeniya.

6th DEFENDANT APPELLANT
RESPONDENT

1. Pearl Karalliadde, No. 74/2, Jaya Road, Udahamulla, Nugegoda.

2. Saddathissa Bandara Karalliadde, No. 71, Rajapihilla Mawatha, Kandy.

3. Kawan Tissa Bandara Karalliadde, Madapola, Karalliadde, Teldeniya.

4. Karalliadde Walawwe Anula Karalliadde, Karalliadde, Teldeniya.

5. Swarna Kumarihamy Karalliadde, Karalliadde, Teldeniya.

7. Ekanayake Mudiyanselage Kande Walawwe Ranjith Karalliadde, Karalliadde, Teldeniya.

8. Ekanayake Mudiyanselage Kande Walawwe Sarath Karalliadde, Karalliadde, Teldeniya.

9. Ekanayake Mudiyanselage Kande Walawwe Lalinda Karalliadde, Karalliadde, Teldeniya.

10. Sriyani Kularatne

11. Sarath Kularatne
Both of Teldeniya, Karalliadde

1st to 5th and 7th to 11th DEFENDANT RESPONDENT RESPONDENTS

Before : Hon. B.P. Aluwihare, PC., J.
Hon. S. Thurairaja, PC., J.
Hon. E.A.G.R. Amarasekara, J.

Counsel : Ranjan Suwandaratne, PC with Anil Rajakaruna & Ineka Hendawitharana for the Plaintiff-Respondent-Petitioner-Appellant

Kushan D' Alwis, PC with Milinda Munidasa and Sashendra Mudannayake for the 4th and 5th Defendant-Respondent-Respondent

Sunil Abeyratne with Thashira Gunathilake for the 1st Defendant-Respondent- Respondent.

Samantha Ratwatte, PC with Upendra Walgampaya for the 6th Defendant-Appellant-Respondent

Upendra Walgampaya for the 7th, 8th and 9th Defendant-Respondent-Respondents.

Argued on : 27. 07.2020

Decided on : 03.10.2023

E.A.G.R Amarasekara, J.

The Plaintiff Respondent Appellant (herein after sometimes referred to as Plaintiff) instituted partition action no. P14028 in the District Court of Kandy for the partition of the land shown as Lot 1 in plan no.3356P made by Mr. S.C.K.R. Misso, licensed surveyor. The aforesaid plan was made for the purpose of a previous partition action no. P3908 instituted in the same District Court. It is common ground that even though the said Lot 1 was initially surveyed as part of the

corpus of the said partition case no. P3908, it was later excluded from the corpus that was partitioned in the said case. As per the amended plaint dated 18.01.2002, the Plaintiff and first to fifth Defendant Respondent Respondents (herein after referred to as first to fifth Defendants) were given one sixth each from the corpus sought to be partitioned in the matter at hand. The said first to fifth Defendants had no contest with the Plaintiff. However, the fifth Defendant claimed a right of way over the land sought to be partitioned in the present action, which right of way was depicted from X to Y on the preliminary plan no.2213 made by B.P. Rupasinghe L.S marked X at the trial. Sixth Defendant Appellant Respondent (herein after referred to as Sixth Defendant.) sought a dismissal of the action while claiming title to the entire land sought to be partitioned in the matter at hand.

The learned District Judge after trial decided to partition the corpus of the present partition action as prayed for in the plaint. Being aggrieved by the said decision, Sixth Defendant appealed to the Civil Appellate High Court of Kandy and the learned High Court Judges set aside the judgement of the learned District Judge and dismissed the action of the Plaintiff while refusing to grant a declaration of title in favor of the Sixth Defendant to the corpus. Being aggrieved by the said decision of the Civil Appellate High Court, the Plaintiff filed a leave to appeal application before this court and this court granted leave on the questions of law set out in paragraph 48 (a) (b) (c) and (d) of the petition dated 4.8.2012. The said questions of law will be referred to in the latter part of this judgement.

As per the amended plaint, among other things the Plaintiff has averred;

a. That the name of the land sought to be partitioned is “Kekiriwel lande watta” and “Gamagedara walawwe watta” – vide paragraph 1 of the amended plaint. (It must be observed here that irrespective of the name used to describe the land, as per averments 6 to 11 of the amended plaint, it is clear that the land sought to be partitioned is the land described in the schedule (b) of the plaint as lot 1 of plan no.3356P of Mr. Misso L.S. which is filed of record in the previous partition action no.3908)

b. That the land described in schedule (a) of the amended plaint was the subject matter of the previous partition action no. P3908 and lot 1 of the said plan no.3356P was excluded from the corpus of the said partition action and lots A, B, C of the same plan were given to Jayatilake Banda Karalliadde, Tikiri Banda Karalliadde and Abeyratna Banda Karalliadde respectively by the final decree of the said partition action – vide paragraph 2 to 6 of the amended plaint.

c. That the aforesaid Jayatilake Banda Karalliadde possessed the said lot 1 excluded in that action after the said final decree for 10 years without any interruptions or disturbance and became entitled to said lot 1 by prescription due to his adverse

possession – vide paragraph 7 of the amended plaint. (However, it is not revealed against whose title the said adverse possession took place)

d. That said Jayatilake Banda Karalliadde died and the Plaintiff and the 1st to 5th Defendants inherited the said lot 1 which is the corpus of this action – vide paragraph 8 of the amended plaint.

e. That the Plaintiff and the 1st to 5th Defendants adversely possessed this land without any interruptions or disturbances for more than 10 years. – vide paragraph 9 of the amended plaint. (Here also the plaintiff has not disclosed against whose title they possessed the land adversely.)

f. That the 6th to 9th Defendants without any title or entitlement started various activities and was getting ready to put up a building – vide paragraph 12 of the amended plaint. (Here the Plaintiff's position seems to be that sixth to nineth Defendants do not have any right to the property in issue and are intruders against their title which they have acquired as aforesaid. Thus, it is clear that Plaintiff was not presenting a case to indicate that he and the other purported co-owners had an adverse possession against the true ownership of or paper title of 6th to 9th Defendants but they entered into the property owned by them from the time of their predecessor, their father.)

Even though it is clear that the land sought to be partitioned is Lot 1 of plan no. 3356P made for the previous partition action, in schedule (b) of the amended plaint, the Plaintiff has named it as "Kekiriwel lande watta" and "Gamagedara walawwe watta". The trial at the District Court has commenced on 10.06.2003 and no admission has been recorded to indicate that the land sought to be partitioned bears the name as stated in the schedule (b) to the plaint. In fact, dispute based as to the name of the land has been raised by the point of contest no.14 recorded on the said date. After recording the said point of contest no.14, the learned District Judge has recorded that there is a dispute as to the name of the land – vide page 291 of the brief. As per the stance of the 6th Defendant in his amended statement of claim, the name of the land sought to be partitioned is "Gamawalawwe watte". It must be noted that the land partitioned in the previous partition action no. P3908 bears the same name given in the plaint, namely "Kekiriwel lande watta" and "Gamagedara Walawwe watta" – vide schedule (a) of the amended plaint and the final partition decree found at page 996 of the brief. As per the boundaries given in the schedule (a) to the plaint there is no other land with the same name described as a boundary. Even as per the plan no.3356P made in the said partition case no. P3908 the corpus partitioned in that case consists of lot A, B and C of the said plan and lot 1 of the said plan which is the corpus of this case is the Lot excluded from the corpus. According to the said plan, corpus of the present case is adjoining to the partitioned corpus of the previous case. When one says that a portion of land is excluded

from corpus of a partition action, the first impression that comes to one's mind is that the excluded portion does not belong to the land sought to be partitioned. If so, the question arises whether the Plaintiff correctly named the land sought to be partitioned in the present case as it bears the same name as one partitioned in the previous case. If the land sought to be partitioned is not properly named in the present case, then the registration of Lis pendens, steps relating to public notice of institution of partition action as pre-trial steps may become defective. On the other hand, there are certain circumstances an excluded portion from a corpus of a partition action may bear the same name of the partitioned portion as explained below.

1. If the excluded portion is a different land bearing the same name. (However as explained before no adjoining land was described using the same name – vide schedule (a) of the amended plaint and description of the main land in the final decree of the case no. P3908 marked as P2.)

2. If the exclusion is done due to the fact someone has acquired title to that portion of the same land by prescription. (No such evidence has been placed before the District Court.)

3. The parties to the action agree to exclude a portion from the corpus in favour of someone. (No such evidence has been placed before the District Court)

However, there is no such evidence available in the present action that the exclusion of Lot 1 of Misso's plan no. 3356P was due to the reasons mentioned above. If they were the reasons for the land sought to be partitioned in this case to bear the name of the land partitioned in the previous case, such person or people who owned or in whose favour those portions were excluded or their descendants etc. should have been made parties to this partition action to claim prescriptive title against them. No such party or parties have been revealed in the amended plaint or through evidence. No evidence has been placed before court to show that the said exclusion of lot one was done in favor of the predecessor in title of the Plaintiff and the purported co-owners, namely their father. If it was excluded in their father's favour, they would have naturally pleaded that and tendered the necessary evidence such as Judgment and interlocutory decree etc. For some reason, the judgment and interlocutory decree which should reveal the reason for exclusion of Lot 1 of plan no.3356P of Misso L.S. were not tendered in evidence. Even though the learned District Judge in answering the point of contest no.14 in the negative has refused to accept the name given to the corpus of this action by the Sixth Defendant, it is not sufficient. First the learned District Judge must satisfy himself that the land sought to be partitioned in the present action had been correctly named. No doubt it is the lot 1 of plan no.3908P. However, if it is not correctly named, it might have affected the proper registration of Lis pendens and pre-trial publication of notice and naming the correct parties. It appears that the learned District Judge whose duty was to investigate title has not given his thoughts to the above facts observed by this court in relation to the identification of the purported corpus sought to be partitioned in this case by its name.

The fifth Defendant who stands with the Plaintiff to get the purported corpus partitioned, in her oral evidence has twice stated that there is no specific name to the corpus. The learned District Judge has failed to appreciate that one of the old deeds, which is older than the final decree of the previous partition action, namely deed no.1525 in the chain of title of the sixth Defendant contains a land named "Gama Walawwe Watta" as described by the sixth Defendant in his statement of claim and the deeds written after that on the strength of the title gained through that deed also have described the land dealt by those deeds as Lot 1 of plan 3365P of case no. P3908. Thus, there were material to think that the exclusion was done in the previous partition action since Lot 1 was a different land as described by the 6th Defendant. In my view mere attempts to show certain errors of the learned High Court Judges through the questions of law raised will not suffice if the Plaintiff Appellant fails to satisfy this court that the substantial rights were affected by the dismissal of their case by the High Court. The Plaintiff's substantial rights are affected by the dismissal made in the High Court only if the District Judge had come to the correct finding to partition the corpus.

However, for the reasons discussed below in this judgement, I am of the view that the learned High Court Judges were correct in coming to their conclusion to allow the appeal before them and to dismiss the plaint as the learned District Judge erred in deciding to partition the purported corpus of this action.

It must be stated here that the Roman Dutch law of acquisitive prescription ceased to be in force after Regulation no.13 of 1882 and that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession. The common law of acquisitive prescription is no longer in force except as regard the crown. [See **W.Perera v C. Ranatunge (1964) 66 N L R 337 at 339**, also see **Dabare v Martelis Appu 5 N L R 210, Terunnanse v Menike 1 N L R 200 at 202**, **Fernando v Wijesooriya et al 48 N L R 320 at 325**, **I.L.M**. **Cadija Umma and Another v S. Don Manis Appu and Others 40 N L R 392 at 395**].

Since it is the Prescription Ordinance that governs the acquisitive prescription in relation to immovable property, it is worthwhile to quote section 3 of the said ordinance here.

"3. *Proof of undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation*

thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

provided that the said period of ten years shall only begin to run against the parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

As per the above section, it is through an action filed in court one gets a decree in his favour based on prescriptive title. Aforesaid section contemplates three categories of people who can get a decree based on prescription in their favour namely;

1. Defendant can claim prescriptive title by proof of undisturbed and uninterrupted possession for 10 years by a title adverse or independent of that of the claimant or plaintiff.

2. Like manner a plaintiff can bring an action for the purpose of being quieted in his possession of immovable property, or to prevent encroachment or usurpation or to establish his claim in any other manner to such property by proof of possession as mentioned above and can pray for a decree in his favour.

3. An intervenient party to an action also by proof of possession as mentioned above can pray for decree in his favour.

Thus, it is clear that it is a party to an action, whether it be a plaintiff, defendant or an intervenient, who can ask for a decree based on prescriptive title. The said section 3 does not provide for a party to get a decree from court in favour of a person who is not a party before the court to say that the said person has got prescriptive title to the subject matter of the action. By this I do not intend to say that one in possession cannot tack on to his predecessor's possession. In fact, one may. {See **Terunnanse V Menike 1 N L R 200 at 201, Wijesundera and Others V Constantine Dasa and Another (1987) 2 Sri L R 66, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197**}. However, the plaintiff, the Defendant or the intervenient, as the case may be, must pray for a decree on prescriptive title in their favour. The Plaintif and others standing with him in this action pray for a declaration or a finding that their father even prior to the alleged intrusion by the 6th Defendant acquired title by prescription without revealing adverse to whose title it was acquired.

It is the position of the Plaintiff that their father acquired title by prescription and he and the 1st to 5th Defendants became co-owners on his demise by inheritance. In fact, points of contest number one and two have been raised at the beginning of the trial on this basis. The learned High Court Judges have come to the conclusion that as per the aforesaid section 3 of the Prescription Ordinance and section 2 of the Partition Act, the court cannot decree that the predecessor in title

of the Plaintiff and the 1st to 5th Defendants, who is not a party to the action, acquired title by prescription. Even in **Punchi Rala v Andris Appuhami (1886) 3 SCR 149**, it was held that it is not competent for a party to set up a third person's title under section 3 of the Prescription ordinance. It is stated in the judgment that the Prescription Ordinance contemplates possession by a party getting judgment, a plaintiff, a defendant or intervenient, - his own possession or that of his predecessors in title and it is to be a judgment declaratory of the right of property in a party to the action. [In this regard also see **K. D. Edwin Peeris v Kirilamaya 71 NLR 52**, **Terunnanse v Menike 1 NLR 200**, **Timothy David v Ibrahim 13 NLR 318**, **Kirihamy Muhandirama v Dingiri Appu 6 NLR 197, Raman Chetty et al., v Mohideen 18 NLR 478**]. As per the stance taken by the Plaintiff and his siblings, only if they can get a decree in favour of their father who is dead and gone and not a party to the action, they become co-owners. Otherwise, evidence shows that some of them live far away from the purported corpus. Unless they can prove co-ownership, they cannot say one who possess represents the possession of the other co-owners. Anyway, it appears that the 6th Defendant was there in possession as confirmed by a 66 application.

It appears that one of the grounds for the Learned High Court judges to allow the appeal and dismiss the partition action was that the predecessor in title to the Plaintiff and his siblings, namely their father was not a party to the action which debars a court in terms of section 3 of the Prescription Ordinance from decreeing that he acquired prescriptive title which in turn debars a declaration that the Plaintiff and his siblings are co-owners.

As a decree on prescriptive title can only be given in favor of a party to the action, in my view the aforesaid conclusion of the learned High Court Judges is correct. It must be noted that no direct question of law has been proposed through the petition or thus, allowed by this court with regard to the said conclusion of the learned High Court Judges. Therefore, in a way the said conclusion remains unchallenged. For completeness, I quote the relevant portions of the High Court judgement below which refer to aforesaid section 3 of the Prescription Ordinance and section 2 of the Partition Act respectively.

(Referring to section 3 of the Prescription Ordinance)

"*The above provisions confer a right on the possessor who has been in undisturbed and uninterrupted possession of a land to bring an action for the purpose of being quieted in possession or for a defendant who is sued in ejectment to take up the defense that he has acquired title to the land in dispute by prescriptive possession but these provisions do not permit a person who is in possession of land to bring an action for partition on the basis that his predecessor in title had acquired title to the land by prescription*. "

(Referring to section 2 of the Partition Act)

"*In view of the provision of the section 2 above a person must be a co-owner of land to be partitioned to bring an action for partition. A person who is not a co-owner cannot bring an action for partition. The plaintiff cannot expect for the court to decide whether a so called predecessor in title had acquired title for the corpus by prescription and then proceed to investigate the title*

of the parties to the action. The plaintiff came to court on the basis that his father acquired title by prescription and that he and first to fifth defendants inherited from the father. The court in a partition action cannot declare that the predecessor in title of the plaintiff and first to fifth defendants acquired title by prescription specially when the person sough to be declared so entitled is now deceased."

In short, the learned High Court Judges have tried to point out that in terms of section 3 of the Prescription Ordinance a Court cannot decree a person who is not before court has acquired title by prescription. As per the stance taken by the Plaintiff, the Plaintiff and the parties stand with him cannot proceed ahead without getting such a declaration or decree.

Even though the Plaintiff's and the 1st to 5th Defendants' position is that their father acquired the prescriptive title and they inherited the property as co-owners at the demise of their father, the paragraph 9 of the amended plaint as well as the point of contest number 3 raised at the trial focus on whether the Plaintiff and the 1st to 5th Defendants acquired prescriptive title along with their predecessor in title. Thus, it is necessary to see whether they have proved their prescriptive title to the corpus as co-owners. It is already stated above if the court cannot hold that their father acquired prescriptive title, it cannot hold that they are co-owners through inheritance as per their stance.

It must be reiterated that the position of the Plaintiff was that the father of the Plaintiff and the 1st to 5th Defendants entered into the lot 1 of plan no.3356P after it was excluded from the corpus of the partition case no. P3908 and acquired prescriptive title to it and Plaintiff and his siblings got their right through inheritance. Since the 6th and 9th Defendants without any title acted in violation of their rights, they want to get the land partitioned. Thus, the case was not presented to say that the Plaintiff and his siblings along with the possession of their predecessor adversely possessed it against the title of the 6th to 9th Defendants and they acquired prescriptive title against the 6th to 9th Defendants. It is presumed that if a person enters into a possession in one capacity, he continues to possess it in the same capacity unless he changes the nature of the possession by an overt act. Adverse possession means a possession incompatible with the title of the true owner or the title holder. (See **Fernando v Wijesooriya et al., 48 NLR 320**). To acquire ownership or dominion of a property, the adverse possession must be against the true ownership of the property in a manner denying the said ownership. Thus, if one claims prescriptive title to gain ownership of a property, he must reveal against whose ownership the adverse possession was exercised. In **I. De Silva V Commissioner General of Inland Revenue 80 N L R 292,** it was held that, "*The Principle of law is well established that a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. The acts of the person in possession should be irreconcilable with the rights of the true owner; the person in possession must claim to be so as of right as against the true owner. Where there is no hostility*

to or denial of the title of the true owner, there can be no adverse possession. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts."

No evidence was led to show who was the true owner of lot 1 of plan no. 3365P at the time of purported entry to possess it by the Plaintiff's father. The interlocutory judgement of the previous partition action has not been tendered for the court to see why the said lot 1 was excluded or in whose favor it was excluded. If it was excluded in favor of the Plaintiff's father the Plaintiff or the people who want to partition the corpus would have marked it to support their case. Non -production of the said judgment of the previous partition case which should contain the reasons for exclusion of said Lot 1 should have been considered as a factor that prompts a court to presume that the production of said evidence would have been not favourable to the Plaintiff's stance. For example, the reason could have been that it was a different land as described by the old deeds of the 6th Defendant's chain of title as mentioned above. However, the stance taken in the plaint was that the Plaintiff's father acquired prescriptive title even prior to the alleged infringing acts of the 6th to 9th Defendants but without revealing against whose title he acquired prescriptive title.

If this is a case to evict the 6th to 9th Defendants based on their alleged infringing acts for the purpose of being quieted in his possession by the Plaintiff, it would have been a different scenario altogether. In that situation the Plaintiff has to prove his adverse, uninterrupted and undisturbed possession for ten years against the 6th to 9th Defendants against any title they claim. In my view, section 3 of the Prescription ordinance contemplates such situation. A claim of prescription by a party against another party in an action filed in court and not a situation of claiming prescriptive title against whole world. However, for some reason, the Plaintiff has chosen to file a Partition action which is an action in Rem and claim prescriptive title accrued to their father prior to his death which is also prior to the alleged infringing acts of the 6th to 9th Defendants. The Plaintiff has taken the arduous task of proving title against whole world without revealing against whose title their father acquired prescriptive title. In my view one cannot prove prescriptive title without revealing against whom he claims prescriptive title and without giving that person an opportunity to respond. Furthermore, as per section 3 of the Prescription Ordinance itself, the time does not start to run against parties claiming rights in remainder or reversion and section 13 of the same ordinance has created certain limitations to claims on prescription based on certain disabilities. Thus, indicating the person against whom the prescriptive claim is made in evidence is essential for a court to decide on prescriptive title. When the Plaintiff and his siblings take up a position that their father acquired prescriptive title even prior to the alleged infringing acts by the 6th to 9th Defendants, it is questionable and unascertainable against whose true ownership he acquired prescriptive title.

The learned High Court Judges have referred to **Sirajudeen and Two Others v Abbas (1994) 2 SLR 365** in their judgement where it was held that when a party invokes provision of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to an immovable

property, the burden of proof rests squarely and fairly on him[1] to establish a starting point of his or her acquisition of prescriptive rights and a facile story of walking into an abandoned premises after the Japanese air raid constituted materials far too slender to found a claim based on prescriptive title. Similarly in the matter at hand, the burden of proof rests on the Plaintiff and the Parties who rely on the same stance to prove prescriptive title. Even here, the position taken is that father of the plaintiff commenced possession of the land after the exclusion of lot 1 of plan no.3356P in the previous partition act. The basis for such commencement of purported possession and against who's right it was commenced or the animus (intention) of their father have not been revealed through evidence. By referring to the said decision in **Sirajudeen and Two Others V Abbas**, the learned High Court Judges have attempted to point out that the commencement of adverse possession was not proved. Basically, the reasons given by the High Court Judges while referring to the section 3 of the Prescription Ordinance and section 2 of the Partition Act and the commencement of purported possession was to indicate that the partition action filed by the Plaintiff is misconceived in law and even the purported possession of the Plaintiff and 1st to 5th Defendants and their father cannot be conceded as a possession containing sufficient materials to prove prescriptive title. If their father's possession was not proved as an adverse possession, the Plaintiff and her siblings, if they have any possession, also continue in the same capacity as no overt act to change the nature of possession was revealed. It must be noted that the said part of the judgment of the High Court is not directly and clearly challenged through the questions of law suggested by the petition and accepted by this court when granting leave. The said reasoning is sufficient to dismiss the partition action filed by the Plaintiff

Because of the above reasons, it appears that the learned High Court Judges have not gone into analyze the evidence led by the Plaintiff in detail. Even if it is considered for the sake of argument that a proper action has been filed, the reasons given below will show that the learned District judge erred in evaluating evidence led at the trial to get the land partitioned.

If one wants to establish prescriptive title, he has to prove his adverse possession to an identified land or to an identified portion of a land and that possession must satisfy requirements contemplated in the prescription ordinance. As explained above, there is no reference to any overt act and they continue in possession, if they had any, in the same capacity as their father. The lack of evidence to show that their father's possession was adverse to a true owner is sufficient to dismiss any claim of prescription by the Plaintiff and his siblings. Even to consider it as an adverse possession to the 6th Defendant, since the position of the Plaintiff is that the 6th Defendant came to the land after the demise of their father, the parties relying on prescriptive title along with Plaintiff must show facts that indicate an adverse possession against the predecessors in title of the 6th Defendant by the father of the Plaintiff. As said before, no basis for commencement of possession was revealed and no evidence as to any act by the Plaintiff's

[1] See also S.K. Chelliah v M. Wijenathan et al., 54 N L R 337,342 and Mithrapala and Another V Tikonis Singho (2005) 1 Sri L R 206

father or even by the Plaintiff and his siblings that rejects the title of the predecessors in title of the 6th Defendant has been revealed through evidence. Thus, it can be presumed, that if they had any possession, they continued the possession of their father which was not proved as an adverse possession.

On the other hand, the plaint states that the 6th Defendant has no right or title to the land sought to be partitioned and the name of the corpus used by the 6th Defendant also is challenged, indicating that the paper title claimed by the 6th Defendant is not relevant to the corpus. If so, it is questionable against whose title the Plaintiff and her siblings claim adverse possession.

Pahalawatte Gedara Sumanawati, Edwin Jayasuriya, Ekanayaka Mudiyanselage Ran Banda, Batagolle gedara Simon, who gave evidence for the Plaintiff, had worked or had been employed by the Plaintiff's father or one of his offspring. Even though they speak of plucking pepper or coconut, having a threshing floor, cow shed, place to tether the elephants, parking of vehicles etc., they do not identify the corpus referring to the boundaries or to the plan. The preliminary plan no 2213 has not identified any place where a threshing floor or garage or cow shed or a place where elephants were tethered in the past. Further it is evinced from the said plan that certain portions shown by the Plaintiff for the survey do not belong to the corpus (For example Lots 4 to7) and Lot 2 has been identified through superimposition. Thus, the evidence of the aforesaid witnesses with regard to the possession cannot be ascertained with certainty whether it relates to the whole land identified as the corpus or only to certain areas shown by the Plaintiff as the corpus. Some of them have indicated that they do not have knowledge of the corpus. Therefore, their evidence alone is not sufficient to say that the evidence given by them with regard to the possession refers to the corpus as identified by the preliminary plan. Even if it is considered that they were giving evidence regarding the possession of the corpus, no material was revealed through them with regard to the nature of the possession that the father of the Plaintiff had over the corpus to decide whether it was adverse or whether it was permissive possession. Since the Plaintiff and the 1st to 5th Defendants rely on the possession of their father and the continuation of the same possession without referring any overt act to change the nature of the possession, it has to be presumed that if the Plaintiff's father had possession, the nature of that possession remains the same. As indicated above nothing has been revealed by the aforesaid witnesses with regard to proof of an adverse possession.

Evidence of Bernard P. Rupasinghe L.S called by the plaintiff relates to the survey of the corpus and the preparation of the plan done by him. He is not a person who has knowledge of prescriptive possession of the Plaintiff and 1st to 5th Defendants or their predecessor.

Edirisinghe Mudiyanselage Rana Raja Banda and Karunanayake Mudiyansalage Tissa Kotinkaduwa are court officers who gave evidence regarding the previous partition case and 66 application respectively. They too cannot have knowledge of prescriptive possession relating to the corpus. Through these witnesses, nothing has been revealed to indicate that lot 1 of MR.

Misso L.S plan was excluded for the benefit of the Plaintiff's father. However, it was said in evidence that the disputed land in the 66 application was given to the 6th Defendant on the basis that the 6th Defendant was in possession at the date of filing of that application.

Ananda Lekam is a relative of the parties who had come to the Walawwa on several occasions and stayed there even. Wallawwa is not within the corpus. He has given evidence with regard to the access road he used to visit Wallawwa. He has also stated about some cultivation of crops around said road but do not indicate whose cultivation was that. However, he too does not state facts sufficient to decide that the possession of Plaintiff and 1st to 5th Defendants and their predecessor was adverse to the title of the true owner who is unknown or to the 6th to 9th Defendants.

5th Defendant Swarna Karalliadde and the Plaintiff have given evidence to indicate that the threshing floor, cow shed, garage and the place where the elephants were tethered were within the lot 1 of the plan no, 3356P excluded from the previous partition action. However certain areas shown by the Plaintiff to the commissioner does not fall within the corpus identified by the commissioner in making the preliminary plan no.2213 and Lot 2 was identified as part of the corpus through superimposition. It is observed that the Plaintiff and the parties who wanted to partition the corpus based on prescriptive rights have not taken any steps to indicate that those places referred to by the witnesses to prove their possession were within the corpus as identified through the preliminary survey by showing those places to the court commissioner. If the 5th Defendant and the Plaintiff rely on those facts relating to the existence of a garage threshing floor, cow shed etc. in the past, they could have shown those areas where they were to the court commissioner during the survey. Even if it is presumed that they were within the area identified as the corpus by the preliminary survey, it itself does not prove that the possession was adverse. It has to be presumed that the nature of the possession of their father continued. As said before there is no material to established that their father's possession was adverse. It is necessary to prove the possession of their father was adverse to the true owner of the corpus when he entered into the said corpus sought to be partitioned. However, when the 5th Defendant gave evidence in 2003, she was 42 years old. Thus, she was born in 1961 and when the Plaintiff gave evidence, she was 58 years of age in 2005 indicating that she was born in 1947. Final partition plan and final decree of the previous partition action were made in 1953 and 1954 respectively. Thus the 5th Defendant was born after the final decree and the Plaintiff appeared to be a child of very mild age when the said final decree of the previous partition action was entered. If, as per their stance, their father entered into the excluded lot 1 after the said partition decree of the previous partition action, 5th Defendant cannot have any personal knowledge or the Plaintiff cannot have well informed knowledge with regard to the animus (intention) of their father when he commenced his possession or whether he entered with permission of someone else or whether it was adverse to someone else's title.

5th Defendant as well as the Plaintiff through their evidence tried to convince court that their father took the crops from the land sought to be partitioned and cultivated it and thereafter,

they possessed it. But as per the report of the preliminary plan marked X1, no one has preferred a claim to the plantation found within the portion identified as the corpus. The Plaintiff's position is that the 6th to 9th Defendants entered the land only in 1995. If so, it is questionable why the Plaintiff and his siblings did not claim the old plantation within the corpus during the preliminary survey. During the evidence called on behalf of the 6th Defendant, several documents have been marked subject to proof but such objections were not reiterated at the close of the 6th Defendant's case. Thus, those documents can be considered as evidence. The plan No.1457 made by Mawalagedara L.S marked 6V27 and its report marked 6V28 have been so tendered in evidence. As per the said report 6th Defendant as well as Plaintiff have shown the boundaries to prepare the said plan. As per Item No. vii in 6V28 there seems to be some difference between the boundaries shown by them, but it is clear lot 2 of the said plan marked 6V27 belongs to the corpus as per their own showing of the boundaries of the excluded portion of the previous partition action for the preparation of the said plan. However, as per the report marked 6V28 it was only the 6th Defendant who has claimed plantation within said lot 2 and no cross claim before the surveyor has been made by the Plaintiff or any other party who rely on the Plaintiff's pedigree. If their father was in possession and they acquired prescriptive title, it is questionable why the Plaintiff or her siblings did not claim the plantation in lot 2 in the said plan and allowed the 6th Defendant to claim some old plantation in the area shown by her as the corpus without any cross claim. This too questions the nature of possession of the Plaintiff and his predecessors as well as their story presented to court.

Dr. Laxman Karalliadde, one of the predecessors in title of the 6th Defendant, and one time power of attorney holder of Dr. Laxman Karalliadde, Ranjith Abeyratne have given evidence with regard to the land claimed by the 6th Defendant. They explained how the land was given to various people including plaintiff's relatives to be looked after on behalf of Dr. Laxman Karalliadde as he was abroad. Through those witnesses, 6th Defendant has marked several communications (see 6v3, 6v11, 6v12,6v13, etc.). Those communications indicate that some of the Plaintiff's siblings who have been given shares in the Plaintiff's pedigree has communicated with Dr. Laxman Karalliadde in a manner admitting his title to the land. It must be noted one of these communications contain a sketch of the land and some refers to the path leading to Wallawwa which show on balance of probability that communications were done in relation to the land in dispute.

The Plaintiff in her amended plaint has concealed the fact that there was a testamentary case after the death of her father. The list of properties in the said testamentary case has been marked during the evidence and the corpus which is two roods in extent cannot be found in the said list. The 5th Defendant has tried to indicate that a one-acre land included in the said list is the corpus of this case. Most probably the one-acre land included in the list could be the one-acre and nine perches land the Plaintiff's father got through the previous partition action. On the other hand, the fifth Defendant who twice said that there is no specific name to the land sough to be partitioned in this action cannot say the one-acre land listed as Gamagedara Watta alias Kekiri

welland alias Wallawwe watta in the said list of properties is the corpus of this action. If this corpus was considered as the Plaintiff' father's land at the time of his demise, it would have been naturally included in the said list. Even the third Defendant who stands with the Plaintiff in his statement of claim has claimed a right of way over the corpus. Servitude is a right over someone else's property. If he is a co-owner of the property, he has a right to every grain of sand in the property. Other co-owner's possession becomes his possession too. If one enjoys or uses the property, one has to presume that it is based on his legal right. Therefore, by claiming a servitude he admits the property belongs to someone else on which he does not have title. Not only that the Order in the 66-application matter, marked 6v2 also indicate that Swarna Karalliadde's (5th Defendant in the present action) claim before that court was for a right of way over the disputed land. These indicate that some of the siblings who are indicated as co-owners in the Plaintiff's pedigree have acted in a manner accepting that they are not the owner but they have a servitude over the corpus of someone else. Along with what is revealed through the aforesaid communications, there were material to show this claim was over the property that belonged to Dr. Lakshman Karalliadde. When some of the purported co-owners acted in a manner admitting the title was with someone else or Dr. Karalliadde, one of the predecessors in title of the 6th Defendant, how can a court rely on a stance that they as co-owners acquired prescriptive title to the corpus.

Furthermore, this court has to consider whether the so-called long possession generates a presumption that ouster has taken place and the possession is adverse. However, the 3rd Defendant's claim for a servitude, 5th Defendant's position before the primary court as revealed by the order of the primary court, the communications between Plaintiff's siblings and Dr. Karalliadde, claims made by the 6th Defendant without cross claim to the plantation, and Plaintiff or her siblings making no claims to the old plantation during the preliminary survey deter the court making such a presumption in favour of the Plaintiff and her siblings.

The above observations made by this court indicate, the learned District judge erred in evaluating the evidential materials before him.

However, it must be noted that the appeal of the 6th Defendant was allowed not because the learned High Court Judges accepted the claim made by the 6th Defendant to the whole area identified as the corpus. In fact, the learned High Court Judges did not grant the relief prayed by the 6th Defendant for a declaration that he is entitled to the entire corpus identified as the subject matter. The learned High Court Judges allowed the appeal and dismissed the partition action due to the reasons mentioned below;

1. Because it was found that the partition action filed by the Plaintiff and claim based on the prescriptive title of the predecessor in title who was not a party to the action is misconceived in law.

2. Even if it is considered that the action is not misconceived in law, the Plaintiff and the parties who wants to partition the corpus failed in proving prescriptive title in terms of section 3 of the prescription ordinance.

As mentioned before, the reason mentioned in item no.1 above has not been properly challenged through suggesting an appropriate question of law in the Petition. However, the reason mentioned in the item no.1 above is in accordance with the law as explained above.

Following are the only questions of law suggested by the Petition and accordingly allowed by this court.

a) Have the Hon. High Court Judges erred in Law by failing to consider the fact that the 6th Defendant Appellant Respondent in the said District Court case as well as in the said appeal has attempted to claim rights in relation to the subject matter of the said case no. P14028 by using a devolution of title of a completely different land which even the boundaries and extents differs in comparing the corpus of the said partition action?
b) Have the Hon. High Court Judges misdirected themselves in evaluating and considering the evidence led at the trial on behalf of the Petitioner as well as evidence led on behalf of the 6th Defendant Appellant Respondent in arriving the brief conclusion?
c) Have the Hon. High Court Judges completely misdirected themselves and also erred in law by dismissing the said appeal by taking certain extraneous matters which has no bearing on the main issue of identification of the property in arriving at their said judgment?
d) Have the Hon. High Court Judges erred in law by overturning the said well-considered judgment of the learned Trial Judge for the mere reason that the Petitioners at the stage of the appeal had attempted to produce new evidence without proper permission by the Court without considering the well-considered judgment of the Trial Judge which is based on the evidence led at the trial by the parties?

They are answered as follows;

a) They have not granted relief as per the claim made by the 6th Defendant, but allowed the appeal since the action was misconceived and even if considered as a proper action, the prescriptive title claimed by the Plaintiff and her siblings was not proved in terms of section 3 of the Prescription Ordinance. Hence the question is answered in the negative.
b) They did not involve in analyzing the evidence led at the trial in detail since the reasons given by them were sufficient to allow the appeal and dismiss the partition action. As explained above even a detailed analysis would have proved that there was no material to show that the possession was adverse to establish a claim on prescriptive title as contended by the plaintiff and her siblings. Thus, this question also has to be answered in the negative.

c) The appeal was not dismissed but it was allowed by the learned High Court Judges. Thus, the question of law was not properly formulated. Even if it is considered an error and if one replaces the words 'by dismissing the said appeal' with the words 'by allowing the said appeal', as per the reasons given above, the appeal was not decided on the issue of identification of the corpus but on valid reasons explained in the Judgment of the High Court. This question also has to be answered in the negative.

d) The learned High Court Judges correctly refused to accept new evidence tendered without permission and that attempt to produce new evidence was not the reason to overturn the District Court Judgment. Thus, the question of law is answered in the negative.

Therefore, this appeal is dismissed with costs.

……
Judge of the Supreme Court

B.P. Aluwihare PC, J.

I agree.

……
Judge of the Supreme Court

S. Thurairaja, PC, J.

I agree.

……
Judge of the Supreme Court

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 121/ 2011

SC HCCA LA No. 395/2010

NWP/HCCA/KUR/77/2007 (F)

DC Kuliyapitiya Case No. 13938/L

1. Amarasinghe Arachchige Ramani Amarasinghe, Baburugama, Kalugamuwa.

2. Dr. Amarasinghe Arachchige Sepalika Jayamaha neé Amarasinghe,
Presently in the United Kingdom and appearing by her Power of Attorney Holder who is the 1st Plaintiff.

3. Amarasinghe Arachchige Sriyani Manel de Silva nee Amarasinghe, No. 74, Charles Place, Lunawa, Moratuwa.

PLAINTIFFS

Vs.

1. Mahara Mohottalalage Upali Gunarathna Bandara, Badullewa, Narammala.

2. Dasanayaka Achchilage
   Dasanayaka, Badullewa,
   Narammala

3. Mahara Mohottalalage Herath
   Banda, Badullewa, Narammala.

DEFENDANTS

AND BETWEEN

1. Mahara Mohottalalage Upali
   Gunarathna Bandara,
   Badullewa, Narammala.

2. Dasanayaka Achchilage
   Dasanayaka, Badullewa,
   Narammala

3. Mahara Mohottalalage Herath
   Banda, Badullewa, Narammala.

DEFENDANTS-APPELLANTS

Vs.

1. Amarasinghe Arachchige
   Ramani Amarasinghe,
   Baburugama, Kalugamuwa.

2. Dr. Amarasinghe Arachchige
   Sepalika Jayamaha neé
   Amarasinghe,
   Presently in the United Kingdom
   and appearing by her Power of
   Attorney Holder who is the 1st
   Plaintiff.

3. Amarasinghe Arachchige Sriyani Manel de Silva nee Amarasinghe, No. 74, Charles Place, Lunawa, Moratuwa.

PLAINTIFFS-RESPONDENTS

AND NOW BETWEEN

Amarasinghe Arachchige Sriyani Manel de Silva nee Amarasinghe, No. 74, Charles Place, Lunawa, Moratuwa.

3rd PLAINTIFF-RESPONDENTS-PETITIONER

Vs.

1. Mahara Mohottalalage Upali Gunarathna Bandara, Badullewa, Narammala.

2. Dasanayaka Achchilage Dasanayaka, Badullewa, Narammala

3. Mahara Mohottalalage Herath Banda, Badullewa, Narammala. (Now deceased)

3A. Mahara Mohotthalalage Upali Gunarathna Bandara, Badullewa, Narammala.

DEFENDANTS-APPELLANTS-RESPONDENTS

BEFORE : **P. PADMAN SURASENA J.**
JANAK DE SILVA J.
K. PRIYANTHA FERNANDO J.

COUNSEL : Manohara De Silva, PC instructed by Manoj Perera for the 3rd Plaintiff-Respondent-Appellant.

Chula Bandara with Gayathri Kodagoda for the Defendants-Appellants-Respondents.

ARGUED & DECIDED ON : 04th October 2023

P. PADMAN SURASENA J.

Court heard the submissions of the learned President's Counsel for the 3rd Plaintiff-Respondent-Appellant as well as the submissions of the learned Counsel for the Defendants-Appellants-Respondents and concluded the argument.

The Plaintiffs filed their plaint initially against the 1st and 2nd Defendants praying *inter alia:*

(i) for a declaration that the 1st-3rd Plaintiffs are the owners of the lands more fully set out in the schedules to the plaint;

(ii) for an order cancelling the Deed No. 3607 attested on 11-06-2001 by D.M.M. Dissanayake, Notary Public transferring the land described in schedule 1 to the 1st Defendant.

(iii) for an order cancelling the Deed No. 2147 attested on 15-07-2003 by P.A.C. Wijesinghe, Notary Public transferring the land in the 2nd schedule to the 2nd Defendant.

(iv) for ejectment of the 1st, 2nd and 3rd Defendants from the relevant lands.

1st and 2nd Defendants filed a joint answer admitting that the 1st and 2nd Defendants had no title to the paddy land relevant to this case. The 1st and 2nd Defendants also averred that Mahara Mohottalalage Herath Banda was the tenant cultivator of the paddy land relevant to the instant action. The material prayer in the joint answer filed by the 1st and 2nd Defendants is only a prayer to add said Mahara Mohottalalage Herath Banda as a Defendant to the case. This is because the 1st and 2nd Defendants in their joint answer itself had categorically averred the fact that neither of them has any title to the paddy land relevant to the action but their role is limited only to assisting said Mahara Mohottalalage Herath Banda who is the tenant cultivator of the said paddy land. It was on that basis that the learned District Judge had taken steps to add said Mahara Mohottalalage Herath Banda as the 3rd Defendant of the case.

After adding said Mahara Mohottalalage Herath Banda as the 3rd Defendant, he (the 3rd Defendant) also had filed an answer admitting that Menuhamy had been the tenant cultivator under Amarasinghe Arachchige Don Albanu Appuhamy. He also has stated in his answer that after the demise of said Menuhamy, he continued as the tenant cultivator. There is no dispute that Menuhamy is the father of the 3rd Defendant (Herath Banda).

The above facts show that the 1st and 2nd Defendants had not claimed anything in their favour as far as either the possession or the ownership of the properties relevant to this case are concerned.

The 3rd Defendant had taken up two main issues. Firstly, he has not admitted that Piyasiri Amarasinghe is the son of Isabela Hamine. Secondly, the 3rd Defendant has also raised the issue that the title to this property has not devolved on said Piyasiri Amarasinghe as he was not entitled to receive a letter of administration in respect of this property after the demise of Isabela Hamine. In respect of the prayers for cancellation of the two deeds, the 3rd Respondent has taken up the position that the execution of those two deeds was a mistake on his part. We observe that there exists only one material prayer in the 3rd Defendant's answer. That is a prayer for a declaration that the 3rd Defendant is the tenant cultivator in case the Court grants the declaration that the Plaintiffs are the owners of the relevant land. As pointed

out by the learned President's Counsel for the Appellant, we observe that there are two material admissions made in the trial. They are as follows:

(1) Menuhamy had functioned as a tenant cultivator under Amarasinghe Arachchige Don Albanu Appuhamy.

(2) The 3rd Defendant had functioned as a tenant cultivator under 1st, 2nd and 3rd Plaintiffs.

After the trial, the learned District Judge by his judgement dated 05-06-2007, having analyzed the evidence produced in the case before the District Court, had proceeded to grant reliefs prayed for, by the Plaintiffs in their plaint.

Being aggrieved by the judgement of the District Court, the Defendants had appealed to the Provincial High Court of Civil Appeals. The Provincial High Court of Civil Appeals for the reasons set out in the judgement dated 27-10-2010, has set aside the judgement of the District Court. Perusal of the judgement of the Provincial High Court of Civil Appeals shows that the sole ground for setting aside the judgement of the District Court is the alleged failure of the Plaintiffs to prove the fact that their father, Piyasiri Amarasinghe was a child of Dona Isabela Hamine.

The learned Judges of the High Court of Civil Appeals had taken the view that the documents produced by the Plaintiffs marked **P4**, **P5**, **P6**, **P7**, **P8**, **P9**, **P10** and **P11** are not sufficient to prove the fact that the Plaintiffs' father Piyasiri Amarasinghe is the only child of Isabela Hamine. It is in that background that this Court is now called upon to decide the following two central issues that had arisen in the course of the argument of this case in this Court.

i. *Have the learned Judges of the High Court* of Civil Appeals *erred in holding that* the documents produced by the Plaintiffs do not establish that Piyasiri Amarasinghe is the son of Dona Isabela Hamine;
ii. *Has the High Court* of Civil Appeals *erred in not considering the legal effect of the admission No. 3 wherein the 3rd Defendant had admitted that at sometimes prior to filing of this case, he was a tenant cultivator under the Plaintiffs and Plaintiff's mother.*

Let me consider whether the Plaintiffs in the instant case, through the documents produced by them, had established the fact that Piyasiri Amarasinghe is the son of

Dona Isabela Hamine. The 01st Plaintiff in her evidence had produced her father's school leaving certificate marked **P4**. Although her father's name has been written in **P4** as Peter Singho, the 01st Plaintiff in her evidence had clarified that her father used his name as Piyasiri Amarasinghe. The 01st Plaintiff in her evidence had also produced two obituary notices marked **P5** and **P6**. According to these two obituary notices (**P5** and **P6**), the death of A. D.A. Appuhamy was announced by his son Piyasiri Amarasinghe.

The 01st Plaintiff in her evidence had also produced her father's and mother's wedding invitation card marked **P7**. This wedding invitation card has identified Piyasiri as the son of Don Albanu Amerasinghe Appuhamy and Dona Isabela Perera Palihawadana Arachchi Hamine. The 01st Plaintiff in her evidence had testified to the fact that said Piyasiri is her father. The 01st Plaintiff had also testified in her evidence that the bride mentioned in the Wedding invitation card (**P7**) Rathnawali is her mother.

The 01st Plaintiff had also produced the Marriage certificate of her father and mother marked **P8**. According to **P8**, the 01st Plaintiff's father who stood as the bride groom in that wedding has been named as Amerasinghe Arachchige Piyasiri Amerasinghe. The bride groom's father's name has been mentioned in **P8** as Amerasinghe Arachchige Don Albanu Appuhamy whom the 01st Plaintiff has asserted in her evidence as her paternal grandfather.

Another document produced by the 01st Plaintiff in her evidence is a permit issued by Narammala Village Council which had permitted her father to bury the body of her grandmother whose name has been mentioned therein as P A. D. Isabela Perera. This burial permit has been produced marked **P9**.

The 01st Plaintiff had also produced two receipts issued by Wijesinghe Florists which are invoices issued in relation to the expenses borne with regard to a funeral. It is the 01st Plaintiff's evidence that these invoices marked **P10** and **P11** are receipts issued to her father Piyasiri Amerasinghe for the payment of funeral expenses to Wijesinghe Florists in relation to the funeral of Palihawadana Arachchige Dona Isabela Perera Hamine who is her grand mother.

Thus, the Plaintiffs had relied on the following documents namely: **P7** the copy of the wedding invitation of Piyasiri Amarasinghe where it is stated that he was the only child of Don Albanu Amarasinghe Appuhamy and Dona Isabela Perera

Palihawadana Arachchi Hamine; the marriage certificate of Piyasiri Amarasinghe **P8** which shows that he is the son of Amrasinghe Arachchige Don Albanu Appuhamy; **P9**, **P10** and **P11** which are receipts for payments made by Piyasiri Amarasinghe to the Narammala Village Committee and to the funeral undertakers for the burial and other funeral arrangements of Isabela Hamine, to establish the fact that Piyasiri Amarasinghe is the son of Dona Isabela Hamine. Perusal of the questions asked on behalf of the Defendants during the cross examination of the 01st Plaintiff shows clearly that the Defendants had not been successful in assailing the above evidence adduced by the 01st Plaintiff. The Defendants in the cross examination had been content only to highlight the fact that the 01st Plaintiff had not produced her father's (Piyasiri Amarasinghe's) birth certificate to prove that said Piyasiri Amarasinghe is the son of said Isabela Hamine. Having considered the above documentary as well as the oral evidence, we are satisfied that the Plaintiffs have sufficiently proved that their father Piyasiri Amarasinghe is the son of Dona Isabela Hamine.

The learned Judge of the Provincial High Court of Civil Appeals had taken the view that the three receipts marked **P9**, **P10** and **P11** cannot be construed as evidence relevant, under section 32(5) of the Evidence Ordinance, to the matter in issue. He had proceeded to hold that the documents produced marked **P3** to **P12** cannot also be held to be relevant under section 32(5) of the Evidence Ordinance.

Let me reproduce below, Section 32(5) of the Evidence Ordinance:

> *S. 32: Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases :—*
>
> 1) *.....*
> 2) *..*
> 3) *..*
> 4) *..*
> 5) *When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or*

adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

6) *When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.*
7) *…*
8) *…*

Section 50 of the Evidence Ordinance is also relevant in that regard and hence is reproduced below:

> *S.50: When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:*
>
> *Provided that such opinion shall not be sufficient to prove a marriage in proceedings for divorce, or in prosecutions under sections 362B, 362C, and 362D of the Penal Code.*

Learned President's Counsel for the 3rd Plaintiff-Respondent-Appellant relied *inter alia* on the judgment in the case of *Maniapillai and others Vs. Sivasamy.*[1] In *Maniapillai's* case, the issue arose was whether a person was born of a lawful wedlock. In other words, the resolution of the dispute that arose in that case, was dependent on the answer to the question whether Sinnapodi Velupillai married one Annaletchumi and had a child Kailasapillai by her. In that case, there was neither the birth certificate of Kailasapillai nor the marriage certificate of Sinnapodi Velupillai and Annaletchumi had been produced. However, the deed No. 3873 (marked D3 in that case) of 20th May 1907 whereby Sinnapodi Velupillai and his

[1] *1980 (2) Sri L.R. 214.*

father Vyravi Sinnapodi had donated a land to Kailasapillai who was described as the son of Velupillai and grandson of Sinnapodi had been produced as evidence in that case. There was also the certificate of marriage (marked D4 in that case) of Kailasapillai where his father's name had been given as Sinnapodi Velupillai. Soza, J relying on the strength of the contents in those documents adduced as evidence in that case, held that the declarations regarding the relationship found in the documents marked D3 and D4 produced in that case, were relevant and admissible to find an answer to the question whether Sinnapodi Velupillai had indeed married one Annaletchumi and had a child Kailasapillai by her.

Soza J, in *Maniapillai's* case, in relation to sections 32(5) 32(6) and 50 of the Evidence Ordinance, proceeded to state as follows:

> *"Under the provisions of section 32(6) of the Evidence Ordinance when a statement of the deceased person relates to the existence of any relationship by blood, marriage or adoption between deceased persons it will be admissible provided-*
>
> 1. *it is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and*
> 2. *it was made before the question in dispute was raised.*
>
> *Section 50 of the Evidence Ordinance makes relevant the opinion expressed by conduct, as to the existence of relationship of any person who as a member of the family or otherwise has special means of knowledge of such relationship.*
>
> *It is under these provisions, to wit, section 32(5) and (6) and section 50 of the Evidence Ordinance that it is possible to admit evidence, otherwise hearsay, of deceased persons figuring in a genealogical tree such as one often comes across in a partition case. - see Cooray v Wijesuriya.[2] It should be observed that these provisions deal not with presumptions but only with relevance. There is no doubt that the declarations regarding relationship found in D3 and D4 are relevant and admissible. But these declarations*

[2] (1958) 62 NLR 158.

> *must be assessed and evaluated in the context of the other evidence in the case".*[3]

Thus, for the above reasons, I hold that the view taken by the learned Judge of the Provincial High Court of Civil Appeals that the three receipts marked **P9**, **P10** and **P11** cannot be construed as evidence relevant under section 32(5) of the Evidence Ordinance to the matter in issue and the documents produced marked **P3** to **P12** cannot be held to be relevant under section 32(5) of the Evidence Ordinance is erroneous. I have already adverted to the fact that the above documentary evidence taken in to consideration along with the oral evidence adduced on behalf of the Plaintiffs, have sufficiently proved that the father of the Plaintiffs Piyasiri Amarasinghe is the son of Dona Isabela Hamine. Therefore, the learned Judge of the Provincial High Court of Civil Appeals has erred in arriving at the conclusion that the Plaintiffs had failed to prove the fact that their father, Piyasiri Amarasinghe was a child of Dona Isabela Hamine.

We observe that the learned Judge of the Provincial High Court of Civil Appeals had required strict proof of the afore-said relationship. *H.N.G. Fernando, J* in the case of *Pathirana V. Jayasundara, 58 NLR 169,* had the following to say in relation to the requirement of strict proof in vindicatory actions -:

> *"I have no doubt that it is open to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a rei vindicatio for which strict proof of the Plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant is by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the Plaintiff can automatically obtain a declaration of title through the operation of a rule of estoppel should be regarded as a vindicatory action"*

In the same case, *Gratiaen, J.* in his judgment while agreeing with *H.N.G. Fernando, J* had further elaborated on this in the following manner:

> *"A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is*

[3] *At page 217.*

an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner"

We observe that there is no specific mention in the judgement of the Provincial High Court of Civil Appeals that the learned Judge of the Provincial High Court of Civil Appeals had specifically treated this case as a *rei vindicatio* action when deciding this case. However, from the fact that the learned Judge of the Provincial High Court of Civil Appeals had required strict proof of the afore-said relationship, could be an indication that the learned Judges of the Provincial High Court of Civil Appeals may have been confused on this aspect of the case.

Be that as it may, in view of the admission made by the 3rd Defendant that he functioned as the tenant cultivator under the Plaintiffs, we see no necessity for the Provincial High Court of Civil Appeals to require strict proof of the afore-said relationship. In those circumstances, we hold that the learned Judge of the Provincial High Court of Civil Appeals had erred in totally disregarding the presence of the aforesaid admission made by the Defendants. Therefore, we decide to set aside the judgment dated 27-10-2010 pronounced by the learned Judges of the Provincial High Court of Civil Appeals. We proceed to restore the judgment dated 05-06-2007 pronounced by the learned District Judge.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA J.
I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO J.
I agree.

JUDGE OF THE SUPREME COURT

Mhd/-

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

SC/APPEAL/174/2011
SC/HCCA/LA/57/10
DC Kalmunai Case No.2298/L
HC (Civil) Kalmunai
Case No.EP/HCCA/Kal/147/08

Kose Mohamed Sulaiha Umma of
Udanga, Summanthurai

PLAINTIFF

Vs

1. Ahamed Lebbe Assanar
2. Aliyar Thangamma
3. Mahulapillai Yseenbawa
   All of Udanga, Sammanthurai

DEFENDANTS

AND

1. Ahamed Lebbe Assanar
2. Aliyar Thangamma
3. Mahulapillai Yseenbawa
   All of Udanga, Sammanthurai

DEFENDANTS-APPELLANTS

Vs

Kose Mohamed Sulaiha Umma of
Udanga, Summanthurai

PLAINTIFF-RESPONDENT

AND NOW

In the matter of an application for Leave to Appeal in terms of section 5(C)(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 127 of the Constitution.

1. Ahamed Lebbe Assanar
2. Aliyar Thangamma
All of Udanga, Sammanthurai

Defendants-Appellants-Appellants

Kose Mohamed Sulaiha Umma of
Udanga, Summanthurai

Plaintiff-Respondent-Respondent

Before : B. P. Aluwihare PC, J.
Priyantha Jayawardena PC, J.
Vijith K. Malalgoda PC, J

Counsel : V. Puvitharan PC with R. A. Vishanthanie, Anuya Rasanayakam for the 1st and 2nd Defendents- Appellants

M. Nizam Kariyaper PC with M.C.M Nausas and M.I.M Iynullah for the Plaintiff-Respondent-Respondent

Argued on : 1st February, 2018

Decided on : 4th October, 2023

Priyantha Jayawardena PC, J

Facts

The defendants-appellants-appellants (hereinafter referred to as "the defendants") filed the instant appeal against the judgment of the Civil Appellate High Court of Kalmunai which dismissed the appeal filed by them against the judgment of the District Court of Kalmunai, dated 24th of April, 2002 where it was held that the learned judge of the District Court is

entitled to frame an additional issue (new issue) during the course of the judgment in terms of section 149 of the Civil Procedure Code, as amended (hereinafter referred to as the "Code").

The plaintiff-respondent-respondent (hereinafter referred to as "the plaintiff") instituted action against the defendants in District Court of Kalmunai on the 29th of April, 1999 and pleaded *inter-alia* that by virtue of the Permit No. AM/SP/282 dated 8th of May, 1979 issued by the Government Agent of Ampara, she became entitled to possess and occupy the land in terms of section 19(2) of the Land Development Ordinance.

Further, it was pleaded that she and her predecessors in title were in undisturbed and uninterrupted possession of the said land. However, the defendants disturbed the possession by breaking the boundary fence constructed by her.

Moreover, it was stated that when she made an attempt to repair the boundary fence by fixing new poles, the defendants not only fought with her but also made a complaint to the Sammanthurai Police. After the said complaint an inquiry was held on the 22nd of March, 1999 by the Divisional Secretary. However, no action was taken by him.

The plaintiff further stated that when the defendants again made an attempt to disturb the possession of the land, her son prevented the defendants from disturbing the possession of the property. Thereafter, the defendants made a false complaint to the Police. Subsequently, the son was arrested by Sammanhurai Police and he was remanded. She stated that the Police were helping the defendants to possess the land illegally and to fence it. Furthermore, the defendants influenced the Divisional Secretary and other State Officials preventing them from taking action against them and taking steps to enter, possess and develop the land and to deprive the plaintiff's entitlement to the land.

In the circumstances, the plaintiff stated that she instituted action in the District Court of Kalmunai and prayed *inter alia to*;

a) declare that the plaintiff is entitled to be possessed and occupy in the land more fully described schedule to the plaint, and

b) grant an enjoining order or interim injunction until the until the case is concluded preventing the Defendants from disturbing the possession and from doing any development to the premises, more fully described in the schedule to the plaint.

Thereafter, the defendants filed an answer denying the averments contained in the plaint and pleaded that the plaintiff was not in possession of the land described in the schedule to the answer. Further, it was pleaded that the defendants owned the property in question under and by virtue of Permit No. AM/SP/244A issued on the 16th of November, 1989 by the Government Agent of Ampara and prayed for a dismissal of the plaint.

At the commencement of the trial, the plaintiff raised the following issues;

1. *Did Aliyar Adambawa become entitled to possess and occupy the premises fully described in the schedule to the plaint by virtue of permit No. AM/SP/282 dated 08.05.1979 issued by Government Agent of Ampara?*

2. ***Is the plaintiff entitled to possess and enjoy the said premises in terms of the permit No. AM/SP/282 dated 02.02.1994 issues by Divisional Secretary of Sammanthurai?***

3. ***Is the possession of the defendants in the said premises lawful?***

4. *If the above issues are answered "No" has the plaintiff incurred a loss?*

5. *If so, how much?*

6. *If the 1st, 2nd and 3rd issues are answered "yes" and the 4th issue is answered "No" is the plaintiff entitled to the reliefs prayed for the plaint?*

Thereafter, the defendants raised the following issues;

7. Did the 1st defendant become entitled to the land morefully as described in the answer and by virtue of the Permit No. AM/SP/244(A) dated 16th November, 1989 issued by the Government Agent Ampara?

8. Are the defendants in possession of the said land since 1978 or 1979?

9. Is the land described in the plaint and the land given to the plaintiff on the permit identical?

10. If issue Nos 7 and 8 were answered "Yes" and issue No. 9 is answered "No" should the action of the plaintiff be dismissed?

Judgment of the District Court

The trial proceeded on 1st to 6th issues raised by the plaintiff and issues 7th to 10th raised on behalf of the defendants. After the conclusion of the *inter parte* trial the learned District Judge raised the following issue as an additional issue at the time of the delivery of the judgment;

Issue No. 11 –

If issue No. 3 is answered in the negative, should the possession be handed over to the plaintiff by ejecting the defendant from the land in dispute?

Thereafter, the learned District Judge having answered the issue No. 3 in the negative, answered issue No. 11 in the affirmative and entered the judgment in favour of the plaintiff. Being aggrieved by the said judgment, the defendants filed an appeal in the Provincial High Court of Kalmunai, *inter alia,* on the following grounds;

“

i. that the said judgment is contrary to law and against all principles governing civil procedure,

ii. it is a cardinal principle of law that a party is not entitled to the relief which has not been prayed for and the learned District Judge erred in law in ordering the ejectment of the defendants-appellants, when there was no prayer for such a relief,

iii. the learned District Judge failed to appreciate the importance of section 34 of the Civil Procedure Code, where the plaintiff-respondent had opted to restrict her claim for declaration of title only and not prayed for the ejectment of the defendant-appellant,

iv. the learned District Judge erred in law in granting the prayer for ejectment on his own, when the plaintiff has not prayed for it,

v. the learned District Judge wrongly applied the principle of framing issues and framed a fresh issue at the time of delivery of the judgment which was not warranted in law,

vi. it is for the party to include all claims and not for the learned District Judge to grant relief which has not been prayed for and,

vii. on the whole there is a clear misdirection of law and the judgment of the District Court should be set aside."

Judgment of the Civil Appellate High Court

After the hearing of the said appeal, the learned judges of the said High Court held *inter alia,* that the learned judge of the District Court acted within the scope of section 149 of the Civil Procedure Code and thus, it is not necessary to interfere with the judgment of the learned District Judge. Accordingly, the appeal was dismissed.

Being aggrieved by the said judgment, the Defendants-Appellants-Appellants appealed to this court and this court granted Leave to Appeal on the following question of law;

> *"Did the Civil Appellate High Court err when it affirmed the decision of the District Court which had the effect of granting relief that had not been prayed for on the basis a fresh issue which had been raised by the District Judge in the course of preparing his Judgment?"*

Submissions on behalf of the Defendants

The learned President's Counsel for the defendants submitted that the plaintiff **did not pray for the ejectment of the defendants from the premises in-suit**. Further, the plaintiff opted to restrict her claim only for a declaration and not prayed for the ejectment of the defendants. Therefore, the learned District Judge was clearly in error when, he on his own accord granted the relief to eject the defendants from the land on his own accord. Further, the plaintiff failed

to make her full claim as required by section 34 of the Civil Procedure Code and therefore, she was not entitled for the additional relief granted by the learned District judge.

Moreover, the plaintiff did not amend the plaint to include a prayer for ejectment of the defendants and they became aware of the new issue framed by the learned District Court Judge only at the time of delivery of the judgment. In the circumstances, it was submitted that the defendants were not heard or allowed to adduce evidence as to why the said new issue relating to the ejectment should not be answered in favour of the plaintiff.

He drew the attention of court to the judgment delivered in ***Hameed V Cassim (1996) 2 SLR 30,*** which the learned District Judge and the learned judges of the High Court based their decision and submitted that it is distinguishable from the instant appeal as in the said judgment no relief was granted which was not prayed for. Thus, the said judgment does not support the impuned judgment. Further, it was submitted that the plaintiff had not prayed for the ejectment of the defendants and hence, the court cannot grant a relief which was not prayed for by a party.

The learned President's Counsel further submitted that in ***Perera V Perera 68 NLR 262,*** the plaintiffs-respondents filed an action for a declaration that they were entitled to draw water from a well and for a sum of Rs.250/- as damages for being deprived of that right. Moreover, after the plaintiffs-respondents obtained a decree moved for a writ of possession, which was allowed. Thereafter, in Appeal, it was contented that the right to draw water carries the right to use a footpath. It was held that the question to be decided was whether the plaintiffs-respondents having failed to ask for anything more than a declaration of their right and damages, can now ask for a writ of possession. The appeal should be allowed.

Submissions on behalf of the plaintiff

The learned President's Counsel who appeared for the plaintiff submitted that the objective of the *rei vindicatio* action is to recover the possession of the land back to the lawful owner, as such actions arise from the right to *dominium*. Moreover, the instant action was filed to recover a property belonging to the lawful owner. He further submitted that both the learned District Judge and the learned High Court Judge relied on the case of ***Hameed V Cassim***

(1996) 2 SLR 30 which is binding on them. Therefore, both the judgments of the District Court and Civil Appellate Court have to be upheld by this court.

Did the Civil Appellate High Court err when it affirmed the decision of the District Court which had the effect of granting relief that had not been prayed for in the plaint?

The scope of an action filed in the District Court

Section 33 of the Civil Procedure Code as amended requires every regular action to be framed in order to achieve a final decision of the disputes between the parties so that it will prevent further litigation between them. Further, section 34 (1) of the said Code states that a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of the court. However, subsection (2) of the said section *inter alia*, states that if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
Moreover, section 93 of the said Code sets out the circumstances in which amendments of pleadings are allowed and section 406 set out the circumstances in which a court would allow a withdrawal and adjustments of claims stated in the pleadings and consequences of such matters.

Further, section 207 of the Civil Procedure Code states that;

> *"All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited."*

Moreover, the explanation to section 207 states;

> *"Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties, to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a* ***res adjudicata****, which cannot*

afterwards be made the subject of action for the same cause between the same parties."

[Emphasis added]

A careful consideration of the aforementioned provisions and the other provisions of the Civil Procedure Code shows that one of the prime objects of the said Code is to prevent multiplicity of actions between the parties on the same causes of action.

Marking Admissions and Raising Issues

A trial in the District Court commences by marking admissions and framing issues on matters which the parties are at variance. In terms of section 72 of the Civil Procedure Code, if the defendants admit the claim of the plaintiff, the court shall deliver the judgment against the defendants according to the admissions so made. Further, in terms of section 146 of the Civil Procedure Code if the parties agree as to the facts, such facts should be recorded as admissions between the parties. Moreover, if the parties agree upon the matters that are required to be decided in the case, they may be recorded as issues to be decided in the case.

However, subsection (2) of section 146 states;

"If the parties, however, are not so agreed, the court shall, upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to record the issues on which the right decision of the case appears to the court to depend."

The said sub section casts a duty on the learned trial judge to settle the issues by identifying the dispute between the parties before the evidence is recorded in the case. When parties are unable to agree on the admissions and issues, the learned judge ought to rule on the rival sets of admissions and issues, and decide on the admissions to be recorded in the case and the issues on which the parties should go to trial to arrive at the right decision in the case.

A similar view was expressed in ***Pathmawathie Vs. Jayasekare (1997) 1 SLR 248*** where it was held;

> *"Though in practice Counsel appearing for the plaintiff and defendant do suggest the issues it is the prime responsibility of the judge to frame issues. This is more so because it is ultimately the judge who should make a finding and without a clear understanding of the dispute and the issues that he has to determine it would be a most dangerous exercise to embark upon."*

Moreover, if evidence is elicited during the trial either by oral evidence or documentary evidence which is necessary to decide the dispute between the parties to the case, the court may amend the existing issues or frame additional issues on such terms as it thinks either at the request of a party to the case or on its own motion.

A plain reading of section 146 of the Civil Procedure Code does not impose a blanket prohibition to frame issues on the matters that have not been averred in the pleadings filed in the case. The object of the legislature in having section 146 is to allow the issues on which the right decision of the case identified by the court.

Further, in ***Bank of Ceylon V Chellaiahpilli 64 NLR 25*** it was observed that;

> *"a case must be tried upon the 'issues on which the right decision of the case appears to the Court to depend' and it is well settled that the framing of such issues is not restricted by the pleadings."*

Moreover, in ***Avudiappan V Indian Overseas Bank (1995) 2 SLR 131*** it was held;

> *"...S.146 of the Civil Procedure Code permits Court to record issues on which the right decision of the case appears to Court to depend, on the pleadings, documents and evidence led at the trial."*

However, explanation (2) to section 150 of the Civil Procedure Code, prohibits a party from making at the trial, a case materially different from that which he has placed on record and which his opponent is prepared to meet the facts proposed to be established by a party must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

The aforementioned provisions show that though the Civil Procedure Code contemplates an adversarial procedure, it casts a duty on the learned judge of the District Court to mark the admissions and raise issues in order to arrive at the right decision in the case.

Did the learned District Judge err in law by framing the issue No. 13 (new issue) referred to above at the time of the delivery of the judgment under section 149 of the said Code, without giving an opportunity to the parties to respond to the said issue?

Section 149 of the Civil Procedure Code states;

> *"The court may, at any time **before passing a decree**, amend the issues or frame additional issues on such terms as it thinks fit."*
>
> [Emphasis added]

Section 149 of the Civil Procedure Code does not preclude a District Judge from framing a new issue after the parties have concluded their respective cases and at the time of the judgment is read out in open Court. On the contrary, it allows the District Judge to amend or frame additional issues before passing a decree.

However, a careful consideration of the provisions of the said Code shows that section 149 of the Code cannot be considered in isolation. Hence, the said section should be considered along with the other sections applicable to framing of issues and be interpreted in harmony with them. The analysis of the said provisions in the Civil Procedure Code show that the power conferred on the District Court by section 149 of the said Code to amend the issues before passing a decree is subject to the other restrictions imposed by the Code. When the sections relating to such matters are considered together the cumulative effect is that the discretion conferred by section 149 of the Civil Procedure Code on the District Court should be exercised subject to the following;

(a) a new issue cannot be framed which will have the effect of converting an action of one character into another,

(b) the issues shall not be altered or raise new issues to change the scope of the action and thus, deprive a party from obtaining reliefs already pleaded in the case,

(c) raising new issues shall not be prejudicial to a party to an action,

(d) it should be necessary to decide the real issue between the parties,

(e) it should be necessary to raise further issues in the interest of justice to adjudicate the dispute/s between the parties, and

(f) none of the parties should be taken by surprise and thereby it will adversely affect their respective cases.

In the instant appeal, it is common ground that the plaint did not have a prayer to eject the defendants from the property described in the schedule to the plaint. However, in her evidence she stated that she became the owner of the land described in the schedule to the plaint by a permit bearing No: AM/SP/282 which was issued on the 2nd of February, 1992 in terms of section 19(2) of the Land Development Ordinance. She further stated that the defendant-appellant forcibly fenced part of her land and started possessing it. Moreover, in her evidence in chief she stated that she be given the possession of the land under consideration. It is pertinent to note that the plaintiff was not cross examined on this point.

Furthermore, the pleadings filed in the District Court and the evidence led at the trial show that the plaintiff and the defendants proceeded to trial on the basis that the peaceful possession of the land by the plaintiff was disturbed by the defendants. Further, as stated above, the plaintiff requested to put her in possession of the land in her evidence. Thus, the evidence led at the trial and issues No.2 and 3 clearly show that the entire case proceeded on the basis that the defendant disturbed the possession of the land belonging to the plaintiff and that she wants to enjoy the peaceful possession of the said land.

In the circumstances, the defendants were fully aware of the grievance of the plaintiff and the relief that she was seeking from the court. In fact, prior to the institution of the action the plaintiff has sought administrative reliefs to prevent the defendants disturbing the peaceful possession of the land by encroaching it. In this regard, it is pertinent to note that the appellant did not contest the findings of the learned District Judge with regard to the of the ownership of the land and granting the prayer for the declaration of title pleaded in the plaint.

Having considered the evidence led at the trial and the issues framed by the parties, I am of the opinion that there is no element of surprise by raising the additional issue by the learned District Judge at the time of the delivery of the judgment. Further the learned District Judge in framing the new issue has taken steps to arrive at the correct decision with regard to the dispute between the parties to the case. Further, it prevents further litigation between the parties and thus, raising the said additional issue is necessary to meet the ends of justice.

In ***Silva v. Obeysekera 24 NLR 97*** it was held in the preamble;

> *"No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings."*

In the case of ***Hameed V Qasim (1996) 2 SLR 30*** it was held as follows:

> *"(1) the Provisions of S.149 of the Civil Procedure Code do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgment is read out in open Court.*
>
> *It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of the documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case".*

The learned President's Counsel for the appellant submitted that the facts of the judgment decided in ***Hameed v Quasin*** were different to the facts of the instant appeal. However, a careful consideration of the said judgment it shows that the ratio decidendi of the said judgment is applicable to the issue that needs to be decided in the instant appeal and thus, it is applicable to the instant appeal.

Therefore, the learned District Court Judge who heard the trial and the learned judges of the Civil Appellate High Court have correctly applied the ratio decidendi in the said case by following the doctrine of *stare decisis*.

Further, in ***In Dharmasiri V Wickrematunga (2002) 2 SLR 218, it was held;***

"Issue raised on titled pleaded, Held;

1) *Once issues framed and accepted, pleadings recede to the background.*
2) *Even though the plaintiff has not asked for a decleration of title it does not prevent him from seeking the relief for ejectment*
3) *Absence in the prayer for a decleration of title causes no prejudice, if in the body of the plaint, the title is pleaded and issues were framed and accepted by Court on the title so pleaded. It cannot be overlooked that title pleaded in the body of the plaint formed the basis for the issues raised at the trial and the question of title was examined by the tiral judge before arriving at a finding that the plaintiff-respondent has obtained title."*

Section 149 of the Civil Procedure Code sates as follows:

> *"The court may at any time before passing a decree, amend the issue or frame additional issue on such terms as it thinks fit."*

Moreover, I am of the view that though there is no specific relief prayed by the plaintiff to eject the defendants, the cumulative effect of the averments in the plaint show that she wanted to possess the land and enjoy her rights under the aforementioned permit without any hindrance from the defendants. As the evidence elicited at the trial showed that the defendants were in possession of the part of the land under consideration, it is essential to evict them in order to occupy the said land of the plaintiff. If the District Court did not order the defendants to be evicted from the land, the purpose of only granting a declaration in favour of the plaintiff will make the entire relief futile as the plaintiff will have to file a fresh case to eject the defendants. Thus, I am of the view that the District Judge has exercised the discretion conferred on him under section 149 of the Civil Procedure Code. In view of the aforementioned findings, sections 33 and 34 of the Civil Procedure Code have no application to the instant appeal.

Accordingly, the question of law is answered as follows;

> *"Did the Civil Appellate High Court err when it affirmed the decision of the District Court which had the effect of granting relief that had not been prayed for on the basis a fresh issue which had been raised by the District Judge in the course of preparing his Judgment?"*

No.

Accordingly the appeal is dismissed without costs.

Judge of the Supreme Court

B.P. Aluwihare PC, J
I Agree

Judge of the Supreme Court

Vijith K. Malalgoda PC, J
I Agree

Judge of the Supreme Court

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

In the matter of an appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No. 47/2020
SC (HCCA) LA Case No. 24/2020
WP/HCCA/KAL/061/2014(F)
DC Kalutara Case No. L/5776

Lellupitiyagama Ethige Roslin Hemalatha,
Karandagoda, Beruwala.

Plaintiff

vs.

1. Ihalahewage Don Lionel Ranasinghe,
   Mahagederawatta,
   Karandagoda, Beruwala.

2. Jagath Investment (Private) Limited,
   Owitigala, Matugama.

3. Koruwage Lalith Fernando,
   Bogalla, Beruwala.

Defendants

And between

Koruwage Lalith Fernando,
Bogalla, Beruwala.

3rd Defendant – Appellant

vs.

Lellupitiyagama Ethige Roslin Hemalatha,
Karandagoda, Beruwala.

Plaintiff – Respondent

1. Ihalahewage Don Lionel Ranasinghe,
   Mahagederawatta,
   Karandagoda, Beruwala.

2. Jagath Investment (Private) Limited,
   Owitigala, Matugama.

1st and 2nd Defendants – Respondents

And now between

Koruwage Lalith Fernando,
Bogalla, Beruwala.

3rd Defendant – Appellant – Appellant

vs.

Lellupitiyagama Ethige Roslin Hemalatha,
Karandagoda, Beruwala.

Plaintiff – Respondent – Respondent

1. Ihalahewage Don Lionel Ranasinghe,
   Mahagederawatta,
   Karandagoda, Beruwala.

2. Jagath Investment (Private) Limited,
   Owitigala, Matugama.

1st and 2nd Defendants – Respondents – Respondents

Before: **P. Padman Surasena, J**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Sanjeeva Dassanayake with Dilini Premasiri for the 3rd Defendant – Appellant – Appellant

Thanuka Nandasiri for the Plaintiff – Respondent – Respondent

Argued on: 6th April 2022

Written Submissions: Tendered on behalf of the 3rd Defendant – Appellant – Appellant on 6th January 2021

Tendered on behalf of the Plaintiff – Respondent – Respondent on 7th July 2021

Decided on: 4th October 2023

Obeyesekere, J

The question that arises for determination in this appeal is whether the Plaintiff – Respondent – Respondent [the Plaintiff] has conveyed to the 1st Defendant – Appellant – Appellant [the 1st Defendant] by Deed No. 4158, the beneficial interest in the land referred to in the said Deed. The answer to this question would then determine whether the said land is being held by the 1st Defendant in trust for the Plaintiff, as provided for by Section 83 of the Trusts Ordinance.

Facts in brief

By Deed of Declaration No. 3939 dated 16th August 2002, the Plaintiff declared as follows:

(a) The original owner of the land referred to in the said Deed is Kalawilage Don Odiris Appuhamy;

(b) The said land, which is in extent of 0A 1R 11.90P and depicted in Plan No. 731/2002 dated 19th May 2002, is situated within the limits of the Beruwala Pradeshiya Sabha;

(c) Upon the death of Odiris Appuhamy, Kalawilage Don Somipala, who is the son of Odiris Appuhamy and the husband of the Plaintiff, came into possession of the said land and occupied the said land for a long period of time;

(d) Don Somipala passed away in 1989 and thereafter, the Plaintiff has been in undisturbed and uninterrupted possession of the said land;

(e) By virtue of such long possession, she is the owner of the said land.

In June 2003, which is less than one year after the execution of the above Deed of Declaration, the Plaintiff had the said land sub-divided into two lots marked A1 and A2, as more fully depicted in Plan No. 554/2003. According to the said Plan, the house of the Plaintiff and the well used by her had been situated on Lot A2, while the toilet was situated on Lot A1.

On 21st September 2003, the Plaintiff executed the impugned Deed of Transfer No. 4158 attested by Nadeel Malagoda, Attorney-at-Law, by which she transferred to the 1st Defendant, who is a relation of hers and who lived close to her house, Lot A1 in Plan No. 554/2003, in extent of 0A 0R 25P. The purchase consideration has been stipulated as Rs. 50,000, with the Notary certifying that the consideration was not paid in his presence. It must be noted that Deed No. 4158 does not contain any condition relating to the re-transfer of the said land to the Plaintiff and on the face of it, was an absolute transfer.

By Deed of Transfer No. 4560 executed on 7th March 2004, the 1st Defendant had transferred Lot A1 to the 2nd Defendant – Respondent – Respondent [the 2nd Defendant] for a sum of Rs. 60,000. The 2nd Defendant is said to be a company engaged in money lending. On 2nd October 2006, the 3rd Defendant – Appellant – Appellant [the 3rd Defendant] purchased from the 2nd Defendant the said land by way of Deed of Transfer No. 221 attested by Nirosha Silva, Attorney-at-Law, for a sum of Rs. 65,000, with the 1st Defendant signing as a witness and the Attorney-at-Law certifying that the consideration had been paid prior to the execution of the said Deed.

The Plaintiff claims that in 2007, she had requested the 1st Defendant to re-transfer the said land to her on payment of Rs. 50,000, which is the sum of money that the Plaintiff received from the 1st Defendant, together with interest, but that the 1st Defendant rejected the said request. The Plaintiff says that it is at this point that she was informed by the 1st Defendant that he had *mortgaged* the land to the 2nd Defendant. The Plaintiff states that her Attorney-at-Law had thereafter carried out a search at the Land Registry which revealed the execution of the aforementioned Deeds in favour of the 2nd Defendant and the 3rd Defendant.

On 20th October 2009, which is six years after the initial conveyance to the 1st Defendant, and two years after the Plaintiff found out about the execution of the aforementioned deeds in favour of the 2nd and 3rd Defendants, letters of demand have been sent on behalf of the Plaintiff to all three Defendants claiming that Deed No. 4158 was in fact only a mortgage, that the said Deed did not seek to convey the beneficial interest in the said land to the 1st Defendant, that the beneficial interest in the said land remains with the Plaintiff and that the 1st Defendant is holding the said land in trust for the Plaintiff. The said letters of demand went on to state that the value of one perch of the said land was Rs. 125,000 and that the Plaintiff has continued to remain in possession of the said land. None of the Defendants have responded to the said letters of demand, with the result that the claim of the Plaintiff that she continues to be in possession of the said land, has not been rejected by any of the Defendants at the first available opportunity.

Action in the District Court

On 7th December 2009, the Plaintiff instituted action in the District Court of Kalutara against all three Defendants. In her plaint, while reiterating the aforementioned matters contained in the letters of demand, the Plaintiff stated that she had been in urgent need of money to settle a loan that she had taken [ලබාගෙන තිබූ නයක් භදිසියෙන් ගෙවීමට සිදු වූ බැවින්] and that she had borrowed a sum of Rs. 50,000 from the 1st Defendant to settle the said loan. The Plaintiff had averred that although she had executed Deed No. 4158 as a transfer, it was in effect a mortgage and that she did not intend to transfer the beneficial interest in the said property to the 1st Defendant and further, that the 1st Defendant was in fact holding the said property in trust for her. The Plaintiff was therefore seeking to

contradict the terms of Deed No. 4158, which, as I have noted already, did not contain any terms or conditions to support the claim of the Plaintiff and was, on the face of it, an absolute transfer.

The position taken up by the Plaintiff in her plaint thus brought into focus fairly and squarely the provisions of Section 83 of the Trusts Ordinance, which provides a Court with a mechanism to decipher the real intention of the owner of a property who later claims that he or she did not intend to transfer the beneficial interest in the property to the transferee, by considering the attendant circumstances surrounding the said transfer.

The Plaintiff had accordingly sought the following reliefs in her plaint:

(a) A declaration that Lot A1 in Plan No. 554/2003 is held in trust by the 1st Defendant in favour of the Plaintiff;

(b) A direction that the 1st Defendant re-transfer the said land to the Plaintiff;

(c) A declaration that the 2nd and 3rd Defendants are not entitled to the said land on the Deeds executed in their favour.

While the 1st and 3rd Defendants filed their answers, the 2nd Defendant did not file an answer and the trial against the 2nd Defendant proceeded *ex parte*. In his answer, the 1st Defendant denied the version of the Plaintiff and took up the position that Deed No. 4158 was an outright transfer, a position from which he resiled at the trial. He admitted that he had mortgaged the property to the 2nd Defendant in order to raise a loan and that the said loan had been settled by him. While stating that he was in possession of the said land, the 1st Defendant sought a declaration that he was entitled to the beneficial interest in the said land. The 3rd Defendant claimed in his answer that he had paid Rs. 170,000 to the 1st Defendant at the office of the 2nd Defendant to enable the 1st Defendant to settle the loan that he had taken and for the 2nd Defendant to transfer the said land to him. The 3rd Defendant therefore claimed that he was a bona fide purchaser and that he is in possession of the said land. Thus, the principal issue raised on behalf of the Plaintiff and the 1st Defendant revolved on the true nature of Deed No. 4158.

At the trial, the Plaintiff gave evidence on her behalf and led the evidence of the Grama Niladhari of the area and a Valuer, while the 3rd Defendant gave evidence on his behalf. The Attorney-at-Law for the 1st Defendant, having informed Court that the 1st Defendant was accepting the position of the Plaintiff, closed the case for the 1st Defendant without leading any evidence.

Judgment of the District Court

By judgment dated 12th May 2014, the learned District Judge, having applied the provisions of Section 83, found that the Plaintiff had been in possession of both lots A1 and A2 at all times and that the consideration she received from the 1st Defendant did not accurately reflect the true value of the land. The learned District Judge, having concluded that,

(a) the Plaintiff did not intend to transfer the beneficial interest in the said land to the 1st Defendant;

(b) there existed a constructive trust between the Plaintiff and the 1st Defendant; and

(c) no ownership rights passed to the 2nd and 3rd Defendants by virtue of the deeds executed in their favour,

delivered judgment in favour of the Plaintiff and directed the 1st Defendant to re-transfer the said land, i.e., Lot A1, to the Plaintiff upon the payment of Rs. 50,000 by the Plaintiff.

The appeal filed by the 3rd Defendant against the said judgment in the High Court of the Western Province holden in Kalutara exercising Civil Appellate jurisdiction [the High Court] was dismissed by the High Court by its judgment delivered on 5th December 2019.

Questions of Law

The 3rd Defendant thereafter sought and obtained leave to appeal from this Court on 10th June 2020 on the following two questions of law:

(1) Have the learned Judges of the High Court failed to consider the fact that the learned Trial Judge has erred in law by failing to appreciate the necessary ingredients applicable in establishing a constructive trust?

(2) Have the learned Judges of the High Court as well as the learned Trial Judge failed to consider and apply attendant circumstances required to establish a constructive trust in its proper perspective?

In answering the above questions of law, I would consider the findings of the learned District Judge and the learned Judges of the High Court in the light of the test laid down in Section 83 and the evidence that was available to the learned District Judge.

Reception of oral evidence of an instrument

There are two laws that I must refer to at the very outset, in order to give context to Section 83.

The first is the Prevention of Frauds Ordinance, of which Section 2 (prior to its amendment by the Prevention of Frauds (Amendment) Act No. 30 of 2022) provided as follows:

> "*No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be in force or avail in law* ***unless the same shall be in writing*** *and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."* [emphasis added]

The second is the Evidence Ordinance of which Sections 91 and 92 are relevant and are re-produced below:

Section 91

> "*When the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and* ***in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such*** *contract, grant, or other* ***disposition of property****, or* ***of such matter, except the document itself****, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained*. …" [emphasis added]

Section 92

> "*When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms*. …" [emphasis added]

None of (a) the exceptions to Section 91 and (b) the provisos to Section 92 arise for consideration in this appeal.

The cumulative effect of the above provisions is that while the disposition of any immovable property must be reduced to writing, proving the terms of a deed by which any immovable property has been transferred can be done only by producing the deed itself or where permissible by way of secondary evidence and in the manner provided therefor in the Evidence Ordinance, and no oral evidence can be given to *inter alia* contradict the terms of such deed. The resultant position is that oral evidence relating to any instrument relating to land that seeks to contradict, vary, add to, or subtract the terms contained in such deed cannot be received by a Court.

Section 83 of the Trusts Ordinance

Section 83 of the Trusts Ordinance, however, acts as an exception to the said rule laid down in Section 92, and reads as follows:

> "*Where the owner of property transfers or bequeaths it, and* ***it cannot reasonably be inferred, consistently with the attendant circumstances*** *that* ***he intended to dispose of the beneficial interest therein****, the transferee or legatee must hold such property for the benefit of the owner or his legal representative*." [emphasis added]

In **Muttammah v Thiyagarajah** [62 NLR 559] H.N.G. Fernando, J (as he then was) referring to Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance, stated as follows at page 571:

> *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise, but only to establish an "attendant circumstance" from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only section 83, but also many of the other provisions in Chapter IX of the Trusts Ordinance will be nugatory. If for example "attendant circumstances" in Section 83 means only matters contained in an instrument of transfer of property it is difficult to see how a conveyance of property can be held in trust unless indeed its terms are such as to create an express trust."*

A similar view was expressed in **Krishanthy Balasubramanium and Another v Vellayar Krishnapillai and Wife and Another** [SC Appeal No. 28/2008; SC minutes of 24th May 2012] where Sripavan, J (as he then was) referring to the judgment in **Dayawathie and Others v Gunasekera and Another** [(1991) 1 Sri LR 115] stated at page 10 that this Court

has "*held that the provisions of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property. In such a case, extrinsic evidence to prove attendant circumstances can be properly received in evidence to prove a resulting trust*."

In **Fernando v Fernando and Another** [SC Appeal No. 175/2010; SC minutes of 17th January 2017], Sisira De Abrew, J reiterated at page 10 that, "… *Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property*."

Section 83 thus being an exception, it has been held that in applying Section 83, Courts must exercise great caution. In **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyanselage Gedara Somawathi** [SC Appeal No. 173/2011; SC minutes of 6th April 2017], Prasanna Jayawardena, PC, J stated at page 15 that:

> "*The Court has to keep in mind that, a notarially attested deed of transfer should not be lightly declared to be a nullity. The Court must also guard against allowing a false or belated claim of 'Trust' made by a transferor who has transferred his property and then had second thoughts or seeks to profit from changed circumstances. Dalton J's observations made close to 90 years ago in Mohamadu vs. Pathuamma [11 CLR 48 at page 49], (that) "It is becoming not uncommon by the mere allegation of a trust to seek to evade the very salutary provisions of (the Evidence) Ordinance to which I have referred," continues to remain a salutary caution*."

What is an attendant circumstance?

The application of the test laid down in Section 83 would enable the Court to decide whether the owner of the property intended to dispose of the beneficial interest in the said property when he transferred it. Accordingly, the intention of the owner must be reasonably inferred from, and be consistent with, the attendant circumstances surrounding the transfer.

Aluwihare, PC, J in **Watagodagedara Mallika Chandralatha v Herath Mudiyanselage Punchi Banda and Another** [SC Appeal No. 185/2015; SC minutes of 4th December 2017] emphasised [at page 8] that, "*One needs to bear in mind that where a constructive trust within the meaning of Section 83 of the Trust Ordinance is asserted, it is incumbent on the court to meticulously examine the evidence placed before the court, the reason being, on the face value the evidence placed may give the appearance of a straight forward transaction of a sale but the real intention of the parties can only be gleaned from a close scrutiny of the circumstances under which the transaction was effected. And the intention of the parties is of paramount importance."*

What, then, would be an attendant circumstance? In **Muttammah v Thiyagarajah** [supra; at page 564], Chief Justice Basnayake who delivered the minority opinion, referring to Section 83 stated as follows:

> "*The section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances.* ***Neither the declaration of the transferor at the time of the execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant which expression in this context may be understood as "accompanying" or "connected with".*** *Whether a circumstance is attendant or not would depend on the facts of each case*." [emphasis added]

In **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyanselage Gedara Somawathi** [supra; at page 14], Prasanna Jayawardena, PC, J prior to referring to the above passage of Basnayake, CJ with approval, stated that, "*The words 'attendant circumstances' can be broadly described as meaning the facts surrounding the transaction. In Black's Law Dictionary (9th Edition) the words 'attendant circumstance', as used in the American Law, have been defined as "A fact that is situationally relevant to a particular event or occurrence*."

Over the years our Courts have identified different circumstances as being attendant circumstances, and emphasised that, what an attendant circumstance is and the weight that must be attached to such circumstance in reasonably inferring the intention of the owner, would depend on the facts and circumstances of each case. It would also mean that a circumstance which is attendant in one case may not be an attendant circumstance in another.

Dias, J stated thus in **Ehiya Lebbe v Majeed** [48 NLR 357 at 359]:

> "*There are certain tests for ascertaining into which category a case falls. Thus if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed – all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration, or something else*."

In **Thisa Nona and Three Others v Premadasa** [(1997) 1 Sri LR 169] Wigneswaran, J held that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer:

(1) The fact that a non-notarial document was signed by the transferee contemporaneous to the impugned deed of transfer, agreeing to transfer the land if the sum of Rs. 1,500 referred to in the deed was paid within six years;

(2) The payment of the stamp duty and the Notary's fees by the transferor;

(3) The fact that the transfer deed came into existence in the course of a series of money transactions;

(4) The continued possession of the premises in suit by the transferor in the same manner as she did before the transfer deed was executed.

In **Carthelis v Ranasinghe** [(2002) 2 Sri LR 359] it was held at page 369 that, "*If it was a pure and simple transfer, one would expect the title deeds and all other old deeds to be in the hands of the transferee having obtained them from the transferor, for the purpose of preparing the deed of transfer*."

I am therefore of the view that it is in the light of the sequence of events and the nature of attendant circumstances peculiar to a case that a Court must arrive at its conclusion on whether Section 83 of the Trusts Ordinance applies to that particular case or not.

The burden of proof

It is clear that the burden of proof lies on the person who claims that he or she did not intend to transfer the beneficial interest in the property to the transferee. In **Watagodagedara Mallika Chandralatha v Herath Mudiyanselage Punchi Banda and Another** [supra] Aluwihare, PC, J cited with approval the following passage from '**The Reception in Ceylon of the English Trust**' (1971) by L.J.M. Cooray – *"Where a person has a notarial conveyance in his favour, courts have placed a heavy burden on the transferor to prove facts bringing himself within Section 83."*

The manner in which the Court must be satisfied that the said burden has been discharged was considered in **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyanselage Gedara Somawathi** [supra], where this Court held as follows:

> "…. *the use of the aforesaid words in Section 83 require that, the Court applies an objective test when determining the intention of the owner from the attendant circumstances. Therefore,* ***if the claim of a Constructive Trust is to succeed, the attendant circumstances must make it plainly clear to the 'reasonable man' that, the owner did not intend to part with his beneficial interest in the property.*** *A secret or hidden intention to retain the beneficial interest will not do.* ***The attendant circumstances must be such that they would have demonstrated to the transferee that the owner intended to retain the beneficial interest in the property.*** *The transferee is judged here as standing in the shoes of the 'reasonable man'. If a 'reasonable man' must have known from the 'attendant circumstances' that the*

owner intended to retain his beneficial interest in the property, the transferee is deemed to hold the property upon a Constructive Trust in favour of the owner. However, if a 'reasonable man' may not have drawn such an inference from the attendant circumstances, the transferee holds the property absolutely, since no Constructive Trust can be deemed to have arisen. Further, the burden of proof lies firmly on the person who claims a Constructive Trust to prove it." [page 15; emphasis added]

At the trial, the learned Counsel for the Plaintiff relied on two principal circumstances in order to establish his position that the Plaintiff did not intend to transfer to the 1st Defendant the beneficial interest in the said land – firstly, that the Plaintiff has continued to remain in possession of the said land; and secondly, that the value of the land was much higher than what was paid to her by the 1st Defendant. These are the two grounds relied upon by the learned District Judge, as well.

However, prior to considering these two grounds, I shall set out the background to the transaction as it transpired before the learned Trial Judge, as the said background places in context the said two grounds urged by the Plaintiff.

<u>The explanation of the Plaintiff for the execution of the Deed</u>

The first matter that I wish to refer to is the purpose for which the Plaintiff required the money, which in her own words is as follows:

"එවැනි ගණුදෙනුවක් කිරීමේ අරමුණ වුනේ, මගේ ස්වාමියා අවුරුදු 12 ක් එක තැන ඉදලා නැති වුන වෙලාවේ ගත්ත ණය. පැවරීම කරල තිබෙන්නේ 2003 වර්ෂයේ. මේ ඔප්පුව ලියන්න රු. 50,000/- ක් ලබා ගත්ත. මේ ගණුදෙනුව කරන අවස්ථාවේ එයාට ඉල්ලුවාම මම ඔයාට ලියන්නම් හදිසියට පිරිමහන්න, සල්ලි සොයාගෙන පස්සෙ මම බේර ගන්නම් කියන පොරොන්දුව පිට දුන්නේ 1 වත්තිකරුට. සල්ලි අවශ්‍යතාවයක් වුනේ."

Thus, the Plaintiff's position was that she had a specific purpose to obtain a sum of Rs. 50,000 as a loan. Whether her evidence on this issue is credible or not is an issue that I shall consider in detail, later in this judgment.

The second matter that I wish to refer to, which explains the reason for the Plaintiff to have approached the 1st Defendant to fulfil her immediate need for money, and the long time taken for her to seek redress from Court, is the blood relationship that existed between the Plaintiff and the 1st Defendant, who in addition was personally known to her and lived about ten houses from where she lived. This relationship in turn appears to have given rise to the implicit trust that the Plaintiff claims that she had in the 1st Defendant, and prompted her to sign a deed of transfer, even though she allegedly had no intention of transferring the land.

Referring to Deed No. 4158, the Plaintiff has stated that:

> "මේ ලේඛණය විකුණුම්කරයක් ලෙස ලියලා තියෙන්නේ. විකුණුම්කරයක් ලෙස ලිව්වේ මට ලොකු විශ්වාසයක් මත ලියලා මම එයාගෙන් රුපියල් 50000 ක් ගත්තා. **විශ්වාසයක් තිබුනා එයා මේක විකුණනවා නම් මට පිටින් දෙන්නේ නැහැ කියලා විශ්වාසය නිසාම රු.** 50000 **ක් ගත්තා.**" [emphasis added]

The Plaintiff thereafter stated that:

> "මේ ඔප්පුව විකුණුම්කරයක් ලෙස ලිව්වට මෙම ඉඩම විකුණන්න අදහස් කලේ නැහැ. 1 වෙනි විත්තිකරු කියන්නේ ඥාතියෙක්. ඔවුන් අද ආවා. මගේ පුතා ඥාති සහෝදරයකුගේ පුතා පොඩි කාලේ සිට මගේ ගෙදර ඉදලා වැඩිලා හිටියා මා විශ්වාසය මත ලිව්වේ. මේ ඔප්පුව ගණුදෙනුවක් සිද්ධ වුන නිසා විකුණුම්කරයක් ලෙස ලිව්වා.
>
> මම 1 වෙනි විත්තිකරුට කිව්වා මෙම ගණුදෙනුව මොන වගේ ගණුදෙනුවක්ද කියලා. විශ්වාසය මත ගොඩ නගාගෙන මම නැවත මුදල් දුන්නහම මට නැවත මේක දෙනවා කියලා එයා කිව්වා ලොකු විශ්වාසයක් මත ලිව්වේ විශ්වාසයක් ගොඩ නගා ගත්තා. මම ඔහුට කියා සිටියා නැවත මුදල් දුන්නහම දෙන්න කියලා."

To my mind, the first answer reflects the thinking of the Plaintiff at the time she executed the Deed – that is, the 1st Defendant would hold the said land in trust for her and that the land would not be sold to a third party without first offering it to her or, in other words, that the Plaintiff would be entitled to a right of first refusal and a re-transfer of the property. The second answer makes it clear that the land was to be re-transferred to her. The Plaintiff has however not been cross-examined on whether she was entitled only to a right of first refusal and not a re-transfer of the said Deed as of right.

Although a secret intention on the part of the Plaintiff will not be an attendant circumstance, the explanation of the Plaintiff demonstrates that she has clearly communicated her intention to the 1st Defendant and gives context not only to what transpired thereafter, but to the attendant circumstances that prompted the learned District Judge to hold in favour of the Plaintiff.

The position of the Plaintiff can therefore be summarised as follows:

(a) The Plaintiff requested a sum of Rs. 50,000 from the 1st Defendant, who was related to her and whom she trusted, in order to settle debts she had incurred.

(b) While agreeing to give her the money, the 1st Defendant had wanted the said land transferred in his name.

(c) The 1st Defendant had agreed to re-transfer the said land upon the re-payment of the money.

(d) Due to the relationship and the trust that she had in the 1st Defendant, and having clarified with the 1st Defendant that the property would be re-transferred upon re-payment, she agreed to the course of action proposed by the 1st Defendant and thereafter executed the said Deed as an outright transfer, without having specified any conditions relating to the re-transfer of the land.

<u>Possession of the land by the Plaintiff</u>

I have already stated that none of the Defendants responded to the letters of demand in which the Plaintiff claimed that she was in possession of the land. Although the 1st Defendant had stated in his answer that he was in possession of the said land, no evidence was placed during the trial to support this position. This applies to the 3rd Defendant as well. Unlike the 1st Defendant, the 3rd Defendant was a stranger to the Plaintiff and therefore should have taken steps that a *bona fide* purchaser would ordinarily take, such as having a search of title carried out by an Attorney-at-Law, having a fresh survey carried out to determine the exact extent of the land especially since the two lots, A1 and A2,

had not been physically separated, having the land fenced soon after purchasing the land and having his name registered in the register at the local authority. Even though the 3rd Defendant gave evidence, he did not state if he did any of the above, except that he used to clean the said land regularly.

On the contrary, the position of the Plaintiff that she has been in possession of the land at all times has been supported by the evidence of the Grama Niladari. I have already stated that the Plaintiff had the land sub-divided into two lots three months prior to the execution of the impugned Deed, and that it is only one lot, namely A1, that is the subject matter of this appeal. Although Plan No. 554/2003 was produced and marked by the Plaintiff, the Plaintiff did not explain the reason or the necessity for the sub-division of the land into Lots A1 and A2, nor was she cross-examined on this issue by any of the Defendants. The learned Counsel for the 3rd Defendant has raised before this Court the issue of the land being sub-divided just three months before the execution of the impugned Deed in order to support his position that the intention of the Plaintiff was to transfer the beneficial interest in the lot referred to in the said Deed. However, I am unable to draw any adverse inference in the absence of this issue having been raised during cross-examination.

What is important is the evidence of the Plaintiff that the two lots were not separated by a fence and that she continued to occupy and possess both lots of land even after the transfer was executed in favour of the 1st Defendant. The Grama Niladari stated that the Plaintiff occupied the entire land and that in fact, until he was cross-examined on this issue, he did not even know the land had been sub-divided into two lots for the reason that there was no physical demarcation of the lots on the ground. The Plaintiff also stated that even though her house was situated on Lot A2, her toilet was situated on Lot A1, a fact which has been corroborated by the evidence of the Valuer. None of the Defendants have questioned the Plaintiff on her sanitation facilities being situated on Lot A1 and whether she had alternative arrangements on Lot A2. The Plaintiff stated further that she had a chicken pen on Lot A1 and that it was she who enjoyed the fruits of the said lot of land.

The learned District Judge has considered the above evidence and concluded as follows:

> "තවද පැමිණිලිකාරිය වෙනුවෙන් සාක්ෂි කැඳවූ එකි ග්‍රාමනිලධාරිවරයාගෙන් හෝ තක්සේරුකරුගෙන් හෝ පැමිණිලිකාරියගෙන් 1 විත්තිකරු හෝ 3 වන විත්තිකරු හරස් ප්‍රශ්න නගමින් පැමිණිලිකාරියගේ පදිංචිය අභියෝගයට ලක් කර නැති අතර 3 විත්තිකරු ඔවුන් ඉඩම මිලදි ගත් පසුවද 1 විත්තිකරු එයට පෙර පැ. 3 ඔප්පුවෙන් මිලදි ගත් පසුවද ඉඩමෙහි පදිංචියට ගිය බවට පදිංචිය සනාථ කරමින් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නොමැති අතර 3 විත්තිකරුද සාක්ෂි දෙමින් ඉඩමට ගොස් සුද්ද පවිත්‍ර කරනවා යයි කියා තිබුණද එකි කරුණු පිළිබඳ ග්‍රාම නිලධාරිවරයා හරස් ප්‍රශ්නවලට භාජනය කරන අවස්ථාවේදි වත් තහවුරු වන ආකාරයට කරුණු ඉදිරිපත් කර නොමැත.
>
> ඒ අනුව වර්ෂ 2003 සිට මෙම නඩුව පවරන දින වන වර්ෂ 2009 දක්වා අදාල විෂය වස්තුවෙහි බුක්තියෙහි පැමිණිලිකාරිය සිටි බව පැහැදිලි වන අතර පැ. 3 ඔප්පුව ලියා අත්සන් කිරීමෙන් පසුව දේපලෙහි බුක්තියෙහි පැවරීමක් සිදුවී නොමැති බව තහවුරු වේ. ඒ අනුව අර්ථලාභි අයිතියක් පැමිණිලිකාරිය විසින් 1 විත්තිකරුට පැවරීමේ අදහසකින් පැ. 3 දරණ ඔප්පුව ලියා අත්සන් කොට ඇති බවට තහවුරු නොවේ."

The learned Judges of the High Court have affirmed the judgment of the District Court only after considering the above evidence. I am in agreement with the above conclusion and take the view that the Plaintiff has established that she continued to be in possession of the property at all times, thereby giving rise to a reasonable inference that she did not intend to transfer the beneficial interest in the said land to the 1st Defendant.

Value of the property

The second ground relied upon by the Plaintiff was that the consideration of Rs. 50,000 that passed from the 1st Defendant to her did not reflect the true value of the land. The consideration of Rs. 50,000 amounts to Rs. 2,000 per perch. With regard to the value, the Plaintiff stated that the land was worth Rs. 125,000 per perch at the time she signed the impugned Deed. The Plaintiff had also obtained through Court a Commission on D.I. Danthanarayana, an Incorporated Valuer, to ascertain the current market value as well as the value that prevailed at the time the impugned Deed was executed. He had reported that the current market value of one perch of the said land was Rs. 30,000 while the market value at the time the said Deed was executed was Rs. 20,000 per perch. Thus, even though there was a glaring disparity between the value given by the Plaintiff and the Court-appointed Valuer, the fact remains that the land was worth well over Rs. 2,000 per

perch, thus supporting the version of the Plaintiff that she only obtained a loan from the 1st Defendant and that she did not intend to transfer the beneficial interest in the said land to the 1st Defendant. The Plaintiff and the Valuer have been cross-examined extensively on behalf of the 3rd Defendant but mostly with regard to the locality of the land and the facilities available in the said locality, and not with regard to any specific aspect of the valuation. It is on this basis that the learned District Judge has concluded that the consideration set out in the said deed does not reflect the true value of the said land. These findings have been considered by the High Court, and I see no reason to disagree with the said findings.

Other attendant circumstances

There are two other circumstances which in my view are attendant circumstances and confirm the position of the Plaintiff. The first, which has not been considered either by the District Court or the High Court, is that the original of the Deed of Declaration and the impugned Deed are with the Plaintiff, and not with the 3rd Defendant, as claimed in the written submissions filed on behalf of the 3rd Defendant. I say this for the reason that it was the Plaintiff who produced and marked the originals of the Deed of Declaration and the impugned Deed as P1 and P3, respectively. The originals are available in the case record and I have examined same. The simple position here is that if P3 was an absolute transfer, then, in the absence of any explanation to the contrary, the originals of P1 and P3 should have been handed over to the 1st Defendant. Furthermore, any *bona fide* purchaser, which the 3rd Defendant claims he is, would have sought the originals of the previous Deeds, especially as he was purchasing the land from the 2nd Defendant. No explanation has been given by the 3rd Defendant why he did not do so.

The second matter is that the consideration has not passed in the presence of the Attorney-at-Law before whom the impugned Deed was signed, which supports the position of the Plaintiff that the transaction was purely monetary and that the execution of the Deed was nominal.

Grounds urged on behalf of the 3rd Defendant

In addition to the submissions on possession and value, the learned Counsel for the 3rd Defendant presented two other arguments to support his position that a reasonable inference cannot be drawn that the Plaintiff did not intend to transfer the beneficial interest in the land to the 1st Defendant.

The first is with regard to the purpose for which the money was required. In the Plaintiff's own words, the money was required for the following purpose:

> "මම ඉන්න නිවසට අදාළ ඉඩම මට රු. 50000 ක මුදල් අවශ්‍යතාවයක් නිසා මගේ ස්වාමිපුරුෂයා අවුරුදු 12 ක් ඔත්පොලවෙලා හිටියා එයා නැති වුනා. ණය ගත්ත ඒවා වගයක් තිබුනා ඒවා ගෙවා ගන්න තමයි මම ඒක ලිව්වේ.
>
> ඉඩම ලිව්ව මගේ විශ්වාසය මත රු. 50,000 ට දෙන්නේ නැහැ, **අන්ත අසරණ වී සිටියේ.** ස්වාමියා නැති වෙලා ඉන්න අවස්ථාවේ මගේ ඥාති පුත්‍රයා ට රු. 50,000 ක් ගත්ත එයාට ලියලා ආපහු ඉඩම දෙන බවට."

As observed by the learned District Judge, the Plaintiff did not produce any further details with regard to the above-mentioned loans that she had taken, including the dates when she had taken such loans, from whom she had taken the loans or whether she used the money to settle such loans. These details become important in view of the fact that in the Deed of Declaration, the Plaintiff has stated as follows:

> "එකී කාලවිලගේ දොන් සොම්පාල යන අය වර්ෂ 1989 දී මිය යාමෙන් අනතුරුව මෙහි ප්‍රකාශකාරිය වන මා විසින් එකී දේපල වැඩී දියුණු කර අඛණ්ඩව නිදහස්ව නිරවුල්ව භුක්ති විඳගෙන එනු ලැබේ.
>
> මේ අනුව මෙහි ප්‍රකාශකාරිය වන මාගේ ස්වාමිපුරුෂයා විසින් පිය උරුමයට අයත්ව ඉතා දිර්ඝ කාලයක් භුක්ති විඳගෙන එනු ලැබූ බැවින්ද, මෙහි ප්‍රකාශකාරිය වන මාගේ ස්වාමිපුරුෂයා වර්ෂ 1989 දී මිය යාමෙන් අනතුරුව එතැන් පටන් මා විසින් අඛණ්ඩව නිදහස්ව නිරවුල්ව භුක්ති විඳගෙන එනු ලබන බැවින්ද."

In my view, the Plaintiff should have been cross-examined on her explanation as to the need for the money, especially since her husband is said to have expired in 1989 and the loan was being raised much later [2003]. However, in the absence of the evidence of the

Plaintiff being challenged in cross-examination, it is not possible for this Court to consider the first argument of the learned Counsel for the 3rd Defendant.

The second is with regard to the arrangement for the repayment of the money. The learned Counsel for the 3rd Defendant submitted that if Rs. 50,000 was taken as a loan, there ought to have been an arrangement between the Plaintiff and the 1st Defendant with regard to the re-payment of the said money and the payment of interest. It must be noted that neither the plaint nor the letters of demand sent on behalf of the Plaintiff contained any details with regard to the rate of interest, the period within which the monies should be repaid etc. During cross-examination, the Plaintiff was questioned in this regard and her position was that she had not paid any interest to the 1st Defendant. The Plaintiff however claims that when she wanted to repay the money in 2007, she offered to do so with interest which demonstrates the intention on the part of the Plaintiff to pay interest. In my view, given the relationship that existed between the Plaintiff and the 1st Defendant, the failure to agree on the payment of interest, the rate of interest and the period of re-payment cannot displace the strong attendant circumstances referenced above, that had been established by evidence and which were relied upon by the learned Judges of the District Court and the High Court.

Conclusion

Having carefully considered the judgments of the learned District Judge and the learned Judges of the High Court, I am of the view that:

(a) both Courts have analysed and applied the evidence in light of the test laid down in Section 83; and

(b) it cannot reasonably be inferred, consistently with the attendant circumstances, that the Plaintiff intended to dispose of the beneficial interest that she had in Lot A1, to the 1st Defendant by way of Deed No. 4158.

In the said circumstances, I would answer in the negative the aforementioned questions of law raised by the 3rd Defendant.

I therefore direct that the Plaintiff shall pay to the 1st Defendant a sum of Rs. 50,000 together with legal interest thereon, from 21st September 2003 until the payment of the said sum of Rs. 50,000 is made. The 1st Defendant shall execute in favour of the Plaintiff a deed of transfer in respect of Lot A1 in Plan No. 554/2003 upon the aforesaid payment by the Plaintiff. If the 1st Defendant fails to execute a deed of transfer, the Registrar of the District Court of Kalutara shall execute a conveyance in favour of the Plaintiff, upon the Plaintiff depositing the aforementioned sum of money with the Registrar of the District Court of Kalutara.

Subject to the above, the judgments of the District Court and the High Court are affirmed and this appeal is dismissed, with costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No. 233/2018

1. H. M. Punchimenike

2. S. H. M. Sumanawathi Menike

Both at Moragolla, Nagollagoda.

PETITIONERS

vs.

1. D. M. Bandula Saman Dissanayake,
Maginpitiya Road,
Dandagamuwa.

2. I. M. Premaratne,
Hikokadawala,
Mahama.

3. K. Wasantha Kumara,
C-45, Saman Uyana,
Mawathagama.

4. R. M. Saman Hemantha Rathnayake,
Ihalakagama, Nikaweratiya.

5. W. M. G. K. G. Aruna Weerakoon,
No. 76, Ihalagama,
Mihigamuwa.

6. H. M. Danushka Buddhi Prabha Ranasinghe,
No. 38/1, Katulanda,
Akaragama.

1st – 6th Respondents at
Excise Department, Kuliyapitiya.

7. Commissioner General of Excise,
Excise Department,
No. 353, Kotte Road,
Rajagiriya.

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

RESPONDENTS

Before: **Jayantha Jayasuriya, PC, CJ**
Murdu N. B. Fernando, PC, J
Arjuna Obeyesekere, J

Counsel: Ms. Thilini Vidanagamage for the Petitioners

J. M. Wijebandara for the 1st – 6th Respondents

Sajith Bandara, State Counsel for the 7th and 8th Respondents

Argued on: 9th January 2023 and 27th March 2023

Written Submissions: Tendered by the Petitioners on 2nd February 2021 and 14th June 2023

Tendered by the 1st – 6th Respondents on 26th May 2020

Tendered by the 7th and 8th Respondents on 10th May 2021

Decided on: 4th October 2023

Obeyesekere, J

The 1st Petitioner and her daughter, the 2nd Petitioner, filed this application on 19th July 2018 alleging that their fundamental rights guaranteed by Articles 11, 12(1), 12(2), 13(1), 13(2) and 13(5) of the Constitution have been infringed by the 1st – 6th Respondents [the Respondents], who are officers of the Excise Department, by their actions in a series of incidents that occurred on 19th December 2017. Leave to proceed was granted on 2nd November 2018 but only in respect of the alleged infringement of the 2nd Petitioner's fundamental rights guaranteed by Article 11.

Although this application has been filed seven months after the alleged infringement, the Petitioners have filed a complaint with the Human Rights Commission of Sri Lanka the day after the occurrence of the incidents complained of. Article 126(2) of the Constitution stipulates that an application must be filed within one month of the alleged infringement, and on the face of it, it is clear that the Petitioners have not complied with such requirement. However, Section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 provides that, *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."* The learned Counsel for the Respondents did not raise any objection with regard to the maintainability of this application for non-compliance with the provisions of Article 126(2) probably in view of the said provision and for that reason, the necessity for this Court to go into the issue of time bar or whether Section 13(1) applies to this application, does not arise.

<u>The complaint of the 2nd Petitioner – the first stage</u>

The incidents complained of by the 2nd Petitioner took place during two stages on 19th December 2017. The first was at the boutique operated by the 1st Petitioner and the sister of the 2nd Petitioner, Damayanthi. The second was at the office of the Excise Department at Kuliyapitiya.

The Petitioners state that the 1st Petitioner, who was 70 years old at the time of the alleged incident, is carrying on a small boutique at her residence situated in Nagollagoda together with Damayanthi. The 2nd Petitioner lives approximately 300 metres away, together with her husband and two children. The 2nd Petitioner states that at about 9.45am on 19th December 2017, she had walked across to the said boutique to "*purchase*" breakfast for herself, despite this being *her own mother's boutique*, when at about this time, a group of six persons – i.e., the Respondents – arrived at the boutique in a blue pick-up lorry. The Petitioners claim that while one of the group was dressed in what appeared to be a Police uniform, the manner in which these individuals conducted themselves and the repeated references they made to

kasippu gave rise to a reasonable apprehension on their part that the said individuals were from the Excise Department.

The Petitioners state that the Respondents had thereafter suggested to the 2nd Petitioner that she consent to criminal charges being filed against her for possession of *kasippu* on the assurance that any action to be filed in a Court of law can be amicably resolved by the 2nd Petitioner pleading guilty to such charge and paying a fine. The 2nd Petitioner claims that as neither she nor her mother agreed to the suggested course of action, the Respondents had become aggressive and attempted to assault her sister, Damayanthi. The 2nd Petitioner had intervened only to have been slapped by the officer who was dressed in what appeared to be Police uniform. The 2nd Petitioner admits that she had then held onto the said officer to prevent herself from falling to the ground and claims that thereafter the other officers had dragged her out of the boutique and across the garden's gravel driveway and forced her into the back of the lorry, in the process of which, the draped cloth that she was wearing had come off.

The Petitioners claim that the 1st Petitioner too had been assaulted by the officer in uniform when she pleaded with the officers not to arrest the 2nd Petitioner. The 2nd Petitioner claims further that she was manhandled by the Respondents, who were all male, whilst being shouted at in obscene language in the presence of several villagers who had gathered by then, and that this caused her intense emotional suffering and humiliation. This is the first and the most critical stage of the incidents complained of by the 2nd Petitioner, as the alleged assault and the subsequent dragging of the 2nd Petitioner out of the boutique, across the gravel driveway and into the lorry, as well as the witnessing of these incidents by the other villagers, took place during this stage. The Petitioners have submitted three video recordings marked P1a, to which I shall advert to later, which the Petitioners claim support the 2nd Petitioner's position.

<u>The complaint of the 2nd Petitioner – the second stage</u>

The 2nd Petitioner states that she was thereafter taken to the office of the Excise Department at Kuliyapitiya, where the second stage of the incidents complained of took place, with the 2nd Petitioner once again being urged to agree to charges being framed against her and that the fine would be paid by the Respondents. The 2nd Petitioner states that she was surrounded by approximately ten officers, including the Respondents, and had been threatened by them as she had refused to comply with

the said suggestion. The 2nd Petitioner states further that there were no female officers present at the time.

The 2nd Petitioner had thereafter been taken to the Bingiriya Police Station where it transpired that her sister Damayanthi had already lodged a complaint against the said Respondents. A copy of this complaint has however not been placed before this Court. The 2nd Petitioner had thereafter been taken to the Hettipola Police Station and had later been produced before the Acting Magistrate at about 6.30pm that day, at a place situated on the Kuliyapitiya – Hettipola main road and thereafter enlarged on bail. As adverted to earlier, the 2nd Petitioner states that she lodged a complaint with the Human Rights Commission the next day and has produced two letters dated 10th January 2018 [P7b] and 23rd January 2018 [P7a] issued by the Human Rights Commission acknowledging receipt of the said complaint and informing the 2nd Petitioner that the said complaint has been referred for further investigation. The 2nd Petitioner has however failed to produce a copy of the said complaint nor has she made an effort to apprise this Court of the status of that inquiry, although this application and the counter affidavit were filed well after P7a and P7b had been issued.

Medical treatment

The 2nd Petitioner states further that as she was feeling unwell and due to several aches and pains following the alleged assault, she sought medical treatment the day after the incident. She had initially visited the Bingiriya Hospital but due to the lack of resources at Bingiriya, she had visited the General Hospital, Chilaw, where she had received in-house treatment for one day. According to the entry card P3a, the 2nd Petitioner had complained of an impact on her left eye, headache, dizziness and pain on the right side of the chest. No injuries suggestive of the 2nd Petitioner having been dragged along the ground or of any assault or for that matter, indicative of there having been a scuffle, have been noted. Although in the prayer to this application, the Petitioners had prayed for a direction on the Medical Superintendent of the General Hospital, Chilaw to produce the bed head ticket and other medical records pertaining to the 2nd Petitioner's medical condition and the treatment carried out on her, the Petitioners have not pursued the said prayer. As a result, there is no medical evidence of any injuries caused to the 2nd Petitioner to support her version of the incident.

Version of the Respondents

The Respondents admit that they were attached to the Kuliyapitiya office of the Excise Department. They state that they left the office at about 7.40am that morning to carry out a detection of illicit alcohol and that on their return, the 2nd Respondent received information that Ranasinghe Bandara, the husband of the 2nd Petitioner, had stored barrels of *kasippu* for sale at the 1st Petitioner's boutique. The Respondents state that both Petitioners as well as Ranasinghe have previously been convicted for possession and sale of illegal alcohol, a fact which had not been disclosed in the petition, but which gives context to the arrival of the Respondents at the boutique that morning, as well as to their version of the events that transpired thereafter. The Respondents have tendered to this Court the case records pertaining to seven cases where the 2nd Petitioner had been charged for the possession and sale of illegal alcohol during the period 2012 – 2017 and where the 2nd Petitioner had pleaded guilty on each occasion.

I am mindful that any previous convictions of the 2nd Petitioner for similar offences are immaterial as far as the alleged violation of her fundamental rights are concerned, for as stated in **Amal Sudath Silva v Kodituwakku, Inspector of Police and Others** [(1987) 2 Sri LR 119 at page 127], "*The petitioner may be a hard-core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution*."

However, it must be noted that, (a) the 2nd Petitioner had been charged in the Magistrate's Court for an incident that involved her being in possession of 15 litres of *kasippu* on 7th November 2017, which is just six weeks prior to the alleged incident, and (b) the detection that led to the filing of the above case had been carried out by the 2nd Respondent. This revelation cannot escape the raising of a doubt in the 2nd Petitioner's version of events, in particular, that she did not know that the persons who arrived at the boutique were officers attached to the Excise Department, and that it is only the '*manner in which such individuals conducted themselves, and the repeated references to kasippu (that) engendered in them the reasonable apprehension that such individuals were all Excise Officers.*'

The version of the Respondents is that having received the abovementioned information, they had proceeded towards the said boutique, arriving there at about 10.05am. Having entered the boutique, they had seen the 2nd Petitioner with a container filled with a yellow colour liquid. The Respondents claim that the 2nd Petitioner had attempted to throw away the said liquid upon her seeing the Respondents, but had been prevented by the Respondents, who had thereafter proceeded to take the 2nd Petitioner into their custody. The Respondents claim that the detection of what was immediately perceived by them to be illicit alcohol had prompted the Petitioners and Damayanthi to behave in an aggressive manner towards them, which necessitated the Respondents using minimum force to compel the 2nd Petitioner to get into the lorry. The Respondents claim that the Petitioners as well as Damayanthi used abusive language on them and attempted to prevent them from discharging their duty.

The Respondents have denied assaulting the 2nd Petitioner, but claim that she resisted arrest and that as a result, they were compelled to use minimum force. While the Respondents have not elaborated on the minimum force they claim to have used, I wish to place emphasis on the cardinal rule of law enforcement that law enforcement officials should only use force in exceptional circumstances where no other option is available, and even then, no amount of force beyond that which is reasonably necessary under the circumstances, for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, can be used.

This position is reflected in, (a) the fundamental right of freedom from arbitrary arrest and detention, guaranteed to all persons, whether a citizen or not, by Article 13(1) of the Constitution, read with Section 23 of the Code of Criminal Procedure Act, No 15 of 1979 (as amended), and (b) the judgment in **Kumara v Silva, Sub-Inspector of Police, Welipenna and Others** [(2006) 2 Sri LR 236 at page 245] where Shirani Bandaranayake, J [as she then was] stated that *'It is not disputed that use of minimum force will be justified in the lawful exercise of police powers. However, the force used in effecting an arrest should be **proportionate** to the mischief it is intended to prevent.'* [emphasis added].

In her counter affidavit, the 2nd Petitioner contends that she was determined to turn a new leaf and hence had given up the brewing and sale of illicit alcohol, and that for

this reason, the allegation of the Respondents that she was found in possession of illicit alcohol at the said premises is false.

Çases filed in the Magistrate's Court

I must note that the incidents that occurred during the first stage on 19th December 2017 have given rise to three cases before the Magistrate's Court. The first is where the Excise Department has instituted action against the 2nd Petitioner for the possession of illicit alcohol, the second is where the Bingiriya Police has instituted action against the 2nd Petitioner for interfering with the duties of public officers and the third is the plaint filed by the Bingiriya Police against the 1st – 6th Respondents on the complaint of Damayanthi. While all three cases were pending at the time of the institution of this action, neither the Petitioners nor the Respondents have apprised this Court of the present status of these cases, which could have been useful in placing in context the facts relating to the present application. Be that as it may, this Court would only be adjudicating on whether the 2nd Petitioner's fundamental rights guaranteed by Article 11 have been infringed during the course of the incidents that are alleged to have occurred on 19th December 2017 and not on the merits of any of the above cases, which would be the function of the learned Magistrate.

Article 11 of the Constitution

It is clear that human dignity underpins the application of all fundamental rights, and is the fundamental virtue sought to be protected through the securement of fundamental rights and the Rule of Law, as demonstrated by the Svasti to our Constitution.

Prasanna Jayawardena, PC, J in **Ajith C. S. Perera v. Minister of Social Services and Social Welfare and Others** [(2019) 3 Sri LR 275 at page 300] mentioned " *… that it seems to me that* ***the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution.*** *It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country. As Aharon Barak, former Chief Justice of Israel has commented [Human Dignity – The Constitutional Value and the Constitutional Right (2015)]:*

'Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights.' 'The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that united the human rights into one whole. It ensures the normative unity of human rights.'' [emphasis added]

In **Kandawalage Don Samantha Perera v Officer in Charge, Hettipola Police Station and Others** [SC (FR) Application No. 296/2014; SC Minutes of 16th June 2020] Thurairaja, PC, J referring to the above passage stated that, "*I am in respectful agreement with his Lordship that '**Human Dignity**' is a constitutional value that underpins the Fundamental Rights jurisdiction of the Supreme Court. I am of the view that 'Human Dignity' as a normative value should buttress and inform our decisions on Fundamental Rights*."

Article 11 provides that, "*No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

In **Kumara v Silva, Sub-Inspector of Police, Welipenna and Others** [supra; at page 244] this Court noted that, "*Article 11 refers to torture separately from cruel, inhuman or degrading treatment or punishment similarly to Article 5 of the Universal Declaration of Human rights, Article 7 of the International Covenant on Civil and Political Rights as well as Article 3 of the European Convention which had referred to torture separately from inhuman, degrading treatment or punishment. The importance of the right to protection from torture has been further recognized and steps had been taken to give effect to the universally accepted safeguards by the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York in 1984, which has been accepted in Sri Lanka by the enactment of Act No. 22 of 1994 on the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*."

Chief Justice Sharvananda in his treatise, **Fundamental Rights in Sri Lanka (A Commentary)** [(1993) at page 69] has pointed out that, "*The fundamental nature of the right of freedom from torture or inhuman treatment is emphasized by the fact that **it is an absolute right subject to no restriction or derogation** under any condition, even in times of war, public danger or other emergency. This human right from cruel or*

inhumane treatment is vouched not only to citizens, but to all persons, whether citizens or not, irrespective of the question whether the victim is a hard-core, criminal or not." [emphasis added]

In **Velmurugu v Attorney General and Another** [(1981) 1 Sri LR 406 at page 453] Wanasundera, J stated as follows:

> "*Article 11 which gives protection from torture and ill-treatment has a number of features which distinguish it from the other fundamental rights. Its singularity lies in the fact that it is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-thirds majority but also a Referendum. It is also the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which is (sic) no way can be restricted or diminished. Whatever one may say of the other rights, this right undoubtedly occupies a preferred position.*
>
> *Having regard to its importance, its effect and consequences to society, it should rightly be singled out for special treatment. It is therefore the duty of this Court to give it full play and see that its provisions enjoy the maximum application*."

Atukorale, J in **Amal Sudath Silva v Kodituwakku Inspector of Police and Others** [supra; at page 126] held as follows:

> "*Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an* ***absolute*** *fundamental right subject to* ***no restrictions or limitations*** *whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee."* [emphasis added]

Although said in the context of Police officers, the following passage by Atukorale, J is equally applicable to this application:

> *"Constitutional safeguards are generally directed against the State and its organs. The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict*

the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their ***standing****, their* ***beliefs*** *or* ***antecedents****. It is therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion*." [emphasis added]

In **Mrs W M K De Silva v Chairman, Ceylon Fertilizer Corporation** [(1989) 2 Sri LR 393 at page 403], Amerasinghe, J opined that "… *the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence*" and "… *would embrace the sphere of the soul or mind, as well*."

Amerasinghe, J went onto state at page 405 that:

"*In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as 'the victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach or a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be.*"

However, as pointed out by A.R.B. Amerasinghe in **Our Fundamental Rights of Personal Security and Physical Liberty** [(1995) Sarvodaya – at page 37], "*Torture, cruel, inhuman degrading treatment or punishment may take many forms, psychological and physical, but whether the relevant criteria have been satisfied must depend on the circumstances of each case.*"

Of the three general observations made by Amerasinghe, J in **Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case)** [(1994) 1 Sri LR 1 at page 105] with regard to an Article 11 infringement, the first was that "… *the acts or conduct complained of must be qualitatively of a kind that the Court can take cognizance of*." At page 106, Amerasinghe, J further noted that where physical harm is concerned, a long line of cases have adopted the criteria set out in **Mrs W M K De Silva v Chairman, Ceylon Fertilizer Corporation** [supra; at page 401], where it was held that for there to be an Article 11 infringement the degree of mental or physical coerciveness or viciousness must be such as to occasion not mere ill-treatment, but maltreatment of a very high degree. This has been emphasised in **Our Fundamental Rights of Personal Security and Physical Liberty** [supra; at page 29], where the author states that, "'*Torture' implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill-treatment may be regarded as inhuman or degrading it must be 'severe'. There must be the attainment of a 'minimum level of severity'. There must (be) the crossing of the 'threshold' set by the prohibition. There must be an attainment of 'the seriousness of treatment envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment.*"

Accordingly, in determining whether Article 11 has been infringed, this Court will consider whether the level of 'intensity', 'cruelty' and 'severity' of suffering implied by and inherent to the notion of 'torture' and 'inhuman', and 'degrading' treatment has been satisfied.

The position is therefore clear. Every human being is entitled to live with dignity and not be subject to any torture or cruel, inhuman or degrading treatment or punishment. It is the duty of this Court, as the guardian of the fundamental rights of our People, to foster and protect these rights. Whenever a complaint alleging the infringement of Article 11 is made to this Court, it is our duty to examine thoroughly the facts relating to such complaint, the corroborative evidence, if any, tendered by the Petitioner in support of such complaint, the version of the Respondents and arrive at a considered decision.

Standard of proof that must be satisfied

I shall now turn to the standard of proof that a Petitioner who alleges an infringement of Article 11 must discharge.

In **Goonewardene v Perera** [(1983) 1 Sri LR 305 at page 313], Soza, J observed thus:

> "*Before I deal with the facts a word about the burden of proof. There can be no doubt that the burden is on the petitioner to establish the facts on which she invites the court to grant her the relief she seeks. This leads to the next question. What is the standard of proof expected of her? Wanasundera, J. considered the question in the case of Velmurugu v. The Attorney-General and another and held that the standard of proof that is required in cases filed under Article 126 of the Constitution for infringement of fundamental rights is proof by a preponderance of probabilities as in a civil case and not proof beyond reasonable doubt. I agree with Wanasundera, J. that the standard of proof should be preponderance of probabilities as in a civil case. It is generally accepted that within this standard there could be varying degrees of probability. The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a court having to decide a question of fraud in a civil suit would.* ***The conscience of the court must be satisfied that there has been an infringement***." [emphasis added]

Wimalaratne, J In **Kapugeekiyana v Hettiarachchi and Others** [(1984) 2 Sri LR 153 at page 165] stated that, "*In deciding whether any particular fundamental right has been infringed I would apply the test laid down in Velmurugu that the civil, and not the criminal standard of persuasion applies, with this observation, that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue.*"

In **Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case)** [supra; at page 107], referring to the third general observation made with regard to an Article 11 infringement, Amerasinghe, J stated as follows:

"*… having regard to the nature and gravity of the issue,* ***a high degree of certainty is required before the balance of probability might be said to tilt in favour of a Petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment or punishment****; and unless the Petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 took place, it will not make a declaration that (a violation of) Article 11 of the Constitution did take place.*" [emphasis added]

(…)

"*Would 'the* ***guarded discretion of a reasonable and just man*** *lead him to the conclusion'? is the* ***test*** *I would apply in deciding the matter. If I am in real and substantial doubt, that is if there is a degree of doubt that would prevent a reasonable and just man from coming to the conclusion, I would hold that the allegation has not been established."* [emphasis added]

Similar sentiments were expressed by my sister, Murdu N. B. Fernando, PC, J in **Ratnayaka Weerakoonge Sandya Kumari v Weerasinghe, Sub Inspector of Police** [SC (FR) Application No. 75/2012; SC minutes of 18th December 2019 at page 10] where, having considered the above cases, it was concluded that, "*The foregoing judicial decisions of this Court has clearly identified and laid down that a high degree of certainty is required before the balance of probability would tilt in favour of a petitioner endeavoring to discharge the burden of proof with regard to an allegation of torture or cruel, inhuman or degrading treatment*."

In **Edward Sivalingam v Sub Inspector Jayasekara & Others** (SC (FR) Application No. 326/2008; SC minutes of 10th November 2010), which has been referred to with approval by Shiran Gooneratne, J in **Kumarihami v Officer-in-Charge, Mahiyanganaya Police Station and Others** [(2021) 2 Sri LR 464 at page 469], Tilakawardane, J held that, "*When considering the allegations made by the Petitioner against officers of the CID it is important to bear in mind that the burden of proving these allegations lies with the Petitioner. This court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a higher threshold than mere satisfaction. The standard of proof employed is on a balance of probabilities test and as such must*

have a high degree of probability and ***where corroborative evidence is not available it would depend on the testimonial creditworthiness of the Petitioner***." [emphasis added]

Amerasinghe, J however added a word of caution in **Samanthilaka v Ernest Perera** [(1990) 1 Sri LR 318; at page 319], which he reiterated in **Channa Pieris and Others v Attorney-General and Others (Ratawesi Peramuna Case)** [supra; at page 108], when he stated that he is conscious of the difficulties faced by a petitioner in proving allegations of torture and that therefore, due regard must be had to the circumstances of the particular case so as not to impose an undue burden on a petitioner, and thereby impede access to justice. As correctly acknowledged in **Weerasinghe v Premaratne, Police Sergeant and Others** [(1998) 1 Sri LR 127 at page 133], this Court must also be alert to the tendency of State officials to act in an '*esprit de corps*' in protecting their own and covering up their wrongs, such as through falsified medical reports and police records.

Thus, while the burden of proof of establishing allegations of torture or cruel, inhuman or degrading treatment or punishment shall remain with a petitioner to be satisfied on a balance of probability with a high degree of certainty, the Court must be guided by the facts of the particular case and the difficulties and disadvantages that a petitioner could face in proving such allegations.

Allegations of the 2nd Petitioner – revisited

It is in the above factual and legal background that I must consider the several complaints of the 2nd Petitioner and determine whether the 2nd Petitioner has proved that the Respondents committed any act amounting to an infringement of her fundamental rights guaranteed by Article 11.

In her affidavit, the 2nd Petitioner has made four allegations of which three took place during stage one, at the premises of the boutique. The first is the physical assault, including a slap across her face and her being dragged along the ground. The second is the humiliation she suffered in front of the villagers who had gathered and the abusive language used on her. The third is her draped cloth being ripped off her as she was dragged out of the boutique and into the lorry. The fourth is the intimidation and

threats made to her at the Excise Department office at Kuliyapitiya, which took place during stage two.

The 2nd Petitioner has lodged a complaint with the Human Rights Commission on the day after the incident, as borne out by the acknowledgment issued – vide P7a – but she has failed to produce a copy of the said complaint before this Court. The 2nd Petitioner has also made a complaint on the same date to the Bingiriya Police Station and on the strength of which, the Bingiriya Police has filed the 'B' report P6. The 2nd Petitioner has neglected to tender a copy of this complaint as well. The 2nd Petitioner has stated further that the Police Post at the General Hospital, Chilaw recorded a statement from her, but this statement has also not been tendered. The 2nd Petitioner had additionally sent a complaint on the day after the incident to the Minister under whose purview the Excise Department functioned at the time and on the strength of which, an inquiry was held by the Excise Department. Regrettably, a copy of this complaint too has not been tendered. In my view, these four complaints / statements could have served as contemporaneous evidence of the incidents that took place on 19th December 2017 and would have shed more light on what actually transpired, especially since this application has been filed seven months after the occurrence of the alleged incidents. The failure to file the said complaints / statements before Court in an action filed to vindicate one's fundamental rights is difficult to comprehend given the enthusiasm with which the 2nd Petitioner invoked the law enforcement machinery soon after the occurrence of the said incidents. Such failure gives rise to a substantial doubt in my mind with regard to the testimonial creditworthiness of the 2nd Petitioner.

Affidavit of Damayanthi

The 2nd Petitioner has tendered affidavits of two others to support her version. The first is that of her sister, Damayanthi, and the second is that of one Lekamlage Dayaratne who claims he was at a nearby bus halt and saw the incident at the boutique. The Petitioners have not produced statements or affidavits from the villagers who are said to have gathered and witnessed the incidents that took place at the boutique on 19th December 2017, and therefore the allegation that they were humiliated in front of the villagers has not been substantiated.

I approach with caution the affidavit of Damayanthi, who, being the 2nd Petitioner's sister, is not a disinterested witness. Damayanthi has stated as follows in her affidavit signed on 24th July 2018:

"03. අපගේ පුදුමයට මෙන් සුරාබදු, නිලධාරීන් 06 දෙනෙකු පමණ එතනට කඩා වැදී මාගේ සොහොයුරිය හට පවසා සිටියේ සාපරාධී ක්‍රියාවක් පිළිබඳව නඩුවක් පැවරීමට කරුණු ඉල්ලා සිටියද, එකී කරුණු කුමක්දැයි කියා ඔවුන් විසින් ඇයට පැවසුවේ නැත.

04. ඉහත අංක 02 ජේදයේ සඳහන් පරිදි එය ප්‍රතික්ෂේප කළ බැවින් 2017.12.19 වන දින උදේ 10.30 ට පමණ එකී නිලධාරීන් පිරිස විසින් මට පහර දීමට උත්සහ කරන විට මාගේ සොහොයුරිය එය වැළැක්වීමට උත්සාහ කළ විටදී **එකී නිළධාරීන් විසින් ඇය හට පහර දෙන ලදී.** ඔවුන් විසින් ඇයගේ වම් කම්මුලට අතුල් පහරක්ද දෙන ලදී. එවිට ඇය බිමට ඇද වැටුණි. **එවිට එකී සියළුම නිලදාරීන් විසින් ඇයට අමානුෂික ලෙස පහර දී ඇයව අප වෙළඳසැලෙන් එළියට ඇදගෙන විත් බිම දිගේ නැවත ඇදගෙන ගොස්** අත්අඩංගුවට ගන්නා ලදී. **මෙම හේතුවෙන් ඇයගේ ඇඳුම් ඉතා අධික ලෙස ඉරී තිබුණි.** ඉන්පසු ඔවුන් විසින් ඇයව නිල් පැහැති කැබ් රථයකට ඇද දමා කුලියාපිටිය සුරාබදු කාර්යාලයට රැගෙන යන ලදී.

05. මෙම සිද්ධිය අපගේ අසල්වාසින් විසින්ද දක්නා ලදුව, සොයුරියගේ ඇඳුම්ද බරපතල ලෙස ඉරී ගොස් තිබුණි. තවද, එකී නිලධාරීන් විසින් අපට පරුෂ වචනයෙන් ඉතා නින්දිත ලෙස බැණ වැදිනි. නමුත් අපට ඇයව බේරා ගැනීමට නොහැකි විය.

07. කිසිම හේතුවක් නොමැතිව එකී සුරාබදු, නිලධාරීන් විසින් සිදු කරන ලද මෙම මිලේච්ඡ පහර දීම පිලිබඳව මා විසින් බිංගිරිය පොලිස් ස්ථානයට ගොස් අංක බී 852/17 යටතේ පැමිණිල්ලක්ද සිදු කරන ලදී. ඒ අනුව පුද්ගලයන් භයදෙනෙක් මේ දක්වා අත්අඩංගුවට ගෙන ඇත."

Neither the 2nd Petitioner nor Damayanthi have produced photographs of the draped cloth that the 2nd Petitioner was said to have been wearing on the said date to prove the assertion that her clothing had been torn, thus embarrassing her in front of the villagers who had gathered at the scene. Furthermore, as I have previously noted, a copy of the complaint that Damayanthi claims she made to the Bingiriya Police Station in Case No. B 852/2017 has not been tendered to this Court, even though the 'B' report P6 itself has been tendered by the Petitioners. Once again, the contents of this complaint could have served as contemporaneous evidence of Damayanthi's version to this Court. It would also be pertinent to note that Damayanthi failed to appear at the inquiry conducted by the Excise Department on the complaint made by the 2nd Petitioner. Thus, Damayanthi's version is also replete with infirmities and therefore it may not be safe to rely on her evidence.

Affidavit of Dayaratne

I must nonetheless consider if the allegations of brutal assault that Damayanthi claims the 2nd Petitioner was subjected to, can yet be established. In that regard, there are two matters that I must consider. The first is the affidavit of Lekamlage Dayaratne, which had only been tendered with the counter affidavit of the 2nd Petitioner, although it had been affirmed one month prior to the filing of this application and was available to the Petitioners at the time this application was filed.

In his affidavit, Dayaratne has stated as follows:

"02. මා ඉහත ලිපිනයේ පදිංචිව සිටින අතර, වර්ෂ 2017.12.19 වන දින පෙ. ව. 09.00 ට පමණ මා සුරියහෙට්ට මුදියන්සේලාගේ මල්ලිකා දමයන්ති යන අයට අයත් වෙළඳසැල අසල පිහිට බස් හෝල්ට් එකේ සිටින විට නිල්පාට කැබ් රථයක් පැමිණ එකී වෙළඳසැල ඉදිරිපිට නවත්වා නිල ඇඳුමෙන් සැරසි සිටි නිලධාරියෙකු ඇතුළු කිහිප දෙනෙකු බැස එකී වෙළඳසැල ඇතුලට ගිය බවත් මා කියා සිටිමි.

03. ඉන්පසු එකී වෙළඳසැල ඇතුලෙන් ගැහැණු පිරිසක් ගහන්න එපා යනුවෙන් කෑගසන ශබ්දයක් ඇසි මා වෙළඳසැල ඉදිරිපිටට පැමිණ බලන විට සුරියහෙට්ට මුදියන්සේලාගේ සුමනාවති මැණිකේ යන අයට කැබ් රථයෙන් පැමිණි නිලධාරියෙකු සහ තවත් කිහිප දෙනෙකු **පහර දුන් අතර ඇයගේ කෙස් වලින් අල්ලා ඇදගෙන ඇයව එකී කැබ් රථය තුළට දැමූ බව මා දුටුව බවත් එසේ ඇදගෙන යන අවස්ථාවේ දී ඇයගේ ඇඳුම් ද ගැලවී තිබූ බවත්** මා ප්‍රකාශ කර සිටිමි.

04. එසේ ඇයව ඇදගෙන යන අවස්ථාවේ දී **අසල තිබූ කණුවක ආධාරයෙන් ඇය එම නිලධාරීන්ගෙන් බේරීමට උත්සහ ගත් බව මා දුටු බවත් නමුත් එම අය ඇයට පහර දී** ඇයව එකී කැබ් රථයට දැමූ බවත් මා කියා සිටිමි. "

No explanation has been tendered by either Dayaratne or the Petitioners with regard to the following:

(a) Whether Dayaratne lives close by to the said boutique, which in turn would have explained his presence at the bus halt at the time of the incident at the boutique;

(b) Whether the 2nd Petitioner is someone who was previously known to him and if so, in what way, especially since he has referred to the 2nd Petitioner by her full name; and

(c) Whether he made a statement to the Bingiriya Police as to what he witnessed that day at the boutique.

While the affidavit of Dayaratne contains the above infirmities, his version also appears to be an exaggeration of what took place, as neither the 2nd Petitioner nor Damayanthi refer to the 2nd Petitioner having been dragged by her hair or the 2nd Petitioner holding on to a post to prevent herself from being dragged by the Respondents. Perhaps these matters could well have been addressed had the Petitioners disclosed to this Court the complaints / statements made to the Human Rights Commission, the Bingiriya Police or at the Police Post at the Chilaw Hospital. Thus, in light of these observations, I am of the view that this Court cannot place much reliance on the affidavit of Dayaratne, either.

Medical evidence

The second matter that I wish to consider in examining if the allegations of brutal assault have been established, is the availability of medical evidence. Before I do so however, I wish to emphasise that there may be instances where medical evidence is not available and therefore it would not be reasonable for this Court to insist upon medical evidence. In fact, in **Ansalin Fernando v Sarath Perera, Officer-in-Charge, Police Station, Chilaw** [(1992) 1 Sri LR 411 at page 419], Kulatunga, J pointed out that, "*Whilst I shall not accept each and every allegation of assault/ill-treatment against the police unless it is supported by cogent evidence I do not consider it proper to reject such an allegation merely because the police deny it or because the aggrieved party cannot produce medical evidence of injuries. Whether any particular treatment is violative of Article 11 of the Constitution would depend on the facts of each case. The allegation can be established even in the absence of medically supported injuries."* Although from a practical point of view, it may be that only medical evidence could afford corroboration, as noted by Dheeraratne, J in **Weerasinghe v Premaratne, Police Sergeant and Others** [supra; at page 134], the facts and circumstances may be such that '*One does not require medical evidence to prove the intensity of the pain which would have been caused to the body of a person (…)*'.

The 2nd Petitioner states that she sought medical assistance the very next day after the incident. As I have already stated, what has been produced are (a) the entry card [P3a] which only sets out the history given by the 2nd Petitioner– i.e., assault by a gang of people, impact and pain on the left eye, headache, dizziness and right side chest pain, and, (b) the requisition for an X-ray examination [P3b]. The Medical Officer who examined the 2nd Petitioner has not mentioned in P3a whether the 2nd Petitioner had any injuries on her body arising from the brutal assault that Damayanthi claims the 2nd

Petitioner was subjected to. Although the Petitioners have pleaded in the prayer to the application that a copy of the bed head ticket, the treatment sheet and the medical reports in respect of the 2nd Petitioner be called for from the Medical Superintendent, General Hospital, Chilaw, the Petitioners have not pursued this prayer. Yet again, this lacuna may have been overcome, at least to some extent, had the 2nd Petitioner produced the four complaints / statements that she made on 20th December 2017, where she may have referred to the assault and the injuries she alleges she sustained as a result of the incidents that took place the day before. The failure to produce any form of medical evidence to support the allegation of assault or take meaningful steps to procure such material, in spite of the 2nd Petitioner claiming that such material is available is a cause for concern.

Video evidence

This brings me to the final item of evidence tendered by the Petitioners with regard to the incidents that occurred during stage one, namely, the three video clips that have been produced with the petition, marked P1a. I have watched them carefully, but did not observe (a) any assault of the 2nd Petitioner, (b) any indication of the 2nd Petitioner being dragged along the ground, (c) the 2nd Petitioner being held by her hair, or (d) the cloth worn by the 2nd Petitioner being torn or coming off her in the process. What I did observe however, was the 1st Petitioner's abusive threats to the Respondents and the officer in uniform slapping the 1st Petitioner. As mentioned at the outset, leave has not been granted in respect of the alleged infringement of the 1st Petitioner's fundamental rights guaranteed by Article 11 and therefore I will proceed no further in this regard. I do however wish to firmly state that this amply documented aggression at the hands of a public servant is in no way condoned by this Court.

What is left to be considered is whether the 2nd Petitioner has established that the Respondents subjected her to humiliation and intimidation at the Excise Department office at Kuliyapitiya. While, as already acknowledged, Article 11 includes mental, emotional and psychological suffering, I reiterate that such suffering must also be qualitatively of the kind that this Court can take cognizance of, and must thereafter be proved on a balance of probability with a high degree of certainty, all things considered. Answering this question attracts the same infirmities observed above, regarding the evidence placed before this Court. There is an abject lack of corroborative evidence in proof of humiliation, intimidation and threats amounting to an infringement of Article 11. Accordingly, I am of the view that the 2nd Petitioner has not proved her allegation with regard to the incidents that occurred during stage two.

Inquiry carried out by the Excise Department

For the sake of completeness, I must state that following the complaint made by the 2nd Petitioner to the Minister, the 7th Respondent, the Commissioner General of Excise had proceeded to hold an inquiry into the conduct of the 1st – 6th Respondents, especially with regard to the absence of a female officer during the raid. Pursuant to the recommendation of the Commissioner of Excise (Human Resources) who conducted the inquiry, the 1st – 5th Respondents have been issued with letters of warning [7R3(A) - 7R3(E)] that they must comply with the requirements of the relevant Circulars and Departmental Orders and ensure the presence of female officers when conducting raids.

Conclusion

Taking into consideration all of the above facts and circumstances, I am of the view that the 2nd Petitioner has failed to adduce sufficient evidence to satisfy this Court that her fundamental rights guaranteed by Article 11 of the Constitution have been infringed by the Respondents during either of the two stages. The acts complained of have not been sufficiently proved for this Court to take cognizance of as constituting torture or cruel, inhuman or degrading treatment.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya, PC, CJ

I agree.

CHIEF JUSTICE

Murdu N. B. Fernando, PC, J

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal under Article 128 of the Constitution from a Judgement of the Court of Appeal.

SC Appeal No.: 60/ 2013

SC (SPL) LA Application No.: 88/ 2011

CA No.: 36- 40/ 2007

HC Colombo Case No.: 111/ 2000

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Vs.

1. Pettiyawattege Anurudha Perera Samarasinghe

2. Panagoda Liyanage Don Tissa Seneviratne alias Lal

3. Priyantha Anura Siriwardena alias Kotiya

4. Samasundara Mohotti Arachchige Nimal alias Kaluwa

5. Egodawattege Kamal Perera

6. Samasundara Hettiarachchige Hemachandra alias Dayananda alias Sudha

ACCUSED

AND

1. Pettiyawattege Anurudha Perera Samarasinghe

2. Panagoda Liyanage Don Tissa Seneviratne alias Lal

3. Priyantha Anura Siriwardena alias Kotiya

4. Samasundara Mohotti Arachchige Nimal alias Kaluwa

5. Egodawattege Kamal Perera

6. Samasundara Hettiarachchige Hemachandra alias Dayananda alias Sudha

ACCUSED-APPELLANTS

Vs.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

RESPONDENT

AND NOW BETWENN

Samasundara Mohotti Arachchige Nimal alias Kaluwa

4th ACCUSED-APPELLANT-APPELLANT

Vs.

The Attorney General of the
Democratic Socialist Republic of
Sri Lanka

RESPONDENT-RESPONDENT

BEFORE : **P. PADMAN SURASENA, J.**
JANAK DE SILVA, J.
K. PRIYANTHA FERNANDO, J.

COUNSEL : Saliya Pieris, PC with Ruwan Udawela and Anjana Rathnasiri for the 4th Accused-Appellant-Appellant.

Rohantha Abeysuriya, PC, ASG for the Hon. Attorney General.

ARGUED &
DECIDED ON : 04th October 2023

P. PADMAN SURASENA, J.

Court heard the submissions of the learned President's Counsel for the 4th Accused-Appellant-Appellant and also the submissions of the learned Additional Solicitor General, PC for the Hon. Attorney General and concluded the argument.

The Attorney General has indicted the 4th Accused-Appellant-Appellant along with five others under fifteen counts.

> *Count No. 01 has alleged that the Accused had committed the conspiracy to commit the attempted murder of Pattiyawattage Nimal Perera Samarasinghe who is the prosecution witness No. 01 listed in the*

indictment, an offence punishable under section 300 read with sections 113 B and 102 of the Penal Code.

Count No. 02 has alleged that the Accused had been members of an unlawful assembly, the common object of which was to cause the death of Deepthi Champa Samarasinghe, an offence punishable under Section 300 of the Penal Code.

Count No. 03 has alleged that the Accused had committed an offence punishable under Section 296 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of murder by causing the death of said Deepthi Champa Samarasinghe in furtherance of the common object of the said unlawful assembly.

Count No. 04 has alleged that the Accused had committed an offence punishable under Section 300 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of attempted murder of said Pattiyawattage Nimal Perera Samarasinghe (who is the prosecution witness No. 01) in furtherance of the common object of the afore-said unlawful assembly.

Count No. 05 has alleged that the Accused had committed an offence punishable under Section 380 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of robbery of cash, gold jewellary and wrist watches from the possession of said Pattiyawattage Nimal Perera Samarasinghe (prosecution witness No. 01) in furtherance of the common object of the afore-said unlawful assembly.

Count No. 06 has alleged that the Accused had committed an offence punishable under Section 443 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had committed the offence of criminal trespass on the house of

said Pattiyawattage Nimal Perera Samarasinghe (prosecution witness No. 01) in furtherance of the common object of the afore-said unlawful assembly.

Count No. 07 has alleged that the Accused had committed an offence punishable under Section 445 read with Section 146 of the Penal Code on the basis that one or more of the members of the afore-said unlawful assembly had trespassed on the house of said Pattiyawattage Nimal Perera Samarasinghe (prosecution witness No. 01) in order to commit the attempted murder of said Pattiyawattage Nimal Perera Samarasinghe in furtherance of the common object of the afore-said unlawful assembly.

Count Nos. 08, 09, 10, 11 and 12 are counts framed under Section 32 of the Penal Code corresponding to the same incidents set out respectively in afore-mentioned counts 3-7.

Count No. 13 has alleged that the 03rd Accused had committed robbery while being armed with a pistol, an offence punishable under Section 383 of the Penal Code.

Count No. 14 has alleged that the 04th Accused had committed robbery while being armed with a pistol, an offence punishable under Section 383 of the Penal Code.

Count No. 15 has alleged that the 05th Accused had committed robbery while being armed with a knife, an offence punishable under Section 383 of the Penal Code.

The 14th and 15th counts are in relation to the offence of robbery punishable under Section 383 of the Penal Code. (Counts 13, 14 and 15 are only against 3rd, 4th & 5th Accused respectively)

At the conclusion of the trial, the learned High Court Judge had acquitted the 6th Accused from all the counts and proceeded to convict the 1st-5th Accused on Count Nos. 1-12. The learned High Court Judge had also convicted the

3rd Accused on Count No. 13; the 4th Accused on Count No. 14; and the 5th Accused on Count No. 15 respectively.

Although the learned High Court Judge had also convicted the 1st-5th Accused on the remaining counts framed under Section 32 of the Penal Code (i.e., the *Count Nos. 08, 09, 10, 11, 12*), he had not passed any sentence on the 1st-5th Accused in respect of those counts.

Being aggrieved by the judgement dated 04-06-2007 pronounced by the High Court, the 1st-5th Accused had appealed to the Court of Appeal. The Court of Appeal after the argument by its judgment dated 25-03-2011, had decided to acquit the 2nd, 3rd and 5th Accused from all counts framed against them. However, the Court of Appeal had proceeded to affirm the conviction and sentence imposed on the 1st and 4th Accused on counts 8-12 and the conviction and the sentence imposed on the 4th Accused in respect of count Nos. 1, 8-12 and 14. The Court of Appeal had proceeded to acquit the 4th Accused from count Nos. 2-7.

The main complaint made by the learned President's Counsel who appeared for the 4th Accused-Appellant-Appellant in this case is against the two different decisions made by the Court of Appeal respectively in respect of the 3rd Accused and the 4th Accused. He pointed out to the evidence of witness No. 01, Pattiyawattage Nimal Perera Samarasinghe who is the sole eye witness in this case. The said witness is the only person who had identified the Accused at the subsequently held identification parade. It is not disputed by the learned Additional Solicitor General that the evidence against the 3rd and 4th Accused is similar. Wherever and whenever the prosecution witness No. 01 had narrated the incident pertaining to this case, what he had stated was that he had identified both the 3rd and 4th Accused. He had always mentioned the names of the 3rd and 4th Accused together. This is apparent from pages 116, 118, 129 and 130 of the Appeal Brief. It is appropriate to re-produce those parts of his evidence in this regard.

Page 116

ප්‍ර: ඔය දෙවෙනි වතාවටත් තමන්ලව ඔය තමන්ගේ කාමරයට ගෙනි ගියාට පසුව එතන සිට තමන් කොහාටද ගියේ

උ: කෑම කන කෑල්ලට ගෙන ගියා.

ප්‍ර: තමන් සමග තවත් කවුරුහරි ගෙනාවද

උ: මම මගේ භාර්යාව සහ දරුවා.

ප්‍ර: කව්ද එක්කගෙන ආවේ

උ: පිස්තෝල අතේ තිබුණු දෙදෙනාම. (3 සහ 4 විත්තිකරුන්.)

Page 118

උ: ඒ අවස්ථාවේදී නිකල් සහ කලුපාට පිස්තෝල ඇති දෙදෙනාම කාමරයට ඇතුල් වුනා.

ප්‍ර: ඒ කාමරය ඇතුලට ආවේ කොයි විත්තිකරුවන්ද?

උ: 3, 4 විත්තිකරුවන්.

ප්‍ර: ඇවිල්ලා තමන්ලට මොකක්ද කලේ ඉස්සෙල්ලම?

උ: ඒ අවස්ථාවේදී ඔවුන් ඔවුන්ගේ හිස් ආවරන ගලවා ගත්තා.

ප්‍ර: ඒ දෙදෙනා ම ගැලෙව්වද?

උ: ඔව්. මුහුණු ආවරන ගැලෙව්වා.

Page 129,

ප්‍ර: කවුද එම චූදිතයින් දෙදෙනා?

උ: විත්ති කූඩුවේ සිටින 3, 4 චූදිතයින්.

Page 130,

ප්‍ර: ඔබ භාර්යාව සමඟ කාමරය ඇතුලට යනකොට 3, 4 විත්තිකරුවන් එම කාමරය ඇතුලේ සිටියා?

උ: ඔව්.

Thus, it is not disputed and is indeed clear from the above portions of evidence recorded in the trial that it is one and the same evidence that could be used either to convict or acquit the 3rd and 4th Accused as far as the evidence in relation to their facial identities are concerned.

According to the judgement dated 25-03-2011, the Court of Appeal has stated as follows-:

> *The 3rd Accused was sentenced to death and rigorous imprisonment ranging up to 15 years. The evidence against the 3rd accused was his identification at a parade and joint representation by Counsel. The 3rd accused is said to have worn a facemask during the commission of the offences and the virtual complainant claims to have identified him when the 3rd accused had occasionally removed/lifted the mask. In any event his identification alone by a single witness unaccompanied by other evidence does not warrant a conviction on the charges as such evidence is insufficient to convict him on the charges. For the reasons, I am satisfied that the verdict against the 3rd Accused was unreasonable and against the weight of the evidence, and that a verdict of acquittal should be entered in his case. Hence, I feel constrained to think that the convictions of the 3rd accused and*

> *sentences passed on him should be set aside and the 3rd accused be acquitted on all the charges.*

Therefore, it is clear that the Court of Appeal was not convinced that the identity of the 3rd Accused was established to the satisfaction of Court through the evidence of prosecution witness No. 01. It is on that basis that the Court of Appeal had set-aside the conviction of the 3rd Accused and proceeded to acquit him from all counts in the indictment.

The Court of Appeal as regards the 4th Accused had stated as follows-:

> *The case against the 4th accused mainly depended on the evidence relating to the identification parade, dock identification and section 27 discovery of the firearms and an opinion expressed by a ballistic expert regarding the use of the firearms in the commission of the offences. The conviction of the 5th accused was based on mere identification, at a parade followed by dock identification. The Counsel for the 4th accused contended that the evidence adduced against their clients is hardly sufficient to bring home a conviction while the State argued the contrary.*

Therefore, it appears that the Court of Appeal was satisfied about the identity of the 4th Accused on the same evidence that it rejected as regards the 3rd Accused, in the presence of evidence of a recovery of a revolver subsequent to 'Section 27 statement' made by the 4th Accused. It appears that the learned Judges of the Court of Appeal had also taken in to consideration that joint representation entered by a single counsel for the 3rd, 4th and 5th Accused and the fact that counsel is a junior of the learned President's Counsel who had appeared for the 1st Accused. This is apparent from the following extract taken from the Court of Appeal judgement.

> *In the circumstances, it could safely be assumed that the 1st accused has indirectly admitted the stand of the prosecution that the 3rd, 4th and 5th accused were concerned with the commission of the crime. In that frame of mind, it is difficult to understand as*

to the basis on which the 1st accused could have reposed confidence in his Counsel who had also taken instructions to defend the 3rd, 4th and 5th accused. This is a grave incriminating circumstance that should have been taken into consideration as an item of evidence against the 1st accused.

The joint representation entered by a single Counsel applies to the 3rd, 4th and 5th accused vice versa. In this background, the prosecution has invited us to take notice of this unusual arrangement made to represent the accused by one single Counsel, as a relevant fact against them as well in determining their degree of responsibility in the commission of the crimes. Considering the extreme unusual conduct of the 1st accused and others, I am of the opinion that it constitutes strong incriminating evidence falling into the category of subsequent conduct of the accused.

I have stated that a President's Counsel had appeared for all the accused in the High Court until 08.09.2005. It is thereafter that the appearance had been marked separately for the 1st accused and others. After this date until the conclusion of the trial, the same President's Counsel continued to enter his appearance for the 1st accused and quite surprisingly his junior in the case, ceased to be his Junior Counsel and took over case of the other accused. This clearly shows that the cure provided was even worse that the disease. The conspiracy between the 1st accused and the others, particularly the 4th accused is quite apparent from this arrangement. This being relevant to the fact in issue, cannot be ignored in determining the degree of culpability of the accused. As this is borne out by the record of the Magistrate Court and High Court none can say that it is not proved to the required standard.

We see no basis for such conclusion. Moreover, since this conclusion has been categorically repeated in more than one place in the judgment, we have no reason to reject the submission made by the learned President's Counsel for the 4th Accused-Appellant-Appellant that this erroneous conclusion had

influenced the mind of the Judges of the Court of Appeal. This factor appears to have ultimately prompted them to arrive at a different conclusion in respect of the 4th Accused which had resulted in a different treatment meted out to the 4th Accused as against the 3rd Accused despite the fact that the evidence against each one of them remains the same.

Let me now deal with the conclusion arrived at by the learned Judges of the Court of Appeal about the presence of evidence of a recovery of a revolver subsequent to 'Section 27 statement' made by the 4th Accused. Admittedly, the 4th Accused had surrendered with an Attorney-at-Law to the police station at 9.00 pm, fifteen days after the incident. We also observe that the police officer had recorded the statement from the 4th Accused at 9.15 pm, just fifteen minutes after the time he had surrendered to Maharagama police station. It is this statement which had contained the 'Section 27 statement' which is alleged to have led to the recovery of a revolver from a particular place. Having regard to: the time at which the 4th Accused had surrendered to the Police Station; the time at which his statement had been recorded; the background of the evidence regarding the identity of the Accused coming from a solitary witness who says at one point of time that the 4th Accused was wearing a mask, it is highly questionable as to whether it is right for the Court of Appeal to place that much of reliance on the 'Section 27 statement' and the subsequent recovery of a revolver to come to a conclusion that the identity of the 4th Accused has been established beyond reasonable doubt. In any event, as pointed out by the learned President's Counsel for the 4th Accused, even if the evidence of a recovery of a revolver subsequent to 'Section 27 statement' made by the 4th Accused is accepted, it is clear that the effect of the 'Section 27 statement' and the subsequent recovery is limited only to the inference that the 4th Accused had knowledge of the particular revolver concealed or placed at that particular location. That would be an independent item of evidence. Moreover, although the learned Judges of the Court of Appeal in their judgment at page 50, had stated that "*According to the evidence of the government analysts P3 is a revolver and it is a gun within the meaning of the law and the two bullets recovered from the body of the deceased may have been fired from the said revolver*". It is clear that this is also not a correct conclusion.

The relevant Government Analyst's report dated 26-02-1990 was tendered to this Court by the 4th Accused-Appellant-Appellant by way of motion dated 09-09-2011. This has been produced in the High Court marked **P9**. What the Government Analyst report has stated is as follows-:

> **" පැ1 සහ පැ2 උණ්ඩ බරින්, ප්‍රමාණයෙන් සහ වර්ණයෙන් ආමානය 9×19mm පතරොම් වල දක්නට ලැබෙන උණ්ඩ වලට හා අනුරූප විය. මෙම උණ්ඩ මත වූ ගිනි අවි ලකුණු පරීක්ෂාකිරීමේදී හෙළිවූයේ ඒවාට වඩා විශාල ආමානයකින් යුත් කානුවක් ඇති තුවක්කුවකින් වෙඩි තබා ඇති බවයි. පැ1 සහ පැ2, පැ3 රිවෝල්වරයෙන් වෙඩි තැබුවා විය හැක. පැ1 සහ පැ2 තවදුරටත් පරීක්ෂාකිරීමේදී හෙළිවූයේ ඒවා මත සැසඳීමට තරම් ප්‍රමාණවත් ගිනි අවි ලකුණු නොතිබුණ බවය.**

We observe that **පැ1** and **පැ2** referred to in the Government Analyst's report are spent bullets. **පැ3** is the revolver. Therefore, what the learned Judge of the Court of Appeal has stated in his judgement does not appear to be a conclusive opinion expressed by the Government Analyst. We observe that this fact also has influenced the mind of the learned Judges of the Court of Appeal to come to the conclusion that the identity of the 4th Accused-Appellant has been established.

As the Court of Appeal has held that the evidence of witness No. 01 relating to the identity of the 3rd Accused is not satisfactory, the Court of Appeal had acquitted the 3rd Accused. Hon. Attorney General had not appealed against that finding. Therefore, to date, the Court of Appeal's conclusion on that matter has survived. The question before us is whether there is any additional material to affirm the conviction of the 4th Accused in view of the fact that it was on the witness No. 01's evidence that the prosecution had sought to establish the identity of the 4th Accused also. We are unable to see any such additional material against the 4th Accused which is capable of independently establishing the identity of the 4th Accused. Thus, we are compelled to take the view that there is a clear disparity in the judgment pronounced by the Court of Appeal which had opted to treat the 4th Accused in a way different to that of the 3rd Accused.

Going by the Court of Appeal conclusion with regard to the 3rd Accused we are of the view that there had been no basis before the Court of Appeal to have enabled it to arrive at a conclusion that the identity of the 4th Accused is nevertheless established.

Although this Court has granted Special Leave to Appeal in respect of several questions of law set out in paragraph 15 of the petition dated 06-05-2011 we are of the view that it would suffice to provide an answer to the following question of law which is set out in paragraph 15 (c) of the petition dated 06-05-2011.

> *Did their Lordships err when they concluded that the Petitioner was clearly identified while at the same time acquitting the 3rd and 5th Accused whose convictions were also based on substantially the same evidence?*

We answer the above question of law in the affirmative. Therefore, we proceed to set aside the conviction and the sentence imposed on the 4th Accused and direct that the 4th Accused be acquitted and discharged from all counts in the indictment.

Judgment of the High Court in so far as the 4th Accused is concerned, is set aside. The judgement of the Court of Appeal in so far as the 4th Accused is concerned, is set aside.

Registrar is directed to forward the copy of this judgement to the relevant High Court as soon as the judgment is ready.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.
I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J.
I agree.

JUDGE OF THE SUPREME COURT

Mhd/-

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

Patadendi Gedara Ratnayake,
alias
Kumbukgolle Gedara
Ratnayake,
No. 37A,
Ihala Arawwala,
Dambulla.

PLAINTIFF

S.C/Appeal No. 116/2015

Vs.

S.C. Application No.
SC/HCCA/LA/286/2014

Kumbukgolle Gedara
Ashokamala,
No. 37A,
Ihala Arawwala,
Dambulla.

Civil Appellate High Court of Kandy
Case No. CP/HCCA/81/2009 (FA)

D.C. Matale Case No. D/3841

DEFENDANT

AND

Patabendi Gedara Ratnayake,
alias
Kumbukgolle Gedera
Ratnayake,
No. 37A,
Ihala Arawwala,
Dambulla.

PLAINTIFF-APPELLANT

Vs.

Kumbukgolle Gedera,
Ashokamala,
No. 37A,
Ihala Arawwala,
Dambulla.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

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

Kumbukgolle Gedera
Ashokamala,
Ihala Arawwala,
Dambulla.

DEFENDANT-RESPONDENT-APPELLANT

Vs.

Patadendi Gedara Ratnayake,
Alias
Kumbukgolle Gedera
Ratnayake,
No. 37A,

Ihala Arawwala,
Dambulla.

PLAINTIFF-APPELLANT-RESPONDENT

Before : Priyantha Jayawardena PC, J
Vijith K. Malalgoda PC, J
Murdu N.B. Fernando PC, J

Counsel : Niranjan De Silva with Kalhara Gunawardena for the Defendant-Respondent-Appellant

Dr. Sunil Cooray for the Plaintiff-Appellant-Respondent

Argued On : 17th January, 2019

Decided On : 4th October, 2023

Priyantha Jayawardena PC, J

This is an appeal filed by the defendant-respondent-appellant (hereinafter referred to as the "appellant") to set aside the judgment of the Civil Appellate High Court of Kandy (hereinafter referred to as the "High Court"), which allowed the appeal filed by the plaintiff-appellant-respondent (hereinafter referred to as the "respondent") against the judgment of the District Court refusing to grant a divorce to the plaintiff.

Facts

The appellant stated that she got married to the respondent on the 27th of November, 1980. However, both of them were living in their parents' houses. Nonetheless, the respondent frequently

visited the appellant at her parents' house, and both of them considered the said house as their matrimonial home.

It was further stated that in 1990, the appellant and the respondent shifted to a new house built by them (however, this fact was disputed by the respondent) on a land owned by his parents, and thereafter, they considered the said house as their matrimonial home. Two daughters and a son were born to them.

The appellant stated that the respondent instituted action in the District Court of Matale on the 15th of May, 2006 praying for a divorce on the ground that she was guilty of constructive malicious desertion. The appellant further stated that the respondent had pleaded in his plaint that her behaviour towards him changed after some time and she had started quarrelling with the respondent for no apparent reason. The respondent in his plaint further stated that he tolerated the hostile conduct of the appellant with great difficulty as he wanted to continue with the marriage.

Furthermore, the respondent stated that a land dispute arose between his father and the appellant's mother, and a case was filed in the District Court of Matale. Due to the aforesaid land dispute, the situation became worse as the appellant frequently quarrelled with the respondent and treated him in a cruel manner.

Moreover, being unable to tolerate the ill-treatment any further, the respondent left the matrimonial home on or around the 11th of July, 2004 and shifted to a house built by him on a land owned by his parents. Thereafter, he took steps to divorce the appellant. However, as a result of the intervention of his relatives and friends once again, both of them started living in the same house.

The respondent further stated that after some time the appellant started to ill-treat him and neglected her duties as a wife. Being unable to bear the ill-treatment, he left the matrimonial home on or around the 5th of January, 2006 leaving some of his belongings in the said home.

The respondent stated that thereafter, he had been living at his brother's house, which is 500 meters away from where the appellant was residing. Further, since his belongings were still in the matrimonial home where the appellant was residing, he visited the said house from time to time to get his belongings when necessary. Moreover, the appellant earns an income from selling paddy and other crops owned by him and has no other source of income.

In the circumstances, the respondent prayed *inter alia*;

(a) for a divorce on the ground of constructive malicious desertion on the part of the appellant, and
(b) to evict the appellant from the respondent's property.

The appellant further stated that thereafter, she filed an answer denying the allegations made by the respondent in his plaint. The appellant pleaded in her answer that the matrimonial home was built with the income earned by both the respondent and herself. Further, the appellant stated that it was the respondent who abused her and their children and took steps to chase them from the matrimonial home.

Furthermore, she stated that on or around the 9th of July, 2006 the respondent had assaulted the younger daughter and the appellant and chased them out of the matrimonial home. Moreover, the respondent had given their matrimonial home to his brother and his wife and had rented out two of the rooms in the said house.

The appellant further pleaded that the respondent owned several properties and possesses a fixed deposit amounting to Rs. 1,000,000/-. In addition to those, he earns a monthly income of Rs. 30,000/- from farming. Moreover, she had no intention of divorcing the respondent and wishes to continue with their marriage. In the circumstances, the appellant in her answer prayed, *inter alia*;

(a) to grant an Order directing the respondent to lead to a good family life with the appellant
(b) to grant the divorce on the basis that the respondent had constructively deserted the appellant if the court is granting a divorce,
(c) to order the respondent to pay permanent alimony amounting to Rs. 1,000,000/-,
(d) to give the matrimonial home to the appellant and their children.

Judgment of the District Court

The trial proceeded *inter parte,* and upon the conclusion of the trial, the learned District Judge delivered the judgment holding that the respondent has failed to prove any of the allegations made by him against the appellant. Further, it was held that in the complaint made by the appellant to the police on the 14th of July, 2006 the respondent had admitted that he evicted the appellant and their children from the matrimonial home. Furthermore, at the trial, the respondent admitted that

he had given the said house to his brother and had rented out a few rooms of the said house. Moreover, at the trial, it was proved that the respondent was guilty of constructive malicious desertion. In the circumstances, the learned District Judge dismissed the plaint filed by the respondent.

Being aggrieved by the said judgment of the learned District Judge, the respondent appealed to the High Court on the following grounds;

(i) the evidence led at the trial had not been evaluated properly by the learned District Judge, and

(ii) the judgment is contrary to law.

Judgment of the High Court

Having considered the said appeal, the learned judges of the High Court allowed the appeal and set aside the judgment of the District Court on the basis that there was sufficient evidence to prove that the respondent had to leave the matrimonial home due to the conduct of the appellant. It was held that the respondent has been very specific in stating to court how the appellant had been abusive towards the respondent and that the appellant had failed to perform her duties as a wife. Moreover, even though the trial judge held that the appellant was not cross-examined on the alleged harassment caused to the respondent, the evidence shows that the appellant was cross examined on this point. Hence, the appellant is not entitled to alimony on the basis that the desertion was not due to the fault of the respondent.

Being aggrieved by the said judgment of the High Court, the appellant sought Leave to Appeal from this court, and this court granted Leave to Appeal on the following questions of law;

“

(i) Is the judgment of the Civil Appellate High Court of Kandy wrong in law?

(ii) Did the Honourable Civil Appellate High Court of Kandy err in law in failing to analyze and evaluate and ascribe the relevant probative values to the evidence lead in the instant District Court case and in overturning the Learned District Judge’s judgment?

(iii) Did the Honourable Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of the matrimonial fault of constructive malicious desertion of the plaintiff?

(iv) Did the Honourable Civil Appellate High Court of Kandy err in law in failing to appreciate that the plaintiff's evidence was *ipse dixit* evidence?

(v) Did the Honourable Civil Appellate High Court err in law in erroneously holding that the defendant had admitted that the plaintiff was compelled to leave the matrimonial home due to the behavior of the defendant?

(vi) Did the Honorable Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of matrimonial fault of constructive malicious desertion of the plaintiff when there was no clear cogent evidence to evince such?"

During the course of the submissions of the learned counsel for the appellant, he informed the court that the court need not consider the 1st and 5th questions of law stated above.

Did the Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of the matrimonial fault of constructive malicious desertion?

In the instant appeal, both parties claim that their spouses maliciously deserted them. Hence, it is necessary to consider the evidence led at the trial to ascertain;

(a) whether there is evidence to prove the malicious desertion, and
(b) if there is evidence to prove malicious desertion, which party had deserted the spouse.

Evidence at the trial

At the trial, the respondent admitted that the appellant left the matrimonial home because she was assaulted by him.

"ප්‍ර: තමුන්ට යෝජනා කරනවා විත්තිකාරිය නිවසින් ගිහින් තිබෙන්නේ තමන් පහර දුන්න නිසා කියලා?

උ: එහෙමයි"

Moreover, in the Police complaint made by the respondent on the 14th of July, 2006 he stated that he had chased the appellant and the children from their matrimonial home.

"මම එයාලා ගෙදරින් එලවලා ඉන්නේ"

The above admission of the respondent was corroborated by the evidence given by their daughter and son at the trial.

The evidence of Sandhya Kumari Ratnayake, the daughter is as follows:

"ප්‍ර: මා තමුන්ට යෝජනා කරනවා තමුන්ගේ පියාට වෛවාහික නිවසින් පිටවීමට සිදු වුනා කියලා?

පි: නැහැ ස්වාමීනි අපිව එලවලා තාත්තා ජීවත් වෙනවා."

Dinesh Prasanna Kumara Ratnayake, the son, gave evidence and stated:

"37/ඒ ගෙදරින් මගේ සහෝදරියට, මට සහ මගේ මවට පිටවන්න සිදු වුනා. එහෙම සිදු වුනේ පියා ගහලා පැන්නුවා."

Furthermore, the appellant stated in her evidence at the trial that it was the respondent who harassed her and the children and evicted them from the matrimonial home. The above position was admitted by the respondent under cross examination;

"ප්‍ර: තමුන්ට යෝජනා කරනවා විත්තිකාරිය නිවසින් ගිහින් තියෙන්නේ තමුන් පහර දුන්න නිසා කියලා

උ: එහෙමයි"

The appellant further stated that on the 9th of July, 2007 the respondent assaulted their daughter, Sandhya Kumari, with a mamoty. A complaint was made regarding the said incident to the Dambulla Police Station on the 10th of July, 2006. Thereafter, on the 4th of October, 2006 the Police instituted proceedings at the Magistrate's Court of Dambulla against the respondent. This incident was also corroborated by both the son and the daughter. Furthermore, the respondent admitted going to the Mediation Board for assaulting their daughter.

"ප්‍ර: එහෙම නම් මම මතක් කර දෙන්නම්, සමත මණ්ඩලයට ගියාද දෙවෙනි දුවට ගහලා

උ: එහෙමයි ස්වාමීනි"

Although the respondent alleged that he left the matrimonial home because of the constructive malicious desertion on the part of the appellant, the evidence led at the trial proves that the respondent continued to live in the said home. In fact, the respondent admitted in his evidence that at the time of instituting action in the District Court, he was residing in the matrimonial home.

ප්‍ර: තමුන් පදිංචි වෙලා සිටිය තැන ලිපිනය මොකද්ද?

උ: අංක 37 (ඒ) ඉහත ඇරැවුල, දඹුල්ල

ප්‍ර: අංක 37(ඒ) කියන තැන තමයි තමාලා විවාහ වෙලා එකට ජීවත් වුනේ?

උ: එහෙමයි ස්වාමිනි

The answer by the appellant and her evidence led at the trial shows that she refused to grant a divorce to the respondent as she wants to resume cohabitation. At the trial, the appellant stated that she cannot afford to get a divorce as she has two children who are of marriageable age.

"මට දික්කාසාද වෙන්න බැහැ. ළමයින් දෙදෙනෙකු ඉන්නවා කසාද බඳින වයසේ."

It is pertinent to note that desertion is a continuing offence and thus, may be terminated at any time on proof of change of *animus* or *factum.* In this context, the respondent has to prove that the appellant conducted herself with the intention of bringing the conjugal life to an end.

Malicious Desertion

The grounds for divorce are set out in section 19 of the Marriage Registration Ordinance No. 19 of 1907, as amended, sets out the grounds for divorce. It reads thus;

> *"(1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court.*
>
> *(2) Such judgment shall be founded either on the ground of adultery subsequent to marriage, or of* ***malicious desertion****, or of incurable impotence at the time of such marriage.*
>
> *(3) Every court in Sri Lanka having matrimonial jurisdiction is hereby declared competent to dissolve a marriage on any such ground."*
>
> [emphasis added]

In addition to the above, section 608(2) of the Civil Procedure Code states;

> *"Either spouse may—*

(a) after the expiry of a period of two years from the entering of a decree of separation under subsection (1) by a Family Court, whether entered before or after the 15th day of December, 1977, or

(b) notwithstanding that no application has been made under subsection (1) but where there has been a separation a mensa et thoro for a period of seven years, apply to the Family Court by way of summary procedure for a decree of dissolution of marriage, and the court may, upon being satisfied that the spouses have not resumed cohabitation in any case referred to in paragraph (a), or upon the proof of the matters stated in an application made under the circumstances referred to in paragraph (b), enter judgment accordingly:

Provided that no application under this subsection shall be entertained by the court pending the determination of any appeal taken from such decree of separation. The provisions of sections 604 and 605 shall apply to such a judgment."

In the instant appeal, the respondent alleged that he had to leave the matrimonial home as he was treated in an inhumane and derogatory manner by the appellant. He further alleged that the appellant failed to perform her duties as a wife. Accordingly, the respondent relied on section 19(2) of the Marriage Registration Ordinance to obtain a divorce on the basis of constructive malicious desertion.

Malicious desertion may be either 'direct' or 'constructive' desertion. The difference between these two grounds depend on the *factum* element of the offence. In the case of 'direct' malicious desertion, the deserting spouse leaves the matrimonial home, while in 'constructive' malicious desertion, the innocent spouse is forced to leave the matrimonial home due to the expulsive acts of the other.

Desertion has been defined in the case of ***Silva v Missinona*** **26 NLR 116** as:

"deliberate and unconscientious, definite and final repudiation of the obligations of the marriage state… and it clearly implies something in the nature of a wicked mind."

It is pertinent to note that the *factum* of desertion has an important bearing on the burden of proof for desertion. Particularly when a spouse leaves the matrimonial home, there is a *prima facie*

inference that the spouse had the required *animus deserendi*. The onus is then shifted to the spouse to rebut the said presumption by proof of *justa causa*, in the absence of which the actual desertion will be established. On the other hand, in the case of constructive malicious desertion, the spouse who is out of the matrimonial home must show that the other spouse has acted with the intention of putting an end to the marriage.

Cruelty by one spouse compels the other to leave the matrimonial home

The respondent stated in his evidence that the appellant frequently quarrelled with him and ill-treated him, which resulted in him leaving the matrimonial home.

Cruelty by one spouse, which renders cohabitation intolerable for the other, amounts to constructive malicious desertion by the offending spouse. A similar view was expressed in ***Somawathie Dias v Alwis* 66 CLW 30,** where it was held as follows:

> *"cruelty need not necessarily be physical cruelty inflicted personally by the defendant on the applicant. It may be physical or mental cruelty caused by persons whom the defendant has the power to remove from the matrimonial home."*

However, there is no evidence to prove that the appellant treated the respondent in a cruel manner which compelled him to leave the matrimonial home. On the contrary, the aforementioned evidence led at the trial show that the respondent had chased the appellant and their children from the matrimonial home.

Termination of Desertion

Conclusive evidence of a settled intention to terminate the conjugal relationship is best illustrated by proof of abortive efforts for reconciliation. Further, if the offer to reconcile made by the deserting spouse is rejected by the other spouse, the tables will be turned and the opposing spouse will be held liable for desertion. A genuine offer of reconciliation was described in ***Canekeratne v Canekeratne*** *(supra)* as follows:

> *"It is only genuine if there is a fixed and settled intention to offer a resumption of marital life under reasonable conditions, and it will not be fixed and settled intention if it is a mere fluctuating desire to resume cohabitation."*

In the instant appeal, the appellant had not sought a decree of divorce in her answer filed in the District Court. Further, she had prayed the Court to direct the respondent to commence the married life with her. Furthermore, the evidence of the appellant shows that she did not want to divorce the respondent and wanted to continue with the marriage. Moreover, when the maintenance application filed by the appellant in the Magistrate's Court of Dambulla was taken up, she had informed her wish to resume the marriage, which was refused by the respondent. Further, at the trial, the appellant categorically stated that she does not want a divorce as she has children of marriageable age. This position was discussed in ***Muthukumarasamy v Parameshwary* 78 NLR 493**, where it was held as follows:

> *"termination of desertion can take place by a supervening animus revertendi, coupled with a bona fide approach to the deserted spouse with a view to resumption of life together; and that a deserted spouse must always,* ***until presentation of his or her plaint****, affirm the marriage and be ready to take back the deserting spouse."*
>
> [emphasis added]

In the instant appeal, the plaint was filed on the 15th of May, 2006 while the appellant had made the offer to reconcile the disputes among them on the 9th of May, 2007 when the maintenance application was taken up in the Magistrate's Court. Further, the evidence led at the trial shows that the respondent had not left the matrimonial home even at the time he gave evidence at the trial. On the contrary, it was revealed that he chased the appellant and their children from the matrimonial home.

Did the Civil Appellate High Court of Kandy err in law in failing to analyse and evaluate the evidence led in the District Court case?

The learned judge of the High Court set aside the judgment of the District Court on the basis that there was sufficient evidence to prove that the respondent had to leave the matrimonial home due to the conduct of the appellant.

In evaluation of the evidence given by a witness at a trial, the evidence should be considered as a whole, and the answers given to certain questions either in evidence in chief or in cross examination shall not be considered in isolation. Further, a careful consideration of the totality of the evidence led at the trial shows that there is overwhelming evidence before the District Court

to prove that the appellant was not responsible for the offence of committing the matrimonial offence of constructive desertion. On the contrary, the respondent admitted in his evidence that he chased the appellant and the children from the matrimonial house.

The trial judges have the benefit of seeing the witnesses giving evidence and it facilitates observing the demeanour of the witnesses which is useful in evaluating the evidence. In fact, the demeanour of a witness is one of the matters taken into consideration in accepting or rejecting the evidence of a witness. However, the appellate courts do not have the opportunity of seeing the witnesses giving evidence when hearing appeals. Thus, as a practice the appellate courts do not interfere with the findings of facts of the trial judges unless such findings are perverse.

The above view was expressed by the ***Privy Council in Fradd v Brown & Co., Ltd.,* 20 NLR 282,** where it was held that where the controversy is about the veracity of witnesses, immense importance attaches, not only to the demeanour of the witnesses, but also to the course of the trial, and the general impression left on the mind of the judge of the first instance, who saw and noted everything that took place in regard to what was said by one or other witnesses. It is rare that a decision of a judge of first instance on a point of fact purely is overruled by an appellate court. Further, a similar view was expressed in ***Shaik Alli v Jafferjee* 3 NLR 368**.

Moreover, in ***Oberholzer v Oberholzer* (1921) South African Law Reports Appellate Division 274,** Innes CJ held:

> *"These matrimonial cases throw a great responsibility upon a judge of the first instance; with the exercise of which we should be slow to interfere. He is able not only to estimate the credibility of the parties but to judge of their temperament and character. And we, who have not had the advantage of seeing and hearing them must be careful not to interfere, unless we are certain, on firm grounds, that he is wrong."*

The learned High Court Judge held that there was sufficient evidence to prove that the respondent had to leave the matrimonial home due to the conduct of the appellant. As stated above, at every point, the appellant was refusing to give a divorce to the respondent and repeatedly requested the respondent to start cohabiting with her. However, the respondent did not heed to any of those requests made by the appellant.

In ***N.J.Canekaratne v Mrs. R.M.D. Canekeratne*** **66 NLR 380,** it was held:

> *"…. it is correct to say that the conduct of the parties up to and including the time of the trial is relevant when the court has to decide who is to blame. Certainly up to the stage of entering decree nisi it is the duty of each party to provide a reasonable opportunity for a resumption of married life, and the party who deliberately and unreasonably refuses to accept that opportunity will be guilty of malicious desertion."*
>
> [emphasis added]

Further, in ***N.J.Canekaratne v Mrs. R.M.D. Canekeratne*** *(supra),* it was held:

> *"a wife who has been deserted by her husband is not liable to be ejected by her husband from the matrimonial home. (unless alternative accommodation or substantial maintenance to go and live elsewhere is offered to her)."*
>
> [emphasis added]

A careful consideration of the evidence led at the trial shows that the appellant was not guilty of committing the matrimonial offence of constructive malicious desertion. Further, at the trial, it was proved that the respondent was guilty of constructive desertion of his spouse. In such circumstances, it is not possible to invoke section 19(2) of the Marriage Registration Ordinance against a spouse who is not guilty of matrimonial fault.

Hence, I am of the opinion that the respondent has failed to establish that the appellant was guilty of constructive malicious desertion.

I am also of the opinion that the High Court has failed to analyse and evaluate the evidence lead in the District Court and erred in setting aside the judgment of the learned District Judge and allowing the appeal filed by the respondent.

Conclusion

In the light of the above, I am of the opinion that the questions of law posed to this court should be answered as follows:

Did the Honourable Civil Appellate High Court of Kandy err in law in holding that the defendant is guilty of the matrimonial fault of constructive malicious desertion of the plaintiff?

Yes

Did the Honourable Civil Appellate High Court of Kandy err in law in failing to analyse and evaluate the evidence lead in the instant District Court case and in overturning the judgment of the learned District Judge?

Yes

In view of the foregoing answers, it is not necessary to consider the other questions of law stated above.

Therefore, the appeal is allowed. I set aside the judgment of the Civil Appellant High Court of Kandy in Appal No. CP/HCCA/81/2009 (FA) dated 20th of May, 2014 and affirm the judgment of the District Court of Matale delivered in D/38/41 dated 31st March, 2009.

I order no costs.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J

I Agree

Judge of the Supreme Court

Murdu N. B. Fernando PC, J

I Agree

Judge of the Supreme Court

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

In the matter of an application under Article 17 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC/FR Application No. 169/08

1. Balasooriya Arachchige Chandradasa
2. Rammuthu Purage Premawathi Suraweera
3. Samarathunge Arachchige Ranaseeli
4. Malalage Chandralatha Peiris
5. Pathiranage Niwanthi Perera
6. Dona Bandumathi Lokugamage
7. Udagedara Appuhamilage Chitra Gethanjali Wimaladasa
8. Sudathge Ravindra Athula Theja Hemanatha
9. Nandana Jayadasa
10. Mahabalage Don Aruni Manoja Jayawardana
11. Mestiya Don Jayantha Gunathilaka
12. Geethangani Jayathunga
13. Jayawardenage Champa Sriyani
14. Manathunge Subadhra Manathunga
15. Disanayake Mudiyanselage Pushpa Manel Disanayake
16. Mabulage Dhanapali Hemalatha
17. Kasthuri Mudiyanselage Uthpala Iresha Kasthuri
18. Dikkuburage Chandralatha De Silva
19. Ranasinghe Arachchige Nadeeka Ranasinghe
20. Wickramasinghe Athukoralage Shantha
21. Chandima Wijewardana
22. Werapurage Sitha Ranjani Fernando
23. Suriya Arachchilage Gayani Asanka

24. Don Rupasena Vithana
25. Adikari Mudiyanselage Thamara Kumari Gunathilaka
26. Pathirage Dona Seetha Gajanayake
27. Meemange Somawathie
28. Chandrani Mangalika Hapuarachchi
29. Hollu Pathirage Anura Ananda Caldera
30. Chitra Kananke Liyanage
31. Atthanayake Arachchige Pushpa
32. Ranathunga Arachchige Sriyalatha
33. Herath Mudiyanselage Lalith Wasantha Siriwardana
34. Dharshana Lalitex Samarawickrama
35. Puwakpitiyage Maurya Desappriya Bandara Hewawasam
36. Pallegama Gohagodage Chandradasa
37. Kalu Arachchilage Dimuthu Wasana Rathnayaka
38. Uduwa Vidanalage Sajeewa Chandani Perera
39. Herath Mudiyanselage Chandrika Kumari
40. Hewa Kasakarage Sepali
41. Dulani Kumuduni Hettiarachchi
42. Katukurunde Gamage Ajantha Himali Gamage

All C/O the Office of the Assistant Commissioner of Co-operative Development,
No. 72, Mahameghawatta Road,
Maharagama.

43. Ranketta Kumbure Gedara Sumanarathna
44. Arambawattage Kusumawathie
45. Galbokke Balapatibedige Darmasiri
46. Jayasundara Walpola Kankanamalage Susatha Siriwardana
47. Batugedara Gamethiyalage Padmini Batugedara
48. Bulathsinghalage Deepika Chandarakanthi Cooray

49. Suriyage Swarnalatha
50. Widanagamage Wansawathi
51. Wijesuriya Arachchige Don Christy
52. Ranathunga Gamaralalage Sriyama Mangalika Weerasinghe
53. Paththamperuma Arachchige Don Selton Lionel
54. Bambrandage Rtta Mary Beatrice
55. Perumbada Pedige Dayarathna
56. Dissanayake Kapuruhamige Jayathe Dissanayake
57. Dehiwalage Greta Jenet Matilda Perera
58. Sakalasuriya Appuhamilage Buddika Kaushalya Sakalasuriya
59. Herath Mudiyanselage Chamila Udeni Samarakoon
60. Abesinghe Mudiyanselage Pushpa Kamalani
61. Warusapperuma Ranasinghe Arachchige Don Pradeepika Samanthi Kamari Ranasinghe
62. Madaga Ananda Premalal
63. Elandari Dewage Lasika Niroshini
64. Rathna Sirige Indrani Senavirathna
65. Nalintha Wickramarachchi
66. Wijerathna Walisinghe
67. Werawardana Pathirannahelage Nalin Bandara Jagathsiri
68. Ranepura Dewage Seetha Ramyalatha
69. Vitana Wickramasinghe Arachchige Rathna Manel Wickramasinghe
70. Gamlath Mohotti Appuhamilage Senajith Dinesh Rupasinghe
71. Mukthu Kusumalatha De Silva
72. Morapitiya Liyanage Hoshan Indula Mahanada
73. Ranasinghe Kerthi Ranasingha
74. Vithana Palpita Koralalage Padmakumara

75. Dasanayaka Pathirennehalage Thilaka Malani
76. Karunanayaka Athukoralalage Mangalika Briyatrish
77. Samaradivakara Mudiyanselage Nandani Pathmalatha
78. Mallawa Arachchige Darmapiya
79. Yakdehge Pathma Piyaseeli
80. Sakalachchari Nekathige Nilmini Priyangika
81. Kirigalbodage Chandana Kapila Rathnaweera
82. Wanasinghe Arachchige Nimal Chandra Wanasingha
83. Pata Pelige Brighot Padmine
84. Vithana Pathirannahelage Ramya Surajini
85. Hetti Pathirage Saman Thusitha Kumara
86. Karavitage Chandrawathie
87. Adikari Appuhamilage Sunil Adikari
88. Nanakkara Jayasuriya Appuhamilage Leela Indrawathi Kumari
89. Kurukulasuriya Nirmala Anjela Felicia Priyadarsani Perera
90. Nugawela Pathirannahelage Champa
91. Chakrawarthige Roshini Samanthi Priyadarshani
92. Mahavithanage Don Gunapala Mahadeva
93. Madihe Arachchige Amoda Lochani Gunawardana
94. Kukulaarachchige Nilanthi Shayamali
95. Waligamage Kamanie Krishanthi Perera
96. Herath Mudiyanselage Nishanthi Herath
97. Muthugala Arachchige Geethi Priyanwada Muthugala
98. Dissanayaka Mudiyanselage Wasantha Kumuduni Dissanayaka
99. Mallikage Mahinda Sarath Kumara Perera
100. Wijayalath Paranawitharanage Pathma Kumara Wijayalath

101. Karunaratne Muhandiramlage Ganga Jeewani Karunaratne
102. Arachchi Kapuge Don Lasantha Meril Sanjeewa

All C/O the Office of the Assistant Commissioner of Co-operative Development – Gampaha, Walawwatta, Kidagammulla, Gampaha.

103. Naida Hewa Ruwan Amaradewa
104. Jayathunga Weda Arachchige Mohan Jayathunga
105. Kalutharage Anoma Suwarnalatha Fernando
106. Kalutharayalage Ruwandika Nilusha Piyasena
107. Babina Kankanamge Vipula Dewapriya Abeyrathna
108. Kumarage Wasantha Padmini
109. Wewalwala Hewage Dayani
110. Kasthuri Badalge Pathmini
111. Darmadasa Wickramarachchi
112. Geemuni Indrane Shyamika
113. Hewa Numuni Arachchige Piyasena
114. Hewage Yasarupika Rosayuru
115. Sittrachchary Gahithayanlage Dayawathie
116. Kiriwaththuduwage Dona Padmini Perera
117. Babumunysinghe Arachchige Chitra Ranjani
118. Yahamuni Somawathie
119. Kalapuge Dona Rukmani Wasantha Abeygunawardana
120. Liyan Arachchige Don Dudly Lalith Gunawardana
121. Rathnasekara Kuruppu Arachchige Sathyapala
122. Karunamuni Prabhavi Niranjali Silva
123. Ranasinghe Arachchige Chandrika Geethani Ranasinghe
124. Thota Hewage Tylet Hemalatha Silva
125. Disanayaka Mudiyanselage Kularathna Bandara
126. Lesthuruge Indika Sapumal Fernando

127. Bothalage Daya Swarnapali
128. Thewara Thanthrige Shiromani Fernando
129. Don Lionel Vithana
130. Ranasinghage Don Uditha Indragith
131. Kalubowilage Lakshman
132. Amara Chakna Wawthilage Udulawathie Menike Kalubivila
133. Manna Markkalage Latha Marian Cooray
134. Ethuldora Arachchige Deepa Malathi
135. Kande Ranasinghege Somalatha
136. Thibbotuge Perasanga Kalum Perera
137. Olaboduwage Kumudini Priyanga Perera
138. Hewafonsekage Shiromi Chinthika Fonseka
139. Madampe Hettiarachchilage Sujeewani Thisera
140. These Appuhamilage Enoka Siriwardhana
141. Hewage Thushari Darshani Perera
142. Bulathwaththe Rathnayaka Mudiyanselage Nethali Priyangika
143. Maligaspe Koralage Chithra

All C/O the Office of the Assistant Commissioner of Co-operative Development – Kalutara, No. 246, Galle Road, Kalutara-North.

144. Hewafonsekage Chinthaka Pubudu Kusumasiri Fonseka
145. Chaminda Rasith Abayaratne
146. Rajapaksha Pillasdeniyage Karunathilake
147. Nandalal Thissa Dias Sucharitharathna
148. Salman Arachchige Chandarasena
149. Thiramuni Sunil Fernando
150. Kapuruge Don Jayantha Neel

151. Kudaligamage Asoka Ranjith Perera

All C/O the Office of the Commissioner of Co-operative Development, No. 444, Duke Street, Colombo 01.

Petitioners

Vs,

1. Hon. Reginald Cooray,

   Former Chief Minister of the Western Provincial Council, Chief Minister's Officer, No. 32, Sie Marcus Fernando Mawatha, Colombo 07.

2. Hon. Hector Bethmage,

   Former Minister of Lands, Agriculture, Irrigation and Animal Production of the Western Provincial Council,

   C/O the Chief Minister's Office, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

3. Hon. Dulip Wijesekara,

   Former Minister of Electricity,

   Provincial Ways and Co-operatives of the Western Provincial Council, No. 204, Denzil Kobbekaduwa Mawatha, Battaramulla.

4. Hon. Prasanna Ranathunga,

   Former Minister of Health, Indigenous Medicine, Social Welfare, Probation and Child Care and Council Affaires of the Western Provincial Council, Independence Square, Colombo 07.

5. Hon. Gamini Thilakasiri,
   Former Minister of Sports, Youth Affairs, Women's Affaires, Fisheries of the Western Provincial Council, No. 204, Denzil Kobbekaduwa Mawatha, Battaramulla.

6. Hon. Alavi Moulana,
   Former Governor of the Western Provincial Council, Governor's Office, Unity Plaza, Colombo 04.

6A. K.C. Logeswaran,
   Former Governor of the Western Province, Governor's Office, No. 98/4, Havelock Road, Colombo 05.

6B. A.J.M. Muzamil,
   Former Governor of the Western Province, Governor's Office, No. 98/4, Havelock Road, Colombo 05.

6C. Roshan Gunathilake,
   Governor of the Western Province, Governor's Office, No. 98/4, Havelock Road, Colombo 05.

7. K. Champa N. Perera,
   Secretary, Ministry of Electricity, Provincial Ways and Co-operatives of the Western Provincial Council, No. 204, Denzil Kobbekaduwa Mawatha, Battaramulla.

8. S.H. Hewage,
   Former Provincial Commissioner of Co-Operative Department, Provincial Department of Co-operative Development, No. 444, Duke Street, Colombo 01.

9. Victor Samaraweera,
   Former Chief Secretary, Former Provincial Council, Western Provincial Council, Srawasthi Mandiraya, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

9A. Jayanthi Wijethunga,
   Former Chief Secretary, Former Provincial Council, Western Provincial Council, Srawasthi Mandiraya, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

9B. Pradeep Yasarathne,
   Chief Secretary, Western Provincial Council, Srawasthi Mandiraya, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

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

11. Prasanna Ranatunga,
   Former Chief Minister of the Western Provincial Council, Chief Minister's Office, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

11A. Isuru Devapriya,
   Former Chief Minister of the Western Provincial Council, Chief Minister's Office, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

12. Upali Kodikara,

Former Minister of Electricity and Power, Provincial Roads, Housing and Construction, Water Supply and Drainage, Social Welfare, Urban and Estate Infrastructure Facilities of the Western Provincial Council, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

12A. Sumithral Mendis,

Former Minister of Health and Child Care of the Western Provincial Council, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

13. Jagath Angage,

Former Minister of Agriculture, Irrigation and Tourism Activities of the Western Provincial Council, Independence Square, Colombo 07.

14. Nimal Lansa,

Former Minister of Transport, Sports and Youth Affairs, Women's Affairs, Food Supplies and Distribution, Co-operative Development, Domestic Economic Promotion, Fisheries, Rural Development, Tourism, Investment Promotion Co-ordination and animal Production and Development of the Western Provincial Council, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

14A. Lalith Wanigaratne,

Former Minister of Co-operative Development of the Western Provincial, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

15. Udaya Gammanpila,

    Former Minister of Agriculture, Agrarian Development, Minor Irrigation, Industry, Environmental Affairs and Cultural and Arts Affairs of the Western Provincial Council, C/o the Chief Minister's Office, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

15A. Gamini Thilakasiri,

    Former Minister of Agriculture, Agrarian Development, Minor Irrigation, Industry, Environmental Affairs and Cultural and Arts Affairs of the Western Provincial Council, C/O the Chief Minister's Office, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

16. S. S. Satharasinghe,
17. H.M.A.H. Herath,
18. S.P. Uyangoda,
19. G.P. Nimal,
20. V.M.N. Dissanayaka

    All C/O the Office of the Assistant Commissioner of Co-Operative Development, No. 72, Mahameawatta Road, Maharagama.

21. L.D.L. Jayawickrama,
22. M. Sumanawathie,
23. M.Sunandawathie,
24. H.K.K. Kusumalatha,

    All C/O the Office of the Assistant Commissioner of Co-operative Development, Kaluthara.

25. Wilbert Gallage,
26. W.A.U. Perera,
27. A.M. Hamsa,

All C/O the Head Officer of the Department of Western Provincial Co-operative Development, No.444, Duke Road, Colombo 01.

28. D.D. Jayamaha,
29. M.P.M. Muthugala,
30. N.S. Dehigahawatta,
31. H.P.T. Nandani,
32. K. Rathnayaka,

All C/O the Office of the Assistant Commissioner of Co-operative Development, Gampaha.

33. D.D. Upul Santha de Alwis,

Former Provincial Commissioner of Co-operative Development, Provincial Department of Co-operative Development, No. 444, Duke Street, Colombo 01.

33A. Ruwini Wijewickrama,

Provincial Commissioner of Co-operative Development,
Provincial Department of Co-operative Development,
No. 444, Duke Street, Colombo 01.

34. Hon. Ranjith Somawansha Kalawila Withanage,

Former Minister of Education of the Western Provincial Council, No. 32, Sir Marcus Fernando Mawatha, Colombo 07.

Respondents

Before: **Hon. Justice Vijith K. Malalgoda PC**
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Dr. Jayampathy Wickramaratne, PC, with Ms. Subashini Weerakkodi for the Petitioners,

Mahen Gopallawa, SDSG, with Ms. Sureka Ahmed, SC, for the 6C, 7th,9B, 10th and 33A, Respondents.

Argued on: 30.05.2023

Decided on: 05.10.2023

Vijith K. Malalgoda PC J

151 Co-operative Inspectors attached to the Department of Co-operative Development of the Western Province, had complained of the violation of their fundamental rights guaranteed under Article 12 (1) of the Constitution by the Executive or Administrative action taken by the 1st to the 7th Respondents.

When the matter was supported for leave on the 26th of August 2008, this Court having considered the material placed before the Court had granted leave to proceed for alleged infringement of Article 12 (1) of the Constitution. After the leave to proceed was granted and the matter was fixed for hearing, on 30th April 2009, an application was supported on behalf of 17 Intervenient Petitioners. The Petitioners did not object to the said intervention, and the request for intervention was permitted by this Court. The Intervenient Petitioners were named as 16th -32nd added respondents to the instant application.

As revealed before us the main grievance that was complained by the Petitioners, was the decision by the Western Provincial Council to place a group of Co-operative Inspectors at a higher salary step against the scheme of Recruitment (hereinafter referred to as SOR) applicable to the Co-operative Inspectors Service.

At the time the alleged violation took place the SOR to the post of Co-operative Inspectors Service consisted of 3 grades namely Class II-B, Class II-A, and Class I. In terms of the SOR, the recruitment Grade was Class II-B and the basic requirement for entry into Class II-B was Four passes at the GCE (Advance Level) Examination and a pass at the Co-operative Employees Certificate (Advance) Examination conducted by the Co-operative School Polgolla was considered as an added qualification.

As per the SOR Co-operative Inspectors in Class II-B who have been confirmed in that grade and have five years of satisfactory service and successfully completed the Second Examination held for Co-operative Inspectors by Co-operative College were eligible to be promoted to Class II- A of the Co-operative Inspectors Service.

Promotions to Class I was made on the availability of vacancies based on seniority from among Co-operative Inspectors who have completed 5 years of satisfactory service and successfully completed the 1st Examination held for Co-operative Inspectors by the Co-operative College.

As submitted before this Court, the Co-operative Inspectors considered their service above the Government Clerical Service or the Management Assistant Service that was introduced after Public Administration Circular 06/2006 since the basic qualification was the four passes at the G.C.E. (Advance Level) as against G.C.E. (Ordinary Level) for the Management Assistants. However Public Administration Circular 06/2006 placed the Co-operative Inspector's salary at MN I-2006 scale, whereas the Management Assistants were placed at MN 2 -2006 scale.

The Co-operative Inspectors were agitating against the said placement to the National Salaries and Cadre Commission and by letter dated 04.01.2008, their recommendation was communicated to the Secretary of the relevant Ministry by the said commission to place Co-operative Inspectors at MN 3-2006.

As further submitted by the Petitioners, the subject of Co-operative being a devolved subject under the 13th amendment to the Constitution, Provincial Co-operative Departments were functioning in the provinces with the implementation of the 13th Amendment and the Petitioners belonging to the Western Province Co-operative Department.

The Western Provincial Council had granted the MN I-2006 scale to the co-operative Inspectors in the Western Province prior to the salary revision recommended by the National Salaries and Cadre Commission and Placed Co-operative Inspectors in Class II-B at step-I, Class II-A at step 12 and Class I at step 23.

According to the Petitioners, although the entry-level qualifications for Co-operative Inspectors were G.C.E. (Advance Level) there were graduates serving as Co-operative Inspectors and at the time the instant application was filed, there were about 85 graduates serving as Co-operative Inspectors in the Department of Co-operative Development of the Western Province at different levels (i.e., Class II-B, II-A, and I) including 37th, 38th, 42nd, 93rd to 102nd, 135th and 138th Petitioners.

The Petitioners were unaware of any decisions by the Western Provincial Council or by the National Salaries and Cadre Commission to place a group of Co-operative Inspectors serving in the Western Provincial Council at MN4-2006 from April 2008, but they were surprised when they got to know that approximately 20 Co-operative Inspectors receiving a salary higher than the others for the month of April 2008, which they have subsequently complained to this Court by the instant application.

As further submitted by the Petitioners, the said salary increase was granted ignoring the class under which the recipient of the said increment was serving at that time but the only basis was that the recipient was a graduate employed after 1977 and had served for 15 years or more as a Co-operative Inspector. The said *ad hoc* increment granted to a small number of Co-operative Inspectors serving in the Western Province had created a salary anomaly among the Co-operative Inspectors since even a class I officer of the Co-operative Inspectors Service was entitled to an MN 3 salary.

The Petitioners when invoking the Jurisdiction of this Court had made the Chief Minister, the Board of Ministers of the Western Provincial Council, the Governor, the Secretary to the Co-operative Ministry- Western Province, and the Attorney General as Respondents. Among the Respondents, only the 7th Respondent the Secretary to the Co-operative Ministry Western Province filed objections before this Court justifying the decision impugned before this Court.

According to the 7th Respondent, graduate employment schemes were implemented as far back as year 1971 and before, but their grievances were not looked into until 1994. For the first time, Public Administration Circular 20/94 was issued in granting relief to certain categories of under-employed graduates identified by the circular as "රාජ්‍ය සේවයේ ලිපිකාර හා සමාන්තර සේවාවන්හි ඌන සේවා නියුක්ත උපාධිධාරීන්ට සහන සැලසීම සහ 1971-1976 දක්වා කාලය තුල උපාධිධාරී අභ්‍යාස යෝජනා ක්‍රමය යටතේ බඳවා ගනු ලැබූ නිලධාරීන්ට සහන සැලසීම" and as per the said circular (7R10) it was applicable to,

a) graduates who joined the Public Service under the graduate training scheme between 1971-1976

b) graduates who joined prior to 1971 to positions allied to plan implementation officers

c) graduates who joined outsides the graduate training scheme between 1971-1977

d) graduates who joined under the graduate placement scheme subsequent to 1977 and have completed 15 years of service in the Public Service

The next document the 7th Respondent relied upon in his objection was the Public Administration Circular 20/94 (II) issued on 15.07.2005, (7R 11) extending the relief granted to under-employed graduates in clerical and allied services who joined those services after 1977. The said circular was applicable to those who joined clerical and allied serviced between 01.01.1978 and 31.12.1980 and obtained the degree during this period or prior and served in the same capacity for 15 years as of 01.06.1994

Whilst referring to the above two circulars, the 7th Respondent had tried to explain that, even though there is no specific reference that, those circulars are applicable to the Co-operative Inspectors Service, those circulars apply to the Co-operative Inspectors service as well. In paragraph 16 of his affidavit the 7th Respondent referred to the above as follows;

> "16. Answering the averments contained in paragraph 12 of the said petition I admit that PA Circular 29/94 does not include Co-operative Inspectors as an allied service for the clerical service. However, I state that until the circular No. 06/2006 the Co-operative Inspectors were placed on the same salary scale as of the clerical and allied services. Accordingly, they were considered employees of a similar category until circular No. 6/2006. Further, I state that circular No. 2/97 classified the public service according to the salary scale, and accordingly, Co-operative Inspectors were also categorized among others, along with the clerical service according to their salary scale Rs. 45,900-14x320-6x 1,560-73,740 (salary Code T.2.1.-T.2.5) until the circular No. 6/2006 was implemented. The preamble to circular No. 2/97 is annexed herewith marked 7R4."

However, the above position is contradicted by his own document which was produced by him marked 7R 7(a). The above document is a memorandum submitted to the Provincial Board of Ministers of the Western Province to obtain approval to extend the relief granted to the under-employed graduates in clerical and allied service by Public Administration Circular 20/94 (original Circular) to the Co-operative Inspectors with similar qualification.

In the said provincial memorandum, the reason to obtain special approval was explained as follows;

2. 1994.06.15 දිනැති රාජ්‍ය පරිපාලන චක්‍රලේඛ 20/94 හි 2 (ආ) II වගන්තිය ප්‍රකාර රාජ්‍ය පරිපාලන චක්‍රලේඛ 37/92 හි එස් 3:8 මත 1994.06.01 දින සිට ක්‍රියාත්මක වන පරිදි මෙම නිලධාරීන්ගේ වැටුප් ප්‍රතිශෝධනය කිරීමට කටයුතු කර ඇත. ඉහත චක්‍රලේඛය ප්‍රකාරව මෙම නිලධාරීන්ගේ වැටුප් සකස් කිරීම පිළිබඳව යම් යම් මතභේද මතු වූ හෙයින් මේ සම්බන්ධයෙන් ගත යුතු ක්‍රියා මාර්ගය පිළිබඳව බස්නාහිර පළාතේ සමූපකාර සංවර්ධන කොමසාරිස් විසින් ආයතන අධ්‍යක්ෂකගෙන් උපදෙස් විමසා ඇත. රාජ්‍ය පරිපාලන චක්‍රලේඛ 20/94 හි 2 ආ II යටතේ සහන ලබා දී ඇත්තේ ලිපිකරු හා සමාන්තර සේවාවන්හි නියුතු ඌන සේවා නියුක්ත උපාධිධාරීන්ට පමණක් බවත් සමූපකාර සමිති පරීක්ෂක සේවයේ නිලධාරීන්ට එම චක්‍රලේඛයේ සහන ලබාදිය නොහැකි බවත් ආයතන අධ්‍යක්ෂ විසින් දන්වා ඇත.

As revealed before us the provincial Board of Ministers has approved the said memorandum and the Co-operative Inspectors who were eligible to come under the said decision were paid salaries according to the Public Administration Circular 20/94, even though the Director Establishment had taken a different view. However, there was no challenge to the implementation of the said decision by the rest of the Co-operative Inspectors at that time.

With regard to the implementation of the second circular issued in the Year 2005 (Public Administration Circular 20/94 (ii)), the 7th Respondent had taken up the position that Public Administration Circular 20/94 (ii) was issued in the year 2005 expanding the coverage of the original circular and the Governor of the Western Province, the 6th Respondent had approved the decision of the Board of Ministers to place the "Underemployed graduate Co-operative Inspectors" those who joined the service after 1977 and completed 15 years of service to be placed on a salary scale as referred to in the circular.

Even though the 7th Respondent had taken up the above position in his affidavit filed before this Court, he has failed to submit before this Court the decisions of the Board of Ministers and/or the Governor Western Province as referred to above. However, the justification he submitted before this court was twofold.

Firstly, he took up the position that it is correct to consider the graduate Co-operative Inspectors along with clerical and allied services since the Co-operative Inspectors were also drawing a salary equal to those grades and secondly, he justified the implementation of circular 20/94(ii) since the original circular 20/94 too was implemented without any objection in the Western Province in order to give effect to the state policy on resolving grievances of the underemployed graduates.

However, he was silent on the decision communicated to the provincial Co-operative Commissioner by the Director Establishment ruling out that Graduate Co-operative Inspectors were not belonging to clerical and allied services in order to get the benefit of the circular 20/94. In other words, the state policy implemented by circular 20/94 was to give relief only to under-employed graduates in clerical and allied services only and therefore those who do not belong to clerical and allied services are not entitled to the same benefit.

The same officer who issued the 20/94 circular in the year 1994, namely the Secretary to the Ministry of Public Administration had issued another circular subsequently bearing number 29/94, and in the said circular the clerical and allied services were identified as follows;

2-1 (අ) ලිපිකරු හා සමාන්තර ශ්‍රේණි යනු

1) සාමාන්‍ය ලිපිකාර සේවය

2) යතුරු ලේඛක සේවය

3) ලඝු ලේඛක සේවය

4) පොත් තබන්නන්ගේ සේවය

5) සරප් සේවක සහ

6) ගබඩා භාරකරුවන්ගේ සේවය වේ.

The Co-operative Inspectors Service was not included in the said circular. The Petitioners whilst referring to the above circular had taken up the position that the said interpretation was the result of the long-standing grievance complained on behalf of the Co-operative Inspectors.

Even though it was argued on behalf of the 7th Respondent that both Public Administration Circulars which provided relief to under-employed graduates in clerical and allied services had equally applicable to the under-employed graduates in the Co-operative Inspectors Service, Public Administrative Circular 29/1994 clearly leave out the Co-operative Inspectors from the clerical and allied services and therefore a question will arise as to the applicability of those circulars to a group of graduates outside the clerical and allied services.

As already observed in this judgment the wording of the two circulars (7R10 and 7 R 11) are very specific and the circulars do not provide provisions in grating any relief to other groups except those who are covered by the circulars.

As further observed by this Court the grievances and the anomalies complained by the Co-operative Inspectors were resolved by the National Salaries and Cadre Commission and the said decision was communicated by letter dated 04.01.2008 placing the Co-operative Inspectors at MN3-2006 scale. In those circumstances treating the Graduate Co-operative Inspectors on par with the underemployed Graduates in clerical and allied services and granting MN 4-2006 scale had created an anomaly in the Co-operative Inspectors Service by giving a wrong interpretation to the state policy in granting relief to underemployed graduates in clerical and allied services.

As already referred to by me the two circulars relied by the 7th Respondent are specific on their applicability and Circular 20/94 (ii) specifically identified the graduates to whom the said circular is applicable.

For clarity, I would like to once again refer to the second paragraph of the circular which clearly identifies the applicable groups as,

2. 1978.01.01. දින හා 1980.12.31. දින අතර කාලපරිච්ඡේදය තුල ලිපිකරු හා සමාන්තර සේවා වලට බඳවා ගන්නා ලදුව එම කාලපරිච්ඡේදය තුල හෝ ඊට පෙර උපාධිය ලබා මේ වන විටද එම තනතුරු වල සේවය කරණ උෆණ සේවා නියුක්ත උපාධිධාරීන්ට උපාධිය ලබා ගැනීමෙන් අනතුරුව එම තනතුරේ වසර 15 ක සේවා කාලයක සම්පූර්ණ කිරීම හෝ 1994.06.01 හෝ යන දින දෙකෙන් පසුව එළබෙන දින සිට පහත සඳහන් වැටුප් ගෙවීමට රජය තීරණය කර ඇත.

The two highlighted areas in the said paragraph require the graduate to obtain the degree either before or during the period relevant to the circular and should work for 15 years after obtaining the degree. If the degree was obtained in 1978, he needs to wait until 01.06.1994 and in those circumstances, the graduate will have to wait nearly 16 years to become eligible under the said circular.

A group of Graduate Co-operative Inspectors sought intervention in the instant application and as already referred to by me, the Petitioners did not object to the intervention, and the Intervenient Petitioners were added as 16th -32nd added Respondents. The papers that were filed by the Intervenient Petitioners before this Court includes the details of the Intervenient Petitioners and according to them, they were among the recipients who received the salary increment that was challenged before this Court. The details provided by the Intervenient Petitioners Respondents can be summarized as follows;

	Date joined	Degree awarded
16. S.S. Satharasinghe	16.11.1981	01.10.1982
17. A.M.A.S. Herath	16.12.1985	01.10.1982
18. S.P. Uyangoda	01.03.1988	Diploma in management by Galle Technical College 11.10.1988
19. G.P. Nimal	30.12.1985	01.11.1983
20. V.M.N. Dissanayake	16.12.1985	01.04.1990
21. L.A.N. Jayawickrama	01.01.1982	01.11.2001
22. M. Sumanawathy	05.12.1985	Higher Diploma in Management by Kandy Technical College 09.11.1983
23. M. Sunandawathi	-	01.09.1982
24. H.K. Kanthi Kusumalatha	01.03.1988	01.04.1990
25. W. Gallage	16.12.1985	01.10.1985
26. W.A. Upali Perera	16.01.1978	01.10.1985
27. M. Hanza	01.03.1988	01.04.1991
28. D.D. Jayamaha	16.12.1985	01.11.1984
29. M.P.N. Muthugala	16.01.1978	01.02.1983
30. N.S. Dehigahawatta	01.03.1988	01.10.1990
31. M.P. Thamara Nandani	15.07.1987	01.10.1982
32. R. Kanthi	16.12.1985	01.10.1981

Out of the seventeen Intervenient Petitioners Respondents, only two had joined the Co-operative Inspectors Service (26th and 29th Respondents) between 01.01.1978 and 31.12.1980. But they were not degree holders at the time they joined the service. 26th had obtained the degree seven years after he joined the service and the 29th after five years. However as already observed above the under-employed graduates should possess the degree within the period referred to in the circular and the

above Respondents does not come within the circular even if the circular is applicable to Co- operative Inspectors Service.

All the other Respondents had joined the Co-operative Inspector Service between 1981 and 1988 and except for six Respondents (17th, 19th, 25th, 28th, 31st, and 32nd), others were not degree holders at the time they joined the service. 21st Respondent had obtained the degree in 2001, 19 years after joining the service, and had completed only 07 years of service after obtaining the degree when he was given the salary increment. The 18th and 22nd Respondents were not degree holders but were holding diplomas obtained from Galle and Kandy Technical Colleges and there is no material to show that the Diplomas they possess are equal to a degree.

Even if the argument made on behalf of the 7th Respondent that 1994/20 (ii) circular is applicable to the under-employed Co-operative Inspectors who complete 15 years serving; as identified in the circular the 15 years period will only be applicable after obtaining the degree, and the officer should complete 15 years of service by 31.12.1995. In those circumstances, a further question arises as to the applicability of the said circular to the Intervenient Petitioners Respondents.

When considering the above matters, it is clear that no proper scheme was followed when granting the increments to a group of Co-operative Inspectors and the seventh Respondent had failed to produce before the Supreme Court the decision taken by the Board of Ministers of the Western Provincial Council or the directive said to have been signed by the 6th Respondent, Governor, Western Province.

In the absence of a specific decision, the 7th Respondent had heavily relied on the board paper and the decision by the Board of Ministers in implementing the provisions of the main circular, 20/1994 in favour of the Co-operative Inspectors Service in the year 1998 but as already referred to in this Judgment, the said decision was contrary to the state policy on granting relief to the under Employed Graduates in clerical and allied services.

The failure of the North-Western Provincial Public Service Commission to give effect to the "National Teachers Transfer Policy" identified in Circular 95/11 issued by the Ministry of Education and Higher Education was complained about in the case of ***Kamalawathy V. Provincial Public Service Commission of the North -Western Province [2001] 1 Sri LR 1 at 5*** *Mark Fernando (J)* held, "while powers in respect of education have been devolved to Provincial Councils, those powers must be

exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject there cannot be any conflicting provincial policy on the same subject."

When considering the material already discussed in this judgment, I hold that the Petitioners before this Court were successful in establishing the violation of their fundamental rights guaranteed under Article 12 (1) of the Constitution. Neither the Petitioners nor the 7th Respondent who filed an affidavit before this Court had been able to produce the impugned decision but it is admitted that a small group of Co-operative Inspectors belonging to the Western Provincial Council were placed at a higher salary scale based on a decision said to have taken by the Board of Ministers of the Western Provincial Council and approved by the Governor, which is implemented by the 7th and 8th Respondents.

In the said circumstances, I hold that the 1st to the 7th Respondents and the 8th Respondent have acted in violation of the Petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

We further direct the said Respondents or their successors to take necessary steps to alleviate the effects caused to the Petitioners by the impugned decision arrived in violation of the fundamental rights guaranteed under Article 12 (1) of the Constitution.

Application allowed

Judge of the Supreme Court

Hon. Justice E.A.G.R. Amarasekara,

I agree,

Judge of the Supreme Court

Hon. Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) No. 166/2017 with S.C. (F/R) Nos. 155/2017, 156/2017,157/2017, 158/2017, 159/2017 & 12/2017

1. J. P. Jayasena
   Halmillakulama, Nachchaduwa,
   Anuradhapura.

2. M.M.M. Heerath
   Nallamudawa,
   Eppawala.

3. S.S.P. Weerasinghe
   Halmillakulama, Nachchaduwa,
   Anuradhapura.

4. P. Ranathunga
   No. 104, Pahala kuruvita,
   Hidogama.

5. A.R. Bandara
   Mawatha wewa,
   Eppawela.

6. G.W. Bandara
   Kusawa,
   Nachchaduwa.

7. H.P.S.K. Wickramasinghe
   Pansala laga Niwasa,

Ihala wewa, Galkulama.

8. H.B. Udayarathna
Selesthi Maduwa,
Nachchaduwa.

9. H.M.A. Ananda
No. 61, Mawatha Wewa,
Eppawala.

10. D.J.B. Jayawardana
Nachchaduwa wewa para,
Ponimankulama,
Galkulama.

11. H.P.D. Kaldera
Ihala Katugampola,
Hidogama.

12. P.G.B.U. Weerasinghe
No-2 B, Nithulgollawa,
Hurulunikawewa.

13. W.A.P.S. Wanniarachchi
L.B. Janapadaya,
Megoda Wewa.

14. D.M.U.P. Bandara
No-487, C Yaya,
Padavi-Parakramapura.

15. J.T. Kumara
No-48, Nuwara Elliya
Janapadaya,
Padikara Maduwa.

16. W.K.G.P. Walpita
No. 147, Kekirawa road,
Galenbidhunuwewa.

17. S.C.S Udaya Kumara
Mahadiulwewa, Namalpura,
Galenbidhunuwewa.

18. A.G.A Dayananda
No-252/B,
Padikara Maduwa,
Galenbidunuwewa.

19. K.T.L. Perera
No-101, A, Yaya,
Padavi-Paraktamapura.

20. G.K.R. Indika Kumara
Diwara Gammanaya,
Govipalapara, Padaviya.

21. U.A.N. Chamara
Wewapara,
Padaviya.

22. S.A.D. Dinesh Bandara
1 Kanuwa,
Padaviya.

23. H.P. Jayaweera
No. 117, 40 Kolaniya,
Padavi-Parakramapura.

24. M.R.A.P. Jayakodi
No-94/B,

Padavi-Parakramapura.

25. M.P.C.S Kumara
No-93/B,
Padavi-Parakramapura

26. G.W. Weerasekara
No-2260, Yaya 11,
Padavi Sri Thissapura.

27. R.D. Krishantha
1 Kanuwa,
Padaviya.

28. S.R. Nawarathna
No-99, A Yaya,
Padaviya.

29. H.M.G. Jayathilaka
D-9, Ala Para, C Yaya,
Padavi-Parakramapura.

30. S.D.A.G. Chathuranga
No-112/B,
Padavi-Parakramapura.

31. U.G.A. Bandaranayaka
No. 498, C Yaya,
Padavi-Parakramapura.

32. R.M.S.D. Ranasinghe
No-382-A, Maithree Mawatha,
Padavi Parakramapura.

33. H.M.R. Jayathilaka
D-9, Ala para, B Yaya,

Padavi-Prakramapura.

34. P. Anura Dissanayake
Kuruketuwewa,
Kebithigollewa.

35. W.V.C. Kumara
Kandagasgoda, Karadagoda,
Uyangoda, Mathara.

36. M.M. Tharanga Sisira Kumara
Isuru Kerennagolla,
Theliggavila.

37. M.G.P.M. Kumara
126, Mudune Gedara,
Akurassa.

38. H.M. Lakman
Willapaththinige Waththa,
Kanampitiya, Gandara.

39. P.K. Nishantha
No-101, Bandarayakepura,
Kekanadura, Mathara.

40. H.P. Upali
No. 18 ½, Sidevi, Suriyagama,
Suriyara,
Thanamalwila.

41. W.H.D.N. Gamage
Ella Road, Nuganalawa,
Nuwara Eliya.

42. W.A.C. Priyadarshani

12 Warimarga Nivasa, Hawa Eliya,
Nuwara Eliya.

PETITIONERS

vs.

1. M. Thureisinghham
   Director General,
   Department of Irrigation,
   230, Bauddhaloka Mawatha,
   Colombo 7.

1A. S. Mohanrajah
   Director General,
   Department of Irrigation,
   230, Bauddhaloka Mawatha,
   Colombo 7.

1B. Nihal Siriwardhana
   Director General,
   Department of Irrigation,
   230, Bauddhaloka Mawatha,
   Colombo 7.

2. D.D. Ariyaratne
   Secretary,
   Ministry of Irrigation & Water Resources Management,
   No. 11, Jawatte Road,
   Colombo 05.

2A. Sisira Kumara
   Secretary,
   Ministry of Irrigation & Water Resources Management,

No. 11, Jawatte Road,
Colombo 05.

2B. K.D.S. Ruwanchandra
Secretary,
Ministry of Irrigation & Water Resources Management,
No. 11, Jawatte Road,
Colombo 05.

2C. Anura Dissanayaka
Secretary,
Ministry of Irrigation & Water Resources Management,
No. 11, Jawatte Road,
Colombo 05.

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

RESPONDENTS

In the matter of an application under and in terms of Article 126 of the Constitution read together with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. (F/R) No. 155/2017

1. Kuruppu Arachchige Chathuri Niroshika
   No. 304/27/3, Pinnagollawatta,
   Nittambuwa.

2. Ranhoti Bandaralage Manjula Madumanthi
   No. 89, Rajawewa,
   Ampara.

3. Nambi Kandage Nayana Thushari
   No. 427, Batuwaththa,
   Ragama.

4. Galkande Gedara Dulmini Privadarshani
   No. 350/4, Maligathanna,
   Uhana.

5. Vinayagam Inthirasanthy
   No. 22, Thirunthanikai,
   Natpiddimunai Road,
   1st Cross Street, Kalmunai.

PETITIONERS

vs.

1. Eng. M. Thuraisingham

Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

1A. Eng. S. Mohanarajah
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

2. Eng. R.M.W Rathnayake
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road,
Colombo 5.

2A. Eng. N.A. Sisira Kumara
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road,
Colombo 5.

2B. Anura Dissanayake
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 500, T, B. Jaya Mawatha,
Colombo 10.

3. Mr. J.J Rathnasiri
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

3A. Padmasiri Jayamanne
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

3B. Mr. J.J Rathnasiri
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

4. Dharmasena Dissanayaka
Chairman,

4A. Hon. Justice Jagath Balapatabendi
Chairman,

5. Prof. Hussain Ismail
Member,

5A. Dr. Prathap Ramanujam

5AA. Indrani Sugathadasa

6. D. Shirantha Wijayatilaka
Member,

6A. V.Shivagnanasothy
Member,

7. Prathap Ramanujam
Member,

7A. Dr.T.R.C. Ruberu
Member,

8. V. Jegarasasingam
Member,

8A. Sudharma Karunarathne

8AA. Ahamod Lebbe Mohamed Saleem
Member,

9. Santi Nihal Seneviratne
Member,

9A. G.S.A, De Silva P.C.

9AA. Leelasena Liyanage

10. S. Ranugge
Member,

10A. Dian Gomes
Member,

11. D.L. Mendis

Member,

11A. Dilith Jayaweera
Membe

12. Sarath Jayathilaka,
Member,

12A. W.H.Piyadasa
Member

The 4(A) to 12(A) Respondents
of All;
Public Service Commission,
No. 1200,
Rajamalwattha Road, Battaramulla.

Presently at
Public Service Commission
No.1200/09,
Rajamalwattha Road,
Battaramulla

13. Mr. H.M.G Senevirathne
Secretary,
Public Service Commission,
No 177, Nawala Road,
Narahenpita, Colombo 05.

13A. A. Kulathunga
Secretary,
Public Service Commission,
No 177, Nawala Road,
Narahenpita, Colombo 05.

13B. M.A, B. Daya Senarath Secretary,
Public Service Commission,
No 177, Nawala Road,
Narahenpita, Colombo 05.

Presently at
Public Service Commission
No.1200/09, Rajamalwattha Road, Battaramulla

14. Honourable Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1), Article 12(2) and Article 14 (1)(g) of the Constitution.

S.C. (F/R) No. 156/2017

1. Thenuwara Dawayalage Kalum Priyankara Sarathchandra,
   No.91/1, Tile Factory area,
   Manikkamadu, Irakkaman 07.

2. Aaseem Msawwar Thasneem
   No 73, Main Street,
   Akkaraipattuwa 01.

3. Palliya Guruge Pradeep Kumara Nanayakkara
   32/44/01,
   Gonagolla, Ampara.

4. M.K Janaka Dharmasiri
   Girana, Narangoda,
   Giriulla.

5. G.J Guluwita
   30/154/1, Mayadunna, Gonagolla,
   Ampara.

6. H.T Krishantha
   No: 33/35/02, Nawagiriyawa,
   Gonagolla, Ampara.

7. P. Chaminda Prasanna Kumara
   No28/132-A, Warankatagoda,
   Ampara.

8. 8. A.G Jayawardane
   152/2, Ambalangoda Town,
   Damana, Ampara.

9. S.R Senevirathne
   29/31/1, Senagama, Wrath
   Ketagoda, Ampara.

10. M.D Ruwan Wasana Wijesinghe
    No: 33/55, Nawagiriyawa,
    Gonagolla, Ampara.

11. D.M Wimalarathne
    1B/28, Namal Oya,
    Ampara.

12. Bokalawela Waduge Senaka
    Danapala
    No 10, Galoya Pallama,
    Iginiyalagala, Ampara.

PETITIONERS

vs.

1. Eng. M. Thuraisingham,
   Director General of Irrigation,
   Department of Irrigation,
   No. 230, P.O. Box 1138,
   Bauddhaloka Mawatha,
   Colombo 07.

1A. Eng. S. Mohanarajah,
   Director General of Irrigation,
   Department of Irrigation, No. 230,
   P.O. Box 1138, Bauddhaloka

Mawatha, Colombo 7.

1B. Eng. K.D.N.Siriwardane
Director General of Irrigation,
Department of Irrigation, No. 230,
P.O. Box 1138, Bauddhaloka
Mawatha, Colombo 7.

2. Eng. R.M.W Rathnayake
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road, Colombo 5.

2A. Eng. N.A.Sisira Kumara
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road, Colombo 5.

2B. Anura Dissanayake
Secretary,
Ministry of Irrigation & Water Resources Management
No. 11, Jawatte Road,
Colombo 05.

3. Mr. J.J Rathnasiri
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

3A. Padmasiri Jayamanne
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

3B. Mr. J.J Rathnasiri
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

4. Dharmasena Dissanayaka
Chairman,

4A. Hon. Justice Jagath Balapatabendi
Chairman,

5. Prof. Hussain Ismail
Member,

5A. Dr. Prathap Ramanujam

5AA. Indrani Sugathadasa
Member,

6. D. Shirantha Wijayatilaka
Member,

6A. V.Shivagnanasothy
Member,

7. Prathap Ramanujam

Member,

7A. Dr.T.R.C. Ruberu
Member,

8. V. Jegarasasingam
Member,

8A. Sudharma Karunarathne

8AA. Ahamod Lebbe Mohamed Saleem
Member,

9. Santi Nihal Seneviratne
Member,

9A. G.S.A, De Silva P.C.

9AA. Leelasena Liyanage

10. S. Ranugge
Member,

10A. Dian Gomes
Member,

11. D.L. Mendis,
Member,

11A. Dilith Jayaweera
Member

12. Sarath Jayathilaka
Member,

12A. W.H.Piyadasa
Member,

The 4A to 12A Respondents of All;
Public Service Commission,
No. 1200, Rajamalwattha Road,
Battaramulla.
Presently at
Public Service Commission
No.1200/09,
Rajamalwattha Road,
Battaramulla

13. Mr. H.M.G Senevirathne
Secretary,
Public Service Commission,
No 177, Nawala Road,
Narahenpita, Colombo 05.

13A. Mr. A. Kulathunga
Secretary,
Public Service Commission,
No 177, Nawala Road,
Narahenpita, Colombo 05.

13B. M.A, B. Daya Senarath
Secretary,
Public Service Commission,
No 177, Nawala Road,
Narahenpita, Colombo 05.

14. Honourable Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1), Article 12(2) and Article 14 (1)(g) of the Constitution.

S.C. (F/R) No. 157/2017

1. Illangasinghe Kalukumara Punchi Bandaralage Irosha Jeewa Kumari Illangasinghe
"Sadhapaya", Thalawa Road,
Eppawala.

PETITIONER

vs.

1. Eng. M. Thuraisingham,
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 7.

1A. Eng. S. Mohanarajah,
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 7.

1B. Eng. K.D.N. Siriwardane
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 7.

2. Eng. R.M.W Rathnayake
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road, Colombo 5.

2A. Eng. N.A. Sisira Kumara
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road, Colombo 5.

2B. Anura Dissanayake
Secretary,
Ministry of Irrigation & Water Resources Management,
No. 11, Jawatte Road,
Colombo 05.

3. Mr. J.J Rathnasiri
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Ministry of Public
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Independence Square,
Colombo 7.

3A. Padmasiri Jayamanne

Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

3B. Mr. J.J Rathnasiri
Secretary,
Ministry of Public
Administration and Management,
Independence Square,
Colombo 7.

4. Dharmasena Dissanayaka
Chairman,

4A. Hon. Justice Jagath Balapatabendi
Chairman,

5. Prof. Hussain Ismail
Member,

5A. Dr. Prathap Ramanujam

5AA. Indrani Sugathadasa
Member,

6. D. Shirantha Wijayatilaka
Member,

6A. V.Shivagnanasothy
Member,

7. Prathap Ramanujam
Member,

7A. Dr.T.R.C. Ruberu
Member,

8. V. Jegarasasingam
Member,

8A. Sudharma Karunarathne

8AA. Ahamod Lebbe Mohamed Saleem
Member,

9. Santi Nihal Seneviratne
Member,

9A. G.S.A, De Silva P.C.

9AA. Leelasena Liyanage

10. S. Ranugge
Member,

10A. Dian Gomes
Member,

11. D.L. Mendis
Member,

11A. Dilith Jayaweera
Member,

12. Sarath Jayathilaka
Member,

12A. W.H.Piyadasa
Member,

The 4A to 12A Respondents of All;
Public Service Commission,
No. 1200, Rajamalwattha Road,
Battaramulla.

Presently at
Public Service Commission
No.1200/09,
Rajamalwattha Road,
Battaramulla

13. Mr. H.M.G Senevirathne
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No 177, Nawala Road,
Narahenpita, Colombo 05.

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Secretary,
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14. Mr. W.D Somadasa
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14A. Mr. H.A. Chandana Kumarasinghe
Director General of
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Ministry of Public Administration
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15. Mr. H.G.Sumanasinghe
Director General,
Department of Management
Services, Ministry of Finance,
Colombo 01.

15A. Ms. Hiransa Kaluthanthri
Director General,
Department of Management
Services, Ministry of Finance,
Colombo 01.

16. Honourable Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1), Article 12(2) and Article 14 (1)(g) of the Constitution.

S.C. (F/R) No. 158/2017

1. Singakkarige Udesh Prasanna
   No.90, Etabagaha Watta,
   Angangoda,
   kPayagala.

PETITIONERS

vs.

1. Eng. M. Thuraisingham
   Director General of Irrigation,
   Department of Irrigation,
   No. 230, P.O. Box 1138,
   Bauddhaloka Mawatha,
   Colombo 07.

1A. Eng. S. Mohanarajah
   Director General of Irrigation,
   Department of Irrigation,
   No. 230, P.O. Box 1138,
   Bauddhaloka Mawatha,
   Colombo 7.

1B. Eng. K.D.N. Siriwardane
   Director General of Irrigation,
   Department of Irrigation,
   No. 230, P.O. Box 1138,

Bauddhaloka Mawatha,
Colombo 7.

2. Eng. R.M.W Rathnayake
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road, Colombo 5.

2A. Eng. N. A. Sisira Kumara
Secretary,
Ministry of Irrigation and Water
Resource Management,
No. 11, Jawatta Road, Colombo 5.

2B. Anura Dissanayake
Secretary,
Ministry of Irrigation & Water Resources Management,
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3. Mr. J.J Rathnasiri
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3A. Padmasiri Jayamanne
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Ministry of Public Administration
And Management,
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14. Honourable Attorney General,
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RESPONDENTS

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1), Article 12(2) and Article 14 (1)(g) of the Constitution.

S.C. (F/R) No. 159/2017

1. Kumarasinghe Patabadi Mudiyanselage Inoka Priyadarshani
"Himali", Serankada.

PETITIONER

vs.

1. Eng. M. Thuraisingham,
Director General of Irrigation,
Department of Irrigation,
No. 230, P.O. Box 1138,
Bauddhaloka Mawatha,
Colombo 07.

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Department of Irrigation, No. 230,
P.O. Box 1138, Bauddhaloka
Mawatha, Colombo 7.

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Department of Irrigation, No. 230,
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Ministry of Public
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RESPONDENTS

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of the violations of Article 12(1), Article 12(2) and Article 14 (1)(g) of the Constitution.

S.C. (F/R) No. 12/2017

1. Amaraweera Vidana
   Kankanamage Wikum
   Amaraweera "Kon Sevana"
   Gangasiripura,
   Tissamaharama.

PETITIONER

vs.

1. Director General of Irrigation,
   Department of Irrigation,
   No. 230, Bauddhaloka Mawatha,
   Colombo 07.

2. Attorney-General
   Attorney General's
   Department,
   Colombo 12,

RESPONDENTS

BEFORE : **B.P. ALUWIHARE, PC, J,**

MURDU N.B. FERNANDO, PC, J and

S. THURAIRAJA, PC, J.

COUNSEL : Manohara de Silva, PC with Sasiri Chandrasiri for the Petitioners in S.C. (F/R) 166/2017.

Uditha Egalahewa, PC with Vishva Vimukthi for the Petitioners in S.C. (F/R) Nos. 155/2017, 156/2017, 157/2017, 158/2017 & 159/2017.

S.N. Vijithsingh for the Petitioner in S.C. (F / R) No. 12/2017.

Ganga Wakishta Arachchi, DSG for the Respondents in all matters.

WRITTEN SUBMISSIONS :

Petitioner in SC FR No. 166/17 on 21st May 2018

Petitioner in SC FR No. 155/17 on 22nd November 2019

Petitioner in SC FR No. 156/17 on 22nd November 2019

Petitioner in SC FR No. 157/17 on 22nd November 2019

Petitioner in SC FR No. 158/17 on 22nd November 2019

Petitioner in SC FR No. 159/17 on 22nd November 2019

ARGUED ON : 6th May 2022 and 3rd February 2023.

DECIDED ON : 6th October 2023

S. THURAIRAJA, PC, J.

This Judgement relates to an Application filed in terms of Articles 17 and 126 of the Constitution by the 1st to 42nd Petitioners (hereinafter referred to as "the Petitioners") seeking relief in respect of an alleged infringement of Fundamental Rights guaranteed under and in terms of Articles 12(1), 12(2) and 14(1)(g) of the Constitution by one or more of the Respondents to this Application.

The 1st Respondent is the Director General of the Department of Irrigation, the 2nd Respondent is the Secretary to the Ministry of Irrigation and Water Resources Management, and the 3rd Respondent is the Attorney General who has been made a Respondent in compliance with the Constitution.

This matter was supported before this Court on 12th February 2018, and leave was granted under Articles 12(1), 12(2) and 14(1)(g) of the Constitution.

In S.C. (F/R) No. 157/17 Counsel for the Petitioners made an application on 24th May 2017 and the Court was informed that S.C. (F/R) No. 157/17 was connected with the instant case, S.C. (F/R) No. 166/17. The Court listed both matters for support with S.C (F/R) Nos. 155/17, 156/17, 158/17 and 159/17. Leave was granted under Article 12(1) of the Constitution on 10th October 2017.

In S.C (F/R) No. 12/17, Counsel for the Petitioners made an application on 22nd May 2018 and informed the Court that the circumstances of this matter are the same as in S.C. (F/R) 166/17 Counsel for the Petitioner moved to re-fix this matter with S.C. (F/R) 166/17 for Argument on 21st September 2018, and leave was granted under Article 12(1) of the Constitution on 15th March 2017.

I find it pertinent to refer to the factual matrix of this application as provided by the parties in order to ascertain whether the Petitioner's Fundamental Rights guaranteed under Articles 12(1), 12(2), and 14(1)(g) of the Constitution have been violated by the 1st to 3rd Respondents.

Facts of the case as per the Petitioners

The Petitioners state that they were recruited to the Department of Irrigation (hereinafter referred to as the "Department") as "Casual Employees" between 1st January 2000 and 3rd March 2014 to the roles of either Technical Officer, Management Assistant and or Primary Grade – Unskilled worker.

Thereafter, the Petitioners state that they received appointment letters from the 1st Respondent (marked "P5(1)" to "P5(42)") stating that the Petitioners were appointed to permanent posts with effect from 24th October 2014 in accordance with the Public Administration Circular 25/2014 (hereinafter referred to as "P.A.C. 25/2014" and marked "P4"). The Petitioners state that the letters of appointment indicated that the afore-stated appointments to permanent posts were subject to a three-year probationary period, following which, if the work is found to be satisfactory, the Petitioners would be issued confirmation letters. The Petitioners state that, up to date, the Petitioners have received no complaints pertaining to unsatisfactory work and, as a result, harboured the legitimate expectation that they would be confirmed in their appointments following the conclusion of three-year probationary period.

According to the Petitioners, however, those who were appointed to the posts of Technical Assistant and Management Assistant received letters on or about 18th August 2015 (marked "P6(1)" to "P6(8)"), which cancelled the previous letters of appointment to permanent posts and instead stated that the aforementioned Petitioners were re-appointed to posts of Primary Grade – Unskilled worker.

The Petitioners state that, despite this, the aforementioned Petitioners continued to carry out the functions of a Technical Assistant and Management Assistant; the Petitioners further state that they were treated similarly vis-à-vis a permanent employee and experienced similar salary deductions.

Thereafter, the Petitioners state that they received a letter on or about 20th June 2016 (marked "P8(1)" to "P8(28)") stating that an Audit had commenced, and as per the

Audit, there were observations of instances wherein the minimum requirements and qualification of an employee under the P.A.C. 25/2014 were not fulfilled. Subsequently, the Petitioners state that the same letter further revealed that they shall be removed from employment as the Petitioners did not fulfil the aforementioned minimum qualifications stipulated in the P.A.C. 25/2014.

The Petitioners state that the 1st Respondent did not communicate information regarding the individual(s) responsible for conducting the Audit, and neither were the Petitioners, at any point in time, summoned, questioned or inquired from to ascertain their compliance with the minimum qualifications. The Petitioners maintain that they fulfilled all requirements set forth in the P.A.C. 25/2014. The Petitioners state that, instead, the Audit was the commencement of an "organized attempt of political revenge" by the Respondents to remove the Petitioners from Public Service posts appointed to them by the previous government.

The Petitioners further state that, notwithstanding the aforesaid letters informing the Petitioners of the commencement of the Audit, the Petitioners continued to work as permanent employees for more than two years; according to the Petitioners, this was until the Petitioners received letters signed by the 1st Respondent between 7th April 2017 and 21st April 2017 (marked "P9(1)" to "P9(42)") stating that the Petitioners' appointments have been cancelled and/or the Petitioners have been removed from employment in light of the discovery made as a result of the Audit, stating that the Petitioners had failed to continuously work for 180 days as set forth in the P.A.C. 25/2014. According to the Petitioners, this same letter further claimed that any advancements of money and loans obtained from the government should be paid on or before 2nd May 2017.

The Petitioners believe that the word "continuous", in the context of the P.A.C. 25/2014, has been erroneously misinterpreted by the 1st Respondent to mean "every day". The Petitioners base this belief on the following reasons: (a) the objective of enacting the P.A.C. 25/2014 was to grant employment for those who were recruited and are still in

the service on Temporary Casual (daily wages), Substitute, Contract or Relief basis; (b) it is impossible for any of the employees in the above categories to work "every day" as none of them are permanent employees and are not assigned work every day; (c) it is impossible and impracticable to work every day as "every day" may include Saturdays, Sundays, as well as public holidays, and as no employee is immune from illnesses, it is impossible to expect that any person could work every day for 180 days; (d) if the word "continuous" is interpreted to mean "every day" it shall not give any substance to the objectives of the P.A.C. 25/2014, and the process of enacting the P.A.C. 25/2014 will be rendered nugatory; and (e) if the government wanted the P.A.C. 25/2014 to confine to employees who have worked "every day" the government would have expressed so, but the Cabinet deliberately used the word "continuous" knowing that employees in the categories specified are not assigned work every day.

The interpretation employed by the Petitioners of the use of the word "continuous" is to mean "six months"; hence, the Petitioners state that an employee must be eligible under the P.A.C. 25/2014 if the said employee has worked continuously for six months. The Petitioners further state that, even if the use of "continuous" is interpreted to mean a total of 180 days from the date of recruitment to 24th October 2014, the Petitioners would still satisfy this requirement.

Additionally, the Petitioners state that, to the best of their knowledge, the aforementioned interpretation of the use of "continuous" employed by the Petitioners was adopted at the time of the Petitioners' appointments as permanent employees.

Moreover, the Petitioners state that, on or about 4th April 2016, the Cabinet adopted the Public Administration Circular 25/14 (II) (hereinafter referred to as the P.A.C. 25/14 (II) and marked "P12"), which cancelled the previously issued P.A.C. 25/14. The Petitioners state that, in doing so, the Cabinet expressly communicated that the P.A.C. 25/14 was being cancelled without prejudice to any permanent appointments made according to the P.A.C. 25/14. In support of the Petitioners' interpretation of the use of "continuous" in the context of the P.A.C. 25/14, the Petitioners state that: (a) when

adopting P.A.C. 25/14 (II) the Cabinet would have been fully aware of the interpretation given to the use of "continuous" in the previously issued P.A.C. 25/14 and, therefore, knowingly, intentionally and deliberately communicated that no appointment made in accordance with the P.A.C. 25/14 was to be affected by its cancellation which confirms that the Petitioners' interpretation of the use of "continuous" was the policy adopted by the government; (b) subsequently, a change in the interpretation of the use of "continuous" amounts to a change in policy as it is a broad concept affecting the livelihood of several Public Officers; (c) as per Article 55 of the Constitution, only the Cabinet has the power to change or make policy in respect of appointments, promotions, transfers, disciplinary and dismissal of Public Officers; and (d) even if the interpretation of the use of "continuous" adopted by the Petitioners is considered erroneous, it is the Cabinet of Ministers, and not the 1st Respondent, that reserves the power under the law to make decisions and/or interpretations to the P.A.C. 25/14 and P.A.C. 25/14 (II) in respect of policy pertaining to appointments, promotions, transfers, disciplinary control and dismissal of Public Officers.

The Petitioners state that, consequently, the removal from employment of the Petitioners in the absence of a hearing and the erroneous interpretation of the P.A.C. 25/14 employed by the 1st Respondent are unjust, unlawful, arbitrary, capricious and in violation of the Petitioners' Fundamental Rights guaranteed by the Constitution. In the foregoing circumstances, the Petitioners claim that the Petitioners' Fundamental Rights guaranteed under Articles 12 (1), 12 (2), and 14 (1) (g) of the Constitution have been infringed and/or are being continuously infringed by the aforesaid executive and administrative action. Hence, the Petitioner prays for an order to quash the decision to remove the Petitioners from employment.

Facts of the case as per the Respondents

As per the 1st Respondent, the Petitioners were not recruited on a casual or contract basis but instead as "Labourers" on an ad hoc/Thaduchitha (තදුචිත) basis. Persons

recruited under the afore-stated category were to be paid only for the days on which they worked, were free to work elsewhere simultaneously on the days they did not work for the Department and were not entitled to leave nor maternal benefits.

The 1st Respondent states that, as per the P.A.C. 25/14, only the persons who were recruited on a temporary, casual (on a daily wage), substitute, contract or relief basis were eligible to be granted permanent employment, and that too only if the said persons, inter alia, (a) had worked for a continuous period of 180 days as of 24th October 2014 as per paragraph 02 of the P.A.C 25/2014; and (b) had possessed the relevant educational qualifications stipulated by the P.A.C. 25/14 as per paragraph 03 of the same. Accordingly, any persons who had not worked for a continuous period of 180 days as of 24th October 2014 or had not possessed the relevant educational qualifications stipulated in the P.A.C. 25/14 will not have a right to permanent employment nor be deemed to be eligible to claim permanent employment under the P.A.C. 25/14.

Moreover, the 1st Respondent states that, as per paragraph 04 of the P.A.C. 25/14, the eligible person(s) ought to be made permanent in the post to which they were initially recruited and not to the post they were serving or in relation to the functions they discharged.

The 1st Respondent further states that, as per the Gazette Notification No. 1733/52 dated 25th November 2011, the powers to make appointments to the posts relevant to this case have been devolved to the Department by the Public Service Commission, and it is the Department's duty to ensure that permanent appointments made under the P.A.C. 25/14 are compliant with the provisions thereof.

The 1st Respondent states that the Petitioners who were recruited as "Labourers" on the aforementioned ad hoc/Thaduchitha (තදුචිත) basis were issued letters of appointment (marked "P5(1)" to "P5(42)") in respect of the posts of Labourer, Clerk, Technical Assistant, etc.

The 1st Respondent states that, however, the Department was informed by the Department of Management Services by means of a letter dated 18th March 2015 marked "R1" that a number of these appointments, i.e. "P5(12)", "P5(18)", "P5(21)", " P5(30)", "P5(32)", "P5(33)", "P5(41)" and "P10(42)", appeared to have been made on the basis of the functions they performed, which was contrary to the provisions of paragraph 04 of the P.A.C. 25/14. The 1st Respondent states that, accordingly, the abovementioned eight Petitioners were issued fresh letters of appointment dated 18th August 2015 (marked "P6(1)" to "P6(8)") appointing the Petitioners to the posts of "Labourer". The 1st Respondent states that the Petitioners accepted the abovementioned appointments and did not take any legal steps to question the same at the relevant time. Hence, the 1st Respondent maintains that the Petitioners had acquiesced to the act of being appointed as "Labourers" and, as a result, are estopped from complaining about the same.

The 1st Respondent states that, following confusion as to the calculation of the requirement set forth by paragraph 04 of the P.A.C. 25/14 wherein only the persons who had worked satisfactorily for a continuous period of 180 days as of 24th October 2014 would be eligible, a clarification was sought from, and a response thereto was issued by the Ministry of Public Administration and Management to the Ministry of Irrigation and Water Resource Management by means of a letter dated 9th May 2016 (marked as "R2", "R2(a)" and "R2(b)"). The 1st Respondent states that this clarification set forth the interpretation of the said 180 days to mean 180 working days, excluding public holidays, Saturdays and Sundays. As such, the 1st Respondent maintains that the interpretation given in "R2" is consistent with the provisions of paragraph 02 of the P.A.C. 25/14, that the various interpretations of the word "continuous" employed by the Petitioners are erroneous and misleading, and further that the Ministry of Public Administration and Management has informed the Ministry of Irrigation and Water Resource Management by means of a letter dated 2nd October 2015 (marked "R3")

that if the Department wished to act in excess of the provisions in the P.A.C. 25/14, it should be done after receiving a policy decision in respect of the same.

The 1st Respondent states that the Petitioners who served on the ad hoc/Thaduchitha (තදුචිත) basis were not eligible to be considered under the P.A.C. 25/14 as the said ad hoc/Thaduchitha (තදුචිත) basis was not recognized by the P.A.C. 25/14. The 1st Respondent states that, even if the Petitioners were serving as casual employees and were, therefore, eligible to be considered under the P.A.C. 25/14, the Petitioners would be compelled to establish inter alia that: (a) the Petitioners had worked satisfactorily for 180 days continuously as per paragraph 02 of P.A.C. 25/14, and (b) the Petitioners possessed the relevant educational qualifications as per paragraph 03 of the P.A.C. 25/14.

The 1st Respondent states that an internal Investigation Report (marked "R4") in respect of the appointments made under the P.A.C. 25/14 by the Department revealed that the Petitioners had not worked a continuous period of 180 days as required by paragraph 02 of the P.A.C. 25/14 but had yet been granted permanent appointments under the P.A.C. 25/14.

The 1st Respondent states that, in light of the aforementioned circumstances, the Department was compelled to cancel the permanent appointments previously issued to the Petitioners by means of letters dated 31st March 2017 (marked "P9(1)" to "P9(42)").

The 1st Respondent further states that the Petitioners have failed to submit proof of the Petitioners' compliance with the relevant educational qualifications stipulated in paragraph 03 of the P.A.C. 25/14.

As such, the 1st Respondent maintains that: (a) the cancellation of the Petitioners' appointments was reasonable, in good faith and legal, and not politically motivated; (b) the Petitioners have failed to adduce any evidence to suggest that the cancellation of the Petitioners' appointments was politically motivated; and (c) in view of the

aforementioned facts, if the Petitioners' appointments were not cancelled, then it might appear that the Respondents have acted in violation of the provisions of the P.A.C. 25/14.

The 1st Respondent submits the following preliminary objections: (a) the Petitioners are attempting to obtain a relief they cannot obtain directly; (b) the Petitioners have suppressed and/or misrepresented material facts from/to this Court; (c) the Petitioners have failed to come before this Court with clean hands and/or the Petitioners are in breach of the doctrine of *uberima fides*; and (d) the Petition is filed after the expiry of the one month's time set out in Article 126(2) of the Constitution. The 1st Respondent, therefore, prays to dismiss the Petition.

The Preliminary Objections will be addressed within the body of the analysis.

Legal Analysis

Article 12(1) of the Constitution

The specific question before this Court is whether the decision of the 1st Respondent to remove the Petitioners from permanent employment is violative of the equality postulated by Article 12(1) of the Constitution.

The two well-known legal expressions that are interrelated to the concept of equality are found in Article 12(1) of the Constitution, and it provides as follows:

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

Thus, Article 12(1) of the Constitution confers a positive obligation on the State to ensure that every individual is entitled to equal treatment and equal protection guaranteed by the law, regardless of their status in a given circumstance. In this context, it is the duty of the Department of Irrigation to ensure that the permanent appointments are made in line with the P.A.C. 25/14 and its provisions thereof.

In the instant case, the Petitioners who were recruited to the said Department on an ad-hoc /Thaduchitha (තදුචිත) basis were later appointed as permanent employees in accordance with the P.A.C. 25/14 through appointment letters from the 1st Respondent effecting from 24/10/2014 (as provided in documents marked "P5(1)" to "P5(42)").

Thereafter, as per the letters (marked "P9(1)" to "P9(42)") received by the Petitioners, it is evident that the Petitioners had been removed from permanent employment on the basis that they had not continuously worked for a period of 180 days as required by the P.A.C. 25/14.

Accordingly, the grievance of the Petitioners is that the removal from employment of the Petitioners in the absence of a hearing and the erroneous interpretation of the P.A.C. 25/14 employed by the 1st Respondent are unjust, unlawful, arbitrary, capricious and in violation of the Petitioners' Fundamental Rights guaranteed by the Constitution.

However, in order to determine whether the 1st Respondent violated the Petitioners' Fundamental Rights under Article 12 (1) of the Constitution, firstly, it is necessary to examine the eligibility of the Petitioners to be considered under the P.A.C. 25/14 for permanent employment and secondly, the reasonableness of the conduct of the 1st Respondent.

The P.A.C. 25/14 granted permanent employment to those in the mentioned categories who had completed 180 days of continuous satisfactory service as of 24th October 2014 and who possess educational qualifications to have at least passed Grade 8/Year 9. The Petitioners were recruited as "Labourers" on ad hoc/Thaduchitha (තදුචිත) basis, and the said ad hoc /Thaduchitha (තදුචිත) basis was not recognized under the P.A.C. 25/14. In these circumstances, could the challenge based on Article 12(1) succeed? It is apparent from the foregoing circumstances that the Petitioners are not eligible to be considered under the P.A.C. 25/14 for permanent employment and thus have no right to claim permanent employment. The Petitioner cannot claim a right to which he is not entitled, and allowing such would be unlawful and indeed negate the

advancement of equal protection of law principle enshrined in Article 12 (1) of the Constitution.

G. P. A. de Silva J, in **Jayasekara V. Wipulasena and Others [1988] 2 Sri LR 237**, stated as follows:

> *"Article 12(1) cannot confer on the petitioner a right to which he is not entitled in terms of the very contract upon which he found his complaint of "unequal treatment"".*

In **K. J. A Chathumi Sehasa and Another v. S. Irani Pathiranawasam, Principal, Southlands Balika Vidyalaya and 7 Others [2018] S.C. [FR] Application No. 201/2017(SC Minutes dated 30. 05. 2018)**, Aluwihare PC, J. observed as follows:

> *"For the complaint of an unequal treatment of law to succeed the petitioner must show that the unequal treatment was meted out in the performance of a lawful act. It is a cardinal principle that equal treatment should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is illegal in law".*

Justice Shirani Bandaranayake in the case of **Farook Vs Dharmaratne, Chairman, Provincial Public Service Commission, Uva and others (2005) I Sri L. R. 133** observed as follows:

> *"When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his Fundamental Rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted*

illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act".

The Petitioners have also maintained that they were of the legitimate expectation that they would be confirmed in their appointments as there were no complaints against them that their work was unsatisfactory.

Prof. Endicott of the University of Oxford [Administrative Law 2nd ed. at p. 283] has commented that a legitimate expectation,

"Might be better called a 'legally protected expectation'".

In the case of **India vs. Hindustan Development Corporation (1993) 3 SSC 499** it was stated as follows:

"*However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiable, legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense.*"

When considering whether the Petitioners can base their application on legitimate expectation, this Court has already held that the Petitioners are not eligible under the P.A.C. 25/14 to be considered for permanent employment. Further, in the instant case, the Petitioners neither satisfy the minimum educational qualifications nor fulfil the requirement of satisfactorily working continuously for 180 days as required by the P.A.C. 25/14. Therefore, there is no legitimate expectation to be frustrated by the 1st Respondent.

With regard to the reasonableness of the conduct of the 1st Respondent in the instant case, although the Petitioners had been wrongly appointed as permanent employees through appointment letters (marked "P5(1)" to "P5(42)") effecting from 24th October 2014, the 1st Respondent had rectified the above by issuing fresh letters of appointment (marked "P6(1)" to "P6(8)") dated 18th August 2015 which comply with the provisions of the P.A.C. 25/14. As the 1st Respondent had taken action to rectify the previously issued letters of appointment to comply with the provisions of the P.A.C. 25/14, I am of the view that the conduct of the 1st Respondent is reasonable.

The Petitioners have also alleged that Petitioners were not provided with an opportunity to establish whether they satisfied the minimum qualifications required by the P.A.C. 25/14. As it has already been established that the Petitioners are not eligible to be considered for permanent employment under the P.A.C. 25/14, this Court can see no justification as to why the Petitioners should be afforded an opportunity for a hearing.

Furthermore, the allegation of the Petitioners that the 1st Respondent had erroneously interpreted the word "continuous" is dismissed by reason of the clarification sought from and the response thereto issued by the Ministry of Public Administration and Management to the Ministry of Irrigation and Water Resource Management which prescribed that the interpretation of the use of "continuous" was to mean 180 working days excluding public holidays, Saturdays and Sundays. The 1st Respondent had acted accordingly and in compliance with the aforementioned interpretation.

It must also be noted that the Petitioners accepted the appointment letters marked P6(1) to P6(8) dated 18/08/2015 without raising any objection and did not seek any relief from the Court at the time they received the above letters. And if the Petitioners are eligible under the Circular, they should have revealed all the details affirming the same. The absence of the above explanations show that the Petitioners were aware that they had no legal basis to challenge the above and thus, the Petitioners cannot now complain that their Fundamental Rights have been violated by the 1st Respondent.

The Petitioner had sought relief from the Court to quash the decision taken by the 1st Respondent to terminate the Petitioners' services and/or cancel the appointments, as well as claim advancements of money and loans obtained from the Government to be paid on or before 2nd May 2017. It must be borne in mind that the Petitioners cannot seek this Court to compel the Respondents to act illegally or against the law. The relief sought by the Petitioner is one that this Court, as a Court of Law and Equity, cannot provide since,

> "*Illegality and equity are not on speaking terms.*"

Therefore, this Court declares that the Petitioners' Fundamental Rights guaranteed under Article 12(1) of the Constitution have not been infringed by the Respondents in this instant case.

Article 12(2) of the Constitution

While Article 12(1) of the Constitution outlines the positive obligation of the State, Article 12(2) of the same sets out the negative obligation of the State to ensure that,

> *"No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds"*.

The Petitioners allege that the Petitioners' removal from employment is an organised attempt at political revenge since the appointments were made permanent by the

previous government. In the instant case, the Petitioners are attempting to insinuate that the Petitioners were discriminated against based on the grounds of political opinion. However, this allegation is insufficient, especially in the absence of any material evidence illustrating the Petitioners' association with the previous government, in establishing that the Petitioners' removal from employment by the 1st Respondent infringes the Fundamental Rights secured by Article 12(2) of the Constitution. In actuality, the decision of the 1st Respondent in removing the Petitioners from employment is evidently in accordance with the provisions prescribed by the P.A.C. 25/14.

In these circumstances, this Court declares that the Petitioners' Fundamental Tights under Article 12(2) of the Constitution have not been violated in the instant case.

Article 14(1)(g) of the Constitution

This Court shall now deal with the Petitioners' complaint of a violation of Article 14(1)(g) of the Constitution.

Article 14(1)(g) of the Constitution states as follows:

> *"Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."*

It must be noted that this is not an absolute right. It is subjected to Article 15(5), 15(7) and 15(8):

> *"15(5) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to –*

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

15(7) The exercise and operation of all the Fundamental Rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

15(8) The exercise and operation of the Fundamental Rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them."

Further, Article 28(c) of the Constitution lays down the following duty:

"(28) The exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka –

(c) to work conscientiously in his chosen occupation."

Justice A.R.B. Amerasinghe in **W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation S.C. Application No.7/88 [1988] 2 Sri L.R. 393** observed as follows:

> *"In an application for relief under Article 14(1)(g), the Petitioner must also show that her right to engage in any lawful occupation, profession, trade, business or enterprise was, unreasonably obstructed. The Petitioner must go further still and establish that the right claimed was (a) a legal right and that (b) it is a fundamental right."*

He further added that:

> *"Article 14(1)(g), recognizes the right of every citizen to use his powers of body and mind in any lawful calling: to pursue any livelihood and avocation. It confers no obligation to give any particular kind of work or indeed any right to be continued in employment at all."*

It would thus be seen that Article 14(1)(g) of the Constitution confers on citizens of Sri Lanka the fundamental right to do work of any particular kind and of their choice. It does not, however, confer the right to hold a particular job or to occupy a particular post of one's choice.

The equivalent to Article 14(1)(g) of our Constitution is Article 19(1)(g) of the Indian Constitution, which states:

> "All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business."

In **Fertilizer Corporation v. Union of India (1981) AIR 344, 1981 SCR (2) 52**, the Court held that Article 19(1)(g) of the Indian Constitution does not protect the right to work in a particular post under a contract or employment, and as such Article 19(1)(g)

of the Indian Constitution cannot be invoked against the loss of a job or removal from service.

A similar view was taken in **Elmore Perera v. Major Montague Jayawickrema**, **Minister of Public Administration and Plantation Industries [1985] S.C./Application No. 134/84,** where Chief Justice Sharvananda stated as follows:

> *"Article 14(1)(g) recognises a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice. The compulsory retirement complained of, may, at the highest affect his particular employment, but it does not affect his right to work as a Surveyor."*

In the instant case, the Petitioners have failed to establish that their right to engage in any lawful occupation, profession, trade, business or enterprise was unreasonably obstructed by the Respondents. As this Court exhibited the view that the Petitioners are not eligible to be considered for permanent employment under the P.A.C. 25/14, the Petitioners have further failed to establish that the claimed right was a legal right. Correspondingly, this Court observes that the removal of employment of the Petitioners affects the Petitioners' particular status of employment but does not affect their right to work as "Labourers".

Hence, I am of the view that the Respondents have not infringed the Petitioners' Fundamental Rights guaranteed in terms of Article 14(1)(g) of the Constitution.

Time Bar

The Counsel for the Respondent took up a preliminary objection that the Petition has not been filed within the time frame stipulated in terms of Article 126(2) of the Constitution. As this Court observed, the impugned letters of termination were issued on 31st March 2017 and received by the Petitioners on 7th April 2017. Thereafter, the Petitioners filed the application for the instant case on 5th May 2017. It must be noted

that the one-month time period prescribed by Article 126(2) of the Constitution does not commence from the date the right was violated upon, but instead commences from the date when either party is made aware of this violation or when one can feasibly take steps to come before this Court. Therefore, based on the facts and circumstances of this case, this Court takes the view that the application of the Petitioners in the instant case is not barred by time and accordingly, the preliminary objection raised by the Respondent is dismissed.

Decision

In view of the foregoing circumstances and reasons, I hold that the decisions and conduct of the 1st Respondent have not infringed the Fundamental Rights guaranteed by Articles 12(1), 12(2) and 14(1)(g) of the Constitution. Therefore, I proceed to dismiss this application.

Application Dismissed.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/FR/100/2022

Rannula Sugath Mohana Mendis,

Puwakwatta Road,

Kithulampititya,

Uluwitike,

Galle.

PETITIONER

vs.

1. D. K. A. Sanath Kumara,
   Assistant Superintendent of
   Police, Embilipitiya.

2. M. N. S. Mendis,
   Senior Superintendent of Police,
   Embilipitiya.

3. J. S. Wirasekara,

Deputy Inspector General of Police,
Rathnapura.

4. Mahinda Gunarathna,
   Senior Deputy Inspector General of Police,
   Sabaragamuwa Province.

5. C. D. Wickramaratne,
   Inspector General of Police,
   Sri Lanka Police,
   Police Headquarters,
   Colombo 01.

6. Justice Jagath Balapatabendi,
   Chairman,

7. Indrani Sugathadasa, Member,

8. Dr. T. R. C. Ruberu, Member,

9. Ahamod Lebbe Mohamed Saleem, Member,

10. Leelasena Liyanagama, Member,

11. Dian Gomes, Member,

12. Dilith Jayaweera, Member,

13. W. H. Piyadasa, Member,

14. Suntharam Arumainayaham,
    Member,

15. M. A. B Daya Senarath, Secretary,

    The 7th to 15th respondents: all of:
    Public Service Commission,
    1200/9, Rajamalwatha Road,
    Battaramulla.

16. Major General (retd). Jagath Alwis,
    Secretary to the Ministry of Public
    Security, Ministry of Public
    Security,
    14th Floor "Suhurupaya",
    Battaramulla.

17. Hon. Attorney General
    Attorney General's Department,
    Hulftsdorp, Colombo 12.

RESPONDENTS

BEFORE : **PRIYANTHA JAYAWARDENA, PC, J**
S. THURAIRAJA, PC, J AND
MAHINDA SAMAYAWARDHENA, J

COUNSEL : Viran Corea with Thilini Vidanagamage instructed by Lilanthi De Silva for the Petitioner

Suharshie Herath, DSG for all Respondents

WRITTEN SUBMISSIONS : Petitioner on 14th September 2022

ARGUED ON : 12th December 2022

DECIDED ON : 06th October 2023

S. THURAIRAJA, PC, J.

The Petitioner, namely Rannulu Sugath Mohana Mendis, (hereinafter referred to as the "Petitioner") filed an application in the Supreme Court of Sri Lanka on the 23rd of March, 2022 against the Respondents, for alleged violation of fundamental rights enshrined under Articles 12(1) and 14 (1)(g) of the Constitution, and prayed *inter alia* for his salary to be paid until the final determination of this Application.

When the matter was taken up on the 18th of May, 2022, upon hearing both Counsel, the Court granted Leave to Proceed against the 1st – 14th Respondents under Articles 12(1) and 14(1)(g) of the Constitution. The facts and circumstances of the instant case are set out in brief below.

The Petitioner is a Police Officer of the Sri Lankan Police and he had joined the Sri Lanka Police on the 01st of July, 1995 as a Police Constable. He was promoted to a Police Sergeant with effect from the 01st of May, 2007, and as a Sub-Inspector of Police with effect from the 31st of May, 2018.

The Petitioner had served for more than twenty-five (25) years in the service of the Police Force and at the time of filing the instant application, he was 52 years of age. The Petitioner also claimed that his wife and three younger children depend on him.

Further, on or about the 01st of August, 2020, while discharging his duties as a Sub Inspector of Police at the Embilipitiya Police Station, a 'Message Form' had been sent from the Colombo Crimes Division, which the Petitioner received on or about the 2nd of August, 2020. Whereby, the Petitioner was asked to give a statement pertaining to a suspect named Naligamage Dileepa Asanka Naligama who was arrested upon a statement made by I.P. Wilwala Arachchi dated 11th of March, 2014.

Thereafter, the Petitioner was arrested on the 03rd of August, 2020 and produced at the Gampaha Magistrate's Court with a B-report bearing No. 1536/20/CDD on purported allegations that the suspect had falsely introduced certain weapons that fell within the ambit of the Offensive Weapons Act No. 18 of 1966, Firearms Ordinance No. 33 of 1916 as amended by Act No. 22 of 1996 and the Explosives Act No. 21 of 1956 as amended by Act No. 33 of 1969. The B-report also alleged that the suspect had fabricated evidence to frame and arrest the former Deputy Inspector General Police, namely Vass Gunawardena. However, the investigations relating to the said B-Report were pending in Court as at the date of filing the instant application.

Subsequently, the 1st Respondent, namely the Assistant Superintendent of Police, Embilipitiya (hereinafter referred to as the "1st Respondent"), issued a purported letter of interdiction dated the 07th of August, 2020 (Ref: EM/ASP I/2416/2020), placing the Petitioner on interdiction without pay.

According to the said letter, the Petitioner was alleged to have caused one or more acts of misconduct set out in section 31:1 of Chapter XLVIII of the Establishment Code (Volume II).

Section 31:1 of Chapter XLVIII of the Establishment Code (Volume II) reads as follows:

> ***"31. Interdiction and Compulsory Leave***
>
> *31:1 Where it is disclosed, prima facie, that a public officer has committed either one or some or all of the following acts of misconduct, the relevant*

Disciplinary Authority, or the relevant Secretary to the Ministry of Head of Department not holding disciplinary authority, may forthwith interdict the officer concerned subject to the covering approval of the Disciplinary Authority should be informed sending also a copy of such letter to the purpose of obtaining covering approval.

31:1:1 *Non-allegiance to the Constitution of the Democratic Socialist Republic of Sri Lanka.*

31:1:2 *Act or cause to act in such a manner as to bring the Democratic Socialist Republic of Sri Lanka into disrepute.*

31:1:3 *Being prosecuted in a Court of Law on anti-government, terrorist or criminal charges.*

31:1:4 *Being prosecuted in a Court of Law on bribery or corruption charges.*

31:1:5 *Being drunk or smelling of liquor within duty hours or within Government premises.*

31:1:6 *Use or be in possession of narcotic drugs within duty hours or within Government premises.*

31:1:7 *Misappropriate or cause another to misappropriate government funds.*

31:1:8 *Misappropriate government resources or cause such misappropriation, or cause destruction or depreciation of government resources willfully or negligently.*

31:1:9 *Act or cause to act negligently or inadvertently or willfully in such manner as to harm government interests.*

31:1:10 Act in such a manner to as to bring the public service into disrepute.

31:1:11 Divulge information that may harm the State, the State Service or any other State Institution or make available or cause to make available State documents or copies thereof to outside parties without the permission of an appropriate authority.

31:1:12 Alter, distort, destroy or fudge State documents.

31:1:13 Conduct oneself or act in such manner as to obstruct a public officer in the discharge of his duties, or insult, or cause or threaten to cause bodily harm to a public officer.

31:1:14 Refuse or neglect to carry out lawful orders given by a Senior officer, or insubordination.

31:1:15 Where it is considered that allowing an officer to perform his duties is harmful or imprudent so far as the public service is concerned."

The Petitioner stated that prior to receiving the purported letter of interdiction, he had an unblemished career in the Police Force. Further, the Attorney General in his letter dated 19th of October, 2011 **(P3(a))**, commended the Petitioner who was part of the investigating team, stating "high commendation in solving a gruesome crime," for his contribution in resolving the murder of two young suspects while in police custody (in the High Court Trial-at-Bar Case 5247/2010). Another letter issued by the Additional Solicitor General, Jayantha Jayasuriya, P.C. (as he was then) dated 08th of July 2014 (**P3(l)**) commended the "meticulous and diligent conduct" of the investigation into the Royal Park Murder Case, of which the Petitioner was an investigator and that letter was forwarded to the Attorney General who sent another letter commending the

Petitioner's work by letter dated 09th of July, 2014 **(P3(m))**. Apart from those, many commendations, special increments and awards have been awarded to the Petitioner by the Police Department.

However, as per the submissions of the counsel for the Petitioner, he was not served with an indictment nor a charge sheet from the 2nd of August, 2020 until to date. Furthermore, no preliminary investigation was carried out prior to issuing the letter of interdiction.

Once the purported letter of interdiction was received, the Petitioner's wife filed a complaint on his behalf in the Human Rights Commission, dated the 2nd of September, 2020 (HRC/1906/20) which is currently pending before the said Commission.

Numerous applications made on behalf of the Petitioner to obtain bail were rejected by the learned High Court Judge of Gampaha. In or about February 2021, the Petitioner's wife filed an application for revision in the Court of Appeal to revise the order given by the learned High Court Judge. Consequently, the Petitioner was enlarged on bail by the Court of Appeal. The Court of Appeal in its judgement observed the following;

> *"It is my view that on account of the unusual and extraordinary delay in lodging the first complaint despite every ability to do so demonstrates very strongly that the allegations against the suspect Rannulu Sugath Mendis are a result of falsification and embellishment and a creature of after-thought.* ***On account of the said unusual and extraordinary delay, the complaint has not only lost the benefit of the advantage of spontaneity, but also smacks of the introduction of a fabricated, false version and an exaggerated account or concocted story involving a set of collaborators or conspirators, to unduly cause prejudice and harm to the suspect Rannulu Sugath Mendis, for collateral purposes****. Not only that the said delay has not been*

satisfactorily or credibly explained. It is crystal clear that the statements given by the said witnesses in 2020 are contradictory to statements given by them in 2014.

Upon the statements of apparent backers and supporters or collaborators of the convicted murders, purported facts have been reported in B/1536/20 to the Learned Magistrate's Court of Gampaha against the suspect, in a blatant attempt to frame allegations through fabrication of false evidence pertaining to purported commission of offences under the Penal Code and for the purported possession of a cache of firearms, explosives and ammunition in a manner that constitutes offence under the Offensive Weapons and the Explosives Act. ***However, no credible evidence had been brought to the attention of the Court to substantiate this position or credibly establish a semblance of a prima facie case****."*

(Page 8-9 of the Judgement in Case CA (Rev.) Application No. CA/CPA/19/2021)

(Emphasis added)

The learned Judges of the Court of Appeal further observed that with regard to the purported possession of firearms under the Offensive Weapons Act No. 18 of 1966 and the Explosives Act No. 21 of 1956 as amended by Act No. 33 of 1969, it follows

> "no credible evidence had been brought to the attention of the Court to substantiate this position or credibly establish a semblance of a prima facie case."

The Petitioner further stated that he remained without his *salary until the Supreme Court made an interim order directing to pay his salary. The Petitioner stated that such treatment is a continuing infringement of his fundamental rights guaranteed under Articles 12(1) and 14 (1)(g) of the Constitution.*

The Petitioner claims that the actions of the Respondents have violated his rights under Article 12(1) and Article 14(1)(g) of the Constitution.

Article 12(1) of the Constitution provides as follows;

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

Article 14(1)(g) of the Constitution provides as follows;

> *"Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."*

In light of the facts and circumstances of the instant case, there are two issues which are required to be answered. Firstly, whether the Respondents are empowered by law to take action against the Petitioner, and secondly, whether the actions of the Respondents violate the rights of the Petitioner guaranteed by Article 12(1) and 14(1)(g) of the Constitution.

In addressing the first question of law, it must be considered whether the Respondents have the authority to interdict the Petitioner in the manner stated above. As per Article 57(1) of the Constitution, the Public Service Commission (PSC) has delegated its powers to the Assistant Superintendent of Police (ASP) under the Extraordinary Gazette No. 2202/24 dated 20th of November, 2020. Thereby, the 1st Respondent being the ASP has the necessary powers with regard to interdiction within the purview of respective administrative area.

The Petitioner's contention is that there was no preliminary investigation conducted prior to interdicting him from the service or up to the time of the hearing of this appeal and no specific reasons were given for his interdiction.

Section 31:3 of the Establishments Code provides for the manner in which notice of interdiction should be conveyed to a Public Officer. Accordingly, the said section provides that,

> *"an authority who decides to interdict a public officer in terms of subsection 31:1 above* ***should note clearly and specifically*** *in the relevant file* ***the reasons on which such a decision was based."***
>
> *(Emphasis added)*

Section 31:4 of the Establishments Code states as follows:

> *"Normally a public officer should be interdicted on matters relating disclosed in a* ***preliminary investigation held*** *into the charges against him."*
>
> *(Emphasis added)*

However, the letter of interdiction dated 7th of August 2020 sent by the 1st Respondent and received by the Petitioner states as follows:

> *"ඒ අනුව ඔබ ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ආයතන සංග්‍රහයේ II වන කාණ්ඩයේ XLVIII වන පරිච්ඡේදයේ 31.1 අනුව වීෂමාචාරයන් එකක් හෝ කිපයක් හෝ සියල්ලම හෝ සිදුකර ඇති බව බැලූ බැල්මට පෙනී යන බැවින්... මූලික විමර්ශණයකට යටත්ව වහාම ක්‍රියාත්මක වන පරිදි 2020.08.03 වන දින සිට ඔබගේ වැඩ තහනමට ලක්කරමි. වැටුප් හා දීමනා කිසිවක් හිමි නොවේ."*

The unofficial translation of the above is provided below;

> *"Accordingly, as it appears prima facie that you have committed one or more or all of the violations in accordance with Chapter XLVIII, Volume II, Establishments Code of the Democratic Socialist Republic of Sri Lanka... subject to preliminary investigation, your work will be suspended with*

immediate effect from 03.08.2020 and will not be entitled to any remuneration and other benefits."

It must be noted that the letter does not "clearly and specifically" state the reasons for the interdiction of the Petitioner, as required under section 31:3 as cited above.

In terms of section 31:4 of the Establishment Code, a public officer should be interdicted on matters disclosed during the Preliminary Investigation. It is pertinent to note that well over two years since the interdiction, no such preliminary investigation have been conducted. This is a blatant disregard of the disciplinary power vested on the 1st Respondent as well as a grave injustice done to the Petitioner.

However, as per section 31:5:3 of the Establishment Code, a relevant authority can interdict a public officer even without holding a preliminary investigation where *Court proceedings have been instituted against a public officer in terms of section 27 of the Establishment Code. In such a scenario, at the very least,* action should be taken to hold a preliminary investigation as required under section 31:7 of the said Code. For the purposes of the aforementioned provisions, the Respondent would constitute a "relevant authority".

Section 27 of the Establishment Code provides the procedure followed when a Court of Law or Statutory Authority proceeds with a case filed against a Public Officer such as the Petitioner, whereby section 27:1 of the Code provides that it must be reported to the necessary authority to take action against the said officer.

Under such circumstances, under section 27:9 of the Establishments Code the Petitioner should have been reinstated if the Disciplinary Authority determined that "his reinstatement will not adversely affect the interests of the public service", taking into consideration the observation made by the learned Judges of the Court of Appeal who granted the bail, and stated in his judgement that "no credible evidence has been brought to the attention of the Court to substantiate this position or credibly establish

a semblance of a prima facie case". However, no steps had been taken to reinstate the Petitioner in his post.

Section 27:10 of Chapter XLVIII of Volume II of the Establishments Code, as amended by the Public Administration Circular 06/2004 dated 15th of December, 2004 now reads as provided below:

> *"the Disciplinary Authority/ Administrative Authority* ***should conduct a preliminary investigation against such Officer within a period not more than 02 months****. The respective preliminary investigation report should be submitted to the Public Service Commission by the Disciplinary Authority/ Administrative Authority and* ***if the Public Service Commission determines that the reinstatement of the Officer concerned is not detrimental to the interests of the Public Service according to facts revealed by such report, such an Officer may be reinstated in service****."*
>
> *[Emphasis added]*

However, under the above section, if it is decided that the reinstatement would be detrimental to the interests of the Public Service, then as per section 27:10:1, the Petitioner's interdiction will remain in force pending the final outcome of the case. However, this section also provides that if the delivery of the Judgement exceeds the timeframe of a year, then the Disciplinary Authority may authorise the payment of salary not exceeding half thereof to the officer concerned. In the instant case, even two years after the Petitioner was interdicted, no preliminary investigation was begun, nor was he given his salary due to him. The Respondents have committed a grave error in keeping the Petitioner on interdiction for a long period of time. There were numerous opportunities to rectify their wrongs before this case was taken up in the Supreme Court, but they have not done so.

The Petitioner has submitted letters to the Chairman of the National Police Commission dated 1st of July, 2022, the Chairman of the Human Rights Commission Sri Lanka, the Director of Police Ombudsman Division, and the Deputy Inspector General of Police through the relevant chain of command, and requested for his reinstatement. The Petitioner is yet to receive reasons as to why he was interdicted from service.

If this Court were to criticise the actions of the Police Force, it need not look further than the police motto itself; "ධම්මෝ හවේ රක්ඛති ධම්මචාරී" which states "those who live by the Dhamma are protected by the Dhamma". One would expect that the Police force of Sri Lanka would follow this motto when carrying out their duties, without *mala fide*. However, we observe, they have failed to stick to the basics of their code of conduct and the principles of natural justice.

It is pertinent to note that when this matter came up in Court on the 18th of May, 2022, Court made an interim order and fixed this application for hearing on the 21st of September, 2022. Further, the Court made the following order:

"Objections, counter objections, written submissions in terms of the rules."

On the 5th of August 2022, the Instructing Attorney for the Petitioner filed a motion informing the Court that the Respondents have not complied with directions given by the Court as well as not complied with the rules of the Supreme Court. He also informed the Court that the interim order was not complied with. On the 14th of September, 2022, the listing Judge-in Chambers made an order to support this motion on the 21st of September, 2022, in Open Court, i.e. the date fixed for the hearing of this application.

On the 21st of September, 2022, the said Attorney filed another motion stating that the Respondents have not complied with order made by the Court as well as the rules of the Supreme Court. Further, the Respondents have not sought or obtained any further time for filing of objections and written submissions. Moreover, the Petitioner

has filed written submissions and objected for any time being granted for Respondents to file objections.

When the matter was listed for hearing on the 21st of September, 2022, the learned Deputy Solicitor General had sought permission to file counter objections or further material **in relation to the motion dated 5th of August, 2022** and Court granted time until the 22nd of September, 2022. However, the Respondents did not file any objections or any material to counter the facts stated in the said motion.

In the meantime, on the 14th of September, 2022, the Attorney-at-Law for the Petitioner filed a motion and tendered the written submissions on behalf of the Petitioner. In the motion, she categorically stated that the Respondents have not filed any objections and therefore, they are objecting for filing of any objections and/or written submissions.

On the 22nd of September, 2022, the 4th Respondent filed an Affidavit through his Registered Attorney. Paragraph 6 and 7 of the Affidavit states as follows:

> *"I state that an administrative difficulty as to the payment in full of the salary to an officer serving an interdiction arose in making the payment in full of the salary to an officer under interdiction and necessitated the Head of the Department to be kept informed."*
>
> ***Vide Paragraph 6***
>
> *"I state that, in the circumstances, I brought the matter to the attention of the Inspector General of Police (IGP)."*
>
> ***Vide Paragraph 7***

This is a completely different stance taken by the DSG before this Court on the 21st of September, 2022. When the application came up in Court, on the 23rd of September, 2022, the Court observed that the DSG has not filed any counters or any other materials other than the Affidavit of the 4th Respondent dated 22nd of September, 2022.

The Petitioner supported the motion dated 14th of September, 2022 and moved Court to make an order. As the learned DSG neither filed objections, nor sought permission for further time to file the same, as per the Supreme Court Rules, Court allowed the motion filed by the Petitioner and refused to grant a date to file objections of the Respondents. Thereafter, the application was fixed for argument for the 16th of November 2022.

On the 10th of October 2022, the 5th Respondent, had filed an Affidavit dated 7th of October, 2022. In the said Affidavit, it was stated that the Petitioner had been reinstated in service on the 23rd of September, 2022, and is currently serving at the Hikkaduwa Police Station and arrears of his salary had been paid.

Further, it is stated that the reinstatement was:

I. subject to Court orders and

II. subject to disciplinary action related to the incident (especially Establishments Code Volume II Section 27:10).

This reinstatement is proof to show that the Respondents themselves have accepted that their previous decision to interdict the Petitioner was wrong. Looking at the hardships that the Petitioner has been subject to, in the words of Fernando, ACJ, in **Range Bandara v. Gen. Anuruddha Ratwatte and Another (1997) 3 Sri LR 360**, this treatment was

> "not the result of a mistake or error of judgment, but of a misuse of those powers, of a kind which demoralises and demotivates the victim, and indirectly the entire service"

When any State authority or the Sri Lankan Police arrive at a decision, that decision should be supported by materials available to them. Further, the authority must be able to defend the decision, if it is questioned before a Court of Law or a Tribunal. Whether the Court decides to accept or disregard such evidence, they should be able

to submit such evidence before the Court. In this application, the Respondents did not file objections within the time given by Court. Hence, the averments in the Petition filed by the Petitioner are not challenged. Accordingly, the Court is required by law to act on the averments in the Petition and that did not happen, and were they unable to defend their decision to interdict the Petitioner.

In a government service, the government servants should be able to work independently without fear or favour. If the relevant authorities are unable to provide such an environment, it will lead to corruption, which ends up in weak or poor government service.

Decision

After careful consideration of the facts and circumstances outlined above, I hold that the Petitioner's rights, as guaranteed by Articles 12(1) and 14(1)(g) of the Constitution, have been violated by the Respondents.

Therefore, I direct the State to pay as compensation, Rupees One Million (Rs. 1,000,000) to the Petitioner within 3 months from the date of this judgment.

Furthermore, I direct the Respondents to retrospectively grant all salary increments, benefits, and promotions to the Petitioner, extending up to the date of his retirement from the Police Service if he has already retired from the service.

Application Allowed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 99 (13) (a) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Expulsion 01/2022

Zainul Abdeen Nazeer Ahamed
No. 107, Railway Avenue,
Kirulapone, Colombo 05

PETITIONER

Vs.

1. The Sri Lanka Muslim Congress,
   Dharussalam
   No 51, Vauxhall Lane,
   Colombo 02.

2. Rauff Hakeem
   Leader, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

3. A. L. Abdul Majeed
   Chairman, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

4. A. C. Raawather Naina Mohamed
   Senior Deputy Leader, Sri Lanka
   Muslim Congress

No 51, Vauxhall Lane,
Colombo 02.

5. U. T. M. Anver
   Deputy Leader II, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

6. Br. H. M. M. Harees,
   Deputy Leader III, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

7. Br. S. M. A. Gaffoor,
   Deputy Leader IV, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

8. Br. Nizam Kariapper,
   Secretary, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

9. Br. M. S. M. Aslam,
   Treasurer, Sri Lanka Muslim Congress
   No 51, Vauxhall Lane,
   Colombo 02.

10. Br. M. I. M. Mansoor
    National Coordinating Secretary, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,

Colombo 02.

11. Moulavi A. L. M. Kaleel
    President Majlis – e-Shoora , Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

12. Br. U. L. M. N. Mubeen
    National Propaganda Secretary, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

13. Shafeek Rajabdeen
    National Organiser, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

14. Br. A. M. Faaiz
    Director International Affairs, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

15. Br. M. B. Farook
    Director Constitutional Affairs, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

16. Br. M. S. Thowfeek
    Director Affiliated Bodies, Sri Lanka Muslim Congress

No 51, Vauxhall Lane,
Colombo 02.

17. Moulavi H. M. M. Ilyas
    Representative of the Ulema's
    Congress, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

18. Br. K. A. Baiz
    Director Political Affairs, Sri Lanka
    Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

19. Br. M. Naeemullah
    Deputy Chairman, Sri Lanka Muslim
    Congress
    No 51, Vauxhall Lane,
    Colombo 02.

20. Br. Mansoor A. Cader
    Deputy Secretary, Sri Lanka Muslim
    Congress
    No 51, Vauxhall Lane,
    Colombo 02.

21. Br. Ziyadh Hamieedh
    Deputy President Majlis – e - Shoora,
    Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

22. Br. Rahmath Mansoor

Deputy National Coordinating
Secretary, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

23. Seyed Alizahir Moulana
Deputy National Propaganda
Secretary, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

24. Br. M. Faizal Cassim
Deputy National Organiser, Sri Lanka
Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

25. Br. A. L. M. Nazeer
Coordinator Political & Religious
Affairs, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

26. S. L. M. Faleel
Coordinator Education & Cultural
Affairs, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

27. R. M. Anver MPC
Coordinator Social Service & Disaster
Relief, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

28. A. L. Thavam MPC
    Coordinator Youth & Employment
    Affairs, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

29. Ms. Sithy Rifaya Ifthie
    Ladies Congress Representative, Sri
    Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.
30. Br. A. J. M. Rizvi
    Secretary Working Committee, Sri
    Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

31. Br. I. L. M. Mahir MPC
    Secretary – Delegate's Conference,
    Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

32. Br. U. M. Wahid
    Secretary – Majlis – e-Shoora, Sri
    Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

33. Br. M. H. Abdul Hai
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

34. Br. M. Y. M. Hilmy

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

35. Br. J. Ansar
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

36. Br. A. S. M. Rilvan
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

37. Br. M. N. M. Nafly
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

38. Br. M. I. M. Firthouse
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

39. Br. Jaufer Marikar
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

40. Br. A. M. Rakeeb
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

41. Br. M. T. Thameem

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

42. Br. M. H. A. Gaffoor
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

43. Br. J. M. Lahir
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

44. Br. M. H. M. Nazik
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

45. Br. M. Safee Raheem
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

46. Br. Arshad Nizamdeen
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

47. Br. M. H. Segu Ismail
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

48. Br. N. Mahir

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

49. Br. M. S. A. Waasith
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

50. Br. M. I. Naiser
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

51. Br. A. M. Harees
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

52. Br. M. H. M. Salman
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

53. Br. J. M. Fuard Najeeb
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

54. Moulavi U. M. Jabeer
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

55. Br. S. H. M. Niyas

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

56. Br. H. M. Rayees
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

57. Br. A. R. A. Hazeer
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

58. Br. A. C. A. Nazar
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

59. Br. Moulavi A. M. Mubardeen
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

60. Br. A. H. Fairoze
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

61. Br. A. H. Fairoze
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

62. Br. A. C. Yehya Khan

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

63. Br. S. M. M. Musthaffa
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

64. Br. Marzuk Ahamed Lebbe
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

65. Br. Shibly Farook
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

66. Br. Arif Samsudeen
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

67. Br. A. Jalaaldeen
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

68. Br. B. Thajudeen
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

69. Br. H. M. M. Riyal

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

70. Br. M. N. M. Jawzy
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

71. Br. F. Fatheen
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

72. Br. M. S. M. Marzook
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

73. Br. Riya Mashoor
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

74. Br. Hunais Farook
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

75. Br. H. M. M. Faiz
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

76. Br. S. M. A. Niyas

Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

77. Br. Athamlebbe Nafeel Amanulla
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

78. Br. K. M. Nihar
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

79. Br. M. M. A. Aroos
Chairman Mutur Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

80. Br. A. Mubarak
Chairman KPS Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

81. Br. Rizvi
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

82. Br. Aliyar Nazeer
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

83. Moulavi M. A. J. Mohamed Jazeel
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

84. Br. K. Ameenullah
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

85. Br. M. S. M. Ilham Sathar
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

86. Br. M. H. M. Najath
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

87. Br. Seiyadu Mohamed Ibrahim
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

88. Seen Mohamed Mohamed Haniffa
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

89. M. T. Mohamed Safras
    Member, Sri Lanka Muslim Congress
    No 51, Vauxhall Lane,
    Colombo 02.

90. Br. S. M. A. Ansar Moulana
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

91. Br. Ayathubawa Riyas
Member, Sri Lanka Muslim Congress
No 51, Vauxhall Lane,
Colombo 02.

The 2nd to 91st Respondents above named all being members of the High Command of the Sri Lanka Muslim Congress Dharussalam, No 51, Vauxhall Lane, Colombo 02.

92. Dammika Dissanayaka
Secretary General of Parliament
Parliamentary Complex,
Sri Jayawardenapura Kotte.

93. Nimal G. Punchihewa
Chairman, Election Commission
Election Secretariat,
Sarana Mawatha,
Colombo 12.

94. S. B. Divaratne
Member Election Commission
Election Secretariat,
Sarana Mawatha,
Colombo 12.

95. M. M. Mohamed
Member Election Commission
Election Secretariat,
Sarana Mawatha,
Colombo 12.

96. A. P. P. Pathirana
Member Election Commission
Election Secretariat,
Sarana Mawatha,
Colombo 12.

97. J. Thiyagarajah
Member Election Commission
Election Secretariat,
Sarana Mawatha,
Colombo 12.

RESPONDENTS

Before : **P. PADMAN SURASENA, J**
: **S. THURAIRAJA PC, J**
: **MAHINDA SAMAYAWARDHENA, J**

Counsel : Sanjeeva Jayawardena PC with Ruwantha Cooray, Rukshan Senadheera and Punyajith Dunusinghe for the Petitioner.

M. A. Sumanthiran PC with Viran Corea, Anne Kulanayagam and Divya Mascranghe for the 1st, 2nd, and 8th Respondents.

Dr. Romesh de Silva PC with Niran Anketel for the 17th and 21st Respondents.

Uditha Egalahewa PC with N. K. Ashokbharan for the 33rd Respondent.

Kuvera de Zoysa PC with Pasindu Bandara for the 41st, 42nd and 45th Respondents.

Indumini Randeny SC for the 92nd to 97th Respondents.

Argued on : 10.05.2023, 23.06.2023

Decided on : 06.10.2023

P Padman Surasena J

THE BACKGROUND

The Petitioner is a member of the 1st Respondent party, the Sri Lanka Muslim Congress (hereinafter sometimes referred to as the 'SLMC'). The SLMC is a political party recognized under the Parliamentary Elections Act No. 01 of 1981 (as amended).

The 2nd Respondent and the 3rd Respondent in this case are respectively, the Leader and the Chairman of the SLMC and are also members of the SLMC's High Command. The High Command of the SLMC is the apex decision making body of the party.

According to the petition, the 4th-91st Respondents are also members of the High Command of the SLMC. The 92nd Respondent is the Secretary General of the SLMC and the 93rd Respondent is the Chairman of the Election Commission, while the 94th to the 97th Respondents are all members of the Elections Commission.

At the General Election conducted in the year 2020, the Petitioner was elected as a Member of Parliament from the SLMC and agreed to conduct himself as a member of the opposition in line with the electoral pact of the SLMC. The Petitioner along with the 6th, 16th and 24th Respondents had signed a document as members and representatives of the SLMC in parliament pledging their loyalty to the constitution, rules and regulations of the SLMC. The Petitioner himself has produced the said special pledge of loyalty to the constitution, rules and regulations marked '**P5**' with his Petition. The facts relevant to the instant case revolves around the voting took place at the budget proposal (Appropriation Bill) for the year 2022 presented to the Parliament by the Hon. Minister of Finance on 12-11-2021. The second reading of the said Appropriation Bill had been fixed for 22-11-2021. The SLMC had then called an urgent meeting of the High Command to be held on 21-11-2022 which is the day prior to the said scheduled second reading. This was for the purpose of deciding how members of the SLMC should vote at the second reading of the said Appropriation Bill.

It is the position of the SLMC that its High Command had decided at that meeting not to vote in favour of the said Appropriation Bill in Parliament. The High Command had also decided that the SLMC members could either vote against the said Appropriation Bill or abstain from voting. The 1st Respondent has produced its decision marked '**1R2**'. It is the position of the SLMC that the Petitioner being aware of the aforesaid meeting and its unanimous decision taken on 21-11-2021 had nevertheless proceeded to vote in favour of the said Appropriation Bill on 22-11-2021 at its second reading, and at the third reading as well, in blatant violation of the said decision of the SLMC High Command. The SLMC has alleged that the Petitioner while holding a senior and substantial position in the party High Command has breached the party decision.

The Petitioner admits that he was aware of the said meeting which was to be held on 21-11-2022 to decide on the party position in the voting at the said second reading of the said Appropriation Bill which was scheduled on 22-11-2021. However, the petitioner states that upon being informed that the said meeting of the High Command was to be held on 21-11-2021 at the party headquarters, he had duly communicated to the Secretary of the SLMC of his inability to attend the said meeting and sought to be excused from the said meeting. It is the position of the Petitioner that he was not informed of any such decision taken at the meeting held on 21-11-2021 and therefore he had voted in favour of the aforesaid Appropriation Bill at its second reading held in Parliament on 22-11-2021.
It was in the above circumstances, that the SLMC has called for a written explanation from the Petitioner by the letter dated 27-11-2021 (produced marked "**P9**") signed by the 8th Respondent who is the Secretary of the SLMC. After the exchange of several other letters between the SLMC and the Petitioner which I will refer to later in this judgment, the SLMC by the letter dated 23-04-2022 produced marked **P15**, had communicated to the Petitioner about his expulsion from the party. Thus, it is in the above backdrop that the Petitioner has filed the Petition in the instant case in terms of Article 99 (13) (a) of the Constitution, praying in his Petition for an order from this court to set aside and invalidate the SLMC's decisions to expel him from the party as per letter **P15** dated 23-04-2022.

JURISDICTION OF THE SUPREME COURT.

As the Petitioner has filed the Petition in this case under Article 99 (13) (a) of the Constitution, let me at the outset reproduce that Article here.
Article 99 (13) (a)

> *(13) (a) Where a Member of Parliament ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper (hereinafter referred to as the "relevant nomination paper") his name appeared at the time of his becoming such Member of Parliament, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member:*
>
> *Provided that in the case of the expulsion of a Member of Parliament his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Supreme Court by petition in writing, and the Supreme Court upon such application determines that such expulsion was invalid. Such petition shall be inquired into by three Judges of the Supreme Court who shall make their determination within two months of the filing of such petition. Where the Supreme Court determines that the expulsion was valid the vacancy shall occur from the date of such determination.*

As the Petitioner in the instant case has prayed in his Petition for an order from this court to set aside and invalidate the SLMC's decisions to expel him from the party, let me first clearly identify the nature of the jurisdiction this Court must exercise under the above constitutional provision over the impugned decision of the SLMC to expel the Petitioner from the SLMC. In doing so, let me at the very commencement of this discourse, refer to the previous decisions of this Court which had considered the nature of the jurisdiction this Court must exercise in such cases.

In the case of *Gamini Dissanayake Vs M. C. M. Kaleel and others*,[1] (hereinafter sometimes referred to as *Gamini Dissanayake's* case), which this Court had decided on 03rd December 1991, eight members of the United National Party who were also Members of Parliament had filed eight petitions in terms of Article 99 (13) (a) of the Constitution challenging their expulsion from the Party.

Mr. H. L. de Silva, PC during the argument in *Gamini Dissanayake's* case, had cited many cases relating to social clubs, trade unions and voluntary associations in which decisions for the expulsion of their members had been struck down for want of a fair hearing. To the contrary, Mr. K. N. Choksy PC had contended in that case, *inter alia* that the right to a hearing is not an inveterate rule and depends on the facts and circumstances of the case and the grounds on which disciplinary action has been taken. It was the contention of Mr. Choksy PC in that case, that if the matter which the petitioner says he could have placed before the

[1] 1993 (2) Sri. L. R. 135.

tribunal for consideration is a question of law or interpretation of statute or a rule or contract, all such matters are questions which this Court must decide and therefore, the lack of hearing does not vitiate the decision because the Court is in a position to adjudicate on them. Having considered those arguments, Kulatunga, J. in the majority judgment of this Court in *Gamini Dissanayake's* case, observed as follows:

> *"The right of a MP to relief under Article 99 (13) (a) is a legal right and forms part of his constitutional rights as a MP."*[2]

In *Gamini Dissanayake's* case, Fernando J in the minority judgment, stated the following on the above arguments:

> *"Our jurisdiction under Article 99(13) (a) is not a form of judicial review, or even of appeal, but rather an original jurisdiction analogous to an action for a declaration,*[3] *though it is clearly not a re-hearing. Are we concerned only with the decision-making process, or must we also look at the decision itself? Article 99 (13) (a) requires us to decide whether the expulsion was valid or invalid, some consideration of the merits is obviously required. .."*[4]

The case of *Tilak Karunaratne Vs. Mrs. Sirimavo Bandaranaike and others*,[5] (hereinafter sometimes referred to as *Tilak Karunaratne's* case), is a case this Court had decided on 27th April 1993. The Petitioner Tilak Karunaratne who filed that petition in terms of Article 99 (13) (a) of the Constitution challenging his expulsion from the Party was a Member of Parliament belonging to the Sri Lanka Freedom Party who was duly elected at the General Election held in 1989, to represent Kalutara District.

Mr. H. L. de Silva, PC who appeared for some of the respondents including the 1st respondent Mrs. Sirimavo Bandaranaike in *Tilak Karunaratne 's* case, contended that the jurisdiction of this court does not extend to an examination of the merit worthiness of the expulsion as the decision to expel the petitioner in that case was a political decision and therefore the criteria adopted for expulsion may vary from case to case, person to person and time to time. Mr. H. L. de Silva, PC in that case further submitted that this court could interfere only if the decision of the expelling authority was unreasonable in the 'Wednesbury sense' (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation)[6] that is, if the decision is so unreasonable

[2] At page 234.
[3] Emphasis is mine.
[4] At page 198.
[5] 1993 (2) SLR 90.
[6] [1947] 2 All ER 680; [1948] 1 KB 223.

as to be irrational. In that case, the learned counsel for the respondents relying on the cases Dawkins v. Antrobus;[7] Richardson - Gardner v. Freemantle;[8] Maclean v. Workers Union and others;[9] and Hopkinson v. Marquis of Exeter;[10] which were cases in relation to expulsion of members from voluntary associations, sought to argue that if exercise of the power of expulsion was made bona fide, this court should refrain from interfering with it. Mr. H. L. de Silva, PC in that case had reminded the Court of the words of caution of the great American Chief Justice, Marshall that 'judges should not enter the political thicket'.[11]
Rejecting the above argument, this Court in *Tilak Karunaratne's* case by its majority judgment, has identified the jurisdiction this Court must exercise under Article 99 (13) (a) of the Constitution in the following paragraph which has been quoted from the majority judgment of Dheeraratne J.

> *"The nature of the jurisdiction conferred on the Supreme Court in terms of the proviso to Article 99 (13) (a) is indeed unique in character; it calls for a determination that expulsion of a Member of Parliament from a recognized political party on whose nomination paper his name appeared at the time of his becoming such Member of Parliament, was valid or invalid. If the expulsion is determined to be valid, the seat of the Member of Parliament becomes vacant. It is this seriousness of the consequence of expulsion which has prompted the framers of the Constitution to invest that unique original jurisdiction in the highest court of the Island, so that a Member of Parliament may be amply shielded from being expelled from his own party unlawfully and/or capriciously. It is not disputed that this court's jurisdiction includes, an investigation into the requisite competence of the expelling authority; an investigation as to whether the expelling authority followed the procedure, if any, which was mandatory in nature; an investigation as to whether there was breach of principles of natural justice in the decision making process; and an investigation as to whether in the event of grounds of expulsion being specified by way of charges at a domestic*

[7] (1879) 17 Ch D 615 [1881-51] All ER Rep. 126; (1881) 44 LT 557.

[8] (1870) 24 L.T. 81; 19 W.R. 56

[9] (1929) 141 Law Times 83 ; [1929] 1 Ch. 602.

[10] (1867) LR 5 Eq. 63 ; (1867) 37 LJ Ch. 173.

[11] At page 102.

> *inquiry, the member was expelled on some other grounds which were not so specified. ….."* [12]

Having held as above, Dheeraratne J in that case, cited with approval the views expressed by Fernando J in the minority judgment in *Gamini Dissanayake's* case with regard to the nature of jurisdiction of this Court under Article 99 (13) (a) of the Constitution. Thus, Dheeraratne J in *Tilak Karunaratne's* case stated as follows:

> *"… Our jurisdiction appears to be wider; it is an original jurisdiction on which no limitations have been placed by Article 99 (13) (a). As stated by Fernando J. in Dissanayake and others v. Kaleel and others, " Our own jurisdiction under Article 99 (13) (a) is not a form of judicial review, …"* [13]

On 1st July 2005, a bench of five judges of this Court decided the case of *Ameer Ali and others Vs. Sri Lanka Muslim Congress and others*,[14] hereinafter sometimes referred to as *Ameer Ali's* case. All five judges of this Court were unanimous in their conclusion. In that case, three Petitioners who had contested the General Election held in April 2004, and returned as Members of Parliament had filed the petitions in that case in terms of Article 99 (13) (a) of the Constitution challenging their expulsion from the Party. The five Judge bench of this Court proceeded to examine the nature of the jurisdiction of this Court with regard to the petitions filed under Article 99 (13) (a) of the Constitution. The said five-judge bench in the judgment of Court, also cited with approval (unanimously), the aforesaid views expressed by Kulatunga J in the majority judgment of this Court in *Gamini Dissanayake's* case, as well as the aforesaid views expressed by Dheeraratne J in the majority judgment of *Tilak Karunaratne 's* case, regarding the nature of the jurisdiction of this Court under Article 99 (13) (a) of the Constitution. Thus, in *Ameer Ali's* case, five judges of this Court have unanimously endorsed the aforesaid views.

In *Sarath Amunugama and others Vs. Karu Jayasuriya Chairman UNP and others*,[15] (hereinafter sometimes referred to as *Sarath Amunugama's* case), which this Court had decided on 03rd February 2000, the five petitioners (whose cases were heard together) were Members of Parliament representing the United National Party which is a recognized political party. The petitioners in that case had filed applications in the Supreme Court in terms of

[12] At page 101.
[13] At page 102.
[14] 2006 1 SLR (at page 189).
[15] 2000 (1) Sri. L. R, 172.

Article 99(13)(a) of the Constitution as they had been summarily expelled from the membership of the Party on a decision of the Working Committee of the Party. With regard to the nature of the jurisdiction of this Court under Article 99 (13) (a) of the Constitution, Amerasinghe J who was then Acting Chief Justice, in his judgment had cited and reproduced with approval, Fernando J's sentiments with regard to the said jurisdiction of this Court expressed in *Gamini Dissanayake's* case.

The Petitioner in *Perumpulli Hewage Piyasena Vs. Illankai Thamil Arsukachchi and others*,[16] had filed that application in terms of the proviso to Article 99 (13) (a) of the Constitution challenging his expulsion from the Ilankai Tamil Arasu Kadchi (ITAK), which is a recognized political party on whose nomination paper his name admittedly had appeared at the time of his election as a Member of Parliament for Digamadulla District at the April 2010 General Election. The learned President's Counsel for the 3rd Respondent in that case highlighted four specific allegations of suppressions and misrepresentations by the petitioner in that case in the course of his lengthy oral and written submissions before Court. The learned President's Counsel for the Petitioner in that case, too made detailed submissions to show firstly, that the Petitioner's conduct was bona fide and secondly, that it was in accordance with his obligations to Court in relation to uberrima fides.

In *Perumpulli Hewage Piyasena's* case, Saleem Marsoof J also cited with approval, the aforesaid views expressed by Dheeraratne J in the majority judgment of *Tilak Karunaratne 's* case, regarding the nature of jurisdiction this Court must exercise in cases of this nature filed under Article 99 (13) (a) of the Constitution, and went on to state as follows:

> *"The jurisdiction of this Court conferred by Article 99(13)(a) of the Constitution is sui generis, original and exclusive, and does not confer any discretion to this Court to dismiss in limine an application filed there under merely on the ground of suppression or misrepresentation of material facts, as in cases involving injunctive relief or applications for prerogative writs.[17] As noted by Fernando, J. in Gamini Dissanayake v. Kaleel and Others [1993] 2 Sri LR 135 at 198, it is "not a form of judicial review, or even of appeal, but rather an original jurisdiction analogous to an action for a declaration, though it is clearly not a re-hearing." As Dheeraratne, J. observed in Tilak Karunaratne v. Sirimavo Bandaranaike [1993] 2 Sri LR 90 at 101".[18]*

[16] SC Expulsion No. 03/ 2010 (decided on 08-02-2011).
[17] Emphasis is mine.
[18] Page 6 of that judgment.

Thus, this court in all the previous cases has consistently taken and maintained the position that the nature of the jurisdiction this Court conferred on it by Article 99 (13) (a) of the Constitution: is not a form of judicial review; is not even in the form of an appeal; is rather an original jurisdiction analogous to an action for a declaration; is not a re-hearing; is indeed unique in character and original in nature vested in the highest Court of the island; is a very wide jurisdiction; is an original jurisdiction on which no limitations have been placed by Article 99 (13) (a); is sui generis; is original and exclusive; is a jurisdiction to determine the validity or otherwise of an expulsion in terms of the proviso to Article 99(13)(a) of the Constitution; is neither injunctive nor discretionary; is indeed unique in character. I agree with the above views consistently taken by this Court.

Thus, this Court is under a duty as empowered by Article 99(13)(a) of the Constitution, to examine the merits of the decision of the SLMC expelling the Petitioner from the party as the Petitioner in the instant case has invoked the jurisdiction of this Court vested in it under Article 99(13)(a) of the Constitution.

EFFECT OF BREACH OF THE RULES OF NATURAL JUSTICE IN EXPULSIONS

The next question I would consider is as to what would happen when there is some breach of the Rules of Natural Justice in particular, the Rule of Audi Alteram Partem. Let me refer to the previous instances where this Court had considered this aspect when it had exercised its jurisdiction under Article 99(13)(a) of the Constitution.

In *Gamini Dissanayake's* case, Kulatunga J in delivering the majority judgment of this Court observed as follows:

> *"The right of a M.P. to relief under Article 99 (13) (a) is a legal right and forms part of his constitutional rights as a M.P. If his complaint is that he has been expelled from the membership of his party in breach of the rules of natural justice, he will ordinarily be entitled to relief and this Court may not determine such expulsion to be valid unless there are overwhelming reasons warranting such decision.[19] Such decision would be competent only in the most exceptional circumstances permitted by law and in furtherance of the public good the need for which should be beyond doubt. ..."[20]*

Kulatunga J in *Gamini Dissanayake's* case, had taken that view whilst being mindful of the fact that any expulsion of a member from the party will visit the same consequence as any

[19] Emphasis is mine.
[20] At page 234.

declaration that his election to Parliament is void or subject to any of the disqualifications as are specified in the Constitution which would result in such member losing his seat in Parliament. Nevertheless, it was Kulatunga J's view that when there is a complaint that the relevant decision has been taken in breach of the rules of natural justice, even such decision would stand competent in the presence of overwhelming reasons warranting such decision. Such overwhelming reasons must be most exceptional circumstances permitted by law and in furtherance of the public good the need for which should be beyond doubt.

Even in the minority judgment in *Gamini Dissanayake's* case, Fernando J having considered all the relevant authorities before him, had recognized the fact that there are several cases in which decisions have been allowed to stand although such decisions had been taken without a hearing.[21] Fernando J in that case had listed some of the categories to which such cases belong: the instances where there is 'no legitimate expectation' of a hearing; the instances where a hearing becomes a 'useless formality'; the instances where there is 'no injustice or no real prejudice'; the instances where there is 'urgency' to take a decision; the instances where there is 'discretion' on the decision maker; the instances where there is a 'subsequent hearing also taking place after the impugned decision which 'is enough'; the instances where the person aggrieved by the decision could not have adduced any evidence even if an inquiry was held; the instances where the case is in the nature of "open and shut case" etc.

In *Gamini Dissanayake's* case, Fernando J having considered the above aspects, had proceeded to hold in respect of some of the petitioners in that case, that a hearing would not have been a useless hearing as those petitioners could have tendered an explanation to the issues raised. Having held as above, Fernando J then proceeded to consider the merits of the cases in respect of the other petitioners in that case and indeed held that the expulsion of the other petitioners in *Gamini Dissanayake's* case, (petitioners in SC Special No.s 05 and 08/ 1991) was valid for the reasons he had set out in his judgment. In doing so, Fernando J went on to say, in his judgment the following:

> *"Had these proceedings been purely by way of judicial review, it may well be that we would have to shut our eyes to the merits of the decision, and look only at the defects in the decision-making process. But it is accepted that our jurisdiction is not restricted. The burden, if any, must be on the Respondents, for it is the denial of natural justice by them which has resulted in these proceedings. I have*

[21] At page 186.

therefore to consider whether, on the merits the respondents have shown that the decision was a good one, thereby disentitling the petitioners to relief".[22]

The basis for Fernando J to hold that the expulsion of some of those petitioners to be valid in *Gamini Dissanayake's* case was because those petitioners had not tendered any explanation either in their affidavits or in the documents.

Thus, it could be seen that even Fernando J in his minority judgment, despite the breach of the Rules of Natural Justice by the respondents in that case, had proceeded to hold that the expulsion of some of those petitioners was valid. This goes on to show that our courts have recognized the availability of such a course of action in the course of the proceedings in this court, where a petitioner has invoked this Court's jurisdiction under Article 99 (1) (3) of the Constitution. This is because the jurisdiction of the Supreme Court in this instance is not mere exercise of Judicial Review of the decision of the relevant party which has expelled the relevant member.

The set of cases I would cite next, would show that this Court has indeed consistently applied the above test in all the other cases as well, before it had decided to grant relief to the petitioners of those respective cases.

The petitioner in *Rambukwella Vs. UNP and others*,[23] being a Member of Parliament has filed that petition in terms of Article 99(13)(a) of the Constitution, for a determination that his expulsion from the United National Party (UNP), is invalid. In that case also this court had held, that the expulsion of the petitioner in that case by the UNP was invalid. That was because the reasons such as: the cogent material pointing to the absence of jurisdiction of the body which had taken relevant disciplinary action against the petitioners; the denial of legal representation to the petitioner, which would have enabled the petitioner to show to the satisfaction of the body and to establish the absence of jurisdiction; the defects in the resolution of the national executive committee in that the said resolution had not been seconded by any person, or put to vote before national executive committee, i.e., because the resolution was *ex facie* defective since no person seconding it nor the matter being discussed or put to vote before the national executive committee; the fact that the petitioners conduct could not have possibly come within the ambit of Article 3.4(d) of the constitution of the United National Party under which the petitioner in that case was charged etc. were present in that case. Sarath N Silva CJ in that case, held as follows:

"Although membership of the Party has a concomitant liability to disciplinary action in terms of the Constitution of the Party as correctly submitted by Counsel for the

[22] Emphasis is mine.
[23] 2007 (2) SLR 329.

> *respondents, in deciding on the validity of an expulsion, which has the further implication of the loss of the seat in Parliament, the overall conduct of the person subject to such action has to be taken into account".*[24]

In *Sarath Amunugama's* case, the United National Party expelled five petitioners (five connected applications) from the membership of the party on a decision of the working committee of the party. The immediate ground of expulsion was that the petitioners had met then President Chandrika Bandaranaike Kumaratunga, and assured her of winning the Presidential Election 1999, when in fact the United National Party had nominated its leader Ranil Wickremesinghe as a candidate at that election. Two more allegations made especially against petitioner Sarath Amunugama, were,

1. Pronouncing to National media about formation of a national government without a mandate form the party and
2. The fact that he had told the BBC that he would leave the United National Party if the party failed to respond to his national government concept.

In that case, no explanations were called for from the petitioners; no charge sheets were served on petitioners; no inquiry was held against the petitioners, before the decision to expel them from the membership of the party. Acting Chief Justice Amerasinghe, in that case, stated that he was unable to accept the submissions of the learned counsel for respondents that a hearing would have been "useless" for several reasons. Some of those reasons were, that the matter could not have been described as an "open and shut case". Another reason Acting Chief Justice Amerasinghe had given was that a hearing would not have been a "useless formality" for the working committee had a choice of sanction.

Even in *Sarath Amunugama's* case, Acting Chief Justice Amerasinghe had cited the proposition of kulatunga J in *Gamini Dissanayake's* case which had recognized that in the presence of overwhelming reasons, the court, as it is exercising a *sui generis* jurisdiction under Article 99 (13) (a) of the constitution, can do what the court did in *Gamini Dissanayake's* case. It is apt to reproduce the relevant paragraph of Acting Chief Justice's judgment from *Sarath Amunugama's* case.

> *"Kulatunga, J. (with whom Wadugodapitiya, J. agreed) stated at p. 242 that "since the petitioners had not been prepared to submit themselves to the party councils, then, there is no force in their complaint that the Working Committee had failed to give them a hearing. I hold that the Working Committee acted fairly and reasonably in taking disciplinary proceedings against the petitioners in the way it did.*

[24] At page 334; emphasis is mine.

> *Kulatunga, J. went into the merits of the case and concluded at p. 246 that "the remedy of expulsion befits the mischief unleashed by the petitioners".*
> *However, Kulatunga, J. seems to suggest that it is not in every case that the Court should go into the merits". ….*[25]

Similarly, Acting Chief Justice Amerasinghe, in *Sarath Amunugama's* case had also cited Dheeraratne J's judgment in *Tilak Karunaratne's* case. The relevant paragraph from Acting Chief Justice's judgment is reproduced below,

> *"In Tilak Karunanaratne v. Mrs. Sirimavo Bandaranaike and others, the petitioner, a Member of Parliament, was expelled from his party on a decision of the Executive Committee of the party to which he refused to submit. He challenged his expulsion in terms of Article 99(13)(a) of the Constitution. Dheeraratne, J. at p. 115 stated that, in view of the conclusion His Lordship had reached, namely that "the petitioner's impugned statements are justified" in that he was exercising his Constitutional rights of freedom of speech and association, it was "unnecessary" to deal with certain questions, including a "failure to observe principles of natural justice in the decision making process." Dheeraratne, J. (Wijetunga, J. agreeing) held that the expulsion of the petitioner was invalid. Dheeraratne J. said at pp. 101-102 that Article 99(13)(a) conferred an original jurisdiction on the Court empowering it to go into the merits and shield Members of Parliament from being "unlawfully and/or capriciously" expelled from their parties. His Lordship did not accept the submission of learned counsel, Mr. H.L. de Silva, P.C., that investigations by the Court should be restricted to the question whether proper procedures had been followed,*[26] *lest judges might find themselves wandering into the "political thicket", and cited with approval the observations of Fernando, J. quoted above in Dissanayake on that question".*[27]

In *Ramamoorthy and Rameshwaran Vs. Douglas Devananda and others*,[28] , G. P. S. de Silva CJ had quoted with approval, the observations of Kulatunga J in *Gamini Dissanayke's* case (quoted above), and proceeded to hold that no "weighty considerations" like in *Gamini Dissanayke's* case were present in *Ramamoorthy's* case.

In *Ameer Ali's* case, three petitioners who had been expelled from the SLMC, had contended that they had serious differences of views in regard to the manner in which the members

[25] At page 199.
[26] Emphasis is mine.
[27] At page 200.
[28] 1998 (2) Sri. L. R. 278.

elected from the SLMC should conduct themselves, in Parliament as well as with the Leader of the party. They had refused to sign a pledge in the specimen form declaring loyalty and total allegiance to the party, to its Leader and to the High Command. They had written a joint letter informing the Leader of the party that they would extend their fullest support to the Government in its endeavor to find a lasting solution to the problems identified by them, which will benefit the Muslims in particular and the country at large in general. Shortly thereafter the three petitioners in that case were appointed as project ministers, they received letters from the party requiring them to show cause as to why disciplinary action should not be taken against them. The petitioners responded by letter requesting time to answer and were granted an additional 10 days and were required to be present at the meeting of the High Command, scheduled for 09-12-2004. The petitioners replied to charges by letter dated 07-12-2004 denying allegations and setting out most of the facts and circumstance included in the letter previously addressed to the Leader. By letter dated 20-12-2004, the Secretary General, disputed the contents of the reply and informed the Petitioners that they could present their case to the High Command and requested that a date be nominated in the month of January, on which date the matter would be heard at one of the Hotels that were specified. It appears that no further action was taken in the matter until March 2005, when letters dated 01-03-2005, was received by the Petitioners, signed by the Secretary General who informed them that the Polit bureau will go in to the show cause notice at a meeting on 12-03-2005 to be held at the Earls Court, Trans Asia Hotel at 5.00 p.m. The Petitioners were requested to be present. Another letter was received by the Petitioners bearing the same date sent by the Secretary General requesting the Petitioners to be present on Sunday 13th March at 5.00 p. m. at the same venue for a meeting of the High Command and at which meeting the High Command will go into the show cause notice that had been issued. The Petitioners replied by letters dated 11-03-2005, referring to the two sets of inquiries to be held by two bodies of the party and stated that they were puzzled as to how they have been summoned to face two disciplinary inquiries on two successive dates in respect of allegations set out in one show cause notice. The Petitioners sought specific clarification as to which particular body would seek to exercise disciplinary control. It was in such a background that the petitioners in that case had been notified of their expulsion from the party by letter dated 04-04-2005.

Indeed, it is noteworthy that in *Ameer Ali's* case the High Command of SLMC, after this Court had issued notices on the Respondents in that case, having taken into consideration the statements in the affidavits filed in Court and having taken into consideration the positions taken up by the petitioners that they were not afforded a hearing prior to adopting the extreme measure of expulsion, had decided to withdraw the expulsions communicated by letter dated

04-04-2005 in order to give them a further opportunity to present their position before the Party. Thus, in *Ameer Ali's* case, the relevant party (the SLMC) itself had conceded that it should have afforded the petitioners in that case, an opportunity to present their positions before the Party.

Even in *Ameer Ali's* case, the five-judge bench of this Court had cited the proposition of kulatunga J in *Gamini Dissanayake's* case that 'if the complaint is that the petitioner has been expelled from the membership of his party in breach of the rules of natural justice, he will ordinarily be entitled to relief and this Court may not determine such expulsion to be valid unless there are overwhelming reasons warranting such decision' when it decided the following:

> *"To say the least, the Leader has thrown the principles of natural justice and fairness to the winds. The hostile comments made well before the commencement of any disciplinary action by itself establish the allegations of the Petitioners of malafides and of bias. To make matters worse, the Leader has precipitously stated that the Party will take action against the Petitioners in due course. Thereby he has assumed the authority to decide on the matter for the entire Party. This is far removed from the democratic process, which should characterize the action of a political party and the degree of fairness, being a sine qua non of any disciplinary action that may be validly taken by a political party in respect of any of its members.*
>
> *In this background the Court has to examine the impugned disciplinary process with a greater degree of caution to ascertain whether the initial stigma of bias and mala fides have been removed in the course of the disciplinary action allegedly taken".*[29]

With regard to *Ameer Ali's* case, it would suffice for me to state here that such were the facts of *Ameer Ali's* case. Thus, the foregoing judicial precedence show in short that any breach of the Rules of Natural Justice alone cannot finally decide the validity of the expulsion of a petitioner in a petition filed under Article 99 (13) (a) of the constitution.

HAS THE ABSENCE OF A FORMAL INQUIRY VITIATED THE EXPULSION?

Let me now turn to the question whether the absence of a formal inquiry has vitiated the decision of the SLMC to expel the Petitioner in the instant case. In doing so, let me first refer to the approach the following three English cases had taken on the above question. These

[29] At page 197.

would be relevant in that regard as Kulatunga J in *Gamini Dissanayake's* case, has adopted those principles.

Let me first refer to the case of Gaiman Vs. National Association for Mental Health,[30] (hereinafter sometimes referred to as *Gaiman's* case). The National Association for Mental health a highly reputable charitable body concerned with, *inter alia*, the preservation and development of mental health and the prevention and treatment of mental disorders. The Association had a council of management comprising the chairman, vice-chairman and honorary treasurer together with a number of ordinary members elected by the association. The Articles of Association provided, inter alia, that a member of the Association shall forthwith cease to be a member if such member has been requested by resolution of the Council to resign. It has further provided that a member so requested to resign may within seven days after such notice of resolution has been given, appeal against such resolution to the Association in a General Meeting and in the event of such appeal being successful, the resolution requesting the member to resign shall be void *ab initio*.

Let me now briefly state facts of *Gaiman's* case. For five years there had been a state of hostility between the Association and members of the 'Church of Scientology' and articles in a periodical published by the association had resulted in two actions by Scientologists against the Association for libel. The Scientologists had attacked the Association in various publications. In 1969, the rate of applications for membership of the Association had increased. Notice was given of the annual general meeting of the Association to be held on 12th November. The nominations included the nominations of the plaintiffs as chairman and ordinary members of the council. All nominees, proposers and seconders appeared to be Scientologists. On 10th November, the council, acting under the above provisions in its Articles of Association, expelled 302 members of the Association. Those expelled members sought a mandatory injunction from Courts, praying for an order on the Association to afford to the plaintiffs, until trial of the action, all rights of their membership.

Megarry J in *Gaiman's* case, refusing to grant the prayed mandatory injunction, held in his judgment *inter alia*, the following points:

i. There were no grounds for the court to intervene to prevent an alleged abuse of power by the council since the power to deprive a member of his membership was a direct power and the evidence did not disclose that it had been exercised otherwise than in good faith and in what were believed to be the best interests of the association and members as a whole.

[30] [1970] 2 All ER 362, 374, 376, 381.

ii. The principles of natural justice did not apply to the expulsion of members, so as to afford them a right to be heard before expulsion, because there were circumstances sufficient to prevent the application of the principles, in that the council owed the association a duty to exercise their powers bona fide in the interests of the association; this duty might require a power to be exercised at great speed (whereas natural justice might require delay); this in itself indicated that the council was intended to be able to exercise its powers unfettered by the principles of natural justice.

Megarry J in his judgment proceeded further to hold that the council had acted in the *bona fide* belief that it was in the best interests of the Association and that the council had exercised its power of deprivation of membership in good faith for the purpose for which it was conferred on it by the Articles of Association. Megarry J proceeded further to hold as follows:

> *It is beyond question that Scientologists have for long been attacking the association in a variety of ways. The attacks have been virulent, and like the sentiments, the language, I think, speaks for itself. I need say no more about it than that much of it cannot be described as moderate and reasoned argument designed to convert those who hold what are conceived to be erroneous views".*[31]

In *Gamini Dissanayake's* case, it was common ground that the petitioners have been expelled from the party without informing them of the charge or giving them an opportunity of being heard. Kulatunga J in its majority judgment having considered the question whether such a procedure could be justified, referred to and adopted the principle used by Megarry J, in Gaiman's case. Kulatunga J then proceeded to apply the same to the facts and circumstances in *Gamini Dissanayake's* case. The following paragraph quoted from Kulatunga J's judgment in *Gamini Dissanayake's* case would bear testimony to that.

> *"As Megarry J. observed in Gaiman's case I am myself not concerned with " the merits of the views " held by the UNP and the petitioners, (described in the Press as "rebels"). I am concerned with the right of the Working Committee to have proceeded against the petitioners without a hearing. As in Gaiman's case here too the attacks have been " virulent " and " much of it cannot be described as being moderate and reasoned argument designed to convert those who hold what are conceived to be erroneous views." Mr. Choksy submitted that in Gaiman's case the Scientologists had been making representations for several years; here they launched a campaign without any prior discussion within the party. I would add that in Gaiman's case there was no threat to stable*

[31] At page 373 & 374.

> *government in the country; nor was there any campaign which was likely to confuse or inflame the public mind against the Head of a State, the government and the party in power. The interests involved in that case were those of the Mental Health Association whereas this case involves the interests of a party which has been voted into power by the electors and above all the interests of the public who are often the victims of such indisciplined controversy."*

Having stated the above, Kulatunga J in *Gamini Dissanayake's* case proceeded to hold as follows:

> *"The point I make is that if the petitioners themselves were not prepared to submit to the party councils, then, there is no force in their complaint that the Working Committee had failed to give them a hearing. I hold that the Working Committee acted fairly and reasonably in taking disciplinary proceedings against the petitioners in the way it did".*[32]

The second English case I would refer to, is the case of *Glynn Vs. Keele University and another*,[33]hereinafter sometimes referred to as *Keele University's* case. In that case, certain students had appeared naked in the area of the Students' Union on 19th June 1970 causing offence to many members and employees of the University, and residents on the campus. The offenders included the Plaintiff in that case and certain students due to graduate on the 1st July. The term ended on the 30th June and the Graduation Ceremony was on the 1st July. If a Disciplinary Panel had been convened it could not have met until after the end of term, by which time the graduation students would no longer have been within the disciplinary jurisdiction of the University. Thus, the vice-chancellor referring to the incident of 19th June and to his responsibility for maintaining good order, wrote to the plaintiff by letter dated 1st July, to the following effect:

> *`.. I shall report to the Council at its meeting on the 7th July that you have been fined 10 pounds and excluded from residence in any residential accommodation on the University campus from today's date for the whole of the session of 1970/71 . . . If you wish to address any grievance in connection with the above to the Council . . . you should send it in writing to the Registrar to reach him not later than Tuesday, 7th July.'*

The plaintiff replied to the Registrar by letter dated 3rd July stating that he wished to appeal; but having gone abroad for the long vacation, and having left no forwarding address he did

[32] At page 242.
[33] [1971] 1 W L R 487, [1971] 2 All E R 89.

not receive a letter giving him notice that the appeal was to be heard on 2nd September. As the plaintiff did not appear at the hearing of the appeal the vice-chancellor's decision stood. The plaintiff, sought from Courts, *inter alia*, an injunction against the University of Keele and the vice-chancellor of the university, restraining them from excluding him from residence on the campus of the university for the remainder of the academic year 1970/71.

It must be stressed here that in *Keele University's* case, the Plaintiff had not made any formal admission that he was one of the undergraduates concerned in the offence; there was nowhere in his affidavits, or in the submissions of the counsel for him, any real suggestion that he was not one of the naked undergraduates on that occasion.

Pennycuick V-C in *Keele University's* case, having concluded the followings: the Vice Chancellor was under a duty to comply with the requirements of natural justice; the Vice Chancellor had not complied with the rules of natural justice; nevertheless, proceeded to decide as follows.

> *I have, again after considerable hesitation, reached the conclusion that in this case I ought to exercise my discretion by not granting an injunction. I recognize that this particular discretion should be very sparingly exercised in that sense where there has been some failure in natural justice. On the other hand, it certainly should be exercised in that sense in an appropriate case, and I think this is such a case. There is no question of fact involved as I have already said. I must plainly proceed on the footing that the plaintiff was one of the individuals concerned. There is no doubt that the offence was one of a kind which merited a severe penalty according to any standards current even today. I have no doubt that the sentence of exclusion of residence in the campus was a proper penalty in respect of that offence. Nor has the plaintiff in his evidence put forward any specific justification for what he did. So the position would have been that if the vice-chancellor had accorded him a hearing before making his decision, all that he, or any one on his behalf could have done would have been to put forward some general plea by way of mitigation. I do not disregard the importance of such a plea in an appropriate case, but I do not think the mere fact that he was deprived of throwing himself on the mercy of the vice-chancellor in that particular way is sufficient to justify setting aside a decision which was intrinsically a perfectly proper one.*
>
> *In all the circumstances, I have come to the conclusion that the plaintiff has suffered no injustice, and that I ought not to accede to the present motion.*[34]

[34] At page 97.

Kulatunga J in *Gamini Dissanayake's* case, relied on *Keele University's* case, to illustrate how the Court's approach is affected by the subject matter.

The third English case I would refer to, is the case of Cinnamond and others Vs. British Airports Authority,[35] (hereinafter sometimes referred to as the *Cinnamond's* case. In that case, six minicab drivers (the appellants in that case), had been prosecuted on numerous occasions by the British Airports Authority for loitering at an airport owned and operated by the Authority and touting there for passengers. They persistently refused to pay the fines and continued to loiter and tour for fares. Acting under a byelaw which empowered the Authority to prohibit any person from entering the airport except as a bona fide airline passenger, the Authority by notice prohibited the appellants from entering the airport until further notice. The Authority had not given any opportunity for the appellants to make any representations to the Authority before the ban was imposed. Thus, one of the grounds upon which the appellants sought a declaration from Courts that those notices were invalid was that there had been a breach of the Rules of Natural Justice.

Lord Denning, Shaw LJ and Brandon LJ though unanimous in their final conclusion in *Cinnamond's* case had considered the question whether there had been a breach of the rules of natural justice because the appellants had not been given an opportunity of making representations to the Authority before the ban was imposed and proceeded to comment on this aspect of the case in their separate judgments. Lord Denning in his judgment in *Cinnamond's* case held as follows:

> *"Counsel for the plaintiffs urged us to say that this was such a case; that there ought to have been an opportunity given to these six car-hire drivers, so that they could be heard. They might give reasons on which the prohibition order might be modified; or they might be given a little time; or they might be ready to give an undertaking which might be acceptable: to behave properly in future. When it was said that a fair hearing would make no difference, counsel cited an important passage from Professor Wade's Administrative Law (4th Edn, 1977, P 455):*
>
> > *'... in the case of a discretionary administrative decision, such as the dismissal of a teacher or the expulsion of a student, hearing his case will often soften the heart of the authority and alter their decision, even though it is clear from the outset that punitive action would be justified.'*

[35] [1980] 2 All ER 368.

I can see the force of that argument. But it only applies when there is a legitimate expectation of being heard. In cases where there is no legitimate expectation, there is no call for a hearing. We have given some illustrations in earlier cases. I ventured to give two in R v Gaming Board for Great Britain, ex parte Benaim [1970] 2 All ER 528 at 533, [1970] 2 QB 417 at 430. I instanced the Board of Trade when they granted industrial development certificates, or the television authorities when it awarded television programme contracts. In administrative decisions of that kind, a hearing does not have to be given to those who may be disappointed. Only recently in Norwest Holst Ltd v Department of Trade [1978] 3 All ER 280 at 292, [1978] Ch 201 at 224 I gave the instance of a police officer who is suspended for misconduct. Pending investigations, he is suspended on full pay. He is not given any notice of the charge at that stage, nor any opportunity of being heard. Likewise, the Stock Exchange may suspend dealings in a broker's shares. In none of these cases is it necessary to have a hearing.

Applying those principles, suppose that these car-hire drivers were of good character and had for years been coming into the airport under an implied license to do so. If in that case there was suddenly a prohibition order preventing them from entering, then it would seem only fair that they should be given a hearing and a chance to put their case. But that is not this case. These men have a long record of convictions. They have large fines outstanding. They are continuing to engage in conduct which they must know is unlawful and contrary to the byelaws. When they were summonsed for past offences, they put their case, no doubt, to the magistrates and to the Crown Court. Now when the patience of the authority is exhausted, it seems to me that the authority can properly suspend them until further notice, just like the police officer I mentioned. In the circumstances they had no legitimate expectation of being heard. It is not a necessary preliminary that they should have a hearing or be given a further chance to explain. Remembering always this: that it must have been apparent to them why the prohibition was ordered, and equally apparent that, if they had a change of heart and were ready to comply with the rules, no doubt the prohibition would be withdrawn. They could have made representations immediately, if they wished, in answer to the prohibition order. That they did not do.

The simple duty of the airport authority was to act fairly and reasonably. It seems to me that it has acted fairly and reasonably. I find nothing wrong in the course

which it has taken. I find myself in substantial agreement with the judge, and I would dismiss the appeal."

Shaw LJ in his judgment in *Cinnamond's* case, while agreeing with Lord Denning, referring to the failure to give the six minicab drivers an opportunity of making representations to the Authority, stated as follows:

"As to the suggestion of unfairness in that the plaintiffs were not given an opportunity of making representations, it is clear on the history of this matter that the plaintiffs put themselves so far outside the limits of tolerable conduct as to disentitle themselves to expect that any further representations on their part could have any influence or relevance. The long history of contraventions, of flouting the regulations and of totally disregarding the penalties demonstrate that in this particular case there was no effective deterrent. The only way of dealing with the situation was by excluding them altogether.

It does not follow that the attitude of the authority may not change in the future if it can be persuaded by representations on behalf of the plaintiffs that they are minded in future to comply with those regulations.

The learned judge came to the right conclusion, and I too would dismiss the appeal".[36]

Brandon LJ in his judgment in *Cinnamond's* case while agreeing with Lord Denning, held as follows:

"The third question which was argued before us was that of natural justice. So far as that is concerned, I agree with what has been said by Lord Denning MR and Shaw LJ. I do not think that in the circumstances of this case there was any need to give the plaintiffs an opportunity to make representations to the authority before they issued the ban. The reason for the ban must have been well known when the letters were received. Any representations which were desired to be made could have been made immediately by letter. None were. The truth is that no representations other than representations which included satisfactory undertakings about future behaviour would have been of the slightest use.

If I am wrong in thinking that some opportunity should have been given, then it seems to me that no prejudice was suffered by the plaintiffs as a result of not being given that opportunity. It is quite evident that they were not prepared then,

[36] At page 375 & 376.

and are not even prepared now, to give any satisfactory undertakings about their future conduct. Only if they were would representations be of any use".[37]

In *Gamini Dissanayake's* case, Kulatunga J in the majority judgment when considering the question whether such a procedure could be justified had referred to and adopted with approval, the approach Lord Denning had taken in *Cinnamond's* case.[38]That was to justify the common ground that the petitioners in *Gamini Dissanayake's* case, had been expelled from the party without informing them of the charge or giving them an opportunity of being heard. In *Jayatillake and another Vs. Kaleel and others*,[39] (hereinafter referred to as *Jayatillake's* case), two petitioners who are Members of Parliament filed petition in this Court invoking its jurisdiction under Article 99 (13) (a) of the Constitution challenging their expulsion from the United National Party (UNP). In that case, the Disciplinary Committee of the Party's Working Committee recommended on 3-12-1991 to take disciplinary action against the Petitioners on account of several matters. The Working Committee met at 7.00 p.m. on the same day and, having considered the Report of the Disciplinary Committee and the letters dated 9-10-1991 written by the Petitioners, decided that the General Secretary should write to these two members, requesting them to be present at a meeting of the Working Committee to be held on 06-12-1991 at 8.00 p.m. "for the purpose of discussing their conduct as members of the Party". No particulars were given to the petitioners. Admittedly, the petitioners had not received those letters on or before 06-12-1991. Assuming that the Petitioners had received notice, the Working Committee duly met on 06-12-1991, considered the relevant material and then resolved to expel the petitioners in that case from the Party, with immediate effect, for the reasons given in the letters dated 09-12-1991 and communicated to the petitioners of their expulsion. The petitioners before they received the letters from the party communicating their expulsion, had sent letters dated 09-12-1991 to the UNP to inform that they were not in receipt of letters informing them that the meeting of the Working Committee was to be held on 06-12-1991 at 8.00 p.m. However, neither Petitioner had requested another opportunity of appearing before the Working Committee. Nevertheless, the UNP had sent letters to the petitioners asking the petitioners to submit written observations stating their position with regard to the charges before 27-12-1991. The petitioners had received those letters on 23-12-1991 and they had replied. The Working Committee met on 30-12-1991; they considered the Petitioners' replies dated 26-12-1991. The Working Committee decided that the Petitioners had not adduced any facts or reasons to justify further inquiry and accordingly, decided not

[37] At page 376 & 377.
[38] At page 236.
[39] 1994 (1) Sri. L.R. 319.

to reconsider or alter the decisions reached on 06-12-1991 which was then communicated to the petitioners the same day.

Although there are two judgments in *Jayatillake's* case, one by Fernando J and the other by Kulatunga J with which Wadugodapitiya J had agreed. Both judgments had considered the question whether there had been a breach of the Rules of Natural Justice in view of the fact that there was no formal hearing before making the decision to expel the petitioners in that case from the party. Both judgments had concluded that in the above circumstances, the UNP had sufficiently complied with the Rules of Natural Justice and therefore the expulsion was valid and proceeded to comment on this aspect in those separate judgments to which I would now turn.

Fernando J in *Jayatillake's* case, holding that in the context of all that happened in December 1991, the four days allowed to the petitioners (of which they needed only three) were sufficient to state their case and the manner in which they did so, had a direct bearing on the further question whether Natural Justice required an oral hearing and additional evidence to be placed in that case, proceeded to hold as follows:

> *"Those were cases of re-hearing by the same authority. The principle that a failure of Natural Justice at the original hearing may sometimes be cured by a "full re-hearing" by another body was recognised by the Privy council in Pillai v. Singapore City Council. Having held that the rules of Natural Justice did not apply to the first tribunal, yet the Privy Council observed that even if they did apply, the subsequent proceedings cured the defect. Although they were by way of "appeal", those proceedings were in the nature of a re-hearing and evidence was called de nova. This was followed in Stringer v. Minister of Housing. In Calvin v Carr, the Privy Council dealing with an appeal from New South Wales, recognised that there was no absolute rule, either way, as to whether defects in Natural Justice at an original hearing can be cured through proceedings by way of appeal or re-hearing (at pp. 447-448); everything depends on whether after "examination of the hearing process, original and appeal as a whole", the Court is satisfied that "there has been a fair result, reached by fair methods"; whether "the appellant's case has received, overall, full and fair consideration", (pp. 448, 449, 452).*
>
> *Applying these principles, (a) the initial breach of Natural Justice was not deliberate; (b) action was not taken to enforce, or to make legal consequences flow from, the order of expulsion, and the fact that the Petitioners participated in the subsequent proceedings gave the Working Committee a locus poenitentiae; (c) the allegations were fairly and adequately, though not fully and precisely, communicated; and (d)*

a fair opportunity was given to the Petitioners to state their case, and an oral hearing became unnecessary as the facts were " undisputed in consequence of their replies. I hold that the Petitioners, case had received - overall - full and fair consideration, and that there had been a fair result, reached by fair methods".[40]

Kulatunga J (Wadugodapitiya J agreeing) in *Jayatillake's* case, in his judgment rejecting the allegation that the expulsion of the petitioners was invalid for contravention of Rules of Natural Justice proceeded to hold as follows:

"I am of the view that the Working Committee had done everything possible to hold a full and fair hearing on the second occasion. The petitioners, however had defected from the Party and were irreconcilable. They were not interested in answering the allegations adequately and relied on mere jurisdictional grounds and bald denials. The learned President's Counsel for the petitioners told us that the petitioners were not bound to disclose their material or to disclose the reasons for their failure to attend Parliament on 10.10.91. If so, the petitioners are themselves to blame for their predicament. I have taken this view in the light of the following considerations:-

a) *The rights of the petitioners to Party membership are contractual. At the time of their expulsion, they had repudiated the UNP and were de facto members of the DUNF; and their expulsion constituted nothing more than the severance of the formal link between them and the Party. It follows that if they wished to remain in the Party they should have taken the initiative and cooperated with the Party by making a full and frank disclosure of their defence. If they failed to do so, they must take the consequences.*

b) *In handling a crisis of the magnitude faced by the respondents and in dealing with men of the petitioners' calibre, a political party must be allowed a discretion to decide what sanctions are appropriate for violations of Party discipline; and if the Party decides, bona fide, to expel any member guilty of repudiating the Party, as the petitioners have done, this Court will not in the exercise of its constitutional jurisdiction impose such member on the Party. If that is done, Parliamentary Government based on the Political Party System will become unworkable.*

I am satisfied that the disciplinary proceedings against the petitioners were, in all the circumstances, fair".[41]

[40] At page 357.
[41] At page 399.

Mr. Sumanthiran PC, appearing for the 1st, 2nd and 8th Respondents (i.e., the SLMC, its Leader, its Secretary respectively) conceded that the SLMC had not held a formal inquiry against the Petitioner before issuing **P15**. However, it was his submission that the Petitioner has failed first to show cause that he has a prima facie tenable explanation, which he is bound to tender in the first place, as response to **P9**.

Finally, Mr. Sumanthiran, PC, also submitted that the antecedent hearing that the Supreme Court has given to the Petitioner on the totality of the case would satisfy the compliance of Rules of Natural Justice (Principle of 'Audi Alteram Partem') as far as the validity of the Petitioner's expulsion from the party is concerned. It was therefore his submission that even on that ground the absence of a formal inquiry the instant case would not vitiate the decision of the SLMC to expel the Petitioner.

Let me now consider whether the absence of a formal inquiry has vitiated the decision of the SLMC to expel the Petitioner in the instant case. In order to consider this aspect of the case, let me first outline the sequence of events which had led to the High Command of the SLMC to unanimously resolve to expel the Petitioner from party membership with immediate effect. The SLMC has called for a written explanation from the Petitioner by the letter dated 27-11-2021 (produced marked **P9**) signed by the Respondent who is the Secretary of the SLMC. This letter is as follows,

> *"As you are aware, the Party called for a high command meeting on 21.11.2021 at the Party headquarters "Dharussalam', to discuss and decide on the Party stand vis-a-vis the 2022 Budget (The Appropriation Bill).*
>
> *You are also aware that at this meeting, it was decided unanimously, that Members of Parliament being members of the Sri Lanka Muslim Congress, shall not vote in favour of the budget at it's second reading vote on 22.11.2021 and shall not vote in favour at the third reading vote as well.*
>
> *You, however, on 22.11.2021 voted in favour of the said Budget at its second reading, in blatant violation of the said decision of the High Command.*
>
> *In doing so, you have acted in breach of the party decision while holding a senior and substantial position in the party high command namely, Deputy Leader.*
>
> *In the circumstances, the party leader, exercising his powers under the party constitution, has decided to suspend you from the High Command position held by you and to call for explanation on the said breach of the party decision.*
>
> *Therefore, as instructed by the Leader, I do hereby call for your explanation of your decision to vote in favour of the 2022 Budget in violation of the party decision.*

Your explanation in writing in the form of an affidavit should reach me within fourteen days from the date of the receipt of this letter.

Failure to do so will compel the party to arrive at the conclusion that you have no cause to show against the said violation of the party decision by you."

Replying to **P9** the Petitioner by letter dated 10-12-2021 (produced marked **P10**), had communicated to the SLMC stating the followings:

i. He could not attend the meeting of the High Command scheduled for 21-11-2021 at party headquarters, as it had been summoned at very short notice and hence, he was not able to attend the meeting due to reasons beyond his control which he had duly notified to the secretary of the SLMC.
ii. He did not receive any communication as to whether the meeting was held or postponed or any decision taken at the meeting.
iii. He requires a period of one month to furnish his response to the 'show cause letter' dated 27-11-2021, which he had received.
iv. He requests to let him know the relevant provisions in the party constitution under which the leader is said to have exercised his powers to suspend him from the High Command position.
v. He also requests a copy of the party constitution.

The secretary of the SLMC by letter dated 22-12-2021 produced marked **P11**, has clearly allowed the further period of one month requested by the Petitioner to tender his response to the 'show cause letter'. The Petitioner himself in his petition has admitted that he had received **P11** as a response to his letter dated 10-12-2021 (**P10**), from the secretary of the SLMC which had granted him a further period of one month to tender his response.[42] That is also the position of the SLMC and hence it is common ground that the SLMC has clearly allowed the further one-month period requested by the Petitioner to tender his response to **P9**, the 'show cause letter'.

Then the Petitioner has written the letter dated 04-01-2022 produced marked **P12**, thanking the SLMC for granting the further one-month period requested by him to tender his response to **P9** while also repeating the same request again, namely, the request for a copy of the latest party constitution and the sections under which the Secretary of the SLMC had called for his explanation. **P12** is a short three-line letter which is as follows:

[42] Paragraph 46 of the petition dated 20th May 2022.

"Thank you for your letter dated 22-12-2021 allowing a month's time for my response. Please send me a copy of the latest party Constitution & the sections under which you have called for my response at your earliest convenience."

The Secretary of the SLMC by letter dated 14-03-2022 (produced marked **P13**), had once again informed the Petitioner to submit his explanation by 15-04-2022. The Petitioner has admitted that he was in receipt of **P13** which had extended the time to submit his explanation until 15-04-2022. Indeed, **P13** is a document produced by the Petitioner himself. Reading of both **P12** and **P13** together would show that the SLMC had extended time until 15-04-2022 by **P13** even without any request made in that regard by the Petitioner in **P12**. Indeed, the Petitioner in **P12** had continued to maintain his silence on tendering his explanation.

Replying to **P13**, the Petitioner by the letter dated 07-04-2022 (produced marked **P14**), has repeated his request for a copy of the party constitution. It is worthwhile producing this letter **P14** as it is. It is as follows,

"I am in receipt of your letter dated 14.03.2022

In my response letter to you dated 10.12.2021, I had explained as follows:

You also refer to a meeting of the High Command scheduled for 21.11.2021 at the party headquarters, which I could not attend. You are aware, the said High Command meeting had been summoned at very short notice and I was not able to attend the said meeting due to reasons beyond my control which I had duly notified to you. I did not receive any communication whether the meeting was held or postponed or of any decision taken at the meeting."

" Meanwhile please let me know the relevant provisions in the party Constitution under which the Leader is said to have exercised his powers to suspend me from the High Command position together with a copy of the relevant Constitution."

You will note that you have not made available the relevant information and a copy of the relevant Constitution as yet. I shall therefore request you to furnish me with the relevant Information and a copy of the relevant Constitution which are undoubtedly available to you, at your earliest convenience, to enable me to furnish a more detailed response further to your request."

With the receipt of the letter **P14** from the Petitioner, the SLMC by letter dated 23-04-2022 (produced marked **P15**), had communicated to the Petitioner the following,

*"**Disciplinary Action - Expulsion from the Party (Sri Lanka Muslim Congress) Membership.***

I received your letter dated 7th April 2022.

Your letter was placed before the High command of the party which met on 22.04.2022.

The High Command noted that you have not given any reason for violating the party decision taken at the High Command meeting held on 21.11.2021, except to plead your purported ignorance of the said decision.

High command noted that the said decision was not only conveyed to you by the leader but also it was given a huge publicity through the media.

The High Command also noted that;

1. *you are well aware the said meeting on 2.11.2021 was summoned for the specific purpose of taking a decision as to the party's stance on the government's proposed Appropriation Bill for the year 2021/2022, as it was spelled out in the invitation SMS sent by the secretary.*
2. *You are also aware that the secretary has not sent any message, cancelling or postponing the meeting. On the contrary you have sent SMS to the secretary, excusing your attendance, which you have admitted in your letter,*

Hence, the High Command proceeded to consider the action to be taken against you on the basis that you have no cause to show.

After due considerations of all these relevant matters the High Command has unanimously resolved to expel you from party membership with immediate effect. Accordingly, on the instructions of the party I do hereby communicate that your party membership from Sri Lanka Muslim Congress is duly terminated and as a result you have ceased to be a member of the Sri Lanka Muslim Congress the political party from which you were elected to the present Parliament."

Let me digress a bit from the sequence of events at this stage to again refer to *Gamini Dissanayake's* case. In that case, Kulatunga J having considered many authorities cited before him, stated as follows:

> *"I appreciate that it is not possible to come to a finding on the contentions advanced before us on a piece-meal approach with reference to this authority or the other. In my view our decision rests on an application of more than one principle, cumulatively, to the facts and circumstances of this case bearing also in mind the legal safeguards to which the petitioners are entitled".*[43]

Thus, with that in mind let me further probe into the afore-stated sequence of events which took place before the decision of the SLMC to expel the Petitioner from the party.

[43] at page 239.

It is Mr. Sumanthiran PC's position that since the Petitioner has failed to show any cause as to why he had breached the decision of the party and voted in favour of the Appropriation Bill (2022 Budget), the disciplinary authority is entitled to proceed on the basis that the Petitioner has no cause to show. Indeed, this is what **P9** in its last line has stated. The relevant part is as follows:

> *"…Your explanation in writing in the form of an affidavit should reach me within fourteen days from the date of the receipt of this letter.*
>
> *Failure to do so will compel the party to arrive at the conclusion that you have no cause to show against the said violation of the party decision by you…"*

The letter **P9** which called for a written explanation from the Petitioner is dated 27-11-2021. Time granted for the Petitioner for that purpose is fourteen days. It is important to note, that the first response by the Petitioner to **P9**, which is the letter **P10** is dated 10-12-2021. That date is the 14th day since the date of **P9**. Therefore, as per **P9**, it is the last day of the deadline given for the Petitioner to submit his explanation.

In the meantime, the Petitioner having accepted the cabinet portfolio was appointed as the cabinet minister in charge of environment, on 28-04-2022. Although the Petitioner has stated in his petition that this appointment was made on 18-04-2022, the 1st, 2nd and 8th Respondents have brought to the notice of the Court that this appointment was in fact made on 28-04-2022. The relevant Gazette notification has been produced marked **P14(a)**.

When the Petitioner received **P9**, he knew very well that an explanation in writing in the form of an affidavit must be tendered to the secretary of the SLMC within the time designated in that letter. Moreover, he was also aware of the consequences of any failure on his part to tender such explanation in the form of an affidavit within that time. This is because in the last paragraph of that letter, the secretary of the SLMC had clearly communicated to him that any failure on his part to tender such explanation will compel the party to arrive at the conclusion that he has no cause to show against the alleged violation of the party decision taken on 21-11-2021, not to vote in favour of the budget (the appropriation bill 2022) on 22-11-2021 and at the 3rd reading of that bill as well. In his response in **P10** (which is the response of the Petitioner to **P9**) the only reason the Petitioner had adduced was that the Petitioner did not receive any communication as to whether the meeting was held or postponed, or any decision taken at the meeting. Having stated so, the Petitioner had requested a period of one month to furnish his response. He had also requested the relevant provisions in the party constitution under which the leader is said to have exercised his powers to suspend him from the High Command together with a copy of the party constitution.

The SLMC had proceeded to grant the further period of one month requested by the Petitioner by **P10** for which the Petitioner had even proceeded to thank the SLMC for accommodating his request for further time (by **P12**). Thus, the Petitioner does not allege any unfair refusal of his request by **P10** for further time to tender his written explanation. Therefore, on that point we cannot hold that the SLMC had breached the Rules of Natural Justice.

The Petitioner writes **P12** on 04-01-2022. The one-month time granted by **P10** if calculated from the date of that letter i.e., 10-12-2021, must end on 10-01-2022. **P12** is dated 04-01-2022 and it only requests a copy of the latest party constitution and sections under which the SLMC had called for the Petitioner's explanation. The Petitioner does not request for further time by **P12** to tender his explanation. It is thereafter, that the SLMC by letter dated 14-03-2022 (produced marked **P13**) had communicated to the Petitioner, that the Petitioner must tender his explanation before 15-04-2022. The Petitioner replying to **P13** by letter dated 07-04-2022 marked **P14**, had stated the following two things.

i. He did not receive any communication as to whether the meeting was held or postponed or any decision taken at the meeting.
ii. He requests to let him know the relevant provisions in the party constitution under which the leader is said to have exercised his powers to suspend him from the High Command position. He also requests a copy of the party constitution.

The Petitioner himself has admitted that the above two things are a mere reproduction of the contents in **P10**. The Petitioner in the last paragraph of **P14**, had stated that the above would enable him to furnish a more detailed response. It is after consideration of **P14** that the SLMC High Command had made the decision to expel the Petitioner which was communicated by **P15**.

The Petitioner does not challenge his expulsion before this Court on the basis that the SLMC had failed to tender to him a copy of the constitution or its provisions he had requested. Nevertheless, let me now consider whether the Petitioner has satisfied before this court, that he could not have tendered a full response without the SLMC complying with his request for the relevant provisions and a copy of the party constitution.

It is the Petitioner himself who had produced a copy of the SLMC constitution annexed to his Petition marked **P1**. This means either he was in possession of the SLMC constitution or he was capable of easily getting it procured for his use on his own rather than making repeated requests to the party. Admittedly, the Petitioner is an experienced politician, whose political career has spanned over 30 years and at the time of his expulsion form the SLMC, he had held the position of 'Deputy Leader I' of the High Command and the post of the 'Director of

International Affairs', of the party.[44] In my view, such an attitude on the part of the Petitioner cannot be seen as a genuine request made by the Petitioner, the compliance of which by the SLMC should have been necessary as a pre-requisite to tendering the Petitioner's explanation. I am unable to accept that as aground which would vitiate the decision of the SLMC to expel him from the party.

The Petitioner has not challenged his expulsion before this court on the basis that the Leader of the SLMC had no power to suspend him from the High Command position he held. In any case, what the Petitioner had requested from SLMC is to let him know the relevant provisions of the SLMC constitution under which the Leader of the SLMC is empowered to suspend him from his position in the SLMC High Command. As has been already mentioned, the SLMC with or without powers under the SLMC constitution has suspended the petitioner by **P9**. The Petitioner does not seek to challenge **P9** in this proceeding. Moreover, the jurisdiction conferred by Article 99 (13) (a) of Constitution does not empower this court to engage in such exercise of reviewing a decision to suspend a member form the party. The jurisdiction under Article 99 (13) (a) is clear in that it only confers jurisdiction on this court to decide whether the expulsion of a member from a political party is valid or not. That is what the Petitioner had exactly sought to do in this case. Therefore, I hold that the question whether the SLMC leader had power under SLMC constitution to suspend the Petitioner by **P9** or the question whether the SLMC should have complied with the Petitioner's request to let him know the relevant provisions in the party constitution under which the Leader had suspended him from the High Command position, are irrelevant to decide on the validity of the expulsion of the petitioner which only had happened by **P15** which is five months after the date in **P9**.

The above facts show clearly that the SLMC had tried its best to get an explanation form the Petitioner but the Petitioner had not cooperated. In the above circumstances, I am unable to hold that the SLMC had breached the Rules of Natural Justice in the instant case as it had granted ample opportunities for the Petitioner in the instant case to tender his written explanation as to why he had violated the party decision taken at the High Command meeting held on 21-11-2021.

The Petitioner knew very well that his failure to tender written explanation would result in the party concluding that he has no cause to show against the alleged violation of the party decision by him. Despite that, the Petitioner was determined to blatantly ignore the last two paragraphs of **P9**. Thus, the petitioner was determined not to submit himself to the disciplinary proceedings initiated by the party. In such a situation, as Kulatunga J held in

[44] Vide paragraph 12 of the Affidavit of the Petitioner dated 20-05-2022.

Gamini Dissanayake's case there is no force in the Petitioner's complaint that the party had failed to give him a hearing.

Moreover, as the Petitioner had determined not to submit himself to the disciplinary proceedings initiated by the party, he could not have had any legitimate expectation of any formal inquiry. Therefore, as Lord Denning held in *Cinnamond's* case, where there is no legitimate expectation, there is no call for a hearing.

For the foregoing reasons, I hold that the absence of a formal inquiry has not vitiated the decision of the SLMC to expel the Petitioner under the circumstances of the instant case.

IS THE DECISION TO EXPEL THE PETITIONER JUSTIFIED?

Let me now consider whether the decision taken by the SLMC to expel the petitioner is justified on its merits. The main ground on which the Petitioner has sought to canvass his expulsion from the party is the fact that the SLMC did not conduct a formal inquiry according to the law.[45] For the reasons I have already set out above, I have held that the SLMC had not breached the Rules of Natural Justice in the instant case as it had granted ample opportunities for the Petitioner in the instant case to tender his written explanation as to why he had violated the party decision taken at the High Command meeting held on 21-11-2021. I have also held that the absence of a formal inquiry has not vitiated the decision of the SLMC to expel the Petitioner under the circumstances of the instant case. Therefore, the Petitioner is not entitled to succeed on this ground.

Let me now consider the other grounds urged by the Petitioner. The Petitioner in his petition, has stated that his expulsion is capricious, manifestly *mala fide* and is motivated purely by the clear resentment towards the Petitioner arising inter alia, from the Petitioner being appointed as a cabinet minister on 18-04-2022.[46]

Although the Petitioner has stated in some instances that his expulsion was done *mala fide*, the Petitioner has not sought to support any of those allegations with evidence.

Mr. Sanjeeva Jayawardena PC submitted that although it was not only the Petitioner who voted in favour of the aforesaid Appropriation Bill despite the party decision to vote against the same, it was only the Petitioner who was expelled from the party. Let me further probe in to this complaint.

[45] Paragraph 55 (c) and (d) of the petition dated 20th May 2022.

[46] Paragraph 55 of the petition dated 20th May 2022.

Four SLMC members namely, the 6th Respondent Hon. H.M.M. Harees, the 16th Respondent Hon. M.S.M. Thoufeek, the 24th Respondent Hon. Faizal Cassim and the Petitioner had voted in favour of the aforesaid Appropriation Bill 2022. Indeed, the SLMC had called for explanations from all of those who had voted in favour of the Appropriation Bill 2022. It is in evidence that the other members involved in the voting had complied with the directive of the party and tendered their explanations to the SLMC.[47] This also explains as to why the High Command of the SLMC on 22-04-2022 had unanimously resolved (as per the extract from the minutes produced marked **1R1**) to expel the Petitioner from the party membership with immediate effect and to suspend those three members from the party membership and to proceed to hold a formal inquiry against them. This goes on to show that those members had an explanation to be tendered and in fact they did so. However, unlike the other three members who had tendered their explanations, the Petitioner had determined not to submit himself to the disciplinary proceedings initiated by the party. In those circumstances, I cannot resist drawing the inference that the Petitioner in the instant case did not offer any explanation despite repeated requests from the party, solely because he did not have any explanation to be given as to why he had voted in favour of the Appropriation Bill 2022 despite the party decision to vote against **P9**.

Another complaint the Petitioner has made in his petition, is that his expulsion is capricious, manifestly mala fide and is motivated purely by the clear resentment toward the Petitioner arising inter alia, from the Petitioner being appointed as a cabinet minister on 18-04-2022. Even if the date of the Petitioner's appointment as the cabinet minister in charge of environment is taken as 18-04-2022 as stated by the Petitioner, the SLMC had called for a written explanation from the Petitioner by the letter **P9** dated 27-11-2021. Thus, initiating the disciplinary proceedings against the Petitioner had well preceded the event of the Petitioner being appointed as a cabinet minister. It was only after the exchange of several other letters between the SLMC and the Petitioner that the SLMC by the letter **P15** dated 23-04-2022, had communicated to the Petitioner about his expulsion from the party. The SLMC had extended the time for the Petitioner to tender his explanation until 15-04-2022 by **P13**. The Petitioner had replied **P13** by his letter **P14** dated 07-04-2022. Thus, the final deadline for the Petitioner to tender his explanation had ended on 15-04-2022.

On the above facts, I observe that the active part of the disciplinary proceeding against the Petitioner which had led to his expulsion from the party had come to an end well before the date 18-04-2022 on which he claims he was appointed as a cabinet minister.

[47] Paragraph 23(f)-(g) of the affidavit of the 2nd Respondent dated 29th September 2022.

The Petitioner's assertion that this appointment was made on 18-04-2022 is factually incorrect or not supported by evidence he has adduced. The relevant Gazette notification has been produced marked **P14(a)**. This is the Gazette which the Petitioner relies on, to establish that this appointment was made on 18-04-2022. However, as pointed out by Mr. Sumanthiran PC, the relevant Gazette notification is dated 28-04-2022. Thus, The Petitioner has not established before this Court that this appointment was made on 18-04-2022 as claimed by him. The SLMC had communicated to the Petitioner that it has unanimously decided to expel him from the party by **P15** which is dated 23-04-2022. Thus, in this sense, I observe that the whole of the disciplinary proceeding against the Petitioner which had led to his expulsion from the party had also come to an end well before the Petitioner was appointed as a cabinet minister. For those reasons, I am unable to accept the Petitioner's position that his expulsion is manifestly *mala fide* and is motivated purely by the clear resentment towards the Petitioner arising from the appointment of the Petitioner as a cabinet minister.

The Petitioner in his Petition,[48] has also stated that his expulsion is contrary to the provisions of the provisions of Clauses 8.12, 13.1, 13.2, 13.3 and 13.4 of the Constitution of the SLMC. The Petitioner had not sought to substantiate these allegations in any other means other than merely stating in his petition and affidavit that his expulsion is contrary to these clauses of the SLMC constitution. Nevertheless, let me first reproduce Clauses 13.1 and 13.2 of the Constitution of the SLMC.

> *"13.1 Where the High Command of the party is in receipt of any information or complaint, that a member of the Party has committed an act or omission which in its opinion-*
>
> *a) amounts to a failure and /or a refusal to perform any one or more duties of a member or is in conflict with and /or inconsistent with any one or more duties of a member and /or,*
>
> *b) prejudicial to the interests and reputation of the Party or the collective responsibility of the Party.*
>
> *The member concerned is liable to be dismissed from the membership and expelled from the Party in terms of the Rules of the High Command in respect of Disciplinary actions."*
>
> *"13.2 The High Command shall exercise its summary jurisdiction as provided hereinbefore in respect of disciplinary action in respect of any of its members."*

[48] At paragraph 55 (a) of the Petition.

Both of those Clauses in my view, are not in favour of the case advanced by the Petitioner that the SLMC had wrongly expelled him from the party. This is because any member violating those clauses have been made specifically liable to be expelled from the party. The Petitioner by voting in favour of the Appropriation Bill 2022 has breached his collective responsibility of the party which he has already willingly undertaken by virtue of signing **P5**. Then Clause 13.1 makes the Petitioner liable to be expelled from the party. The High Command of the party is empowered to exercise its summary jurisdiction in respect of such situation. The said summary jurisdiction is a reference to some earlier provisions in the SLMC constitution. Thus, Clause 8.12 of the SLMC constitution would be relevant in that regard. It is as follows:

> *"Where a member of the Party is deemed to be guilty of misconduct and is liable to be dismissed from the membership and expelled from the party, the High Command in its absolute discretion shall be entitled to adopt any procedure it thinks fit and proper in the circumstances. However, the High Command shall observe the rules relating to the Principles of Natural Justice in exercising such powers."*

This shows that the High Command has been given absolute discretion and powers under the SLMC constitution to adopt any procedure it thinks fit and proper in a given circumstance subject to the condition that it should observe rules of natural justice when exercising such powers. I have already set out above the circumstances prevailed in the instant case. I have also held above that the SLMC has not breached the Rules of Natural Justice. In those circumstances, the procedure adopted by the SLMC for its decision by the High Command to expel the Petitioner from the party, is a procedure well within the Clause 8.12. Clause 13.4 of the SLMC constitution does not apply to the instant case as the SLMC High Command had not delegated its disciplinary powers to a smaller committee.

For those reasons, I am unable to accept that the decision to expel the Petitioner from the SLMC has been done contrary to any of those provisions in the SLMC constitution.

It remains for me only to consider, whether there is merit in the position taken up by the Petitioner that he was not made aware regarding any decision taken by the High Command on 21-11-2021 that SLMC Members of Parliament shall not vote in favour of the Appropriation Bill 2022 at its second reading on 22-11-2021 and at the third reading as well. The 2nd Respondent (the Leader of the SLMC) in his affidavit has categorically asserted that in the morning of 22-11-2021, before the commencement of the proceedings in Parliament, a group meeting of SLMC Members of Parliament was held; the Petitioner was present at the said Group Meeting; the decision that SLMC Members of Parliament shall not vote in favour of the

Appropriation Bill 2022 was re-iterated.[49] This factual position has been corroborated by the followings: the affidavit of the 3rd Respondent (the Secretary of the SLMC) produced marked **1R3**; the Attendance Sheet of the Parliamentary Group Meeting of SLMC held on 22-11-2021 produced marked **1R4(a)** where the Petitioners signature is found; the affidavit of the 16th Respondent produced marked **1R4(b)**; the affidavit of the 24th Respondent produced marked **1R4(c)**. The Petitioner was content with making only a bare denial of his presence at the Parliamentary Group Meeting of SLMC held on 22-11-2021 at the Parliament premises in his counter affidavit.[50]In the course of the oral submissions, the learned President's Counsel who appeared for the Petitioner submitted that the signature of the Petitioner found in **1R4(a)** is a forged signature. However, I observe that the Petitioner had never taken up such a position in his Counter Affidavit. Thus, in my view, the Petitioner himself by taking up the above position which he cannot substantiate, has pushed his assertion that he was not present at the Parliament premises in the Group Meeting of SLMC held on 22-11-2021, beyond my belief. I hold that the Petitioner had in fact been present at the Parliament premises in the Group Meeting of SLMC held in the morning of 22-11-2021 at the Parliament when he was informed (at the Parliament) by the Leader about the decision of the SLMC that the SLMC Members of Parliament shall not vote in favour of the Appropriation Bill 2022. I further hold that the Petitioner has not been truthful with regard to the position he has taken up before this Court in this proceeding.

Let me move further to highlight some of the Petitioner's obligations with regard to the decisions of the Party and his collective responsibility. The Petitioner who was elected to the Parliament at the General Election held on 05-08-2020, has signed **P5** in which he has accepted *inter alia* the followings.

i. He has accepted that the provisions of the constitution, code of conduct and all decisions, resolutions and directives of the High Command, and of the Party would strictly bind him.

ii. He has accepted that any willful contravention or failure to comply with the provision of the constitution, code of conduct and /or decisions, directives or resolution of the High Command, and of the Party shall make him liable to be expelled from the membership of the Party.

[49] Paragraph 23(a)-(c) of the affidavit of the 2nd Respondent dated 29th September 2022.

[50] Paragraph 11(d) of the Counter Affidavit of the Petitioner dated 25th November 2022.

iii. He has accepted that any refusal to subscribe to the annual special pledge of loyalty shall make him guilty of gross misconduct upon which he shall be liable to be expelled from the membership of the party by the High Command.

iv. He has accepted that he will always vote in Parliament in accordance with the mandate of the Party.

v. He has accepted that he will conduct himself at meetings in Parliament with a sense of collective responsibility and also should on all occasions speak in one voice at such meetings as per the decisions of the Party.

vi. He has accepted that any violation of the accepted norms and general standards of party discipline shall make him liable to be expelled from the membership of the Party.

vii. He has accepted that leaving the island, or being unable to attend the meetings of the Parliament for any specific reason, he should get prior approval from the Leader and/or the Secretary of the Party and his failure to do so would result in disciplinary action being taken against him.

viii. He has accepted that it is his duty to consult the Party leadership, to ascertain the stand of the Party in respect of any matter before casting, abstaining or taking any step at the time of voting in the Parliament.

ix. He has accepted that he will not take a stand against and /or not in conformity and/or not consistent with the policy of the Party.

Moreover, chapter 5 of the constitution of SLMC under the title 'duties of members of the party' (chapter 5) states the followings:

"*The following shall inter alia shall be the duties of every member of the Party.*

a. *Be loyal to the Party and shall recognise honour and submit to the authority of the hierarchy of the Party.*
b. *Abide by and honour the provisions of the Constitution, codes of conduct, decisions, rules, regulations, directives, policies and programmes of the Party as decided by the High Command,*
c. *Propagate and defend in public the policies and programmes of the Party.*
d. *Always conform to the standards laid down in the Code of Conduct of the Party.*
e. *Regularly attend meetings and sessions of the various bodies and committees set up and / or recognized by the High Command.*
f. *Be individually and collectively responsible for his conduct and shall also ensure that his conduct in no way affects the image or reputation of the Party."*

As has already been mentioned earlier in this judgment, the Petitioner himself has admitted that he is an experienced politician whose political career has spanned over 'thirty long years'.[51] He held the position of Deputy Leader I of the party's High Command and Director of International Affairs of the SLMC at the time he was suspended from office by **P9**. I have to note that these are assertions made by the Petitioner himself.

In Paragraph 43 of the Petition, the Petitioner had made it clear, that the Petitioner was not informed of any decision taken at the meeting of the High Command held on 21-11-202. Thus, it is the position of the Petitioner that he had voted in favour of the Appropriation Bill 2022 at its second reading held in Parliament on 22-11-2021 as he was not informed of any such decision taken at the SLMC High Command meeting held on 21-11-2021.

The Petitioner had voted in favour of the Appropriation Bill 2022 at its second reading on 22-11-2021. I note that the first letter **P9**, sent to the Petitioner by the SLMC is dated 27-11-2021. In paragraph 44 of the Petition, the Petitioner has admitted the receipt of said letter. The Petitioner states that he was shocked and surprised to receive such a letter. The Petitioner would have stated so to convince Court that he did not know the existence of any decision taken at the SLMC High Command meeting held on 21-11-2021 not to vote in favour of the Appropriation Bill 2022.

In signing **P5** the Petitioner has undertaken/promised: to vote in Parliament in accordance with the mandate of the Party; to conduct himself at meetings in Parliament with a sense of collective responsibility; to speak on all occasions in one voice at meetings as per the decisions of the Party. He has also accepted that it is his duty to consult the Party leadership, to ascertain the stand of the Party in respect of any matter before casting, abstaining or taking any step at the time of voting in Parliament. It is the Petitioner himself who has produced **P5**. Despite the above acceptances and undertakings, the Petitioner has not adduced any reason as to why he had failed to consult the Party leadership, to ascertain the stand of the Party before voting in favour of the Appropriation Bill 2022 at its second reading in the Parliament.

I also note that the Petitioner had thereafter proceeded to vote at the third reading of the Appropriation Bill 2022 on 10-12-2021. Why did the Petitioner vote at the third reading? Was it because the Petitioner even by that time, did not know that there was a decision made by the SLMC High Command that its members should not vote in favour of the Appropriation Bill 2022? The Petitioner is silent as to why he had voted at the third reading. He also has not adduced any basis as to why he had voted at the third reading.

[51] Vide paragraph 12 of the Affidavit of the Petitioner dated 20-05-2022.

It was on 10-12-2021 that the Petitioner had voted at the third reading of the Appropriation Bill 2022. The SLMC had first called for explanation from the Petitioner by letter **P9**, dated 27-11-2021. The Petitioner has admitted the receipt of **P9**. Then am I to take the unsupported bare averment in the affidavit of the Petitioner that he did not know of any such decision of SLMC High Command taken on 21-11-2021 to be truthful? The answer in the above circumstances, is clearly no. Thus, in my view, what the Petitioner has established according to his own documents before this Court is only the fact that he has not been truthful on this before this Court.

Although the Petitioner at some occasions had sought to challenge the authority of the SLMC to suspend or expel him from the party membership, I observe that by signing **P5**, the Petitioner has clearly accepted the authority of the SLMC and of the party High Command to suspend or expel him from the party membership. Thus, as far as the Petitioner is concerned, the authority of the SLMC is an admitted fact. Then why does he want to rely on the party constitution in that regard? In the same way in view of the undertakings/promises the Petitioner has made in **P5** as shown before in this judgment, the Petitioner has not adduced any basis/reason as to why he would have wanted to rely on the party constitution in that regard.

In the above circumstances, what is the explanation he has tendered as to why he had voted in favour of the Appropriation Bill 2022 at its second reading held in Parliament? I hold that the answer is none. It must be noted that the Petitioner's expulsion as per **P15** had occurred after the lapse of approximately five months from the communication of **P9** calling upon the Petitioner, to show cause. The SLMC had tried its best to get an explanation form the Petitioner but the Petitioner had not cooperated. For the foregoing reasons, I am unable to accept the Petitioners position that his expulsion is completely arbitrary, discriminatory and tainted with serious mala fides.

In *Tilak Karunaratne's* case, Dheeraratna J in the majority judgment of this Court referring to the violation of party discipline within a registered political party, has held as follows:

> *"A political party is a voluntary association of individuals who have come together with the avowed object of securing political power on agreed policies and a leadership. Cohesion is a sine qua non of success and stability whether a political party is in power or in the opposition. To foster party cohesion discipline among its members becomes absolutely necessary. Party disintegration has to be arrested by firm disciplinary measures that include expulsion which Article 99 (13) (a) of our Constitution itself recognizes. The members of a party are bound together by a*

contract which is usually the party constitution, from which arises contractual obligations of the membership. These obligations are either express or implied" .[52]

In *Gamini Dissanayake's* case, Kulatunga J in the majority judgment of this Court having regard to the fact that the UNP Constitution has imposed on all its members obligations such as: the duty to harmonize with the policy and code of conduct of the party; the duty to be bound by the directions of the Leader or the Deputy Leader regarding matters in Parliament; the duty to vote in Parliament according to the Mandate of the Parliamentary Party conveyed through the party whip; observed as follows:

"I can see no illegality in these arrangements for group action. How can any government or opposition function without disruption if the conduct of M.P.s as a group cannot be regulated including in the matter of voting in the House and each M.P. is free to do whatever he pleases? How can the party fulfil its mandate given to it by the electors? Can an individual M.P. who has been elected on the party vote and policy be heard to say " from today I am a free man, the party and the group are secondary and are subordinate to me "? Can Parliamentary business be transacted without the party having some assurance as to how the M.P.s are going to vote? I see no evil in reasonable restrictions on the conduct of M.P.s in Parliament based on group action or in the obligation to harmonize with party policy or in the Whip system all of which have the effect of ensuring the smooth functioning of Parliament itself and peace, order and good government.

In this country the electors elect a government for six years after an election which is often bitterly fought and in recent times in conditions of turmoil and death. It is then the duty of both the opposition and the government, owed to the people, to ensure as far as possible, stable government. The Constitution has frozen party composition in the House for the duration of Parliament and made provision for vacation of seats where a Member of Parliament ceases by resignation, expulsion or otherwise to be a member of the recognized political party or independent group on whose nomination paper his name appeared at the time of his election to Parliament. It is not our function to examine the wisdom of these provisions the object of which, I believe, is to achieve stability of government. Group action, party discipline and the Whip system are complimentary. If we declare these arrangements to be invalid we would be making the Constitution unworkable and

[52] At page 111.

as Sir John Donaldson MR observed in Waltham Forest case (Supra) " We should..... be criticizing the system operating in Parliament itself."

On the other hand, the Petitioner's challenge to his expulsion is not on the basis that he has a right to go against the decision of SLMC High Command made on 21-11-2021 that its members should not vote in favour of the Appropriation Bill 2022. Moreover, the Petitioner has pledged that he would be loyal to the Party; shall recognize honour and submit to the authority of the hierarchy of the Party; abide by and honour its decisions, rules, regulations, directives, policies of the Party as decided by the High Command. But the Petitioner has not only breached this solemn pledge but also has deliberately refrained from giving any explanation for his conduct. He has also determined not to submit himself to the authority of the Party. In those circumstances and for the foregoing reasons, I hold that the decision made by the SLMC to expel the Petitioner from the party by letter **P15** dated 23.04.2022, is valid in law.

I proceed to dismiss this Petition.

JUDGE OF THE SUPREME COURT

S. Thurairaja PC J

I agree,

JUDGE OF THE SUPREME COURT

Samayawardhena J

The gravamen of the Petitioner's complaint is that the decision to expel him from the Party was taken without giving him a hearing in violation of the rules of natural justice – *audi alteram partem*. If it is correct, I accept that "the decision must be declared to be no decision". However, on the facts and circumstances of this case, I cannot subscribe to the assertion that the rules of natural justice were violated.

The Secretary of the Sri Lanka Muslim Congress sent P9 to the Petitioner requiring him to show cause for his decision to vote in favour of the Appropriation Bill for 2022 (Budget) in violation of the decision of the Party High Command taken at the Meeting held on 21.11.2021. P9 dated 27.11.2021 reads as follows:

> *As you are aware, the Party called for a High Command meeting on 21.11.2021 at the Party headquarters 'Dharussalam', to discuss and decide on the Party stand vis-à-vis the 2022 Budget (The Appropriation Bill).*
>
> *You are also aware that at this meeting, it was decided unanimously, that Members of Parliament being members of the Sri Lanka Muslim Congress, shall not vote in favour of the Budget at its second reading vote on 22.11.2021 and shall not vote in favour at the third reading vote as well.*
>
> *You, however, on 22.11.2021 voted in favour of the said Budget at its second reading, in blatant violation of the said decision of the High Command.*
>
> *In doing so, you have acted in breach of the Party decision while holding a senior and substantial position in the Party High Command namely, Deputy Leader.*
>
> *In the circumstances, the Party Leader, exercising his powers under the Party Constitution, has decided to suspend you from the High Command position held by you and to call for explanation on the said breach of the Party decision.*
>
> *Therefore, as instructed by the Leader, I do hereby call for your explanation of your decision to vote in favour of the 2022 Budget in violation of the Party decision.*
>
> *Your explanation in writing in the form of an affidavit should reach me within fourteen days from the date of the receipt of this letter.*
>
> *Failure to do so will compel the Party to arrive at the conclusion that you have no cause to show against the said violation of the Party decision by you.*

The Petitioner was the Deputy Leader of the party at that time. The Petitioner replied to P9 by P10 taking up an unusual position that he was unaware of the Party decision

regarding how to vote at the Budget since he could not attend the said Meeting. P10 dated 10.12.2021 reads as follows:

> *I am in receipt of your letter dated 27.11.2021 informing me that you have been requested by the SLMC Leader claiming to exercise powers under the Party Constitution, has decided to suspend me from the High Command position held by me and to call for my reasons for my voting in favour of the Budget on 22.11.2021.*
>
> *You also refer to a meeting of the High Command scheduled for 21.11.2021 at the Party headquarters, which I could not attend. You are aware, the said High Command meeting had been summoned at very short notice and I was not able to attend the said meeting due to reasons beyond my control which I had duly notified to you. I did not receive any communication whether the meeting was held or postponed or of any decision taken at the meeting.*
>
> *I wish to inform you that I require a period of one month to furnish my response to your queries due to pre-arranged programmes and would thank you to oblige. Meanwhile please let me know the relevant provisions in the Party Constitution under which the Leader is said to have exercised his powers to suspend me from the High Command position together with a copy of the relevant Constitution.*

When P10 is read contextually it is clear that the Petitioner was more concerned about his suspension from the post of the Deputy Leader of the Party than showing cause to the main allegation that he violated the decision of the Party High Command in relation to the voting for the Budget. His request in P10 for a copy of the Party Constitution is related to his removal from the High Command position and is irrelevant to the matter under consideration in this application, which is expulsion. By P10 he sought a period of one month to show cause.

There was some correspondence exchanged between the Petitioner and the Party during that time. He was granted extended time to show cause.

Nearly five months after P10 whereby the Petitioner sought a period of one month to show cause, the Petitioner wrote P14 to the Party Secretary. By P14, the Petitioner did not show cause, which he undertook to do by P10 but merely quoted the contents of

P10 verbatim. He did not seek further time to show cause why he voted in favour of the Budget. P14 dated 07.04.2022 reads as follows:

> *I am in receipt of your letter dated 14.03.2022.*
>
> *In my response letter to you dated 10.12.2021, I had explained as follows:*
>
> *"You also refer to a meeting of the High Command scheduled for 21.11.2021 at the party headquarters, which I could not attend. You are aware, the said High Command meeting had been summoned at very short notice and I was not able to attend the said meeting due to reasons beyond my control which I had duly notified to you. I did not receive any communication whether the meeting was held or postponed or of any decision taken at the meeting."*
>
> *"Meanwhile please let me know the relevant provisions in the party Constitution under which the Leader is said to have exercised his powers to suspend me from the High Command position together with a copy of the relevant Constitution."*
>
> *You will note that you have not made available the relevant information and a copy of the relevant Constitution as yet. I shall therefore request you to furnish me with the relevant information and a copy of the relevant Constitution which are undoubtedly available to you, at your earliest convenience, to enable me to furnish a more detailed response further to your request.*

As indicated in P10, the relevant information and a copy of the relevant Constitution refers to "*the relevant provisions in the party Constitution under which the Leader is said to have exercised his powers to suspend [him] from the High Command position*". As I understand the Petitioner requests "*a copy of the relevant Constitution*" because according to him the Constitution which is available does not have a provision which empowers the Party Leader to suspend him from the High Command position. As I have already stated, this Court is not concerned about suspension but only expulsion.

In my view, if he did not show cause in response to P9, there is no necessity to fix the matter for the formal inquiry. The Petitioner cannot now be heard to say that the failure to hold a formal inquiry is a violation of the rules of natural justice. The rules of natural

justice are not written in stone; whether or not these rules have been violated must be determined based on the unique facts and circumstances of each individual case.

It is after receipt of P14 and "*after due considerations of all these relevant matters*" the High Command has unanimously resolved to expel the Petitioner from Party Membership with immediate effect "*on the basis that you have no cause to show*". This was informed to the Petitioner by P15 dated 23.04.2022, which reads as follows:

> ***Disciplinary Action – Expulsion from the Party (Sri Lanka Muslim Congress) Membership***
>
> *I received your letter dated 7th April 2022.*
>
> *Your letter was placed before the High Command of the Party which met on 22.04.2022.*
>
> *The High Command noted that you have not given any reason for violating the Party decision taken at the High Command meeting held on 21.11.2021, except to plead your purported ignorance of the said decision.*
>
> *High Command noted that the said decision was not only conveyed to you by the leader but also was given huge publicity through the media.*
>
> *The High Command also noted that,*
>
> *1. You are well aware the said meeting on 21.11.2021 was summoned for the specific purpose of taking a decision as to the Party's stance on the government's proposed Appropriation Bill for the year 2021/2022, as it was spelled out in the invitation SMS sent by the Secretary.*
>
> *2. You are also aware that the Secretary has not sent any message, cancelling or postponing the meeting. On the contrary you have sent SMS to the Secretary, excusing your attendance, which you have admitted in your letter.*
>
> *Hence, the High Command proceeded to consider the action to be taken against you on the basis that you have no cause to show.*

After due considerations of all these relevant matters the High Command has unanimously resolved to expel you from Party Membership with immediate effect.

Accordingly, on the instructions of the Party I do hereby communicate that your Party Membership from Sri Lanka Muslim Congress is duly terminated and as a result you have ceased to be a Member of the Sri Lanka Muslim Congress the political Party from which you were elected to the present Parliament.

The Petitioner was aware that the High Command Meeting on 21.11.2021 was to take a decision on how to vote at the Second and Third Readings of the Budget. The Petitioner who was the Deputy Leader of the Party opted not to attend this important Meeting. The First Reading of the Budget was on 22.11.2021 and there was a Parliamentary Group Meeting of the Sri Lanka Muslim Congress held on the morning of 22.11.2021 in the Parliamentary premises just before the First Reading of the Budget. How can the Petitioner make a sweeping statement in P10 that "*I did not receive any communication whether the meeting was held or postponed or of any decision taken at the meeting*" and remain silent? He was not a Party supporter but the Deputy Leader of the Party.

Let me assume for a moment that he was unaware of the Party decision taken on 21.11.2021 before he voted in favour of the Budget on 22.11.2021. What about his voting in favour of the budget at the Third Reading, which happened on 10.12.2021, admittedly after he received P9 dated 27.11.2021 wherein it was specifically mentioned the Party decision that "*Members of Parliament being members of the Sri Lanka Muslim Congress, shall not vote in favour of the budget at its second reading vote on 22.11.2021 and shall not vote in favour* ***at the third reading vote as well****"?* The Petitioner cannot plead ignorance of the Party decision in respect of voting at the Third Reading of the Budget.

I see no reason to interfere with the decision of the Party as reflected in P15. The application of the Petitioner shall stand dismissed. No costs.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for special leave to appeal in terms of Article 154(p) of the Constitution read with Section 31DD of the Industrial Disputes Act (as amended) and Section 9 of the High Court of the Province (Special Provisions) Act No.19 of 1990.

SC APPEAL 131/2017

SC (SPL) LA 252/2016

CP HCLTA 23/2015

LT NO 03/50/2004

I.A.S.N. Premalal (deceased),

No. 196/9,

Millange Kumbura,

Ranawana, Katugasthota.

APPLICANT

Badulpe Ramani Sepalika Pathirange,

No. 196/9,

Millange Kumbura,

Ranawana, Katugasthota.

SUBSTITUTED-APPLICANT

vs.

People's Bank,

No.75,

Sri Chiththampalam A. Gardner Mw,

Colombo 02.

RESPONDENT

AND

People's Bank,

No.75,

Sri Chiththampalam A. Gardner Mw,

Colombo 02.

RESPONDENT-APPELLANT

vs.

Badulpe Ramani Sepalika Pathirange,

No. 196/9,

Millange Kumbura,

Ranawana, Katugasthota.

SUBSTITUTED-APPLICANT-RESPONDENT

AND NOW BETWEEN

Badulpe Ramani Sepalika Pathirange,

No. 196/9,

Millange Kumbura,

Ranawana, Katugasthota.

SUBSTITUTED-APPLICANT-RESPONDENT-APPELLANT

vs.

People's Bank,

No.75,

Sri Chiththampalam A. Gardner Mw,

Colombo 02.

RESPONDENT-APPELLANT-RESPONDENT

BEFORE : **VIJITH K. MALALGODA, PC, J**
S. THURAIRAJA, PC, J AND
MAHINDA SAMAYAWARDHENA, J

COUNSEL : Chanaka Kulatunga instructed by R. Thennakoon for the Substituted-Applicant-Respondent-Petitioner.
Rasika Dissanayake with Shabbeer Huzair for the Respondent-Appellant-Respondent.

WRITTEN SUBMISSIONS: Substituted Applicant-Respondent-Appellant on 10th August 2017.

ARGUED ON : 02nd November 2022

DECIDED ON : 06th October 2023

S. THURAIRAJA, PC, J.

The husband of the Substituted Applicant-Respondent-Appellant filed an application in the Labour Tribunal of Kandy (hereinafter referred to as the "Labour Tribunal")

against the Respondent-Appellant-Respondent (hereinafter referred to as the "Respondent bank") for unlawful termination of his services. After an Inquiry, the Learned President of the Labour Tribunal held that, the termination of the services of the Applicant was unjust and inequitable and awarded compensation of Rs.1610105.20 (equivalent to 6 years salary and Rs. 250,000/- which was deducted from the Applicant's gratuity by the Respondent Bank after the domestic inquiry alleging that the Appellant has defraud of Rs. 250,000/-) to the Applicant. Being aggrieved by the order of the Labour Tribunal, the Respondent Bank appealed to the Provincial High Court of the Central Province (hereinafter referred to as the 'High Court') seeking inter alia, to set aside the order of the Labour Tribunal. The Learned High Court Judge by her judgment had set aside the order of the Labour Tribunal. Being unsatisfied with the said order, the Substituted Applicant had preferred this appeal before us, special leave to appeal was granted on 29th June 2017, on the issues set out in paragraph '15 (i), (ii), (iii) and (iv)' of the petition dated 28th November 2016. When this matter was taken on 2nd November 2022, both parties have agreed to confine their arguments on the questions of law referred to in paragraph '15 (i) and (ii) of the petition dated 28th November 2016 reads as follows;

> *"(i) Is the Order of the Honourable Judge of the High Court of the Central Province against the weight of the evidence led at the inquiry before the Labour Tribunal.*
>
> *(ii) Is the Order of the Honourable Judge of the High Court of the Central Province bad in law so far as coming into conclusion that there is no specific procedure for substitution soon after the death of the Applicant in the original Court."*

Substituted Applicant-Respondent-Appellant filed her written submissions on 10th August 2017 and both parties have advanced their oral submissions.

I find it pertinent to set out the material facts of the case prior to addressing the question of law before us.

Iddamalgoda Arachchige Sunil Neksil Premalal (now deceased) (hereinafter sometimes referred to as the "Applicant") was an employee of the People's Bank (hereinafter sometimes referred to as the "Respondent Bank") from 1st August 1978 as a Grade VI-Clerk. The Applicant gradually rose in rank and was appointed as a Staff Assistant-Grade I of the Respondent Bank. In the material time relevant to this application, Applicant worked as a Staff Assistant-Grade I at Peradeniya Branch of the Respondent Bank and is alleged for defraud of Rs. 250,000/- and this was considered as a serious misconduct. The Applicant was served with a charge sheet on 25th July 2002 setting out three charges namely,

(1) On or about 6th September 2001 the applicant had committed theft and dishonestly misappropriating the said sum of money Rs. 250000/- from the 'cash bag' of another employee namely Wijesundera who was on leave;
(2) Reporting for work on or about 19th September 2001 without the approval or the authority of any superior officer and leaving the office without placing the signature on the attendance register;
(3) As a result of the two acts referred to above failure to uphold the trust and confidence the Respondent Bank had placed on the Applicant.

After this incident the Respondent Bank considered the past record of the Applicant, there it was found that he had been warned, cautioned, punished with suspension of increments and promotions. Further he was punished for gross acts of discipline. Consequently, a domestic inquiry was conducted by the Respondent Bank against the Applicant and was found guilty of serious misconduct and Applicant was dismissed from his service by letter dated 19th December 2003. The Applicant filed an application on 20th January 2004 before Labour Tribunal against the Respondent Bank for unlawful termination of his services seeking, inter alia, re-instatement in his service and/ or reasonable compensation.

The Respondent Bank filed its answer dated 20th February 2004 denying the position taken up by the Applicant and fixed the matter for inquiry on 6th April 2004. Since the Respondent Bank admitted the termination of service of the Applicant, the Respondent Bank was directed to commence the inquiry on 6th April 2004. However, upon a personal difficulty of the Counsel of the Respondent Bank, matter has been re-fixed for 7th July 2004 and 19th July 2004. When the matter was taken up for inquiry on the 19th July 2004, the Counsel for the Respondent Bank moved the Labour Tribunal that there is a criminal case regarding this issue is pending before the Magistrate Court and moved to lay by the matter until final determination at the Magistrate Court, with the consent of both parties the Labour Tribunal had laid by the case. This case was not taken up for more than 2 ½ years, then the Applicant filed a motion on 31st of January 2007 to re-open the inquiry. It was revealed that, the Honourable Attorney General has instructed the learned Magistrate by letter dated 19th June 2006, that there is no evidence against the Applicant, therefore that he be discharged from the charges against him. Accordingly, the learned Magistrate had discharged the suspect (Applicant).

The learned president of the Labour Tribunal has fixed this matter for inquiry for 25th of April 2007 and evidence of Kalutharage Harreld Lal Fernando, the Deputy Manager-Human Resource Management Department of the Respondent Bank was lead and marked documents R-1 to R-7. Further inquiry was fixed for 6th May 2008. On that date the Applicant was absent and his wife Badulpe Ramani Sepalika Pathirana appeared before Labour Tribunal and informed that her husband had passed away on 1st of April 2008 and moved to substitute herself on behalf of her husband (Vide Journal entry dated 6th May 2008 at page 30 of the High Court brief). The details of the substitution will be discussed latter part of this judgment.

Thereafter, evidence of K. Surendra Premathilake- Retired Bank Officer, P. Premaratne Rajapakse- Retired Bank Officer, S.M. Bandula Lal Kumara- Deputy Manager, Senarath Palihawadana- Manager, W. M. Wijesundera- Retired Bank Officer, R.M. Nawarathna-

Retired Bank Officer, Indrani Harischandra- Retired Bank Officer and W.M. Karunawathie Menike- Retired Bank Officer were lead on behalf of the Respondent Bank. There was no evidence lead by the Applicant nor the Substituted Applicant. After both parties closed their case, they filed their written submissions.

On 30th November 2015, the Learned President of the Labour Tribunal delivered her Order and held that the termination of the Applicant's service by the Respondent Bank was unjustifiable and inequitable, and thus ordered the Respondent Bank to pay the Appellant a sum of Rs. 1,610,105.20 being a sum equivalent to 06 years' salary and Rs. 250,000/- (which was deducted from the Applicant's gratuity) as compensation.

Being aggrieved by the order of the Labour Tribunal, the Respondent Bank appealed to the High Court seeking inter alia, to set aside the order of the Labour Tribunal. The Learned High Court Judge by her judgment had set aside the order of the Labour Tribunal. Being aggrieved with the said Judgment, the Substituted Applicant had preferred this appeal.

Now I wish to deal with the second question of law which deals with substitution at the Labour Tribunal.

The learned High Court Judge decided in her judgment and says that,

> "කෙසේ වෙතත් කම්කරු විනිශ්චය සභා නීතිය යටතේ ඉල්ලුම්කරු වගඋත්තරකරු මිය යෑමෙන් පසුව ඒ වෙනුවට ඔහුගේ උරුමකරුවෙකු ආදේශ කිරීමට නීතියේ කුමන ප්‍රතිපාදනයක් අදාළ කර ගත්තාද යන්න පිළිබඳව මෙම අධිකරණයට වටහාගත නොහැක.''
>
> "However, this Court is unable to understand as to what provision of law relating to Labour Tribunals applied to substitute an heir of the in room of the Applicant -Respondent after his death."

I perused the petition submitted to the Provincial High Court of Kandy dated 29th December 2015 by the Respondent Bank under CP/HCLTA 23/2015, and found that the questions of law raised by referring to paragraph 10 of the Petition does not raised any issue about the substitution procedure which was made before the learned President of the Labour Tribunal. I am puzzled to understand how the learned Judge of the High Court discussed and decided an issue about the substitution procedure which was not raised by the said petition of appeal nor in the written submissions filed by the parties.

As I stated above, on 6th of May 2008, the wife of the Applicant was present before the Labour Tribunal and she was informed of the procedure to be followed by the learned President of the Labour Tribunal in the presence of the Respondent Bank officials and the Substituted Applicant adhered to those instructions and filed an Affidavit, Death Certificate of the deceased Applicant and Marriage Certificate of the deceased Applicant and copy of her National Identity Card.

It is evident in the brief that she had filed an Affidavit, Death Certificate of the deceased Applicant and Marriage Certificate of the deceased Applicant and copy of her National Identity Card and same were served on the Respondent Bank.

On 28th July 2008 matter was called before the Labour Tribunal and Respondent Bank was absent and unrepresented. The learned President of the Labour Tribunal ordered the Assistant Secretary to send copies of the records to the Respondent Bank which was sufficiently complied with.

The matter was fixed for 9th October 2008, on that date, both parties were present and the Substituted Applicant supported for substitution. The Respondent Bank not only not raised any objections but also agreed to continue with the proceedings before the Labour Tribunal. The relevant portion of the proceedings dated 9th October 2008, reproduced as follows; (vide page---- High Court appeal brief)

> *"මෙම නඩුවේ ඉල්ලුම්කරු මියගොස් ඇති හෙයින් ඔහු වෙනුවෙන් ඔහුගේ විරිද ආදේශ කිරීම සඳහා ඉල්ලුම්කාර පක්ශවය විසින් කර ඇති ඉල්ලීම*

සම්බන්ධයෙන් ***වගඋත්තරකෘ පෘශ්ශවයේ විරුද්ධත්වයක් නෑ හා අද දින එයට එකඟව ඉදිරියට නඩු විභාගය පවත්වාගෙන යෑමටත් සූදනම්*** *හෙයින් විභාගයට ගනිමි."*

The above Sinhala proceedings were unofficially translated for the purpose of understanding as follows:

Since the Applicant in this case died, his wife had made an application to substitute her. Respondents had no objections regarding the said application, and prepared to continue with the case further, Hence I am taking it for inquiry

After the substitution of Badulpe Ramani Sepalika Pathirana in the room and place of the Applicant I.A.S.N. Premalal, the inquiry proceeded and the Respondent Bank lead the evidence of seven witnesses which were recorded and appears in the high court brief from page no.39 to 520.

As discussed above there is no objection raised at the time of substitution. As per the law, which I wished to discuss later, I do not see any illegality of the procedure adopted by the learned President of the Labour Tribunal. The Respondent Bank is estopped raising the issue of substitution before the High Court. Anyhow, I do not see that the parties have raised an issue of substitution before the High Court. Since the matter was mentioned in the judgment of the High Court and raised as a question of law before this Court, I wish to analyse the legality of the provisions for substitution.

Section 31 C (2) of the Industrial Disputes Act (Amended) No.43 of 1950 reads as follows;

"31 C (2) - A labour tribunal conducting an inquiry shall observe the procedure prescribed under section 31A, in respect of the conduct of proceedings before the tribunal."

In numerous cases this Court held that there is no procedure prescribed in the Industrial Disputes Act. But the President of the Labour Tribunal is empowered to make provisions for substitution, subject to rules of natural justice. In **Amerajeewa v University of Colombo (1993) 2 SLR 327** (Five Judges Divisional Bench) Justice Mark Fernando in agreement with all other Judges held as follows (at page 331),

> *"While it is correct that the Industrial Disputes Act does not prescribe the procedure to be followed in such a situation, yet* ***section 31C (2) confers powers upon the Labour Tribunal to devise a suitable procedure****. It was therefore incumbent upon the Tribunal to have taken some appropriate steps to give notice to interested persons so as to satisfy the basic requirements of Natural Justice."*
>
> (Emphasis added)

In the present case as I stated in detail above, the learned President of the Labour Tribunal had asked the Substituted Applicant to file an Affidavit, Marriage Certificate and Death Certificate and support the matter which is similar to the requirements stated in the Civil Procedure Code for substitution. Considering the above judgement, the President of the Labour Tribunal had complied with and proceeded for adoption. With regret, the learned High Court Judge had not taken note of the judgment of the Divisional Bench above mentioned. Considering all I am convinced that the learned President of the Labour Tribunal had followed the proper procedure hence the adoption is legal and compatible.

Now I see the learned Judge of the High Court dismissed the order of the President of the Labour Tribunal at the stroke of a pen without giving reasons.

> *"කෙසේ වෙතත් කම්කරු විනිශ්චය සභාව විසින් ඉල්ලුම්කාර වගඋත්තරකරුට සිය ඉල්ලීම සඳහා සහන ලබා දී ඇත. නමුත් මෙහිදී වග-උත්තරකාර අභියාවක සඳහන් කර සිටින්නේ ඉල්ලුම්කාර වගඋත්තරකරුගේ මෙම හැසිරීම සාක්ෂිකරුවන්ගේ සාක්ෂි සහ ලේඛන මගින් කම්කරු විනිශ්චය සභාව විසින් එය සිය අවධානයට යොමුකර නොමැති බවය. කම්කරු*

විනිශ්චය සභාව විසින් දෙන ලද තීන්දුව සලකා බැලීමේදී මෙම අධිකරණයට ද එය පෙනී යනු ඇත.”

An approximate unofficial translation of the above has been provided below for ease of reference.

> *“Regardless, the Labour Tribunal granted relief to the Applicant-Respondent in his claim. However, the Respondent-Appellant states that this conduct of the Applicant-Respondent has not been brought to its notice by the Labour Tribunal through the evidence of witnesses and documents. This conduct has, however, come to the attention of this Court upon perusing the judgment passed by the Labour Tribunal.”*

Considering the evidence led before the Labour Tribunal which commenced from page no. 14 to 720 and the order of the Labour Tribunal which consists of 23 pages., I find I find there are contradictions per se and inter se in the evidence led by the Respondent Bank. The judgment of the High Court Judge runs into four pages (actual content of four pages in double space typed) has not analysed the evidence, corroborations and nor contradictions. It is not a healthier practice to turn down a judgment of the original court without giving adequate reasons. Superior Courts time and again insisted that order/judgment made based on facts and evidence will not be rejected without giving proper and satisfactory reasons hence the judgment of the learned High Court Judge cannot be accepted of dismissing the order of the learned President of the Labour Tribunal without giving reasons.

With the reasons mentioned above, I answer the first question of law affirmatively. After careful consideration, I answer the second question of law affirmatively.

I find that the learned President of the Labour Tribunal has awarded a compensation equivalent to 6 years of Applicant’s salary. I find that, the calculation was done from the date of interdiction up to the date retirement. The President of the Labour Tribunal slipped in her mind that the Applicant had died before reaching the age of retirement.

That is 4 years and 3 months from the date of interdiction and he had passed away. But the President of the Labour Tribunal computed compensation up to the age of retirement.

There is no scheme of calculating compensation in the Industrial Dispute Act. The calculation of compensation is very subjective and it depends on several factors, to name a few; type and nature of employment, period he had served, past conduct of the employee, contribution to the employer/establishment, future prospects, type of the offence committed or the reason for termination etc. Further, when computing the compensation, the tribunal should be mindful the age of the Applicant, the service he had rendered and the future capability of doing a job etc., A person cannot stay at home and say that, he should be paid for not being employed. The employee should find a suitable job either equivalent or less salary, within a reasonable period of time and he cannot be unemployed without acceptable reasons.

In **Ceylon Transport Board v A.H. Wijeratne (1975) 77 NLR 481,** at page 487 Vythialingam. J held that,

> *"The President also said that the workman was 51 years old and that he had not been able to obtain employment elsewhere. At the time that he gave evidence the workman said he was fifty-one years old. But nowhere in his evidence did he say that he was unemployed or that he had not been able to secure employment elsewhere. He did not produce any evidence that he had tried to obtain alternative employment and was unsuccessful or that having regard to his qualifications, his aptitude and his special suitability for any particular type of work it was not possible to him to secure alternative employment. He did not even say so. So that the President's statement in regard to this matter is based on pure conjecture and is based on no evidence at all. Except for the bald statements the President has also given no reasons for the acceptance of the workman's*

position that he has lost his pension rights and other benefits and the President has also based his findings that the workman has not been able to secure employment elsewhere on no evidence at all. There was no warrant therefore to award compensation on the basis that he would continue to be Unemployed for the rest of his life..."

As Weeramantry, J. pointed out in the case of **The Ceylon Transport Board Vs. Gunasinghe (72 N. L. R. 76)** at page 83,

''Proper findings of fact are a necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable. Where there is no such proper finding of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for justice and equity cannot be administered in a particular case apart from its own particular facts. "

In **Ceylon Transport Board v A.H. Wijeratne** (supra) at page 498, Vythialingam J. after carefully analysing the law and the just and equitable concept held as follows,

"The Labour Tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectations for the future in that employment, in the injury caused to his reputation in the prejudicing of further employment opportunities. Punitive considerations should not enter into its assessment except perhaps in those rare cases where very serious acts of discrimination are clearly proved. Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age. the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the

dismissal including the nature of the charge levelled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place. The amount however should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation and should seldom if not never exceed a maximum of three years' salary."

In **Caledonian Tea & Rubber Estate Ltd. V Hillman (1977) 79(1) NLR 421,** Justice Sharvananda stated that he was unable to subscribe to Justice Vythialingam's proposition of 3 year's salary and states that flexibility is essential and pointed out that circumstances may vary in each case and the weight to be attached to any particular factor depending on the context of each case, and accordingly, an amount equivalent to 7 years of monthly salary was granted as compensation. In **Cyril Anthony v Ceylon Fisheries Corporation [S.C. 57/85 - SC Minutes dated 06. 03. 1986]**, the Supreme Court awarded 7 years' salary as compensation to a dismissed workman. In exercising such a flexibility of determining the quantum of compensation, it was noted by Hon. Justice Dr. Amerasinghe in **Jayasooriya v Sri Lanka State Plantation Corporation (1995) 2 SLR 379** as follows;

"In determining compensation what is expected is that after a weighing together of the evidence and probabilities in the case, the Tribunal must form an opinion of the nature and extent of the loss, arriving in the end at an amount that a sensible person would not regard as mean or extravagant but would rather consider to be just and equitable in all the circumstances of the case. There must eventually be an even balance of which the scales of justice are meant to remind us."

After careful consideration, I find that the Applicant has not provided any evidence before the Labour Tribunal therefore, the calculation and awarding 6 years' salary as compensation by the President of the Labour Tribunal is arbitrary. After due consideration of the dictum pronounced by Justice Vythialingam in **Ceylon Transport Board v A.H. Wijeratne** (supra), I am in agreement with his Lordship, hence I decide to award compensation equivalent to 3 years' salary to be paid to the Substituted Applicant. While affirming the findings other than the computation of the compensation, of the President of the Labour Tribunal, I am hereby varying the order made regarding the compensation.

For the purposes of clarity, Two hundred and fifty thousand Rupees (Rs. 250,000/-) which was deducted from the gratuity payable to the Applicant, and Applicant's salary for 3 years as compensation, the calculation for which has been provided below.

Gratuity deducted, now to be returned = ***Rs. 250,000.00***

Applicant's salary (monthly as November 2003) = Rs. 18,890.35

Applicant's salary (3 years = 36 months) = Rs. 18,890.35 x 36

= ***Rs. 680,052.6***

= *Rs. 250,000.00*

Total amount payable to Applicant's Wife = *Rs. 680,052.60*

= ***Rs. 930,052.60***

Therefore, the total amount of Nine hundred and thirty thousand fifty-two Rupees and sixty cents (Rs. 930,052.60) is to be paid to the wife of the Applicant by the Respondent Bank as Compensation within three months of this Judgement. If the money is deposited at the Labour Tribunal, this amount plus proportionate portion of interest is to be paid to the Substituted Applicant from the said deposit, and the balance money and interest to be released to the Respondent-Bank.

Appeal Allowed subject to limitations.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, PC, J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to appeal under section 5 C of the High Court of the Provinces (Special Provisions) Act No.54 of 2006.

Illandari Devage Jayathilake,
Ginihigama South,
Pepiliyawala.

Plaintiff

SC/APPEAL 131/2011
SC/HC/CA/LA/438/2010
WP/HCCA/AV/858/2008(F)
District Court of Pugoda
Case No.331/L

Vs.

1. Illandari Devage Karunawathie,
2. Batepolage Dayaratne,

Both of
No.205/2,
Ginihigama South,
Pepiliyawala

Defendants

AND BETWEEN

Illandari Devage Jayathilake,
Ginihigama South,
Pepiliyawala.

Plaintiff-Appellant

1. Illandari Devage Karunawathie,
2. Batepolage Dayaratne,

Both of
No.205/2,
Ginihigama South,
Pepiliyawala

Defendants-Respondents

AND NOW BETWEEN

Illandari Devage Jayathilake,
Ginihigama South,
Pepiliyawala.

Plaintiff-Appellant-Petitioner

1. Illandari Devage Karunawathie,
2. Batepolage Dayaratne,

Both of
No.205/2,
Ginihigama South,
Pepiliyawala

Defendants-Respondents-Respondents

Before : **Vijith K. Malalgoda, PC. J**
Mahinda Samayawardhena, J
K. Priyantha Fernando, J

Counsel : Manohara de Silva, PC with
Ms. Sasiri Chandrasiri for the
Plaintiff-Appellant-Petitioner.

Niranjan de Silva with Sanjay Thambiah for the Defendants-Respondents-Respondents.

Argued On : 19.06.2023

Written Submissions Tendered On : 16.12.2011 on behalf of the Petitioner.

03.02.2012 on behalf of the Respondents.
02.08.2023 on behalf of the Respondents.

Decided On : 10.10.2023

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Appellant-Petitioner (hereinafter referred to as the appellant) in this case, preferred an appeal from the judgment of the learned High Court Judge of *Avissawella* dated 18.11.2010 which was given in favour of the Defendants-Respondents-Respondents (hereinafter referred to as the respondents). The appellant alleges that, he is the owner of the land to which the dispute relates to, and that the respondents should not be given a right of way by way of a servitude over the appellant's land.

2. This Court granted leave to appeal on the questions of law stated in (b),(d),(f) and (g) in averment No.11 of the petition dated 28.12.2009.

The facts in brief.

3. The appellant became the owner of the land described in the schedule to the plaint by deed No. 17714 dated 08.11.1987 attested by *P.M. Srimathie Suriapperuma,* Notary Public. The appellant has bought the said land from one *Thilakarathne* in 1987. As per the appellant, the appellant and his predecessors in title has had over 10 years of uninterrupted and undisturbed possession of the said land, and has also had prescriptive title to the same and further, there has been no servitudes over the said land. According to the Survey Plan No. 28/L, in District Court Case No. 33004/L drawn by surveyor *Mayadunne*, the land to which the dispute relates to is seven perches in extent.

4. The land which belongs to the appellant is situated facing the *Pepiliyawala-Dangalla* Road. The land belonging to the respondents in this case has been situated behind the land of the appellant, adjacent to the appellants' land towards the north-west. The respondents' land is far larger in extent than that of the appellant.

5. In March 1989, the appellant has started constructing a boutique in his land. Following this, a dispute has arisen between the appellant and the respondents. The respondents have lodged a complaint at the *Pugoda* police station on 10.06.1989, alleging that the said boutique blocks the footpath over the appellant's land that leads the respondents to the Pepiliyawala-Dangalla road. The footpath has been claimed from the right side of the building which rests on the appellant's land.

6. Consequent to this complaint, the case bearing No. 445/L has been instituted in the Magistrate's Court of *Pugoda,* under section 66 of the Primary Courts Procedure Act, and after inquiry, the respondents were permitted to use a 3 feet wide footpath over the southern end of the appellant's land.

7. Thereafter, the appellant has instituted action No. 33004/L in the District Court of *Gampaha* stating that the respondents were not entitled to a footpath over his land. However, as the appellant has not referred this dispute to the Mediation Board in the first instance, the appellant has withdrawn the action No. 33004/L, reserving the right to file a fresh action. After referring the case to the Mediation Board, a certificate of non-settlement was obtained.

8. Thereafter, the appellant has instituted action in the District Court of *Pugoda* bearing Case No. 331/L [the appeal brief is marked as 'X'] seeking a declaration that he is the owner of the land described in the schedule to the plaint, a declaration that the defendants have no right to use a foot path by way of a servitude over the plaintiff's (appellant)

land, a permanent injunction preventing the defendants from using a roadway over the said land, compensation and costs.

9. The appellant claimed that the disputed footpath was a new roadway which was demarcated on his land on 25.01.1990 by the Primary Court, and the respondents have no right of way over his land.

10. The respondents in their answer ['A-2' of 'X'] took up the position that, the respondents and their predecessors in title have been using the roadway over the appellant's land for about 18 years, that they have obtained prescriptive title over it, and that the roadway after being blocked by the appellant was reopened consequent to filing of the Case No. 445/L in the Magistrate's Court of *Pugoda*. It was also averred that the said roadway was the only way to reach the *Dangalla-Pepiliyawala* road and was the shortest way to reach the said road. Further, the respondents claimed that they have a right to claim a 10 feet wide roadway by way of necessity and prescription.

11. *Mayadunne*, Licensed Surveyor has prepared the Survey Plan No. 28/L dated 08.04.1991, on a commission taken by the appellant and this has been marked and produced in the District Court as ['P-2']. *K. G. Hubert Perera,* Licensed Surveyor has prepared the Survey Plan No. 4905/L on a commission taken by the respondents and this has been marked and produced in the District Court as ['V-1'].

12. The learned District Judge, by judgment dated 07.10.2002 ['A-4' of 'X'] dismissed the appellant's action and also dismissed the respondents' claim to a right of way by necessity. The learned Judge of the District Court held in favour of the respondents stating that, the respondents are entitled to a use of a 3 feet wide foot path by prescription.

13. Being aggrieved by the judgment of the learned District Judge, the appellant appealed to the Court of Appeal. Consequently, the case was transferred to the Provincial High Court of *Gampaha* and subsequently, to the Civil Appellate High Court of *Avissawella* bearing Case No. WP/HCCA/AV/858/2008(F).

14. The appellant in his submissions has taken up the position that the learned District Judge has failed to evaluate the evidence led at the trial, in granting a 3 feet wide roadway despite there being no prescriptive acquisition proved by the respondents. By judgment dated 18.11.2010 ['Z'] the learned High Court Judge dismissed the appellant's appeal and held for the respondents.

15. Being aggrieved by the decision of the learned Judges of the Civil Appellate High Court, the appellant preferred the instant appeal to this Court. Although eight questions of law were averred in the petition of appeal, the Court granted leave on the following questions of law,

    (b) The learned Judges of the High Court failed to duly consider the evidence led by the plaintiff (appellant).

    (d) The learned Judges of the High Court erred in holding that the defendants have acquired prescriptive title to the footpath.

    (f) The High Court failed to consider the evidence of *Thilakaratne* who is the plaintiff's (appellant) predecessor in title who stated that there was no foot path at the time he sold the land in suit for the plaintiff (appellant) in 1987.

    (g) The High Court failed to consider that the defendants have failed to prove physical use of the footpath for over 10 years.

Written submissions for the appellant

16. It was the position of the learned President's Counsel for the appellant that, the learned Judges of the High Court erred in holding that the defendants (respondents) have acquired prescriptive title to the footpath.

17. The learned President's Counsel for the appellant submitted that, the learned Judges of the High Court, by relying on the case of ***Mercin v. Edwin and Others [1984] 1 Sri.L.R. 224,*** which in turn relied on the South African case of ***Head v. Toit S.A.L.R [1932] C.P.D. 287*** and stating that, the mere enjoyment of the right of way for the prescriptive period is proof of adverse user in relation to a claim for a servitude based on prescription, and holding that the respondents have acquired prescriptive title to the footpath in question, has decided this case based on principles of Roman Dutch Law, ignoring the decisions of this Court and the Prescription Ordinance. It is his position that, as the Roman Dutch Law is no longer the law governing prescription in Sri Lanka, the learned Judges of the High Court have erred in their decision.

18. The learned President's Counsel further submitted that, the High Court, in arriving at the finding that the respondents have used the footpath in question for over 10 years, has placed heavy reliance on the Survey Plan No. 4905/L drawn by *Hubert Perera* ['V-1' at page 216 of 'X'] and the observations made by the learned Magistrate of *Pugoda* in Case No. 445/L. It is the position of the learned President's Counsel for the appellant that the said plan demarcating a footpath over the appellant's land, was drawn in the year 1992, which was after the order of the learned Magistrate of *Pugoda* dated 25.01.1990. It is his position that the footpath which was demarcated in the said plan came into existence after the order of the learned Magistrate of *Pugoda*. Therefore, it has been submitted that the High Court misdirected itself by relying on the Survey Plan drawn by

Hubert Perera, and failed to consider the evidence led by the appellant to show that footpath did not exist prior to the order of the learned Magistrate of *Pugoda*.

19. It was further submitted that, unlike the duty of a Magistrate under section 66 of the Primary Courts Procedure Act, the duty of a District Judge in a civil case is to determine the rights of the parties by examining whether there has been undisturbed and uninterrupted use of the footpath for over 10 years, and whether such use has been adverse to the rights of the owner of the land. It was the submission of the learned President's Counsel that, the learned Judges of the High Court have misdirected themselves in relying on the observation of the learned Magistrate in determining the rights of the parties.

20. The learned President's Counsel further submitted that, the respondents have failed to prove undisturbed, uninterrupted, and adverse physical use of the footpath for over 10 years. The learned Judges of the High Court in reaching their decision, in addition to the plan drawn by *Hubert Perera* and the order of the learned Magistrate, also relied on the evidence of *Sarath Wijesinghe* and *G. Piyasiri*. It was the submission of the learned President's Counsel that the testimony of the witnesses aforementioned were not specific, and that their testimony was limited to the fact that they themselves used the footpath across the appellant's land to reach the respondents' house, there is nothing to suggest that the respondents used the footpath to gain access to the respondents' land.

21. It was further submitted that, although both the witnesses said that they have been residents of the area since their childhood and know the area well, they both took up the position that they were unaware of another road to gain access to the respondents' land. However, the Survey Plan drawn by *Mayadunne* in 1991 ['P-2'] clearly shows two other access roads to the respondents' land [marked 'B' and 'C' in 'P-2']. Therefore, it was the submission of the learned

President's Counsel that, the evidence of the two witnesses, *Sarath Wijesinghe* and *G. Piyasiri* cannot be relied upon to establish that the respondents have physical user of the footpath for the prescriptive period.

22. It was also submitted that, there existed no clear and well-defined track as required by law. The purported right of way runs over the apron of a public well which has been in existence since 1942. Further, a telephone post has also been erected in the middle of the said footpath.

23. It was further submitted by the learned President's Counsel for the appellant that, the burden of proof of prescriptive title is on the party invoking the same, and that the respondents of this case failed to discharge the burden of proof that the use of the said footpath was for 10 years, undisturbed, uninterrupted and was adverse to the title of the appellant.

24. It was also submitted by the learned President's Counsel that, the High Court failed to duly consider the evidence led by the appellant, when the appellant led evidence of his predecessor in title *Thilakaratne* [pages 83 to 97 of 'X'] to the effect that the appellant and his predecessors in title has had over 10 years of uninterrupted and undisturbed possession of the land, and also have prescriptive title to the same and that there had been no servitudes over the said land. Further, at the time the said *Thilakaratne* sold the land to the appellant in 1987, there had been no right of way over the said land. The learned President's Counsel further submitted that, as there were two alternate roads to the respondents' land as depicted in plan ['P-2'] drawn by Surveyor *Mayadunne*, the respondents should not be entitled to the footpath in question.

<u>Written submissions for the respondents</u>

25. The learned Counsel for the respondents contended that, the learned Judges of the High Court have accurately considered the requirements to acquire a servitude of right of way, and

that the learned Judges of the High Court have not erred in law in considering *Mercin(supra),* as the said case was decided well after the enactment of the Prescription Ordinance. Further, that their Lordships of the High Court have taken into consideration and satisfied the requirements of the Prescription Ordinance as there was no leave or license in using the said footpath, the use was adverse. The learned Counsel further submitted that, principles of Roman Dutch law can be harmoniously used with the Prescription Ordinance and relied on the case of ***M.S. Perera v. M.N. Gunasiri Perera [S.C. Appeal No. 59/2012]*** **decided on 18/01/2018**.

26. It was submitted by the learned Counsel for the respondents that, the learned Judges of the High Court were correct in concluding that the footpath in dispute was not a new footpath which came into existence after the order of the learned Magistrate. The witness *Ruparatne Weerakkody* (who was the *Grama Seva Niladhari* of the area) called by the appellant stated in his cross examination that, there was no dispute as to the footpath in his period of service, which was from 1978 – 1985. Therefore, as there was also no argument by the appellant for disapproving the above contention, this negates the appellant's assertion as to the said footpath being a new footpath. It was further submitted that, the survey plan drawn by surveyor *Hubert Perera* cannot be dismissed on the basis that it was drawn after the observation of the learned Magistrate. The said plan was drawn in order to have it recorded in evidence, the said footpath did exist over a period of time and after the observation of the learned Magistrate of *Pugoda*, the respondents thought it wise to have the said right of way drawn by a surveyor to avoid any disputes in the future.

27. It was further submitted by the learned Counsel for the respondents that, the learned Judges of the High Court were correct in finding that the respondents have proved undisturbed, uninterrupted, and adverse physical use of the footpath for over ten years. When considering the evidence

of the witnesses that were called by both the appellant and the respondents, it is clear that the respondents have established by cogent evidence, the physical user of the footpath for over the full prescriptive period. *Ruparatne Weerakkody* in his evidence said that, there was no dispute relating to the said footpath during his period of service in the years 1978-1985 and the witness *Nimal Wijesiri* in his evidence revealed that, there was an amicable partition of the land adjoining the respondent's land in 1986 and thereafter the co-owners of the said land granted a roadway to the respondents. Further, witness *Sarath Wijesinghe* who was called by the respondents stated that he used the said footpath in 1989-1990 to gain access to the respondents' land. This position was confirmed by witness *G. Piyasiri*.

28. It was further submitted by the learned Counsel for the respondents that, the respondents have adduced cogent evidence through the evidence of the witnesses which makes reference to dates and facts which are undeniably relevant material to the said right of way, and discharged the burden of proof required by law.

29. It was the submission of the learned Counsel for the respondents that, the evidence of the witness *Thilakaratne* (the previous owner of the land belonging to the appellant) should be given minimal value. The learned Counsel made reference to the Indian Evidence Act, where *Stephen* classified the grounds for believing or disbelieving particular statements made by particular persons in particular circumstances. Referring to the *'Law of Evidence'* by *E.R.S.R. Coomaraswamy Volume II, Book 2, Page 1049* the learned Counsel submitted that, one must consider certain attributes which affects the power of the witness to speak the truth, those which affect his will to speak the truth, and those which depend on the probability or improbability of the statement.

30. I will first resort to answer the question of law (d) and consider whether the learned Judges of the High Court erred

in holding that the defendants(respondents) have acquired prescriptive title to the footpath.

31. At the hearing of this appeal, the main point in contention was that of prescription. The appellant urged that, after the enactment of the Prescription Ordinance in Sri Lanka, the Roman Dutch Law was no longer in force. However, the respondents took the position that principles of Roman Dutch law can be harmoniously used with the Prescription Ordinance.

32. I will now consider the applicability of Roman Dutch Law on prescription after the enactment of the Prescription Ordinance in Sri Lanka.

33. The appellant in his evidence has strenuously asserted that no footpath existed in his land which provided the respondents access to the *Pepiliyawala-Dangalla* road. The witness *Thilakaratne* who was the predecessor in title to the appellant's land in his evidence also takes a similar position. However, when considering the evidence of the witnesses *Ruparatne Weerakkody* (the *Grama Seva Niladhari* of the area), *Nimal Wijesinghe*, *Sarath Wijesinghe* and *G. Piyasiri* it is clear that a footpath has been in existence and it has in fact been used. Be that as it may, the mere physical user of the footpath is not sufficient to discharge the burden of proof and establish a claim for a servitude based on prescription. There exist certain other requirements that needs to be satisfied.

34. The respondents in their written submissions stated that, principles of Roman Dutch Law can be harmoniously used with the Prescription Ordinance and relied on the case of *M.S. Perera(supra)* where it was stated that,

> *"It seems to me that, the aforesaid requirements of use nec vi, nec clam and nec precario of the Roman Dutch Law, when taken in their totality, can be related to the requirements under section 3 of the Prescription Ordinance…"*

35. In the case of *M.S. Perera(supra)* the requirements of use *nec vi, nec clam* and *nec precario* were defined.

> *"… .The occupation or use must be peaceable (nec vi), for if it be in the face of opposition and the opposition be on good grounds the party endeavouring the establish prescription will be in the same position at the end as he was at the beginning of his enjoyment (Gale, pp. 204 and 205). It must be openly exercised (nec clam) and during the entire period of 30 years the person asserting the right must have suffered no interference at the hands of the true owner, nor must he by any act have acknowledged anyone as the owner (Paarl Municipality v. Colonial Govt., 23 S.C., pp.527 and 528). Finally, the occupation or use must take place without the consent of the true owner (nec precario); it must not be by leave and license or on sufferance and thus liable to cancellation at any time (Uitenhage Divisional Council v. Bowen 1907 E.D.C.,p.80; S.A.Hotels v. Cape Town City Council, 1932 C.P.D., p.236). It must be adverse, i.e., the exercise of a right contrary to the owner's rights of ownership."*

36. Further, in *M.S. Perera(supra)* it was stated that,

> *"Thus, if the plaintiff in the present case was to prove that he was entitled to a right of way by prescription over the defendant's land, he had to establish that, the plaintiff had possessed and used a right of way over the specific and defined area of land described in the Second Schedule to the plaint, for a minimum period of ten years,* ***in the manner stipulated in section 3 of the Prescription Ordinance****."*
>
> [Emphasis Mine]

37. His Lordship *Prasanna Jayawardene, J.* in *M.S. Perera(supra)* has clearly said that,

> *"…a plaintiff who claims a right of way by prescription must establish the requisites stipulated in section 3 of the Prescription Ordinance. This means that, as set out in*

section 3, the plaintiff had to prove that: he has had undisturbed and uninterrupted possession and use of the right of way for a minimum of ten years and that such possession and user of the right of way has been adverse to or independent of the owner of the land and without acknowledging any right of the owner of the land over the use of that right of way."

38. Therefore, it is clear that, even in the above case, even though it is primarily acknowledged that the principles of Roman Dutch Law can be related to the requirements under section 3 of the Prescription Ordinance, when considering the above position, it is clear that finally the Prescription Ordinance is what needs to be applied when considering the law relating to Prescription in Sri Lanka. It has been decided since as far back as in 1918 by *Bertram CJ* in ***Tillekeratne et al. v. Bastian et al. [1918] 21 N.L.R. 12*** that our Prescription Ordinance is a complete code. This position is furthered by His Lordship *Prasanna Jayawardene, J.* in *M.S. Perera(supra).*

39. *Bertram CJ* in case of *Tillekeratne(supra)* said that,

"These are the principles of the Roman and Roman-Dutch law. They are, however, only of historical interest, as it is recognized that our Prescription Ordinance constitutes a complete code; and though no doubt we have to consider any statutory enactments in the light of the principles of the common law, it will be seen that the terms of our own Ordinance are so positive that the principles of the common law do not require to be taken into account. Let us, therefore, consider the terms of our own Ordinance."

40. In case of ***Perera V Ranatunge [1964] 66 NLR 337*** *Basnayake C.J.* said that,

"It is common ground that the Roman Dutch Law of acquisitive prescription ceased to be in force after Regulation

13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects the Crown."

41. Further, in case of ***Therunnanse v. Menike [1895] 1 NLR 200*** it was stated that,

"It has been laid down and constantly acted upon by this Court that the governing Ordinance No. 22 of 1871, and the previous Ordinance No. 8 of 1834, kept alive the repeal by regulation No. 13 of 1822 of " all laws heretofore enacted or customs existing" with respect to the acquiring of rights and the barring of civil "actions by prescription," and that the consequence of that regulation and those Ordinances was to sweep away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown. Hence the only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of the Ordinance No. 22 of 1871…"

42. The Prescription Ordinance No. 22 of 1871 as amended by Ordinance No. 2 of 1889 (Prescription Ordinance) provides that,

Section 2

"In this Ordinance, unless the context otherwise requires - "immovable property" shall be taken to include all shares and interests in such property, and all rights, easements, and servitudes thereunto belonging or appertaining."

Section 3

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs …"

43. The above provisions clearly set out that after the implementation of the Prescription Ordinance, any person asserting a servitude as to right of way must essentially prove the requirements of undisturbed and uninterrupted physical use of the right of way, for a minimum period of ten years and must also show such use of the right of way was adverse.

44. When considering the evidence before court, as explained in paragraph No. 33 of this judgment, it is clear that the respondents have established physical use of the footpath in question. However, although physical use is established, there is no evidence to show that the use of the right of way was adverse to the rights of the appellant.

45. The learned President's Counsel for the appellant took the position that, the learned Judges of the High Court have erred in holding that the mere enjoyment of the right of way for the period of prescription is proof of adverse user with regard to a servitude based on prescription. It was asserted that, the learned Judges of the High Court in relying on the case of ***Mercin v. Edwin and Others [1984] 1 Sri.L.R. 224*** which in turn relied on the South African case of ***Head v. Toit S.A.L.R 1932 C.P.D. 287*** have decided the instant case based on principles of Roman Dutch Law. However, it was the position of the learned Counsel for the respondents that, the learned Judges of the High Court have not erred in law in considering *Mercin(supra)* as it was decided after the enactment of the Prescription Ordinance.

46. *Athukorale J in case of Mercin(supra) referring to what was said in* ***Head v. Toit S.A.L.R 1932 C.P.D. 287*** *said,*

> *"… .In Head V Toit (1) it was urged that the plaintiff in a claim for a servitude based on prescription must prove not only user for the prescriptive period but must also establish that the user was adverse for which purpose the plaintiff must show positively that the user was not with the permission of the owner of the servient tenement. This contention was rejected by Sutton, J. who adopted the following statement of the law laid down by Maasdorp in Institutes of Cape Law (Vol. 1, p. 226). …*
>
> > *"in the case of an affirmative servitude… the mere enjoyment of the right in question is in itself an adverse act."*
>
> *I hold that on the facts in the instant case the plaintiff has proved adverse user of the right of way claimed by him for over the prescriptive period."*

47. The entirety of the above statement adopted by *Sutton J.* in the case of ***Head v. Toit S.A.L.R 1932 C.P.D. 287*** has been laid down in *Maasdorp in Institutes of Cape Law (Vol. 2, p.216).*

> *"**It is above all things necessary that the enjoyment be adverse**. In the case of an affirmative servitude, that is, one by which the owner of a dominant tenement is entitled to do something upon or with respect to the property or real rights of another, **the mere enjoyment of the right in question is in itself an adverse act, that is an act conflicting with the rights of the owner of the servient tenement.** Thus, where a person has used a certain road or a dam constructed upon his neighbor's land or has cut wood upon the same for the period of prescription, or where an upper riparian proprietor has for the same periods used the whole or a fixed quantity of the water of a public stream to the exclusion of a lower proprietor, the enjoyment is patently adverse, and a prescriptive servitude will by these means have been acquired by the person exercising these respective rights. …"*
>
> [Emphasis mine]

48. It seems to me that, the statement that, "*the mere enjoyment of the right in question is in itself an adverse act, that is an act conflicting with the rights of the owner of the servient tenement"* should be understood in its context.

49. The above extract clearly stipulates that, "*It is above all things necessary that the enjoyment be adverse*". Thus, it must nevertheless have the underlying requirement of an adverse act "*that is an act conflicting with the rights of the owner of the servient tenement*". I am unable to see how merely walking on a footpath for the period of prescription in this instance would in any sense be adverse. Thus, considering the facts and circumstances of this case, I am of the view that, mere use in the absence of an adverse act, is insufficient to establish a servitude of right of way by prescription as per section 3 of the Prescription Ordinance.

50. Merely walking on a footpath does not make it an adverse act conflicting with the rights of the owner. If prescription is allowed to be established merely by walking through someone's land, it would pave the way for countless claims to be levelled against owners of land. It would give rise to drastic consequences in village settings where people casually walk through the lands of each other as a practice. If all persons casually exercising physical use of footpaths across neighboring lands were to bring their claims stating that each such footpath constitutes a right of way by prescription simply by physical use, the doctrine of prescription would have far reaching and drastic consequences which were never intended by its proponents.

51. Therefore, as an essential element required under section 3 of the Prescription Ordinance has not been satisfied in the instant case, it is my position that the respondents have not aptly discharged the burden of proof in establishing prescriptive title to the footpath in question. It is also my position that, after the enactment of the Prescription Ordinance in Sri Lanka, the sole governing law with regard to establishing a claim by prescription is the Prescription Ordinance. Any claim under prescription should follow nothing but the Ordinance itself.

52. Thus, in answering the question of law (d), it is my view that the learned Judges of the High Court have erred in holding that the respondents have acquired prescriptive title to the footpath.

53. Finally, I will answer the questions of law (b),(f) and (g). These questions of law will be answered together. When considering the evidence presented in the testimony of witnesses, it is clear that sufficient and cogent evidence has been adduced in the District Court to show that the respondents have in fact used the said footpath for over a period of time. The High Court has duly considered the

evidence of the witnesses and has also proved physical use of the footpath for over 10 years.

54. However, for the reasons that I have stated from paragraph No. 33 to 52 of my judgment, even if the questions of law (b),(f) and (g) are answered in the negative, the appellant will succeed in the appeal.

55. Thus, I set aside the Judgment of the Provincial High Court in Case No. WP/HCCA/AV/858/2008(F) dated 18.11.2010. I also set aside the judgment of the District Court of *Pugoda* in Case No. 331/L dated 07.10.2002. I make no order with regard to costs.

The appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH K. MALALGODA, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE MAHINDA SAMAYAWARDHENA

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal and/or Leave to Appeal from an order of the Provincial High Court of the Eastern Province dated 6 June 2014, in terms of the Industrial Disputes Act and the High Court of the Provinces Act read with the Rules of the Supreme Court.

SC/Appeal/ 85/2016

SC (SPL) LA/118/2014

HC/Appeal HCB/LT/279/2012

LT Application
LT/BT/212/2011

Vadivel Vigneswaran
No. 60/08,
Sinna Uppodai,
Batticaloa.
APPLICANT-RESPONDENT-PETITIONER

Vs.

1. Bank of Ceylon,
   Head Office,
   Colombo.

2. Bank of Ceylon,
   Batticaloa.

RESPONDENTS-APPELLANTS-

RESPONDENTS

SC/Appeal/ 86/2016

SC (SPL) LA/117/2014

HC/Appeal HCB/LT/278/2012

LT Application
LT/BT/211/2011

Vadivel Maheswaran
No. 60/08,
Sinna Uppodai,
Batticaloa.

APPLICANT-RESPONDENT-PETITIONER

Vs.

3. Bank of Ceylon,
   Head Office,
   Colombo.

4. Bank of Ceylon,
   Batticaloa.

RESPONDENTS-APPELLANTS-RESPONDENTS

Before: Buwaneka Aluwihare PC J

S. Thurairaja PC J

Mahinda Samayawardhena J

Counsel: Jude Dinesh for the Applicant- Respondent- Appellant.

N. Vigneshvaran, DSG for the Respondents-Appellants-Respondents instructed by D. Munasinghe.

Written Submissions: Written submissions of the Applicant-Appellant 20.04.2023

Written submissions of the Respondent 25.04.2023

Argued on: 31.01.2023

Decided on: 11.10.2023

JUDGEMENT

Aluwihare PC. J,

The Present appeals are concerned with the termination of employment of two brothers who were employed by the Batticaloa Branch of the Bank of Ceylon. The brothers were recruited by an oral agreement during the time of the armed conflict, partly in consideration of their father being a minor employee of the bank. After the end of the hostilities, on or about 02nd June 2011, the Appellants were informed that their services were no longer necessary as the Bank had recruited other persons to fill their positions. At the time both the Appellants were in their mid-twenties.

Each of them had filed separate applications before the Labour Tribunal, however, their appeals to the High were consolidated and a common judgment was delivered by the learned High Court judge as the facts and circumstances relating to the cases were identical. As such, this court too considered both appeals together and are dealt with in a single judgement.

Being aggrieved by the loss of their employment, the Appellants filed applications in the Labour Tribunal of Batticaloa seeking reinstatement and other benefits on the basis that the Appellants' services were wrongfully and unlawfully terminated. The Labour Tribunal by order dated 15th October 2012 ordered reinstatement with back wages amounting to Rs. 170,100/- and that the Appellants be made permanent in their posts. The Respondents appealed to the High Court of the Eastern Province, which by order dated 6th June 2014, set aside the order for reinstatement, and converted the back wages of Rs, 170,100/- to compensation. The present appeals arise from the said judgement of the High Court.

The Appellants claim that they were permanent employees and therefore entitled to reinstatement. The Respondent bank maintains that the Appellants were casual employees who were employed "on an ad-hoc casual basis without any contract to carry out 'odd-jobs' " during the period of the hostilities that prevailed in that part of

the country because they were children of a minor employee at the bank. The Respondent bank claims that it was unable to regularize the Appellants' recruitment after the end of the war as they had been recruited outside the normal channels. The Respondents argue that compensation of 18 months' salary i.e., one and a half years' salary is reasonable and in view of the present economic situation, has agreed to increase the amount to Rs. 800,000/- which amounts to more than 76 months' salary.

Special leave was granted on the following questions of law;

Paragraph 9

a) Did the Learned High Court Judge err in considering the law related to casual employment?
b) Did the Learned High Court Judge err in failing to consider that the usual reliefs for wrongful termination are reinstatement with back wages?
c) Did the Learned High Court Judge err in failing to consider that the absence of a written contract in Industrial Law does not warrant a definite conclusion that employment was casual in nature?

The Question of Type of Employment

The central question in this matter is whether the Appellants were casual employees, thereby not being entitled to the right to reinstatement. In determining the type of employment, rather than relying on the label given to the type of employment, the Court must evaluate the nature of the actual work carried out. A person labelled as a casual employee may very well be carrying out more responsibilities than that characteristic of a casual employee and be expected to function in a regular capacity. In ***Superintendent of Pussella State Plantation, Parakaduwa v. Sri Lanka Nidahas Sevaka Sangamaya*** (1997) 1 SLR 108 the Supreme Court highlighted that a "*mere label is not sufficient to classify a workman as a 'casual employee'; if the real character of the employment is that of a permanent employee.*" In ***National Water Supply and Drainage Board, Regional Office, Peradeniya v. DP David and Others*** CA 1787/93

decided on 02.02.1993 it was specified that it is the duty of the court to decide the type of the employment based on the facts rather than the label given.

The Appellants had worked at the Batticaloa Head Office, the Branch Office at Mamangam and the Branch Office at the Railway Station. Their main duties were those required for the orderly maintenance of the respective branches. The learned Deputy Solicitor General appearing for the Respondent Bank, submitted a table containing the applicable facts; the enumeration of the tasks carried out by the Appellants as well as the chronology of the events tabulated therein, which was useful in evaluating the employment of the Appellants to determine the type of employment.

The Appellant in SC Appeal 85/2016 was usually tasked with cleaning the branch office, cleaning the toilets at the Station Road Branch, preparing tea and watering the garden etc. The Appellant was further tasked with delivering cheques from one bank to another, depositing cash in the locker in the presence of the cashier and the Manager, arranging the cash once it arrives every month from Colombo, and pasting damaged currency notes. His brother [SC Appeal 86/2016] similarly, was required to clean the branch offices including the toilets and the office furniture, prepare tea, cleaning the Manager's quarters, do shopping and buying provisions needed by the Manager and the bank staff , attending to matters connected with posting of letters by attending to the post office. It is noteworthy that the Appellant in SC Appeal 86/2016 too, like his brother, carried out the tasks of searching for voucher bundles, checking forms and scanning receipts of pawned jewellery which were related to the integral activities of the bank.

The Appellants were not employed under a contract of employment nor were they recruited through a formal process. They had been recruited during the turbulent times due to their father being a minor employee of the bank. The Appellants position was that they were made to understand that they would be made permanent employees at some point in the future. The Appellants were not required sign a register or mark attendance and were paid by voucher signed by the Manager and the Chief Clerk as opposed to the salary being deposited in a bank account which is

the practice for permanent employees of the bank. The Appellants were not considered for EPF or ETF benefits. At one point the Appellants had submitted letters to the Respondent bank requesting that they be made permanent employees.

While the abovementioned factors indicate that the Appellants were not originally employed on a permanent basis there are several factors that support the Appellants' proposition that they were in fact not merely casual employees. The Appellants were paid once a week, for each day they had worked, through a voucher signed by both the Manager and the Chief Clerk which was forwarded to the Cashier who would pay their salaries. One of the Appellants would collect the cheques signed by the Manager. The Appellants had reported to work regularly for a period in excess of 5 years, had been in the practice of formally requesting for leave from the Manager by letter, had been issued bank ID cards, had been assigned chairs to sit, were under the supervision of the Manager and Chief Clerk when going to other banks for official purposes and had received certificates for participating at sports events organized by the bank for its employees. Furthermore, the former Manager had in his evidence stated that he considered the Appellants to be essential for the smooth functioning of the bank.

When considering the nature of the responsibilities fulfilled by the Appellants and certain practices related to the management of their employment relationship with the bank, a considerable degree of regularity and permanence can be observed. The Appellants reported to work daily and were paid their salary on a weekly basis. As demonstrated by judicial precedent, uninterrupted service and a payment method other than a daily wage payment are characteristic of the non-casual nature of the work. This was illustrated in ***All Ceylon Commercial and Industrial Workers Union v. Pieris*** ID 44 and 58 CGG 11, 471 of 05.08.1958 where the work of the employees in question was held to be of a non-casual nature as they were paid at the end of each week and their names kept in the check-roll unless they did not come to work for a long period. That the workmen had come to work regularly for several years was also considered to be a factor supporting the non-casual nature of the work.

Furthermore, in terms of obtaining leave the petitioner has been in the practice of obtaining prior permission for leave through a letter addressed to the Bank Manager. The Petitioner had also been required to report to work at a set time every day in order to open the doors of the building. These practices negate the primary attribute of casual employment that the employee is not mandatorily expected to report to work every day and can take leave without prior approval as the wage is paid on a daily basis or according to the tasks completed.

The Appellants' salaries were increased from Rs. 300 per day to Rs. 350 per day. On March 2010 a further application was made by the Manager to increase their salaries to Rs. 450 per day. An increase in salary was considered to be an indication of non-casual employment. In ***Ceylon Ceramics Corporation v. Weerasinghe*** SC 24-25/76 SCM 2507.78 (unrep) the Supreme Court held that the increase of the employee's salary was a factor that her employment was of a permanent nature, regardless of the fact that in evidence she had admitted that she was employed on a casual basis as informed by the employer.

Although the Appellants themselves had at the earlier stages considered that they were not permanent employees, it cannot be held to militate against a finding that over time the employment has assumed a permanent character. Here I quote with approval, Justice R. K. S. Suresh Chandra in **'The Employment Relationship (scope) in Sri Lanka'**;

> "*The description or designation on a document where the workman may have agreed to be designated as a casual employee is not conclusive. The actual relationship between the parties must be examined and if it is revealed that the employer had treated the employee as a person with a permanent character, then he will not be treated as a casual employee."*

The impression to be had from the sum of the evidence is that the Appellants carried out their work diligently and conscientiously and were able to handle increasing responsibilities, which was appreciated by the bank Manager as well. Although not tasks integral and indispensable to the principal activities of the bank, the Appellants were held in a level of regard as to be trusted with several tasks related to the

transactional activities of the bank such as delivering cheques from one bank to another. The work carried out by the Appellants enabled the smooth functioning of the activities of the bank without any discomfort or inconvenience to the officers and the customers.

The foregoing evaluation leads to the conclusion that although the Petitioners may have been employed as casual employees, over time the nature of the employment underwent such changes as to make it take a permanent form. The absence of a written contract in itself does not warrant a definite conclusion that employment was casual in nature.

Reinstatement or Compensation

In ***Meril Fernando & Co v. Deiman Singho*** (1988) 2 SLR 242 the rationale for reinstatement not being available to a casual employee was explained thus;

> "*The word 'casual' denotes such employment as is subject to, resulting from or occurring by chance and without regularity. By its very nature, such employment cannot confer upon a workman a right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored, as in the case of a permanent employee.*"

Although the Appellants cannot be classified as casual employees, after considering the circumstances particular to this case the court should be cautious in ordering reinstatement. The Respondent being a financial institution, the recruitment to various positions in all probability must be tied to requisite qualifications that commensurate with the position. There is no material before us to say that the Appellants possessed the requisite qualifications to join the Respondent Bank as permanent employees. The court is mindful that the trajectory of their employment at the bank was such as to reasonably create an expectation of being formally employed as permanent employees in the minds of the Appellants. Furthermore, the nature of their work was such as to transform their employment into a regular and permanent character. However, I am of the view that the passage of more than 10

years since the dismissal from work, and the age of the Appellants being not so advanced as to make it impossible to find other employment, as well as the work carried out by the Appellants not being of a highly specialized nature which militates against finding employment elsewhere, are practical consideration that warrant attention in this particular case.

While the usual relief for wrongful termination is reinstatement with back wages, compensation in lieu of reinstatement can be granted as equitable relief. Labour Tribunals are endowed with discretion to make just and equitable orders. Justice Kulatunga in ***Saleem v. Hatton National Bank*** [1994] 3 Sri LR 409 at page 415 identified three cardinal principles the Court has used to decide whether the order of payment of compensation by the Labour Tribunal is possible. Those grounds which map the parameters of the just and equitable jurisdiction of the Labour Tribunal are;

> "*…the jurisdiction of the Labour Tribunal is wide; relief under the Industrial Disputes Act is not limited to granting benefits which are legally due; and the duty of the tribunal is to make the order which may appear to it to be just and equitable*."

It is in the exercise of this discretion that the Labour Tribunal of Batticaloa has found in favour of the Appellants and ordered reinstatement and back wages. Therefore, the Learned High Court Judge did not err in failing to consider that the usual reliefs for wrongful termination are reinstatement with back wages.

In fairness to the Appellants, I am of the view that the compensation in the sum of 170,000/- ordered by the High Court does not sufficiently compensate for the diligence and loyalty of the Appellants especially during the turbulent period of the war, they had consistently and conscientiously worked and made a noteworthy contribution enabling the Respondent to provide banking services to the public without an interruption during that period.

Albeit on a justification other than that of the Learned Judge of the High Court of the Eastern Province, I am inclined to uphold the grant of redress in the nature of

compensation. The compensation that was ordered in a sum of Rs.170,000/- by the High Court is hereby varied and the Respondent is directed to pay a sum of Rs. 800,000/-[Rupees eight hundred thousand] to each of the Appellants. Subject to the above variation the Appeal is dismissed.

Appeal partially allowed

JUDGE OF THE SUPREME COURT

S. THURAIRAJA PC. J

I agree

JUDGE OF THE SUPREME COURT

MAHINDA SMAYAWARDHENA J.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal under Article 128(2) of the Constitution read with the provisions of the High Court of Provinces (Special Provisions) Act, No. 10 of 1996.

SC Appeal No. 74/2021
SC (Special) LA No. 91/2021
HC (Civil) No. 202/2019/MR

1. Upul Chaminda Perera Kumarasinghe
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

2. Airport City Club Hotel Ltd.,
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

PLAINTIFFS

-Vs-

Pan Asia Banking Corporation PC,
No. 450, Galle Road,
Colombo 03.
Having its Branch Office at No. 71,
Negombo Road,
Ja-Ela.

DEFENDANT

AND NOW (BY AND BETWEEN)

1. Upul Chaminda Perera Kumarasinghe
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

2. Airport City Club Hotel Ltd.,
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

PLAINTIFF-APPELLANTS

-Vs-

Pan Asia Banking Corporation PC,
No. 450, Galle Road,

Colombo 03.
Having its Branch Office at No. 71,
Negombo Road,
Ja-Ela.

DEFENDANT-RESPONDENT

BEFORE: Hon. Buwaneka Aluwihare, PC, J
Hon. P. Padman Surasena, J
Hon. Janak De Silva, J

COUNSEL: Mr. Sanjeewa Dasanayake with Ms. Dilini Premasiri instructed by Ms. D. Jimininge for the Plaintiff-Appellants.
Mr. Chandaka Jayasundera, PC with Mr. Priyantha Alagiyawanna and Mr. Isuru Weerasooriya instructed by Mrs. Nayani Jayasinghe for the Defendant-Respondent.

ARGUED ON: 28.10.2021.

WRITTEN SUBMISSIONS: 21.09.2021 for the Plaintiff-Plaintiffs.
25.10.2021 for the Defendant-Defendant.

DECIDED ON: 11.10.2023

JUDGEMENT

Aluwihare, PC, J,

The Plaintiffs-Plaintiffs (hereinafter referred to as 'Plaintiffs') preferred this Appeal to this Court by way of Petition dated 7th May 2021. On the 6th August 2021, having heard the submissions of counsel for each party, the court granted leave to appeal. The factual circumstances of this appeal and the questions of law which warrant determination have been set out below.

The Factual Circumstances of this Appeal

As set out in the accepted Offer Letter dated 8th August 2016 (marked 'R1'), addressed to the 2nd Plaintiff-Plaintiffs (hereinafter referred to as '2nd Plaintiff') by the Defendant-Defendant Bank (hereinafter 'Defendant bank'), the following facilities were offered on terms and conditions listed in the letter:

Facility No. 1

A Term Loan of Rs. 20,000,000 to part finance a purchase of property to be repaid in 72 equated monthly instalments with a grace period of 12 months "during which

interest to be serviced monthly commencing 30 days from the date of grant of facility. After the grace period, 72 equated monthly instalments of Rs. 422,900/27 each" (*vide* 'R1'). Security for this facility was to be furnished in the form of a Primary Floating Mortgage Bond of Rs. 90 million over the 'property situated at Andiambalama depicted as Lot No. 2 and 5 in plan No. 6961 in extent of 3R 25.8P.

Facility No. 2

A Term Loan of Rs. 70,000,000 to part finance the construction cost of a hotel to be repaid in 72 equated monthly instalments with a grace period of 12 months "during which interest to be serviced monthly commencing 30 days from the date of grant of facility. After the grace period, 72 equated monthly instalments of Rs. 1,480,150/93 each" (*vide* 'R1'). Security for this facility too was listed as "same as security of Facility No.1".

A Joint and Several Personal Guarantee from the Directors for Rs. 90 million was given as additional security for both facilities.

The Directors of the 2nd Plaintiff, including the 1st Plaintiff who owned 70% shares of the 2nd Plaintiff company undertook the obligations which flow from the mentioned facilities by signing the Offer letter (marked 'R1'). In pursuance of the accepted offer, the 2nd Plaintiff entered into loan agreements for the two facilities dated 9th August 2016 (marked 'R2' and 'R3'). The Plaintiffs admitted to submitting the following as securities for repayment of the said Loan facilities with interest and charges.

a. the 2nd Plaintiff as the obligor/mortgagor mortgaged with the Defendant Bank, the land described in the 2nd Schedule (Lot 5) to the Plaint by Mortgage Bond No. 298 dated 12th August 2016.
b. the 2nd Plaintiff as obligor and the 1st Plaintiff as the mortgagor mortgaged with the Defendant Bank, the land described in the 1st schedule (Lot 2) to the Plaint by Mortgage Bond No. 300 dated 12th August 2016.

The certified copy of the Loan Ledger of the loan of Rs. 20 million produced as 'R4' notes that, as at 2nd April 2018, a sum of Rs. 20, 278, 983.95 was owed to the Defendant by the 2nd Plaintiff company. The certified copy of the Loan Ledger for the

loan of Rs. 70 million produced as 'R5' notes that as at 2nd April 2018, a sum of Rs. 72,495,623.17 was owed to the Defendant by the 2nd Plaintiff company. Accordingly, the Plaintiffs owed the Defendant a total sum of Rs. 92,774,607.12 as at 2nd April 2018.

By two letters of demand dated 11th April 2018 ('R6' and 'R6(a)'), the Defendant Bank demanded that the Plaintiffs provide the said sums, with interest from 3rd April 2018. The letters also note that if the amounts demanded were not paid with interest, the Defendant Bank would take steps under the Recovery of Loans by Banks (Special Provisions) Act, No. 04 of 1990 (hereinafter sometimes referred to as 'the Act') to auction the mortgaged properties.
On 25th April 2018, the Board of Directors of the Defendant Bank resolved to auction the said properties mortgaged to the Bank in order to recover the said sums of Rs. 92,774,607.12 and interest from 3rd April 2018. The said resolution was published in the Government Gazette and in Newspapers in all three languages ('A28(ii)'-'A28(vii)') and also copied to the 1st and 2nd Plaintiffs via covering letters dated 13th June 2018 ('R7' and 'A28(i)').

The public auction of the said property was fixed for 16th July 2018. The Defendant published the auction notice in the Government Gazette on 14th June 2018 and in Newspapers in all three languages ('A29(ii)'-'A29(vii)'). The Plaintiffs were also informed of the same by letters dated 26th June 2018 ('A28(i)'-'R8') along with copies of the Gazette Notice and Newspaper publications. By letter dated 29th June 2018 ('R8(b)'), the Plaintiffs agreed to deposit Rs. 4 million on or before 4th July 2018, requesting the Defendants to suspend the auction.

The Defendants claim that they suspended the said auction, acting on the representation and undertaking of the Plaintiffs. It is also submitted that the Plaintiffs did not repay the loans as undertaken by the Defendant. By letter dated 3rd October 2018, the Defendant requested the Plaintiffs to settle monies due the Defendant.

Since the Plaintiffs failed to settle the loans, the public auctions of the properties was, once again fixed for 12th November 2018, and the Defendant published the auction notice in the Government Gazette on 25th January 2019 and in Newspapers in all

three languages ('A30(ii)'-'A30(vi)') before the said publications. The Defendant also informed the 1st and 2nd Plaintiffs of the scheduled auction by covering letters dated 29th October 2018 along with copies of the Gazette and Newspaper Publications ('R10' and 'A30(i)'). The Defendant claims that this auction was also suspended at the request of the Plaintiffs due to several representations, promises and undertakings of the Plaintiffs to repay the amounts due.

By Offer letter dated 11th December 2018 ('R11'), the Defendant offered to reschedule the repayment contingent upon a deposit of Rs. 700,000 by the Plaintiffs. However, the Plaintiffs had failed to make such a deposit.

Thereafter, the Defendant had requested the Plaintiffs to settle the total arrears by letter dated 26th December 2018 ('R12'), which conveys that if the Plaintiffs fail to do so, or the parties fail to arrive at a settlement, the Defendant will proceed to *parate* execute the property. Indicating that the arrears was not settled, and no settlement was arrived at, the public auctions of the properties was once again fixed for the third time on the 28th February 2019 and the relevant notice was published in the Government Gazette and Newspapers on 25th January 2019 in all three languages ('A33(i)'-'A33(vii)'). Notice of the above scheduled auction, along with copies of the Gazette and Newspaper notifications was conveyed to the 1st and 2nd Plaintiffs with covering letters dated 6th February 2019 ('R13', 'A33(i)').

By filing a Plaint dated 21st February 2019 (X1), the Plaintiffs instituted action in the Commercial High Court against the Defendant praying for *inter alia*:

- a declaration that the resolution adopted by the Board of Directors of the Defendant dated 25th April 2018 was illegal, wrongful and a document which cannot be enforced by law;
- a declaration that the Defendant does not have any right to adopt a consolidated resolution to auction for two separate properties stated in the Mortgage Bonds marked 'A35' and 'A36' (referred to above);
- a declaration that no right is devolved based on the above Mortgage Bonds.

The Plaintiffs also sought as interim relief:

- an enjoining order preventing the Defendant and its agents from selling the

properties sought to be auctioned by the resolution (A28(ii)) and inter alia engaging in further activities based on the notices of sale of the properties until the determination of the interim injunction;

- an interim injunction preventing the Defendant and its agents from selling the properties sought to be auctioned by the resolution (A28(ii)) and inter alia engaging in further activities based on the notices of sale of the properties until the final determination of the action.

Pursuant to this action, the Commercial High Court issued an enjoining order as prayed for by the Plaintiffs. Due to the enjoining order, the auction which was fixed for 28th February 2019 was suspended. Thereafter, on 17th July 2019, the Defendant filed a Statement of Objections (X3). Subsequent to inquiry carried out by written submissions, the learned High Court Judge delivered an Order (X6) dated 21st April 2021 vacating the enjoining order and dismissing the application of the Plaintiffs for an interim injunction.

Being aggrieved by the said order, the Plaintiffs invoked the appellate jurisdiction of this court urging that the said order is contrary to law.

On the 6th of August 2021, having heard the submissions of counsel for each party, the court granted leave to proceed on the following questions of law.

(1) Has the learned High Court Judge failed to give his judicial mind to the fact that the impugned resolution was passed for a consolidated sum thereby depriving the Plaintiffs of their right to secure their loan to the maximum limit of each mortgage bond?

(2) Has the learned High Court Judge failed to identify that if the interim order sought is not given, the Defendants are permitted to recover an amount exceeding the amounts pledged by the Mortgage Bonds marked 'A35' and 'A36' to the plaint which is contrary to the provisions of Sections 10,11 and 14 of Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 as amended?

(3) Has the learned High Court Judge failed to identify that if the interim order sought is not given, it will prejudice Plaintiffs to remedies available in terms of Sections 10 and 11 of Recovery of Loans by Banks (Special Provisions) Act, No.

4 of 1990 (as amended) to deposit the upset price and release the scheduled properties from auction?

Further to granting leave to proceed, this court also issued an interim order dated 6th August 2018 staying the operation of the order of the Commercial High Court dated 21st April 2021 along with an interim order spare in the operation of the above order of the Commercial High Court and an ordered parties to maintain the status quo until final determination of the case.

The Position of the Plaintiffs

The principal position of the Plaintiffs is that although the two plots of land pledged as securities by the two mortgage bonds (A35 and A36) are situated next to each other, they are considered two separate plots of land belonging to two separate parties. The Plaintiffs submitted that the title to such lands were obtained in the following manner, by the following parties:

1. By virtue of **Deed of Transfer bearing No. 22** dated 1st May 2016, attested by N.M.R Cooray Notary Public, **the 1st Plaintiff** seized and possessed the land described as **Lot 02** in the Plan bearing No. 6961 dated 4th December 2015 made by K.R.S. Fonseka, Licensed Surveyor, containing in extent 1R.35.80P.
2. By virtue of **Deed of Transfer bearing No. 39** dated 12th August 2016, attested by N.M.R Cooray Notary Public, the **2nd Plaintiff** seized and possessed the land described as **Lot 05** in the Plan bearing No. 6961 dated 4th December 2015 made by K.R.S. Fonseka, Licensed Surveyor, containing in extent 1R.30P.

It is the Plaintiffs' position that their case presents exceptional and extraordinary circumstances and that the Defendant Bank cannot arbitrarily recover the loss borne of default by way of *parate execution* and that the Defendant must act in a 'commercially reasonable manner' (*vide* the Plaintiffs' written submission dated 21st September 2021) in compliance with the terms of the respective mortgage bonds and the rules of law.

As final relief, the Plaintiffs seek that the order of the learned High Court Judge (X6) be varied, and an interim injunction be issued to preserve the properties in their possession and title until the Commercial High Court resolves the substantial matters

at trial.

The Plaintiffs submitted, relying on His Lordship Chief Justice Sarath N. Silva's judgement in ***Ramachandra and another v. Hatton National Bank*** **[2006] 1 SLR 393** that as per the process of recovery under the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, parties' prejudiced by any decision of the Board of Directors has no remedy besides agitating their grievance prior to the auction sale as no notice is provided to the defaulter prior to the passing of the resolution, and that consequently, the process contravenes the principles of natural justice.

The Plaintiffs also complained that by passing a single Resolution in respect of both properties mortgaged to it, the Defendant had failed to set an 'upset price' for each property and had consequently deprived the Plaintiffs the opportunity to release at least one property by paying the amount recoverable. The Plaintiffs submitted that such conduct by the Defendant was 'commercially unreasonable', considering the economic strife caused by Covid-19 and other struggles singular to the Plaintiffs. On the aforementioned grounds, the Plaintiffs prayed for an interim injunction to preserve their possession of the properties and variation of the order of the learned Judge of the Commercial High Court (X6).

The Position of the Defendant Bank

Principally, the Defendant submitted that the Order of the learned High Court Judge is correct in all aspects and should not be set aside or varied. Buttressing this view, the Defendant submitted that the Plaintiffs have failed to establish a *prima facie* case for the grant of an Interim Injunction (*vide* ***Felix Dias Bandaranaike v. State Film Corporation*** **[1981] 2 SLR 287** and ***DFCC Bank PLC v. Fathima Ruzana Fakurdeen*** **SC Appeal No. 133/2014 S.C Minutes 24.03.2016**).

The Defendant submitted that as admitted by both parties, the 2nd Plaintiff failed to repay the facility for Rs. 70 million and the facility for Rs. 20 million, that as at 2nd April 2018, the 2nd Plaintiff was in default of a sum of Rs. 92,774,607.12 and outstanding interest on capital of Rs. 88,639,658.09. Furthermore, the Defendant submitted that above computation accounted for repayments made till 2nd April 2018 as established by the Loan Ledgers marked 'R4' and 'R5'. As per the ledgers, no

repayments have been made after 23rd January 2018.

The Defendant then adverted to Section 3 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. Relying on the Section, the Defendants submitted within the meaning of the Act, where the Plaintiffs failed to fully repay the facilities obtained inclusive of interest, the Plaintiffs were in default. Accordingly, the Defendant submitted that acting under Section 4 of the Act, the Board of Directors adopted the Resolution to *parate execute* the mortgaged properties.

Furthermore, it was also noted by the Defendant that resorting to *parate execution* was lawful, correct and necessary to maintain daily commerce which would benefit society at large (*vide* ***People's Bank v. Telepix (Pvt) Limited*** [2010] BLR 235).

Responding the Plaintiffs' contention that the Resolution passed by the Defendant was bad in law as it relates to two separate properties, the Defendant submitted that the Plaintiffs are estopped from raising such contention as the Defendant had on two previous occasions passed resolution to *parate execute* the same properties and on both occasions, the Plaintiffs did not find fault with the form or contents of the resolution. Instead, on both occasions, the Plaintiffs provided various undertakings to repay the loans. The Defendant submitted that the Plaintiffs have acquiesced to their unfavourable position by engaging the previous resolutions and providing undertakings and are therefore barred from adopting a contrary position. Additionally, the Defendant submitted that the Plaintiffs' position is, in any event, without merit as they have not referred to any provision of law which prohibits the Defendant from passing one resolution in respect of two properties mortgaged for the purposes of two facilities given to the same borrower.

The Defendant also submitted that the principal contract between the 2nd Plaintiff and the Defendant is contained in the Offer Letter where it offered the facilities (R1) and the Loan Agreements (R2 and R3). Further, they submitted that as observed by the learned High Court Judge in the Order (p. 9), as per the loan agreements, both loans were secured by Lot No. 2 and 5 in Plan No. 6961 as joint security for both facilities.

Of final note, is that the Defendant has refuted the Plaintiffs' claim that the 2nd

Plaintiff is not a willful defaulter. The Defendant submitted that the Plaintiffs have also defaulted on loans given by Hatton National Bank PLC and DFFC Bank PLC, and two more cases for which *parate execution* proceedings are ongoing before the Commercial High Court and the District Court of Negombo.

The Questions of Law

(1) **Has the learned High Court Judge failed to give his judicial mind to the fact that the impugned resolution was passed for a consolidated sum thereby depriving the Plaintiffs of their right to secure their loan to the maximum limit of each mortgage bond?**

Upon perusal of the order of the learned High Court Judge, it is evident that the learned Judge has provided ample consideration to the contentions advanced by the Plaintiffs regarding the security for each loan facility.

Noting that the central relief sought by the Plaintiffs was to an interim injunction to prevent the Defendant from auctioning the properties (at page 6 of X6), the learned Judge declared that the Plaintiffs grievances over not being able to enjoy the security of each loan to the maximum extent of each mortgage bond must be considered in light of the justifications advanced by the Plaintiffs for their failure to make payments owed the Defendant. Moreover, noting that Section 4 of the Act permits the Board of Directors to pass resolution to *parate execute* any property mortgaged to the Bank as security for a loan defaulted upon in order '*to recover the whole or the unpaid portion of such loan, and interest due thereon…*', and that as per the elements in the three consequential tests laid down in ***Felix Dias Bandaranaike v. State Film Corporation*** **[1981] 2 SLR 287,** the learned Judge held that for an interim injunction to be granted, it is incumbent upon the Plaintiffs to establish that they have a strong *prima facie* case against the Defendants and that they would suffer irreparable and irremediable damage if such relief is not granted.

The learned Judge also had observed (at page 9 of X6) that the Resolution passed by the Defendant clearly set out the outstanding amount due under the two mortgage bonds and the Plaintiffs had the option to make payment in respect of one facility or

both and get one or both lands released. The outstanding amounts set out in the Resolution seemingly correspond to the Loan Ledgers R4 and R5. Additionally, no material produced indicates that the Plaintiffs had made any attempt to make any repayments and get at least one property released. If the Plaintiffs wished to have at least one property released, they could have provided an undertaking to the Defendant to that effect such as the previous occasions where the auctions were suspended.

It is also pertinent to note that the learned High Court Judge, citing ***Yashoda Holdings (Pvt) Ltd. V. People's Bank*** **[1998] 3 SLR 382** and ***Inglis v. Commonwealth Trading Bank of Australia*** **[1972] 126 CLR 161** correctly observed (at pages 10-11) that the Bank's right to recover loans by the power of sale as mortgagee will not be prevented or interfered with by the court except on exceptional circumstances where it is shown that irremediable damage would be caused without such intervention. The Plaintiffs complaint regarding a single resolution being passed is particularly perplexing when considering that they had found no issue with the single resolution on the previous occasions for the auction of the properties (*vide* A28(ii)-A28(vii) and A30(ii)-(vi)).

Nothing in the law prevented the Bank from passing a single resolution to recover loans by *parate executing* two separate properties. The focus of the resolution is the Board's exercise of power over loans owed to them, not the property concerned. The law must be read in a manner which assists expediency while adhering to principles of natural justice, not a device which hampers commerce. The Court is bound to assist expediency, particularly where the legislature has legislated for that exact purpose.

As concluded by the learned High Court Judge, upon perusal of the Loan Agreements (R2 and R3), I too observed that the Plaintiffs have secured the facilities by providing Lots 2 and 5 in Plan No. 696 as joint security. In the portion titled "On the security of", the following is written.
"(1) Primary Floating Mortgage Bond for Rs. 90.0 Mn over the property situated at Andiambalama depicted as Lot No. 2 and 5 in Plan No. 6961 in extent of 3R.25.8P."

Both these agreements are signed and endorsed by Directors of the 2nd Plaintiff and the Plaintiffs have admitted to their contents. This lends credence to the Defendant's position that the Defendant lawfully, and quite appropriately, passed the same and

single resolution in respect of both Lot Nos. 2 and 5.

Moreover, this court has on previous occasions too, refused to intervene and prevent Banks from exercising their lawful rights on mere grounds of procedural impropriety. In ***Amaradasa Liyanage v. Sampath Bank PLC*** **(S.C. Appeal No. 126/2012, S.C Minutes 04.04.2014)**, this court noted that, (in the said case) the validity of the Certificate of Sale pursuant to a Resolution issued had been challenged on vexatious grounds i.e. upon the Certificate being signed by two members of the Board rather than all members of the board. Noting that this was an irregularity that could be readily remedied without any prejudice to the rights of the borrower, the court refused to overturn the High Court Judgement which was appealed against. Similarly, the validity of a Resolution which merely consolidated amounts and properties mortgaged to it for facilities in common is not a ground upon which the Plaintiffs appeal could succeed.

For these reasons, I am inclined to answer this question in the negative. It is my opinion that the learned Judge of the Commercial High Court has adequately addressed his judicial mind and had arrived at the appropriate conclusion.

(2) Has the learned High Court Judge failed to identify that if the interim order sought is not given, the Defendants are permitted to recover an amount exceeding the amounts pledged by the Mortgage Bonds marked 'A35' and 'A36' to the plaint which is contrary to the provisions of Sections 10, 11 and 14 of Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 as amended?

It was the Plaintiffs' submission that by passing a single resolution in respect of both properties, the Defendant prevented the Plaintiffs from availing remedies/steps they were entitled to, in terms of Sections 10, 11 and 14 of the Act.

Section 10 of the Act states as follows:

"10. (1) If the amount of the whole of the unpaid portion of the loan, together with

interest payable and of the moneys and costs, if any, *recoverable by the Board under section 13* ***is tendered to the Board at any time before the date fixed for the sale, the property shall not be sold, and no further steps shall be taken*** *in pursuance of the resolution under section 4 for the sale of that property.*

(2) ***If the amount of the instalment in respect of which default has been made, and of the moneys and costs, if any,*** *recoverable by the Board under section 13* ***is tendered to the Board at any time before the date fixed for the sale, the Board may in its discretion direct that the property shall not be sold and that no further steps shall be taken*** *in pursuance of the substitution under section 4 for the sale of that property.*

Accordingly, where the Resolution is passed and the borrowers are noticed, Section 10 envisages two options.

1. The borrower could settle the entire outstanding amount to the Bank including the costs recoverable under S. 13. If done so, the Bank cannot auction the property as it has no discretion in the matter.
2. Alternatively, the borrower could settle only the portion of the loan in arrears and costs recoverable. If done so, the Bank retains the discretion to decide whether to proceed with the auction.

Crucially, the Defendants cannot prevent the Plaintiffs from making payments in the manner specified under S. 10(1) or S. 10(2). Therefore, it would be incorrect to state that the Plaintiffs were 'prevented' from availing Section 10 of the Act by the Defendant Bank. For the purposes of commercial expediency, it is my view that Banks would in fact prefer such payments. This is evident in the fact that the Bank suspended previously scheduled auctions on two occasions, upon receiving undertakings from the Plaintiffs. As the Plaintiffs had not made any payments in accordance with the aforementioned provisions of Section 10, the Defendant was not bound to suspend the auction.

Section 11 states that;

"The Board may fix an upset price below which the property shall not be sold to any parson other than the bank to which the property is mortgaged."

As this portion of the judgement directly relates to the third question under which

leave to appeal was granted, it will be substantially dealt with later on.

Section 14 states as follows.
"If the mortgaged property is sold, the bank shall, after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13, pay the balance remaining, if any either to the borrower or any person legally entitled to accept the payment due to the borrowers or where the Board is in doubt as to whom the money should be paid into the District Court of the district in which the mortgage property is situated."

Section 14 contemplates the payment of any balance sum a borrower may be entitled to once the mortgaged property is sold. In my view, the Plaintiffs cannot seek to prevent the sale or auction of mortgaged property by arguing that if sold, it will not be entitled to any remaining balance, as it is evident that sale proceeds may not always yield a balance after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13.

Therefore, this question of law is also answered in the negative.

(3) Has the learned High Court Judge failed to identify that if the interim order sought is not given, it will prejudice Plaintiffs to remedies available in terms of Sections 10 and 11 of Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 (as amended) to deposit the upset price and release the scheduled properties from auction?

As per Section 11 of the Act, the Board of Directors of the Bank to which the property is mortgaged may fix an upset price, an amount lower than which the property shall not be sold to any person other than the bank. Section 17 of the Act provides that where the property auctioned and sold has been purchased on behalf of the Bank, upon the borrower paying the amount due in respect of the loan, the Board of Directors of the Bank may cancel any scheduled resale of the property.

"The Board may fix an upset price below which the property shall not be sold to any parson other than the bank to which the property is mortgaged."

The operative term in Section 11 is the word '**may**'. Section 11 bestows a degree of discretion upon the Bank to determine whether an upset price may be fixed to purchase the property to itself, and then, if such intention is indicated, allow the Borrowers to re-purchase the property from the Bank. It is evident that such discretion was vested in the Board of Directors of the Bank because it may have to consider whether purchasing the property in its own name may be in its own interest. As in any purchase, a property does not carry the same relative commercial value to each prospective purchaser. The extent, the structure, its proximity to a metropolis and potential value for resale are all factors which take precedence in the Bank's considerations prior to evaluating the defaulter's concerns. Accordingly, the Plaintiffs cannot claim that the Defendant Bank acted 'unreasonably' when the Defendant Bank has provided ample consideration and opportunity for repayment to the Plaintiffs and then proceeded to act lawfully, within its rights, to ensure that it does not bear any losses due to the Plaintiffs' failure to honour debt obligations.

Therefore, I answer this question too in the negative.

Conclusion

It is clear that the Plaintiffs have sought an interim injunction to prevent the Defendant from *parate* executing the mortgaged properties. *Parate Execution* is a right the Defendant is entitled to execute lawfully as per the Recovery of Loans by Banks (Special Provisions) Act of 1990 as amended.

I wish to reiterate the role of the Court in matters relating to recovery of loans by banks under the Recovery of Loans by Banks Act, as eloquently expressed by Justice Tilakewardena in ***Amaradasa Liyanage v. Sampath Bank PLC*** **(S.C. Appeal No. 126/2012, S.C Minutes 04.04.2014) at p. 12:**

"*The ambit and purpose of the Recovery of Loans by Banks Act is, in essence, to recover monies due to the Bank while ensuring that the Bank does not enjoy an unjust enrichment. The provisions of the Act, by allowing parate execution, is to facilitate the process of collecting monies due, without lengthy court proceedings, and to do so in a fair and reasonable manner. This objective should therefore not be hindered by minor procedural irregularities… for such minor irregularities cannot have much*

impact on the rights of the borrower.
Minor procedural irregularities cannot, further, be grounds upon which actions may be instituted for such actions would only amount to the abuse of the process of Court which must not be allowed."

The plaintiffs cannot seek the intervention of the court to prevent the Defendant Bank from lawfully exercising their rights in terms of a valid contract, without making a case for irreparable and irremediable damage. Courts cannot and should not be treated as the refuge of all defaulting creditors.

The Plaintiffs' appeal to vary the Order of the learned High Court Judge dated 21st April 2021 (X6) and issue an interim injunction is hereby dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA
I agree.

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal to the Supreme Court against Judgment of the Court of Appeal delivered on 04/06/2010 in C. A. Appeal No. 1185/95 (F) D.C. Galle No. 9180/P.

Akmeemana Mahanama Gamage
Therabaya Gunasekara, of Mabotuwana Road, Wanduramba.

Plaintiff

SC Appeal No. 96/2010
CA Appeal No. 1185/95 (F)
DC Galle Case No. 9180/P

Vs.

1. Lokunarangodage David De Silva, of Pallewatte,Wanaduramba

2. Babynona Gunasekara, of Haputantrigewatte, Wanduramba.

3. Akmeemana Gamage Sriyalatha Gunasekara

4. Akmeemana Gamage Sunil Palitha Gunasekara

5. Akmeemana Gamage Gamini Gunasekara

6. Akmeemana Gamage Chandranee Gunasekara

7. Akmeemana Gamage Gnanatilaka Gunasekara

8. Akmeemana Gamage Maithreepala Gunasekara

Defendants

Akmeemana Mahanama Gamage Therabaya Gunasekara, of Mabotuwana Road, Wanduramba.

Plaintiff-Appellant

Vs.

1. Lokunarangodage David De Silva, of Pallewatte, Wanduramba.

2. Babynona Gunasekara, of Haputantrigewatte, Wanduramba. (Deceased)

2A. Akmeemana Gamage Maithreepala Gunasekara

3. Akmeemana Gamage Sriyalatha Gunasekara

4. Akmeemana Gamage Sunil Palitha Gunasekara

5. Akmeemana Gamage Gamini Gunasekara

6. Akmeemana Gamage Chandranee Gunasekara

7. Akmeemana Gamage Gnanatilaka Gunasekara (Deceased)

7A. Akmeemana Gamage Maithreepala Gunasekara

8. Akmeemana Gamage Maithreepala Gunasekara
All of 'Chitral',
Haputantrigewatte,
Wanduramba.

Defendant-Respondents

Akmeemana Mahanama Gamage Therabaya Gunasekara, of Mabotuwana Road, Wanduramba.

Plaintiff-Appellant-Petitioner

Vs.

1. Lokunarangodage David De Silva, of Pallewatte, Wanduramba.

2. Babynona Gunasekara, of Haputantrigewatte, Wanduramba. (Deceased)

2A. Akmeemana Gamage Maithreepala Gunasekara

3. Akmeemana Gamage Sriyalatha Gunasekara

4. Akmeemana Gamage Sunil Palitha Gunasekara

5. Akmeemana Gamage Gamini Gunasekara

6. Akmeemana Gamage Chandranee Gunasekara

7. Akmeemana Gamage Gnanatilaka Gunasekara (Deceased)

7A. Akmeemana Gamage
Maithreepala Gunasekara

8. Akmeemana Gamage
Maithreepala Gunasekara
All of 'Chitral',
Haputantrigewatte,
Wanduramba.

Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, PC. J.
Murdu N. B. Fernando, PC. J.
S. Thurairaja, PC. J.

Counsel: Uditha Egalahewa PC with Damitha Karunaratne, Miyuru Egalahewa, Arunodha Jayawardena, Thilini Payagala Bandara for the Plaintiff-Appellant-Appellant.

D. T. T. Dassanayake with W. R. Kaushali Samaratunga for the 2nd to 8th Defendant-Respondent-Respondent.

Argued on: 21. 07. 2020

Decided on: 11 .10. 2023

Judgement

Aluwihare PC. J

(1) The Plaintiff-Appellant-Petitioner-Appellant sought leave to appeal against the judgement of the Court of Appeal dated 17.06.2010 and this court on 08.09.2010, granted leave on the questions of law referred to in subparagraphs (a) and (b) of paragraph 18 of the Petition of the Plaintiff-Appellant-Petitioner-Appellant [hereinafter referred to as the 'Plaintiff']. The said questions are reproduced below;

(a) Has the Court of Appeal erred in law in holding that the contesting Defendants have acquired a prescriptive title by possession from the date of the final decree in 1965, because in terms of the last will of Andoris Gunasekera and also in terms of the final decree, from the date of the final decree in 1965 the undivided 471/480 share of Andoris Gunasekera was subject to the life interest of Metaramba Liyanage Rosa who conveyed same by deed 2D1 in 1975 to the 2nd Defendant and she (Rosa) thereafter died only in October 1979:; This action was instituted in 1984, so that, ten years had not lapsed since even the execution of Rosa (and two others) of Deed 2D1 in 1975 and this action was instituted in 1984;

*(b) Did the Court of Appeal err in law in failing to apply the proviso to Section 3 of the Prescription Ordinance(as interpreted in **Lesin V. Karunarathne** 61 NLR 138) to the facts of this case, in that, as a matter of law, during the lifetime of the life interest holder it is not possible for anyone to acquire a prescriptive title to the land as against its owner; as a matter of law, no one could have begun to acquire a prescriptive title as against the Plaintiff until the death of Rosa in 1979;*

The Factual background

(2) The Plaintiff instituted a partition action before the District Court seeking to partition a land called 'Haputantrigewatte' consisting of three contiguous

allotments. The said lands are depicted in the preliminary plan bearing No. 1206 as lots 'A', 'B' and 'C'. The aggregate extent of these three lots is, 2 acres 2 roods and 17 perches. The Plaintiff cited two defendants, namely David Silva [1st Defendant- Respondent-Respondent] and Baby Nona Gunasekera [2nd Defendant]. Subsequently, however, on an application for intervention, 4 other defendants [3rd to 6th] were added on 08th June 1990. On 15th October 1991, the 7th Defendant was also permitted to intervene. The 3rd to the 6th Defendants happened to be the children of the 2nd Defendant whereas the 7th Defendant happened to be the husband of the 2nd Defendant. Finally, the 5th child of the 2nd Defendant was added as the 8th Defendant. The case proceeded to trial on that basis.

(3) The learned District Judge by her judgement dated 26.01.1995, dismissed the Plaint subject to costs. Aggrieved by the said judgement the plaintiff moved the Court of Appeal by way of appeal and the Court of Appeal too dismissed the appeal.

(4) There is no dispute as to the identity of the corpus. To put it in a nutshell, the Plaintiff claimed the corpus on the strength of the Last Will of his father Adonis Gunasekera (also called 'Andoris'), whereas the 2nd to the 7th Defendants moved for dismissal of action based on the ouster by virtue of undisturbed and uninterrupted possession for over ten years.

(5) The learned District Judge held with the Defendants and had come to a finding that the said Defendants have proved ouster and had gained prescriptive title to the corpus and the Court of Appeal upon analysing the evidence held that the learned District Judge had arrived at the correct finding and accordingly dismissed the appeal.

(6) The thrust of the learned President's Counsel's argument on behalf of the Plaintiff was that this is a case where the proviso to Section 3 of the Prescription

Ordinance [hereinafter the 'Ordinance'] ought to have been applied by both the District Court as well as the Court of Appeal. It was argued, however, that both the learned District judge as well as the Court of Appeal erred in not doing so. It was contended by the learned President's Counsel that if the proviso was applied, the Defendants would not have been able to satisfy the court that there was an ouster and that they were in possession of the impugned property for a period of over 10 years, two of the requisites that need to be established to succeed in a claim for prescription.

(7) According to the Plaintiff, his father Adonis Gunasekera [hereinafter referred to as Adonis] was allotted 471/480th share of the corpus under the final decree entered in a partition action bearing No. P/2261 of the District Court of Galle. There was no dispute among the parties of this fact. Adonis died in 1962 and his executor Metaramba Liyanage Elgin was substituted in the room and place of Adonis in the said partition case. The final decree of the District Court was delivered in 1965.

(8) Adonis had executed a Last Will in 1948 [No 1722; marked and produced as 'P2' at the trial] which had been admitted to probate in case No. 8851 of the District Court of Galle. In terms of the said Last Will, the rights of Adonis accrued to his three children namely; (i) Therabhaya Gunasekera [Plaintiff in the instant case] (ii) Harishchandra Gunasekera and (iii) Asoka Gunasekera. The three children of Adonis referred to above, however, got their rights subject to the life interest of their mother Metaramba Liyanage Rosa [herein after referred to as Rosa].

(9) It is also in evidence that one of Adonis' children, Asoka Gunasekera passed away unmarried and issueless and Asoka's interest devolved on their mother Rosa and the two remaining children Therabhaya [Plaintiff] and Harishchandra.

(10) The final decree of the partition action in P/2261 had been marked and produced as 'P1'. It appears that the 2nd to the 7th Defendants were not parties to the said partition action. What is more significant is that no steps had been taken to execute the decree of the said partition action.

(11) In 1975, Rosa along with Elgin and Gnanathilaka Gunasekera executed a deed of transfer No. 31409 which was marked and produced as '2V1', by which the said three persons had transferred whatever rights they had over the corpus, to the 2nd Defendant, Baby Nona Gunasekera. Thus, it appears whatever rights Rosa had over the corpus; she had given them up in 1975. Rosa passed away four years later in 1979.

Evidence of Prescription

(12) For the ease of following the devolution of title, it would be pertinent to place the relationships between the parties in a perspective. It appears that prior to his involvement with Rosa, Adonis was married to one Cecilia De Silva, and sired three children by that marriage. The 7th Defendant, Gnanathilaka Gunasekera happened to be one of those three children. Subsequently Adonis had lived with Rosa, who was his mistress. He states in his Last Will; *"I do hereby direct that my Mistress Metaramba Liyanage Rosa of …shall be entitled to life interest over all my property…"*. Baby Nona Gunasekera [the 2nd Defendant] is the wife of Gnanathilaka Gunasekara, the 7th Defendant. It was to Baby Nona whom Rosa and two others conveyed their rights in 1975 by Deed No. 31409 as referred to earlier.

(13) According to the Plaintiff himself, his stepbrother Gnanathilaka the 7th Defendant and his wife Baby Nona, 2nd Defendant were living in Haputantrigewatte [the corpus] since about 1954. At that time the Plaintiff had been living with his mother Rosa, at No. 80, Halls Road, Galle. In the year 1962, his father Adonis had died. He has said that after the father's death he was not permitted to go to the corpus and that he was abused and chased away by the

7th Defendant. He had also admitted that, after 1954, the Defendants improved the buildings that were standing on the corpus and engaged in cultivation. Subsequently, the children of the 2nd and the 7th defendants had put up houses on the corpus.

(14) The 7th Defendant in his evidence had said that the land in question was given to him by his father [Adonis] even before the decision of the partition action in P/2261 was delivered, and he continued to possess it even after the judgement. According to him, he had requested his father for a block of land, and he was asked to take over the land [corpus] and had been promised a deed in respect of the same. He had been in possession ever since. The 7th Defendant also had said that they mortgaged the property and obtained a loan from the Co-operative Society ['2V3']. He had further said that they had possessed the land for more than 40 years at the point he gave evidence in 1992.

(15) The learned District Judge had acted on the evidence given by the 7th Defendant plus the evidence of the Plaintiff who admitted in the course of his evidence that the 7th Defendant and Baby Nona have been in possession of the land in question since about 1954. Based on this evidence the learned District Judge held that the Defendants had acquired title by prescription.

The application of the proviso to Section 3 of the Prescription Ordinance;

(16) The learned President's Counsel contended that, during the lifetime of the life interest holder it is not possible for anyone to acquire prescriptive title to land, as against the owner. As far as the corpus is concerned, by virtue of the testamentary decree, the Plaintiff and his siblings became the owners of the corpus, however, subject to the life interest of their mother Rosa. The position taken up on behalf of the Plaintiff was, that for the purpose of prescription, the relevant date is either 1975 [the year in which Rosa gave up her rights over the corpus by the execution of the Deed no. 3361] or 1979, the year she died.

It was pointed out that the children of Rosa acquired the right of possession to the property in dispute only after Rosa executed the deed 3361 in 1975 or in the alternative after the death of Rosa [in 1979] who was the life interest holder. The partition action was filed by the Plaintiff in 1984 and therefore the Defendants were short of the required ten-year period of possession to prescribe to the corpus.

(17) In this regard the Plaintiff relied on the decision of **Lesin v. Karunaratne** 61 NLR 138, where Sansoni J. held that under the proviso to Section 3 of the Prescription Ordinance, "*prescription begins to run against parties claiming estates in remainder or reversion* ***only from the time when such parties acquire a right of possession*** *to the property in dispute.*" (Emphasis added). **Lesin** (*supra*), a case with facts similar to that in the instant case was relied upon to explain the above mentioned position; the operation of life interest against the running of prescription. It was observed in Lesin [supra] that, "*The proviso was to be found even in the earlier Prescription Ordinance No. 8 of 1834 and it has been applied in numerous cases. In one of the earliest reported cases (1842 Morg. Diy. 323) the plaintiff and the defendant were children of a deceased proprietor who also left his widow surviving him. The widow had a life interest which only ceased on her death within 10 years of the filing of the action.* ***As the plaintiff acquired the right of possession only on her death, it was held that the defendant could not acquire a prescriptive title against the plaintiff.***" [Emphasis added]

(18) The proviso to Section 3 of the Prescription Ordinance reads thus;
"Provided that the said period of ***ten years shall only begin to run*** *against parties claiming estates in remainder or reversion* ***from the time when the parties so claiming acquired a right of possession*** *to the property in dispute."*
[Emphasis is mine]

(19) As will be made evident in a latter portion of this judgement, the consequence of conveying a property subject to life interest is most peculiar in effect for the purposes of prescription. 'Life Interest' is a unique in that it creates a legal endowment whereby a person who is bestowed such interest is legally entitled to enjoy the property. Therefore, the application of the proviso to Section 3 of the Prescription Ordinance also takes a unique form.

(20) This court is inclined to agree with the learned President's Counsel for the Plaintiff that the proviso to the Section 3 of the Prescription Ordinance, as propounded in **Lesin v. Karaunaratne** (*supra*) should apply to the present case. By the application of the ratio in **Lesin v. Karaunaratne** (*supra*), prescription cannot run during the period in which Rosa enjoyed life interest over the property as against her children. The life interest would have come to a termination upon the death of the life interest holder Rosa in 1979 or in the alternative on the transfer of her rights to the 1st Defendant in 1975 by deed 3361. For the purpose of resolving the question of law, it is immaterial whether we take into account the year 1975 or 1979 as the terminal point of Rosa's life interest. However, as it would be more beneficial from the stand point of the Plaintiff to take the date as 1979, [in which case the proviso to Section 3 of the Ordinance would be applicable for a greater period] and for the ease of explaining the rationale for the conclusions reached in this judgement, the terminal point of Rosa's life interest would be considered as the year 1979, the year in which she died.

(21) In view of the proviso to Section 3 of the Ordinance, by operation of law, the period Rosa enjoyed life interest over the corpus has to be discounted from the period of possession as far as the claim for prescription is concerned. However, there are a number of factors that this court needs to consider in deciding whether the learned District Judge was correct in coming to the finding that the Defendants have established all requisites in Section 3 of the Ordinance to satisfy that they [in particular the 7th Defendant] had acquired prescriptive

rights to the impugned property. In the circumstances it would be relevant to iterate them here;

(a) There is no dispute that the 7th Defendant had come into possession of the property in 1954.

(b) It is also common ground that the 7th Defendant and his family continued to possess the property since then without an interruption, a period of 30 years up to the date of action in the District Court.

(c) It is the position of the 7th Defendant that the land was 'given' to him by his father with the promise of executing a deed which never materialised up to his father's death in 1962.

(d) It is clear from the evidence that the possession that was given to the 7th Defendant was not mere 'permission' to possess but with a declared intention of conveying its ownership to him by Adonis.

(e) It is in evidence that the 7th Defendant possessed the land, developed it, constructed buildings and there was corporeal occupation of the land attendant with manifest to hold and continue it. The fact that the plaintiff was chased away when he attempted to disturb the 7th Defendant's possession after the death of the father, only makes it more certain that he held the corpus adversely to those who disputed his rights.

(22) I am also mindful of the fact that the issues involved in the proof of prescriptive title are mainly questions of fact and in the absence of compelling considerations, sitting in appeal this court should not disturb the findings arrived at by the learned District Judge. Based on the facts referred to in the previous paragraph, we cannot see any flaw in the findings of the learned District judge, save for the application of the proviso to Section 3 of the Ordinance.

(23) This brings us to the question as to whether the non-application of the proviso to Section 3 of the Ordinance to the facts of the instant case has caused

prejudice to the Plaintiff and if so whether it is sufficiently grave to grant relief as prayed for by the Plaintiff. In this regard the only issue that this court is called upon to consider is whether the Defendants have satisfied the requirement of the 'uninterrupted possession' of the corpus for ten years.

(24) It was argued that Rosa died in the year 1979, the point at which the Plaintiff acquired the right to possess the land and the action before the District Court was filed in 1984 and as such the Defendants did not have a ten-year period of possession, thus, their claim for prescription is bound to fail.

(25) To my mind the issue does not appear to be that straightforward. As referred to earlier the Defendants were in possession since 1954. The period that must be discounted by virtue of the proviso to Section 3 of the Ordinance is the period from 1962 [The year in which Adonis died] to 1979 [The year in which Rosa died] for the purpose of considering the period that the Defendants were in possession, in determining whether the Defendants have acquired prescriptive rights.

(26) The main issues that would be required to address by this court is whether;

(a) The period from 1954 to 1962 [7 years] can be 'tacked' onto the period from 1979 to 1984 [6 years] in computing the period the Defendants were in possession for the purpose of prescription.

(b) Whether the application of the proviso to Section 3 of the Ordinance arrests the progress of prescription.

(27) In the case of ***Carolis Appu v. Anagihamy*** **51 NLR 355**, the court held that the period of possession of an intestate person can be "tacked on" to the possession of his heirs for the purpose of computing the period of ten years. Although the ratio in the decision in ***Carolis*** (*supra*) is not directly applicable to the case

before us, the fact remains our courts have recognised in principle the 'tacking on' of time periods. **Balasingham** [*Laws of Ceylon Volume 3, Part 2*] has expressed the view that, *"for the purpose of computing this period of prescription the possession of the deceased person and his executor or heir and of a person and his particular successor whether legatee or purchaser, will be reckoned together".*

(28) If not for the supervening factor of Rosa having life interest, prescriptive rights of the Defendants would have extended as against the Plaintiff without an interruption. Assuming that Adonis had died 9 years and 11 months after the 7th Defendant had enjoyed uninterrupted and undisturbed possession of the property, to argue that the 7th Defendant has to prove that he had the requisite possession for ten years, commencing from the death of Rosa would seem unreasonable.

(29) In the case of ***Casie Chetty v. Perera*** **(1886) 8 S.S.C 31**, dealing with the construction of the Ordinance relating to the phrase "... *ten years previous to the bringing of such action*", Berwick D. J. expressed the view; "*The law is always reasonable, or at least must be worked into reason when possible.*"

(30) The fact remains that the 7th Defendant had exercised uninterrupted possession of the corpus until the date of institution of the action. The life interest vested in Rosa impeded his adverse possession only from the date of such conveyance till Rosa's demise. Therefore, in my view, it would be more appropriate to state that his possession was suspended by operation of law, and not 'interrupted'.

(31) I take this view in consideration of the overall scheme of the Prescription Ordinance and what it appears to have contemplated, as evident in the words of the Ordinance.

(32) Although it may not be directly relevant, a parallel can be drawn to the application of Section 13 of the Ordinance which operates as an exception to Section 3 of the Ordinance. Section 13 operates as a proviso in the case of disabilities such as infancy, idiocy, unsoundness of mind, lunacy and absence beyond seas. The crux of the principle is that as long as such disability continues, possession of such immovable property by any other person shall not be taken as giving that person the rights under the Ordinance.

(33) One important aspect that needs consideration is, what would be the effect of prescription already commenced before the disability arose [as akin to the situation in the present case]. The case referred to in ***Sinnatamby v. Meera Levvai*** **6 NLR 50**, was an action for vindication of various parcels of land by the children of one Naina Mohamadu. Naina Mohamadu was the owner of the property in question under a Fiscal's sale which took place in 1879. The conveyance was obtained in 1882. In 1892 Naina Mohamadu went to India, and apparently never returned. He died there six or seven years before the action was filed, which was in1901. Sometime after his death his children returned to Ceylon in 1902 and proceeded to claim this land. They were met by the defendants, who have apparently been in possession of the land for a long time. The Commissioner has found that the plaintiffs had admitted that the land was in fact in the possession of the defendants independently of, and adversely to, the rights of Naina Mohamadu. The Commissioner, however, had said that, although the title was in the plaintiffs, and although the defendants have had what may be called adverse possession for more than ten years, the period of prescription has been interrupted by the fact that during the earlier part of the defendants' occupation Naina Mohamadu was beyond seas, and that until recently the plaintiffs have been minors, and therefore were protected by the provisions of the Prescription Ordinance (Section 14 of Ordinance No. 22 of 1871 and Section 13 of the Ordinance No. 2 of 1889). The Commissioner thereupon gave judgment for the plaintiffs. Moncrieff A.C.J., observed that the Commissioner had overlooked the principle which

was laid down in the case of ***Sinnatamby v. Vairavy*** **(1 S. C. C. 14)** in which it was held by a Court of three Judges that, where prescription had run and the matter had not been, taken out of the Ordinance by any act or other incident, the objection was not sound that the minority of the heir had defeated the Ordinance. Once the Ordinance had begun to run against a party and that its progress was not arrested by the fact that the child of the party (the plaintiff) was at the time of the death of that party a minor. The decision was given under the Prescription Ordinance No. 8 of 1834, section 10, the terms of which are very much the same as those of section 13 of Ordinance No. 2 of 1889. The Court held in ***Sinnatamby v. Vairavy*** *(supra)*, that they could not read the clause so as to stop the running of prescription already commenced by reason of the disability of a person succeeding to the right of the obligor.

(34) In the case of ***Meera Levavi*** (*supra*) Naina Mohamadu did not leave the country until 1892, and the Ordinance had begun to run against him for some time at all events; and, relying on the principle enunciated in Sinnatamby**,** Moncreiff A.C.J. held that; "*the mere fact that his succession passed to the plaintiffs on his death, and that they were minors at the time, cannot arrest the progress of prescription.*" He went on to observe that "It being admitted, therefore, that the defendants have been in adverse possession for more than ten years, the progress of the Prescription Ordinance has not been arrested by the minority of the plaintiffs, or the absence of their father [Naina Mohamadu] beyond the seas. On the reasoning referred to above Moncreiff A.C.J. held that the Commissioner's decision was wrong and reversed it.

(35) Moreover, in our kindred jurisdiction of South Africa, it is now settled that prescriptive possession previously halted may be 'tagged on' to, and resume when a natural or civil disability disappears or expires, and that absolute continuity is not required to establish uninterrupted possession. ***Wille's Principles of South African Law***, citing **Voet 41.3.17**, states that:

"Traditionally, the course of prescription could be interrupted or suspended. If interrupted, the running of prescription was, subject to certain qualifications, completely halted and had to start de novo. Suspension of prescription, on the other hand, suspended prescription only temporarily and once the suspending circumstance disappeared, the running of prescription was resumed." [page 514]

(36) Considering the statutory provisions and the weight of the judicial authority referred to above, I am of the view that; As far as this case is concerned, the period from 1954 to 1962 [7 years] can be 'tacked' onto the period from 1979 to 1984 [6 years] in computing the period the Defendants were in possession for the purpose of term of prescription and regarding the application of the proviso to Section 3 of the Ordinance the progress of prescription is not arrested subject, however, to discounting the period Rosa enjoyed life interest to the corpus.

(37) As far as the instant case is concerned, I do not think that this court needs to go to the extent of the decisions in either ***Meera Levavi*** (*supra*) or ***Sinnatamby*** (*supra*). The commencement date of the period of prescription was 1954 when Adonis gave the land to the 7th Defendant. By operation of law, the clock stopped ticking as against the Plaintiff in 1962 when Adonis died and Rosa accrued life interest and again time started running from 1979 upon the death of Rosa. The Plaintiff knew very well that the 7th Defendant had resisted when the Plaintiff approached him regarding the land in 1962, hence he had every opportunity to challenge the Defendants' claim soon after the death of Rosa which the Plaintiff failed and when action was eventually filed, even after discounting the period Rosa enjoyed life interest, still the Defendants had enjoyed adverse possession for more than 10 years when the two periods; Prior to Adonis's death and subsequent to Rosa's death are tacked on.

On the reasoning referred to above, both questions of law on which leave was granted are answered in the negative.

Accordingly, the judgements, both of the District Court and the Court of Appeal are affirmed and the appeal is dismissed.

The Defendants would be entitled to costs of this court as well as the courts below.

Appeal dismissed.

Judge of the Supreme Court

Murdu N. B. Fernando, PC. J

Judge of the Supreme Court

S. Thurairaja, PC. J

Judge of the Supreme Court

IN THE SUPREME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5 C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal No. 89/2019

SC (HC CA) Leave to Appeal Application No. 55/2018

Civil Appellate High Court Kandy Case No. 04/2016(LA)

DC Kandy Case No. DLM 00143/2014

1. Karawita Aarachchige Nihal,
   No. 22A, Dumindu Mawatha,
   Watapuluwa Housing Scheme,
   Kandy.
   PLAINTIFF

Vs.

1. Pepiliyanage Sriyani Manjula Perera alias Pepiliyane Sriyani Manjula Perera Tennakoon,
   No. 74/1/B, Bomaluwa Road, Watapuluwa, Kandy.

2. DFCC Vardhana Bank Limited,
   No. 73, W.A.D Ramanayake Mawatha, Colombo 02.
   DEFENDANTS

AND THEN BETWEEN (IN THE APPLICATION FOR INTERIM INJUNCTION IN THE DISTRICT COURT)

1. Pepiliyanage Sriyani Manjula Perera alias Pepiliyanege Sriyani Manjula Perera Tennakoon,
   No. 74/1/B, Bomaluwa Road, Watapuluwa, Kandy.
   1ST DEFENDANT-PETITIONER

   Vs.

1. Karawita Aarachchige Nihal,
   No. 22A, Dumindu Mawatha, Watapuluwa Housing Scheme, Kandy.
   PLAINTIFF-RESPONDENT

2. DFCC Vardhana Bank Limited,
   No. 73, W.A.D Ramanayake Mawatha, Colombo 02.
   AND
   DFCC Vardhana Bank Limited,
   Branch Office,
   No. 05, Deva Veediya,
   Kandy.
   2ND DEFENDANT-RESPONDENT

   AND THEN BETWEEN (IN THE HIGH COURT OF CIVIL APPEAL)

1. Pepiliyanage Sriyani Manjula Perera alias Pepiliyane Sriyani Manjula Perera Tennakoon,
   No. 74/1/B, Bomaluwa Road, Watapuluwa, Kandy.
   1ST DEFENDANT-PETITIONER-

APPELLANT

Vs.

1. Karawita Aarachchige Nihal,
   No. 22A, Dumindu Mawatha, Watapuluwa Housing Scheme, Kandy.
   PLAINTIFF-RESPONDENT-RESPONDENT

2. DFCC Vardhana Bank Limited,
   No. 73, W.A.D Ramanayake Mawatha, Colombo 02.
   AND
   DFCC Vardhana Bank Limited PLC,
   Branch Office,
   No. 05 Deva Veediya,
   Kandy.
   2ND DEFENDANT-RESPONDENT-RESPONDENT

AND NOW BETWEEN (IN THE SUPREME COURT)

1. DFCC Bank PLC,
   (Formerly DFCC Vardhana Bank Limited),
   No. 73, W.A.D Ramanayake Mawatha,
   Colombo 02.

2ND DEFENDNT-RESPONDENT-RESPONDENT-APPELLANT

Vs.

1. Pepiliyanage Sriyani Manjula Perera alias Pepiliyane Sriyani Manjula Perera Tennakoon,
   No. 74/1/B, Bomaluwa Road, Watapuluwa, Kandy.
   1ST DEFENDANT-PETITIONER-APPELLANT-RESPONDENT

2. Karawita Aarachchige Nihal,
   No. 22A, Dumindu Mawatha, Watapuluwa Housing Scheme, Kandy.
   PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

Before : **P. Padman Surasena J**
E. A. G. R. Amarasekara J
Shiran Gooneratne J

Counsel : Kushan de Alwis, PC with Mr. Kaushalya Nawaratne and Ms. Surangi Kannangara for the 2nd Defendant–Respondent–Respondent-Appellant.

Ms. Sandya Kalalpitiya with Ms. Kaushalya Samaratunga for the 1st Defendant-Petitioner-Appellant-Respondent.

Ms. Panchali Ekanayake for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 15-05-2023
Decided on : 12-10-2023

P. Padman Surasena, J:

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted action against the 1st Defendant-Petitioner-Appellant-Respondent (hereinafter referred to as the 1st Defendant) and the 2nd Defendant-Respondent-Respondent-Appellant (hereinafter referred to as the 2nd Defendant) in the District Court of Kandy. The Plaintiff in his Plaint had prayed *inter alia for:*

(i) a declaration that the he is the owner of the property morefully described in the schedule to the Plaint.
(ii) ejectment of the 1st Defendant and her assigns and for restoration of the premises for his benefit
(iii) damages payable for the alleged illegal occupation of the said premises by the 1st Defendant

The 1st Defendant filed the answer to the Plaint (document produced marked **X2**) praying *inter alia* :

(i) for a declaration that the Plaintiff has no right to claim the relevant property as the Plaintiff must hold the relevant property as a trust in favour of the 1st Defendant;
(ii) for a declaration that the 1st Defendant is the lawful owner of the property relevant to the case;
(iii) for dismissal of the Plaint.

Thus, it must be stressed at this commencing point itself that the 1st Defendant in her answer has not prayed for anything against the 2nd Defendant.

The 2nd Defendant has not filed an answer. This is understandable because neither the Plaintiff nor the 1st Defendant has prayed for anything against the 2nd Defendant.

Thereafter the 1st Defendant has filed the Petition and affidavit dated 16-12-2015 in the District Court praying *inter alia* for following reliefs:

(i) An enjoining order to prevent the Plaintiff and the 2nd Defendant from selling or disposing or alienating the relevant property,

(ii) An order issuing the notice of interim injunction; and

(iii) An interim injunction to prevent the Plaintiff and the 2nd Defendant from selling or disposing or alienating the property relevant to this action.

The learned District Judge having considered the material in the said Petition and affidavit dated 16-12-2015, by his order dated 23-12-2015, had decided to refuse to issue both the enjoining order and the notice of interim injunction.

Being aggrieved by the said order dated 23-12-2015 pronounced by the learned District Judge of Kandy, the 1st Defendant has filed a Leave to Appeal application in the Provincial High Court of Civil Appeals holden in Kandy. The Provincial High Court having granted Leave to Appeal, had thereafter concluded the argument thereof which led to the pronouncement of its judgment dated 17-01-2018.

By the judgement dated 17-01-2018, the Provincial High Court has set aside the order dated 23-12-2015 pronounced by the learned District Judge of Kandy refusing to grant the enjoining order and the notice of interim injunction. The Provincial High Court had directed the learned District Judge to issue an interim injunction as prayed for, under paragraph (ඊ) of the prayers of the petition dated 16-12-2015 filed in the District Court by the 1st Defendant.

It is against that order that the 2nd Defendant has filed the Leave to Appeal application relevant to the instant appeal in this Court. This Court having heard the submissions of the learned Counsel for the relevant parties, had granted Leave to Appeal by its order dated 23-05-2019 on the following questions of law:

1) Did their Lordships of the High Court of Civil Appeals err in directing the learned Trial Judge to issue an Interim Injunction ex facie in the absence of a prima facie case against the 2nd Defendant?
2) Have their Lordships of the High Court of Civil Appeals erred in setting aside the Order of the learned Trial Judge dated 23.12.2015 marked X7 with the Petition in the absence of any evidence to prove a grave and irremediable injustice which may be caused to the 1st Defendant in the event the purported application for the Interim Injunction is refused?

3) Have their Lordships of the High Court of Civil Appeal erred in law in failing to take into consideration the principles governing the grant of interim relief, in delivering the said impugned judgment?

Before I proceed to consider the above questions of law, it would be pertinent at this stage, to set out briefly, the facts of the case at hand. The original owner of the relevant property at the time of transactions pertaining to this case, was the 1st Defendant. The 1st Defendant by Deed of Transfer No. 12, attested on 14-10-2011 by D.S. Perera Notary Public, had transferred its title to the Plaintiff. The Plaintiff on the same date, had mortgaged the said property to the 2nd Defendant Bank by Mortgage Bond No. 1482 attested on 14-10-2011 by C.P. Rajaratne Notary Public. According to the said Mortgage Bond, the Plaintiff had tendered the said property as security to obtain a loan amounting to a sum of Rs. 7,500,000/= from the 2nd Defendant Bank. It is the case for the Plaintiff that the Plaintiff after purchasing the property from the 1st Defendant had permitted the 1st Defendant to remain in occupation of the property as the 1st Defendant was planning to leave the country shortly after selling her property to the Plaintiff. According to the Plaintiff, the present dispute had arisen when the 1st Defendant had thereafter refused to hand over the possession of the property to the Plaintiff. This had led the Plaintiff filing the instant action to recover the vacant possession of the property from the 1st Defendant.

Having narrated the facts of the case let me now introduce briefly, the law that must be applied to answer the above questions of law which revolve around the question whether the Provincial High Court had failed to consider the principles governing the grant of interim injunctions. Interim injunction is an equitable remedy and is not available as of a right. Such injunctions will be granted at the discretion of the Court. The effect and the purpose of such injunction is to preserve the status quo of the subject matter of the action until the final judgment is delivered. The Civil Procedure Code has dedicated its Chapter XLVIII for the procedure relating to applications for injunctions.

Section 662 is followed by few other sections in that Chapter of the Civil Procedure Code and they form the procedure to be followed when an application for an injunction (for any of the purposes mentioned in section 54 of the Judicature Act), is made. As has been clearly stated in section 662, the 'purposes' for which such injunction may be obtained are set out in section 54 of the Judicature Act. The corollary of the above, is that a Court can only grant such an

injunction for the purposes set out in section 54 of the Judicature Act. This means that it is this section which vests Courts with jurisdiction to grant such injunctions.

In the case of Alubhay Vs Mohideen,[1] a case relating to an issuance of an interim injunction, De Sampayo J stated that it was section 87 of the Courts Ordinance No. 1 of 1889 which creates the jurisdiction of the Court to grant injunctions, and one must look to the Civil Procedure Code for the relevant procedure. Looking back at the recent legal history of the country, one could observe that the Courts Ordinance No. 1 of 1889 was replaced by the Administration of Justice Law No. 44 of 1973,[2] and the latter was in turn replaced by the Judicature Act No. 2 of 1978. This is why in Felix Dias Bandaranayake Vs. State Film Corporation and another,[3] Justice Soza stated that 'generally speaking section 54 of the Judicature Act No. 2 of 1978 is the jurisdictional section while sections 662, 664 and 666 of the Civil Procedure Code set out the procedure' for granting of injunctions. This concept has been long followed by our Courts. Thus, section 54 of the Judicature Act states the substantive law relating to injunctions in the following manner:

Section 54:

(1) Where in any action instituted in a High Court, District Court or a Small Claims Court, it appears-

(a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or

(b) that the defendant during the pendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiffs rights in respect of the subject matter of the action and tending to render the judgment ineffectual, or

(c) that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff, the Court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from

[1] 18 NLR 486.
[2] Jurisdiction to grant interim injunctions was in section 42 therein.
[3] 1981 (2) Sri L. R. 287 at page 292.

(i) committing or continuing any such act or nuisance;

(ii) doing or committing any such act or nuisance

(iii) removing or disposing of such property.

(2) For the purposes of this section, any defendant who shall have by his answer set up any claim in reconvention and shall thereupon demand an affirmative judgment against the plaintiff shall be deemed a plaintiff, and shall have the same right to an injunction as he would have in an action brought by him against the plaintiff for the cause of action stated in the claim in reconvention, and the plaintiff shall be deemed the defendant and the claim in reconvention the plaint.

(3) Such injunctions may be granted at any time after the commencement of the action and before final judgment after notice to the defendant, where the object of granting an injunction will be defeated by delay, the court may enjoin the defendant until the hearing and decision of the application for an injunction but for periods not exceeding fourteen days at a time.

Since it is section 54 of the Judicature Act which grants jurisdiction to court to issue injunctions any party gets its entitlement to agitate for such injunction only to the extent to which section 54 of the Judicature Act has permitted. This is because the Court has to derive its jurisdiction from that section before it could consider granting the requested injunction. On the face of it section 54 has primarily conferred jurisdiction on court to issue such injunction against the Defendant named in the plaint on the application of the Plaintiff. This can be clearly seen from Section 54(1) as what has been mentioned throughout that section, is only about issuance of an injunction against a defendant. However, in terms of section 54(2) of the Judicature Act, any Defendant falling under the categories set out in section 54(2) would also get the same entitlement if he had set up a claim in reconvention against the plaintiff praying for an affirmative judgment against the Plaintiff. For further clarity requirement which must be fulfilled by a defendant to get the same entitlement to agitate for such injunction in terms of section 54(2) can be identified in the following manner:

I. the defendant concerned shall have by his answer set up any claim in reconvention against the plaintiff, and
II. such defendant shall thereupon have demanded an affirmative judgment against the plaintiff

For the purposes of that section, it is then only that a defendant could be deemed to be a plaintiff. It is only such party who can have the same right to an injunction as if he had brought

an action against the plaintiff for the cause of action stated in the claim in reconvention. It is only in such a situation that the plaintiff can be deemed to be the defendant as far as the claim in reconvention is concerned. It is then only that such defendant can file petition and affidavit in terms of section 662 of the Civil Procedure Code to pray for an interim injunction. Further, such defendant must also bear in mind that such interim injunction can be asked for, only in relation to the cause of action stated in the claim in reconvention.

Thus, section 54(2) has permitted only a defendant falling under the above category to apply for an injunction. In other words, the section has set out the above two pre-requisites which such defendant must fulfill before such defendant could request Court to issue an injunction.

Another important feature which can be seen from the above two requirements found in section 54(2) of the Judicature Act is that the entitlement of the defendant is to pray for an injunction only against the plaintiff of the case. This is because of the wordings in section 54(2) of the Judicature Act which has specifically stated "set up any claim in reconvention against the plaintiff" and "demanded an affirmative judgment against the plaintiff". In the instant case it is the 1st Defendant who had obtained an interim injunction against the 2nd Defendant of the case and not against the Plaintiff of the case. This is not permitted by section 54 of the Judicature Act.

The above section shows that a court may grant an injunction for one or more of the purposes set out in section 54 (1) under three limbs namely (a), (b) and (c). While the aforesaid three limbs [(a), (b) and (c)] set out the purposes for which injunctions may be granted, limbs (i), (ii) and (iii) appearing at the end of section 54 (1), set out what a Court can restrain by issuance of an injunction. It is not accidentally that the same wordings found in the aforesaid three limbs [(a), (b), (c)] have been incorporated in verbatim, in limbs (i), (ii) and (iii) appearing at the end of that section. This is why Justice Soza in Felix Dias Bandaranayake case,[4] has stated that the person requesting the Court to issue an injunction must have a clear legal right which is being infringed or about to be infringed. This is reflected in the following passage quoted from that judgment.

> *"It is necessary first of all to have a clear picture of the legal principles that are applicable to the question before us. The jurisdictional provisions have already been noted. This is an action instituted in the District Court and the application for an interim*

[4] Supra at page 301.

injunction was made at the time the plaint was filed. So section 54(1) (a) and (i) of the Judicature Act No. 2 of 1978 and sections 662 and 664 of the Civil Procedure Code apply. If it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendants, restraining the commission of an act or nuisance, which would produce injury to him the Court may, on its appearing by the affidavit of the plaintiff or any other person (and that would include the defendants as I have already pointed out) that sufficient grounds exist therefor, grant an interim injunction restraining the defendants from committing any such act or nuisance. ***The plaintiff must therefore have a clear legal right which is being infringed or about to be infringed****.[5] …"*

I have already held above that it is not open for the 1st Defendant to obtain an injunction against the 2nd Defendant of the case. Although this is sufficient to dispose this matter I would proceed to consider another important aspect which can be seen in this case.

As has been mentioned above, the 1stDefendant in his answer has not set up any claim in reconvention against the 2nd Defendant. The 1st Defendant has also not prayed for any affirmative judgment against the 2nd Defendant. Thus, according to section 54(2) the 1st Defendant is not qualified to ask for an injunction against the 2nd Defendant. Thus, the 1st Defendant cannot be deemed to be a Plaintiff in terms of section 54(2) of the Judicature Act because the 1st Defendant had not set up any claim in reconvention against the 2nd Defendant. The Provincial High Court has fallen into error as it had totally missed this point. Although the Provincial High Court has held that the 1st Defendant has established a prima facie case, I fail to understand how it could be so when the 1st Defendant had not even claimed anything against the 2nd Defendant. I must add a caution that the position may be different in partition cases for the reason that every statement of claim in a partition case is generally considered as a plaint and every party in a partition case is generally considered as a plaintiff. The record shows that the District Judge by his Order dated 23-12-2015 had refused to issue the enjoining order prayed for and also refused to issue notice of injunction. This means that no inquiry to decide whether the interim injunction prayed for should be granted or not, had ever been conducted in the District Court. The Civil Appeals High Court has lost sight of this fact when they had directed the District Judge to issue an interim injunction. To the contrary, the prayer (අ) of the Petition dated 16-12-2015 is as follows:

[5] Emphasis is mine.

ඈ) මුල් අවස්තාවේදීම අතුරු තහනම් නෝතිසි සමග මෙහි පහත උපලේඛනයේ වඩාත් සවිස්තරව දක්වා ඇති විෂය ගත දේපල විකිණීම හා/හෝ බැහැර කරලීම හා/හෝ අන්සතු කිරීම හා/හෝ වෙනති පිළිබැඳීමකට විෂය ගත දේපල යටත්කිරීම 02 වන විත්ත්කාර-වගඋත්තරකරුට තහනම් කරනු ලබන වාරණ නියුගයක් නිකුත් කරන ලෙසත්

Therefore, it is clear the prayer (ඈ) of the Petition dated 16-12-2015 is not a prayer for interim injunction although the Civil Appeals High Court by its judgment has directed the District Judge to issue an interim injunction as per that prayer.

The procedure one has to follow with regard to obtaining/granting an interim injunction is set out in Chapter XLVIII of the Civil Procedure Code. This position was accepted by Soza, J in Felix Dias Bandaranaike vs. State Film Corporation and another[6]. According to section 664 of the Civil Procedure Code, it is mandatory for the court to issue notice of injunction before it decides to grant an injunction. This is unambiguous in the wordings used in section 664 which is as follows:

Section 664:

(1) The court shall before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party.

(2) Where it appears to court that the object of granting an injunction would be defeated by delay, it may until the hearing and decision of the application for an injunction, enjoin the defendant for a period not exceeding fourteen days in the first Instance, and the court may for good and sufficient reasons, which shall be recorded, extend for periods not exceeding fourteen days at the time, the operation of such order. An enjoining order made under these provisions, shall lapse upon the hearing and decision of the application for the grant of an injunction.

(3) The court may, of its own motion, or on an application made by any party suspend the operation of an enjoining order issued under subsection (2), if it is satisfied that such order was obtained by suppression, or misrepresentation, of any material facts.

[6] supra

Thus, it is clear that the High Court had directed the District judge to grant the interim injunction prayed for by the 1st Defendant even in the absence of not only an inquiry in that regard but also an order issuing notice of injunction in the first place.

As has been shown above, there is no legal basis for the Provincial High Court to have directed the learned District Judge to issue an interim injunction as prayed for by the 1st Defendant in terms of paragraph (ඇ) or to issue an enjoining order or the notice of interim injunction as prayed for by the 1st Defendant in terms of paragraph (ඈ) of the prayers of the Petition dated 16-12-2015 filed in the District Court against the 2nd Defendant.

For the foregoing reasons, I answer the questions of law in respect of which this Court has granted Leave to Appeal in the affirmative. I proceed to set aside the judgment dated 17-01-2018 pronounced by the Provincial High Court. I restore the order dated 23-12-2015 of the learned District Judge of Kandy. The Petition dated 16-12-2015 praying for the enjoining order and interim injunction must stand dismissed. The 1st Defendant-Petitioner-Appellant-Respondent must pay to the 2nd Defendant-Respondent-Respondent-Appellant a cost of Rs. 100,000/=.

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara J

I agree,

JUDGE OF THE SUPREME COURT

Shiran Gooneratne J

I agree,

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Writs in the nature of Certiorari and Mandamus under and in terms of Article 140 read with Article 104H of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Writ Application No.07/2020

A. L. M. Athaullah
Secretary General,
National Congress, South Road,
Akkaraipattu 01.

Petitioner

Vs.

1. Mr. Mahinda Deshapriya,
   Chairman,
   Election Commission.

2. Mr. N. J. Abeysekara,
   Member,
   Election Commission.

3. Professor Ratnajeevan Hoole,
   Member,
   Election Commission.

   All of
   Election Commission,
   Election Secretariat,
   Sarana Mawatha,
   Rajagiriya.

4. Mr. J. S. D. M. Asanka Abeywardana,
   Returning Officer,
   Electoral District of Trincomalee,
   District Secretariat,
   Trincomalee.

5. Mr. G. G. Ponnambalam,
   Secretary,

Ahila Ilankai Thamil Congress,
'Congress House',
No. 120, Main Street,
Jaffna.

6. Mr. S. Arokkiyanayakam,
Secretary,
Akhila Ilankai Tamil Mahasabha,
No. 53, Pulavu Road,
Sampativu,
Trincomalee.

7. Mr. K. Thurairasasingham,
Secretary,
Ilankai Thamil Arasu Katchi,
No. 30, Martin Road, Jaffna.

8. Mr. Douglas Devananda,
Secretary,
Ealam People's Democratic Party,
No. 9/3, Station Road,
Colombo 04.

9. Mr. Akila Viraj Kariyawasam,
Secretary,
United National Party,
'Sirikotha',
No. 400, Kotte Road,
Pitakotte.

10. Rev. Battaramulle Seelarathana
Thero,
Secretary,
Janasetha Peramuna,
No. 185, Devala Road,
Thalangama South,
Battaramulla.

11. Mr. L. Nipunaarachchi,
Secretary,
Jathika Jana Balawegaya,
No. 464/20, Pannipitiya Road,
Pelawatta, Battaramulla.

12. Mr. N. Sivasakthi,
Secretary,
Tamil Makkal Thesiya Kuttani,
No. 26/10, First Lane,
Kandy Road, Vavuniya.

13. Mr. K. Sivarasa,
Secretary,
Social Democratic Party of Tamil,
No. 294, Kandy Road, Jaffna.

14. Mr. Kumar Gunaratnam,
Secretary,
Frontline Socialist Party,
No. 553/B/2, Gemunu Mw.,
Udumulla Road, Battaramulla.

15. Mr. Sagara Kariyawasam,
Secretary,
Sri Lanka Podujana Peramuna,
No. 8/11, Robert Alwis Mw.,
Boralesgamuwa.

16. Mr. Mahinda Dewage,
Secretary,
Socialist Party of Sri Lanka,
No. 2/69, Melfet Estate,
Gemunupura, Kothalawala,
Kaduwela.

17. Mr. R. M. R. Maddumabandara,
Secretary,
Samagi Jana Balavegaya,
No. 347/A, Kotte Road,
Mirihana, Nugegoda.

18. Mr. Range Nimal Chandrasiri,
Leader,
Independent Group – 01,
No. 24, Sirimapura,
Trincomalee.

19. Mr. S. Vijayarethnam,
Leader,

Independent Group – 02,
No. 853, Pasal Mawatha,
Selvanayagapuram,
Trincomalee.

20. Mr. M. F. M. Arafath,
Leader,
Independent Group – 03,
No. 30/12, Kadakkarai Veedi,
Rahumaniya Nagar,
Kinniya 01.

21. Mr. M. L. Sugath Prasantha,
Leader,
Independent Group – 04,
No. 159/D, 6th Lane,
Sinhapura, Trincomalee.

22. Mr. T. Vamadeva,
Leader,
Independent Group – 05,
No. 72, Kannagipuram,
Ors Hill, Trincomalee,

23. Mr. A. H. Abdul Jawathu,
Leader,
Independent Group – 06,
No. 361/3, Kuttikarachchi,
Kinniya.

24. Mr. M. A. Muhammadu Lafeer,
Leader,
Independent Group – 07,
No. 127/27, Hijra Veediya,
Kinniya 03.

25. Mr. Muhammathu Ali Ajeeb,
Leader,
Independent Group – 08,
No. 66, Ward 03,
Pullumalai.

26. Mr. Ali Jawfar Mubarak,
Leader,
Independent Group – 09,

Annal Nagar, Kinniya 03.

27. Mr. A. M. Pajilkuththoos,
Leader,
Independent Group – 10,
No. 14, Hijra Veediya,
Kinniya 03.

28. Mr. S. Muhammad Riswan,
Leader,
Independent Group – 11,
Nagara Sabha Mawatha,
Kinniya 04.

29. Mr. G. K. Manoj Rangana,
Leader,
Independent Group – 12,
No. 35/B, Parakrama Mawatha,
Kanthale.

30. Mr. P. M. Ajimal,
Leader,
Independent Group – 13,
T. B. Jayah Mawatha,
Kinniya 03.

31. Mr. R. G. Premathilake,
Leader,
Independent Group – 14,
No. 694/4, Ralaela,
Kanthale.

Respondents

Before: Buwaneka Aluwihare PC J
Murdhu Fernando PC J
S. Thurairaja PC J

Counsel: Geoffery Alagaratnam PC for the Petitioner.
Viveka Siriwardana DSG for the 1st, 2nd, 4th Respondents.

M. U. M. Ali Sabry PC with Ruwantha Cooray and Amila Kumara instructed by Athula de Silva for the 15th Respondent.

Supported on: 10.07.2020

Order on: 11.10.2023

Order

Aluwihare PC J.,

(1) The Petitioner invoked the jurisdiction of this court in terms of Article 104H of the Constitution and sought writs in the nature of *Certiorari* and *Mandamus* on the basis that the decision of the 4th Respondent to reject the nomination papers tendered by the Political Party the Petitioner represents, to contest the election of members to the Parliament from the electoral district of Trincomalee, is *ultra vires*.

(2) The Petitioner supported this application for notices on the respondent and the court heard the submissions of the learned President's Counsel for the Petitioner, the learned President's Counsel for the 15th Respondent and the learned Deputy Solicitor General for the 1st, 2nd and the 4th Respondents.

(3) The 'National Congress,' a political party recognized under and in terms of Section 7(4)(b) of the Parliamentary Elections Act No. 01 of 1981 (hereinafter referred to as the 'Parliamentary Elections Act') tendered their nomination paper for the Parliamentary Election of 2020 which was rejected on the basis that the oath/affirmation set out in the Seventh Schedule of the Constitution was not duly tendered.

(4) The Petitioner, the Secretary General of the 'National Congress' by his petition sought a declaration that the determination made by the 4th Respondent, Returning Officer of the Electoral District of Trincomalee to reject the nomination paper of the 'National Congress' to be illegal, void and of no effect or avail in law on the following grounds;

a) The 4th Respondent has no power or authority under the Parliamentary Elections Act No. 01 of 1981 to reject the said nomination paper on the grounds set out in the letter marked 'P3a' and 'P3b' and as such the decision is *ultra vires*,

b) The said decision is *ex facie* bad in law and unsupported by evidence and *ultra vires*,

c) *Ex facie* the nomination paper has been submitted by the National Congress in compliance with the law and as such the said determination of the 4th Respondent is unsupported by evidence and unreasonable in all the circumstances of the case,

d) The said determination of the 4th Respondent has been occasioned by the failure to take into account relevant circumstances and is therefore unsupported by evidence,

e) The said decision of the 4th Respondent is arbitrary, unreasonable, illegal, in breach of the principles of natural justice and contrary to legitimate expectations and need for accountability and transparency,

f) The 4th Respondent has failed to pose the correct question, namely; as to whether the said nomination paper had been submitted in accordance with the law and thereby misdirected himself and fallen into the further error of failing to take into account all the relevant circumstances,

g) The said determination is vitiated by the failure to give reasons for arriving at the said decision,

h) The said decision is in breach of the 4th Respondent's duty to advance the franchise,

i) The said rejection had been occasioned by the failure to properly construe the terms of the said nomination paper and as such is vitiated by an error of law,

j) The said rejection gravely undermines the free and unfettered exercise of the choice vested in the people in the exercise of their franchise.

(5) It was contended on behalf of the Petitioner that his party submitted the nomination paper with the names of 7 candidates to be elected to the Parliament at the Parliamentary Election of 2020 from the Electoral District of Trincomalee. It was pointed out that the nomination paper was as required by the law and that each of the seven candidates have expressed their written consent and subscribed their respective oath or affirmation in the Form set out in the Seventh Schedule to the Constitution and endorsed in the said nomination paper. The nomination paper was delivered to the 4th Respondent by the first named candidate who is the authorized agent before the expiry of the nomination period on 19th March 2020.

(6) After the closure of the nomination period the 4th Respondent had declared that the nomination paper of the National Congress was rejected. The 4th Respondent had issued a letter dated 19th March 2020 both in Sinhala and Tamil marked 'P3a' and 'P3b' respectively. The same states that, acting under Section 19(2) of the Parliamentary Elections Act, which requires the returning officer to inform the secretary or the group leader who submitted the nomination paper of the fact of such rejection. The letter also states that the nomination paper was rejected under Section 19(1)(d) of the Parliamentary Elections Act for not fulfilling the requirements under Section 15(2).

(7) Section 15(2) requires that the written consent of each candidate to be nominated and an oath or affirmation in the Form set out in the Seventh

Schedule to the Constitution by every such candidate shall be endorsed on the nomination paper.

(8) Section 19(1)(d) of the Act, empowers the returning officer to reject any nomination paper where the consent of one or more candidates nominated or the oath or affirmation in the form set out in the Seventh Schedule to the Constitution have not been endorsed on the nomination paper.

(9) It was contended that the Petitioner and his political party were not given an adequate explanation of the reason or the reasons for the rejection. By letter marked 'P4' dated 20th March 2020 the Petitioner had requested for the specific reason in writing for the rejection of the nomination paper and requested for a certified copy of the nomination paper submitted by his party. He had not received a reply to this letter and the Petitioner states that by the fax dated 23rd April 2020 marked 'P8' addressed to the 1st Respondent he had again requested a certified copy of the nomination paper submitted by his party. The letter had been followed by an email on 24th April 2020 to the same effect by the Petitioner. These communications had not received a reply.

(10) The Petitioner had handed over a letter dated 1st May 2020 to the 1st Respondent *inter alia* drawing his attention to the letters marked 'P4' and 'P8' referred to above. By this letter marked 'P9' the Petitioner had appealed to the Election Commission to review the 4th Respondent's decision to reject the nomination paper and to allow the party to contest the Parliamentary Election, as the party had filed its nomination paper in compliance with the law. The Petitioner, however, had not received a reply to this letter either.

(11) By letter dated 3rd June 2020 marked 'P10' addressed to the 1st, 2nd and 3rd Respondents respectively the Petitioner had demanded from the Election Commission to reconsider the 4th Respondent's decision and permit the

National Congress to contest the Parliamentary Election. He had further demanded a certified copy of the nomination paper and connected documents tendered by the National Congress. The letter too had not received a response.

(12) As enumerated above the Petitioner had made several requests for a certified copy of the nomination paper submitted by the National Congress and a detailed explanation of the reason for rejection of the nomination paper, from the 4th Respondent and later from the 1st, 2nd and 3rd Respondents.

(13) By virtue of Section 19(1)(d) of the Parliamentary Elections Act the Returning Officer has the authority to "*examine the nomination papers received by him and reject any nomination paper…. where the consent of one or more candidates nominated or the oath or affirmation, in the form set out in the Seventh Schedule to the Constitution, of one or more candidates, had or have not been endorsed on the nomination paper.*" Section 19(2) specifically states that the decision of the returning officer to reject such nomination paper shall be final. There is no explicit requirement for the returning officer to further explain the reason for rejecting a nomination paper. Section 19(2) only requires "*Where any nomination paper has been rejected by the returning officer under subsection (1), the returning officer shall inform the secretary of the recognized political party or the group leader, as the case may be, who had submitted such nomination paper the fact of such rejection.*"

(14) The nomination paper submitted by the Petitioner's party, the 'National Congress' was submitted to court by the Election Commission, and we have had the opportunity of examining the same. According to our observations the nomination paper is defective due to two grounds;

1. The 7th Schedule to the Constitution requires the respective candidate to either '*declare and affirm*' or '*swear*'. Thereby the requirement is either to submit 'an oath' or in the alternative, 'an affirmation'. The omission to strike through the unnecessary words and specify whether it is an oath or an affirmation that is being made has rendered the nomination paper submitted by the Petitioner's political party defective.

2. Section 12(3) of the Oaths and Affirmations Ordinance No. 09 of 1895 (as amended) states that any oath or affirmation "*shall state truly in the jurat or attestation at what place and what date the same was administered or taken…*" The failure to fulfill the requirement of stating the place at which the oath or affirmation was administered or taken has rendered the nomination paper submitted by the Petitioner's political party defective.

(15) On these grounds it is evident that the nomination paper submitted by the Petitioner is defective and warrants rejection. As mentioned before, the returning officer is bound to inform the fact of rejection to the respective secretary of the party or the group leader of the independent group, but there is no explicit requirement for the returning officer to spell out the reason for rejecting the nomination paper.

(16) As the candidacy at an election involves not only the rights of the candidates but also the rights of the electors, transparency and specificity may very well be virtues to uphold. While stating the provisions on whose authority a nomination paper is rejected, mentioning the exact grounds for the rejection, where possible, may serve to demonstrate to the candidates that such rejection was done on justifiable grounds. It may very well settle the minds of the candidates and prevent the need for litigation such as the present matter.

(17) Be that as it may, in the present application the returning officer has carried out the duties recumbent on him and the Petitioner has been duly notified. On such observation, notice is refused.

JUDGE OF THE SUPREME COURT

Murdhu Fernando PC J

I agree.

JUDGE OF THE SUPREME COURT

S. Thurairaja PC J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal under Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with Section 6 thereof, Sections 754(1), 755(3) and 758 of the Civil Procedure Code and Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (CHC) Appeal No. 37/2011
Commercial High Court of Colombo
Case No. HC (Civil) 285/2006(1)

Pan Arch Architecture (Pvt) Limited,
19-D, Ocean Tower, Station Road,
Colombo 4.

Plaintiff

vs

(1) Neat Lanka (Pvt) Limited,
47A Prince Street, Colombo 11.

And also at
No. 50 1/11, Colombo Plaza, Wellawatte.

(2) Neat Property Developers (Pvt) Limited,
51, Vipulasena Mawatha,
Colombo 10.

Defendants

And now between

Pan Arch Architecture (Pvt) Limited,
19-D, Ocean Tower, Station Road,
Colombo 4.

Plaintiff – Appellant

vs

(1) Neat Lanka (Pvt) Limited,
47A Prince Street, Colombo 11.

And also at
No. 50 1/11, Colombo Plaza, Wellawatte.

(2) Neat Property Developers (Pvt) Limited,
51, Vipulasena Mawatha,
Colombo 10.

Defendants – Respondents

Before: **Vijith K. Malalgoda, PC, J**
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Geoffrey Alagaratnam, PC with Suren Fernando for the Plaintiff – Appellant

Argued on: 29th May 2023

Written Submissions: Tendered on behalf of the Plaintiff – Appellant on 7th June 2023

Decided on: 13th October 2023

Obeyesekere, J

The Plaintiff – Appellant [the Plaintiff] instituted action in the High Court of the Western Province exercising Civil jurisdiction and holden in Colombo [the Commercial High Court] on 7th December 2006 against Neat Lanka (Private) Limited, the 1st Defendant – Respondent [the 1st Defendant] and Neat Property Developers (Private) Limited, the 2nd Defendant – Respondent [the 2nd Defendant], claiming that the Defendants are jointly and severally liable to pay the Plaintiff a sum of Rs. 10,200,000 for the architectural and consultancy services provided by the Plaintiff to the Defendants and seeking to recover

the said sum of money together with interest from 28th September 2006. While each of the Defendants filed answer denying liability, the 2nd Defendant preferred a claim in reconvention against the Plaintiff, necessitating the filing of a replication by the Plaintiff denying the said claim.

Admissions and Issues having been raised on behalf of all parties, the case proceeded to trial with the Plaintiff leading the evidence of two witnesses, namely Kumudu Munasinghe, its Managing Director and Lakkana Abeynayake, who had served as the Chief Executive Officer of the 2nd Defendant at the time relevant to the impugned transaction. Sanjeeva Senaratne, a director and shareholder of the 1st and 2nd Defendants gave evidence on behalf of the Defendants. On 16th September 2011, the learned Judge of the Commercial High Court entered judgment in favour of the Plaintiff but only against the 1st Defendant.

Aggrieved, the 1st Defendant filed an appeal in this Court against the said judgment. The Plaintiff too filed an appeal complaining that the learned Judge of the Commercial High Court erred when he failed to hold against the 2nd Defendant, as well, in spite of having answered the issues relating to the 2nd Defendant in a manner favourable to the Plaintiff. Both appeals were taken up together for argument on 29th May 2023, on which date the learned President's Counsel for the Defendants informed this Court that he has received instructions from the Defendants that both companies are presently defunct and for that reason, the 1st Defendant is not interested in pursuing with the appeal filed by it and the 2nd Defendant will not participate in the appeal filed by the Plaintiff.

The learned Counsel for the Plaintiff, Geoffrey Alagaratnam, PC informed this Court that he has received instructions to proceed with the appeal of the Plaintiff. Accordingly, this Court proceeded to hear Mr. Alagaratnam, PC, who submitted that while the findings of the Commercial High Court against the 1st Defendant are no longer in issue, the principal issue that is left to be determined is whether the learned Judge of the Commercial High Court erred when he did not hold the 2nd Defendant jointly and severally liable for the payment of the aforesaid sum of money to the Plaintiff.

Background to the transaction

I shall commence by setting out as briefly as possible the background events relating to the transaction that culminated in the filing of action in the Commercial High Court.

The Plaintiff, a limited liability company incorporated under the provisions of the Companies Act, was engaged in the business of architecture, engineering, project management and safety consultancy. According to its Managing Director Munasinghe, discussions had taken place in November and December 2005 with Senaratne, Suminda Perera, who was the other director and shareholder of the 1st Defendant, and Lakkana Abeynayake who did not hold any position in either of the Defendants at that time, relating to the construction of a luxury mixed development project [the Project] on a land situated on Galle Face Terrace, Colombo 3, which land was said to have been owned by the 1st Defendant.

There are three matters that must be noted. The first is that Abeynayake was appointed as the Chief Executive Officer of the '*2nd Defendant*' by the 1st Defendant with effect from 2nd January 2006 by letter dated 3rd January 2006 signed by Senaratne and Perera [P26]. The second is that the 2nd Defendant was not in existence at this point in time and was incorporated only on 26th January 2006. The third is that the intention of the aforementioned Directors of the 1st Defendant was to incorporate the 2nd Defendant as a special purpose vehicle for the purpose of carrying out the said Project, which meant that the 2nd Defendant too was to be a contracting party. Senaratne confirms this position in his affidavit which served as his evidence-in-chief before the Commercial High Court where he states that, "*The 2nd Defendant Company was incorporated to engage in a Project for the development of a land situated in Kollupitiya and for the construction of a condominium building thereon and for the 2nd Defendant to sell or lease condominium units therein to prospective buyers and lessees.*" With the 2nd Defendant being a shell company with no assets of its own, the Project was to be funded by the 1st Defendant.

Offer and acceptance

Pursuant to the aforementioned discussions and at the invitation of the 1st Defendant, the Plaintiff had submitted its written offer dated 28th December 2005 [P4] for the provision of consultancy services for the said Project, addressed to Suminda Perera, in his capacity as a Director of the 1st Defendant. The said proposal sets out the scope of services to be performed by the Plaintiff, the fee that was payable for the said services and the payment milestones linked to six design stages. P4 had been followed by another letter from the Plaintiff the next day [P5], addressed in the same manner as P4, amending the fee proposed in P4 from 6% to 4%. It is noted that the receipt of P4 and P5 have been acknowledged in writing by P6, to which I shall refer in detail, later.

Although no formal written agreement was executed between the Plaintiff and the 1st Defendant relating to the provision of services by the Plaintiff for the Project, the acceptance by the 1st Defendant of the offer of the Plaintiff contained in P4 and P5 is borne out by the payment of a sum of Rs. 1,500,000 that the 1st Defendant made as an advance by a cheque dated 5th January 2006 drawn on its account [D5]. While this payment served as a promise from the 1st Defendant to the Plaintiff that payment for the work that was to be carried out by the Plaintiff was to be made by the 1st Defendant, it also demonstrated the intention on the part of the 1st Defendant to contract the services of the Plaintiff for the said Project and create a legal relationship between the parties. The receipt of the said sum of money has been acknowledged by the Plaintiff by an invoice dated 6th January 2006 [P10] issued in favour of "Suminda Perera, Neat Developers (Pvt) Limited" which is not the corporate name of either the 1st or the 2nd Defendant. Be that as it may, by making this payment, and especially in the absence of any written correspondence to the contrary, the 1st Defendant has clearly undertaken to be financially responsible and contractually liable for payment for services that the Plaintiff was to provide in terms of P4, read with P5.

Appointment of the Plaintiff

P4, P5 and the aforementioned payment were followed by letter dated 17th January 2006 [P6] titled, '*Letter of appointment for Consultancy Services for new Luxury Mixed Development Project at No. 27A, Galle Face Terrace, Colombo 3*', addressed to the Plaintiff. Although the 2nd Defendant was yet to be incorporated, P6 was on a letter head of the 2nd Defendant and signed by Abeynayake, in his capacity as the Chief Executive Officer of the 2nd Defendant.

P6 reads as follows:

> "***On behalf of Neat Property Developers (Private) Limited****, I am pleased to appoint your company, Pan Arch Architecture (Private) Limited as the Consultancy Company for the provision of a Consortium service for our prestigious new luxury development project at No. 27A, Galle Face Terrace, Colombo 3,* ***on the terms and conditions as set out in your letters dated 28th and 29th December 2005*** *except that the Consortium Fee is 3.5%, as was subsequently agreed between our Directors, Mr. Sanjeeva Senaratne and Mr. Suminda Perera and yourself.*
>
> *Further, as approved and confirmed by our Directors, Mr. Sanjeeva Senaratne and Mr. Suminda Perera,* ***Neat Lanka (Private) Limited will be responsible for all payments/expenses with regard to the Project****, since both Directors, Mr. Sanjeeva Senaratne and Mr. Suminda Perera are also directors of Neat Lanka (Private) Limited and the project site at No. 27A, Galle Face Terrace, Colombo 3 is also owned by Neat Lanka (Private) Limited.*
>
> *We look forward to a successful outcome to this project and a long and happy association with Pan Arch Architecture.*" [emphasis added]

There are three important matters to be noted with regard to P6. The first is that even though P6 had been written on behalf of the 2nd Defendant, the 2nd Defendant had not been incorporated as at the date of P6. The second is that in between P4 and P6, negotiations had taken place between the 1st Defendant and the Plaintiff which resulted in the consortium fee being reduced by a further 0.5% to 3.5%. The third is that even

though the Plaintiff was required to provide the consultancy services to the 2nd Defendant, the 1st Defendant had undertaken the liability to make the payments for the work that was to be carried out by the Plaintiff.

Pre-incorporation contracts

I must at this stage advert to the legality and the consequences of a contract entered into by a company prior to its incorporation, known as pre-incorporation contracts, and thereby place P6 in its proper perspective.

In **Gower's Principles of Modern Company Law** [by Paul L. Davies and Sarah Worthington, 10th ed., 2016, Sweet & Maxwell] the position in England with regard to pre-incorporation contracts has been laid down in the following manner [pages 111 to 113]:

> "*As already noted, these contracts cannot bind the non-existent entity, and the company, once formed, cannot ratify or adopt the contract. Prior to statutory amendments driven by the UK's entry into the EU, the legal position as between the promoter and the third party seemed to depend on the terminology employed. If the contract was entered into by the promoter and signed "for and on behalf of XY Co Ltd" then, according to the early case of Kelner v. Baxter [(1866) L.R. 2 C.P. 174], the promoter would be personally liable. But if, as is much more likely, the promoter signed the proposed name of the company, adding his own to authenticate it (e.g. XY Co Ltd, AB Director) then, according to Newborne v. Sensolid (Great Britain) Ltd., [(1954) 1 Q.B. 45 CA] there was no contract at all. This was hardly satisfactory.*
>
> *The statutory rule took a clear if rather dramatic stand. The relevant provision is now CA 2006, s. 51, which reads:*
>
> > *"(1) A contract which purports to be made by or on behalf of a company at a time when the company has not been formed, has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly."*

The obvious aim of the provision is to increase security of transactions for third parties by avoiding the consequences of the contract with the company being a nullity. The provision imposes contractual liability on the promoter, and applies even if the new company is never formed. To avoid the promoter's personal liability under the statute, the third party must explicitly agree to forego the protection – consent cannot be deduced simply from details of the contract which, interpreted widely, would be inconsistent with the promoter accepting personal liability, such as the promoter signing as agent for the company.

The presence of the statutory provision has had an effect on the courts' perception of the common law in this area. In Phonogram Ltd v. Lane [(1982) 1 Q.B. 938 CA], Oliver LJ said that the "narrow distinction" drawn in Kelner v. Baxter and the Newborne case did not represent the true common law position, which was simply: "does the contract purport to be one which is directly between the supposed principal and the other party, or does it purport to be one between the agent himself – albeit acting for a supposed principal – and the other party?" ***This question is to be answered by looking at the whole of the contract and not just at the formula used beneath the signature****. If after such an examination the latter is found to be the case, the promoter would be personally liable at common law, no matter how he signed the document.*

On this analysis the difference between s. 51 and the common law is narrowed, but not eliminated. At common law, if the parties intend to contract with the non-existent company, the result will be a nullity and the third party protected only to the extent that the law of restitution provides protection. Under the statute, a contract which purports to be made with the company will trigger the liability of the promoter, unless the third party agrees to give up the protection. ***In other words, the common law approaches the question of the third party's contractual rights against the promoter as a matter of the parties' intentions****, with no presumption either way, whereas the statute creates a presumption in favour of the promoter being contractually liable. The common law is still important in those cases which fall outside the scope of the statute."* [emphasis added]

In **Attygalle and Another v Commercial Bank of Ceylon Ltd**. [(2002) 1 Sri LR 176], the Court of Appeal observed that the Companies Act, No. 17 of 1982 does not have a provision similar to Section 36(c) of the Companies Act of England 1975 which was in force at that time and which was similar to Section 51 referred to earlier. In **Company Law** by Kanag-Isvaran and Wijayawardana [2014, at page 79], it has been pointed out that prior to the enactment of the present Companies Act in 2007, and in the absence of any provisions in the Companies Act, No. 17 of 1982, " *… it was the common law that governed pre-incorporation contracts in Sri Lanka. The common law, as it stood, that governed pre-incorporation contracts was simple. A company had no capacity to contract before its incorporation, for one cannot act before one comes into existence. This was based on the principle that an act which cannot be done by a non-existent principal, cannot be done through an agent. It was also a settled principle in common law that after a company was incorporated it could not ratify pre-incorporation contracts, for the reason that a contract purported to be made by a company which did not exist was considered a nullity in the eyes of the law.* "

The issue that had arisen in Kelner v Baxter (supra) and Newborne v Sensolid (Great Britain) Ltd. (supra), was however laid to rest by some legislative wizardry in the form of Sections 23 to 25 of the Companies Act, No. 7 of 2007, of which Sections 23 and 24 are re-produced below:

Section 23

"*(1) For the purpose of this section and sections 24 and 25 of this Act, the expression "pre-incorporation contract" means –*

(a) a contract purported to have been entered into by a company before its incorporation; or

(b) a contract entered into by a person on behalf of a company before and in contemplation of its incorporation

(2) Notwithstanding anything to the contrary in any law, a pre-incorporation contract may be ratified within such period as may be specified in the contract or if no such period is specified, within a reasonable time after the incorporation of such company, in the name of which or on behalf of which it has been entered into.

(3) A pre-incorporation contract that is ratified under subsection (2), shall be as valid and enforceable as if the company had been a party to the contract at the time it was entered into.

(4) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under section 19."

Section 24

"*(1) Notwithstanding anything to the contrary in any law, in a pre-incorporation contract, unless a contrary intention is expressed in the contract, there shall be an implied warranty by the person who purports to enter into such contract in the name of or on behalf of the company –*

(a) that the company will be incorporated within such period as may be specified in the contract, or if no period is specified, within a reasonable time after the making of the contract; and

(b) that the company will ratify the contract within such period as may be specified in the contract or if no period is specified, within a reasonable time after the incorporation of such company.

(2) The amount of damages recoverable in an action for breach of an implied warranty referred to in subsection (1), shall be the same as the amount of damages that may be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract, if the contract had been ratified by the company.

(3) *Where after its incorporation, a company enters into a contract in the same terms as or in substitution for, a pre-incorporation contract (not being a contract ratified by the company under section 23), the liability of a person under subsection (1) shall be discharged*."

Thus, had this transaction taken place after the Companies Act, No. 7 of 2007 was enacted, the Plaintiff could have resorted to the above provisions in pursuing its legal rights.

Continued involvement of the 1st Defendant

The evidence of Abeynayake was that P6 had been prepared on the instructions of Senaratne and Perera. With the 2nd Defendant not having been incorporated by the time P6 was written, I must emphasise the fact that P6 to my mind, served as much more than a mere comfort letter to the Plaintiff that payment would be made by the 1st Defendant, especially since the 2nd Defendant was being incorporated for the specific purpose of carrying out the Project and did not possess the necessary financial resources at the beginning of the Project to meet the advance payment of 10% which was due upon the Plaintiff undertaking the Project. The fact that the 2nd Defendant did not have any assets or for that matter even a bank account after its incorporation has been confirmed by Abeynayake in his evidence, thus demonstrating that it is the 1st Defendant who had the financial strength to execute the Project and that the 1st Defendant was very much an integral part of the Project, and was to continue as a contracting party to the transaction, in spite of the fact that the services were to be provided to the 2nd Defendant. This is further confirmed by the email dated 24th January 2006 [P9], by which the Plaintiff had forwarded the Preliminary Construction Cost Estimate to Abeynayake, with the 1st Defendant being referred to as the Client.

Entry of the 2nd Defendant

The 2nd Defendant was incorporated two days after P9 – i.e., on 26th January 2006 [P8a], with Senaratne and Perera being the only shareholders and directors of the 2nd Defendant. While the correspondence tendered do not indicate as to what transpired

between the parties immediately thereafter, by letter dated 24th February 2006 [P12] addressed to Abeynayake in his capacity as Chief Executive Officer of the 2nd Defendant, the Plaintiff had sought the payment of a sum of Rs. 3,400,000 being the balance of the advance payment and a further Rs. 9,800,000 being the percentage due for the schematic design which the Plaintiff claims it had completed for the 2nd Defendant after its incorporation. The fact that the Plaintiff called for payment from the 2nd Defendant demonstrates that in its mind, the 2nd Defendant too was a contracting party and an integral part of the transaction.

This is confirmed by the reply to P12 which is a letter dated 2nd March 2006 [P13] sent by Abeynayake in his capacity as Chief Executive Officer of the 2nd Defendant on a letter head of the 2nd Defendant, where, under the title of "*Consultancy Fees for new luxury mixed development project at No. 27A, Galle Face Terrace, Colombo 3,*" he has stated as follows:

> "*We have received your letter dated 24th February 2006 setting out the payments due for the advance and the schematic stage of design.*
>
> ***Our directors**, Mr. Sanjeeva Senaratne and Mr. Suminda Perera **have approved and agreed to release the balance money from Neat Lanka (Pvt) Limited**, as soon as possible, **since the payments due are in order**.*
>
> *Thank you for sending me a copy of the schematic design drawings.*" [emphasis added]

P13, quite apart from not contesting the fact that services have been and are being performed by the Plaintiff for the 2nd Defendant and that payments are due, contains a promise on the part of the 2nd Defendant that the payments would be made by the 1st Defendant, thus ensuring the continued presence of the 1st Defendant in the transaction. I must perhaps emphasise that the transaction that had developed since December 2005 and which was still evolving in the months of January and February 2006, saw the involvement of both Defendants, with work being carried out by the Plaintiff initially at the request of the 1st Defendant and after its incorporation, for the 2nd Defendant, with the 2nd Defendant acknowledging that the work has been carried out to their satisfaction,

and the 1st Defendant taking financial responsibility for the said work, thus giving rise to a tri-partite transaction. One cannot argue that the 2nd Defendant stands removed from the relationship between the Plaintiff and the 1st Defendant as, had that been the case, there need not have been any involvement from the 2nd Defendant at all and, it certainly should not have made any representations as to the contract terms, like those that one sees from P13.

Further payments by the 1st Defendant

Pursuant to P13, the 1st Defendant had made two further payments of Rs. 1,500,000 by cheque drawn on its account in favour of the Plaintiff, the first being on 20th March 2006 [D8] and the second being on 27th March 2006 [D9]. The two payment vouchers [D6 and D7] prepared by the 1st Defendant however state that the monies are being given by way of a loan to the 2nd Defendant. By stating so, the 1st Defendant has confirmed that the work is being carried out for the 2nd Defendant. The invoices for these two payments [P14 and P15] have been issued by the Plaintiff in favour of the 2nd Defendant, thus confirming the intention of the Plaintiff to create a legal relationship with the 2nd Defendant, as well.

By letter dated 8th May 2006 [P16] addressed to Senaratne in his capacity as Director of the 2nd Defendant, the Plaintiff had requested that the balance sum of Rs. 10,200,000 be paid. It appears that the relationship between the parties had deteriorated by this time, probably due to the failure to make payment for the work already done. Two reminders to P16, both addressed to the same person as in P16, had been sent to the 2nd Defendant on 31st May 2006 [P17] and 25th July 2006 [P18], with the receipt of both letters having been acknowledged by the 1st Defendant. In between P17 and P18, i.e., on 14th June 2006, Abeynayake had resigned as Chief Executive Officer of the 2nd Defendant. P17 and P18 have been followed by letters of demand dated 28th September 2006 to both the 1st Defendant [P20] and the 2nd Defendant [P21]. As the Defendants had failed to respond to any of the aforementioned letters P16, P17, P18, P20 and P21 and pay the money claimed therein, action had been instituted on 7th December 2006, on the basis that the 1st and the 2nd Defendants are jointly and severally liable for the payment of the balance sum for the work performed by the Plaintiff.

Relationship between the parties – *vide* the pleadings

The question whether it is the 1st or the 2nd Defendant that is liable or whether both Defendants are liable depends on the relationship that developed between the parties, the promises they made to each other and the intention of each party that can be gathered from the evidence, both oral and documentary.

In paragraph 12 of its plaint, the Plaintiff had stated that, "*at all times material the **Defendants are jointly and severally liable** to the Plaintiff on the written agreement entered into between the parties, especially as **the contract was between the 2nd Defendant and the Plaintiff** and the **holding out of the 1st Defendant as being also liable for payments** was for the convenience of the 2nd Defendant and in any case in addition to the liability of the 1st Defendant.*" [emphasis added]

Thus, the pleaded position of the Plaintiff was that the agreement is not only with the 2nd Defendant but with the 1st Defendant as well, as the 1st Defendant had undertaken the obligation of making payment for the services carried out by the Plaintiff, thus making both Defendants liable to the Plaintiff, jointly and severally. It must be stated that the Plaintiff did not claim that part of the contract had been novated in favour of the 2nd Defendant.

The position taken up by the 1st Defendant in its answer was of course a complete denial of liability with its position being that it only provided the necessary finances to the 2nd Defendant to enable the 2nd Defendant to make the necessary payments to the Plaintiff. The 1st Defendant alleged that Abeynayake, who had worked with Munasinghe on another project prior to assuming office as Chief Executive Officer of the 2nd Defendant, had colluded with the Plaintiff and committed the 2nd Defendant to certain obligations without the knowledge of the 1st Defendant. While a similar position has been taken by the 2nd Defendant in its answer, a claim in reconvention had also been made by the 2nd Defendant for the refund of the monies paid so far on the basis that the schematic drawings prepared by the Plaintiff, for which payment was being claimed by the Plaintiff, had not been accepted by the Defendants. The allegation of collusion has been denied by the Plaintiff in its replication, and remained unsubstantiated during the trial.

The principal issues between the parties

There are two principal issues that were raised at the trial by all parties which remains to be answered by this Court. The first is, was there an agreement between the 1st and/or 2nd Defendant/s on the one hand, and the Plaintiff, on the other?

In **Noorbhai v Karuppan Chetty** [27 NLR 325] it was held by the Privy Council that "… *the very elementary proposition of law [is] that a contract is concluded when in the mind of each contracting party there is a consensus ad idem* ..."

Weeramantry in "**The Law of Contracts**" [1967, Volume I, paragraph 84] has pointed out that the constituent elements of a contract can be reduced to the following basic essentials:

(a) Agreement between parties;

(b) Actual or presumed intention to create a legal obligation;

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

(d) Legality and possibility of the object of the agreement;

(e) Capacity of parties to contract.

Weeramantry goes on to state as follows:

> "*An agreement is a manifestation of mutual assent by two or more persons to one another. In simpler terms, therefore, an agreement would mean a state of mental harmony regarding a given matter between two persons, as gathered from their own words or deeds. Contract generally connotes among other things an actual or notional meeting of minds, for in general without such a meeting of minds a contract does not come into being. Agreement on the other hand, primarily denotes such meeting.* [paragraph 86]

The view is commonly held that in addition to the other requisites ***for the formation of a valid contract there should also be present, on the part of the parties, an intention to enter into legal relations****. It follows from this view that this requirement must be superadded to the fact of agreement if the agreement is to be productive of legal results.* [paragraph 158; emphasis added]

Whether two minds are in actual or real agreement not even the parties themselves can say for no man can fathom the thoughts of another; and in the realm of actual intention no man can speak for anyone but himself. ***The law consequently views the question of intention objectively****. Unable to plumb the depths of intention, it proceeds upon the external manifestations of such intention, whether by words or by deeds. From these external manifestations the law ascertains the presumed or notional intentions of parties.* [paragraph 86; emphasis added]

Agreement, which is so important to the formation of contract, depends in its turn on the intention of the contracting parties. The inner or true intention of a person is, however, not generally capable of ascertainment with any degree of assurance by another, if indeed it is capable of ascertainment at all. ***The law therefore always adopts an objective test in determining the intention of the parties to a contract****, and is guided by their manifestations of intention whether by words or by acts. From such words or acts it draws its inferences regarding intention on the basis of a reasonable person's assessment of them in the context in which they were uttered or performed.* [paragraph 104; emphasis added]

It would therefore be more correct to say that in all cases where the law requires an actual intention to enter into legal relations, what is required is either an intention which actually exists or one which, ***having regard to all surrounding circumstances, it will by a fiction deem to exist in the minds of the parties****."* [paragraph 158; emphasis added]

The second issue that needs to be answered in this appeal is whether the 1st and 2nd Defendants are jointly and severally liable towards the Plaintiff. Several liability arises when two or more persons make separate promises to another, whether by the same instrument or by different instruments. On the other hand, joint liability arises when two or more persons jointly promise to do the same thing, with their being only one obligation. Joint and several liability arises when two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing.

Relationship between the parties – *vide* the evidence

Munasinghe, having referred to the background facts that I have already referred to, has stated as follows in his affidavit which served as his evidence-in-chief:

a) Upon its incorporation, the 2nd Defendant acted on the offer reflected in P4 and proceeded with the Project subject to the terms and conditions specified in P4 and P5;

b) The 1st Defendant undertook the financial responsibility for the payments – vide P6 and P13 – although the agreement was formally to be entered into with the 2nd Defendant;

c) The 1st and 2nd Defendants agreed to be jointly and severally liable to the Plaintiff in respect of all monies due to the Plaintiff.

In cross examination, Munasinghe stated as follows:

a) The initial negotiations were with the 1st Defendant which was followed by an offer of services [P4 and P5] to the 1st Defendant;

b) The 2nd Defendant came into the transaction in addition to the 1st Defendant, as the 1st Defendant *wanted a separate company for the project*;

c) Accordingly, the 2nd Defendant was incorporated for the execution and implementation of the Project, as admitted by Senaratne in his affidavit;

d) After its incorporation, the Plaintiff corresponded with the 2nd Defendant as it was the intention of all parties that the 2nd Defendant too would be a contracting party. Accordingly, there is an agreement between the 2nd Defendant and the Plaintiff;

e) The work was carried out by the Plaintiff at the request of the 1st Defendant for the 2nd Defendant;

f) By making three payments to the Plaintiff, the 1st Defendant has accepted the terms and conditions of the offer that the Plaintiff had made to the 1st Defendant by P4 and P5;

g) The receipts for the payments however were issued in favour of the 2nd Defendant;

h) Even though there was no written agreement with the 1st Defendant, the 1st Defendant was nonetheless liable because it is the 1st Defendant who initiated the discussions, had negotiations with the Plaintiff, extended the promises and acted upon such promises by making the payments.

Viewed objectively, it is evident from the oral and documentary evidence that what had emerged was an agreement between the 1st and 2nd Defendants on the one side, and the Plaintiff on the other, thus giving credence to the position taken up by the Plaintiff that both Defendants are jointly and severally liable to the Plaintiff.

Relationship between the parties – *vide* the evidence of Senaratne

It would perhaps be relevant to refer to the affidavit of Senaratne at this stage. I must say at the outset that most of the matters averred in the said affidavit, especially as to the discussions that took place during February to April 2006 between the directors of the 1st and 2nd Defendants and the Plaintiff and what transpired at such discussions were not suggested to Munasinghe in cross examination, thereby reducing the evidentiary value of Senaratne's affidavit.

The fact that the 2nd Defendant was incorporated for the sole purpose of the Project is made clear by Senaratne's statement that, "*in the month of December 2005, steps were taken to incorporate the 2nd Defendant to engage in the development of this land by constructing a Condominium Building thereon and selling or leasing Condominium units therein to prospective buyers and lessees.*"

I am of the view that the transaction that took place between the parties must be viewed from the perspective of the above explanation of Senaratne. When a company already in existence is keen to commence a new project and takes on the role of the promoter, an option that is open to the promoter of the new project would be to incorporate a separate corporate entity with limited liability for that project, thus making the newly formed entity a special purpose vehicle. Quite apart from separating or isolating the entity to be formed from the existing promoter entity for commercial and financial reasons, and gaining the advantage that a limited liability company with a separate legal personality has to offer, considerations of tax benefits and fiscal concessions for entities engaging in specific kinds of activity too demand that the activity relating to the new project be kept separate.

However, on the other side of the table is an entity – the Plaintiff in this case – who is entering into the transaction on the financial strength of the already existing promoter company and which therefore seeks some form of comfort from the promoter in order to ensure that payments are made for the services provided. It is therefore important that these transactions are structured properly with the rights and liabilities of each party correctly identified. Unfortunately, in this appeal, that has not been done, with the result that:

(a) the evidence, similar to pieces of a jigsaw have to be put together by Court to form the complete picture and determine the intention of the parties; and

(b) for reasons to which I have already adverted to and shall advert, both Defendants have exposed themselves to liability.

In his affidavit, Senaratne, for the first time stated as follows:

(a) P4 and P5 were unsolicited proposals;

(b) The parties were only having preliminary discussions to explore the possibility of the 2nd Defendant employing the Plaintiff as architect for the Project;

(c) There were no dealings whatsoever between the Plaintiff and the 1st Defendant;

(d) The Plaintiff did not submit a detailed Project proposal acceptable to the 2nd Defendant;

(e) No firm contract was entered into between the Plaintiff and the 2nd Defendant for the employment of the Plaintiff as the architect.

I must say that the above, quite apart from not being suggested to Munasinghe during cross examination, was contrary to the documentary and oral evidence that the Plaintiff had already placed before the Commercial High Court.

Senaratne has stated further that:

> "***We advised the Plaintiff*** *that in the event the Plaintiff company being in fact employed as Architect,* ***the related contract would be between the Plaintiff and the 2nd Defendant*** *which was then under incorporation and would not be between the Plaintiff and the 1st Defendant as the 2nd Defendant was to be responsible for all aspects of the Project and the 1st Defendant was unconnected with the Project and was engaged in an entirely different field of business.*"
>
> "***Although the Plaintiff and the 2nd Defendant had discussions regarding the 2nd Defendant employing the Plaintiff as architect****, no firm agreement or contract was entered into by which the 2nd Defendant in fact employed the services of the Plaintiff as architect. "* [emphasis added]

Although Senaratne took great pains to explain that the 1st Defendant had no liability towards the Plaintiff, he was confronted by the fact that not only had an assurance of payment been made by the 2nd Defendant on behalf of the 1st Defendant but that payments had in fact been made by the 1st Defendant. Even if his explanation that, "*as the 2nd Defendant was pending incorporation at that stage, the payment was lent and advanced to the 2nd Defendant by the 1st Defendant and the cheque in payment was issued by the 1st Defendant*" could be accepted for the first payment in January 2006, it cannot be accepted for the balance two payments as the 2nd Defendant had been incorporated by then. Thus, in my mind, the 1st Defendant had contractually bound itself to the Plaintiff by making all three payments.

Referring to the payments made to the Plaintiff, Senaratne has stated as follows:

> "*The payments aggregating Rs. 4.5 million* ***made by the 2nd Defendant*** *to the Plaintiff* ***were by way of an advance payment to cover the cost of preliminary work*** *said to have been done by the Plaintiff such as the initial project appraisal and the cost of preliminary studies on the obtaining of the necessary approvals from the Urban Development Authority and the Colombo Municipal Council and liaising with these two authorities and the checking of the electricity, water and sewerage connections etc. which were to be carried out by the Plaintiff.*"
>
> "*No agreement was reached for the appointment of the Plaintiff as the architect and no agreement was reached as to the fees that were payable to the Plaintiff other than the* ***aforesaid Agreement for the 2nd Defendant to pay the Plaintiff a sum of Rs. 4.5 million to cover the cost of preliminary work*** *said to have been done by the Plaintiff.*" [emphasis added]

It is clear to me that Senaratne was blowing hot and cold. On the one hand, he states that there was no agreement at all with the 2nd Defendant and on the other he admits that payment was made to cover the cost of preliminary work carried out by the Plaintiff but adds a rider by saying that the work was *said to have been done* by the Plaintiff. None of these explanations were made at the time payment was demanded in writing nor were these matters suggested to Munasinghe during cross examination.

Failure to respond to business correspondence

Mr. Alagaratnam, PC has invited this Court to draw an adverse inference against the 2nd Defendant for its failure to respond or deny the contents of the letter of demand [P21] or for that matter, most of the other letters sent, although the receipt of such letters was admitted by Senaratne.

In **The Colombo Electric Tramways and Lighting Co. Ltd v Pereira** [25 NLR 193 at page 195], Jayawardena, A. J, quoted with approval the following dicta of Lord Esher in **Wiedeman v Walpole** [(1891) 2 Q. B. 534], which has been cited in many later cases:

> "*Now there are cases – business and mercantile cases – in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it, if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that," if the other does not answer that letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement*."

Dias, J in **Saravanamuttu v De Mel** [49 NLR 529 at page 542] held that, "*In business matters, if a person states in a letter to another that a certain state of facts exists, the person to whom the letter is addressed must reply if he does not agree with or means to dispute the assertions. Of course there are exceptions to this rule. For example, failure to reply to mere begging letters when the circumstances show that there was no necessity for the recipient of the letter to reply can give rise to no adverse inference against the recipient*."

Having considered *inter alia* the above cases, my brother, Justice Samayawardhena has stated as follows in **Disanayaka Mudiyanselage Chandrapala Meegahaarawa v Disanayaka Mudiyanselage Samaraweera Meegahaarawa** [SC Appeal No. 112/2018; SC minutes of 21st May 2021]:

"*However, I must add that although it is a general principle that failure to answer a business letter amounts to an admission of the contents therein, this is not an absolute principle of law. In other words, failure to reply to a business letter alone cannot decide the whole case. It is one factor which can be taken into account along with other factors in determining whether the Plaintiff has proved his case. Otherwise, when it is established that the formal demand, which is a sine qua non for the institution of an action, was not replied, Judgment can ipso facto be entered for the Plaintiff. That cannot be done. Therefore, although failure to reply to a business letter or a letter of demand is a circumstance which can be held against the Defendant, it cannot by and of itself prove the Plaintiff's case. The impact of such failure to reply will depend on the facts and circumstances of each case*."

I am in agreement with Samayawardhena, J and wish to reiterate that the failure to respond to a business letter must not be looked at in isolation of the other facts and that its impact would depend on the facts and circumstances of each case. Having said so, I am in agreement with the learned President's Counsel that this Court is certainly entitled to draw an inference against both Defendants arising from their failure to deny the existence of a contract with the Plaintiff to provide consultancy services upon receipt of the several letters referred to earlier. I am therefore of the view that the Defendants cannot deny that the Plaintiff in fact provided the relevant services, thus requiring this Court to consider whether the Defendants are jointly and severally liable to make payment for the said services.

Judgment of the Commercial High Court

The learned Judge of the Commercial High Court, having taken into consideration the following circumstances of this case, concluded that the 1st Defendant is the *alter ego* of the 2nd Defendant and thereby the 1st Defendant is liable to the Plaintiff:

(a) The initial discussions were with the 1st Defendant;

(b) The invitation to submit bids was extended by the 1st Defendant;

(c) The directors and shareholders of both the 1st and the 2nd Defendant are identical;

(d) The land on which the Project was to be implemented belonged to the 1st Defendant;

(e) P6 was prepared by Abeynayake in consultation with the Directors of the 1st Defendant who later became the shareholders of the 2nd Defendant and took up appointment as directors of the 2nd Defendant;

(f) At the time P6 was written, the 2nd Defendant was yet to be incorporated and the acceptance of P4 and P5 by Abeynayake who had been appointed by the 1st Defendant as the Chief Executive Officer of the company that was to be incorporated is binding on the 1st Defendant;

(g) By P6, it was represented to the Plaintiff that the payment obligation has been undertaken by the 1st Defendant which was the only existing entity at that time and the payments were in fact made by the 1st Defendant, even after the incorporation of the 2nd Defendant.

I must add to the above list, the fact that, (a) the negotiations prior to and post P4 and P5 were with the 1st Defendant; (b) P17 and P18 by which payments were demanded from the 2nd Defendant were acknowledged by the 1st Defendant.

Lifting of the corporate veil

The learned President's Counsel for the Plaintiff did not seek to argue before us that the 2nd Defendant would be liable simply in view of the above conclusion of the Commercial High Court, and hence, the necessity for me to consider if the said conclusion is correct does not arise. I must however state the obvious. A limited liability company is a separate legal entity, has an existence of its own and is organised to do business in its own right. Each such entity has legal rights and liabilities distinct from its shareholders and the corporate veil between them would not be disturbed lightly.

Of course, there are circumstances where the corporate form will be disregarded and the corporate veil will be pierced to hold individual officers or shareholders personally liable for the acts of the corporate. In '**Gower's Principles of Modern Company Law**' [supra; at page 198], the authors, having stated that, "*When analysing the judicial decisions on lifting the veil, it is crucial to distinguish between those situations where the court is applying the terms of a contract (other than legislation relating to companies) or, less often, a contract, from those where, as a matter of common law, the veil is lifted. The reason is that the justification for lifting the veil in the former group of cases is to be found in the wording of the statute or the contract*," proceeded to state as follows [at pages 205 and 206]:

> "*The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes. Even where the case for applying the doctrine may seem strong, as in the under capitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so. As Staughton LJ remarked in Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose [1991] 4 All ER 769 at 779*:
>
> > "*The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine*."

The above passage from Gower and Davies, albeit from the 8th edition, has been quoted by Saleem Marsoof, PC, J in **DFCC Bank v Weliwita Don Kushmitha Mudith Perera** [SC Appeal No. 150/2010 – SC minutes of 25th March 2014]. Merely because one company is a parent and another is its subsidiary does not mean that their rights and liabilities – and their fates – are inextricably intertwined in law. And, to introduce a wide and easily accessible route, via which the distinctness in corporate personalities between the parent and the subsidiary can be flouted, would be to shake the very foundations of company law. This does not mean, however, that by virtue of being separate corporate entities, an

impassable gulf exists between the parent and the subsidiary. In exceptional circumstances, our Courts are indeed empowered to lift and/or pierce the veil of incorporation, and have done so in the past, though of course cautiously. It bears repeating therefore that it would be a rare occasion indeed for the veil to be lifted and/or pierced.

The factual circumstances – revisited

While reiterating the aforementioned factual matters relied upon by the learned Judge of the Commercial High Court as to why the 1st Defendant is liable to the Plaintiff, the learned President's Counsel for the Petitioner submitted that the 2nd Defendant too must be held liable for the reason that (a) the work was to be performed for the 2nd Defendant; (b) the contract was for the benefit of the 2nd Defendant; (c) the 2nd Defendant too has extended promises to the Plaintiff; and (d) therefore the contract was not only with the 1st Defendant but with the 2nd Defendant, as well. In other words, his position was that there was a clear intention on the part of all parties to create legal relations in respect of the Project which gave rise to a contract where both Defendants are jointly and severally liable to the Plaintiff.

It would be well at this stage to recapitulate the factual circumstances in order to decide whether there existed an agreement with the 1st and 2nd Defendants on the one hand, and the Plaintiff on the other. The starting point of course would be the initial discussions held in December 2005 between the Plaintiff and the 1st Defendant, with the 1st Defendant being represented by its two directors and shareholders, namely Senaratne and Perera, and Abeynayake who became the Chief Executive Officer of the 2nd Defendant a few days later.

The discussions were followed by the initial proposal of the Plaintiff [P4 and P5] made to the 1st Defendant. In my view, P4 and P5 fortify the position of the Plaintiff that they had discussions with the 1st Defendant and were invited to submit its proposal. This is followed by the 1st Defendant making the first payment of Rs. 1,500,000 [D5], which was prior to the incorporation of the 2nd Defendant. Thus, the cumulative effect of the above is the

intention of the 1st Defendant to enter into an agreement with the Plaintiff for the provision of consultancy services for the Project.

The '*entry*' of the 2nd Defendant to the transaction takes place on 6th January 2006 by P6. Although not incorporated as at that date, P6, which according to Abeynayake was prepared in consultation with Senaratne and Perera, is signed by Abeynayake on behalf of the 2nd Defendant and not only refers to and accepts P4 and P5 but seeks to appoint the Plaintiff as the Consultant for the provision of a Consortium service for the Project on the terms and conditions set out in P4 and P5 and provides a specific assurance that payments would be made by the 1st Defendant, with a payment of Rs. 1,500,000 being made almost simultaneously. While P6 does not make the 2nd Defendant liable for the reason that the 2nd Defendant was not incorporated as at that date, it certainly gives context to the intention of the parties to have the 2nd Defendant involved in the entire transaction.

The next document after P6 is P9 dated 24th January 2006, by which the Plaintiff forwarded the Preliminary Construction Cost Estimate to Abeynayake, with the 1st Defendant being referred to as the client. The incorporation of the 2nd Defendant followed two days thereafter on 26th January 2006.

The next two letters are crucial. The first is letter dated 24th February 2006 [P12] addressed to Abeynayake in his capacity as the Chief Executive Officer of the 2nd Defendant. By P12, the Plaintiff requested the 2nd Defendant to pay a sum of Rs. 3,400,000, which was the balance sum of money outstanding on the advance payment of 10%. Thus, by P12, the Plaintiff acknowledged the presence and involvement of the 2nd Defendant in the transaction. What followed thereafter – P13 – cements the contractual involvement of the 2nd Defendant for the reason that the 2nd Defendant not only confirmed that the payments are in order but also stated that "…*our directors, Mr. Sanjeeva Senaratne and Mr. Suminda Perera have approved and* ***agreed to release the balance money from Neat Lanka (Pvt) Limited****, as soon as possible...*". Thus, P13 confirms the position of the Plaintiff that there existed an agreement between the parties with both Defendants promising to do the same thing.

Pursuant to P13, the 1st Defendant continued to make two further payments by cheques drawn on its account [D8 on 20th March 2006 and D9 on 27th March 2006], even though the 2nd Defendant had been incorporated by then and payments were called from the 2nd Defendant. The explanation of Senaratne was that even though it is the 1st Defendant that made the payments, it was only a loan made to the 2nd Defendant. While this confirms that the services were being performed for the 2nd Defendant, it must be noted that the payments were made directly by the 1st Defendant to the Plaintiff and not through the 2nd Defendant. Thus, the position is that the work was carried out for the 2nd Defendant, with the invoices and receipts issued to the 2nd Defendant and for payments to be made by the 1st Defendant.

Conclusion

Based on the above discussion, it is clear to me that both the 1st Defendant and the 2nd Defendant have been present on one side of the table and made separate promises to the Plaintiff but with the same objective – i.e., to contract the Plaintiff to provide consultancy services for the Project. Adopting an objective test, the promises the Defendants had made to the Plaintiff through the entire course of the transaction point to the two of them acting together. This being so, the liability must surely fall on both of them, not just on the 1st Defendant.

The learned Judge of the Commercial High Court has appreciated the fact that the evidence was sufficient to hold the 1st Defendant liable. It appears from the answers given by the learned Judge of the Commercial High Court to the issues raised by both parties that he was of the view that the 2nd Defendant too is liable. This is borne out by the answers given to Issue Nos. 3, 4, 9 and 10 raised by the Plaintiff and issue No. 19 raised by the Defendants, as set out below.

Issue No. 3 – Was there a written agreement between the 1st and the 2nd Defendants and the Plaintiff? – P6 න් P13 න් හා ගෙවීම් කිරීමෙන් ගිවිසුම්ගත පැවැත්ම සංස්ථාපනය වේ.

Issue No.4 – Are the 1st and 2nd Defendants liable jointly and severally under the said Agreement? පෙනි යන ගිවිසුම අනුව මුදල් ගෙවීමේ වගකීම 1 වන විත්තිකරු වෙතය. ඒ අනුව 1 විත්තිය වග කිව යුතුය.

Issue No. 9 – Has a cause of action arisen to the Plaintiff to sue the Defendants jointly and severally for the recovery of Rs. 10,200,000? ඔව්. නඩු පැවරීමට නඩු නිමිත්තක් පැනනැගී ඇත. ගෙවීමේ වගකීම 1 විත්තිය වෙතය.

Issue No. 10 – If one or more of the above issues are answered in favour of the Plaintiff, is the Plaintiff entitled to the relief prayed for? ඔව්. ගිවිසුම්ගත බැඳීම් අනුව එය ගෙවීමට බැඳෙන්නේ 1 විත්තිය වේ.

Issue No. 19 – Did the Plaintiff and the 2nd Defendant not enter into the purported contract claimed by the Plaintiff? ගිවිසුමකට ඇතලු වූ බව සාක්ෂි අනුව පෙනේ.

However, the learned Judge of the Commercial High Court has failed to undertake a closer look at the liability of the 2nd Defendant and appears to have overlooked the fact that the 2nd Defendant is liable. It is on this point alone that the learned Judge of the Commercial High Court has erred in an otherwise correct and exhaustively analysed judgment.

Taking into consideration the totality of the above circumstances, I am of the following view:

(a) The findings of the learned Judge of the Commercial High Court in respect of the 1st Defendant are correct and therefore are affirmed;

(b) The learned Judge of the Commercial High Court erred when he failed to consider that the 2nd Defendant too has made promises to the Plaintiff and that the correspondence establish that the 2nd Defendant and the Plaintiff had an intention to create legal relations in respect of the work performed by the Plaintiff in respect of the Project, and the 2nd Defendant is therefore jointly and severally liable towards the Plaintiff;

(c) The learned Judge of the Commercial High Court erred in law when he failed to answer Issue Nos. 4, 9 and 10 in favour of the Plaintiff against the 2nd Defendant. The said three issues are accordingly answered in favour of the Plaintiff and the Plaintiff shall be entitled to relief as prayed for in the plaint against the 2nd Defendant, as well.

The Commercial High Court is directed to enter decree accordingly.

I make no order for costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the Act, No. 54 of 2006.

Lindamulage Paul Jesudasa De Silva,
No. 508/1, De Soyza Road,
Molpe, Moratuwa.

PLAINTIFF

SC APPEAL 232/2016
SC/HCCA/LA 502/2014
CA Appeal: WP/HCCA/MT/No. 01/13/RA
DC Moratuwa No. 254L

Vs.

Rambukkanage Lesman Fernando
De Soyza Road,
Molpe, Moratuwa.

DEFENDANT

AND THEN

Lindamulage Paul Jesudasa De Silva,
No. 508/1, De Soyza Road,
Molpe, Moratuwa.

PLAINTIFF-PETITIONER

Vs.

Rambukkanage Lesman Fernando
De Soyza Road,
Molpe, Moratuwa.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Rambukkanage Lesman Fernando
De Soyza Road,
Molpe, Moratuwa.

DEFENDANT-RESPONDENT-APPELLANT

Vs.

Lindamulage Paul Jesudasa De Silva,
No. 508/1, De Soyza Road,
Molpe, Moratuwa.

PLAINTIFF-PETITIONER-RESPONDENT

BEFORE: Hon. Buwaneka Aluwihare, PC, J
Hon. Murdu N. B Fernando, PC, J
Hon. Yasantha Kodagoda, PC, J

COUNSEL: Darshana Kuruppu with Chinthaka Udadeniya for the Defendant-Respondent-Appellant.
Dhanya Gunawardena for the Plaintiff-petitioner-Respondent.

WRITTEN SUBMISSIONS: 21st November 2016 and 22nd May 2020 for the Defendant-Respondent Appellant.

ARGUED ON: 10.03.2020.

DECIDED ON: 13.10.2023

Judgement

Aluwihare, PC, J

(1) The Plaintiff-Respondent-Respondent [hereinafter referred to as 'the Plaintiff'] filed action against the Defendant-Respondent-Petitioner-Appellant [hereinafter 'the Defendant'] in the District Court seeking an order to obtain a right of way over the Defendant's land on the basis that

the Plaintiff had acquired prescriptive rights over the roadway by immemorable user of the right of way.

(2) At the conclusion of the trial, the learned trial judge held with the Plaintiff and delivered judgement holding that the Plaintiff is entitled to the right of way sought by him.

(3) The Defendant asserts that, consequent to the entering of the decree, the writ was executed and possession in respect of the right of way had been handed over to the Plaintiff on 19.06.2003.

(4) The Defendant, however, sought to have the decree amended on the basis that the same was not in conformity with the judgement. Having heard the parties, by his order dated 04.03.2004, the learned District Judge rejected application of the Defendant.

(5) Aggrieved by the order referred to in the preceding paragraph, the Defendant moved the High Court of Civil Appeals by way of an appeal. Upon consideration of the same, the appeal was dismissed by the learned Judges of the Civil Appellate High Courts on 29th March 2011.

(6) During the pendency of the appeal filed by the Defendant referred to above, in 2009, the Plaintiff had filed charges of contempt against the Defendant for obstructing his roadway. The District Court, however, by its order dated 31.03.2010, held that the District Court does not have the power to inquire into and determine the allegation of contempt against the Defendant.

(7) Consequent to the dismissal of the Defendant's Appeal, [referred to in paragraphs 4 and 5 above] the Plaintiff, in 2012, by way of Petition and affidavit moved the District Court for a direction on the fiscal, to have the obstructions removed and to have the possession of the 8-foot roadway handed over to the Plaintiff, who became entitled to the same, by virtue of the judgement delivered by the District Court in 2001.

(8) The said application was made by the Plaintiff on the premise that the Defendant had constructed a building on the entire property in a manner causing obstruction to the usage of the roadway the Plaintiff was granted by virtue of the judgement aforesaid.

(9) It was in this backdrop that the Plaintiff sought an order directing the fiscal to hand over possession of the roadway, free from any obstacles. The relief prayed for by the Plaintiff [according to the petition he filed] is reproduced;

(අ) මෙම නඩුවේ තීන්දුව ක්‍රියාවට යෙදවීමේ ක්‍රියාවලිය අවහිර කිරීමට වත්තිකරුට කිසිදු අයිතියක් නොමැති හෙයින් වෂී 2003/06/19 වන දින මෙම අධිකරණයේ පිස්කල් නිලධාරී විසින් පැමිණිලිකාරුට නඩුවට අදාළ ස්ථානයේදී බාදුන් ආකාරයට අඩි 08ක් පළල මාර්ග ප්‍රවේශය ඒ ආකාරයෙන්ම ලබා ගැනීම සඳහා ඇති සියළු බාධා ඉවත් කොට එම මාර්ගයේ ඵුක්තාය පැමණිලිකරු වෙත බාර දෙන ලෙසට මොරටුව පිස්කල් නිලධාරීට නියෝගයක් නිකුත් කරන මෙන් ද

(ආ) මෙම නඩුවේ ගාස්තු යහ ගරු අධිකරණයට යෙහෙකැයි හැගෙන වෙනත් සහ වැඩිමනත් සහනයන් ලබා දෙන ලෙයත් වේ

(10) The learned District Judge by his order dated 28-11-2012, rejected the relief sought by the Plaintiff on the basis that the Plaintiff had been handed over possession of the roadway once, way back in the year 2003 and as such there is no provision in the law to order the execution of the writ [of possession] for the second time.

(11) Aggrieved by the said order, the Plaintiff moved the High Court of Civil Appeal by way of revision and after the inquiry, the High Court held that the Plaintiff was entitled to have the writ executed again. The basis for drawing this conclusion was that, the Plaintiff had not received the complete and effectual possession in terms of Section 325 of the Civil Procedure Code and in the instant case the rights of the parties were finally determined only on 29.03.2011, when the High Court of Civil Appeals dismissed the Defendant's appeal. The Court went on to observe that the issue of lapse of time does not arise as the Plaintiff had not 'got complete and effectual possession' in terms of Section 325 of the Civil Procedure Code. On this basis, the learned judges of the High Court of Civil Appeals held that the Plaintiff was entitled to have the writ executed as the

application [for writ] was made after all the disputes in relation to the rights of the parties had been settled. Accordingly, acting in revision, the relief sought by the Plaintiff was granted.

(12) Being aggrieved by the said Judgement of the High Court of Civil Appeals, the Defendant invoked the jurisdiction of this Court by way of leave to appeal, to have the judgement of the High Court set aside.

(13) On the 6th of June 2016, this Court granted leave to appeal on the questions of law referred to in sub-paragraphs (i) to (v) of Paragraph 13 of the petition of the Defendant dated 7th October 2014. At the hearing of this appeal, however, the learned counsel for the Defendant confined himself to the following questions:

i. Have the Learned Judges of the Civil Appellate High Court of Mount Lavinia failed to consider that the Plaintiff has not averred any exceptional circumstances in his petition?

ii. Have the learned Judges of the Civil Appellate High Court of Mount Lavinia erred in Law by holding that the application for issue of a fresh writ was not time barred when there is one year and six months delay from 29/03/2011?

<u>Respective positions of the parties;</u>

(14) The Plaintiff, in explaining the delay, submits that he could not have sought the remedy that was available to him in terms of Section 325 of the CPC to have the writ executed for the second time as the Defendant's appeal relating to the variation of the decree, was pending and it was on that basis that his complaint of contempt against the Defendant was rejected. As such, he had no option but to await the conclusion of the appeal process in 2011, before moving court to have the writ executed for the second time as provided in Section 325(1) of the CPC in 2012.

(15) Elaborating the delay further, the Plaintiff takes up the position that, it was correct that the writ was executed in 2003, but when he complained to the

District Court of the disturbance to his peaceful enjoyment of the rights he had obtained from the court, the District Court was *functus*, as far as the case was concerned, in view of the appeal[of the Defendant] challenging the District Court order rejecting his application to vary the decree was pending before an appellate forum.

(16) It was argued on behalf of the Plaintiff that the jurisprudence developed over the years has now crystalised into a rule, that the Court can exercise its inherent powers vested in it under the Section 839 of the Civil Procedure Code to avert injustices in situations of this nature, particularly in instances where parties take the law into their own hands and that the court was not hamstrung by the period statutorily stipulated [Section 325] in the CPC relating to issuing of the writ for the second time which is one year and one day from being disposed.

(17) The learned Counsel for the Plaintiff relying on the decision of ***Senevirathne Vs. Francis Fonseka Abeykoon*** **1986 2 SLR** and ***Sirinivasa Thero Vs. Suddassi Thero*** **63 NLR 31**, submitted that in the case of ***Senevirathne*** [supra] it was held that *'since the plaintiff had taken the law into his hands and forcibly evicted the defendant alleging abandonment and deterioration of the premises, the Court could in the interest of justice resort to its inherent powers saved under Section 839 of the Civil Procedure Code and make order of restoration of possession for the fiscal to execute even though the Civil Procedure Code provided for such restoration to possession only on a decree to that end entered under section 217(c) of the Civil Procedure Code.*

(18) The Defendant, on the other hand argued that the application for a writ in terms of Section 325 of the CPC requires strict compliance and even if the appellate process had come to an end on 29.03.2011, the Plaintiff had moved court for the execution of the writ for the second time only on 06.09.2012, which is almost 18 months after the decision of Defendants Appeal was delivered.

(19) Before I address the questions of law on which leave to appeal was granted, it would be of significant importance to consider the findings and the conclusions of the learned District Judge in refusing the application of the Plaintiff to refuse to issue the writ for the second time based on his application made in 2012.

(20) The reason being, the judges of the High Court set aside the order of the learned District Judge who refused to issue the writ for the second time, in exercising the revisionary jurisdiction vested in them. The criteria for exercising revisionary power, as a discretionary remedy, is when the court's conscience is shocked by the illegality of the order that is sought to be revised.

(21) In the circumstances aforesaid, it would be pertinent to consider the order made by both the learned District Judge as well as the High Court of Civil Appeals. It is significant to note that the learned High Court judges have not referred to any illegality of the order of the learned District Judge but have merely stated in their order that *"a writ for the second time cannot be issued only if the Plaintiff gets complete and effectual possession in terms of section 325 of the Civil Procedure Code. In the instant action the parties can only obtain complete and effectual possession of a land only after the rights of parties are finally determined. In this case the rights of the parties were finally determined only on 29.03.2011. Thus, the issue of lapse of time does not arise as the Plaintiff had not got complete and effectual possession in terms of Section 325 of the Civil Procedure Code"* [page 5 of the Order].

(22) Apart from the passage referred to above, nowhere in the order had the High Court pointed out any illegality of the impugned order of the learned District Judge. Essentially, it appears to me that the only element which the learned Judges of the High Court deem to have been incorrectly concluded by the learned District Court Judge is that "*parties can only obtain complete and effectual possession of a land only after the rights of parties are finally determined"* [supra]. The power of the court to issue a writ for the second

time is undisputed. In my opinion, the issue which had to be determined by the learned Judges of the High Court, is whether the impugned order of the learned District Judge was 'illegal' or whether in refusing to issue the writ for the second time, he had exercised his discretion wrongly, and in a manner which shocked 'the conscience of the court'. The same question – whether in refusing to issue the writ for the second time, the Order of the learned District Judge had broached legality, is now placed for determination before this Court.

(23) I have given the sequence of events in paragraphs 2 to 7 of this judgement. For convenience, I shall briefly refer to them here;

(i) The Judgement of the District Court was delivered in 2001.
(ii) The writ of possession was executed in 2003.
(iii) The defendant sought a variation of the decree in 2004.
(iv) The Defendant challenged the refusal before the High court in 2004.
(v) The Plaintiff filed contempt proceedings in 2009.
(vi) Contempt charges were rejected by the District Court in 2010.
(vii) The High Court refused the application of the Defendant for a variation of the Decree in 2011.

(24) From the sequence of events referred to above, it is clear that from 2003 up to 2009, there had been no complaint by the Plaintiff of any obstruction on the part of the Defendant. The District Court by its considered order delivered on 31.03.2010, held that the District Court has no jurisdiction to inquire into the contempt charges filed by the Plaintiff. The Plaintiff did not challenge the said order.

(25) It was in this backdrop that the Plaintiff moved the District Court in 2012 for a writ of possession for the second time. The ground on which this application was made is that the District Court rejected the contempt charges on the basis that there was a connected matter pending in appeal and that the District Court is *functus officio* due to that reason.

(26) Although the petition filed before this court also states that the reason to dismiss the contempt proceeding filed by the Plaintiff was due to the fact that the challenge by the Defendant to vary the decree was still pending before an appellate forum, when perusing the said order of the District Court, it is evident that the refusal to proceed with the contempt charges was based on the *ratio* of the case of ***Regent International Hotel Ltd v. Cyril Gardiner*** **78-79 1 SLR 278** and the order does not refer to any pending case before an appellate forum as a fetter to inquire into the allegation of contempt against the Defendant.

(27) The assertion, therefore, of the Plaintiff, that he had to wait to make an application to issue the writ for the second time till the rights of the parties were finally determined in 2011, does not appear to be accurate. The fact remains that the Plaintiff's complaint of interruption to his peaceful enjoyment of the roadway was only after six years from the date of the execution of the writ which was in 2003.

(28) Undoubtedly, the Defendant appears to have prevented the Plaintiff from enjoying the right he won years after litigation and the conduct of the defendant cannot be condoned by this court; however, this court is called upon to decide on specific legal issues and not the contumacious conduct of the Defendant.

(29) As referred to earlier, all we are called upon to decide is whether the High Court of Civil Appeals had corrected an illegality of the Order made by the learned District Judge.

(30) The learned District judge, in refusing to issue the writ for the second time, had observed that the application was made many years [six years] after the previous order was made, and in terms of Section 325(1) of the CPC, where after the officer [fiscal] has delivered possession, the Judgement-Creditor is hindered or ousted by the Judgement-Debtor, in taking complete and effectual possession, in the case of immovable property, ***where the judgement creditor had been hindered or ousted within a period***

of one year and one day, the judgement-creditor any time within one month of the date of such obstruction or hindering or ouster, complain thereof to the court by a petition. The learned District Judge relying on the decision of ***Badrun Nisa Wazeer Vs. Velayuthan*** **90 2 SLR 146** held that the Plaintiff was not entitled to have the writ obtained for the second time.

(31) As stated before, in granting the writ for the second time and revising the Order of the learned District Judge, the learned Judges of the High Court had only noted that per Section 325, a writ sought for the second time could only be refused if the Plaintiff who sought such writ had obtained 'complete and effectual possession', and since the matter was pending in appeal and the legal rights of the parties were, at the time, unresolved, the "*issue of lapse of time does not arise as the Plaintiff had not got complete and effectual possession in terms of Section 325 of the Civil Procedure Code"* [Supra]. No reliance is placed on any judicial precedent to support the above position.

(32) The concept of 'complete and effectual possession' does not in any way contemplate the legal entitlement or rights of the parties. In my view, all that is contemplated by the phrase is de facto possession of the property concerned, in a manner which allows for the complete enjoyment of the property. The fact that legal entitlement to such property was being resolved by a Court of Law did not and should have any bearing on the *factum* of physical possession of the property.

(33) The issue of time lapse is therefore central to this determination of this case. Section 325(1) and its requirements have been comprehensively addressed in a recent judgement of this court.
In ***Saleem Mohamed Fawsan v. Majeed Mohamed & Others*****, SC Appeal No. 135/2017, S.C Minutes of 31.03.2023**, his Lordship Justice Samayawardhena observed that; [at pages 18 and 19]
"*According to section 325(1)*
(a) *Wherein the execution of a decree for the possession of immovable*

or movable property the fiscal is resisted or obstructed by the judgment-debtor or any other person, or

(b) *where after the fiscal has delivered possession of immovable or movable property the judgment-creditor is hindered or ousted in taking complete and effectual possession by the judgment-debtor or any other person the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster complain to the District Court by way of a petition.*

The first limb of Section 325(1) contemplates a situation where the fiscal is totally prevented by the judgment-debtor or any other person from delivering possession to the judgment-creditor by resistance or obstruction.

The second limb of section 325(1) contemplates two situations:
(i) after the fiscal had delivered possession of the property, the judgment-creditor has been hindered in taking complete and effectual possession thereof; or
(ii) ousted therefrom.
….
It may further be observed on a careful reading of section 325(1) that, in a situation of ***(a)*** *above, the judgment-creditor shall come to Court within one month from the date of resistance or obstruction to the fiscal, but in a situation of* ***(b)*** *above where possession has been delivered,* ***if it is immovable property, in addition to the one month restriction from the date of the hindrance or ouster, such hindrance or ouster shall also fall within one year and one day from the date of delivery of possession.***"** [Emphasis added]

(34) The limb which would be applicable to the present case is the second limb of Section 325(1). As noted above, the Plaintiff was hindered by the Defendant from enjoying the 'effectual possession' of the property after the execution of the decree and after the fiscal had delivered possession. Accordingly, the Plaintiff could seek a writ by invoking the jurisdiction of the District Court if and only if the hindrance occurred within one year and

one day from the date the fiscal delivered the property, and only by complaining to the court **within one month** of the date of the hindrance. This position was previously affirmed in ***Badrun Nisa Wazeer Vs. Velayuthan*** **90 2 SLR 146** and in ***Sinna Lebbe Saliya Umma Vs. Shahul Hameed Mohammed & Others*****, S.C Appeal No. 99/2014, S.C Minutes of 04.04.2018**. In the case of ***Badrun Nisa Wazeer***, it was held that the time clause in S. 325(1) of the Civil Procedure Code is mandatory, and that per the Section, in matters relating to immovable property, a party who was dispossessed or obstructed from exercising possession within one year and one day can complain to court within one month of ouster or hindrance. The learned District Court Judge had also relied on the aforementioned judgement in his Order.

(35) The Fiscal delivered possession to the Plaintiff on 19th June 2003. The Plaintiff invoked the jurisdiction of the District Court to seek a writ for the second time on 06th September 2012. If there had been a hindrance to the Plaintiff enjoying complete and effectual possession within one year and one day of 19th June 2003, the Petitioner should have invoked the jurisdiction within one month of such hindrance. The Petitioner had only made an application under Section 325(1) after 9 years of being delivered possession. Therefore, it is evident that the Plaintiff had not invoked the jurisdiction of the District Court in the manner required by the law and the Order of the learned District Cort Judge was lawful and could not have shocked the conscience of the court.

In the circumstances, I find that it would not be necessary to determine the first (i) question of law since the application for the issue of a fresh writ, as stated in the question of law (ii) was in fact time barred. Accordingly, the questions of law; "*Have the learned Judges of the Civil Appellate High Court of Mount Lavinia erred in law by holding that the application for issue of a fresh writ was not time barred when there is one year and six months delay from 29/03/2011"* is answered in the affirmative.

For the reasons stated above, the Order of the High Court dated 26.08.2014 is hereby set aside and the Order of the learned judge of the District court dated 28.11.2012 is hereby affirmed.

In the circumstances of this case, the parties may bear their own costs.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

MURDU N. B FERNANDO, PC, J
I agree

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J
I agree

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of the Proviso to Article 99(13)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC Expulsion 02/2021

Ven. Athuraliye Rathana Thero,
Sadaham Sewana,
Gothami Road,
Rajagiriya

PETITIONER

Vs.

01 Ape Janabala Pakshaya,
No. 15/27, Adagala Watta,
Wellava Road, Kurunegala

02. Nishantha Ratnayake,
General Secretary,
Ape Janabala Pakshaya,
No. 15/27, Adagala Watta,
Wellava Road, Kurunegala

03. Saman Perera,
Chairman,
Ape Janabala Pakshaya,
No. 15/27, Adagala Watta,
Wellava Road, Kurunegala

04. Samantha Keerthi Bandara,
General Secretary,
Wijaya Dharani National Council, Gothami Road, Rajagiriya

05. Nimal Punchihewa,
Chairman,
Election Secretariat,
Sarana Mawatha, Rajagiriya

06. G.S.B. Divaratne,
Member,
Election Secretariat,
Sarana Mawatha, Rajagiriya

07. M.M. Mohomed,
Member,
Election Secretariat,
Sarana Mawatha, Rajagiriya

08. K.P.P. Pathirana,
Member,
Election Secretariat,
Sarana Mawatha, Rajagiriya

09.Member,
Election Secretariat,
Sarana Mawatha, Rajagiriya

10. Saman Sri Ratnayake,
Commissioner General of Elections,
Election Secretariat,
Sarana Mawatha,
Rajagiriya

11. Dhammika Dasanayaka,
Secretary General of Parliament,
Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.
RESPONDENTS

Before: Buwaneka Aluwihare, PC, J
Murdu N.B. Fernando, PC, J
Janak De Silva, J

COUNSEL: Sanjeewa Jayawardena, PC with Rukshan Senadeera, S. Palihawadana and Eranga Thilakaratne for the Petitioner instructed by Deshan Wimalaratna
Farman Cassim, PC with Vinura Kularatne instructed by Dimuthu Kuruppuarachchi for the 1st to 3rd Respondents.
Nilshantha Sirimanne with De Shara Goonethileke for the 4th Respondent.
Dr. Avanti Perera, DSG for the 5th to 11th Respondents.

ARGUED ON: 26.09.2022.

DECIDED ON: 13.10.2023

Determination

Aluwihare PC, J

The Petitioner invoked the jurisdiction of this court in terms of Article 99(13)(a) of the Constitution seeking declarations from this court that the expulsion of the Petitioner from 'Ape Janabala Pakshaya', is invalid; that the seat he held in Parliament has not become vacant consequent to such expulsion and that the Petitioner has not ceased to be a member of Parliament.

The Petitioner was declared elected as a Member of Parliament under Article 99A of the Constitution and the same was gazetted by the Commissioner General of Elections under an order of the Election Commission on 18-12-2020.

The factual background

The Petitioner is the Chairman of the 'Wijaya Dharani National Council'; a political party but not a recognized political party under the provisions of the Parliamentary Elections Act No. 1 of 1981, as amended. The Petitioner, therefore, had decided to contest the general elections through the 1st Respondent which is a recognized political party registered with the Election Commission. Accordingly, a Memorandum of Understanding (hereinafter referred to as the MOU) was signed between the 1st Respondent, 'Ape Janabala Pakshaya' party and 'Wijaya Dharani National Council' on 18.03.2020. This was to create a coalition or an alliance between the two political parties and to facilitate 'Wijaya Dharani National Council' to contest for the Parliamentary Elections under the 1st Respondent, 'Ape Janabala Pakshaya'. [P4]

In terms of the MOU entered between the 'Ape Janabala Pakshaya' and the 'Wijaya Dharani National Council', the parties had expressly agreed, inter alia, to the following conditions;

a) Clause 5; the parties had very clearly agreed that the 'Ape Janabala Pakshaya' being the first party to the same, has no right to influence or intervene or object to any political decisions and activities taken by the 2nd

party to the MOU*, i.e.,* the 'Wijaya Dharani National Council' of which the Petitioner is a member as well as its chairman.

b) Clause 6;, the parties had agreed that the 1st Party Ape Janabala Pakshaya' will not have any influence on a member of parliament elected from the 2nd party 'Wijaya Dharani National Council' in relation to any activity of such member.

c) Clause 7; The members of the 2nd party [Wijaya Dharani National Council'] cannot be subjected to the rules and regulations of the 1st Party; Ape Janabala Pakshaya', no disciplinary action or other influence can be brought upon the members of the 2nd Party.

d) Clause 4, the parties also agreed to appoint a candidate nominated by the Petitioner, as a member of Parliament as the 1st appointee from the National List and in the event a 2nd member is to be nominated from the National list, such nomination to be done by the 1st Party.

Further, the members of the 'Wijaya Dharani National Council' were to remain separate and distinct as opposed to *de jure* members of the 'Ape Janabala Pakshaya' and were not required to obtain the membership of the said 'Ape Janabala Pakshaya'.

Pursuant to executing the MOU, each candidate of the 'Wijaya Dharani National Council' party including the Petitioner, thereafter signed and executed a 'Letter of Promise', whereby the candidates agreed to abide by the terms and conditions stipulated therein, pledging allegiance to the 'Wijaya Dharani National Council'. The Pledge further confirmed that the Disciplinary Committee of 'Wijaya Dharani National Council' had disciplinary control over its members.

At the conclusion of the Parliamentary Election on 05.08.2020, the 'Ape Janabala Pakshaya' was informed by the Election Commission that it had secured one National List seat in Parliament, in terms of Article 99A of the Constitution.

The Petitioner, albeit, after a brief dispute among the coalition partners, was declared elected as a Member of Parliament under the Constitution provision referred to, by Gazette Notification dated 18.12.2020.

According to the Petitioner, he received a letter dated 30.06.2020 under the hand of the 2nd Respondent, calling for explanation in relation to five issues enumerated therein, on the basis that the Central Committee of the 'Ape Janabala Pakshaya' had decided to hold an inquiry, in view of the several complaints received by the Party [P18]. Whilst calling upon the Petitioner to respond to the 'issues' referred to in the letter within seven days, it states that if the Petitioner is unable to provide acceptable explanation to the issues raised in the letter, the Disciplinary Committee of the 'Ape Janabala Pakshaya' will take steps to issue a charge sheet' against the Petitioner.

The Petitioner has taken strong objection to the said letter on the basis that he cannot be subjected to any disciplinary control by the 'Ape Janabala Pakshaya' since the Constitution of the said Party has no application to the Petitioner as he is not a member of the said political Party and the Constitution of the said Political Party mandates taking disciplinary action against its members only. In any event, the MOU [P4] categorically states that the disciplinary control of the members of 'Vijaya Dharani National Council' is not within the preview of the 'Ape Janabala Pakshaya'.

The Petitioner has not replied the latter [P18] reasoning that, without any form of prejudice to the position of the Petitioner, the provisions contained in the Constitution of 'Ape Janabala Pakshaya' have no application or authority as far as the Petitioner is concerned.

The Petitioner was sent a second letter [by the 2nd Respondent] dated 05.08.2020 containing eight charges and informing the Petitioner that a disciplinary inquiry relating the to the said charge sheet would be held on the 20th August 2020,requiring the Petitioner to attend the same. Due to the spread of Covid 19 pandemic, however, the Petitioner was informed that the said inquiry will not be held on 20.08.2021.

The Petitioner had then been sent a charge sheet again by a letter dated 01.10.2021 by the Chairman of the Disciplinary Committee of 'Ape Janabala Pakshaya' containing the same charges as the previous charge sheet dated 05.08.2021 and informing the Petitioner that the inquiry into the charges will be held on 14.10.2021

The petitioner was also informed that in the event the Petitioner is found guilty for one or more of the charges stipulated therein, the same will be communicated to the Chairman of the party, the Political Board and Central Working Committee, for the consideration of the expulsion of the Petitioner from 'Ape Janabala Pakshaya' and in the event of the Petitioner failing to attend the said disciplinary inquiry, the inquiry will be conducted by the said Disciplinary Committee, *ex parte*.

The Petitioner contended that he was hospitalised on the 13.10.2021 and as such, he instructed his Attorney, Dinesh Vidanapathirana to inform the Disciplinary Committee of his medical condition and his incapacity to participate at the inquiry. It is alleged that the Attorney concerned was prevented at the gate either to communicate with any official or from informing the medical condition of the Petitioner,This is affirmed by the Affidavit of Dinesh Vidanapathirana dated 11 .11.2021 [P22].

The 2nd Respondent, by his letter dated 15.10.2021, had communicated to the Election Commission, the decision of the Central Committee of the 'Ape Janabala Pakshaya' to expel the Petitioner from the membership of the Party and had requested the Election Commission to annul the parliamentary seat held by the Petitioner.

The Petitioner had also received a letter dated 15.10.2021 informing him of the recommendation of the disciplinary committee and the purported decision of the Central Working Committee and the Chairman of the party; 'Ape Janabala Pakshaya'.

By letter dated 16.10.2021[P25], the 2nd Respondent had informed the Secretary General of the Parliament that the Petitioner has been expelled from 'Ape Janabala Pakshaya' with effect from 14.10.2021 and consequently, the Parliament seat held by the Petitioner had fallen vacant by virtue of Article 99(13)(a) of the Constitution and had requested the Secretary General to take necessary action in terms of Article 99(13) of the Constitution read with Section 64 of the Parliamentary Elections Act No.1 of 1981.The Petitioner, by letter dated 08.11.2021 addressed to the 2nd respondent, placed his position relating to the dispute and challenged the decision taken by the disciplinary committee and the Central Working Committee of the party including the Chairman of 'Ape Janabala Pakshaya'.

The gravamen of the Petitioner is that he cannot be subjected to the disciplinary control or authority of the 'Ape Janabala Pakshaya' or its Central Working Committee and as such the action taken against him is patently illegal and grievously unlawful and is also violative of the rules of natural justice. It was on the above premise that the Petitioner invoked the jurisdiction of this court in terms of Article 99(13) (a) of the Constitution.

Subsequent developments

After the Petitioner invoked the jurisdiction of this court, which was on the 11th of November 2021, the attorney on record for the 1st to the 3rd Respondent by way of a motion dated 21st January 2022, informed the Court that steps had been taken to withdraw the expulsion of the Petitioner and produced a copy of the letter signed by the 2nd Respondent dated 12.01 2022, sent to the Petitioner and copied both to the Secretary General of Parliament as well as the Chairman Election Commission [A]. The letter states that the decision taken by 'Ape Janabala Pakshaya' on 14.10.2021 to

expel the petitioner will be revisited by the Central Committee and the Chairman of the Party.
In response to the motion referred to above, the Petitioner by way of a motion dated 21st February 2022, brought to the attention of the Court that the withdrawal of the decision to expel the petitioner is conditional and as such the Petitioner wishes to pursue this application and invited this Court to make a final determination with regard to the validity or otherwise of the impugned expulsion.

Sequel to the said motion by the Petitioner dated 21.02.2022 referred to above, the 1st to the 3rd Respondent filing a further motion on 24th February 2022 informed court that steps have been taken to withdraw the expulsion of the Petitioner and had annexed a letter dated 14.02.2022 addressed to the Petitioner informing him that the decision taken by the Central Committee and the Chairman of the 'Ape Janabala Pakshaya' 14.10.2021 to expel the Petitioner was rescinded [X]. The letter had been copied to the Secretary General, Parliament and the Chairman, Elections Commission. As opposed to the letter issued by the 2nd Respondent dated 12.01.2022 [A], the second letter referred to above [X] is clearly an unconditional rescinding of the decision to expel the Petitioner from the membership of the 'Ape Janabala Pakshaya'.

Even in this backdrop, relying on the decision in the case of ***Ameer Ali and Others V. Sri Lanka Muslim Congress and Others*** **2006 IV SLR 189**, the learned President's Counsel for the Petitioner contended that notwithstanding the withdrawal of the expulsion of the Petitioner, this Court has the jurisdiction to determine the validity of the expulsion. The learned President's Counsel contended that the withdrawal of the expulsion is conditional and restricted only to one of the grounds on which the expulsions have been challenged before this court, namely the failure to comply with the principles of natural justice, thus, this Court should hear and determine the matter in its entirety.

The learned Counsel for the 1st to 3rd respondents, [the party, General Secretary and Chairman respectively], however, submitted that, since the expulsion had been withdrawn, it is unnecessary for this court to make any decision as to the validity of the expulsion and that the proceedings should be accordingly terminated.

In terms of Article 99(13)(a) of the Constitution, where a Member of Parliament ceases by expulsion to be a member of a recognized party on whose nomination paper, his name appeared at the time of becoming such Member of Parliament, his seat becomes vacant upon the expiration of a period of one month from the date of his ceasing to be such member. The proviso to the Sub-article states that the seat will not become vacant if prior to the expiration of one month the member applies to the Supreme Court and this Court determines in such application that the expulsion was invalid. It is to be noted that the withdrawal of the expulsion by the 2nd and 3rd respondents on behalf of the 1st respondent was done on 14.02.2022, after a period of one month had elapsed from the date of the impugned expulsion. Thus, the withdrawal [of the expulsion] was done at a time when this Court was seized with the matter and in terms of the proviso to the Constitutional provision referred to, the seat will become vacant only if this Court makes a determination that the expulsion is valid. Accordingly, the withdrawal by the respondents does not *per se* result in a position where the expulsion becomes invalid and the Petitioner is correct in requesting a determination to be made by the Court as to the validity of the expulsion. The learned President's Counsel submitted that the initial letter [A] seeking to withdraw the expulsions on the alleged non-compliance with the principles of natural justice in arriving at a decision to expel the Petitioner should be taken as a concession on the part of the 1st to 3rd Respondents of this ground of invalidity.

The sequence of events outlined above reveals that the patent failure to adhere to the principles of natural justice in the purported decision to expel the Petitioner from the party, without prejudice to the position held by the Petitioner that Petitioner is not subject to the disciplinary control or authority of the 'Ape Janabala Pakshaya' and/or

its Central Working Committee, the party Chairman or the Disciplinary Committee. Furthermore, the Petitioner asserts that the conduct of these bodies including the party itself is patently illegal and grievously unlawful and is also violative the fundamental postulates of the rule of law, and also the basic rules of natural justice, including the principle of *Audi Alteram Partem*, in as much as, it is very clear that the said purported disciplinary committee of the 'Ape Janabala Pakshaya' arrived at the aforesaid recommendation/decision to expel the Petitioner from 'Ape Janabala Pakshaya' political party, without affording any form of hearing whatsoever to the Petitioner and/or his legal representative.

In the case of ***Tilak Karunaratne vs. Sirimavo Bandaranaike and Others*** **1993 1** SLR 91, Dheeraratne J., having examined the nature of the jurisdiction conferred on this Court in terms of the provisions of Article 99(13)(a) observed; [at page 101]-

"The nature if the jurisdiction conferred on the Supreme Court in terms of the proviso to Article 99(13)(a) is indeed unique in character; it calls for a determination that expulsion of a member of Parliament from a recognized political party on whose nomination paper his name appeared at the time of his becoming such Member of Parliament, was valid or invalid. If the expulsion is determined to be valid, the seat of the Member of Parliament becomes vacant. It is this seriousness of the consequence of expulsion which has prompted the framers of the Constitution to invest that unique original jurisdiction in the highest court of the island, so that a Member of Parliament may be amply shielded from being expelled from his own party unlawfully and/or capriciously. It is not disputed that this Court's jurisdiction includes, an investigation into the requisite competence of the expelling authority, an investigation as to whether the expelling authority followed the procedure, if any, which was mandatory in nature; an investigation as to whether there was breach of principles of natural justice in the decision-making process; and an investigation as to whether in the event of grounds of expulsion being specified by way of charges at a domestic inquiry the member was expelled on some other grounds which were not so specified" ....

In the instant case, as referred to earlier Clauses 5, 6 and 7 of the MOU[P4] entered into between the Petitioner's party; 'Wijaya Dharani National Council' and the political party of the Respondents, 'Ape Janabala Pakshaya' clearly spells out that the members of the 'Wijaya Dharani National Council including the Petitioner shall not be subject to the rules and regulations of the ' Ape Janabala Pakshaya' and such members cannot be called upon for any disciplinary inquiry.

In the circumstances aforesaid, it was submitted that the office bearers of the 'Ape Janabala Pakshaya' cannot influence, intervene, or object to the political decisions taken by the 'Ape Janabala Pakshaya' nor is there any provision to subject the Petitioner to disciplinary control of 'Ape Janabala Pakshaya'. Thus, it would be of vital importance to consider whether officials of 'Ape Janabala Pakshaya' had a mandate to initiate disciplinary proceedings against the Petitioner in the first place. In this regard Justice Marsoof in the case ***Perumpulli Hewage Piyasena, v. Ilankai Tamil Arasu Kadchi*** **[SC Application Special [Expulsion] No. 03/2010,SC minutes 8.02.2011]** observed;

"For this purpose, before considering the grounds set out in paragraph 29 of his Petition dated 10th December 2010 for challenging his expulsion, it is necessary to consider whether, in the first place, the Petitioner was amenable to the disciplinary control of ITAK. This is a matter of fundamental importance which involves another important question, namely, whether the Petitioner is or was a member of ITAK, because it is obvious that only a member of a political party that can be dealt with by that party for any breach of discipline."

In the case of ***Ameer Ali and Others vs. Sri Lanka Muslim Congress and Others,*** 2006, 1 SLR 189, Sarath N. Silva J [as he then was]., observed that this Court has to examine the requisite competence of the expelling authority and the nature of the decision-making process including that of the "domestic inquiry" to be satisfied as to its bona fides and the compliance with the principles of natural justice.

In the circumstances, I hold that the decision to expel the petitioner from the membership of 'Ape Janabala Pakshaya on a purported decision of the Disciplinary Committee by the letter dated 15.10.2021 marked 'P23', is *ex-facie* illegal as it has not been made by the appropriate disciplinary authority in terms of the MOU.

For all the aforesaid reasons, I determine that for the purposes of Article 99(13)(a) of the Constitution, the purported expulsion of the Petitioner, Ven. Athuraliye Rathana Thero was invalid.

In all the circumstances of the case, I make no order as to costs.

Expulsion determined invalid.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Colombage Dona Bandulani Basnayake,
No. 128, Helweesiyawatte,
Narammala.

Petitioner

S.C.(F.R.) Application No: 311/2016

Vs.

1. Sunil Hettiarachchi,
Secretary,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.

1A. Prof. K. Kapila C. K. Perera,
Secretary,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.

1B. Nihal Ranasinghe,
Secretary,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.

2. Dharmasena Dissanayake,
Chairman,
Public Service Commission of Sri Lanka,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

2A. Jagath Balapatabendi,
Chairman,
Public Service Commission of Sri Lanka,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

3. A. Salam Abdul Waid,
Member.

3A. Indrani Sugathadasa,
Member.

4. D. Shirantha Wijetilake,
Member.

4A. V. Shivagnanasothy,
Member.

4B. Suntharam Arumainayaham,
Member.

5. Dr. Prathap Ramanujam,
Member.

5A. T. R. C. Ruberu,
Member.

6. V. Jegarasasingam,
Member.

6A. Ahamed Lebbe Mohamed Saleem,
Member.

7. Santi Nihal Seneviratne,
Member.

7A. Leelasena Liyanagama,
Member.

8. S. Ranugge,
Member.

8A. Dian Gomes,
Member.

9. D. L. Mendis,
Member.

9A. Dilith Jayaweera,
Member.

10. Sarath Jayathilaka,
Member.

10A. W. H. Piyadasa,
Member.

3rd to 10th Respondents all of;

Public Service Commission of Sri Lanka,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

11. H. M. G. Seneviratne,
Secretary,
Public Service Commission of Sri Lanka,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

11A. M. A. B. Daya Senarath,
Secretary,
Public Service Commission of Sri Lanka,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

12. J. H. Rohana Karunaratne,
Nakkawatte National School,
Nakkawatte.

13. Akila Viraj Kariyawasam,
Minister of Education,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.

13A. Prof. G. L. Peiris,
Minister of Education,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.

13B. Hon. Susil Premajayantha,
Minister of Education,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.

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

Respondents

Before: Hon. Buwaneka Aluwihare, P.C., J.

Hon. Janak De Silva, J.

Hon. Achala Wengappuli, J.

Counsel:

Shantha Jayawardena with Chamara Nanayakkara, Hafeel Faris, Hirannya Damunupola and Azra Basheera for the Petitioner

Nirmalan Wigneswaran D.S.G. for the 1B, 2A to 11A, 13B and 14 Respondents

Written Submissions:

27.07.2020 and 05.02.2021 by the Petitioner

03.02.2022 and 08.02.2023 by the Respondents

Argued on: 18.01.2023

Decided on: 16.10.2023

Janak De Silva, J.

The Petitioner is a Grade III officer of the Sri Lanka Education Administrative Service (SLEAS). She was appointed as the Principal of Nakkawatta National School by letter dated 10.12.2013 (P14a) with effect from 01.01.2014.

According to the Petitioner, the school was in a state of neglect when she took on her duties. The Petitioner's efforts resulted in a significant improvement in the quality of education. The school's best result in the past was a student who received 6 'A' grade passes in the General Certificate of Education (Ordinary Level) Examination. After the Petitioner assumed duties, a student obtained 9 'A' grade passes for the first time in the history of the school while four other students obtained 8 'A' grade passes and two students obtained 7 'A' grade passes.

During the August school vacation in 2016, the Petitioner received a letter dated 10.08.2016 (P21) from the Secretary, Ministry of Education informing that, subject to the covering approval of the Public Service Commission (PSC), she has been temporarily 'attached' to the Provincial Education Department of the North Western Province with immediate effect due to exigencies of service.

The Petitioner appealed to the Secretary of the Ministry of Education and requested that her temporary attachment be rescinded with immediate effect. She also made an appeal to the PSC. According to the Petitioner, the usual course of action adopted by the Ministry of Education in such circumstances is to allow the incumbent to continue

in the post till a decision is taken on the appeal. Nevertheless, the Secretary of the Ministry of Education temporarily attached the 12th Respondent with immediate effect to cover duties as the Principal of Nakkawatta National School by letter dated 30.08.2016 (P24). At that time, the 12th Respondent was the Deputy Principal of Kuliyapitiya Central College. The 12th Respondent is a Class III officer of the SLEAS but is junior to the Petitioner by 6 years.

The Petitioner claims that she was removed from her post as Principal of Nakkawatta National School for the purpose of giving the 12th Respondent a promotion in effect and in fact. It is alleged that her attachment to the Provincial Education Department of the North Western Province is arbitrary, unreasonable, irrational, tainted with malice, and made for an ulterior and collateral purpose.

The Petitioner seeks *inter alia* the following relief:

(a) Declare that the Petitioner's fundamental rights guaranteed to her under Article 12 (1) and/or 14 (1) (g) of the Constitution have been infringed by the 1st to 11th Respondents or one or more of them;
(b) Declare that the 'attachment' (evidenced by P21) of the Petitioner to the Provincial Education Department of the North Western Province is null and void;
(c) Direct the 1st to 11th Respondents or one or more of them to forthwith appoint the Petitioner to a suitable substantive post commensurate with her qualifications, experience and seniority in the SLEAS.

Leave to proceed has been granted only under Article 12 (1) of the Constitution.

On 12th December 2018, the Petitioner informed that she may consider returning if offered a suitable school in the Central Government. On 2nd September 2020, the Respondents filed a motion along with a letter dated 24th February 2020, by which the Petitioner was appointed as the Principal of Mayurupada Vidyalaya in Kurunegala. The Petitioner appears to be with this appointment.

Nevertheless, she is desirous of proceeding with this application. Therefore, we must proceed to investigate the allegations of infringement of her fundamental rights under Article 12 (1).

The Respondents claim that the Petitioner's temporary attachment to the Provincial Education Department of the North Western Province by P21 was based on exigencies of service and was not disciplinary in nature.

According to the Respondents, an internal audit was conducted on 28th March 2016 on the orders of the Secretary of the Ministry of Education as part of the internal audit programme 2016/2017. It revealed several lapses in the administration and discipline of Nakkawatta National School, as well as several irregularities regarding the finances and assets of the school. In light of the findings of the internal audit report (1R1) following the aforementioned internal audit, the predecessor of the 1st Respondent was of the opinion that due to the administrative reasons borne out in the said audit report (1R1) the retention of the Petitioner as the Principal of the Nakkawatta National School, was not suitable. Accordingly, the predecessor of the 1st Respondent, by P21, took steps to temporarily attach the Petitioner to the Provincial Education Department of the North Western Province.

A preliminary investigation was conducted following the audit report on the PSC's direction. A preliminary investigation report was issued on 7th February 2018 after the preliminary investigation was completed. Pursuant to the said report, the 1st Respondent requested the PSC to grant covering approval for the attachment of the Petitioner to the Wayamba Provincial Department of Education and for approval to implement the recommendation of transferring the Petitioner in the preliminary investigation report. The PSC approved the transfer of the Petitioner after taking into account the preliminary investigation report.

Nevertheless, whether the fundamental rights of the Petitioner guaranteed under Article 12 (1) has been violated or not must be decided on the material available with the predecessor of the 1st Respondent at the time P21 was issued. The temporary attachment made by P21 cannot be justified based on subsequent events. In fact, the Respondents have, at paragraph 4 of the written submissions filed with motion dated 3rd February 2022, emphasised that the decision made in 2016 was reasonable based on the material available to the Secretary, Ministry of Education at the time the decision was made. According to the Respondents as well, the focus should be on the material available at the time P21 was issued.

This position appears to have been in the minds of the drafters of the Procedural Rules on Appointment, Promotion and Transfer of Public Officers and to provide for matters connected therewith and incidental thereto published in Gazette No. 1589/30 dated February 20, 2009 (PSC Rules 2009). Rule 221 reads:

> "*221.* ***The Appointing Authority shall record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service***. *The Appointing Authority shall convey the reasons to the officer concerned.*" (emphasis added)

The Appointing Authority cannot use other materials that were not available at the time of the decision to justify the transfer because of this obligation.

I am conscious that the Respondents do not assert that the Petitioner was transferred. They claim that it was only a 'temporary attachment' based on service exigencies. Nevertheless, there is no reference to 'temporary attachment' in the PSC Rules.

Moreover, the Respondents have in the written submissions filed with motion dated 3rd February 2022, sought to rely on Rule 218 (iii) of the PSC Rules to justify the contents of P21. Rule 218 (iii) empowers a transfer on the basis of exigencies of service *"where it is found, due to administrative reasons, that the retention of an officer in his*

present station is not suitable". As a result, the Respondents acknowledge that P21 is in fact a transfer.

The Respondents deny that the transfer was due to disciplinary reasons. It is claimed to have been due to exigencies of service. Such a transfer can indeed be made in accordance with Rule 243 (XXVI) of the PSC Rules, which reads:

> "*'Transfer' means the* ***moving of a public officer from one station or institution to another station or institution*** *by the Commission or an authority with delegated power at their discretion or on disciplinary grounds or on the proposal of an Annual Transfer Committee and/or on the recommendation of an Annual Transfer Proposals Review Committee or on the request of the officer or* ***on exigencies of service*** *or on the appointment of the officer to another post as a result of promotion.*" (emphasis added)

The 1st Respondent in his affidavit states that in the light of the findings of the internal audit report (1R1), his predecessor was of the opinion that due to administrative reasons borne out in the said report, the retention of the Petitioner as Principal of Nakkawatta School was not suitable.

However, P21 does not refer to the transfer made for the reasons outlined in the affidavit of the 1st Respondent. It merely states that the transfer is made due to exigencies of service.

PSC Rule 218 identifies three situations where a transfer can be made on the exigencies of service. They are:

> *(i) Where the services of an officer is no longer needed at his present station;*
>
> *(ii) Where an officer is needed for service in another station or that particular officer himself is needed;*

(iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable.

Hence, it was imperative for the Secretary of the Ministry of Education to specify in P21 which of the above is the reason for the transfer of the Petitioner. This enables the Petitioner to become aware of the reasons for her transfer and take any necessary steps to defend her rights.

In ***Dayasena v. Bindusara, Director, National Blood Transfusion Service and Others*** **[(2003) 1 Sri.L.R. 222]** court was called upon to examine the legality of a transfer order. Fernando J. held (at page 227):

"While the 2nd Respondent had authority to transfer the Petitioner on one or more of the grounds stated above, there is no proof that he did actually make a transfer order. Even assuming that he did make a transfer order, there is no evidence as to the basis on which he acted, and it cannot be assumed that it was on one of the four permitted grounds. But even if I were to assume that he did act on one of those grounds, yet that ground and the supporting reasons were not disclosed to the Petitioner when the transfer order was made, and even when his appeals were refused and that was a fatal flaw…In the present case, not only the reasons but even the ground had not been disclosed. I therefore hold that the Petitioner's transfer was wrongful and arbitrary."

Moreover, a public officer cannot be transferred due to service exigencies at the whims and fancies of a superior. PSC Rule 219 requires that before a public officer is transferred on exigencies of service, the Authority with Delegated Power shall personally satisfy himself that need has actually arisen as specified in Rule 218 and that the transfer cannot be deferred till the next annual transfers. Accountability and transparency are established by this.

PSC Rule 221 seeks to crystallise this situation by requiring the Appointing Authority to record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service. The Appointing Authority shall convey the reasons to the officer concerned. These are mandatory requirements.

In ***Premachandra v. Bandara, Secretary Ministry of Lands, Irrigation and Mahaweli Development and Others*** **[(1994) 1 Sri.L.R. 301 at 318]**, Fernando J. held, in reference to the scheme stipulated in the Establishment Code, that:

> *"[…]* ***when the law requires disclosure of such reason****, it will have to be disclosed – and,* ***if not disclosed****, legal presumptions will be drawn.*" (emphasis added)

The note or minute the Secretary, Ministry of Education should have recorded in the relevant file in terms of PSC Rule 221 would have established if the transfer of the Petitioner was made for the reasons outlined in the affidavit of the 1st Respondent. However, the Respondents have not produced the said note or minute.

In the absence of such note or minute, the best evidence to prove that the Petitioner's transfer was actually based on the internal audit report (1R1) is not available. Furthermore, the internal audit report (1R1) does not recommend the Petitioner's transfer.

In the aforementioned circumstances, we are entitled to draw an adverse inference in terms of section 114 (f) of the Evidence Ordinance that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.

Moreover, in response to the appeal made by Petitioner to the PSC, the PSC referred the letter dated 05.10.2016 (P37) stating that:

> "සී.ඩී.බී. බස්නායක මහත්මිය විසින් 2016.08.30 දිනැතිව උක්ත කරුණ සම්බන්ධයෙන් ඔබ මගින් මා වෙත යොමු කර ඇති අභියාචනයක ප්‍රගමන පිටපතක් මෙම කාර්යාලය වෙත ලැබී ඇත.

02. එහි පිටපතක් මේ සමඟ අමුණා එවන අතර, අභියාචනයෙහි සඳහන් කරුණු සම්බන්ධයෙන් ඔබගේ නිරීක්ෂණ හා නිර්දේශ රාජ්‍ය සේවා කොමිෂන් සභාව වෙත ඉදිරිපත් කිරීමට හැකිවනු පිණිස දන්වා එවන ලෙස කාරුණිකව දැනුම්දෙමි.”

The final sentence of the passage confirms that the internal audit report (1R1) did not reach the PSC by the date mentioned earlier. It should be noted that there is a nearly two-month difference between the letter dated 10.08.2016 (P21) and the letter dated 05.10.2016 (P37).

In the circumstances, I am inclined to draw the inference that the transfer was not based on the internal audit report (1R1).

Nevertheless, the Respondents submit that the internal audit report (1R1) is dated 4th August 2016 and P21 is dated 10th August 2016. As a result, the Petitioner has been transferred within a week of the internal audit report (1R1). The Respondents argue that the close proximity of the two events indicates a causal nexus between the audit report and the action taken.

Assuming that the transfer of the Petitioner was actually based on the internal audit report (1R1), it is nonetheless troubling for various reasons.

According to the Petitioner, the audit officers who conducted the audit failed to record her statement, nor did they make any inquiries from her regarding matters stated in the internal audit report (1R1). According to the Petitioner, she became aware of the report when it was filed with the objections in this application.

It was admitted that the audit was finished within a day. The report does not refer to any statements recorded from the Petitioner or at a minimum, any inquiries made from her regarding the matters dealt with therein. The decision to transfer the Petitioner had allegedly been taken based on such a report.

Public officers play a crucial role in providing public services to the public. They do so at great sacrifice, disregarding more lucrative opportunities in the private sector, and for a meager salary.

It is important to point out that the SLEAS is perhaps one of the most significant sectors in the public sector of the country. The concept of 'free education' makes it even more special. The public officers' role in the context of free education does not merely suggest that education is provided free of charge by the State, but it is offered to the highest standard within the limitations of the resources available. Furthermore, Article 27 (2) (h) of the Constitution states that:

> "*27. (2) The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include – […]*
>
> *(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.*"

The concept of free education is still maintained by Sri Lanka, which is a welfare State, through tax payer money. Due to this, administrators have a higher responsibility in ensuring that education is provided smoothly, effectively, and efficiently. The process of developing a robust system begins within the system itself. Free education can only produce the desired results if the administration maintains the highest standards in its functions. Actions with negative outcomes, whether deliberate or inadvertent, will result in demoralising the teachers, which in turn negatively impacts their productivity. The lower officials cannot be expected to adhere to the laws and norms of the public sector if the higher officials fail to do so. Moreover, the failure to uphold the highest standard would ultimately affect the student.

In ***Premachandra v. Bandara, Secretary Ministry of Lands, Irrigation and Mahaweli Development and Others*** **[(1994) 1 Sri. L. R. 301 at 318]**, Fernando J. held that:

> "***The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration*** *and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is reali[s]ed.*" (emphasis added)

An individual's dignity and freedom are guaranteed by the Preamble to the Constitution. In the case of teachers, it requires that they be assured of good working environment where they are able to render their services with dignity befitting of the sacred role, they play in molding future generations. Any action taken in relation to a public officer must conform to the rules that the State has adopted.

In ***Abeywickrema v. Pathirana and Others*** **[(1986) 1 Sri. L. R. 120 at 138]** Sharvananda C.J. held:

> *"Article 55 (4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers […] The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation, though they may be applied to a particular class of public officers. This power is a legislative power and this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative, not executive or judicial in character. A rule made in exercise of this power by the Cabinet has all the binding force of a statute, or regulation.*"

The same rationale applies to the PSC Rules which have constitutional underpinning and were issued by the PSC in accordance with Article 61B and 58 (1) of the Constitution. It is important to follow them in all matters pertaining to public officers. Failure to do so will result in a violation of Article 12 (1) of the Constitution.

The decision to transfer the Petitioner by P21 was made based on an internal audit report that was prepared without recording a statement from the Petitioner. Moreover, the Secretary of the Ministry of Education has failed to comply with PSC Rule 221. The Petitioner was not made aware of the reasons for her transfer. The PSC Rules recognise three different categories of exigencies of service, so merely stating that it was on exigencies of service is not sufficient.

Based on the foregoing reasons, I hold that the Secretary, Ministry of Education has violated the Petitioner's fundamental right under Article 12 (1) by issuing P21. I award her a sum of Rs. 1,00,000/= as compensation payable by the State, and a sum of Rs. 50,000 as costs also payable by the State.

Both of these sums should be paid to the Petitioner within one month of the judgment.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wasana Niroshini Wickrama,
School Road,
Dodampapitiya,
Uthumgama,
Mathugama.

Petitioner

SC (FR) Application No. 349/2014

Vs.

1. **Nalaka**,
   Acting Officer-in-Charge.

2. **A. A. K. S. Adhikari**,
   Officer-in-Charge.

   Both of;
   Welipenna Police Station,
   Welipenna.

3. **N. K. Illangakoon**,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

3(A). **Pujith Jayasundara**,
   Inspector General of Police,
   Police Headquarters,
   Colombo 01.

4. **Hon. Attorney General**,
Attorney-General's Department,
Colombo 12.

Respondents

Before : **E. A. G. R. Amarasekara, J**
Achala Wengappuli, J
K. Priyantha Fernando, J

Counsel : Pulasthi Hewamanne with Harini Jayawardhana for the Petitioner.

Chula Bandara for the 1st and 2nd Respondents.

Lakmali Karunanayake, DSG for the 3rd and 4th Respondents.

Argued on : 08.08.2023

Decided on : 16.10.2023

K. PRIYANTHA FERNANDO, J

1. The petitioner in this case is a 33-year-old who has been arrested by the police pursuant to a warrant being issued against her. The petitioner alleges that, the manner in which the respondents carried out her arrest and the events following such arrest have violated the fundamental rights guaranteed to her under Articles 11, 12(1), 13(1) and 13(2) of the Constitution. At the hearing of this application, this Court granted leave on the alleged violations of Articles 11 and 12(1) of the Constitution.

2. The Petitioner's Position.

On 19.05.2014 at around 5.15 p.m. the acting Officer in Charge of the *Welipenna* police station (hereinafter referred to as the 1st respondent) has arrived at the residence of the petitioner in a police jeep along with four other police officers. According to the petitioner, at the time the 1st respondent and the other police officers arrived, the petitioner and her family has been inside their house. The petitioner states that she has been breastfeeding her youngest child who was seven months of age at the time. The four police officers have walked towards the petitioner's husband and has informed him that a warrant has been issued against the petitioner and her mother for failing to appear before the Magistrate of *Mathugama* in case No. 7653/14.

3. The petitioner's husband has requested the 1st respondent that he be permitted to bring the petitioner to the *Welipenna* police station the next day or to be permitted to have the petitioner produced directly to Court. However, the 1st respondent has denied this request, and has tried to arrest the petitioner in executing the warrant.

4. Upon hearing the conversation between her husband and the 1st respondent, she has come out of her house carrying her youngest child in her arms, accompanied by her daughter who was two-and-a-half years of age. After getting to know that she was to go to the police station, she has requested for a woman police officer to accompany her to the police station.

5. The 1st respondent has denied her request for a woman police officer to be present and has grabbed the petitioner by her left upper arm and pushed her into the police jeep. She alleges that, when she was pushed into the police jeep along with the child that she was carrying, she was partially denuded. She further alleges that, she suffered intense humiliation as the neighbours also witnessed the treatment that was meted out to her. Thereafter, the mother of the

petitioner has been arrested and the 1st respondent has also grabbed the daughter of the plaintiff and pushed her into the police jeep.

6. It is averred that, although she and her husband requested that the children be left at home, the 1st respondent has refused such request and has directed the petitioner's husband that if he wished to collect the children, he should come to the *Welipenna* police station. The petitioner further alleges that, she was not informed of the fact that a warrant has been issued and no copy of the warrant has been shown to her.

7. At about 7.00 p.m. on the same day, the petitioner's husband, along with her family and some neighbours have come to the *Welipenna* police station to request the 1st respondent to release the children. The 1st respondent has informed the petitioner's husband to come on the following day to collect his children.

8. On the next morning (20.05.2014), the 1st respondent has directed the petitioner's husband to come to Court and informed him that the children will be released in Court. Thereafter, the petitioner's husband has complained to the National Child Protection Authority (NCPA). However, the petitioner states that no steps have been taken regarding the same.

9. According to the petitioner, at about 11.45 a.m., the petitioner has been produced before the Magistrate's Court of *Mathugama*. The petitioner and her children have been immediately released. The petitioner whilst stating that she was not permitted to make any statement in Court regarding the treatment that was meted out to her, has further stated that she did not wish to make such complain due to fear of repercussions from the police.

10. On 21.05.2014, the petitioner's husband has submitted a complaint to the Assistant Superintendent of Police (ASP) of *Kalutara* on behalf of the petitioner. Thereafter on 27.05.2014, a further complaint has been made to the Deputy Inspector General of Police (DIG) of *Kalutara*. Since no action was taken, on 13.06.2014 the petitioner's husband has submitted a complaint to the Inspector General of Police (IGP) (3rd respondent) regarding the events that had transpired. Although a complaint bearing No. IGP/PAC/O/673/2014 has been recorded, the petitioner alleges that she is unaware of any action being taken regarding the same. On 17.06.2014, the petitioner's husband has also submitted a complaint on behalf of the petitioner to the Human Rights Commission of Sri Lanka, regarding the arrest that took place on 19.05.2014 and an inquiry is pending.

11. <u>The Respondents' Position</u>

The 1st respondent in his response, denying the allegations against him states that, on 19.05.2014, he has reached *Dodampapitiya* along with his team to arrest the petitioner and her mother in terms of the order bearing No. 658/14 on a warrant issued against them in case No. 7653/14 in the Magistrate's Court of *Mathugama*. However, when the petitioner was informed about the warrant and shown the warrant, the petitioner has resisted arrest and has clung on the 1st respondent's hand and has also started shouting in a threatening manner and stated "මම යන්නේ නැහැ යකෝ". She has also yelled at the police in abusive language. The petitioner has also refused to part with the child and has refused to wear appropriate clothing to go to the police station. In the backdrop of these circumstances, the subordinate police officers have pushed her into the police jeep as she was resisting arrest. Both the petitioner and her mother has been taken into custody. The 1st respondent also states that, he did not pull the petitioner's jacket causing it to tear. Thereafter, at the police station, the 1st respondent has directed a matron to attend to the petitioner and her mother

and they were searched and detained under the supervision of the matron.

12. Contrary to what the petitioner states, the 1st respondent states that, the mother of the petitioner, the petitioner, and her youngest child who she refused to let go, had been taken into custody and were taken to the police station. Thereafter, at around 9.00 p.m. on the same day, the petitioner's husband has come to the police station and has forcibly left the older child in the custody of the petitioner without the permission of the 1st respondent.

13. The 1st respondent stated that, he had every authority to make the arrest as there was a warrant issued on the petitioner and her mother. He denies the allegations made by the petitioner of ill treatment and assault and states that, he had to use reasonably necessary force to effect the arrest as the petitioner had been acting in a violent manner. The 1st respondent states that, he had not acted in a manner which would violate the fundamental rights of the petitioner. A copy of the extract from the day book maintained at the *Welipenna* police station has been produced as [A-6].

14. The 2nd respondent, who is the Officer in Charge of the *Welipenna* police station stated in his affidavit in response, that on 19.05.2014 which was the day the petitioner was arrested, the 2nd respondent has been on official duty appearing before the High Court of Anuradhapura in case No. 129/13.

15. **Alleged violation of Article 11 of the Constitution.**

The learned Counsel for the petitioner on behalf of the legal aid commission, submitted in her written submissions that, in the case of ***W.M.K. de Silva v. Chairman, Ceylon Fertilizer Corporation [1989] 2 S.L.R. 393*** it was recognized that Article 11 of the Constitution is not confined to physical violence and encompasses protection against emotional or psychological harm as well. The claim in the instant case is also based on psychological harm that was

suffered by the petitioner. It was submitted that the petitioner has suffered immense psychological harm when she was berated in the presence of her family and neighbours, when she was arrested demeaning her dignity, her clothes been torn and being partially denuded and having to travel to the police station in such torn clothing in the presence of male police officers, being pushed into the police jeep while carrying her child, witnessing her daughter being manhandled into the police jeep. She has also suffered immensely for not being able to provide protection for her children and fearing for their safety.

16. The learned Counsel for the petitioner relied on the case of ***W. Nandasena v. U.G. Chandradasa, Officer-in-Charge Police Station Hiniduma and Two Others [2006] 1 Sri.L.R. 207*** and submitted that allegations of the violation of Article 11 can be proven by way of affidavits even in the absence of medical evidence where the suffering was of an aggravated kind. Even in the instant case, the affidavits of the petitioner's family and neighbours corroborate the evidence of the petitioner being subjected to degrading treatment by the respondents.

17. The learned Counsel for the petitioner further submitted that, in the case of ***Adhikary and Another v. Amerasinghe and Others [2003] 1 S.L.R. 270*** the Courts recognized the plight of a mother and her little child whose allegations were not physical injuries, where there was no evidence of physical injury and no submission was made as to medical evidence. However, the Court in the above case recognized the psychological harm suffered by the wife who was torn between the safety of her husband and her child and the feelings of the husband who could not protect his wife and his child from the respondents when he was being arrested. It was submitted that the above case has glaring similarities with the instant case.

18. It was further submitted that, the petitioner in the instant case too undeniably faced immense humiliation in the presence of neighbours and male officers when she was partially denuded by the 1st respondent, further she was in anguish as she was unable to protect her infant son who was in her arms when she was pushed into the police jeep. She has also feared for the safety of her two-and-a-half-year-old daughter when she was pushed into the police jeep.

19. The learned Counsel submitted that, as Article 11 of the Constitution has several limbs, in the event the conduct of the respondents in respect of the petitioner and her family does not amount to torture, it would at least fall within the second limb which is "cruel, inhuman or degrading treatment."

20. The learned Counsel for the petitioner further submitted that, the police have got angered when the petitioner's family requested if she could be brought directly to police station the next morning and when she requested time to dress herself. It was submitted that, the acts of the police in making the petitioner's children spend the night at the police station while being denied the safety of their home was to punish the petitioner by placing her children through unnecessary trauma. This has caused anguish to the petitioner. This is an unnecessary and disproportionate response by the police. Therefore, it violates Article 11 of the Constitution.

21. It was further submitted by the learned Counsel that, in the case of **Subasinghe V Police Constable Sandun [1999] 2 S.L.R. 23** the Court has recognized that the conduct of police in causing an affront to an individual's human dignity as being violative of Article 11 of the Constitution. It was submitted that the petitioner was stripped off of her human dignity by the actions or inactions of the respondents. Therefore, her rights guaranteed under Article 11 of the Constitution has been violated.

22. It was submitted by the learned Counsel for the 1st respondent that, the documents tendered to this Court by the petitioner in support of her petition does not establish the veracity of averments made by the petitioner in her application to establish a violation of the said Articles.

23. The learned Counsel for the 1st respondent submitted that, as laid out in the case of ***Velmurugu v. AG [1981] 1 S.L.R. 406.*** The standard of proof in deciding whether any fundamental right has been infringed is the standard of proof in Civil matters. Further in ***Channa Pieris v. AG [1994] 1 S.L.R. 1*** it has been held that having regard to the gravity of the matter in issue, a high degree of certainty is required before the balance of probability might tilt in favour of the petitioner to discharge his burden of proof that he was subject to torture, cruel inhuman degrading treatment or punishment. The petitioner must adduce sufficient evidence to satisfy Court that Article 11 has been violated. Further in ***Jeganathan v. AG [1982] 1 S.L.R 294*** it was held that when public officers are accused of violating Article 11 of the Constitution such allegation must be strictly proved.

24. The learned Counsel for the 1st respondent further submitted that, section 12 of the Convention Against Torture and other Cruel, Inhuman or Degrading treatment or Punishment Act, No. 22 of 1994 defines 'torture' and therefore, it must be ascertained whether the allegations made by the petitioner falls within such criteria in determining if Article 11 of the Constitution has been violated.

25. The learned Counsel for the 1st respondent further submitted that, the police officers who were performing a legal duty in executing a warrant, have used minimum force when she was held by her shoulder and pushed into the police jeep as the petitioner was vehemently against the arrest and refused such arrest.

26. It is further submitted by the learned Counsel that, the petitioner has failed to provide cogent evidence with regard to the alleged torture, inhuman and degrading treatment by the respondents.

27. When considering the instant application, it is alleged that the petitioner has been subjected to torture or cruel, inhuman or degrading treatment by the 1st respondent. It is also alleged that, such violations have taken place at the time of arrest of the petitioner and also while in the custody of the police. The petitioner alleges that her rights under Article 11 of the Constitution is violated by the acts of the respondents and it is furthered by the anguish she had to undergo as a mother for not being able to protect her children from the actions of the respondents causing her psychological torture. Article 11 of the Constitution of Sri Lanka provides that,

> *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

28. In the case of ***Amal Sudath Silva v. Kodituwakku, Inspector of Police and Others [1987] 2 Sri.L.R 119*** *Atukorale J* said that,

> *"Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torturesome, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force, being an organ of the State, is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to*

others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion."

29. When considering the above case, it is evident that the protection provided under Article 11 of the Constitution, unlike other fundamental safeguards, provides for absolute protection to an individual. It is recognized as an absolute right, which guarantees absolute protection. This means that, the freedom from torture cannot be tampered with, limited, or restricted under any circumstances. As it is observed in the case of *Amal Silva(supra)* the Courts of Sri Lanka have acted as guardians to ensure that this right is protected to its fullest measure.

30. In case of ***W.M.K. de Silva v. Chairman, Ceylon Fertilizer Corporation [1989] 2 S.L.R. 393*** it was stated that,

"I am of the opinion that the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well."

31. In light of the above case, it can be observed that Article 11 of the Constitution is not restricted to physical torture, it also includes mental torture within its realm. The instant case is striking as it relates to a lawful arrest carried out pursuant to a warrant being issued against the petitioner. Admittedly, a warrant has been issued against the petitioner and her mother for failing to appear before the Magistrate of *Mathugama* in case No. 7653/14. The petitioner and her mother have had a long-standing land dispute with a neighbour. When the police officers tried to inquire into the dispute on 10.03.2014 at the *Welipenna* police station, the

parties have behaved in an unruly manner inside the police station.

32. Pursuant to this unruly behaviour of the parties, the police have made an application and produced both the parties including the petitioner and her mother to Court in terms of section 81 of the Code of Criminal Procedure Act. The parties were required to show cause as to why they should not be ordered to execute a bond for keeping the peace in terms of section 81. However, the petitioner who was on bail failed to appear in the Magistrate's Court on the date she was required to show cause. As a result, the said warrant has been issued by the Magistrate's Court.

33. In the instant case, the petitioner has resisted lawful arrest. This is evident through the affidavit of the petitioner as well as the affidavits of the several witnesses marked [P-8(a)] and [P-8(b)]. Accordingly, when the husband of the petitioner has asked the petitioner to go to the police station with the police officers, she has resisted stating that, she cannot get into to the police jeep unless a woman police officer accompanies her. When a warrant has been issued, the person against whom the warrant is issued is expected to comply with such warrant. The petitioner could have avoided this entire course of events that allegedly caused her immense psychological torture if she had complied with the said police officers who were engaging in their official duty. One cannot make allegations of mental torture for the acts which are incidental to lawful actions of officials acting within their power.

34. When considering the allegations that the petitioner was berated and thereafter manhandled into the police jeep, it can be observed that the 1st respondent in his affidavit has also admitted that he did push the petitioner into the police jeep as she was resisting lawful arrest. Attention must be drawn to section 23(2) of the Code of Criminal Procedure Act No. 15 of 1979. It sets out that,

"If such a person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the person making the arrest may use such means as are reasonably necessary to effect the arrest."

35. It is clear that the petitioner in this case has resisted lawful arrest. Further, when perusing the document marked [A-6] and the affidavit of the 1st respondent where it has clearly been deposed that, when the petitioner was informed of the arrest, she has vehemently refused to comply with the warrant and has refused to part with her child. She has also refused to wear appropriate clothing and started shouting at the police in a threatening manner. Thereafter, the police officers have pushed her into the police jeep. When considering these circumstances, it seems to me that the conduct by the police officers in pushing the petitioner into the police jeep was reasonably necessary for the police to effect the arrest of the petitioner who was resisting arrest. Police officers are duty bound to comply with the warrant of arrest. Therefore, it is clear that in the circumstances of this case, the police officers have acted within the power conferred to them under section 23(2) of the Code of Criminal Procedure Act No. 15 of 1979.

36. It has also been alleged by the petitioner that, the acts of the 1st respondent have caused her clothes to be torn and she has been partially denuded and she has also had to travel to the police station in such torn clothing in the presence of male police officers. This has been denied by the 1st respondent in his affidavit. When perusing the affidavits of the witnesses on behalf of the petitioner, it can be observed that, most of the witnesses have deposed that the petitioner was partially denuded when the police officer carrying out the arrest grabbed her in order to effect the arrest. However, in the affidavit of the witness marked [P-8(c)] it has been deposed that, one of the police officers from the *Welipenna* police station have ripped off the upper garments of the petitioner, so as to completely denude her before she was pushed into the police jeep. This is patently an exaggeration.

Therefore, the veracity of such documents submitted by the petitioner is questionable.

37. Further, it is observed that the petitioner while resisting arrest was carrying her seven-month-old child in her hands. When the police used minimum force to push her inside the police jeep, the petitioner has been carrying the child in her hands. In a situation such as this, separating the infant child from the mother would be more traumatic to the mother and the child rather than allowing the child to be in the mother's arms. Therefore, it is the petitioner's resistance to lawful arrest, that has led to these events.

38. With regard to the two-and-a-half-year-old daughter, the notes made by the officer at the police reserve [A-6] clearly sets out that, the daughter had been subsequently brought to the police station by relatives and kept within the custody of the petitioner. The 1st respondent in his affidavit has also stated that the said daughter was not taken in the police jeep when the petitioner was arrested but that she was subsequently brought to the police station by her family. Therefore, the conduct of the police in respect of the petitioner's children cannot be considered as an unnecessary and disproportionate response.

39. The petitioner in paragraph 15 of her petition states that, when she was produced before the Magistrate's Court of *Mathugama* on the day after the arrest, she has not informed the Magistrate as to what had transpired. The petitioner claims that, she was not permitted to make any statement in Court, nor could the petitioner complain of the ill-treatment that was meted out to her by the police. The same position is taken by the husband of the petitioner in his affidavit [P-7]. However, the learned Magistrate has recorded that the petitioner has explained her absence in Court on the previous occasion. She had explained how she had been in the wrong Court room when the case was being called. Therefore, it is evident that the petitioner had sufficient opportunity to inform the learned Magistrate as to what had transpired and the alleged violations that took place if she so

wished. It is also clear that the petitioner has been insincere when she stated that she was not given the opportunity to speak in Court.

40. In case of ***Nandasena v. Chandradasa, O.I.C., Police Station, Hiniduma and Others. [2006] 1 Sri.L.R. 207*** it was stated that,

> "*When there is an allegation based on violation of fundamental rights guaranteed in terms of Article 11 of the Constitution, it would be necessary for the petitioner to prove his position by way of medical evidence and/or by way of affidavits and for such purpose it would be essential for the petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden. Discussing this position, Amerasinghe, J. in Channa Peiris and others vs Attorney General and others had clearly stated that,*
>
> > *"Having regard to the nature and gravity of the issue a high degree of certainty is required before the balance of probability might be said to tilt in favour of the petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment".*"

41. When perusing the several affidavits that have been filed on behalf of the petitioner, it can be observed that all the affidavits except for [P-8(c)] are verbatim. While statements that were made and incidents that occurred at the scene of arrest could nevertheless be verbatim, the use of the exact same words in describing matters incidental to the main incident raises a doubt in my mind as to the possibility of concoction or exaggeration. Further, the only affidavit that is not verbatim [P-8(c)] seems to be a clear exaggeration of the events that transpired (more fully described in paragraph 35 of this judgment). Therefore, when considering the probability in the sequence of events, I am inclined to accept

the version of the 1st respondent. Although the petitioner asserts that allegations of the violation of Article 11 can be proven by way of affidavits, where the affidavits in question creates a doubt as to concoction or exaggeration it would be unsafe to act upon them.

42. It can be observed that, while the case of ***Adhikary and Another v. Amarasinghe and Others [2003] 1 S.L.R. 270*** seems to have certain factual similarities to the instant case, it has important and striking dissimilarities as to the points of law. The petitioner in the above case was assaulted by the respondents who were security officers of a minister without any authority. However, in the instant case, a warrant has been issued by the Magistrate and the respondent police officers were exercising their lawful authority in arresting the petitioner in the instant case. Therefore, the rationale of that case cannot be applied in the instant case.

43. In light of the above findings, it is my view that, there has been no violation of the rights guaranteed to the petitioner under Article 11 of the Constitution. I cannot comprehend how effecting an arrest by the use of minimum force, while the person against whom a warrant has been issued is resisting arrest, would amount to a violation of Article 11 of the Constitution by the police. If this is allowed, the police officers would be obstructed from carrying out their official duties.

44. **<u>Alleged violation of Article 12(1)</u>**

The petitioner also alleges that the rights guaranteed to her under Article 12(1) of the Constitution is affected by the arrest, detention and the arbitrary and malicious conduct of the respondents.

45. The learned Counsel for the petitioner submitted that, as recognized in **Wickramasinghe v. Ceylon Petroleum Corporation [2001] 2 S.L.R. 409** the essence of Article 12(1) is reasonableness as opposed to arbitrariness. It was submitted that the police in the instant case have not acted reasonably but in fact they have acted arbitrarily. Therefore, the rights guaranteed to the petitioner under Article 12(1) of the Constitution has also been violated.

46. Further, it was submitted that the petitioner has not been shown the warrant as required by section 53 of the Criminal Procedure Code. It was submitted that this has violated the equal protection which has constitutionally been provided for in Article 12(1) of the Constitution.

47. When considering the alleged infringement of Article 12(1) of the Constitution it is clear that, as clearly explained previously in this judgment, the police in arresting the petitioner has not acted in an unreasonable or arbitrary manner as they have only used reasonable force in arresting the petitioner. The police have acted within the bounds of their authority in accordance with the power conferred to them under section 23(2) of the Code of Criminal Procedure Act No. 15 of 1979.

48. Article 12(1) encompasses two concepts, 'equality before the law' and 'equal protection of the law'. This is explained in the case of ***Satish Chandra v. Union of India [1953] A.I.R. 250*** where it was stated that all persons and things similarly circumstanced should be treated alike in the matter of privileges conferred and liabilities imposed.

49. As it was explained in the case of ***Leo Fernando v. Attorney-General [1985] 2 S.LR. 341***, 'equal protection of the law' does not mean that the same law should identically apply to all persons. What it stipulates is that, the law should apply similarly and without discrimination to all persons similarly situated. Thus, the petitioner in the instant case cannot claim that she has been treated arbitrarily as her circumstances are similar to a person against whom a

warrant has been issued and the police officers acting within their lawful authority has in my view, not denied the petitioner the equal protection of the law.

50. It has been deposed in the affidavit of the 1st respondent that the petitioner was informed of and shown the warrant. In any event, the petitioner should have been aware that a warrant would be issued against her and her mother for not appearing before the Magistrate of *Mathugama* in case No. 7653/14.

51. The petitioner has stated that, a female police officer has been absent while the petitioner was being arrested. She further states that, this has not been contradicted by the respondents. In light of this position, it is my view that, generally it is proper to accompany a female police officer when the person against whom a warrant has been issued is a woman. However, there is no rule of procedure requiring the same.

52. Section 30 of the Code of Criminal Procedure Act No. 15 of 1979 sets out that,

> *"Whenever it is necessary to cause a woman to be searched the search shall be made by another woman with strict regard to decency."*

The above rule of procedure relates to a situation where a search is carried out. When considering the facts of this case, there is no evidence of a search being carried out at the scene of arrest. Therefore, the fact that a woman constable was absent at the scene of arrest does not violate any rules of procedure. Therefore, this position advanced by the petitioner has no merit.

53. In a practical sense, the police officers intending to arrest a person against whom a warrant has been issued would generally expect that, the person against whom the warrant has been issued would comply with such order. Further, one

cannot expect the police officers to go back to the police station to bring a woman constable when the woman against whom the court has issued a warrant resists arrest.

54. In the circumstances of this case, it is my view that the rights guaranteed to the petitioner under Article 12(1) of the Constitution has not been infringed by the respondents as they have acted reasonably in exercising their lawful authority. Further, there exists no violation of rules as to procedure by the police officers.

55. Liability of the 2nd respondent.

At the argument of this appeal, the learned Counsel for the petitioner submitted that, the 2nd respondent who was the Officer in Charge of the *Welipenna* police station would also be liable for the actions of the police officers that carried out the arrest. It was stated that the OIC must take reasonable steps including the monitoring of subordinates. The Counsel for the petitioner relied on the cases of ***Ukwatta v. Sub Inspector Marasinghe S.C. F.R. Application No. 252/2006 S.C. Min. 15.12.2010, Sharmila v. K.W.G. Nishantha S.C. F.R. Application No. 398/2008 S.C. Min. 03.02.2023*** *and the case of* ***Sriyani Silva v. Iddamalgoda [2003] 2 Sri.L.R. 63.***

56. The learned Counsel for the 2nd respondent submitted that, on 19.05.2014, he was on official duty appearing before the High Court of Anuradhapura in case no. 129/13. The record book maintained by the *Welipenna* police station also confirms that the 2nd respondent was in Anuradhapura on official duty on that day [B-1].

57. In *Ukwatta(supra)* the petitioner has been brutally assaulted at the police station by the 1st respondent and other police officers. The 2nd respondent OIC in the above case has also been made liable as the illegal detention and torture of the petitioner could have been prevented by him and on the basis that alteration of information books by the 1st respondent could not have been carried out without the authority of the

OIC. When considering the facts and circumstances of the instant case, the alleged torture has taken place outside the police station. The arrest that was carried out by the 1st respondent and the subordinate officers was a lawful arrest carried out on the basis of a warrant and the 2nd respondent had been away on official duty and in a practical sense there is nothing that the 2nd respondent could have done to prevent these events. Therefore, due to the striking dissimilarities in the instant case when compared with the above case, the rationale in that case cannot be applied to the instant case.

58. Further, in the case of *Sriyani Silva(supra)* the courts found that the officer-in-charge was under a duty to take reasonable steps to ensure that persons held in custody were treated humanely and in accordance with the law. And that included monitoring the activities of his subordinates. However, in the instant case there has been no ill-treatment carried out against the petitioner in the police premises and neither has the 2nd respondent seen the petitioner. Therefore, as the above cases have no applicability to the instant case, the 2nd respondent OIC could not have been held liable in the circumstances of this case.

59. Liability of the 3rd respondent.
The petitioner in paragraph no.16 of the petition dated 28.11.2014 stated that, she is unaware of any action being taken by the 3rd respondent even after the complaint bearing No. IGP/PAC/O/673/2014 was recorded.

60. The learned Deputy Solicitor General (DSG) for the 3rd respondent contended that, the document marked [3R-1] as reported on 12.09.2014 clearly demonstrates that an inquiry has been conducted regarding the alleged violation. However, neither the petitioner nor her mother have appeared at the inquiry even after they were informed to be present. Thus, in light of the document [3R-1] it is my view that the 3rd respondent IGP has acted promptly and the petitioner has patently been insincere to Court in stating that she was unaware of any action being taken by the 3rd respondent.

Therefore, it is evident that the petitioner has not come to Court with clean hands.

61. Declaration.

In the above premise, for the reasons that I have elaborated above, I declare that the fundamental rights that have been guaranteed to the petitioner under Articles 11 and 12(1) of the Constitution has not been violated by the actions of the 1st to 4th respondents. I make no order with regard to costs.

JUDGE OF THE SUPREME COURT

JUSTICE E. A. G. R. AMARASEKARA,

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI,

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal against Judgment dated 01/03/2011 delivered by the High Court of Western Province exercising civil appellate jurisdiction at Kalutara in WP/HCCA/Kalutara/02/2010 (Revision) D.C. Kalutara 5350/L.

SC Appeal No. 97/2011

SC/HCCA/LA 121/2011

WP/HCCA/Kalutara/02/2010 (Rev)

D.C. Kalutara Case No. 5350/L

Matilda Herathge, of No.1118 F, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda.

Plaintiff

Vs.

Halowita Arachchige Dayananda, of No.1118E, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Defendant

AND

Matilda Herathge, of No. 1118F, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Plaintiff - Petitioner

Vs.

Halowita Arachchige Dayananda, of No.1118E, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

AND NOW BETWEEN

Matilda Herathge, of No. 1118F, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Plaintiff – Petitioner – Appellant

Vs.

Halowita Arachchige Dayananda, of No. 1118E, Jayawardena Avenue, Matugama Road, Nagoda, Dodamgoda

Defendant-Respondent-Respondent

Before: Buwaneka. P. Aluwihare, PC, J.

Vijith K. Malalgoda, PC, J.

E. A. G. R. Amarasekara, J.

Counsel: Ms. Sudarshani Coorey for the Plaintiff-Petitioner- Appellant

Argued on: 11th January 2021

Decided on: 19th October 2023

E. A. G. R. Amarasekara, J.

The leave to appeal application relevant to this appeal was filed by the Plaintiff Appellant Petitioner (hereinafter sometimes referred to as the Plaintiff) against the order dated 01.03.2011 made by the learned High Court Judges of the Civil Appellate High Court of the Western Province after the hearing of a revision application made to that Court. Being aggrieved by the order dated

11.12.2009 made by the learned Additional District Judge of Kalutara in case no. 5350/L, the Plaintiff made the aforesaid revision application to the said High Court. The learned District Judge made the said order refusing to accept a land registry folio G /63/221 which had also not been listed in terms of the provisions of the Civil Procedure Code, when the Plaintiff attempted to mark the said folio in evidence as P7 (marked as P10 with the Petition) during re-examination of the Plaintiff. The Plaintiff had argued before the learned Additional District Judge that, since there is a reference to this G/63/221 in the folio marked as V2, no harm would be caused to the Defendant Respondent Respondent (hereinafter sometimes referred to as the Defendant) by allowing to produce this document in evidence during re-examination and producing it in evidence would help to answer the matters in issue. The Defendant objected to the document as neither was it listed in terms of the law nor was shown during cross- examination. It was further stated on behalf of the Defendant before the District Court that documents cannot be marked during the re-examination; perhaps counsel for the Defendant would have meant that new evidence contained in documents cannot be allowed through re-examination- vide proceedings dated 11.12.2009 before the District Court).

As per the order made, the learned Additional District Judge has refused to allow the Plaintiff to mark the document stating that as per the provisions of Section 138(3) of the Evidence Ordinance, a document cannot be marked without permission, therefore, P7 (P10 with the Petition) was not allowed to be marked as evidence. I must state that what the learned Additional District Judge meant by "without permission' is not clear as the objection was raised when the permission was asked by the lawyer for the Plaintiff. Perhaps, what he meant would have been that there was no proper application due to the fact that when permission was sought it was not revealed that it was not listed in terms of section 175(2) of the Civil Procedure Code or it contains new evidence as contemplated in section 138(3) of the Evidence Ordinance. It must be noted here that a document cannot be produced in evidence without leave in terms of section 175(2) of the Civil Procedure Code if it was not included in a list filed in terms of section 121(2) of the Civil Procedure Code and that new matters cannot be introduced during re-examination without permission in terms of section 138(3) of the Evidence Ordinance.

As per the section 138(3) of the Evidence Ordinance, re-examination shall be directed to the explanation of matters referred to in the cross-examination and if new matters are introduced with the permission of court, the adverse party may further cross-examine. Thus, before obtaining permission, it may be necessary to enlighten the Court regarding the nature of the evidence and any lapse by the party requesting permission in order to evaluate whether introducing new evidence at that stage can be countered without harm only by further cross examination. When such permission is sought the Court shall see whether allowing it would prejudice the rights of the adverse party.

However, if dissatisfied by the order made by the learned Additional District Judge in the matter at hand, the Plaintiff could have taken steps to file a leave to appeal application, but without taking such a step, the Plaintiff, on the same day, had closed his case. Thereafter, the Defendant

also had closed his case without calling any evidence. The learned Additional District Judge has given time till 20.01.2010 to file written submissions. It appears that when the District Court case was pending for filing of the written submissions before judgment, on 18.01.2010, the Plaintiff has filed the aforesaid revision application before the Civil Appellate High Court praying to set aside the said order dated 11.12.2009 and for an order directing the District Court to accept the said folio G/63/221 and a deed bearing number 3060 attested by Kuintos Cory [Sic] Notary Public- vide X1. It must be noted that no permission was asked from the District Court to tender deed no. 3060 attested by Quintus Cooray, Notary Public in evidence. Thus, the revision application before the High Court focused not only in correcting the order made by the learned District Judge if there was any miscarriage of justice, but it also contained a prayer to allow a deed to be produced in evidence which application was never made before the District Court. In my view, the Plaintiff should not have asked any relief from the High Court in relation to the tendering of deed no.3060 as there was no application made in that regard to the original court nor a decision made on that aspect. However, there was no relief contained in the petition to the High Court praying to set aside all proceedings held after the said order was made by the District Court on 11.12.2009. Anyhow, in the leave to appeal application made to this court over the dismissal of the said revision application, other than for a direction on the District Court to accept the said folio G/63/221, there is no relief prayed in relation to the said deed no.3060, but it contains a new relief praying to set aside the proceedings that was held after the making of the said order dated 11.12.2009 by the District Court; a new relief that was not there before the High Court. Thus, other than correcting any errors in the order made by the learned High Court Judges, this application made to this Court is intended to get more relief which was not within the scope of the prayer made to the High Court. I do not think that it is proper for this Court to consider a relief which was not canvassed before the High Court in an appeal made against the order of the High Court.

Even the Plaintiff admits that the said Folio G/63/221 was not included in a list tendered in accordance with section 121(2) of the Civil Procedure Code. Section 138 of the Evidence Ordinance provides for clarifications which may be needed after cross-examination. If new evidence is led during such clarification with the permission of Court, the adverse party is entitled to cross examine again. Thus, it is necessary to see whether marking of the Folio G63/221 was necessary to clarify matters revealed through cross-examination or rather the application to produce the said folio was to cure the lapses made by the Plaintiff in preparing for the Trial and leading evidence. In this regard, it is pertinent to refer to the facts relevant to the case at hand.

The Plaintiff instituted the action by the plaint dated 31.01.2005 in the District Court of Kalutara against the Defendant for a declaration of title to a divided and defined allotment of land called Lot 3E of Lot 3 of Horagasmulla more fully described in the 2nd schedule to the plaint which was 2.73 perches in extent as per the plan no.4972A made by W. Seneviratne L.S., and sought a decree be entered in her favour, if necessary to evict the Defendant and place her in possession. She further prayed for recovery of damages from the Defendant for wrongfully removing the gate fixed by the Plaintiff.

The Plaintiff in her plaint averred;

- That she purchased Lots 3C and 3D of plan no 4972A of the same land upon deed No.1667 (marked P2 with the Petition) dated 06/05/1991 and used it as her place of residence along with her family.
- That she possessed the aforesaid Lot 3E of plan no.4972A along with aforesaid Lots 3C & 3D and later acquired title to the aforesaid Lot 3E by right of purchase of the same on deed of transfer No. 6794 dated 30/01/2003. (As per the said deed marked as P6 with the petition, the vendor is Alliance Finance Company Limited.)
- That she had acquired prescriptive title to the aforesaid lots 3E,3C and 3D.
- That the dispute arose when the Defendant who was residing in Lot 3B, on 15/11/2005, removed the wooden gate fixed up at the western boundary of the subject matter, Lot 3E.

The Defendant filed answer dated 25.04.2007 while denying the claims of the Plaintiff and stated that he bought his land Lot 3B by virtue of Deed No.33 dated 02/11/1992 attested by S. Abeyweera, Notary Public and used the aforesaid Lot 3E as part of vehicular access to his land and later bought the right of way over Lot 3E on 26.02.2002 by deed no.283 attested by said S. Abeyweera, Notary Public. As per the land registry folio marked P8 with the petition, which was marked at the trial as V2 before the learned Additional District Judge, the deed of the Defendant bears a prior date but the Vendor is one L.D. Henry Jayawardane. The Defendant, in his answer, denied any cause of action accrued to the Plaintiff against him and admits that he objected to a gate being fixed in November 2004 and states that on one occasion the Pradeshiya Sabha got the gate removed in January 2004. The Defendant claimed damages for malicious prosecution by the Plaintiff.

The Plaintiff filed a replication denying the claims of the Defendant and his counter claim. Even though the Defendant pleaded deed no.283 in his answer which was executed prior to the Plaintiff's deed no. 6794, other than refuting Defendant's cross claim, the Plaintiff had not taken any interest to state in the replication that the vendor in Defendant's deed had executed a deed conveying his rights to the vendor of his deed no.6794 prior to the execution of deed no.283 by deed no.3060 for which he tried to get permission from the High Court through revision application without making any application in that regard before the District Judge to produce the same. The Plaintiff's move to produce the folio marked P10, Folio G/63/221 (P7 at the trial) appears to be in support with this contention to indicate that the vendor in the Defendant's deed had transferred his rights to the vendor in Plaintiff's deed. Even if the Plaintiff did not aver those facts in the replication for some reason, the Plaintiff and his lawyers should have been vigilant to list those documents in the list that was to be tendered in accordance with section 121(2) of the Civil Procedure Code as those were vital to meet the case presented through the answer. It appears that they neglected to list them. Further, they have not asked permission to submit those documents as unlisted documents during the evidence-in-chief of the Plaintiff. The Plaintiff moved to tender folio marked P10, Folio G/63/221 (P7 at the trial) which was refused by the

District Court only after the Defendant tendered folio marked V2 in cross-examination which has a cross reference to Folio marked P10 with the petition. V2 has been marked to show that the Defendant has an older deed when compared to the Plaintiff's deed. In my view, there is nothing to clarify in that evidence. The attempt to mark P10, Folio G/63/221 (P7 at the trial) by the Plaintiff was to cover her lapses and bring new evidence to indicate that the vendor of the Defendant's deed had no title at the time he executed deed no. 283 which issue was there from the time the answer was filed. As mentioned above, the Plaintiff could have taken steps to present such a position from her replication, or take steps to give notice of her intention to produce such evidence at the trial by filing list of documents as contemplated by the Civil Procedure Code etc., which was neglected. If the plaintiff was vigilant enough to reveal her position while filing replication or to list the necessary documents in her list of documents, the Defendant could have listed what would have been necessary for him to meet the stance to be taken up by the Plaintiff in reply to his answer or he could have used the provisions in the Civil Procedure Code under chapter XVI including interrogatories and inspection and production of documents for the benefit of his case. This court also observes that P10, Folio G/63/221, the folio which is expected to be tendered in evidence, describes the Lot 3 with reference to a plan no.375 made by a surveyor named E.P. Gunawardane, and that plan has not been used in this case in evidence or to superimpose the plan used for this case. Since the prayer in the revision application to the High Court includes a prayer to accept deed no.3060 which was not moved in the original court, it is clear that the intention of the Plaintiff is to submit more documents other than the folio G/63/221(P10) which were not listed as per the provisions of the Civil procedure Code. This approach of the Plaintiff is further fortified, since the Plaintiff has prayed to set aside all the proceedings after the impugned order of the learned District judge which proceedings is resulted in consequence of closing of her case by the Plaintiff herself without resorting to the legal remedy available by filing leave to appeal application. It appears that the Plaintiff has not tendered a copy of the said deed no. 3060 along with the petition to the High Court, for the High Court, or now, for this Court to appreciate what it contains and to see the nature and contents of the evidence that the Plaintiff intends to lead. Thus, if the intention to use the said folio marked P10 and any document arising out of that was revealed through the replication or the list of documents, as said before, the Defendant could have used the provisions of the Civil Procedure Code for his benefit and could have included further documents (if any) in his list to meet the case intended to be presented by the Plaintiff. Further he could have asked for a commission to superimpose plans referred to in those documents. In the backdrop explained above, I am not inclined to accept the position that allowing this new evidence contained in P10 will not prejudice the rights of the Defendant even though he was not represented to present his case before this Court.

It is contended on behalf of the Plaintiff that the paramount consideration for a judge is the ascertainment of truth and not the desire of a litigant to be placed at an advantage by some technicality and it is also said that the Court can use its discretion, if special circumstances appear to it to render such a course advisable in the interest of justice, to permit those documents to be

marked. In this regard the Plaintiff has brought this court's attention to the decided cases in **Girantha et al. V Maria et al. 50 N L R 519** and **Casie Chetty V Senanayake (1999) 3 Sri L R 11.** In **Girantha et al V Maria et al** the Court was interpreting the repealed section 121 where there was no stipulation to file list of witnesses and documents 15 days before the date fixed for trial. By stating that I do not intend to say that ascertainment of truth or interest of justice are not matters of concern. They are indeed, but the Court must consider why this condition to file the list 15 days prior to date fixed for trial was introduced. One reason may be to avoid delays due to applications of this nature being made during the trial. On the other hand, listing of documents and witnesses was always there to avoid the element of surprise being caused to the opposite party by introducing new documents and witnesses during the course of the trial. In my view, by introducing this condition to file it 15 days before the date fixed for trial has caused a party to make the other party or parties to the action know the nature and extent of its evidence before the trial so that the other party or parties could take steps to properly meet the case presented by that party. For obvious reasons, in terms of proviso to section 175(2) of the Civil Procedure Code, the documents to refresh memory and documents intended to be shown during the cross examination are the only documents that need not be listed. For the interest of justice and ascertainment of truth, it is necessary for each party to know the scope of and nature of evidence of each other's case. If one acts in a prejudicial manner affecting the opposite party's rights or entitlements by not listing an important document, he or she cannot be allowed to ask permission to produce the same for interest of justice. In **Kandiah V Wisvanathan and Another (1991) 1 Sri L R 269**, it was stated that the precedents indicate that leave may be granted for documents that are not listed;

- Where it is in the interest of Justice
- Where it is necessary for the ascertainment of truth
- Where there is no doubt about the authenticity of documents (as for instance certified copies of public documents or records of judicial proceedings)
- Where sufficient reasons are adduced for the failure to list the document (as for instance where the party was ignorant of its existence at the trial)

It was further held in that case that leave may not be granted if the other party would be placed at a distinct disadvantage.

In the matter at hand, no acceptable reason has been given before the District Judge as to why the documents were not listed even when the Defendant revealed his stance through his answer. On the other hand, as explained before, P10, Folio G/63/221, which was refused by the District Court refers to a Plan in describing the land relevant to that folio and such plan has not been used for the purposes of this case as stated before. As per the application before the High Court, it appears that the Plaintiff intends to mark at least another deed after getting the impugned order vacated, for which no application was made before the District Court. That deed also may contain reference to plans etc. Without producing that deed before this Court, even this court cannot decide whether it affects the substantial rights of the Defendant. This also indicates that the

Plaintiff did not apprise the District Court fully regarding the new documents which she intended to produce in evidence during re-examination. If it was revealed before the learned Additional District Judge, the Additional District Judge would have referred to that deed too in his order. If these documents were revealed through a list and the Defendant was put on notice of the Plaintiff's intention to produce them, the Defendant could have taken steps to meet such evidence as explained above. Thus, in my view if the folio G/63/221 marked P10 was allowed to be produced during re-examination, it would have placed the Defendant at a distinct disadvantage. As said before, even if the decision of the learned Additional District Judge lacks clarity, his decision not to accept the document is correct.

On the other hand, without taking steps to file an application for leave to appeal against the impugned order of the learned District Judge, the Plaintiff closed her case on her own and the Defendant also closed his case without calling any evidence. It must be noted here, as per the surveyor's evidence led on behalf of the Plaintiff, there are discrepancies between the true copy of plan 4972A (marked as V1 at the trial) and the tracing (P2 at the trial) that was used to make his plan (P1 at the trial).

Just 2 days before the date of filing the final written submissions, the Plaintiff has filed the revision application dated 18.01.2010. In the said revision application, the Plaintiff has;

- Not revealed any reason for not using his right to file a leave to appeal application.
- Not revealed any reason for not listing relevant document/s in his list of documents even when the Defendant has revealed his position in his answer.
- Not revealed that she closed her case and accordingly the Defendant closed his case and matter was pending for written submissions prior to judgment.
- Not revealed the discrepancies revealed through evidence between the tracing his surveyor used and the certified copy of the same plan marked V1 at the trial and V1 was not even referred to in the Petition.
- Not revealed that even though she has asked relief in the revision application directing the District Court to accept the deed number 3060, she did not move the District Court to accept the same.
- Not prayed for an order to set aside the proceedings that took place after the closing of her case by her lawyer on her behalf.

It is expected from a party to reveal all material and relevant facts when praying for relief from a court. In **Wijesinghe V Tharmaratnam, Srikantha's L R (IV) at page 47**, it was held that revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of Court. It is not proper for a court to come to a conclusion that the circumstances disclosed in a petition shocks its conscience when the petition does not reveal certain facts that may give different complexion to the application before the court. As per the decision in **Perera V People's Bank (1995) 2 Sri L R 84**, revision is a discretionary remedy and the conduct of the party making the application is intensively relevant.

It is settled law that the exercise of the revisionary power is limited to instances where exceptional circumstances exist warranting the intervention of the court- vide **Hotel Galaxy (Pvt.) Ltd. V Mercantile Hotels Managements Ltd. (1987) 1 Sri L R 5 and Rustom V Hapangama & Co. (1978/79) 2 Sri L R 225. Cadaramanpulle V Ceylon Paper Sacks Ltd. (2001) 3 Sri L R 112.** Not allowing to produce the said Folio G63/221, P10 and a deed contained therein may be prejudicial to the Plaintiff's case but it was a result of her and her lawyer's being not vigilant, since if they were vigilant, they could have taken steps to reply referring to them in their replication or by listing them in their list of documents while giving notice to the Defendant to take steps to meet the case going to be presented against him through such evidence. Now, the Defendant cannot list any documents including plans or get commissions to execute superimpositions of the plans referred to in the said documents or if necessary, use provisions under chapter XVI etc. and that may cause unfairness to the Defendant. The result of the harm caused to the Plaintiff is part of her or her lawyer's negligence or a result of them being non-vigilant but the Defendant need not be allowed to suffer for that. Such a situation should not be considered as an existence of exceptional circumstances for the benefit of the Plaintiff even if not allowing the relief may cause harm to the Plaintiff's case.

It is true that even if there is an alternative remedy, when exceptional circumstances exist, the appellate court can exercise its revisionary jurisdiction but no reason has been elucidated to state why the Plaintiff closed her case without taking steps to file a leave to appeal application. After the impugned order in the District Court, the Plaintiff and her lawyer has not asked time to take necessary steps but proceeded to further re-examine and close her case. If such step was taken to file a leave to appeal application and leave was granted proceedings would have been stayed in the lower court. The Plaintiff's own conduct has made the opposite party and the court to proceed further and conclude the proceedings and allow the parties to file written submissions prior to judgment. In such a background, it is not proper to set aside the proceedings made after the impugned order made by the District Court and in fact, there is no such order prayed before the High Court. Even though, it is prayed before this court to set aside those proceedings, in my view, this court is not empowered in appeal to grant relief exceeding the relief prayed in the Court below, namely the High Court. In **Surangi v Rodrigo [2003] 3SLR 35** it was held that no court is entitled to or has jurisdiction to grant reliefs which is not prayed for in the prayers. Thus, the High Court could not vacate the proceedings taken up after the impugned order as there was no such relief prayed for and as said before, such part of the proceedings was not revealed by the petition to the High Court. By praying for a such relief in this Court, the Plaintiff is trying to cover his lapses in the application for revision to the High Court. If any harm is caused to the Plaintiff, it is due to her lapses from filing of the replication and listing of documents and so forth.

The Learned High Court judges has refused the application on the following grounds,

1. That the refusal of permission to mark folio G/63/221 has not caused any prejudice to the rights of the Plaintiff, as she was well aware that she had to prove how the title derived and that if she had a better title than the Defendant, she should have listed the relevant

prior registration extract of G/63/221 in her list of witnesses and documents whereas she has totally failed to do so, and therefore it is not correct to produce P7(P7 at the trial which is P10 with the Petition to this Court) during re-examination.

2. That the Plaintiff has failed to established the existence of exceptional circumstances.

3. That, as the revision application has been filed only after the closing of the case by both parties, it was not proper for the High Court to exercise its powers of revision at that stage.

4. That, no new evidence may be introduced in re-examination without the leave of court.

As per the item 1, 2 and 4 above, as explained before in this judgment, not allowing the relevant Folio may have caused some harm to the case of the Plaintiff and the Plaintiff may also need to mark at least another deed for which there was no application before the District Judge. However, this harm is caused by the lack of vigilance by the Plaintiff and her lawyers but allowing those documents in re-examination may cause prejudice to the Defendant. As such, circumstances relevant to this case do not establish exceptional circumstances other than a negligence or fault by the Plaintiff or her Lawyers. It was not proper to introduce new evidence at that stage that may cause harm to the Defendant. I have already dealt sufficiently above in relation to the revision application being filed after the conclusion of the cases of both parties without any prayer to vacate those proceedings taken up after the making of the impugned order by the learned Additional District Judge which resulted due to the close of her case by the Plaintiff.

Therefore, I answer the questions of law allowed by this Court when granting leave as follows,

Q. a) Whether the High Court erred in holding that no prejudice has been caused by the refusal of the application to mark P7 folio G/63/221 (P10 with the petition)?

A. The harm, if any, caused by the refusal is a result of the fault of the Plaintiff but allowing the application to mark Folio G/63/221 is prejudicial to the Defendant. Thus, the refusal is correct and this question has to be answered in favour of the Defendant.

Q. b) Whether the High Court erred in holding that it is not proper for the High Court to exercise its revisionary jurisdiction because the cases for both parties had been closed before the revision application was filed?

A. Answered in the Negative.

Q. c) Whether the High Court erred in holding that this application for revision cannot succeed because there were no exceptional circumstances involved in this matter for the exercise of revisionary jurisdiction?

A. Answered in the Negative.

Q. d) Whether the contents of folio G/63/221 arose directly out of the cross-examination; it was also relevant in respect of issues Nos 26 and 28 namely, whether it was the Petitioner 's (Plaintiff's) deed or the Respondent's (Defendant's) deed which passed the title?

A. It did not directly arise from the cross-examination but was in issue from the moment the answer was filed. Raising of issues no.26 and 28 itself indicates that the Plaintiff was aware about what she has to prove to be successful in the case filed but for some reason did not list the documents in terms of section 121(2) of the Civil Procedure Code. The Plaintiff could have taken steps to list necessary documents and indicate the scope of his evidence for the Defendant to take notice to prepare for his case and take necessary steps to present his case in relation to those documents. The question has to be answered in favour of the Defendant.

Q. e) Whether the order of the learned trial judge was ex facie and palpably incorrect in as much as the petitioner (Plaintiff) in fact sought the permission of court to produce p7(P10 with the petition), a copy of the said folio G/63/221, and that itself constituted a ground for the exercise of revisionary jurisdiction?

A. Even if the permission was sought to mark it during evidence in re-examination, no acceptable reason was given why it was not listed in term of section 121(2) of the Civil Procedure Code and why it was not moved to produce in examination-in-chief. Since allowing of the document at that stage could have caused prejudice to the Defendant, even if such request was considered as properly made, refusal to accept the document is correct and Revision being a discretionary remedy it should not have been used by the High Court. Hence this Court need not interfere with the decision. The question has to be answered in favour of the Defendant.

For the reasons given above this appeal is dismissed. No costs.

……..

Judge of the Supreme Court

Buwaneka P. Aluwihare, PC, J

I agree.

……..

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.

I agree.

……..

Judge of the Supreme Court

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

In the matter of an application for Appeal from an Order of the High Court of Civil Appeal of the Central Province Holden in Kandy dated 11th December 2020 in HCCA Kandy Case No. CP/HCCA/KAN/80/2017(FA), under the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 and Article 128 read with Article 154P of the Constitution.

SC Appeal No. 67/2021
SC HC CALA No. 56/2021
HC Appeal No. CP/HCCA/KAN/80/2017 (FA)
DC Kandy Case No. DDV 2387/12

Abdul Kareem Nizar
No.30/4
Galkanda Lane, Aniwaththa,
Kandy.

PLAINTIFF

vs.

Inoka Uthpalani Kaluarachchie
Ettiwatta,
Hettimulla.

DEFENDANT

AND BETWEEN

Abdul Kareem Nizar

No.30/4

Galkanda Lane, Aniwaththa,

Kandy.

PLAINTIFF - APPELLANT

vs.

Inoka Uthpalani Kaluarachchie

Ettiwatta,

Hettimulla.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Inoka Uthpalani Kaluarachchie

Ettiwatta,

Hettimulla.

DEFENDANT-RESPONDENT-PETITIONER

vs.

Abdul Kareem Nizar

No.30/4

Galkanda Lane, Aniwaththa,

Kandy.

PLAINTIFF-APPELLANT-RESPONDENT

BEFORE : S. THURAIRAJA PC, J

ACHALA WENGAPPULI, J AND

K. PRIYANTHA FERNANDO, J.

COUNSEL : Hemathilake Madukanda instructed by Udaya Bandara for the Defendant - Respondent - Petitioner.
Samantha Rathwatte, PC with M. Bandara instructed by Upuli Amunugama for the Plaintiff - Appellant - Respondent.

WRITTEN SUBMISSIONS : Defendant-Respondent-Petitioner – not filed.
Plaintiff-Appellant-Respondent – not filed.

ARGUED ON : 08th September 2023.

DECIDED ON : 20th October 2023.

S. THURAIRAJA, PC, J.

In the matter before this Court, the Plaintiff-Appellant-Respondent, namely Abdul Kareem Nizar (hereinafter referred to as "the Plaintiff"), brought forth a petition for the dissolution of his marriage with the Defendant-Respondent-Petitioner, namely Inoka Uthpalani Kaluarachchie (hereinafter referred to as "the Defendant"), praying for a decree of divorce *a vinculo matrimonii* on grounds of malicious desertion by the Defendant in the District Court of Kandy. The District Court, through its judgment rendered on 4th March 2017, adjudged that the Plaintiff had failed to substantiate the charge of malicious desertion and accordingly dismissed the Plaintiff's claim. Subsequently, the High Court of Civil Appeal of the Central Province Holden in Kandy, by Judgment dated 11th December 2020, held in favour of the Plaintiff and overturned the decision of the District Court.

The Defendant, aggrieved by the judgment of the High Court, has now sought recourse from this Court, lodging an appeal by way of Petition dated 13th January 2021,

praying that the High Court's Judgment be set aside, and the District Court's Judgment be reinstated.

Upon the presentation of the instant case before this Court on 16th July 2021, leave to appeal was granted on the following question of law:

> *"(i) Did the Civil Appellate High Court misdirect themselves that the evidence led by the Respondent amounts to malicious desertion?"*

The question of law set out above requires this Court to examine the evidence proffered before the District Court and subsequently determine whether the learned High Court Judges rightly diverged from the view taken by the learned District Court Judge in determining that the Plaintiff had satisfactorily established the culpability of the Defendant for malicious desertion.

Factual Matrix

The narrative of this case unfolds against the backdrop of a marriage between the Plaintiff and the Defendant on 31st January 2010. The Plaintiff is the husband, and the Defendant is the wife. No children were born of the marriage. Further, the Defendant surpasses the Plaintiff in age by seven years, and their affiliation to different religious faiths, Islam for the Plaintiff and Roman Catholic for the Defendant, underscores their diverse backgrounds. The registration of the marriage transpired without the knowledge of the Plaintiff's parents, primarily due to apprehensions stemming from their divergent religious affiliations. Nevertheless, the Plaintiff avers that, over time, his parents came to accept the marriage, even bestowing gold ornaments upon the Defendant as a symbol of their approval, a fact which is undisputed by the Defendant.

It is to be noted that on examination of the testimony, disparities exist in the chronology of events as recounted by both parties. The Plaintiff, employed within the hospitality industry in Sri Lanka at the time of the marriage, averred that he travelled to Seychelles in search of a new job in February 2010. Six months hence, in August

2010, the Defendant followed suit, and together, they established their matrimonial home in Seychelles.

The Plaintiff further contended that in the ensuing period between August 2010 and October 2011, there was a gradual breakdown of the marriage attributable to the Defendant's conduct. The Plaintiff highlighted a series of incidents: the Defendant's unfounded suspicions, escalating quarrels, and disparaging conduct towards the Plaintiff's friends and family, which allegedly culminated in emotional detachment and disruption of the Plaintiff's professional life. The Plaintiff posits the age disparity and religious divergence as contributing factors to the discord.

A specific incident of note (pages 81 and 84 of the Appeal Brief marked "X") involves an alleged visit by the Defendant to the Plaintiff's workplace, during which she caused a commotion that rendered an impossible work environment for the Plaintiff.

Notably, the Plaintiff and the Defendant frequently shuttled between Seychelles and Sri Lanka during their matrimonial journey. For instance, in October 2010, the Plaintiff and the Defendant returned to Sri Lanka and temporarily resided at the Defendant's parental home. The Plaintiff subsequently returned to Seychelles in late October 2010, with the Defendant joining him approximately a month later.

However, in October 2011, following an extended period of discord, the Plaintiff and the Defendant returned to Sri Lanka together. Upon arrival at the airport, the Defendant chose to depart with her parents. Since October 2011, the Plaintiff and the Defendant have maintained separate residences, marking a decisive cessation of conjugal cohabitation. This act of separation constitutes the basis for the Plaintiff's claim of malicious desertion against the Defendant.

The Plaintiff asserted that, during the period from October 2011 to the initiation of these proceedings, the Plaintiff took proactive steps, with the support of his parents, to invite the Defendant to resume marital life, which the Defendant had allegedly refused.

Conversely, the Defendant denied these averments made by the Plaint, stating that she did not intend to terminate the matrimonial relationship, and is, in fact, inclined to resume said matrimonial life with the Plaintiff, but on the condition that this is done so at any place except the Plaintiff's parental house. The Defendant has testified that the impetus for this condition is alleged mistreatment by the Plaintiff's family, in particular his sister, at the matrimonial home in Seychelles (page 85 of the Appeal Brief marked "X"). According to the Defendant, the Plaintiff's sister attempted to confine the Defendant in the matrimonial house in Seychelles to prevent her from visiting the Plaintiff's workplace and, as a result, the Defendant contends to possessing legal justification for not being inclined to resume marital life at the Plaintiff's parental house.

What does seem to be apparent, however, is that the above-mentioned incident appears to align with the Plaintiff's account of the commotion incited by the Defendant at his workplace.

On behalf of the Plaintiff, he and his father gave evidence. On behalf of the Defendant, the Defendant gave evidence, and no witnesses were called.

Analysis

Section 19(1) of the Marriage Registration Ordinance No. 19 of 1907, as amended, lists "malicious desertion" as one of the three grounds upon which a decree of divorce *a vinculo matrimonii* may be entered by a competent Court. This form of desertion may manifest either as *simple* malicious desertion (sometimes called *actual* malicious desertion) or by way of *constructive* malicious desertion.

The Marriage Registration Ordinance does not explicitly define the term "malicious desertion" employed in Section 19(2) of that enactment. Consequently, one has to peruse past decisions of the Courts to determine the constituent elements requisite for establishing grounds for divorce based on malicious desertion.

In ***Attanayake vs. Attanayake 16 Cey L. R. 206***, Poyser J identified the two pivotal elements necessary to establish malicious desertion as follows:

> *"In order to constitute desertion, there must be cessation of cohabitation and an intention on the part of the accused party to desert the other."*

This fundamental premise was affirmed by Sinha J in ***Bipinchandra Jaisinghbhai Shah vs. Prabhavati (AIR 1957 SC 176),*** wherein the learned Judge stated:

> "*For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi)."*

It has to be borne in mind that what constitutes malicious desertion invariably hinges upon the specifics of each case, as articulated by Jayawardena J in ***Gomes vs. Gomes (S.C. Appeal No. 123/14 by minutes dated 07th June 2018)***:

> *"The question of whether the elements required to constitute malicious desertion have been established in a particular case are questions of fact to be decided by the Court upon the facts and circumstances of each particular case."*

This is especially pertinent because, as observed by Sir Henry Duke (later Lord Merrivale P.), in ***Pulford vs. Pulford (1923 Probate 18)***:

> "*Desertion is not the withdrawal from a place but from a state of things*".

Factum of Separation

In the case of ***Gomes v Gomes (supra),*** Jayawardena J stated as follows:

> *"Simple malicious desertion or, as it is sometimes called, actual malicious desertion is where the spouse who is alleged to be guilty of malicious desertion physically separates from the matrimonial home* ***or terminates matrimonial consortium****, with the intention of deserting his or her spouse. The term "consortium" usually denotes the composite incidents of a marital relationship."*

[Emphasis added]

The term "consortium" is taken to be synonymous with "cohabitation" used in Poyser J's statement in ***Attanayake v Attanayake (supra)*** referred to above. Furthermore, Jayawardena J drew upon the elucidation of "consortium" as propounded by Harcourt J in ***Grobbelaar vs. Havenga (1964 S SALR (N) 522)***:

> *"An abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage… [which embraces] companionship, love, affection, comfort, mutual services, sexual intercourse - all belong to the married state. Taken together, they make up the consortium."*

In ***Rajeswararanee vs. Sunthararasa (64 NLR 366)***, Basanayake CJ stipulated that, with regard to the first requirement of the factum of desertion, the desertion must be *"against the desire"* of the deserted spouse.

Sinha J, in ***Bipinchandra Jaisinghbhai Shah vs. Prabhavati (supra)***, stated as follows:

> *"Two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively."*

It is, therefore, evident that in cases involving simple malicious desertion, the factum of desertion is substantiated when the spouse accused of malicious desertion deliberately and without sufficient cause, physically leaves the matrimonial home or ceases cohabitation against the wishes of the deserted spouse.

The Defendant contended that the Plaintiff failed to establish that she left the matrimonial home in Seychelles as they both left Seychelles jointly and arrived together in Sri Lanka in October 2011. In application of the above-established

principles to the instant case, however, the Defendant's choice to depart with her parents in October 2011, and thereby cease co-habitation with the Plaintiff, constitutes the initial requirement, i.e., the factum of desertion, requisite to establishing malicious desertion. On the face of the evidence presented to the District Court, in my view, the Plaintiff substantiates his claim that this separation was against his consent and willingness. Furthermore, it is important to note that between the period from October 2011 to the institution of legal proceedings, and up until present day, the Plaintiff and the Defendant have not lived together.

Animus Deserendi

In ***Perera v Gajaweera (2005 1 SLR 103),*** Wimalachandra J observed that establishing malicious desertion necessitates demonstrating:

> *"...not only the factum of the desertion but also the required animus to repudiate the marital relationship."*

In ***Silva v Missinona (26 NLR 113)***, Bertram CJ defined this concept as follows:

> *"Deliberate and unconscientious, definite, and final repudiation of the obligations of the marriage state."*

He further added that the desertion must be "*sine animo revertendi*", signifying that the deserting spouse must harbour no intention to resume the marriage.

Similarly, in the cases ***Goonerwardene v Wickremensinghe (34 NLR 5)***, Garvin SPJ opines:

> *"It must be of such a character as would justify the inference that the spouse who is alleged to have deserted the other did so deliberately and with the intention of repudiating the marriage state."*

In English case of ***Buchler v Buchler [1947 1 AER 319]***, Lord Greene MR stated:

"In the case of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one."

Consequently, the mere act of the Defendant discontinuing cohabitation serves as a sufficient foundation for inferring *animus deserendi*.

The Defendant's intention to desert the Plaintiff is further underscored by her refusal to recommence the marital life at the Plaintiff's parental house, citing mistreatment by the Plaintiff's family, which has led to her reluctance to reside in a place where she perceives a threat of confinement.

As articulated by Sinha J in ***Bipinchandra Jaisinghbhai Shah vs. Prabhavati (supra)***, a spouse charged with simple malicious desertion may counter such charge by establishing that he or she was justified in leaving the marital home or ceasing cohabitation because he or she was given sufficient cause to do so by the other spouse.

Dalton ACJ reflects this limitation in ***Ramalingam v Ramalingam (35 NLR 174)***, where the learned judge declared:

"*If a woman left her husband finally, against his will, and without legal justification, her desertion would in law be malicious."*

H.N.G Fernando J, as he was then, employed similar views in in ***Ariyapala v Ariyapala (65 NLR 453 at p.454)***.

Counsel for the Defendant invoked the case of ***Ramalingam v Ramalingam (supra)*** to establish that the Defendant possessed lawful justification for not residing in the Plaintiff's parental home due to fears of potential confinement.

The learned High Court Judges make reference to these averments in their verdict and state that by the Defendant's own testimony, where she alleges that the Plaintiff's sister endeavoured to confine her within the matrimonial residence in Seychelles to prevent her from causing disruptions at the Plaintiff's workplace (page 85 of the Appeal Brief marked "X"), confirms that such incidents caused by the Defendant have occurred in

the past. The learned High Court Judges further state that no police report or similar corroborative evidence attesting to such an incident involving the Plaintiff's sister was presented by the Defendant.

I am inclined to concur with the learned High Court Judges' inferences and, consequently, hold that the Defendant's desertion of the Plaintiff lacks legal justification and is, therefore, characterized by malicious intent.

Another facet to consider is the Plaintiff's averments that he entreated the Defendant to resume marital life before initiating legal proceedings in this Court.

In ***Muthukumarasamy vs. Parameshwary (78 NLR 488)*** Sharvananda J, as he then was, stated:

> "*Termination of desertion can take place by a supervening animus revertendi coupled with a bona fide approach to the deserted spouse with a view to resumption of life together... The refusal of a defendant's bona fide offer to return which the plaintiff had no right to refuse converted the plaintiff into the deserting party and the plaintiff thereafter became the deserter and rendered himself guilty of malicious desertion.*"

Similar views were taken in ***Canekaratne v Canekaratne (66 NLR 380)*** by Sasoni J:

> *"It should also be remembered that a spouse may offer to resume cohabitation after a separation has taken place, but it is for the Court to decide whether the offer is genuine. It is only genuine if there is 'a fixed and settled intention to offer a resumption of marital life under reasonable conditions'; and it will not be a fixed and settled intention if it is a mere 'fluctuating desire to resume cohabitation'. When either spouse has made such an offer, a rejection of it by the other will turn him or her into a deserter."*

This was affirmed by Jayawardena J in ***Gomes v Gomes (supra)***, where he observed:

"A desertion may end if, before the deserted spouse commences an action praying for a divorce on the ground of malicious desertion, the deserting spouse reconciles and returns to the matrimonial home or resumes cohabitation or makes a bona fide offer to do so. Further, an unreasonable refusal of such an offer by the erstwhile deserted spouse may, in some circumstances, turn the tables and make the erstwhile deserted spouse a deserting spouse."

The learned High Court Judges have referred to the Plaintiff's testimony that he, with the support of his parents, proactively sought the Defendant to resume marital life, which the Defendant allegedly declined. This submission is corroborated by the evidence submitted by the Plaintiff's father. The High Court Judges further referenced the Defendant's assertion that she has always acted with the sole purpose of maintaining marital life with the Plaintiff, yet, the learned Judges observed, she failed to exhibit any concrete positive steps or initiatives post-October 2011 to resume marital life.

In light of these aforementioned facts and circumstances, I discern no valid grounds to take a different view than that of the learned High Court Judges. The Defendant's claims of making multiple offers to recommence marital life do not appear genuine, particularly due to the absence of evidence to corroborate that these offers were made before the Plaintiff instituted legal proceedings.

Therefore, I am inclined to endorse the position taken by the learned High Court Judges, which entails setting aside the District Court's judgment and affirming that, based on the evidence presented before the District Court, the Plaintiff has satisfactorily proven that the Defendant is guilty of malicious desertion.

At this juncture, it is imperative to underscore that I am cognizant of the conventional understanding that marriage is not only a union of two individuals but also an amalgamation of two families and their respective cultural bonds, inevitably intertwined when two individuals enter into matrimony. This perspective finds

reflection in the law; the legal framework governing divorce in Sri Lanka, as embodied in the Marriage Registration Ordinance of 1907 and heavily influenced by pre-existing Roman-Dutch and English legal systems, is premised on the notion that marriage is a lifelong commitment that can only be dissolved upon on proof of serious matrimonial fault. This underscores the law's aversion to marital dissolution and its preference for the preservation of conjugal ties, even in the face of life's trials and tribulations.

In ***Silva v Missonona (supra)***, Bertram CJ refers to the following principle adopted in the South African case of ***Gibbon v Gibbon (1 2 E.D.C. 284)***, per Shippard J:

> *"The theory of the Roman-Dutch law appears to have been that divorce should never be granted while there remains a hope of reconciliation."*

However, the law and its application must evolve in conjunction with the shifting tides of societal mores and perspectives. Especially when drawing focus upon newer generations, it is hardly a need to say that venerable concepts such as education, financial independence, and gender roles in the context of marriage have transformed since the enactment of the Marriage Registration Ordinance in 1907, influenced partly by the cultures of Western societies. To a large extent, the current law remains unreformed and is, in several notable ways, incompatible with modern notions relating to marriage.

With this in mind, I allude back to Harcourt J's definition of the word "consortium" in ***Grobbelaar v Havenga (supra)***. On observation of this instant case, there is an evident absence of an abstraction encompassing companionship, love and affection, among other elements, within the marital relationship between the Plaintiff and the Defendant. Most importantly, I find a palpable absence of hope, replaced by a discernible withdrawal from a state of things amounting to "desertion," as elucidated by Sir Henry Duke (later Lord Merrivale P.), in ***Pulford vs. Pulford (supra).*** As stated above, notwithstanding the absence of any reservations in law about cohabitation during divorce proceedings, I do not observe any instances or even genuine attempts

at resuming marital life in the period between the institution of this action and the present day.

In fact, there is a striking observation in the Plaintiff's evidence: he testifies that he found the Defendant's behaviour so intolerable that,

> *"මට තීරණයක් ගන්න අමාරුයි. මට ඉවසාගන්න බැරි නිසා මම ආවේ. ඊට පස්සේ එයත් එක්ක ගිහින් මගෙන් එයාට කරදරයක් වෙයි කියලා මට බය හිතුනා."*

An approximate and unofficial translation of the above reads as follows:

> *"Making a decision is challenging for me. I came because I could not be patient any longer. Later, I was afraid that if I went with her, I would cause harm to her."*

In the face of such circumstances, I am of the view that this Court is not inclined to mandate cohabitation and the resumption of a marital life upon any man or woman, as the law currently stands, that appears before this Court.

Decision

Finally, I turn to address the question of law to which leave has been granted by the Supreme Court on 16th July 2021, as previously cited.

In response to the question of law, pursuant to the aforementioned facts and circumstances, I answer in the negative in finding that the learned Judges of the Civil Appellate High Court did not misdirect themselves that the evidence led by the Respondent amounts to malicious desertion. The appeal is thereby dismissed.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Articles 17 and 126 of the Constitution.

Mohamed Hashim Mohamed Ziyard,
204, Waragashinna, Akurana.

Petitioner

S.C.(F.R.) Application No. 112/2017.

Vs.

1. Mr. Anura Dissanayake,
Director General,
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

ADDED 1A. Subasinghe Mudiyanselage Gotabhaya Jayarathne,
Director General.

ADDED 1B. Rupasinghe Arachchilage Rohan Ratnasiri
Acting Director General,

ADDED 1C. Sarath Chandrasiri Vithana,
Director General

ADDED 1D. Dissanayake M. S. Dissanayake,
Director General

ADDED 1E. Bulathsinghaarachchilage Sunil Shantha Perera

ADDED 1F. Keerthi Bandara Kotagama
Director General,
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

2. D.A. Asantha Gunasekera,
Director (Lands),
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

ADDED 2A. Chistie Perera,
Director (Lands)

ADDED 2B. Eranthika W. Kualratne.
Director (Lands),
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

03. I.M.U.K. Kumara,
Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

ADDED 3A. Sugath Weerasinghe
Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

04. D.J.N. Wickramasinghe,
Deputy Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

ADDED 4A. J. Palitha Jayasinghe,
Deputy Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

ADDED 4B. I. Ranaweera.
Deputy Resident Project Manager,
Office of the Resident Project
Manager System H,
Mahaweli Authority of Sri Lanka,
Tambuttegama.

05. K.G.U.C. Kumara,
Block Manager,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchciyagama.

ADDED 5A. L.R.C. Nethipola,
Block Manager,

ADDED 5B. Kapila Kumara
Block Manager,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

ADDED 5C. P.W.P. Podimenike,
Block Manager,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

06. D.M. Panditaratne,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

ADDED 6A. E.M.Ratnalela
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

ADDED 6B. D. Ranjith Ekanayake,
Nochchiyagama Block Office,
Mahaweli Authority of Sri Lanka,
Nochchiyagama.

07. D. M. Somapala,
Ulukkulama,

Mahabulankulama

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

09. Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.

10. Hon. Chamal Rajapaksa,
Minister of Mahaweli,
Agriculture, Irrigation and Rural Development,
No.500, T. B. Jayah Mawatha,
Colombo 10.

Respondents

****

BEFORE : **MURDU N.B. FERNANDO, PC, J.**
A.H.M.D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Faisz Mustapha, P.C. with Ms.Thushani Machado for the Petitioner.
Ms. Kanishka de Silva, Balapatabendi SSC for the 1st - 6th & 8th -10th Respondents.
Nuwan Kodikara for the 7th Respondent.

ARGUED ON : 23rd February, 2023

DECIDED ON : 20th October, 2023

ACHALA WENGAPPULI, J.

The Petitioner, *Mohamed Hashim Mohamed Ziyard*, by his petition dated 15th March 2017, invoked the jurisdiction conferred on this Court

under Articles 17 and 126 of the Constitution, alleging infringement of his fundamental rights guaranteed to him under Articles 12(1) and 14(1)(g) by executive or administrative actions of the 1st to 6th and 9th Respondents.

When this matter was supported by the learned President's Counsel for the Petitioner on 03.07.2017, seeking leave to proceed, this Court thought it fit to grant leave only under Article 12(1). Pending hearing of the Petitioner's allegation, the caption to his petition was amended from time to time, in order to substitute several Respondents, in place of the ones who had since ceased to hold office. Relevant sub-paragraphs of the prayer to the petition too were amended to be in line with the reliefs sought against those substituted Respondents. On 30.10.2017, the Petitioner amended his caption by inclusion of the 9th Respondent, the *Mahaweli Authority of Sri Lanka*. On the same day the Petitioner also amended some of the reliefs sought in the prayer to reflect the changes made to the caption. On 27.01.2022, the Petitioner sought to add the Minister of *Mahaweli,* Agriculture, Irrigation and Rural Development, as the 10th Respondent with an amended caption. Latest to the series of amendments to the caption was made on 08.02.2022.

With the amendment made on 05.09.2019, the amended prayer of the petition reads as follows;

i. to declare that the failure to grant the Annual Permit to the Petitioner is an infringement and/or continuing infringement of the Petitioner's fundamental rights guaranteed to him under Article 12(1) of the Constitution

by the 1D, 2nd, 3rd, 4A, 5A, 6A Respondents and 9th Respondent or any one or more of them;

ii. to declare that the decision to cancel the nomination made in favour of the Petitioner and the subsequent issuance of an Annual Permit to the 7th Respondent is an infringement of the Petitioner's fundamental rights guaranteed to him under Article 12(1) of the Constitution by the 1D, 2nd, 3rd, 4A, 5A, 6A Respondents and 9th Respondent or any one or more of them;

iii. to declare that the failure to grant an Annual Permit to the Petitioner is an infringement and/or continuing infringement of the Petitioner's fundamental rights guaranteed to him under Article 12(1) of the Constitution by the 1D, 2nd, 3rd, 4A, 5A, 6A Respondents and 9th Respondent or any one or more of them;

iv. to declare the Annual Permit bearing No. අනු/එව්/නො/CLO/වාණිජ/ 2016/28) dated 29.12.2015 issued in favour of the 7th Respondent in respect of No. 283, *Puttalam Road, Nochchiyagama,* is *null* and *void*;

v. to direct the 1st to the 6th Respondents and 9th Respondent or any one of them to issue an Annual Permit to the Petitioner in respect of No.283 *Puttalam* Road, *Nochchiyagama*.

The added 1D Respondent (hereafter referred to as the 1st Respondent) and the 7th Respondent have filed their Statements of

Objection resisting the Petitioner's application and sought its dismissal with costs. In his Statement of Objections, the 1st Respondent made an attempt to explain away the basis on which the decision to cancel the Petitioner's selection to the disputed commercial property was made and the circumstances that led the 9th Respondent to issue an Annual Permit to the 7th Respondent, in respect of lot No. 283, for the second time.

The Petitioner's complaint to this Court is based on three decisions made to his detriment by the 1st to 6th and 9th Respondents, namely the decision to cancel the nomination already made in his favour, the decision to lease out lot No. 283 to the 7th Respondent and the decision to issue an Annual Permit (P30) in the 7th Respondent's favour. The petitioner therefore contends that these three decisions are arbitrary, capricious, unreasonable, and discriminatory.

At the hearing of this application, learned President's Counsel, who represented the Petitioner, submitted that;

a. the Petitioner's possession of the parcel of land under dispute had been regularised as far back as 2005, when he was selected for the issuance of a lease, which was communicated to him by letter dated 26.10.2007 (P13),
b. in furtherance to the said selection, the Petitioner duly complied with all the requirements set out in the letter P13, by making the relevant payments stipulated therein, including arrears of lease for the year 1999,
c. the Petitioner therefore had entertained a legitimate expectation that he would be issued with an Annual Permit as

indicated to him by letter dated 16.05.2013 (P19), which re-confirmed the legitimacy of his expectation,

In these circumstances, learned President's Counsel for the Petitioner had contended that the 1st to 6th and 8th to 9th Respondents, in making the decisions referred to in the preceding paragraph, have acted arbitrarily, capriciously and unreasonably as they frustrated the legitimate expectation entertained by the Petitioner and thereby infringed his fundamental rights to equality and equal protection of the law, as guaranteed by Article 12(1) of the Constitution. It was also contended by the learned President's Counsel that, in doing so, the 9th Respondent had taken irrelevant considerations into account in frustrating the Petitioner's legitimate expectation, when it considered his eviction from the land by the 7th Respondent, but failed to consider the relevant consideration that the said eviction was carried out when the latter had no valid permit.

In addition, the learned President's Counsel highlighted that the Petitioner was not heard by the 9th Respondent, the *Mahaweli* Authority prior to making a decision adverse to his interests and it failed to give any reasons for taking such a decision. He further contended that the *Mahaweli* Authority is in violation of the statutory provisions contained in Land Development Ordinance and the Regulations made under it, when the said Authority decided to issue an Annual Permit in favour of the 7th Respondent, after cancelling the one that had been issued in 1992.

Learned Senior State Counsel, in her reply on behalf of the 1st to 6th and 8th to 10th Respondents, strongly resisted the Petitioner's application. It was contended by the learned Senior State Counsel that

the 7th Respondent's illegal alienation of lot No. 283 and his failure to develop the same had resulted in the cancellation, not only of his selection to lot No. 283, but also the permit issued to him (1R2). None of these decisions were challenged before any Court by the 7th Respondent and thus remain valid to date. She then submitted, consequent to a complaint filed against the 9th Respondent Authority by the 7th Respondent before the Human Rights Commission, it was revealed that he had engaged in litigation with the Petitioner for over a decade pertaining to his rights to the land under dispute. It was further contended by the learned Senior State Counsel that the claim made by the Petitioner that his possession of the parcel of State land under dispute had been regularised by the 9th Respondent and that therefore he entertained a legitimate expectation to receive a permit in respect of that land, is misconceived in law and described as an attempt to place an incorrect position before this Court.

Learned Counsel for the 7th Respondent adopted a similar line by aligning with the position taken by the learned Senior State Counsel, in advancing a contention that the expectation claimed to have entertained by the Petitioner that he would be granted a permit was not a legitimate one and further submitted to Court that his client had vindicated his rights through Courts over the disputed parcel of State land, when the Petitioner illegally overstayed the lease, and thereafter employed other methods to deny him of his due right, that had been affirmed by Courts.

In view of the submissions made by the learned Counsel in respect of the parties they represent, it is helpful if the factual background relevant to the impugned decisions made by the 9th Respondent, which in turn gave rise to the allegation of infringement of

fundamental rights, made by the Petitioner in the instant application is referred hereafter *albeit* briefly.

The 7th Respondent was in possession of an allotment of State land, in extent of 2.5 perches, situated in *Nochchiyagama* town, facing *Puttalam-Anuradhapura* main road and identified as lot No. 283 of the *Nochchiyagama* Town Plan since 1982. After coming into possession, the 7th Respondent had put up a building on that land. In the year 1987, the 7th Respondent entered into an "agreement" (P2) with the Petitioner and two others. In terms of the said "agreement", the 7th Respondent had "*transferred his rights in the subject matter in dispute*" in favour of the Petitioner and others. The "*subject matter*" referred to in that agreement is the said parcel of State land possessed by the 7th Respondent at that point of time. The 7th Respondent was paid a sum of Rs.225,000.00 by the Petitioner and others as the value of a partly constructed building that stood on that allotment of land. However, the Petitioner came into occupy that allotment only on 31.07.1992 with the commencement of the operation of a grocery store in the said premises under the name and style of "*Akurana Traders*". Since then, the Petitioner had regularly paid assessment rates and other taxes and secured supply of electricity to the premises under his name.

On 30.11.1995, the Petitioner claims that he was surprised to learn that, an *ex parte* Judgment had been entered against him in an action filed by the 7th Respondent in the year 1994 and, as a consequence of which, he was ordered by the District Court of *Anuradhapura* to handover vacant possession to the latter. When the Fiscal came to execute the Writ of Execution, the Petitioner informed the Court official that he was neither served with summons of the action nor was he served with the *ex parte* decree. He thereafter moved the original Court

on 01.01.1996, by making an application under section 839 of the Civil Procedure Code, seeking to set aside the said *ex parte* decree, issuance of a direction of Court to serve summons on him and thereafter permit to tender an answer. The Petitioner was not successful in his application before the original Court and therefore sought intervention of the Court of Appeal against the order of the original Court, dated 11.10.1996, by moving in revision to have it set aside under application No. 712/1996. On 04.03.1997, parties have consensually settled the said revision application before the Court of Appeal by jointly seeking a direction on the District Court to re-inquire into the Petitioner's application by calling the Fiscal as a witness.

The District Court, having complied with the direction of the Court of Appeal and by its order dated 05.11.1998, once again dismissed the Petitioner's application. During that inquiry the Petitioner, his witness and the Fiscal, were heard by the original Court. The Petitioner then preferred an appeal to the Court of Appeal against the said order, in appeal No. CA 1175/98L(F) and also instituted an action against the 7th Respondent in case No. 16423/L on 16.12.1997. In that action, the Petitioner had sued the 7th Respondent for breach of the agreement P2 and claimed back the payment of Rs. 225,000.00 he made to the 7th Respondent, in addition to claiming damages quantified at Rs. 150,000.00 and compensation for improvements in a sum of Rs. 325,000.00. On the application of the Petitioner, Court made order on 28.08.2006 to layby same, on the basis that the appeal No. CA 1175/98(F) of the Petitioner was pending before the Court of Appeal.

Pending the hearing of appeal No. CA 1175/98(F), the 7th Respondent sought to execute the writ, and was successful in obtaining an order in his favour. The Petitioner once again resisted his eviction by

the execution of the said writ after obtaining leave to appeal from the High Court of Civil Appeal of *Anuradhapura*, in application No. NCP/HCCA/LA/04/2010 on 18.10.2010. The 7th Respondent had thereupon sought Special Leave to Appeal from the said order of the High Court of Civil Appeal by moving this Court in SC/HC/CA/LA 376/2010.

The appeal bearing No. CA 1175/(F) was subsequently withdrawn by the Petitioner on the basis that "… *a decision of Mahaweli Authority made in favour of the Appellant*". But the 7th Respondent, pleaded his ignorance of any such decision made by the 9th Respondent. The Court of Appeal, however, dismissed the appeal of the Petitioner after allowing his application. The 7th Respondent too had reciprocated by withdrawing the application No. SC/HC/CA/LA 376/2010, filed by him before this Court, challenging the order of the High Court of Civil Appeal.

While the litigation process referred to above was continuing in multiple fronts between the Petitioner and the 7th Respondent, the 9th Respondent had conducted an investigative survey in January of 2005, in respect of the commercial properties coming under its purview in *Nochchciyagama* Town. During the said survey, officers of the 9th Respondent Authority discovered that some of these commercial properties, which had already been alienated by issuance of permits to its respective lessees, were occupied by third parties and not by its lessees. The purpose of the survey was to regularise the possession of those who were in unlawful occupation of such commercial properties. It was found a total of 39 such lessees, who were issued with permits, have either failed to develop the property or had irregularly alienated them, while others failed to pay annual lease rentals.

Upon these findings, the 3rd Respondent submitted a report to the 1st Respondent, through which he recommended to set aside the selection of all 39 lessees, including that of the 7th Respondent. The findings against the 7th Respondent were that he made an irregular alienation of the land and also failed to develop the commercial property alienated to him. However, no cancellation of his Annual Permit was made until 15.12.2008 (1R6). After the said investigative survey and with the issuance of P13, the Petitioner was informed by the 5th Respondent, that he has been selected to receive an Annual Permit over lot No. 283. It also directed him to make the initial deposit and to pay the lease rental for the year 2007.

In 2013, the Petitioner claims that he "received" a copy of a letter dated 16.05.2013 (P 19), issued by the 5th Respondent, with copies to the Resident Project Manager, Deputy Resident Manager and Unit Manager, stating that the Annual Permit issued to the 7th Respondent was cancelled for violating its conditions and that the selection of the said lessee was accordingly set aside. It also indicated of the Petitioner's selection by the 9th Respondent to receive a permit in respect of the same land (depicted as lot No. 283 of the *Nochchiyagama* Town Plan) with a view to regularising his illegal occupation of same. Importantly, it also indicated that the Petitioner would be issued with an Annual Permit, since he had paid up all annual lease rentals from 1999 to 2013.

It is stated by the Petitioner that few days after he received the letter P19, and with the execution of the writ, he was evicted from lot No. 283 on 23.05.2013 by the Fiscal of the District Court of Anuradhapura and the 7th Respondent was placed in possession of same. The Petitioner had then lodged a complaint to the Human Rights Commission and also informed the 9th Respondent Authority of his

entitlement to that land. He conveyed his grievance to the Presidential Secretariat by lodging several complaints with it.

On 18.02.2017, the Petitioner received a letter from the 4th Respondent dated 15.02.2017 (P30) which indicated that the 9th Respondent Authority, during an inquiry held before the Human Rights Commission, had informed the said Commission of its decision to act in terms of the Court order and therefore decided to cancel the selection it made in his favour. It also indicated that the Hon. Minister of *Mahaweli,* the 10th Respondent, had approved the lease of the disputed parcel of State land in favour of the 7th Respondent and it was also decided to issue a lease to the 7th Respondent once again.

It is against the backdrop of these circumstances; the Petitioner alleges that his rights guaranteed under Article 12(1) had been infringed by the 1st to 6th and 9th Respondents and seeks relief in terms of his prayer. Particularly, the declarations sought from this Court are to the effect that the decisions made by the 1st to 6th Respondents and 9th Respondent; to cancel the nomination made in his favour, failure to grant him an Permit and the issuance of an Annual Permit to the 7th Respondent, are violative of his fundamental rights guaranteed to him under Article 12(1) of the Constitution.

In a petition alleging violation of fundamental rights "*it must not be supposed, or suggested, that the need to obtain leave to proceed under Article 126(2) is a mere formality. The onus is on a petitioner seeking relief to establish a prima facie case*". This pronouncement was made by *Fernando* J in ***Hettiarachchi v Seneviratne*** (1994) 3 Sri L.R. 293 (No.2) and that pronouncement was reconfirmed by a bench of seven Judges in ***Edward Francis William Silva, President's Counsel and three others v Shirani***

Bandaranayake and three others (1997) 1 Sri L.R. 92. At this initial stage, this Court would consider whether the petitioner has satisfied that "… *there is something to be looked into*" and if so, grant leave to proceed, per ***Visuvalingam and Others v Liyanage and Others*** (1984) 1 Sri L.R. 305 (at p.316)**.** In the instant matter the Petitioner was successful in establishing before this Court that he had a *prima facie* case but, only in relation to his claim of violation of rights under Article 12(1) of the Constitution.

The Petitioner, having satisfied this Court of the said initial threshold to obtain leave to proceed, now presents a contention based on the doctrine of legitimate expectation, which he allegedly to have entertained upon a promise or an undertaking made by the 9th Respondent, as reflected in the contents of a letter P13, which was once again confirmed by issuance of P19, but collectively frustrated by a series of subsequent decisions taken by the said Respondent and its officers, commencing with the cancellation of his selection to lot No. 283 by 1R16, and, culminating with the issuance of an Annual Permit 7R17, in favour of the 7th Respondent.

It must be stated that the doctrine of legitimate expectation, both in its procedural and substantive forms, are now part of the public law applicable in this Jurisdiction. However, before I proceed to consider the validity of the Petitioner's contention of frustrating his legitimate expectation, it is helpful if the underlying principles of that doctrine are stated here.

In the Privy Council Judgment of ***The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** [2016] UKPC 17, made a

pronouncement of the broader principle, as Lord *Neuberger* stated thus; *"[I]n the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the Courts."*

Identifying some of the salient points in relation to legitimate expectation, his Lordship states (at paras 37 and 38);

> *"First, in order to found a claim based on the principle, it is clear that the statement in question must be 'clear, unambiguous and devoid of relevant qualification';*
>
> *Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty;*
>
> *Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement."*

With this introduction, it is relevant at this stage to identify the category of cases under which the Petitioner's case could be considered. The Petitioner expected the 9th Respondent to grant a licence to occupy State land in the form of an Annual Permit. In the case of ***McInnes v Onslow Fane*** [1978] 3 All ER 211, Vice Chancellor *Megarry* dealt with three situations that arise in the consideration of licencing cases which

he termed as application cases, forfeiture cases and expectation cases. He said (at page 218) "*First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing rights or position, as when a member of an organization is expelled, or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organization or a licence to do certain acts. Third, there is an intermediate category which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence holder applies for renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority*." His Lordship then added that "*[T]he intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable.*"

If this classification is adopted in respect of the matter before this Court and if the Petitioner could satisfy that he entertained an expectation which could be accepted by this Court as a legitimate one, then his claim could be considered as one coming under the "*intermediate category*" as the question that arises in the instant application could also be termed as a one involving "*… what it is that has happened to make the applicant unsuitable for the … licence for which he was previously thought suitable*". In the instant matter, however, the

Petitioner does not complain of a situation where he had not been given the promised opportunity to be heard before the 9th Respondent, prior to making a decision adverse to him, and thereby going against an earlier undertaking given to him that it would. If that was the case, then the alleged frustration of the Petitioner's expectation could be termed as frustration of procedural legitimate expectation. What is complained by the Petitioner in the instant application is, after an assurance that he would be issued with a permit, the 9th Respondent desisted itself from issuing one, and therefore that action had frustrated his substantial legitimate expectation to a permit over lot No. 283.

In order to identify the underlying principles of law that were laid down in the judicial precedents both here and abroad over the years in relation to the doctrine of substantial legitimate expectation, I could conveniently rely on the *Judgment* of ***Ariyaratne and Others v Illangakoon, Inspector General of Police and Others*** - SCFR Application No. 444/2012 – decided on 30.07.2019. *Prasanna Jayawardena J* had undertaken an exhaustive survey of the subject applicable principles of law as contained in the collective judicial wisdom contained in the multiple pronouncements made by the English, Indian and Sri Lankan Courts on the doctrine of legitimate expectation. His Lordship thereafter crystallised the several principles enunciated by them in the said judgment.

The Petitioner too had relied on this Judgment in support of his contention that he did establish before this Court that the 9th Respondent gave him a specific, unambiguous and unqualified assurance that he had been selected to receive an Annual Permit in respect of lot No. 283 by issuance of P13, an undertaking which the said

Authority had now recanted its undertaking by cancellation of the said selection and issuing a permit to the 7th Respondent.

In such a situation, *Prasanna Jayawardena J* stated that a Court may, " … *where it determines that the nature of the expectation, and the prejudice caused to that individual or group of persons by the public authority negating it, outweighs the public interest to such an extent that the negation of the substantive legitimate expectation would be unfair or unjust or disproportionate and constitute an abuse of power by the public authority; exercise its power of judicial review and hold that the substantive expectation is a legitimate one which the public authority is bound to fulfil*." His Lordship also stated that " … *the doctrine of substantive legitimate expectation applies in our jurisdiction in much the same manner as it now applies in England*".

When determining the nature of the expectation, this Court would consider what *Bingham* LJ said in ***R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd*** [1990] 1 WLR 1545 and also referred to in ***The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** (supra). His Lordship stated that "*a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification*'. In ***Perera v National Police Commission and 24 Others*** *2007 [B.L.R.]14,* this Court re-iterated a pronouncement it had made in ***Anushika Jayatileke and Others v University Grants Commission*** (SC Application No. 280/2001 – decided on 25.10.2004), to the effect that " *legitimate expectation derives from an undertaking given by someone in authority and such undertaking may not even be expressed and would have known from the surrounding circumstances.*"

If the Petitioner is successful in establishing the legitimacy of his expectation, then his case could be termed as a one belongs to the "*intermediate category*", per ***McInnes v Onslow Fane*** (supra), in which it was held that "*the applicant has some legitimate expectation from what has already happened that his application will be granted*." In the circumstances, it is also relevant to consider as to the nature of the burden imposed on a petitioner, who claims that the public body had frustrated his legitimate expectation based on a promise it had made earlier on. This was set out in the Privy Council Judgment of ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago*** [2010] UKPC 32. Sir *Dyson* SPJ states (at para.37) that;

> "*The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation.*"

The question of legitimacy of the expectation was re-iterated in the case ***R v North and East Devon Health Authority, Ex p Coughlan*** [2001] QB 213 by Lord *Woolf MR*, by stating (at para 57) thus:

> " *… once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements*

of fairness against any overriding interest relied upon for the change of policy. "

The question of legitimacy of the expectation, as stated by the Privy Council in ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago*** (supra) received further clarification in *De Smith's Judicial Review,* 8th Ed, p. 686, where it is stated " *to qualify as 'legitimate'…*" such a claim must possess certain qualities and, in this context, learned authors listed out ten of them, based on judicial pronouncements, which insisted satisfaction of them by an applicant who seeks judicial review. A similar view was expressed in the text of the book, *Administrative Law – Wade and Forsythe* 10th Ed, p. 449, where it is stated "*it is not enough that an expectation should exist; it must in addition be legitimate*." The Judgment of ***Samaraweera v Peoples Bank and Others*** (2007) 2 Sri L.R. 362, where *Fernando* J stated (at p. 368) that the "*… onus of proving that the petitioner has an outstanding record of performance or that the available staff cannot perform the specific duties is on the petitioner. There is no material before this Court that the petitioner qualified for an extension under the criteria. Hence it is my conclusion that the petitioner has failed to establish that he had a legitimate expectation of being extended in service in terms of the circular*". This pronouncement reflects the application of the said consideration as his Lordship questions the legitimacy of the expectation entertained by the petitioner, in dismissing the application.

In a more recent pronouncement, ***Nimalsiri v Colonel Fernando and Others*** (SCFR 256/2010 – decided on 17.09.2015), *Priyantha Jayawardena* J stated that "*… the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation …*" also indicating the importance of the legitimacy of the expectation. A similar

approach could be found in ***Ariyaratne and Others v Illangakoon, Inspector General of Police and Others*** (supra) as it is stated that " … *the first issue before us is to decide whether the petitioners have succeeded in establishing that they have a 'legitimate expectation' of being absorbed into the Sri Lanka Police Force* ...". The Court of Appeal Judgment in ***Albert and Others v Chief Secretary – Southern Province*** (CA (Writ) Application Nos. 401- 407, and 411 to 413/2015, - decided on 11.10.2016) Surasena J decided "*… all what the Petitioners have established before this Court is that they have had an illegitimate expectation and not a legitimate expectation*." Thus, the legitimacy of the expectation had consistently been insisted upon by the Courts as a necessary precondition before it examines the validity of the reasons adduced by the Respondents in determining whether there was abuse of power, in frustrating such an expectation.

The Petitioner's claim of a legitimate expectation based on the letter P13, was controverted by the Respondents collectively. They have relied on factual considerations that impinge on the legitimacy of the expectation claimed to have entertained by the Petitioner. When the parties made claims based on factually contradictory positions, the following pronouncement made by *Marsoof* J, in ***Ravindra v Pathirana and 11 Others*** *2008 [B.L.R.] 177*(at p. 180), becomes relevant;

> "*[P]proceedings initiated under Article 126* of *the Constitution have to be decided on the basis of evidence led by way of affidavit and the relevant provisions do not provide for the varicosity of the statement made in the affidavits been tested through cross examinations. In the circumstances, when conflicting positions are taken up, the Courts are called upon to make determination of fact based*

mainly on inferences that can be drawn from affidavits. Sometimes this could be a very difficult exercise."

It is already noted that the Petitioner's claim of legitimate expectation of an Annual Permit in respect of lot No. 283, issued by the 9th Respondent, is primarily founded upon the contents of letter P13, by which his selection to receive such a permit for the said commercial property was communicated to him. The said letter is dated 26.10.2007 and titled as "Regularisation of Unlawful Possession – 2005". It conveyed to the Petitioner that his selection for that particular lot was made after an inquiry and the Petitioner was required to make an initial deposit of Rs.48,000.00 before a stipulated date and he must also to pay lease rental for the year 2007. Since the Petitioner placed heavy reliance on the contents of P13, in support of his claim of legitimate expectation, it is helpful, if the contents of P13 are reproduced below in its entirety.

"අවසන් දැන්වීම

මගේ අංකය:- බීඑම්/එස්/එල්/බදු
ශ්‍රී ලංකා මහවැලි අධිකාරිය,
කොට්ටාශ කළමණාකාර කාර්යාලය,
නොච්චියාගම
දිනය **2007.10.26**

M.T.M. රියාද්

2005 අනවසර නියමානුකූල කිරීම - වාණිජ ඉඩම්

ඉහත කරුණ සඳහා පැවැත් වූ පරීක්ෂණයෙන් ඔබ අනවසරයෙන් භුක්ති විඳින වාණිජ ඉඩම් අංක 283 සඳහා ඔබට තේරීමක් ලබා දී ඇත.

ඒ අනුව අදාළ මුලිකය සහ 2007 වසරේ බදු මුදල් ගෙවා වාර්ෂික අවසර පත්‍රයක් ලබා ගැනීමට ඒකක කළමණාකාර මගින් දැනුම් දී ඇතත් එය ඉටුකර ගෙන නොමැත.

ඒ නිසා ඔබ විසින් ගෙවිය යුතු මූලිකය වන රු. 48.000/- මුදල ද, 2007 වසර සඳහා වන බදු මුදල වන රු. 7200/- ද, ගෙවා 2007 නොවැම්බර් 25 වන දිනට ප්‍රථම වාර්ෂික අවසර පත්‍රය ලබාගැනීමට මෙයින් දන්වමි.

එසේ කිරීමට ඔබ අපොහොසත් වන්නේ නම් ඔබගේ තේරීම අවලංගු කිරීමට කටයුතු කරන බවද, තේරීම අවලංගු කලහොත් ඔබට මෙම ඉඩම් සම්බන්ධව නැවත

පරීක්ෂණයකට ඉදිරිපත් විය නොහැකි බවද දන්වන අතර තේරීම අවලංගුකල පසු ඉදිරි නීත්‍යානුකූල පියවර ගැනීමට සිදුවන බවද දන්වමි.

අත්සන
2007.10.30
(පී.එම්.එම්. බී. අභයරත්න)
කොට්ඨාශ කළමණාකාර,
නොච්චියාගම"

If at all, the only reference to an 'undertaking' that could be found in the contents of P13, is in the sentence where it conveys that, after an inquiry, the Petitioner had been "selected" for lot No. 283, which he occupies without any permission granted by the 9th Respondent. Remaining part of P13 warns the Petitioner of his continued failure to comply with the directions that had been issued up to that point of time and, it further alerts him to the consequences which would follow, if he fails to fulfil them any longer. The letter P13 is specific on the condition that if he fails to fulfil what was required of the Petitioner before the stipulated deadline the 9th Respondent had set up, his selection to receive a permit for lot No. 283 would be cancelled. In the circumstances, can it be said that the P13 is "*a promise which is 'clear, unambiguous and devoid of relevant qualification"*? With due respect to learned President's Counsel, who submitted that it is so, I must confess that I am not convinced of the acceptability of that submission as a correct representation of the contents of P13 for I do not think that the contents themselves do not qualify P13 to be treated as a letter conveying a promise or an undertaking, which is clear, unambiguous and devoid of relevant qualification. Even if, for the sake of argument, it is accepted that P13 as a clear and unambiguous promise for issuance of an Annual Permit, could it be then considered also as a promise which is devoid of any "*relevant qualification*"? I am not convinced that the answer is in the affirmative. The very act of setting up a deadline for

the Petitioner to comply with, by the 9th Respondent had set out as mentioned in P13, itself disqualifies the said letter being treated as "*a promise which is 'clear, unambiguous and devoid of relevant qualification"*. Particularly, the condition of regular payment of annual lease rentals, is a qualification that the Petitioner must satisfy each successive year, making him entitled to possess the parcel of State land for that particular year. That particular condition would continue to be in force, even if he is issued with a permit.

On the other hand, if the Petitioner was to entertain even an expectation on P13, he must first fulfil all the required criterion set out therein by the 9th Respondent in P13. The Petitioner did not make the deposit and the lease rental for the year 2007 before the said deadline of 25th November 2007. The Judgment of ***Galappaththy v Secretary to the Treasury*** (1996) 2 Sri L.R. 109, refers to an instance where the petitioner sought to challenge a decision by the treasury to impose import taxes upon importation of a motor vehicle. The petitioner had a permit to import a motor vehicle under concessionary tax scheme. *Ranaraja* J, rejected the contention that petitioner's legitimate expectations were summarily disappointed, on the basis that he " … *cannot therefore claim that he had a legitimate expectation to a benefit under Circular P1 when he himself had breached its conditions."*

The Petitioner also relied on the letter P19, as an instance of re-confirmation of the undertaking made by the 9th Respondent by issuance of P13. In fairness to the Petitioner, although he merely relied on P19 only as a re-affirmation of the 'undertaking' already made in P13, that document of course did contain a statement which could be construed as resembling of a 'promise or an undertaking' as

it stated " මේ අනුව නොවිවියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් සහ වාර්ෂික බදු මුදල් හිඟයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් ඉදිරියේදී වාර්ෂික අවසර පත්‍රයක් මොහු වෙත නිකුත් කිරීමට පියවර ගන්නා බැව් කාරුණිකව දන්වමි". It also contained that the 9th Respondent had accepted annual lease rental from the Petitioner from the year 1999. This action might lend support to the Petitioner's claim to the limited extent that, at least, he entertained an expectation that he would eventually be granted a permit and had acted in that expectation.

In the circumstances, it is apparent that the Petitioner's expectation on the so-called undertaking contained in P13, in itself does not qualify to be treated as a legitimate one and therefore does not make qualify as an expectation that should be protected by Court. However, since the Petitioner also relied on P19, as a document by which the 3rd Respondent had re-confirmed the alleged 'undertaking' it had made in P13, I would take this statement on its face value for the moment, with the intention of dealing with the contents of P19 in more detail during the latter part of this Judgment, and proceed to consider the Petitioner's application whether, in the totality of circumstances referred to above, he could have entertained an expectation that could be accepted as a legitimate one.

The disputed commercial property, being a parcel of State land, must be alienated by the State following lawful procedure as set out in Chapter III of the Land Development Ordinance. Section 20 of the Ordinance states that the selection of persons to whom State lands could be alienated under the Ordinance, shall be made at a Land *Kachcheri*, subject to subsections (a) and (b), while section 21(2) makes it

obligatory on the part of the Government official to call for applications for the lands proposed to be alienated at that Land *Kachcheri*.

In this instance, however, the selection of the Petitioner was made, not as a result of a selection made after an inquiry upon an application presented to a Land *Kachcheri* by him, but apparently only on the basis of him being in *de facto* occupation of lot No. 283, when the officers of the 9th Respondent Agency conducted an investigative survey of the commercial properties under its purview in *Nochchiyagama* town in January 2005. During that survey, the Petitioner had claimed total responsibility for the development of the said parcel of State land by operating his business activity in the building he himself had construct on it.

Consequent to the findings of the said survey, the 7th Respondent was notified by the 9th Respondent to attend an inquiry on 22.02.2005, by pasting a notice on the said premises in terms of the law, as it was *prima facie* evident that the 7th Respondent had alienated the State land that had leased out to him to the Petitioner, and thereby violated its conditions. The 7th Respondent did not turn up for the inquiry and, in the circumstances, the 3rd Respondent recommended to the 1st Respondent that the selection of the 7th Respondent in respect of lot No. 283 be set aside, and the permit issued to him is cancelled. The permit 1R1 was cancelled by the 9th Respondent and on 15.12.2008, the 7th Respondent was informed of the said cancellation by 1R6.

The 7th Respondent was prompt in his reply by which he protested against the said cancellation of his permit, accusing the 9th Respondent of making a decision over a matter before the Court of Appeal, pending for its determination. Having referred to the letter

7R11, by which he was informed that until the pending litigation is over no further action could be taken in respect of lot No. 283, the 7th Respondent accuses the 3rd Respondent, in 1R7, that the latter had maliciously and in collusion with the Petitioner made the said cancellation and therefore he would institute contempt of Court proceedings against him for making an administrative decision disregarding the fact that the matter already under litigation. This seems to be the first instance where the 9th Respondent became aware that the other party to the litigation, instituted by the 7th Respondent, was none other than the Petitioner himself.

Thus, it is evident from the above considerations that the starting point of the administrative process, which culminated with selecting the Petitioner to be issued with an Annual Permit in respect of the State land he illegally occupied and the issuance of P13 in confirmation of the said selection, commenced with the said investigative survey conducted in January 2005 by the officers of the 9th Respondent. The report 1R2 also contained a statement of fact that, in addition to reporting his illegal occupation of the said lot, it was the Petitioner who constructed the building on that land and runs a grocery store. The officers, who were not privy to the activities conducted on that parcel of State land at any time prior to their inspection, had accepted and relied on that claim. It is natural for the Petitioner to make such a claim, since he needed to impress upon the officers, of same as a qualifying factor, if they were to make a selection for issuance of a permit. It is not clear whether the Petitioner, at that particular point of time had relied on the 'agreement' P2 as well, in order to further impress the officers on the fact that the 7th Respondent had transferred all his rights to him. He may well have

done so, as an attempt to explain away the basis of him coming into illegal occupation of lot No. 283.

When the officers visited lot No. 283, the Petitioner was in possession of the same but had no permit over that lot. The Petitioner was therefore found to be the *de facto* illegal occupier of lot No. 283, instead of the 7th Respondent, who should be in its possession, being the lawful lessee, in whose favour an Annual Permit had been issued. It was therefore evident to the officers that the 7th Respondent was in clear violation of the conditions stipulated in the permit P7A/7R5, particularly with the express prohibition regarding the alienation of the State land referred to in that permit in any form. In the absence of any material to indicate any contrary position (as the 7th Respondent did not participate at the ensuing inquiry), the 3rd Respondent had rightly made his recommendation to set aside the selection of the 7th Respondent and to cancel his permit P7A/7R5.

Similarly, the selection of the Petitioner to the said lot No. 283 made by the 9th Respondent Authority too could be understood in the circumstances. Since the purpose of the investigative survey was to regularise the illegal occupancy of its commercial properties in *Nochchiyagama* town and at the time of the said inspection, it was found out it was the Petitioner, who was in occupation of lot No. 283, but without a permit. The Petitioner also claimed that he had put up a building in which he conducted his business activities. The officers were satisfied that the Petitioner was responsible for the development work carried out on the land. It must be noted here that, at that point of time, the officers of the 9th Respondent Authority were only concerned with regularising illegal occupation of State land and the selection of the Petitioner for issuance of a permit was made purely on that basis.

While the administrative process that commenced with the investigative survey carried out in 2005 to regularise the illegal occupation of State land continued at one end, it was revealed from the pleadings that the 7th Respondent had instituted an action over ten years before the said survey, in the District Court of *Anuradhapura* (case No. 15034/L), seeking eviction of the Petitioner from lot No. 283. The 7th Respondent had obtained a judgment in his favour on 08.02.1995, after an *ex parte* trial. The Writ of Execution was issued by the District Court on 28.11.1995. When the Fiscal sought to evict the Petitioner on 30.11.1995, that attempt was thwarted by Petitioner's acquaintances, who gathered in large numbers and thereafter occupied the premises under the said writ. The Petitioner then moved the District Court to vacate the said *ex parte* decree and the Writ of Possession. On 11.10.1996, the District Court refused the Petitioner's application after arriving at a finding that the summons of action and the *ex parte* decree, in fact were served on the Petitioner. The Court had thereby effectively rejected his claim of not serving either the summons or the decree personally to him and his plea of total ignorance of the litigation against him. The Petitioner, however, asserts to this Court that he became aware of the said action only when the fiscal made an attempt to evict him.

The Petitioner moved in revision of the said order before the Court of Appeal in C.A.R.A No. 712/1996. At the inquiry before that Court, the parties consented to set aside the impugned order and to re-inquire into the said claim of the Petitioner, before the original Court, by calling the Fiscal, who served processes of Court. At the conclusion of the re-inquiry, which was held consequent to the order of the Court of Appeal, the original Court, with its order dated 05.11.1998, once again held that the summons of action and the *ex parte* decree were in

fact served on the Petitioner. This time the Petitioner preferred an appeal against the said order before the Court of Appeal in CA 1175/98(F) and was pending its hearing in January 2005. This was the status of the process of litigation between the Petitioner and the 7th Respondent, when the officers of the 9th Respondent authority conducted the investigative survey in 2005 and decided to issue a permit to the Petitioner, based on the findings of that survey.

This being the factual situation, it is necessary to consider the legal status of the Petitioner at the point of conducting the said investigative survey. His two-fold legal status at the time of the said investigative survey could be described in the following manner. Firstly, as already noted, he was the *de facto* illegal occupier of lot No. 283, as found out by the officers of the 9th Respondent. This was the primary criterion adopted by the 9th Respondent to select him for issuance of a permit, along with the fact of claiming credit for its development. Secondly, the Petitioner was also a Judgment Debtor of the 7th Respondent, who, by then had a valid Judgment and a decree against him, issued by a competent Court, declaring the latter's entitlement to evict the former. With the said Judgment and decree, the Petitioner's status had transformed from a lessee to an illegal occupier of a land, to which the 7th Respondent had a valid permit. Similarly, as far as the 9th Respondent is concerned too, the Petitioner was an illegal occupier of a State land, who occupied same without a valid authority.

It is thus clear that, in January 2005, the Petitioner was very much aware as to his status both factually and legally, *vis a vis* lot No. 283 and the 7th Respondent (although the former was yet to withdraw the appeal preferred against the finding of the original Court against him). Whether the Petitioner had disclosed this important aspect of his

possession of lot No. 283 to the officers of the 9th Respondent authority in 2005 is not borne out either by his petition or by any of the documents tendered along with it. The 1st Respondent does not claim that his officers were informed of the litigation history that exists between the Petitioner and the 7th Respondent and of the status of the Petitioner, being a Judgment debtor, when they conducted the investigative survey. However, it is evident from the conduct of the officers, who made the recommendation to select the Petitioner to be issued with a permit, that they were not aware of the pending litigation over the possession of lot No. 283 that had been pending against the Petitioner nor of his status as a Judgment Debtor.

Then a question arises as to how does the failure of the Petitioner to inform of the pending litigation to the officers of the 9th Respondent becomes a relevant factor in the selection made in favour of him, as a prospective recipient of an Annual Permit in respect of lot No. 283?

Consideration of this question requires a brief reference, at the very outset of this segment of the Judgment, as to the circumstances under which the 7th Respondent came to possess lot No. 283. The 7th Respondent claims that in 1982 on a mere verbal authorisation of the officers he occupied lot No. 283 and made annual lease rentals. Despite the fact that the 7th Respondent came to possess the said lot in the year 1982, only in 1992 he was issued with an Annual Permit by the 9th Respondent Authority in respect of the said lot. The 7th Respondent had paid annual lease rentals up to 1994, until the 9th Respondent authority declined to accept any payments from him on account of the litigation he commenced in May 1994. On 06.02.1996, the 7th Respondent was informed by the Deputy Manager (Land) of the 9th Respondent authority, in replying to a complaint made by the former over this issue

to the Minister of Land, that until the conclusion of the pending action, no further action on the land could be taken (7R11). The letter further directed the 3rd Respondent to report back to the Authority, once the Court case is over. This is a clear indication that the 9th Respondent Authority was of the considered view that it should not make any decisions in respect of lot No. 283, when it had already become subject matter of a litigation, initiated by the 7th Respondent.

The process of litigation referred to in 7R11, ended only on 15.01.2013, when the Petitioner decided to withdraw his appeal that was pending before the Court of Appeal in CA 1175/98(F), making the *ex parte* Judgement and decree of case No. 15034/L issued against him final and binding. However, contrary to the position indicated to the 7th Respondent by 7R11, the 9th Respondent authority did make decisions in respect of the subject matter of the litigation that was pending before the Court of Appeal. The 9th Respondent made the decision to select the Petitioner to be issued with an Annual Permit over the identical subject matter in January 2005, as conveyed to him by P13 in 2007. Clearly, when viewed against the said backdrop of circumstances, the 9th Respondent had applied two different standards when dealing with the Petitioner and the 7th Respondent. However, this complaint could validly be made only if it was made known to the 9th Respondent that the other party to the litigation referred to in 7R11, was the Petitioner himself. The 9th Respondent or any of its officers were not made parties to that action and therefore had no formal notice of the same or as to the parties in that litigation. Clearly, there was no material available, which would suggest even inferentially that the 9th Respondent was aware that the other contesting party to the said litigation instituted by the 7th Respondent was the Petitioner himself.

This was primarily due to the fact that the Petitioner either failed to disclose that fact to the officers who conducted the investigative survey or had willfully suppressed that fact, for the fear that it might result in an adverse ruling. Either way, it is evident that the Petitioner did not make a full disclosure of the relevant material to the officers who visited *Akurana Traders* in 2005, conducting an investigative survey with a view to regularise the illegal possession of its commercial plots, despite his expectation of a favourable ruling as to his possession of lot No. 283.

Moving on to the latter part of the question referred to in the preceding paragraph as to how that suppression had affected the decision-making process of the officers of the 9th Respondent Authority could be answered in the following manner.

It is clear from the recommendation made by the 3rd Respondent to the 1st Respondent (1R16) that the suppression of the fact of a pending litigation by the Petitioner to the officers who conducted the investigative survey had eventually resulted in a situation of having made an administrative decision by the 9th Respondent, which in effect contradicts a pronouncement that had already been made by a competent Court, as to the party who is entitled to possess lot No. 283. In the letter 1R16, the 3rd Respondent, after stating that the 7th Respondent had instituted action before the District Court against the Petitioner, recognises the fact that the 7th Respondent had thereby sought to resolve an issue that had arisen due to an informal alienation he himself had made over lot No. 283. The 3rd Respondent then appraises the 1st Respondent of the resultant effect of the decisions thus far made by stating;

" එනමුත් මෙම අධිකරණ තීන්දුව ලබදී තිබියදී ඩී. එම්. සෝමපාල යන අය නමින් ලබාදී තිබූ අවසරපත්‍රය අවලංගු කිරීම සඳහා අංක : ආර්.පී.එම්/ ටී/ එල්/ සී 20 / 14/ 45 හා 2005.09/29 දිනැතිව කරන ලද නිර්දේශයන්ට අනුව අවසරපත්‍රය සහ තේරීම් පසෙක තැබීම අධ්‍යක්ෂ ජනරාල් විසින් අංක : එල්/ 04/ එච්/ ර.ඉ.පොදු 21 හා 2008.06.17 දිනැතිව අනුමත කර ඇත."

This is a clear indication as to the effect that the suppression of the Petitioner of the pending litigation from the officers of the 9th Respondent had resulted in the decision making process, which the 1st Respondent noted by stating that the cancellation of the selection of the 7th Respondent was made after the Judgment of Court was pronounced. Similarly, the 3rd Respondent describes in his observations to the Human Rights Commission (1R14), that the said cancellation had led to a tangled situation ("ගැටලු සහගත තත්වය") and indicated that he sought legal advice to resolve the said issue. Both these statements are allusive remarks made by the officers to denote the position that the 3rd Respondent would not have recommended the selection of the Petitioner to lot No. 283 by 1R3 to the 1st Respondent, if he was fully appraised of the fact that the 7th Respondent, who at that point of time, had already obtained an order of Court in his favour, which made him entitled to evict the Petitioner from lot No. 283. This apprehension could be understood as a realisation of the fact that the 9th Respondent had not considered or failed to consider the actual status of the Petitioner and his possession, when its officers made the selection. Indeed, the two-fold legal status of the Petitioner *vis a vis* the lot No. 283, was a very relevant considerations on which the selection of the Petitioner was very much dependent upon, as the subsequent events unfolded. When making the selection of the Petitioner to receive a permit, the 9th Respondent had admittedly considered only one aspect of the former's legal status, whereas it should have considered both.

In the context of the legal status, learned President's Counsel submitted that the eviction of the Petitioner was wrong, as at the point of the said eviction, the 7th Respondent had no valid permit in his favour to conform any right or interest over lot No. 283. It could well be that this also is a factor among several others, that had troubled the 3rd Respondent, when he referred to a "ගැටලු සහගත තත්වය" in 1R14, as an abridged reference to the knotty issue.

Under the given set of the circumstances, as revealed in the instant matter, and in view of the complex interplay of the different legal principles that ought to have been given due recognition in the decision-making process of the 9th Respondent, it is necessary that I make at least a passing reference to them before proceeding any further in this Judgment. It is not necessary to consider them in depth, in the absence of any submissions of any party regarding same.

One of the grounds on which the 9th Respondent decided to cancel the selection of the 7th Respondent to lot No. 283, was that he had illegally "alienated" the said lot. The 7th Respondent came to possess the said lot in 1984 allegedly on a verbal assurance given by the 9th Respondent, in lieu of a land he had surrendered to the State for a road widening project. The 7th Respondent then allowed the Petitioner and two others to occupy lot No. 283 in December 1987. The Annual Permit 7R5 was issued to the 7th Respondent only on 08.09.1992, which contained a condition that lot No. 283 should not be alienated in any form. This condition binds the 7th Respondent from the date of the permit. When the 7th Respondent allowed the Petitioner to occupy lot No. 283, there was no condition binding on him that it should not be alienated. In ***Lebbe v Samoon*** (1968) 71 NLR 452, Alles J held (at p. 455) thus, "*If the permit had been issued to the defendant containing the conditions*

referred to in P1 it would have been open to the authorities to cancel the permit in view of the defendant non residence, but having failed to issue a permit, I do not think it is open to them to evict the defendant on that ground."

The Petitioner asserted to this Court that the 7th Respondent had "*transferred his rights in the subject matter in dispute*", namely his rights over lot No. 283, upon an agreement marked as P2. This was the consistent position of the Petitioner since the commencement of the dispute which he maintained in almost all of his correspondence that were annexed to his petition. The said agreement P2, that had been entered between the 7th Respondent and the Petitioner and his two associates in 1987, contains a clause which states that "…*do hereby surrender possession of the said part or portion of the building constructed by me and the right of possession of the said land lot No. 283, together with all my rights, claim, and demand whatsoever, as lessee of the said lot No. 283, unto the said purchasers …*".

It is on the strength of this clause only the Petitioner consistently claimed that the 7th Respondent had "*transferred his rights in the subject matter in dispute*" to him. It is not clear whether the Petitioner did in fact relied on P2, when the officers of the 9th Respondent conducted their investigative survey in 2005, but it could be reasonably deduced that he would have done so, as an attempt to explain away the basis on which he came into possess lot No. 283. If the cancellation of selection of the 7th Respondent was made by placing reliance on the clause from the said agreement P2, that had been reproduced above, that decision cannot be validated, in view of the provisions of Section 2 of the Prevention of Frauds Ordinance. Section 2 of that Ordinance declares no such agreement shall "*be in force or avail in law*" unless the statutory provisions contained in subsections 2(a) and 2(b) are complied with.

Clearly, the agreement P2, being an instrument affects an interest, or an incumbrance affecting land, was not notarially executed and therefore did not conform to the provisions of Section 2.

However, when the permit was eventually issued to the 7th Respondent, he had already handed over possession of lot No. 283 to the Petitioner, after having the land 'leased' out to the latter for a period of seven years, as pleaded in his plaint to the District Court of *Anuradhapura.* The permit 7R5 specifically prohibited the 7th Respondent from alienation of lot No. 283 in any form including by subletting and, by his own admission in the said plaint, that factor alone would have made his permit liable to be cancelled, if that position was discovered by the 9th Respondent in 2005.

In instituting action against the Petitioner in case No. 15034/L before the District Court of *Anuradhapura*, the 7th Respondent sought *inter alia* a declaration from Court that he is the lawful permit holder to the lot No.283 and eviction of the Petitioner therefrom. At the time of institution of the said action, the 7th Respondent had a valid permit issued by the 9th Respondent, which remained valid up until the Judgment was pronounced. The legal status of a permit holder was considered by *Gratian* J in ***Palisena v Perera*** (1954) 56 NLR 407, where his Lordship held (at p. 408) that;

> *" This is a vindicatory action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser.*
>
> *It is very clear from the language of the Ordinance and of the particular permit P1 issued to the plaintiff that a*

permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser has prevented him from even entering upon the land does not afford a defence to the action; it serves only to increase the necessity for early judicial intervention."

The description used by *Gratian* J to describe the nature of title of a permit holder, to the land in respect of which it was issued, was that such a person has "*… a sufficient title which he can vindicate against a trespasser in civil proceedings*." Thus, when the District Court entered Judgment in favour of the 7th Respondent in case No. 15034/L, the Court only found that he had "*a sufficient title which he can vindicate against a trespasser in civil proceedings*" and therefore was entitled to evict the Petitioner, who by then became a trespasser. It must also be noted that when the District Court pronounced its judgment in that matter, the 7th Respondent in fact was in possession of a valid permit. If the Petitioner did challenge the validity of the permit of the 7th Respondent, on the basis of P2, after presenting himself before the District Court, the result would have been different.

The ownership of lot No. 283, remained in the State and it was only alienated to the 7th Respondent on an Annual Permit subject to the conditions stipulated therein, and such alienation enabled the latter to be in possession of the same and to take its produce. Thus, the Court, in holding in favour of the 7th Respondent, merely asserted his entitlement only to the extent described in ***Palisena v Perera*** (supra). Therefore, the Judgment of the said action does not confer to the 7th Respondent any

other concomitant attributes of ownership in relation to lot No. 283, other than the ones specifically granted by the said permit.

It is correct to state that by the time the Petitioner was evicted, the permit issued to the 7th Respondent (1R1) was cancelled and therefore his right to be in possession of lot No. 283, granted by the 9th Respondent by way of a permit had extinguished. But the said eviction was made on the strength of Judgment entered in favour of the 7th Respondent, as per his rights on the date of the action. The significant time gap that had elapsed between the Judgment and its execution was a result of the time taken to conclude the appellate proceedings initiated by the Petitioner. The fact that the said Judgment was delivered after a trial held *ex parte*, a fact emphasised by the Petitioner, does not relegate same into a pronouncement of a lessor validity that could be disregarded by the Petitioner. The finding of Court that the summons of action as well as the *ex parte* decree was in fact served on him confirms of his willful refusal to participate in the action against him. The fact that the trial proceeded *ex parte* was due to the actions of the Petitioner and therefore he must accept the consequences it entails.

The Petitioner too had no permit issued to him in respect of lot No. 283, and therefore had no "*sufficient title which he can vindicate against*" the 7th Respondent to regain his lost possession. The 9th Respondent, not being a party to the litigation between the 7th Respondent and the Petitioner, obviously was not bound by the said Judgment. After the 7th Respondent was placed in possession by the Court after evicting the Petitioner, the 9th Respondent could have considered the option of recovery of possession of lot No. 283, from the 7th Respondent, who now was placed in possession of a State land by an order of Court, but occupying same without a valid permit. By then, the

Petitioner's status too had changed with the issuance of P13 by the 9th Respondent, who granted permission to occupy lot No. 283, despite an already made pronouncement by a Court of law that he is a trespasser. The 9th Respondent, made the said decision without being privy to the nature of the litigation that exists between the 7th Respondent and the Petitioner,

It appears that, the 9th Respondent was reluctant to initiate any legal action against the 7th Respondent, at that particular point of time, in order to recover possession of lot No. 283. This could be perhaps due to the realisation that it had adopted a course of action, contrary to the position, indicated to the 7th Respondent in 7R11, by selecting the Petitioner to receive an Annual Permit and accepting lease rentals from him, despite the pending litigation. Letter 7R11, conveyed to the 7th Respondent that until the pending action is decided, 9th Respondent would not take any further action for renewal of his permit. When the 9th Respondent cancelled selection of the 7th Respondent to lot No. 283, on the basis of illegal alienation, the latter had already instituted action in 1994 to regain possession against his lessee and when it made the selection of the Petitioner in 2005, there was a Judgment of Court, ordering the Petitioner's eviction.

Earlier on in this judgment, it was already noted that the Petitioner's legal status at the time of his selection could be described as twofold. In relation to the 9th Respondent, he was a *de facto* illegal occupier of lot No. 283, while also being a Judgment Debtor in relation to the 7th Respondent and was subjected to a writ of execution, validly issued by the District Court in respect of lot No. 283. When the investigative survey was carried out in January 2005, and the officers of the 9th Respondent Authority found out that the Petitioner was in illegal

occupation of lot 283, it could also be contended that a permit holder of a lot, could institute action to regain his lost possession. This is a situation where any permit holder might find himself in. If that in fact the case is, it was unreasonable for the 9th Respondent to deny such a permit holder of his entitlement to the limited ownership of the land it had already granted under the permit, in favour of a trespasser.

This seems to be the one among many reasons, that the Petitioner's selection was set aside, after it was revealed that there had been a litigation and he was evicted from the lot he occupied, by an order of Court. In 1R15 the 3rd Respondent used the term that the 7th Respondent had taken action to "regularise" ("නිරවුල්") the informal alienation, by making reference to the act of eviction of the Petitioner after an order of Court. The relevant sentence from 1R15 is reproduced below;

> " ඩී.එම්. සෝමපාල මහතාට නීත්‍යානුකූලව බැහැර කරන ලද ඉඩම පසුකාලීනව ඔහු විසින් නිරවුල් කර ගැනීමට කටයුතු කරනු ලැබුවත් සියාද් නැමති අය මෙම ඉඩමේ භුක්තිය දරා සිටි හෙයින් ඔහු ඉඩමෙන් ඉවත් නොවූ බැවින් ඩී.එම්. සෝමපාල යන අය අනුරාධපුර දිසා අධිකරණයේ සියාද් යන අයට විරුද්ධව අංක 15034/එල් යටතේ නඩු පවරා ඇත. එම නඩු නියෝගය අනුව ඩී.එම්. සෝමපාල වෙත භුක්තිය භාර දී ඇත."

It seems that the decision to set aside the 7th Respondent's selection was made after it became evident that the 7th Respondent had leased it out and taken legal action to evict the overholding lessee. The 9th Respondent seems to have considered the institution of a case by the 7th Respondent as an action taken to rectify the situation created with his informal alienation. This is reflected from the statement " ඩී.එම්. සෝමපාල මහතාට නීත්‍යානුකූලව බැහැර කරන ලද ඉඩම පසුකාලීනව ඔහු විසින් නිරවුල් කර ගැනීමට කටයුතු කරනු ලැබුවත් ... "

Learned Senior State Counsel for the 1st to 6th and 8th to 9th Respondents however contended that the validity of the decision of the 9th Respondent to set aside the selection of the 7th Respondent for lot No. 283, was never challenged before a Court of law. I could agree with the learned Senior State Counsel on her submission on this point, but the actions of the 9th Respondent, when viewed in the proper context, clearly indicate, that the said Authority, without conceding to the 'error' it had made in setting aside the 7th Respondent's selection without considering his effort to secure possession, sought to correct the resultant problematic situation by reversing its decision to set aside the selection made in 2005, and thereafter to grant an Annual Permit afresh in favour of the 7th Respondent, under the powers vested in the 10th Respondent.

The "ගැටලුකාරී තත්වය" referred to by the 3rd Respondent, is an apt description of the situation the 9th Respondent Authority had encountered. This was primarily due to the fact that, when the investigative survey was carried out in January 2005, the Petitioner had not disclosed to the officers of the 9th Respondent that he is the defendant in the action instituted by the 7th Respondent, and there is an eviction order against him. The illegality of the Petitioner of occupying the parcel of State land does not confine to the interests of the 9th Respondent but also extends to the interests of the 7th Respondent as well. The 7th Respondent has had a valid permit, which conferred him certain rights over the parcel of land during its validity.

The 9th Respondent only considered the illegality of the occupation against its interests but failed to recognise the illegality of the said occupation against the interests of its own lessee, who by then had obtained a declaration as to the illegality of the occupation by the

Petitioner on that parcel of State land. It needs to be highlighted once more that this failure could directly be attributed to the non-disclosure or suppression of that very fact by the Petitioner to the officers who conducted the investigative survey on behalf of the 9th Respondent.

All these factors become relevant to the instant application because of their influence and contribution to the decision made by the 9th Respondent, in making the selection of the Petitioner to receive an Annual Permit in respect of lot No. 283 and setting aside the selection of the 7th Respondent. The recommendation made by the 1st Respondent to the Secretary to the *Mahaweli* Ministry (1R15) indicated that the 7th Respondent's selection to lot No. 283, was set aside due to making an informal alienation of that land, in violation of the conditions stipulated in the permit. It also indicated that since the 7th Respondent had subsequently been restored to the possession of the said lot upon a Judgment of Court by evicting the Petitioner, and since the appeal against said Judgment was dismissed, the latter's selection to the said lot was set aside. This was done, in order to re-issue a permit to the 7th Respondent, who had now been placed in possession of the said lot by an order of Court. This is also the position of the 9th Respondent had taken, when the 7th Respondent complained to the Human Rights Commission under references HRC/AP/656/15/2013(W), per 1R13 and also in relation to the complaint of the Petitioner to that Commission under reference HRC/AP/350/S (1R14). The Petitioner did not attach any documents to indicate the outcome of the inquiry conducted by the Human Rights Commission, over his complaint under the said reference.

Thus, the contents of 1R14 and 1R15 clearly indicate the underlying considerations taken into account by the 9th Respondent in

setting aside the selection made in 2005 in favour of the Petitioner. One such factor was the fact of restoration of the 7th Respondent back into possession of lot No. 283 by an order of Court. With making the said decision to set aside the selection of the Petitioner, the 9th Respondent made an attempt not to have an administrative decision which was in direct conflict with a judicial decision, which became binding both on the Petitioner as well as the 7th Respondent. Therefore, it is clear that the 9th Respondent's decision to set aside the Petitioner's selection to lot No. 283 was made upon the realisation that in the first place, it should not have made the selection of the Petitioner back in 2005, in view of the pending litigation between the two contesting parties in respect of the same parcel of land. In fairness to the 9th Respondent, it must be noted that although it was aware of a litigation instituted by the 7th Respondent, it would not have been known that the other party to that litigation is the Petitioner.

Interestingly, the 1st Respondent also conveyed to the Secretary of *Mahaweli* Ministry that an internal investigation would be initiated into the circumstances that led to the selection of the Petitioner in 2005. In fact, the Resident Project Manager issued a directive on Chief Internal Auditor calling for a complete report as to the inquiry conducted to regularise the illegal occupation of the Petitioner to the said lot (annex 4 to 1R15). This shows that the failure to consider the effect of the pending litigation over lot No. 283, had resulted in the subsequent setting aside of the Petitioner's selection to that particular lot.

Thus far in this Judgement, I have considered several aspects that had a direct bearing on the legitimacy of the expectation the Petitioner, which he claims to have entertained with the issuance of P13. These aspects include the contents of P13 and P19 and their effect, the

litigation history between the Petitioner and the 7th Respondent and, finally, its relevance and the effect on his selection to receive a permit. I have also considered in detail the two grounds on which he was selected to receive a permit, namely occupation and development of lot No. 283, and the legal status of the Petitioner in relation to the occupation of the land and its development.

In addition to the failure to disclose regarding pending litigation against him, the Petitioner had apparently suppressed yet another factor, which also had a bearing on his selection to receive an Annual Permit on lot No. 283. It was noted that the officers of the 9th Respondent made a remark in 1R2, that the Petitioner had "*constructed a permanent building and operates a business enterprise in it*." Obviously, this information must have been provided to the officers by the Petitioner himself. However, in his petition, the Petitioner does not make any averment on developmental activity he carried out on that parcel of State land. Of course, he states therein that he obtained the electricity supply to the grocery store. Why this particular factor becomes relevant in the present analysis is, it is evident from the letter informing the 7th Respondent of the cancellation of his permit (1R6), that one of the reasons the 9th Respondent decided to set aside the 7th Respondent's selection to receive a permit was his failure to develop the commercial lot allocated to him. When the 7th Respondent allowed the Petitioner to occupy lot No. 283 in December 1987, there was in fact a building standing on that lot and that had admittedly been constructed by the former. Contrary to the claim of the Petitioner that he did put up the building, the informal agreement P2 also indicate that he paid the 7th Respondent a sum of Rs. 225,000.00, as the value of the building that stood on that lot in 1987.

When dealing with the legitimacy of an expectation, *Wade*, having posed the question (supra, at p. 449) "*how is it to be determined whether a particular expectation is worthy of protection?*", proceeded to answer same by identifying several considerations a Court could take into account in that regard. Listing as the fifth consideration (at p.450), it is stated that "*... the individual seeking protection of the expectation must themselves deal fairly with the public authority*". Similar view is taken in *De Smith* (supra) as it is stated (at p.692) "*the representation must be preceded by full disclosure*."

Both these texts quoted the Judgment ***R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents ltd and Others*** [1990] 1 All ER 91, to illustrate the point. This was an instance where the Revenue authority had reportedly made known its view on taxation policy applicable to index-linked bonds, which it need not have done. When the Revenue authority decided to resile from its stated policy i.e. "*not to challenge as disguised interest the indexation uplift*" of such bonds, "*provided that the bonds paid a commercial rate of interest in addition to the indexation uplift*", the applicants sought to quash that decision seeking judicial review on the basis, that the Revenue authority had abused its powers by frustrating their legitimate expectation formed on the stated policy.

Bingham LJ held (p.110 *f*) "*If it is to be successfully said that as a result of such an approach the Revenue has agreed to forgo, as has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgement, be ordinarily necessary for the tax payer to show that certain conditions had been fulfilled*". In this context, his Lordships further stresses the point that, therefore, "*… it is necessary that the taxpayer should have put all his cards*

face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling …".

The requirement of an applicant, who expects a ruling of a public body, must "*put all his cards face upwards on the table*" in turn is based on a more fundamental principle, which *Bingham* LJ (p. 111 *a*) describes thus; "*The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen … Fairness requires that its exercise should be on the basis of full disclosure*".

Thus, it is clear that the Petitioner did not ""*put all his cards face upwards on the table*" when the officers of the 9th Respondent Authority conducted an investigative survey with a view to regularise illegal occupation of State lands in *Nochchiyagama* town in 2005, but expected a ruling from them in his favour that he was in occupation of the State land and he had developed the land. In respect of the development of the property as well, the Petitioner was selective in making available the required information. He apparently had claimed full credit to developing the lot by erecting a building on it and had his business of a grocery store house in it. In the process he had suppressed that it was the 7th Respondent who put up that building and he merely occupied it after securing electricity supply to that building.

This factor takes away the validity of any claim seeking to legitimise the expectation entertained by the Petitioner on P13, even if it is accepted as an undertaking that is '*clear, unambiguous and devoid of relevant qualification'*. He clearly suppressed his actual status as a Judgment Debtor, who was to be evicted by an order of Court. He also

shielded the development activity carried out by the 7th Respondent from the officers, who made an investigative survey.

Connected to P13, the document P19 too is a document relied upon by the Petitioner to substantiate his claim of the expectation he said to have entertained on P13, as it contains a re-confirmation of the 9th Respondent's earlier undertaking to issue an Annual Permit.

Perusal of the document P19 reveals that it had been issued in an official letterhead indicating that it had been issued by the Office of the Resident Project Manager – System H and is titled "අදාල අයගේ දැන ගැනීම සඳහා" and "නොවිවියාගම නගර සැලසුමේ අංක **283** වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය සනාථ කිරීම". The letter P19 is dated 16.05.2013, and signed by one *P.W.C. Mohotti,* as the Project Manager. P19 indicates that it was copied to the Resident Project Manager, his deputy and the Block Manager. Having described the circumstances that led to the selection of the Petitioner to receive an Annual Permit for lot No. 283, the letter P19 then states "... **මේ අනුව නොවිවියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් සහ වාර්ෂික බදු මුදල් හිඟයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් ඉදිරියේදී වාර්ෂික අවසර පත්‍රයක් මොහු වෙත නිකුත් කිරීමට පියවර ගන්නා බැව් කාරුණිකව දන්වමි** "

Judging by the persons to whom P19 was copied to, it appears to be an essentially an internal official communication. Surprisingly, it also has the title "අදාල අයගේ දැන ගැනීම සඳහා", depicting its purpose to inform the Petitioner's entitlement to lot No. 283 to the world at large. The Petitioner claims that he "received" the said letter P19, but it was neither addressed to him nor was it generated on his initiative and issued on request. The most striking feature in P19 is that it confers legal ownership of lot No. 283 to the Petitioner, whereas the 9th Respondent was yet to alienate the said lot, in favour of the Petitioner

by issuance of an Annual Permit. The relevant part of P19 reads thus " මේ අනුව නොච්චියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් සහ වාර්ෂික බදු මුදල් හිඟයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් ඉදිරියේදී වාර්ෂික අවසර පත්‍රයක් මොහු වෙත නිකුත් කිරීමට පියවර ගන්නා බැව් කාරුණිකව දන්වමි ". This is when, the Judgment in case No. 15034/L had already made a determination that " උප ලේඛණගත ඉඩමේ නිසි අවසර පත්‍ර ලාභියා පැමිණිලිකරු බවට තීරණය කරමි. ඒ අනුව විත්තිකරු සහ ඔහුගේ සේවක නියෝජිතාදීන් ඉවත්කර පැමිණිලිකරුට සාමකාමී බුක්තිය ආපසු ලැබිය යුතු බවට තීරණය කරමි.".

Clearly, the function of making a decision to alienation of State lands is not conferred or delegated to the then Resident Manager, who decided to issue P19 under his signature. The act of inclusion of the above quoted statement in the said letter and thereby conceding to the 'legal ownership' to the disputed parcel of the State land in favour of the Petitioner, is clearly an act well beyond the powers and functions of its author and therefore had been issued without having proper legal authority to do so. The Resident Manager could only have issued a confirmation of the selection of the Petitioner in respect of lot No. 283 and the fact that he had paid his annual lease rentals up to the time of its issuance, as these factors could be well supported on the available material before him and therefore lies well within his powers and functions. But, for some reason, best known to that particular officer who issued P19, he had made such a declaration of the Petitioner's legal status in relation to lot No. 283, challenging the Judgment of a competent Court, which decided against the Petitioner's interests in respect of the same parcel of land. The relevant pronouncement made in the Judgment of the District Court is "උප ලේඛණගත ඉඩමේ නිසි අවසර පත්‍ර ලාභියා පැමිණිලිකරු බවට තීරණය කරමි." The Resident Manager declares that "අනුව නොච්චියාගම නගර සැලසුමේ අංක 283 වාණිජ ඉඩමේ නිත්‍යානුකූල අයිතිය මොහොමඩ් කරීම් මොහොමඩ් රියාද් වන අයට හිමි ඇති බැවින් ..." and confers right over and above the

said Judgment by making the said declaration. When the said declaration made by the then 3rd Respondent in P19 it was in direct conflict with the said determination of Court, which became final and binding on the Petitioner, after the withdrawal of his appeal. This act clearly amounts to a collateral attack on that Judgment.

It is not clear as to the circumstances that prompted *Mohotti* to issue P19 at that particular juncture, as the Petitioner was already appraised of a 'decision' made by the 9th Respondent in his favour. The Petitioner was so convinced of his entitlement to a permit, subsequent to that 'decision" and he had even withdrawn his own appeal, exposing himself to the risk of being evicted by Court. The 1st Respondent, in his Statement of Objections denies existence of letter P19 and no office copy of P19 was found, tendered to Court, or at least referred to in the same, leading to the reasonable inference that the said letter had been issued only to the Petitioner by the person who issued same. If P19 was issued on the strength of same 'decision' the Petitioner speaks of, then that 'decision'; in the absence of any documentary evidence confirming the fact that such a 'decision' had ever been made by the 9th Respondent, it is reasonable to infer that the existence of that 'decision' is only known to *Mohotti* and the Petitioner. Letter P19 was issued on 16.05.2013 and confirms that the Petitioner had paid annual lease rentals without default ("... වාර්ෂික බදු මුදල් නිහයකින් තොරව මේ දක්වා ගෙවා ඇති බැවිනුත් "). However, the Petitioner had tendered three receipts issued by the 9th Respondent in confirmation of payment of lease rentals marked P20. The receipt No. 275124 of 07.05.2013 indicates that the Petitioner paid arrears of lease rentals for the years 2004, 2012 and 2013 inclusive of the fines for such defaults. It could well be that the payments were made just nine days prior to the issuance of P19 in order to facilitate the

Petitioner to be issued with P19. If that is the case, most probably it is, the effect of P19 is therefore reduced to a mere personal communication between them and had been issued without any authority and therefore cannot be binding on the 9th Respondent. How a Court should consider such an 'undertaking' or 'an assurance' had already been dealt in the Judgment of ***Ariyaratne and Others v Illangakoon, Inspector General of Police and Others*** (supra), where it was held; " … *the law, as it presently stands, is that an assurance given ultra vires by a public authority, cannot found a claim of legitimate expectation based on that assurance."*

This Court, in making the said pronouncement, was mindful of the uncertainty it might create in such claims and added;

> *" … it has to be recognised that there may be many instances where a petitioner who relies on an assurance given by a public authority or one of its officials, reasonably believed that the public authority or official who gave it to him was acting lawfully and within their powers. It is also often the case that an individual who deals with a public authority will find it difficult to ascertain the extent of its powers and those of its officials. In such cases, much hardship will be done to an individual who bona fide relies on an assurance given to him by a public authority or one of its officials and is later told the assurance he relied on and acted upon, sometime with much effort and at great cost to him, cannot be given effect to because of a flaw regarding its vires. In such instances, the principle of legality comes into conflict with the principle of certainty and, the law as it stands now, is that the illegality of the assurance will defeat the value of*

> *certainty which contends that the assurance should be given effect. However, that outcome can cause grave prejudice to an individual, for no conscious fault of his own."*

It is evident from the segment that I have quoted above, if the Petitioner were to be considered a victim of an undertaking or an assurance given *ultra vires* by a public body, then he must qualify to be termed as "*an individual who bona fide relies on an assurance given to him by a public authority…"* for then only it could be said that the "*outcome can cause grave prejudice to an individual, for no conscious fault of his own."* When the Petitioner complains of an unenviable situation which he finds himself in, such as this, and if the material indicate that the Petitioner had a hand and contributed to such a situation, then, I do not think he could be considered as "*an individual who bona fide relies on an assurance given to him by a public authority…"* and therefore, the concern expressed by Court that the "*outcome can cause grave prejudice to an individual, for no conscious fault of his own "* has no application. In the circumstances, the document P19 would not render any assistance to the Petitioner's claim of entertaining a legitimate expectation, he had formed upon receipt of P13, as an instance of making a reconfirmation of the undertaking given in it.

Connected to the issue of the legitimacy of expectation, claimed to have been entertained by the Petitioner, his conduct too has a bearing in determining his application seeking relief from this Court. *De Smith* (at p. 694 under foot note 143) stated " … *appropriate conduct of course be taken into account in the decision of Court as to whether, in its discretion, to award the applicant a remedy*". Adaptation of this principle is reflected from the process of reasoning adopted by the English Supreme Court,

In the matter of an application by JR38 for judicial review (Northern Ireland) [2015] UKSC 42. This was an instance where the applicant sought judicial review, alleging that, subsequent to a request made by the Police, publication of a photograph in a newspaper, which depicted him participating in a disorderly and riotous conduct with the others, is violative of his right to privacy guaranteed under Article 8 of the European Convention of Human Rights. At the time of taking the said photograph, the applicant was only 14 years age and therefore was afforded special statutory protection as to his identity. The divisional Court, by majority decision dismissed the applicant's application and he preferred an appeal. The Supreme Court, having taken note of the fact of taking and use of a photograph of an individual would *prima facie* lie within the ambit of Article 8 of the said Convention, nonetheless, decided to dismiss the appellant's appeal on the basis that the act of publication could be justified in the circumstances. The Court, in dismissing the appeal, did weigh the competing interests of the appellant and interests of the public and applied the test of proportionality, since the police published the photographs only as the last resort. The Court, having observed that, "*after a painstaking approach taken by the police service to the objective of identifying young offenders*" did not yield any information, then referred to the conduct of the appellant, which contributed to the impugned publication of his photograph, in following terms; "*… it is ironical that the appellant and his father were shown the photograph that was later published. Had they identified the appellant; no publication would have occurred*".

A similar approach was adopted by Lord *Denning* in determining the appeal of ***Cinnamond v British Airport Authority***

[1980] 2 All ER 368. This refers to an instance where six car-hire drivers were prohibited by the Airport Authority to enter the *Heathrow* Airport for any purpose other than as a *bona fide* airline passenger. This was done by the Authority after repeatedly prosecuting them under its byelaws, which prohibited anyone loitering at the Airport. The six- car hire drivers have sought to quash that prohibition before the original Court but were unsuccessful. In dismissing their appeal, Lord *Denning* said in relation to the issuance of the said letter " *… I would hold that the airport authority was perfectly in order, and within its rights, in writing the letter of 23rd November 1978 in which it prohibited these car-hire drivers from entering the airport until further notice. Mark you, only until further notice. If they show an intention to abide by the law in the future, if they are ready to give an undertaking, there is no doubt that the prohibition will be withdrawn. That has not happened. We have been told that, despite Forbes J's decision, these six car-hire drivers have been going on in the same way even since that decision in April 1979 until this very day".* In view of the above, it is relevant to consider the conduct of the Petitioner in applying for relief from this Court.

This aspect of the Petitioner's claim of frustration of his legitimate expectation became relevant in view of the approach taken by the Courts as indicative from the Judgment of the Privy Council in ***The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** (supra), where Lord *Carnwath* made the pronouncement that (at para 108); *"[T]he initial burden lay on an applicant to prove the legitimacy of his expectation, and so far as necessary his reliance on the promise."* In the preceding section of this Judgment, the aspect of the Petitioner's claim which dealt with the legitimacy of his expectation was considered and,

in view of the Petitioner's unusual conduct, I now turn to consider whether he had discharged the remaining part of his initial burden, which dealt with the aspect of "*… his reliance on the promise*".

It is already noted that the learned President's Counsel had placed heavy reliance on the 9th Respondent's act of issuing P13 and depicting it as an instance of a clear undertaking made in favour of his client, the Petitioner. However, it is evident from the conduct of the Petitioner, that he was not so convinced of the said 'undertaking' contained in P13, despite his claim before this Court that it conveyed an undertaking by the 9th Respondent to fulfil his expectation to an Annual Permit in respect of lot No. 283. The document P13 is dated 26.10.2007 and contains a tag indicating that it had been issued as "*final notice*" and directed the Petitioner to make the initial payment along with the yearly lease rental for 2007 on or before 25.11.2007. Plainly it is indicative of the fact that the Petitioner had chosen to disregard the earlier communications that were meant to convey his selection to receive a permit.

It also specifically conveyed to the Petitioner that his continued failure to comply with its directions would make him liable to be set aside from his selection to lot No. 283. Undeterred by these warnings and not being convinced of the nature of his selection to receive a permit, the Petitioner opted not comply with the directions issued on P13. This is clearly an indication to the degree to which the Petitioner accepted his selection to receive a permit and the obvious doubts he entertained over the question whether the compliance of the said directions would in itself make him entitled to receive a permit to the said land. However, when he eventually made a payment, the deadline set up by P13, had already lapsed.

Nonetheless, the available material points to the conclusion that at some point of time the Petitioner did entertain a serious expectation that the 9th Respondent would issue an Annual Permit in his favour. This is indicative from the proceedings of the Court of Appeal on 15.01.2013, in CA 1175/98(F), by which the Petitioner invoked appellate jurisdiction of that Court seeking to set aside the order of the District Court pronounced on 05.11.1998 for the second time, rejecting his application to set aside the ex parte judgment (P18). Seeking permission of the appellate Court to withdraw his own appeal against the said order, learned President's Counsel, who represented the Petitioner before that Court, submitted that the said application was made "*in view of a decision of the Mahaweli Authority made in favour of the Petitioner.*" Obviously, by then the Petitioner was convinced that the 9th Respondent had made a 'decision' favourable to him and after legal advice, instructed his Counsel to withdraw his appeal. He was aware that after the said appeal is withdrawn, the finding of the District Court, impugned by the said appeal, becomes binding upon him, in relation to the 7th Respondent and over the lot No. 283.

The only document the Petitioner had in his possession at the point of withdrawing his appeal which is indicative of an 'decision' taken by the 9th Respondent, was P13. But the conduct of the Petitioner amply demonstrated that he did not entertain any expectation on that particular 'decision. Therefore, it could safely be assumed that it is not the document that contained "*a decision of the Mahaweli Authority made in favour of the Petitioner*" and generated confidence in his mind to such a degree to decide to withdraw his appeal. The other 'decision' made in favour of the Petitioner was contained in document P19, which was yet to be issued when the appeal was withdrawn, as it is dated 16.05.2013.

The withdrawal of his appeal itself is an indication of the degree of reliance the Petitioner had placed on that particular 'decision', for him to ignore the probable exposure to risk of being evicted from lot No. 283, if that 'decision' is not implemented by the 9th Respondent.

What then is this 'decision', which generated such a strong confidence in the mind of the Petitioner to such a degree that he decided to withdraw his appeal challenging eviction from lot No. 283, disregarding its obvious consequences?

No explanation offered by the Petitioner as to this favourable 'decision' that led him to withdraw his appeal. In his petition, the Petitioner merely states that he "… *moved to withdraw the appeal on the basis that the Mahaweli Authority had made a decision*" in his favour. The cancellation of the 7th Respondent's selection to lot No. 283 in December 2008, also did not contribute in any way to boost up the confidence of the Petitioner had in P13, to make up his mind to withdraw his appeal thereafter. He waited another five years, and strangely acted on this favourable 'decision', presumably made somewhere in 2013, to instruct his Counsel to withdraw his appeal and thereby bringing the litigation he had with the 7th Respondent to a terminal point.

This is evident from the available material that, despite the issuance of P13, the Petitioner had relentlessly pursued all legally available options seeking to prevent his eviction from lot No. 283, by the 7th Respondent upon execution of writ issued by the Court. In doing so, the Petitioner had acted well within his rights, and sought intervention of appellate Courts against the multiple rulings made by original Courts that are adverse to his interests.

The Statement of Objections of the 1st Respondent also does not indicate the existence of any other favourable 'decision' made by the 9th Respondent, except to the one already conveyed to him through P13. Therefore, the circumstances referred to above indicate that the Petitioner's decision to withdraw his appeal was not made on the strength of either P13 or P19, and obviously was based on some other 'decision' said to have been made by the 9th Respondent, sometime in and around 2013.

Strangely, the very 'decision' on which the Petitioner had actually entertained his expectation, was not made available for consideration of this Court. This failure on the part of the Petitioner resulted in a situation where this Court was placed in a position that it cannot decide whether that particular 'decision' upon which the Petitioner had acted on, could be equated with a specific 'undertaking' of issuance of a permit, whereby he could legitimately expect the 9th Respondent to act on that undertaking. It is also not clarified by the Petitioner whether it is a 'decision' communicated to the Petitioner orally or in the form of a document, as well as the identity of the individual, who would have made that 'decision' on behalf of the 9th Respondent, in his petition.

Judging by the conduct of the Petitioner, it is evident that he had placed implicit faith on the said 'decision' and acted on that particular 'undertaking' to his detriment when he decided to withdraw his appeal on the strength of that 'decision'. In ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago*** (supra), even if the applicant had relied on the promise made by an authority and acted on it to his detriment, the Court insisted that "*If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too*". In this instance too, the Petitioner had acted to his

detriment, by placing reliance of that 'decision'. The documentary evidence does provide ample proof of it. However, that 'decision' or the person who made it is shielded by the Petitioner from this Court and to the Respondents, denying them an opportunity to place their standing on same. In the absence of any positive indication to an actual 'decision' made by the 9th Respondent, as indicative by the contents of the contemporaneous records that were made available in the form of documentary evidence tendered to this Court by the 1st Respondent (who should have made such 'decision' in the first place), it is reasonable to infer that if at all there is a 'decision' then it could well be a one made by a stranger. If this 'decision' is made by 3rd party, claiming to represent the 9th Respondent, it is not possible for the Petitioner to bind the 9th Respondent by placing any reliance on such a 'promise' irrespective of the fact that of his strong belief in it. *De Smith* (supra) states (at p. 689) " *[A] legitimate expectation must be induced by the conduct of the decision maker. The representation by a different person or authority will therefore not found the expectation."*

Clearly, the Petitioner had relied on that particular 'decision' of the unknown entity and founded his expectation on same, as indicative by his act of withdrawing of his appeal. But the Petitioner failed to prove that there was such a 'decision' on which he formed his legitimate expectation, instead he sought to establish that he relied on P13, to entertain an expectation but his own actions violating its conditions indicate that he did not entertain any serious expectations on P13, after it was issued.

It must be noted in this context that the deceptive conduct of the 7th Respondent also had not escaped the attention of this Court. He deliberately made out a false claim in his Statement of Objections

stating that he was totally unaware of any decision made by the 9th Respondent cancelling his selection to lot No. 283 in 2008, until the year 2013. In his affidavit, the 7th Respondent, states under oath that "… *until 2013 I was not aware about the fact that my permit had been cancelled and or suspended by the Mahaweli Authority* …". However, the 1st Respondent, in his Statement of Objections, tendered a letter dated 15.12.2008 (1R6), by which the 7th Respondent was informed of the decision to cancel his permit. On 29.12.2008, the 7th Respondent, through his Attorney-at-Law, writes back to the 3rd Respondent in response. In that letter (1R7), the 7th Respondent states that the appeal No. CA 1175/98 was still pending, and it was wrong for the 9th Respondent to cancel his permit by way of an administrative decision and it was made contrary to letter issued to him (7R11). Clearly, the 7th Respondent had deceived his Attorney-at-Law, who drafted the Statement of Objections that had been filed on his behalf before this Court, to include such an averment, depicting a totally false claim. This deliberate act of deception practiced by the 7th Respondent demands unreserved condemnation of this Court.

However, since it is the Petitioner who came before this Court, alleging that his legitimate expectations were frustrated, after careful consideration of the available material, I am inclined to agree with the contention of the 1st to 6th and 8th to 10th Respondents, as well as of the learned Counsel for the 7th Respondent that the Petitioner had failed to establish the legitimacy of the expectation he had entertained.

One of the complaints of the learned President's Counsel for the Petitioner was that no opportunity was provided for his client to place any material for the consideration of the 9th Respondent Authority, before it made the decision to cancel the selection made in his favour to receive a permit in respect of lot No. 283. In effect, this contention is

founded upon rules of natural justice. In ***Secretary of State for the Home Department v AF (No 3)*** [2009] UKHL 28, para 72, Lord *Hoffmann* noted that the purpose of the *audi alteram partem* rule "*… is not merely to improve the chances of the tribunal reaching the right decision … but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told*." And in ***R (Osborn) v Parole Board*** [2013] UKSC 61, para 68, Lord Reed endorsed a normative understanding of the duty to act procedurally fairly:

> *"[J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken*."

However, the case of ***Cinnamond v British Airport Authority*** (supra), too refers to an instance where the applicants sought judicial review on the basis that the Airport Authority ought to have given an opportunity to them, so that they could be heard and, if such hearing was granted, they could have given reasons to why the prohibition issued by the Airport Authority should be modified. They cited a passage from Wade (4th Ed, p.455), which reads thus "*… in the case of a discretionary administrative decision, such as a dismissal of a teacher or the expulsion of a student, hearing his case will soften the heart of the authority and alter their decision, even though it is clear from the outset that punitive action would be justified*". This passage was cited before their Lordships, in order to counter the respondent's submissions that affording a

hearing would not have make any difference to the prohibition already made.

Delivering his Judgment on this appeal, Lord *Denning* held that (at p.374),“ *[I] can see the force of that argument. But it only applies where there is a legitimate expectation of being heard. In cases where there is no legitimate expectation, there is no call for hearing*.” Similarly, in the instant application too, in view of the fact that the Petitioner had failed to establish the legitimacy of his expectation, the denial of an opportunity of being heard before an adverse order is made, therefore is not a requirement that would have tainted the decision taken by the 9th Respondent.

The premise on which the Petitioner had sought reliefs from this Court is by making a complaint of violation of his fundamental right to equality, guaranteed by Article 12(1) of the Constitution, despite him placing heavy reliance on certain public law principles in support of his contention. The specific relief he seeks in respect of the Annual Permit issued in favour of the 7th Respondent 7R12 is its annulment, which is a public law remedy available to him. In ***Perera v Prof. Daya Edirisinghe*** (1995) 1 Sri L.R. 148, *Mark Fernando* J observed that under the 1978 Constitution “*… there is no doubt that Article 12 ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4(d)”* and added that “*[T]he fact that by entrenching the fundamental rights in the Constitution, the scope of the writs has become enlarged is implicit in Article 126(3), which recognises that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right.”*

In ***Chandrapala v The Commissioner of Elections and three Others*** *2006 [B.L.R.]7,* this Court quoted *Bhagwati* CJ from the Judgment

of ***Royappa v State of Tamil Nadu*** (A.I.R. 1974 S.C. 555) where it was stated that;

> *"[E]quality is a dynamic concept with many aspects and dimensions, and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to whim and caprice of an absolute monarch. When an act is arbitrary, it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14."*

In the circumstances, if the Petitioner could establish that the 9th Respondent had frustrated his legitimate expectation to an Annual Permit in respect of lot No. 283, on the strength of the promise made in P13 with P19, then the said frustration, in the absence of any acceptable justification by the said Respondent, would amount to abuse of power and thereby may have given rise to a situation where it could be said the actions of the 9th Respondent were violative of the fundamental rights guaranteed to him under Article 12(1). Therefore, the Petitioner's contention will have to be considered in the light of the jurisprudence of this Court pronounced on the principles on equality.

However, since the Petitioner was unable to satisfy this Court in respect of the legitimacy of his expectation which he claims to have entertained after the issuance of P13, the consideration of the question

whether there was any infringement of the fundamental rights guaranteed to him under Article 12(1) by one or more of the officers of the 9th Respondent Authority, in frustrating his substantive legitimate expectation to a permit "*is so unfair*" and "*will amount to an abuse of power*" (per ***R v North and East Devon Health Authority, Ex p Coughlan*** [2001] QB 213), does not arise for consideration.

In view of the above reasoning, I hold that the Petitioner had failed to establish any violation of his fundamental rights under Article 12(1) and therefore his application for a declaration of such a violation by this Court should be refused.

The petition of the petitioner is accordingly dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. APPEAL 64/23

SC/SPL/LA No. 337/2022.

CA No: CA/HCC/149/20

HC Case No. HCB 2147/16

The Director General,
Commission to Investigate
Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

COMPLAINANT

Vs.

Chandana Chithral Kariyawasam,
No. 494/4, Hirimbura Road,
Kahaduruwawatte, Galle.

ACCUSEDAND THEN BETWEEN

Chandana Chithral Kariyawasam,
No. 494/4, Hirimbura Road,
Kahaduruwawatte, Galle.

ACCUSED-APPELLANT

Vs.

The Director General,
Commission to Investigate
Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

The Director General,
Commission to Investigate
Allegations of Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

COMPLAINANT-RESPONDENT-APPELLANT

Vs.

Chandana Chithral Kariyawasam,
No. 494/4, Hirimbura Road,
Kahaduruwawatte, Galle.

ACCUSED-APPELLANT-RESPONDENT

BEFORE : **P. PADMAN SURASENA J**

YASANTHA KODAGODA PC J

KUMUDINI WICKREMASINGHE J

COUNSEL : Azard Navavi, SDSG with Ms. Ganga Heyyanthuduwa, Deputy Director General, Ms. Anusha Samandapperuma/ ADL for the Complainant- Respondent- Appellant

Kalinga Indatissa, PC with Ms. Razana Salih, Nirodh de Silva and Ms. Nushani shahib for the Accused-Appellant-Respondent.

ARGUED &

DECIDED ON: 24-10-2023.

P. PADMAN SURASENA J

Court heard the submissions of the learned Senior Deputy Solicitor General who appeared for the Complainant- Respondent-Appellant and also the submissions of the learned President's Counsel who appeared for the Accused-Appellant-Respondent and concluded the Argument.

This Court by its order dated 16-03-2023, has granted Special Leave to Appeal in respect of the questions of law set out in paragraph 12 (a), (b), (f), (g), (i) and (j) of the Petition dated 08-12-2022. In addition to the above questions of law, Court had also granted Special Leave to Appeal in respect of the following two questions formulated by the learned Senior Deputy Solicitor General who appeared for the Director General of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC).

i. *"Does a major part of the judgment of the Court of Appeal contain parts verbatim from the written submissions filed by the parties without such portions being subjected to a proper judicial evaluation?"*

ii. *If the answer to the above question is in the affirmative, should the judgment of the Court of Appeal be permitted to stand?*

Having considered the submissions, we are of the view that for the disposal of this Appeal, it would suffice for us to consider, the afore-mentioned two questions of law formulated at the time of supporting the Special Leave to Appeal Application relevant to this Appeal by the learned Senior Deputy Solicitor General who appeared for the Director General of CIABOC.

In the course of making the submissions Mr. Azard Nawavi, Senior Deputy Solicitor General produced before court, a copy of the judgment of the Court of Appeal in which he had highlighted the verbatim contents taken from the written submission filed by the Accused-Appellant in the Court of Appeal dated 31-05-2021 which has been produced in this Court marked **P7** and from the written submission filed by the Complainant-Respondent-Appellant in the Court of Appeal dated 01-06-2022 which has been produced in this Court marked **P8**.

Having compared the contents of the judgment of the Court of Appeal with the contents of the said written submissions filed by both parties in the Court of Appeal, we observe that except few words of certain sentences, rest of the judgment of the Court of Appeal dated 28-10-2022 is exactly the same in content as those in the written submissions of the Accused- Appellant-Respondent (**P7**) and the written submission filed by the Complainant-Respondent-Appellant (**P8**).

It is the submission of the learned Senior Deputy Solicitor General that this fact alone is sufficient to prove that the Court of Appeal had not given its mind to the merits of the issues raised when deciding them. He proceeded to cite and rely on two previous precedents of this court which he has annexed to his written submissions marked **X 1** and **X 2**. The said judgments of this Court are directly on

point and are self-explanatory. It is worthwhile reproducing their operative parts which are as follows.

In the case of Bilingahawatte Gedara Ariyaratne Vs. Attorney General,[1] this Court having taken into consideration, the submissions of the learned counsel for the Accused-Appellant-Petitioner in that case who had complained that the entirety of the written submission filed on behalf of the Complainant-Respondent had been reproduced in the judgment of the Court of Appeal, proceeded to do a comparison of the written submissions tendered by both parties before the Court of Appeal vis a vis the contents of the judgment delivered by the Court of Appeal which was impugned in that case. Having found merits in the above submission, Aluwihare PC J held in that case as follows:

> *"Upon comparison, it is clear that the same contents inclusive of the formatting, paragraphing, numbering and underlying that appear in the written submissions is reflected in the identical manner in the Judgment of the Court of Appeal. Hence it is clear that the Court of Appeal had not arrived at the decision on an independent evaluation of the material in this case. Other than mere 3 lines that appear on the last page of the Judgment, entirety of the judgment is a reproduction of the written submissions filed on behalf of the Complainant-Respondent.*
>
> *This Court is of the view that it is unsafe to sustain the judgment delivered by the Court of Appeal. ..."*

This Court in that case, having noted that there had been a clear failure on the part of the Court of Appeal to give it's mind to the issues raised, proceeded to set aside the judgment delivered by the Court of Appeal and send the case back to the Court of Appeal for rehearing by a Bench comprising of Judges who did not hear the case in the Court of Appeal at the previous instance.

In the case of Bilingahawatte Gedara Karunaratne alias Raja Vs. Attorney General[2], this Court having perused the judgment of the Court of Appeal in that case, had

[1] SC Spl LA No. 43/2017; decided on 12-10-2017.
[2] SC Spl LA No. 66/2017; decided on 05-12-2017.

found that the written submissions filed by the Attorney General had been reproduced from word to word in the judgment of the Court of Appeal in that case. Sisira J de Abrew J, answering in the affirmative, the question of law *"Has the Court of Appeal failed to consider the defence case?"* stated as follows:

> *"We have perused the judgment of the Court of Appeal and we find that the written submissions filed by the Attorney General have been reproduced from word to word in the judgment. Thereafter Her Ladyship has written two sentences affirming the conviction and the sentence. We therefore, hold that the Court of Appeal has failed to consider the Appellant's case and severe prejudice has been caused to the Accused-Appellant in this case.*
>
> *In our view, when the Appellate Court considers an appeal it becomes the sacred duty of that Court to consider arguments for both sides. When the Appellate Court reproduces the written submissions filed by the Attorney General and writes a few sentences affirming the conviction, (the Appellate Court) fails to perform its sacred duty.*
>
> *It is not the duty of the Court of Appeal to reproduce the written submissions filed by one party in the judgment and give the judgment in favour of the party who filed written submissions. The Court of Appeal in this case after reproducing the written submissions filed by the Attorney General in its judgment, has dismissed the appeal.*
>
> *In these circumstances, we answer the above questions of law in the affirmative.*
>
> *In our view the judgment of the Court of Appeal cannot be permitted to stand. We therefore set aside the judgment of the Court of Appeal and direct the Court of Appeal to re-hear the case by a different Bench."*

In the course of the submissions, the learned President's Counsel who appeared for the Accused- Appellant- Respondent in the instant case, was not able to counter the above submissions made by the learned Senior Deputy Solicitor General. This is because it was clear to everyone that on the face of it, the contents of the judgment of

the Court of Appeal is entirely a reproduction in verbatim, of the written submissions filed by both parties.

In our view, this is a clear indication of the failure on the part of the learned Judge of the Court of Appeal to consciously consider the submissions made by the parties pertaining to the issue at hand when arriving at the decision he had made. Therefore, we are unable to accept such a writing as a judgment pronounced after considering the issues and submissions made by the respective parties to the case. Under the above circumstances, we are unable to permit this judgment to stand.

In view of the above, we proceed to set aside the judgment dated 28-10-2022 and send the case back to the Court of Appeal with a direction to the Court of Appeal to conduct a fresh argument before a panel of Judges who did not sit as members of the panel which had delivered the impugned judgment dated 28-10-2022.

In view of the above conclusion, we will not proceed to consider the other questions of law in respect of which this Court has granted Special Leave to Appeal.

Appeal is allowed. Case is sent back to the Court of Appeal to conduct a fresh argument.

JUDGE OF THE SUPREME COURT.

YASANTHA KODAGODA, PC, J.
I agree

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.
I agree

JUDGE OF THE SUPREME COURT

AG/-

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 02 of 1978 against Mr. Nizam Mohammed Shameem, Attorney-at-Law.

SC Rule No. 6/2021

H.M.B.P. Herath,

Secretary,

Presidential Commission of Inquiry to Investigate and Inquire into and Report or take Necessary Action on the Bomb Attacks on 21st April 2019,

1st Floor, Block No. 05,

Bandaranaike Memorial International Conference Hall,

Bauddhaloka Mawatha, Colombo 07.

COMPLAINANT

Vs.

Nizam Mohammad Shameem,
Attorneys-at-Law,
104 C, Godawaththa Road,
Godapitiya,
Akuressa.

RESPONDENT

Before: Buwaneka Aluwihare PC, J.

Thurairaja PC, J.

Mahinda Samayawardhena, J.

Counsel: Faiz Musthapha PC with N.M. Shaheid PC and M.A. Zaid for the Respondent Attorney-at-Law.

Rohan Sahabandu PC with Chathurika Elvitigala for the Bar Association of Sri Lanka.

Ganaga Wakishta Arachchi DSG for the Attorney General.

Inquiry on: 21.06.2023.

Decided on: 24.10.2023.

Aluwihare PC J.

The respondent, who is an Attorney-at-law, has been called upon to show cause as to why he should not be suspended or removed from office on the ground of conduct that would be regarded as disgraceful or dishonourable by an Attorney-at-law.

When this matter was taken up for inquiry on 21.06.2023, the Respondent Attorney-at-law sought permission of the court to withdraw his earlier plea of, 'not guilty' and he intimated that he wishes to plead guilty to the Rule. Accordingly, the application was allowed and the Rule being read for the second time, the Respondent Attorney pleaded guilty to the Rule.

The Respondent Attorney-at-Law [hereinafter referred to as the Respondent] engaged himself to represent the All Ceylon Jamiyyathul Ulama (hereinafter the 'ACJU') in the proceedings conducted on 9th September 2020 before the Presidential Commission of Inquiry to Investigate and Inquire into and Report or take Necessary Action on the Bomb Attacks on 21st April 2019 (hereinafter the 'PCoI'). Moulavi Murshid Marsa Mullaffar was attending the proceedings of the PCol on 9th September 2020 representing the ACJU in his capacity as the acting Secretary. The Respondent is accused of conveying the mobile telephone of Moulavi Mullaffar, the said representative of the ACJU, bearing Subscriber Identification Number [SIM] 0777 988 395 into the venue of the proceedings and aiding Moulavi Mullaffar to record a part of the proceedings of PCoI on the said date, contrary to the rules of the procedure of the PCoI.

By the aforesaid conduct the Respondent was alleged to have been in breach of Rules 60 and 61 of the Supreme Court (Conduct of and Etiquette for Attorney-at-Law) Rules 1988, made in terms of Article 136 of the Constitution of the Republic of Sri Lanka.

The Respondent Attorney-at-Law has stated his case by affidavit dated 25th November 2020. The Respondent has admitted that he carried the mobile telephone of his client, the said Moulavi Mullaffar into the venue of the proceedings. It is averred that Moulavi Mullaffar had requested the Respondent to keep his mobile phone as he was not permitted to take it into the premises. Only Attorneys-at-Law were allowed to take their mobile telephones into the premises where the hearing of the Commission was taking place.

The Respondent has stated that out of respect for the Moulavi as a member of the clergy of the Respondent's faith and trusting his word, he agreed to keep the mobile phone in his custody. The Moulavi had indicated to him that the mobile phone was on 'flight mode'.

The Respondent in his affidavit has maintained that while the proceedings were ongoing a mild sound had emanated from the mobile phone and it had started vibrating. Failing to switch it off by pressing the power button, the Respondent has stated that he passed the phone to the Moulavi who was seated two rows behind him, so that the Moulavi could switch if off. As the proceedings were ongoing and the Respondent was assisting his Senior Mr. Javed Yousuf to cross-examine Ven. Galaboda Aththe Gnanasara Thero who was giving evidence before the Commission on that day and taking notes he states that he was unable to retrieve the phone from the Moulavi after he passed it over to him. Furthermore, he states that he had no reason to doubt that the Moulavi would not follow his instructions and not switch off the mobile phone.

The Respondent has stated that he was completely unaware of the alleged conduct of the Moulavi and that, had he known of the intention of the Moulavi to record the proceedings he would have declined to take the mobile phone into the venue of the proceedings. He has further stated that he did not intend to abuse the privilege offered to him as an Attorney-at-Law.

The Respondent has stated that he returned the mobile phone to the Moulavi during the proceedings with the indication to turn it off, that he had no knowledge of any ulterior motive on the part of the Moulavi and that he personally had no intention of recording the proceedings of the PCoI. He has further stated that he was unaware that recording of public hearings and/or hearings that were not conducted *in camera* before the PCoI is prohibited.

On the other hand, the Moulavi Mulaffar in his statement to the police dated 09.09.2020 has stated that he had inquired from the Respondent about the possibility of recording

the proceedings on the mobile phone of the Respondent, which the Respondent had allegedly refused to do stating that his mobile phone did not have sufficient memory to record the proceedings. The Moulavi has stated that thereafter, he asked the Respondent whether he can record from the Moulavi's phone and the Respondent had asked him to give the mobile phone to the Respondent after putting it on flight mode and switching on the recording.

The Moulavi has further stated that at one point the Respondent returned the mobile phone to him as it was not working and that thereafter the Moulavi has switched on the recording and kept the mobile phone with him.

The inquiries made by the police unit attached to the PCoI, affirmed the fact that the evidence led before the Commission in the afternoon session in fact had been recorded making use of the mobile phone concerned. Sequel to this revelation, The Chairman of the PCoI had referred this matter to the Supreme Court to consider whether the Respondent was in breach of the Rules relating to 'Conduct of and Etiquette for Attorneys -at -Law'.

The Professional Purpose / Ethics Inquiry Committee of the Bar Association which conducted an inquiry into this matter has observed that the Respondent Attorney had knowledge of the notices placed at the Commission regarding preventive measures put in place to prevent litigants and witnesses taking telephones inside the Commission Hall where the proceedings were held. The said Inquiry Panel has observed that adhering to Rules applicable to the PCoI relating to its proceedings forms part and parcel of responsibilities and obligations towards the Supreme Court Rules applicable to Attorneys.

Pleading in mitigation, the learned President's Counsel on behalf of the Respondent-Attorney, submitted to the court that the court should take cognizance of the fact that the Respondent expressed his unreserved regret and remorse over this incident without wasting the time of the court. The learned President's Counsel urged this court to consider that the Respondent is a young practitioner of law and is a father of an infant child and

that he solely relies on the income of his legal practice to support the family. It was also pointed out that the Respondent had come up in life from humble beginnings. It was submitted that due to this social disparity, he was overawed by the presence of the Secretary of the ACJU which is considered a prestigious body of the people that belong to the Islamic faith. Mr. Musthapha PC contended that it was due to these reasons that the Respondent had agreed to take the phone of the Secretary of the ACJU as the request was overbearing and he could not put the request of the Secretary down. The learned President's Counsel further submitted that the Respondent Attorney had no intention whatsoever to record the proceedings as averred in paragraph 31 of his affidavit furnished to the Supreme Court. Mr. Musthapha appealed to the court to consider that the proceedings before the Commission was public hearings with the presence of several journalists covering the proceedings.

The learned DSG pointed out that Moulavi Mullaffar attended the proceedings on the previous day [i.e. 8th September] as well and on that day his phone was left with the officers who were in charge of the security of the Commission.

The Respondent belongs to the noble profession from which one is entitled to expect a conduct appropriate to the profession which should be of a very high degree with utmost honesty. We share the view of the Disciplinary Committee that the Respondent had full knowledge of the notices placed at the Commission and therefore the restrictions that were put in place. The complaint against the Respondent is a serious one. The degree of punishment that should be imposed in cases of this nature is always a difficult decision to make. We have taken into account the mitigating factors mentioned by the learned President's Counsel and are also not unmindful of the consequences that our order would have on the Respondent's life and future. We however feel that we must mark our disapproval of the conduct of the Respondent in no uncertain terms and are of the view that the professional misconduct that has been disclosed in this case calls for his suspension from the roll of attorneys for a period of eight months.

The suspension of the Respondent from the practice will come into effect from 1st January 2024. The period of eight months will be reckoned from that date.

JUDGE OF THE SUPREME COURT

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S. THURAIRAJA PC, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/FR/393/2010

Gunarathinam Manivannan

Thiru Murikandi Pillayar Kovil,

Thiru Murikandi

More recently of

No.20/10, Housing Scheme,

Kanakambikai Kulam, Kilinochchi.

PETITIONER

Vs.

1. Honourable D.M. Jayaratne, M.P
   Prime Minister and Minister of Buddhist and Religious Affairs 135, Anagarika Dharmapala Mawatha,
   Colombo 00700.

1A. Honourable D.M.Swaminadan

Minister of Resettlement, Reconstruction and Hindu Religious Affairs

No.146, Galle Road,

Colombo 00300.

2. Shanthi Thirunavukkarasu
   Director,
   Department of Hindu Cultural Affairs,
   No.248 1/1, Galle Road,
   Colombo 00400.

2A. A. Uma Mageshwaran
   Director,
   Department of Hindu Cultural Affairs,
   No.248 1/1, Galle Road,
   Colombo 00400.

3. Major General (Retd) M.A.Chandrasiri
   Governor-Northern Province, Jaffna.

3A. H M GS Palihakkara
   Governor-Northern Province, Jaffna.

3B. Mr. Reginold Cooray
   Governor-Northern Province, Jaffna.

4. Puthukudiruppu Pradeshya Sabha,
   Puthukkudiruppu
   Replacing,
   Mullaitivu Pradeshya Sabha, Mullaitivu

5. Emelda Sukumar

Goverment Agent, Mullaitivu.

5A. N Vethanayagam

Government Agent, Mullaitivu.

5B. Rupawathy Keetheesvaran

Government Agent, Mullaitivu.

6. Subashini

Assistant Government Agent

Oddusuddan-Mullaitivu, Mullaitivu.

6A. R Kurubaran

Assistant Government Agent

Oddusuddan-Mullaitivu, Mullaitivu.

6B. Yathukulasingham Aniruththanan

Assistant Government Agent

Oddusuddan-Mullaitivu, Mullaitivu.

6C. Jeganathasharma Rajamalligai

Assistant Government Agent

Oddusuddan-Mullaitivu, Muilaitivu.

7. Ranjith Kumar
   Grama Sevakar – Thiru Murikandi
   Thiru Murikandi.

7A. N Jeyasuthan
   Grama Sevakar – Thiru Murikandi
   Thiru Murikandi.

8. Vishvamadu Co-operative Society
   Vishvamadu.

9. Johnson
   Commissioner of Local Government
   Northem Provincial Council
   Varodaya Nagar, Kannya, Trincomalee.
   Instead of
   Johnson Land Officer
   Northern Provincial Council,
   Varodaya Nagar, Trincomalee.

10. Jeyanthan Sharma

Officiating Priest,

Thiru Murikandi Pillayar Kovil,

Thiru Murikandi.

10A, Ravindra Kurukkandi

Officiating Priest

Thiru Murikandi Pillayar Kovil,

Thiru Murikandi.

11. Puvannakumar

Manager,

Thiru Murikandi Pillayar Kovil,

Thiru Murikandi.

11A. Paramasamy

Manager,

Thiru Murikandi Pillayar Kovil,

Thiru Murikandi.

12. Thanaledchumy Thirunavukkarasu of

C/O Kuhakumaran

Thiru Murikandi Pillayar Kovilady,

Thiru Murikandi.

12A. Thirunavukkarasu Kuhakumaran

Thiru Murikandi Pillayar Kovil,

Thiru Murikandi.

13. Honourable Attorney General

Attorney General's Department,

Colombo 01200.

14. Thirunavukkarasu Jeevanantham

No. 75/43, A9 Road, Thiru Murikandy.

15. Velusamy Nagarajah

No. 75/150, A9 Road, Thiru Murikandy.

RESPONDENTS

BEFORE : S. THURAIRAJA, PC, J

A.L. SHIRAN GOONERATNE, J AND

JANAK DE SILVA, J

COUNSEL : Dr. K. Kanag-Isvaran, PC with M.A.Sumanthiran, PC; Lakshmanan Jeyakumar and N.S. Nishenthiran instructed by Sinnadurai Sunderalingam & Balendra for the Petitioner.

Rajiv Goonetilleke, DSG for 1st, 2nd, 3rd. 5th, 6th, 9th and 13th Respondents.

A.Muttukrishnan, PC with Gowthamy Reepan instructed by Diani Millavithanachchi for the 4th Respondent.

Vivekananthan Puvitharan, PC with Anuja Rasanayakham for the 12A respondent.

K.V.S. Ganesharajah with Sutheshana Sothalingam for the Intervenient Respondent.

WRITTEN SUBMISSIONS: Petitioner on14th November 2022.

4th Respondent 14th November 2022.

1st, 2nd, 3rd. 5th, 6th, 9th and 13th Respondents on 1st November 2022.

Intervenient Respondent 14th November 2022.

12A respondent 14th November 2022.

ARGUED ON : 17th October 2022

DECIDED ON : 24th October 2023

S. THURAIRAJA, PC, J.

The Petitioner namely, Gunarathinam Manivannan (hereinafter referred to as "the Petitioner") and the 12th Respondent are the hereditary trustees of the Thiru Murikandi Pillayar Kovil (hereinafter sometimes referred to as the Temple), a venerated place of worship situated on the A9 Highway. Petitioner states that, since the 12th Respondent is over 80 years of age, although she is a resident in Sri Lanka due to her advanced age, she is not in a position to join in with the Petitioner in filing this application as a co-trustee.

The Petitioner has made the instant application seeking relief in respect of the infringement of his Fundamental Rights guaranteed under and in terms of the Constitution, in the manner hereinafter more fully set out, against the Respondents. The Petitioners instituted this action at the Supreme Court under Article 126 of the Constitution, through Petition dated 2nd July 2010 against the 1st -13th Respondents claiming that the Fundamental Rights of the Petitioner as guaranteed by Articles 10, 12(1), 12(2), 14(1)(e) and 14(1)(f), 14(1)(h) of the Constitution have been infringed by the Respondents. Further, an interim order restraining the 1st-11th Respondents and those under them from causing any further destruction, alteration or new construction to the land granted under the Crown Lease, constituting trust property on which the said Temple and its temporalities stand. Moreover, an interim order directing the 1st - 11th Respondents to hand over to the Petitioner and the 12th Respondent the control and management of the Temple and to restrain any commercial exploitation of the Temple.

This matter was supported on 15th July 2010 and leave was granted under Article 12(1) of the Constitution. The Respondents filed their Statement of objections, and the Intervenient - Respondents, who are the devotees of the subject temple and representing the "Worshippers Society" of the Thiru Murikandy Pillayar Temple, made

an application to intervene in this matter by their Petition dated 01st August 2012 seeking inter-alia the reliefs prayed for therein and the application for intervention was allowed by this Court. Thereafter, when the matter came up on 17th October 2022 for Argument, the parties made their respective oral submissions before this Court and at the conclusion, the Court directed the parties to file their respective written submissions.

I find it pertinent to establish the facts of this matter before addressing the issue of violation of Fundamental rights.

Facts of this case

The Petitioner states that the 1st Respondent is the Minister of Buddhist and Religious Affairs and in charge of the Buddhist and Religious Affairs Ministry, under whose purview, formulation of policies and programmes to inculcate religious values among people in order to create a virtuous society falls. Both the Department of Hindu Religious and Cultural Affairs and the Department of Buddhist Affairs fall under the said Ministry; the 2nd Respondent is the Director of the Department of Hindu Religious and Cultural Affairs, and the Petitioners further that the 2nd Respondent together with the 4th to 9th Respondents has, as hereinafter set out, acted contrary to the Fundamental Rights of the Petitioners guaranteed and protected under the Constitution.

Petitioner states that the Thiru Murikandi Pillayar Kovil and its temporalities, the subject matter of this application, is a place held in veneration by all and is situated on the A9 Highway (Kandy to Jaffna), at Murikandy in Kilinochchi. It is said that all vehicles plying the A9, be it towards Colombo or towards Jaffna, stop at the Thiru Murikandi Pillayar Kovil to pay their obeisance to the presiding Deity before proceeding. The Petitioner's and the 12th Respondent's ancestor, Kathiresar Vythilingam, was an engineer in the employment of the Crown and was posted to Thiru Murikandi in or about the year 1880. During his time at Thiru Murikandi, a God called Pillayar (Pillayaar

is a Hindu God who is believed to remove obstacles) appeared in his dream and told him that he, the Thiru Murikandi Pillayar, was in the new well that was being dug there and to extricate him from the rock and to consecrate him at a Kovil there. Kathiresar Vythilingam, as directed by the Thiru Murikandi Pillayar found the Deity in the well that was being dug and was thereafter consecrated at the Thiru Murikandi Pillayar Kovil with Kathiresar Vythilingam as the trustee of the Thiru Murikandi Pillayar Kovil and built a home as well adjoining the Temple. In a short span of time, the Thiru Murikandi Pillayar Kovil became well known as a place of Hindu religious worship, and soon thereafter, by a Deed dated 10th December 1886, a Crown Lease, in extent Two Acres One Rood and Eight Perches (A2-R1-P8), including the land on which the temple and its temporalities stood was granted in favour of the said Kathiresar Vythilingam in what would appear to be in perpetuity. Upon the death of Kathiresar Vythilingam, the trusteeship of the Thiru Murikandi Pillayar Kovil devolved on his son Vythilingam Kanagasabai. Upon the demise of the said Vythilingam Kanagasabai, the trusteeship of the Thiru Murikandi Pillayar Kovil devolved on his nephew Kandappar Sellappah and his adopted son Ponnuthurai, who functioned as co-trustees of the Thiru Murikandi Pillayar Kovil.

Upon the demise of Kandappar Sellappah, his trusteeship devolved on his son Sellappah Gunarathinam by virtue of deed No. 7429 dated 4th April 1967. Likewise, Ponnuthurai, by a deed of donation dated 20th September 1951, passed on the trusteeship to Thirunavukarasu Thanaledchumy, the daughter of Kandappah Sellappah, the 12th Respondent. Thereafter, upon the demise of Sellappah Gunarathinam on 6th October 1993, his rights of management and trusteeship of the Thiru Murikandi Pillayar Kovil devolved on the Petitioner, namely, Gunarathinam Manivannan who is the only son of the said Sellappah Gunarathinam. From the inception of the Thiru Murikandi Pillayar Kovil, the Petitioner's and 12th Respondent's ancestors had lived in very close proximity to the Thiru Murikandi Pillayar Kovil. However, in or about the year 1990, the LTTE (Liberation Tigers of Tamil Eelam- A

militant group) forcibly took over the Thiru Murikandi Pillayar Kovil and its temporalities, which forced the Petitioner's family, including the Petitioner, to flee to India. Thereafter, the LTTE appointed their representatives to administer the Thiru Murikandi Pillayar Kovil and collected all the income that accrued to the Thiru Murikandi Pillayar Kovil. During the LTTE's administration of the Thiru Murikandi Pillayar Kovil, several shops sprung up in the vicinity of the Temple with the only aim being the generation of income and without any concern whatever for the religiosity and the sanctity of the Thiru Murikandi Pillayar Kovil and its surroundings.

Petitioner states that, in 2003, during the ceasefire, when the A9 was diverted around the Temple, which continues to date, the 12th Respondent's consent was sought and obtained in this regard. After the military defeat of the LTTE, the Petitioner made several attempts to speak to the relevant authorities in order that he, along with the 12th Respondent, may, as they lawfully might, resume the exercise of their legal right to the management and control of Thiru Murikandi Pillayar Kovil and its temporalities as the lawful trustees thereof. However, upon visiting the Thiru Murikandi Pillayar Kovil, the Petitioner was reliably informed, and he verily believes that the Thiru Murikandi Pillayar Kovil is now being managed and administered primarily by the 2nd Respondent together with the 4th to 9th and 11th Respondents.

The Petitioner states that the continued management and administration of the Thiru Murikandi Pillayar Kovil by the 2nd Respondent, together with the 4th to 9th and 11th Respondents, is arbitrary, capricious, without any legal right or authority of whatsoever nature and is violative of the Petitioner's Fundamental Rights enshrined and protected under the Constitution.

The Petitioner, to his utter dismay, also found that the Viswamadu Cooperative Society, the 8th Respondent, with the concurrence and/or collusion and/or permission of the 2nd, 4th, 5th, 6th, 7th, 9th and 11th Respondents, was running a Cooperative Store and a

restaurant at the building that was the Petitioner's and 12th Respondent's home prior to their forcible eviction by the LTTE.

The Viswamadu Co-operative Society, the 8th Respondent, had caused serious and extensive damage to the Petitioner's home. The Petitioner also verily believes that the Viswamdu Cooperative Society, the 8th Respondent, and/or its officers and/or its agents and/or the 2nd, 4th, 5th, 6th, 7th, 9th and 11th have not taken any steps whatsoever to prevent the consumption of alcohol in close proximity to the Thiru Murikandi Pillayar Kovil and are thus defiling and desecrating the sanctity of the Thiru Murikandi Pillayar Kovil.

The Petitioner further verily believes that moves are afoot to once again commercially exploit the Thiru Murikandi Pillayar Kovil and its environs and thus defile the sanctity of the Thiru Murikandi Pillayar Kovil as was done by the LTTE.

The Petitioner has been reasonably informed and also verily believes that the Viswamadu Cooperative Society, the 8th Respondent, is planning to make Several structural changes/alterations to the Petitioner's home, which is at least 130 years old and that the said changes would completely alter the nature and character of the Petitioner's home and would render it unfit to be used as a home.

The Petitioner, by his letters dated 7th April 2010 addressed to the Government Agent of Mullaitivu, the 5th Respondent, and the Assistant Government Agent of Oddusuddan, Mullaitivu, the 6th Respondent, through the Grama Sevaka, the 7th Respondent, informed them that he had returned to Sri Lanka upon the cessation of the war and that his properties are being administered by the Government and pleaded that his properties be returned to him and Petitioner annexed several documents authenticating this claim.

The Petitioner, by letter dated 3rd May 2010, preferred an appeal to the 3rd Respondent, Governor of the Northern Province, setting out his circumstances and pleading that the Governor intervene in the matter. Thereafter, by letter dated 6th May

2010 addressed to the 2nd Respondent, the Petitioner set out his current predicament and requested that his properties be returned to him. Petitioner states that, regretfully, none of the Petitioner's letters to the relevant authorities were even acknowledged or replied.

In this background, the Petitioner was alarmed and perturbed to read a news item in the "Uthayan" Newspaper of 21st May 2010 which stated that the Thiru Murikandi Pillayar Kovil had been taken over by the Government and was being run by the Department of Hindu Religious and Cultural Affairs by Shanthi Thirunavukkarasu, the 2nd Respondent. This news item further went on to state that in response to a query posed to the 2nd Respondent regarding the same, she had stated that the Department of Hindu Religious and Cultural Affairs was administering the Thiru Murikandi Pillayar Kovil and had appointed a priest and a Manager and that once resettlement was completed in the area the administration and control of the Thiru Murikandi Pillayar Kovil was to be handed over to representatives of the persons resettled. The Petitioner, by Email of 21st May 2010, addressed to the "Uthavan' newspaper, set out the true factual position regarding the Thiru Murikandi Pillayar Kovil and stated that the statements attributed to the 2nd Respondent appearing in the above-mentioned news article were false.

Since no response whatsoever was forthcoming from the 2nd Respondent regarding the Thiru Murikandi Pillayar Kovil, the Petitioner, once again by letter dated 12th June 2010 addressed to the 2nd Respondent and copied to Government Agent – Mullaitivu, Assistant Government Agent Oddusuddan, Grama Sevaka Thiru Murikandi, Governor - Northern Province, Minister Douglas Devananda, The Prime Minister, Member of Parliament Chandrakumar, set out yet again his claim to the Thiru Murikandi Pillayar Kovil and its temporalities by annexing several documentation in proof of his claim.

The Petitioner alleged that, however, not even a single acknowledgement for the letters was received from the 2nd Respondent, neither were any favourable steps taken

by the 2nd Respondent and/or any of the other Respondents to return to the Petitioner and the 12th Respondent the Thiru Murikandi Pillayar Kovil and its temporalities.

Objections filed by the Respondents and Intervenient Respondent

The 2nd Res, the Director of Hindu Cultural Affairs, has filed an affidavit dated 29th September 2010, stating that, the Temple has been managed by a Board of Trustees since 1992 and has been administered as a Public Temple for the past 18 years; on the request of the Public, the Department of Hindu Religious and Cultural Affairs took over the administration of the Temple in or about November 2009 and appointed a priest to carryout religious ceremonies. Further, 2nd Respondent states that, on completion of the resettlement process, the administration of the affairs of the Temple will be handed to a committee comprising of the residents of the area and the as Petitioner alleged, the Department of Hindu and Cultural Affairs is not responsible for any construction activities in the vicinity.

The 9th Respondent, the Commissioner of Local Government has filed an affidavit dated 5th January 2011, stating that the validity of the Crown Lease and the extent of land granted thereby are matters to be established by the Petitioner in Court of Law; there are many building which were previously controlled by the LTTE and thereafter abandoned, hence private ownership in regard to lands would have to be established in law; there are many land disputes in Killinochchi District and it is not practical for the Governor to investigate these matters; the activities of the temple and the surrounding lands are not matters that the Commissioner of Local Government is involved with.

It was submitted on behalf of the 1st, 2nd, 3rd, 5th, 6th, 9th and 13th Respondents that, the Petitioner's application is primarily in the nature of a vindicatory action in which he seeks possession and control of the Temple and the administration of its affairs.

Further, the 1st, 2nd, 3rd, 5th, 6th, 9th and 13th Respondents states that, they have not dispossessed the Petitioner and the Petitioner according to his affidavit has abandoned the temple and its premises in or about 1990 and has been away for a long period of time, with no evidence of having controlled the affairs of the temple in that period of absence of 18 years. In the circumstances, the Petitioner would have to establish in a District Court, his right to control the Temple and the Administration of its affairs.

The 4th Respondent submits that, the lease relied on by the Petitioner, was expired in the absence of the renewal and, therefore, the Petitioner has no rights to the subject matter. Further, it was submitted that the land is a State land given to Vythilingam from whom the Petitioner claims that he is a hereditary trustee. The 4th Respondent alleges that the Petitioner abandoned his trusteeship for a long time, and his claims are prescribed in law. The 4th Respondent submits that, as far as concerned, the 4th Respondent is a public-oriented body and is involved in serving the public. They have constructed 46 peanut shops, 12 tea kiosks and a toilet to enable the worshippers and the users of the road to ease themselves and buy pooja items. The money for the construction of the shops is from public funds and entitled to collect rents and has no duty to account to Petitioner.

The Intervenient-Respondent states that, in terms of Trusts Ordinance No.9 of 1917 as amended and as the Petitioner claimed in paragraph 1 of the Petition, the place as a venerated place of worship and when there are no Trustees, then an application has to be made under Sections 75 and 76 of the Trusts Ordinance No.9 of 1917 as amended with regard to the trusteeship. The Intervenient- Respondent alleges that, there was no application made or no order was provided to that effect by the Petitioner and there is no instrument of Trust was submitted or produced to court with regard to the said claim by way of Hereditary Trustee by the Petitioner. In these circumstances, a competent court should have issued an order under Section 112 of the Trusts Ordinance. In this case, there was no such order produced by the Petitioner. In these

circumstances, the Petitioner has no status to file this application. The Petitioner sought relief in the Petition on the basis that he is entitled to the management and control of the "Thiru Murikandi Pilayar Kovil". But no order has been obtained or produced under Section 75 or 76 or 112 of the Trusts Ordinance No.9 of 1917 as amended.

Further, the Intervenient-Respondent states that the best interest of the devotees shall be in the safe custody of the "State Institution" or a receiver appointed under Section 671 of the Civil Procedure Code by the District Court. In the event the Petitioner establishes his right in the proper forum, namely "District Court", which has jurisdiction to make an appropriate order in respect of the Religious Charitable Trust under the Trusts Ordinance No. 09 of 1917 or under Section 671 of the Civil Procedure Code, the Petitioner may claim by a Court order. In the absence of such court order, the Petitioner has no right to file this application as the Petitioner has filed this application for his personal and individual right as a hereditary Trustee.

The 12A Respondent states that the Petitioner and the 12th Respondent, Thirunavukkarasu Thanaladchumy (She died pending the Case), are the hereditary trustees of the Thiru Murikandy Pillayar Temple situated by the side of A9 road at Murikandy in Kilinochchi and the other Respondents have illegally, unlawfully and against the law applicable in the Country taken over the possession, administration, maintenance and management of the Thiru Murikandy Pillayar Temple and its temporalities after the end of civil war and thereby violated the fundamental rights of the Petitioner and 12A Respondent.

The 12A Respondent states that the Trusteeship of the Petitioner and the 12th Respondent is affirmed in the Supreme Court Case No. 115/1954, decided on 1st April 1955. The 12th Respondent is a party to the said case. Decree, Writ and the execution papers of District Court of Vavuniya Case No. 826 are filed by the 12th Respondent along with the Affidavit of the 12th Respondent.

As per the submission of the 12A Respondent, the Pillayar (Vinayakar) was placed under a tree by Great Grandfather of the 12th Respondent in the year 1884. He constructed a small hut and maintained the Pillayar as a Vazhi Pillayar with the belief that God protected their journey. The Thiru Murikandy Pillayar temple is a famous "vazhi Pillayar' which means temple situated by the side of a road where the devotees are people and passengers using the said road. Thus, these types of temples do not have any permanent devotees. These temples are not traditional temples. In these temples, there is no priest and there are no rights and rituals observed strictly.

The Temple is situated in the State Land. The State has, by a long-term lease, given the land in extent of about Two and a half Acres (including the land where the temple is situated) to the predecessors of the Petitioner and the 12A Respondent. Till 1990, the Petitioner and the 12th Respondent and their predecessors to the Trust were in possession, control, management and administration of the said temple and its temporalities. Thereafter, the LTTE took control of the Kilinochchi district and considering the "Till" collection from the said temple, LTTE took total control, management and administration of the temple, which forced the Petitioner to flee to India and the 12th Respondent to Nelliyadi in Point Pedro. The Petitioner and the 12th Respondent were forcibly prevented from performing their duties as trustees due to the said illegal and unlawful taking-over of the LTTE. The Petitioner and the 12th Respondent did not have any place or forum to seek any effective relief against the said acts of the LTTE. The above facts, such as the Trusteeship of the Petitioner and 12th Respondent, taking over of the Temple and its temporalities by the LTTE and its control and fleeing of the Petitioner and 12th Respondent against their will, are admitted by the 4th Respondent.

Article 12(1) violation

The Petitioner and the 12A respondent in this application claim that the actions of the Respondents have violated their fundamental rights under Article 12(1) of the Constitution. Article 12(1) of the Constitution provides as follows;

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

The Petitioner filed this application on the basis that his fundamental rights have been violated in as much as the State Institutions have taken over and managed the subject temple of this application. The above facts, such as the Trusteeship of the Petitioner and 12th Respondent, taking over of the Temple and its temporalities by the LTTE and its control and fleeing of the Petitioner and 12th Respondent against their will are admitted by the 4th Respondent in the Statements of Objection of the 4th Respondent. As in the 6th Paragraph, it was stated that, "*...the 2nd Respondent together with the 4th Respondent and 9th Respondent did not act so as to deny the rights of the Petitioner and the 12th Respondent, but to preserve and protect the temple which was abandoned by the trustees from 1992 till the military took over*". Further, in paragraph 16, it was stated as "*... the management and trusteeship of Thiru Murikandi Pillayar Temple was taken over by LTTE from the year 1990. Therefore, the Petitioner and the 12th Respondent by flying to India have lost their rights to be trustees*."

Furthermore, in 20th, 21st and 22nd paragraph reads as follows, - "*.... Petitioner and the 12th Respondent abandoned the said trusteeship, and thereby allowed the management and control of Thiru Murikandi Pillayar Temple to be temporally managed by the Department of Hindu Religious and Cultural Affairs and to do eventually taken over by the Board of Trustees elected or selected by the worshipers once settlement of displaced people is over.*", "*....as the Petitioner and 12th Respondent abandoned the said trust...*", "*.... as the Petitioner and the 12th Respondent failed to manage the trust and the right to repossess. ....*"

The above quotes, extracted from the Statement of Objections of the 4th Respondent is proof of facts and admissions of the Trusteeship of the Petitioner and 12th Respondent, taking over of the Temple and its temporalities by the LTTE and its control and fleeing of the Petitioner and 12th Respondent against their will are admitted by the 4th Respondent. Further, as submitted above it is clearly established that the 12A Respondent and the Petitioner are the hereditary trustees of the said Temple.

It is an admitted fact that the Department of Hindu Religious and Cultural Affairs has taken over the possession and administration of the Thiru Murikandy Temple and its temporalities after the end of the civil war. The 2nd Respondent, who is the Director of the Department of Hindu Religious and Cultural Affairs, has in her affidavit stated that the Department of Hindu Religious and Cultural Affairs, on or about 9th November 2009, took over the administration of the Temple and appointed a priest to conduct the pooja at the said Temple. Further, as per paragraphs 06, 20 and 22 of the Statements of Objection of the 4th Respondent, in which the 4th Respondent has clearly stated that the Department of Hindu Religious and Cultural Affairs under the Ministry of Cultural Affairs have taken over the temple and its temporalities.

As the 2nd and/or 4th respondents claimed, they did not submit any legal authority to prove that they have power or authority whatsoever under any laws of the country to take over the temple/temples on anyone's request and/or to regulate the administration and management of any temple/temples. The 2nd Respondent is not empowered to take over any temples in any manner whatsoever and for any reasons whatsoever without any legal authority; therefore, I am of the view that the 2nd Respondent had acted in contravening the law and the fundamental rights of Petitioner.

Further, the 4th Respondent had failed to prove in which manner they got the authority to collect the rents from the shops constructed by utilizing the money of public funds offered for charitable purposes of the Temple. As the 2nd Res claimed in her Affidavit,

paragraph 8, the Department of Hindu and Religious Affairs nor the persons administering the Temple are responsible for the purported constructions referred to by the Petitioner and the said constructions, if any, are by private persons.

The 2nd Respondent and the 4th Respondent stated that there were requests from the devotees to take over the temple, and as such, the 2nd Respondent took over the temple and after the resettlement, the temple will be handed over to a committee elected by the devotees. But there are no permanent devotees or worshipers to the said Vazhi Pillayar Temple as it was a temple situated by the side of a road where the devotees are people and passengers using the said road.

As it was submitted by the Respondents, I am of the view that Section 75 or 76 or 112 of the Trusts Ordinance No. 09 of 1917 will not apply to this application since the Petitioner and the 12th Respondent as hereditary trustees of the Thiru Murikandi Pillayar Kovil did not abandoned their rights and responsibilities as trustees willfully but due to the reason of civil war occurred they were forced to leave the area or the country for their protection of lives.

Further, I am of the view that Section 102 of the Trusts Ordinance No. 09 of 1917 will not apply to this application, since this Thiru Murikandi Pillayar Kovil is a "Vazhi Pillayar" which means temple situated by the side of a road where the devotees are people and passengers using the said road.

Decision

In the above premise, I am of the view that the acts and deeds of the Respondents are arbitrary, capricious, contrary to law, without authority and without any legal basis and violated the Fundamental Rights of the 12th Respondent and the Petitioner under Article 12(1) of the Constitution. Therefore, I order the 1st to 11th Respondents or any one or more of them to hand over the management and control of the Thiru Murikandi

Pillayar Kovil, its temporalities and the appurtenant land constituted in the Crown Lease marked and annexed as "P1" of the Petition. Further, I direct the 1st- 11th Respondents not to interrupt the trusteeship of the Temple and the land on which the temple and its temporalities stand.

Application Allowed.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I have had the benefit of reading in draft, the judgment proposed to be delivered by my brother Thurairaja, J. As I am respectfully not in agreement with it, I have written this dissenting judgment.

I do not wish to set out the factual circumstances in great detail as my brother has done so. I will refer to them to the extent required to explain my conclusions.

The Petitioner claims that he is a hereditary trustee of the Thiru Murikandi Pillayar Kovil (Kovil), which is undoubtedly a venerated place of Hindu religious worship. The State land forming the subject matter of this application was leased in perpetuity to Kathiresar Vythilingam, an ancestor of the Petitioner. It is claimed that the LTTE forcibly took over the Kovil and property around 1990. The Petitioner and his family were forced to flee to India.

After the military defeat of the LTTE, the Kovil and properties have been managed by the 2nd, 4th to 9th and 11th Respondents. The Petitioner is seeking to recover possession and control of the Kovil and properties.

As I held in ***Centre for Environmental Justice (Guarantee) Ltd. v. Anura Satharasinghe, Conservator General and Others*** **[C.A. 291/2015, C.A.M. 06.11.2020 at pages 5,14]**, there is a need to settle down all internally displaced persons, who were displaced due to the war in Sri Lanka, as far as possible in the areas where they were residing. However, this is subject to other overriding concerns and, above all, the respect for the rule of law, which is the foundation of our Constitution.

There is no unequivocal admission by the Respondents that the Kovil and its properties are trust property or that the Petitioner is a hereditary trustee. Admittedly, paragraphs 6, 16, 20, 21 and 22 of the statement of objections of the 4th Respondent may be understood in that sense. Nevertheless, in paragraph 3 thereon, it is clearly claimed that the state land leased in 1880 to Kathiresan Vythilingam has expired. Moreover, it is asserted that Kathiresan Vythilingam or his heirs are not the owners of the said land and cannot claim hereditary trusteeship. Hence, the position of the 4th Respondent on these two issues is equivocal.

The Petitioner relies on a judgment of the Supreme Court of Ceylon (P3). It is one made in an appeal between Velupillai Thirunavukkarasu and Kandappar Sellappah and Chelliah Ponnadurai. The State was not a party to that case. Moreover, it is based on a settlement decree between the parties.

The 2nd Respondent states that the Kovil is been managed by a Board of Trustees since 1992 and has been administered as a public Kovil for more than 18 years as at the time the affidavit was attested in 2010. At the request of the public, the Department of Hindu Religious and Cultural Affairs took over the administration of the Kovil in or about November 2009 and appointed a priest to carry out religious ceremonies. On completion of the resettlement process, the administration of the Kovil will be handed over to a committee comprising the residents of the area.

In this context, it is incumbent on the Court to examine the claim made by the Petitioner that the land forming the subject matter of this application is trust property.

In terms of section 3 of the Trusts Ordinance No. 17 of 1917 as amended ("Trusts Ordinance"), *"trust"* is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, or of another person and the owner, of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner.

In ***Fernando v. Sivasubramaniam Aiyer*** **(61 NLR 241 at 243)**, it was held that no particular formula is required by law for the creation of a trust. The requirement of law is that the author should make his meaning clear and evince his intention to create a trust, and the Court will give effect to that intention.

However, there is nothing on the face of the Crown Lease (P1) which indicates that the Crown (then) intended it to form part of a religious trust or trust property. A clear typed copy of P1 has been produced by the State with motion dated 16th May 2018. It is a lease granted in the name of Kathiresan Vayittilingam and his heirs and assigns in free and common socage forever on the payment of an annual quit-rent. In that sense, it appears to be a lease in perpetuity as claimed by the Petitioner. However, it permits the State to enter upon the land for reasons specified therein. In my view, the contents of the said lease do not support the claim of the Petitioner that it is part of a Hindu religious trust.

No doubt, section 107 of the Trusts Ordinance permits the Court to assume an implied trust if it is of the opinion from all the circumstances of the case that the trust, in fact, exists, or ought to be deemed to exist. However, no such material is available before the Court.

Hence, in my view, the application of the Petitioner must fail on the ground that it has not been established that the State land forming the subject matter of this application has been shown to be part of the trust property in question.

Even if one assumes that it is so established, the question of hereditary trusteeship and control over the State land must be addressed.

In examining these two issues, it must be borne in mind that there are two distinct and different modes associated with the devolution of trust property, one in regard to title and the other in regard to the office of trusteeship. The relevant principles have been succinctly stated in ***Kumaraswamy Kurukkal v. Karthigesu Kurukkal*** **(26 N.L.R. 33)**, ***Karthigasu Ambalawanar v. Subramaniar Kathiravelu*** **(27 N.L.R. 15)** and ***Letchi Raman Balasunderam and Others v. Kalimuttu Letchi Raman and Others*** **[(79) I N.L.R. 361]**. They are as follows:

When a person who owns a land dedicates it for the purpose of religious worship or transfers it to a temple, the effect of his doing so is to constitute himself a trustee for a charitable trust for the purpose of the religious worship to be carried out at the temple.

The legal title or dominium remains with the dedicator or the author of the trust and, on his death, passes to his heirs subject to the obligations of the trust, the heirs being constructive trustees.

The legal ownership or dominium does not ordinarily devolve with the office of trustee. Upon the death of the trustee, in whom legal title is vested to the property, the legal ownership does not pass to the new trustee. In the absence of any formal instrument, it will pass to the trustee's heirs, who will hold it subject to the trust.

In so far as the devolution of trusteeship is concerned, Vythilingam Kanagasabai is said to have inherited the trusteeship from Kathiresan Vythilingam. Nevertheless, there is a question mark over the devolution thereafter. It is said that it devolved in equal shares to Kandappar Sellappah, his nephew and Ponnuthurai, his adopted son. How they became the heirs of Vythilingam Kanagasabai is not established.

Moreover, the 14th and 15th Respondents, who are worshippers of the Kovil and the President and Secretary, respectively, of the Kovil Worshippers Council, state that the management of the Kovil should not be left to individuals or to a Government Department of Ministry. They further state that the Kovil should be managed by the Hindus, and they should not be politically involved in any manner. It is claimed that either they or the 12th Respondent are in law entitled to possession, management or control of the Kovil.

For the foregoing reasons, I hold that the Petitioner has failed to establish that the State land in issue is trust property. Neither has he succeeded in establishing that he is an heir of Vythilingam Kanagasabai or a trustee. Hence, I refuse to grant the relief claimed by the Petitioner.

In conclusion, I wish to state that my conclusions are based on the evidence placed before the Court. It should not prevent the Petitioner from seeking to establish both matters before any other Court in appropriate proceedings. In fact, most of the Respondents claim that these matters are more suitable to be determined as provided for in the Trusts Ordinance.

Application dismissed. No costs.

JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE, J

I have considered the Judgement of S. Thurairaja P.C. J. and I have also considered the Dissenting Judgement of Janak De Silva J. and I am inclined to agree with the said Dissenting Judgement of Janak De Silva J.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 and Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR Application No. 91/2018

1. W.A.A.S. Darmasiri,
   No. 266/2,
   Kosgahagoda,
   Boralu Wewa.

2. H. R. Suranjith,
   No. 97 ½, Brukkwaththa,
   Hewagama,
   Kaduwela.

3. M.M.U. Maduranga,
   "Sellika", Godauda,
   Kottegoda.

Petitioners

-Vs-

1. Thusitha Kularathna,
   Chairman,
   Western Province Provincial Road
   Passenger Transport Authority,
   No, 89, "Ranmagapaya",
   Kaduwela Road,
   Battaramulla.

1A. Prasanna Sanjeewa,
   Chairman,
   Western Province Provincial Road
   Passenger Transport Authority,
   No, 89, "Ranmagapaya",
   Kaduwela Road,
   Battaramulla.

2. Prasanna Kumara Madawala,
   Acting Deputy General Manager
   (Finance),

Western Province Provincial Road
Passenger Transport Authority,
No. 89, "Ranmagapaya",
Kaduwela Road,
Battaramulla.

3. Jagath Perera,
General Manager,
Western Province Provincial Road
Passenger Transport Authority,
No. 89, "Ranmagapaya",
Kaduwela Road,
Battaramulla.

4. Western Province Provincial Road
Passenger Transport Authority,
No. 89, "Ranmagapaya",
Kaduwela Road,
Battaramulla.

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

Respondents

Before: Buwaneka Aluwihare, PC., J.
E.A.G.R. Amarasekara, J.
Janak De Silva, J.

Counsel: Shantha Jayawardena with Hirannya Damunupola for the Petitioners.
Kuwera de Zoysa, President's Counsel with Ameer Maharoof and Ms. U. Abeyrathne for the 1st, 2nd, 3rd and 4th Respondents.
Ms. Indumini Randeny, State Counsel for the Hon. Attorney General.

Written Submissions: 12.03.2021, 15.03.2021 and 03. 01.2022

Argued on: 01.11.2021.

Decided on: 24.10.2023.

Judgement

Aluwihare, P.C, J.

1) On 11th March 2018, this court granted leave to proceed in this matter for the alleged violation of Articles 12(1) and 14(1)(g) of the Constitution. Before addressing the actions alleged to be violative of the said Articles, I wish to set out the factual background of this case.

2) On 15th November 2017, the Western Province Provincial Road Passenger Authority (hereinafter referred to as the 4th Respondent) published a newspaper advertisement (marked as 'P3') inviting tenders for passenger service permits for 102 routes within the western province. In response, the Petitioners, who were interested in Item no. 92 (the Kadawatha-Moratuwa route permit for luxury buses via the Southern Expressway) paid the required deposits as stipulated in the notice and procured tender forms and applicable guidelines (marked as 'P4'). According to the advertisement the minimum bid for the mentioned route permit was set at Rs.800,000/= and 4 slots were available for the route.

3) Thereafter, the Petitioners placed bids for the mentioned route within the stipulated time in the following amounts:
   1st petitioner – Rs. 7,500,000
   2nd petitioner – Rs. 7,000,000
   2nd petitioner – Rs. 6,500,000
   3rd petitioner - Rs. 6,000,000

4) When the bids were opened on 7th December 2017 at around 1.30 p.m. the Petitioners became aware of the placement of the highest bid of Rs. 8,500,000 for the same route by one N. D. B. Vitharana (marked 'P9'). The Acting General Manager of the 4th Respondent (hereinafter referred to as the 2nd respondent) informed said Vitharana, by a letter dated 22nd December 2017 (marked 'P10'), that the Procurement Committee had decided to award him a permit for the said bus route and that he is required to pay the full bid amount of Rs.

8,500,000 or a minimum of 50% of the said amount, in terms of Clause 14.1 of the Guidelines on or before 3rd January 2018.

5) Clause 14.1 of the Guidelines denotes that a person who has been awarded a tender has to make an initial payment of 50% of the total bid price within 7 days. The above guideline is also presented as a Condition of Tender in Condition No. 09 of the Tender Form, where it is provided that any bidder who tenders his respective bid agrees to comply with Clause 14.1 of the Guidelines. Other relevant clauses of the Guidelines are as follows; As per Clause 4.2.9, when there are two or more vacant slots for the same bus route, the highest successful bidder is awarded the first permit and the second, third and other bidders (if any) would be awarded the permit for the bidding price of the 'highest successful bidder'. As per Clause 4.2.3, if a selected bidder fails to pay 50% of the price within 7 days, the bid is considered invalid. It is also settled that as per Clause 4.2.3, the tender is 'awarded' after the payment of 50% of the price. Clause 4.26 states that where the selected highest bidder withdraws/is removed, the Procurement Committee may award the tender to the second highest bidder within 3 months of the award of tender for the amount tendered by the former highest bidder who had either withdrawn or removed. As per Clause 4.2.7, where the second highest bidder does not consent to the permit charge of the former highest bidder, and the Procurement Committee is satisfied that the permit charge as per the former highest bidder is 'excessively high', the Procurement Committee may set an appropriate permit charge.

6) The 1st and 2nd Petitioners were informed by the 2nd Respondent that the Procurement Committee had decided to award the 1st Petitioner one route permit and the 2nd Petitioner two route permits for the highest price of Rs. 8,500,000 each, and that they were required to make payments before 3rd March 2018 (letters marked 'P11, P12, P13' respectively). Thereafter, the 3rd Petitioner received, on the 14th February 2018, a letter dated 9th February 2018 informing him that it had been decided to award him a route permit for the same route for Rs. 8,500,000. The 3rd Petitioner accepted the tender by paying 50% of 8,500,000 on 21st February 2018. It is important to note at this instance

that there were only 4 route permits available for awarding. Upon inquiry, the Petitioners become aware on or about the 14th February 2018 that N.D.B. Vitharana had not accepted the award of tender as he had purportedly not made the payment in terms of the Guidelines nor had a route permit been issued to him. The Procurement Committee had decided to grant the 3rd Petitioner a route permit consequent to Vitharana's failure to make the initial payment of the bid price.

7) It is the submission of the Petitioners that according to the Guidelines and Condition mentioned above, the non-payment of 50% of the bid price within 7 days by Vitharana renders his bid of Rs. 8,500,000 invalid and that as a result, his bid of Rs. 8,500,000 was not 'the highest bid price', and treating such invalid bid as a valid one and quoting such price for the procurement of a route permit to the Petitioners by the Respondents was unreasonable, irrational, arbitrary and illegal and amounts to an infringement of the Petitioner's Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution. It was further submitted that the aforementioned acts frustrated the legitimate expectation of the Petitioners that the route permits would be awarded in accordance with the guidelines issued by the 4th Respondent.

8) The submissions of the Respondents are primarily two-fold. First, that 1st and 2nd Petitioners unconditionally accepted the bid price of Rs. 8,500,000 as the permit charge by paying 50% of the price as required by Clauses 11.1 and 1.4 of the Guidelines, and as such their fundamental rights were not infringed. Secondly, that there is no provision in the Tender Guidelines for the automatic reduction of the route permit charge in the event that the highest bidder fails to make the initial payment, and therefore, the Respondents did not, in any event, have the power to reduce the permit charge once it was unconditionally accepted by a bidder by making an initial payment, and the Petitioners could not therefore, complain of the violation of their fundamental rights. Additionally, the Respondents also submit that they had acted in good faith, within the scope of powers entrusted to them by Clauses 4.2.6 and 4.2.7 of the Guidelines to determine the Highest Bid Price.

Was there a violation of Article 12(1) and/or Article 14(1)(g)?

9) The Petitioners contend that the payment of 50% of the bid price within 7 days is a 'condition precedent' to the acceptance of the offer made by the respective bid, in accordance with Clause 14.1 of the Guidelines and the letter issued to N.D.B. Vitharana by the Respondents. The letter states that the tender will be issued once the initial payment has been made. There can be no doubt therefore, that the N.D.B. Vitharana's tender bid was, in fact, invalid. The questions which remain then, are whether the 'highest bid price' could be that of an invalid bid and whether the setting of the bid price for the Petitioners at the price of an invalid bid is contrary to the Tender Guidelines and in violation of Article 12(1) regardless of whether the Petitioners had 'unconditionally accepted' the bid price of Rs. 8,500,000 by paying the initial payment of 50%.

10) I shall first deal with the contention by the Respondents that the Petitioners cannot complain of the violation of Fundamental Rights after making the initial payment of 50% and 'unconditionally accepting' the bid price. If the court were to find in favour of this contention, any bid, regardless of the authenticity of such bid would be considered valid and could thereby be construed as the 'highest bid'. Put simply, any unrealistically bloated bid aimed at escalating tender prices would be set as the price for each succeeding bidder regardless of whether such bid proves successful. That would, in my opinion, defeat the purpose of the tender process. Furthermore, to address the argument of the Respondents that the Petitioners could have prevented themselves from 'unconditionally accepting' the bid by not making the initial payment of 50% of the bid price, I find that it simply cannot be incumbent upon the bidders to determine the authenticity of the highest bidder prior to making the initial payment. The petitioners were not made aware of N.D.B Vitharana's failure to make the initial payment by the Respondent Authority and therefore acted under the information supplied at the time to make their bids. In fact, as pointed out by the learned counsel for the Petitioners at the hearing of this petition, the fact that the Petitioners immediately paid 50% of the highest bid price upon being informed of the highest bid price by the Respondents reveals

the *bona fides* of the Petitioners as they would only have been able to withdraw from the tender process if they were colluding. However, regardless of the corresponding arguments, the absurdity noted above could be avoided by the Procurement Committee considering the reasonability of setting an unsuccessful highest bidding price as the permit charge under Clause 4.2.6 read with Clause 4.2.7 of the Tender Guidelines.

11) While it is true that the Guidelines do not contain any provision for the reduction of price in the event of the highest bid proving unsuccessful, Clause 4.2.7 provides that where the successive bidders do not consent to paying the former permit charge and the Procurement Committee is of the opinion that the highest bid is excessively high, they may grant the route permit at a bid price deemed appropriate. The Petitioners submit that the Respondents had in a similar situation, in respect of the Nittambuwa-Moratuwa bus route, acted under this clause to consider the second highest successful bidder as the highest successful bidder after the former highest bidder did not make the payment within the stipulated time. In light of the Respondent's decision to reduce the bid price in that instance, and failure to do so in the present case, the Petitioners allege that they have been discriminated and such treatment violates equal protection guaranteed to them by Article 12(1).

12) The Respondents, in response, submit that the reason for the such consideration in the grant of route permits for the Nittambuwa-Moratuwa is that the highest bidder's price (Rs. 8,600,000) was 129% higher than the second highest bidder's bid price (Rs. 3,755,500). In that instance, the Procurement Committee, upon being informed by the successive bidders that the permit charge was excessively high and being requested that the permit price be offered at the second highest bid price, decided the amount to be excessively high. The meeting minutes of the Procurement Committee (marked 'R15') reflect the above reasoning. The Respondents submit that in the present case, the highest bidder's price (Rs.8,500,000) was only 13.33% higher than the second highest bidder's price (Rs. 7,500,000). The Respondents submit that the Procurement Committee did not consider this disparity 'excessively high'.

13) The Petitioners have produced no material before this court which indicates *mala fides* on the part of the Procurement Committee and the Respondent Authority. Neither have the Petitioners adduced any material substantiating the claim that the Respondents exercised their discretion in a manner that is abusive of such power, or contrary to law. It must be stated that although discretion should be exercised equitably, discretion itself is subjective in that every decision is subject to related circumstances and facts. The Right to Equality enshrined in Article 12(1) is violated in administrative matters where procedural fairness is deprived. His Lordship Justice Raja Fernando succinctly stated this court's view on the application of Administrative Guidelines and their relation to fairness and equality in **Samaraweera v. The People's Bank and Others [2007] 2 SLR 362.**

"*It is my view that all circulars and other guidelines must be applied fairly and equally to all persons to whom they apply.*" [p. 370]

14) The Procurement Committee's adherence to the Tender Guidelines must therefore be assessed bearing in mind the discretion the Guidelines themselves confer upon the Committee to determine the Tender Charge. It is not reasonable nor equitable that the Procurement Committee be expected to dole out the same treatment in every Tender process without regard or care for the fact that it has been vested with the discretion to vary its procedure depending on the specific circumstances, taking into account the financial effect that such uniform treatment may bear on the authority and bidders. A variation in the manner in which discretion is exercised cannot, by itself, translate to discriminatory treatment in violation of Article 12(1) as 'discretion' inherently embodies the dependence of decision making on circumstance.

"*It is a Fundamental Rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.*" [Wade & Forsyth, Administrative Law, 10th Edition, Ox ford University press, p. 271]

His Lordship Justice Kodagoda, P.C., in **SC. FR. Application No. 256/17 (S.C Minutes of 11.12.2020)** between one W.P.S Wijerathne and the Sri Lanka Ports Authority stated the following regarding matters where discretion is exercised for matters of 'selection':

"*…it is of critical importance that, discretionary authority is exercised by Executive and by administrative authorities in public trust, only for the purpose of securing the purpose for which such power had been conferred, for the best interests of the organization concerned, for the best interests of the State, and in overall public interest. Not adhering to these vital norms, can certainly result in an infringement of Article 12 of the Constitution…"* [p. 23]

15) The Petitioners have resorted to a technical difference between an 'invalid' bid and a 'withdrawn' bid to substantiate their claim that the Respondent Authority could not have exercised their discretion under Clause 4.2.7, claiming that Clause 4.2.7 only pertains to 'withdrawn' bids. However, it is evident upon perusal of the Guidelines that Clauses 4.2.6 and 4.2.7 also apply to bids 'removed'. It appears to me that an 'invalid' bid, invalidated by the Bidder's failure to make initial payment, once removed from the bidding process would most certainly fall within the ambit of Clauses 4.2.6 and 4.2.7. The Respondents have submitted the vast numerical differentiation between 129% and 13.33% as the basis for differed treatment in the separate bidding processes and also noted that the Authority is duty-bound to consider *inter alia* the highest financial return from the bidding process. At no stage in the proceedings have the Petitioners impugned that the Guidelines themselves, or more specifically, Clauses 4.2.6 and 4.2.7 of the Guidelines to be violative of their Fundamental Rights. I cannot find any instance in which the Respondent Authority violated the above-quoted tenets. In my opinion, the discretion vested with the Procurement Committee was exercised within the scope of powers intended by the guidelines of the Tender Process, in a reasonable, indiscriminate manner not violative of the Right to Equality enshrined in Article 12(1) or the Right to engage in a lawful occupation enshrined in Article 14(1)(g) of the Constitution.

Were the Petitioners' Legitimate Expectations breached?

16) Whether an expectation is legitimate or not is a question of fact [*vide* ***Harshani S. Siriwardena v Secretary, Ministry of Health and Indigenous 31 Medicine*** **(S.C.(Application) (FR) 589/2009 S.C. Minutes of 10-03-2011)**]. In examining the existence of any legitimate expectation on the part of the Petitioners, I find the widely known opinion of Lord Diplock J., in the case of ***Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374*** referred to as the 'GCHQ' case, instructive.

"…, the prima facie rule of 'procedural propriety' in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason..."

17) From Lord Diplock's opinion, I find two aspects bearing relevance to the present case. First, that an expectation is legitimate wherein based on the relevant facts, the expectation rests on an assurance of past benefit or promise of future benefit. Secondly, that if one is to be denied a benefit or concession by an administrative body, the body may still be required to ensure a fair hearing where one would be permitted to explain why the benefit should not be withdrawn and why the discretion vested in the body should be exercised in one's favour. In the present case, Clause 4.2.6 read with Clause 4.27 of the Tender guidelines provides bidders an opportunity to raise a complaint against the setting of a permit charge based on a withdrawn or unsuccessful highest bid, and the Procurement Committee is vested with the discretion of determining whether the former highest bid is 'excessively high'. It is not argued before this court by the Petitioners that they were not provided with an opportunity to make their complaints about the bid charge known to the Procurement Committee. The submission of the Petitioners regarding Legitimate Expectations is that they had a legitimate expectation that the price of the route permit would be set 'in accordance with the Guidelines'. I cannot

find any instance in which the Respondents acted contrary to the Guidelines. Therefore, no Legitimate Expectation of the Petitioners had been frustrated.

Conclusion

In the circumstances, for the reasons set out above, I am of the view that the Petitioners have failed to establish a violation of their fundamental rights under either of the Articles of the Constitution (Article 12(1) and Article 14(1)(g)) under which leave to proceed was granted. Accordingly, the application is dismissed. I make no order as to costs.

Application dismissed.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution of The Democratic Socialist Republic of Sri Lanka

Peduru Arachchige Tiuska Pushpa Weerasinghe,
No. 107/A, Kanatta Road,
Mirihana,
Nugegoda.

SC/FR Application No. 120/2019

PETITIONER

-Vs-

1. Sirimewan Dias,
   Chairman,
   Land Reform Commission,
   No. 475, Kaduwela Road,
   Battaramulla.

1a. Nilantha Wijesinghe,
   Chairman,
   Land Reform Commission,
   No. 475, Kaduwela Road,
   Battaramulla.

2. K.AK. Ranjith Dharmapala,
   Acting Chairman,
   Land Reform Commission,
   No. 475, Kaduwela Road,
   Battaramulla.

3. P.B. Ruwan Pathirana,
Executive Director,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

3a. Pathmika Mahanama Thilakarathne,
Executive Director,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

4. R.M.C.M Herath,
Director General,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

4a. W.M.W Weerakoon,
Director General,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

5. K.D.R Olga,
Director General,
Finance Department,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

6. U.G Rathnasiri,
Additional Secretary,
Ministry of National Policies and Economic Affairs,
1st Floor,
"Miloda"

Bristol Street, Colombo 01.

7. W.M.W Weerakoon,
Director General-Agriculture,
Department of Agriculture,
P.O. Box 1,
Peradeniya.

7a. Dr. S.H.S.A De Silva,
Director General-Agriculture,
Department of Agriculture,
P.O. Box 1,
Peradeniya.

8. W.M.M.B Weerasekara,
Commissioner General-Agrarian
Development,
No. 42,
Sir Marcus Fernando Mawatha,
P.O. Box 537,
Colombo 07.

9. B.L.A.J Dharmakeerthi,
Additional Secretary (Development),
Ministry of Plantation Industries,
11th Floor,
Sethsiripaya 2nd Stage,
Battaramulla.

10. R.W Nalaka Rajasekera,
Commission Member,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

10a. R.M.U.K Wijeratna,
Commission Member,

Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

11. D.P Karunarathna,
Assistant Director,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

12. A. A Ishara Abeysinghe,
Secretary/Director – Control
(Covering),
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

13. G.H.N Shyamali Rathnayake,
Assistant Director,
Income Department,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

14. P.B.M Thisera,
Assistant Director,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

15. E.A Pradeep Kumara,
Assistant Director,
Project Division,
Land Reform Commission,
No. 475, Kaduwela Road,
Battaramulla.

16. T.S Wadduwage,
    Project Division,
    Land Reform Commission,
    No. 475, Kaduwela Road,
    Battaramulla.

17. A.H Kumudu Dharmapriya,
    Assistant Director,
    Land Ceiling Section,
    Land Reform Commission,
    No. 475, Kaduwela Road,
    Battaramulla.

18. W.M Sunil Bandara,
    Assistant Director,
    Land Reform Commission,
    No. 475, Kaduwela Road,
    Battaramulla.

19. Nandasena Wanniarachchi,
    Assistant Director,
    Land Reform Commission,
    No. 475, Kaduwela Road,
    Battaramulla.

20. T. Narendranadan,
    Internal Auditor,
    Land Reform Commission,
    No. 475, Kaduwela Road,
    Battaramulla.

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

RESPONDENTS

BEFORE: Buwaneka Aluwihare, PC, J.
Kumudini Wickremasinghe, J.
Achala Wengappuli, J.

COUNSEL: Niranjan de Silva for the Petitioner.
Gihan Liyanage instructed by Mallawaarachchi Associates for the 1A, 11th, 12th, 13th, 15th, 16th & 17th Respondents.
Rajitha Perera SSC for the Hon. Attorney General.

ARGUED ON: 23.11.2022.

WRITTEN SUBMISSIONS: 09th December 2022 for the Petitioner.
16th December 2022 for the 1A, 11th, 12th, 13th, 15th, 16th & 17th Respondents.

DECIDED ON: 24.10.2023.

Judgement

Aluwihare, PC, J,

This is a Fundamental Rights Application concerning the alleged non-promotion of an employee attached to the Land Reform Commission. In the Petition of the Petitioner has alleged that her Fundamental Rights guaranteed by Article 12(1) and Article 14(1)(g) of the Constitution had been violated by the 1st to 10th Respondents or any one or more of them. The Petitioner asserts that the 1st to 10th Respondents had consistently denied her a promotion by failing to appoint her to the post of 'Deputy Director - Legal' of the Land Reform Commission (hereinafter referred to as the 'LRC'), and they had, by this omission violated her fundamental rights. This Court granted leave to proceed on the alleged infringement under Article 12(1) of the Constitution. Only the 1A, 11th, 12th, 13th, 15th, 16th and 17th Respondents have made representations before this Court, and they will hereinafter be referred to as 'the Respondents'.

I wish to succinctly state the facts of this case before delving into the relevant legal considerations.

The Facts

The Petitioner is an Attorney-at-Law who holds a Bachelor of Laws Degree. She was initially employed as a 'Legal Assistant – Grade V' on a contractual basis at the LRC from 23rd July 2007, subject to a six-month probation period (vide 'P3', the letter of appointment dated 16.11.2017). The Petitioner's service contract was renewed for further year on 24.01.2008 till 23.01.2009. The Petitioner was also confirmed in employment with effect from 01.02.2008 by letter dated 29.01.2008.

The Petitioner claims to have been promised recruitment as a 'Legal Officer – Grade III' in accordance with the Scheme of Recruitment of 1979, prior to her recruitment as a 'Legal Assistant – Grade V'. The Petitioner also claims to have been continuously harassed at the LRC while not receiving due promotions. The Respondents made no specific averments in this regard besides noting that the Petitioner was not promoted to due to her 'poor performance' (*vide* Written Submission of the Respondents dated 16th December 2022).

Pursuant to repeated appeals and letters of complaint to the 1st Respondent's predecessor as the Chairman of the LRC ('P7', 'P7(b)', 'P7(c)') as well as a complaint to the Labour Commissioner (Colombo General), the Petitioner had been promoted to the managerial level as the 'Assistant Director – Grade II' of the LRC with effect from 03.10.2012 by letter dated 29.01.2014 ('P9').

Per the minutes of the LRC dated 26.02.2019, 10 Assistant Directors (11th to 20th Respondents) who were appointed alongside the Petitioner on 03.10.2012, had been promoted as Deputy Directors of the LRC.

Submissions

The Petitioner alleges that her omission from the promotion to the post of 'Deputy Director' is particularly concerning as the Petitioner is an Attorney-at-law with 18 years of experience and she possesses educational qualifications above and beyond any qualifications possessed by those who were promoted.

Furthermore, the Petitioner noted that the operational scheme of recruitment of the LRC dated 03.10.2012, in Section 6.1.2 sets out that for promotion to the position of Deputy Director of the LRC requires 6 years of continuous service in Grade II and all due annual salary increments. The Petitioner claims to have fulfilled the elements so required.

The Respondents are in agreement with the Petitioner as to the applicability of the scheme of

recruitment of the LRC dated 03.10.2012 ('P10'). However, they argue that the Petitioner was not eligible for the said promotion as she had not completed the necessary requirements per the scheme.

Section 6.1.2 of the Scheme of Recruitment is reproduced below for convenience.

6.1.2 සුවිශේෂී කාර්ය සාධනය පෙන්නුම් කරන්නන්

(අ) පූර්ව අවශ්‍යතා

i) පත්වීම ස්ථිර කර නිබීම

ii) සේවා ගණයේ II ශ්‍රේණියේ අවම වශයෙන් වසර (06) ක අඛණ්ඩ සේවා කාලයක් සම්පූර්ණ කර නිබීම සහ අදාල කාලයට නියමිත වැටුප් වර්ධක සියල්ල උපාය ගෙන නිබීම.

iii) අනුමත කාර්ය සාධන ඇගයීමේ පටිපාටිය අනුව පූර්වසන්නතම වසර (06) තුලම සුවිශේෂී කාර්යසාධනයක් පෙන්නුම් කර නිබීම.

iv) උසස් වීම දිනට පූර්වාසන්නම වසර (05) තුල සතුටුදායක සේවා කාලයක් සම්පූර්ණ කර නිබීම.

v) අදාළ කාර්යක්ෂමතා කඩඉම් පරීක්ෂණ නියමිත දිනයේදී සමත් වී නිබීම.

vi) අදාල මට්ටමේ දෙවන රාජ්‍ය භාෂා ප්‍රවීණතාවය ලබා ගෙන නිබීම

Of the aforementioned requirements of the scheme, the Respondents claim that the Petitioner has failed to fulfil requirements no. ii) and vi). Specifically, they argue that the Petitioner has not received her salary increments per requirement no. ii) and that she is not proficient, neither has she adduced proof of proficiency of a 2nd National Language per requirement no. vi). The Respondents also added that the Petitioner has failed to indicate that she has performed 'exceptionally well' ("සුවිශේෂී කායර්සාධනයක්") in service during the immediate 6 years prior to the year of application for promotion as per requirement no. iii).

The Petitioner makes no averment regarding requirements iii) and vi) besides noting that she is an Attorney-at-Law and that she has, in the course of her work, executed a considerable number of Deeds and instruments. Regarding requirement no. ii), the Petitioner has

produced a letter from the Secretary, Director (Administration) of the LRC ('Z) and dated 08.12.2022 (subsequent to the filing of the Petition) which affirms that she has, in fact, in received all her due salary increments. The letter also states that it is issued at the Petitioner's request.

Were the Petitioner's Fundamental Rights violated?

It appears to me that the Court has been placed in a peculiar setting for the adjudication of this matter. On the one hand, the Petitioner argues that she has been consistently and deliberately denied promotion within the LRC, which she argues violated her Fundamental Right to equal protection of the Law and equality before the Law under Article 12(1) of the Constitution. On the other hand, the LRC argues that the Petitioner was denied the promotion of concern due to her consistent failure to perform at the required standards in the execution of her duties, as well as her failure to fulfil the requirements which would make her eligible for the promotion.

The issue of ineligibility can be dealt with directly by the application of the scheme of recruitment (P10). The Respondents submitted that the Petitioner has not received her salary increments per requirement no. ii) and that she is not proficient, neither has she adduced proof of proficiency of a 2nd National Language per requirement no. vi), and that the Petitioner has failed to indicate that she has performed 'exceptionally well' ("සුවිශේෂී කායර්සාධනයක්") in service during the immediate 6 years prior to the year of application for promotion as per requirement no. iii) of Clause 6.1.2 of the Scheme. The Petitioner's response was that she is an Attorney-at-Law who has, in the course of her work, executed many Deeds and instruments. The Petitioner also produced a letter from the Secretary, Director (Administration) of the LRC ('Z) and dated 08.12.2022 which affirms that she received all her due salary increments.

Notably, the Petitioner has failed to adduce any evidence (such as certificate to her character or performance) to controvert the Respondents claim that she has performed her duties exceptionally well. The petitioner also failed to produce any material which indicates that she is proficient in a 2nd National Language.

I do not think it necessary to engage in an etymological pursuit to understand what is meant by the words "exceptionally well' in Clause 6.1.2 iii) of the scheme of recruitment (P10). Such a project would only delay the inevitable conclusion that per the scheme of recruitment, in order to be considered eligible for promotion to the post of Deputy Director, the applicant

must have performed exceptionally well in the execution of their duties. It logically follows that such an exceptional performance may be evidenced by a certificate or reference from a superior affirming such notion.

I wish to further state that most schemes of promotion and recruitment for officers require a degree of merit in the performance of duties. In most cases, considerable weightage is given to this requirement as it is perhaps the most potent evidence of the history of a person's performance.

I find it prudent at this stage to make reference to the sage words of Justice Fernando in ***Perera v. Cyril Ranatunga, Secretary Defence and others*** **[1993] 1 SLR 39** (at page 43).

"*The plain meaning of "merit" is the quality of deserving well, excellence, or worth; it is derived from the Latin "mereri", meaning to earn, or to deserve. In my opinion, 'merit" must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks promotion. In relation to the individual officer, there is a negative and a positive aspect: whether there is demerit, e.g. incompetence and poor performance in his present post, and whether there is "positive" merit, such as a high degree of competence and excellent performance. It would also be legitimate to consider the suitability of the officer for the post, having regard to the aptitudes and skills required for the efficient discharge of the functions of that post, and the service to be rendered.*"

It is evident that in the present case, having considered the application of the Petitioner, the Respondents were of the opinion that the Petitioner did not merit a promotion due to her poor performance. Not only is that [performance] a consideration an employer is generally entitled to consider in the context of advancement of their employees, in the present case, the Respondents were *required* to consider the Petitioner's performance per the scheme of recruitment. Therefore, it appears to me that the Respondents had not acted arbitrarily, unreasonably, or unlawfully by denying the Petitioner the promotion to the post of Deputy Director. The Respondents had relied on the applicable scheme of promotion and the assessment of the Petitioner's superiors to determine that she was not eligible for promotion. Even after the filing of this application and being confronted with the submission of the Respondents regarding her failure to fulfil the aforesaid requirements, the Petitioner did not produce any material to her benefit in that regard. This court cannot brush aside lightly the assertions made by the Respondents which indicates that the Petitioner had had a history of underperforming.

In my view, the material before this court falls short of the required threshold of proof to conclude that the Respondents had violated the Petitioner's fundamental rights guaranteed under Article 12(1). The position in our jurisprudence regarding the violation of a person's fundamental right to equal protection of the law and equality before the law has evolved through the decades. Presently, the success of an application alleging a violation of Article 12(1) rests on the ability of a Petitioner to establish any unlawfulness, arbitrary action/inaction, unreasonable conduct or manifest unfairness (*vide* ***Rajavarothiam Sampanthan & Others v. The Attorney General & Others***, SC FR 351-361/2018, S.C Minutes of 13.12.2018; ***W.P.S. Wijerathna v. SLPA & Others***, S.C F.R Application No. 256/2017, S.C Minutes of 11.12.2020). The Petitioner has failed to establish any of the aforementioned elements in this application.

I find it prudent at this stage to recall observations made by me in a prior judgement where uncertainty and a lacuna in factual narratives submitted by parties compelled the Court to determine the standard of proof required to establish a fundamental rights violation.
"*In proceedings of this nature, the court has very limited avenues to test the veracity of these assertions and necessarily have to depend on the affidavits and other documents filed. In the circumstances, in arriving at a just and equitable decision in the realm of the fundamental rights jurisdiction, the court necessarily has to apply the test of probability to the factual matters placed before us.*" [in ***Arangallage Samantha v. OIC, Police Station, Biyagama & Others***, S.C. F.R Application No. 458/2012, S.C Minutes of 28. 01. 2020, at page 8]

My observations forecited were formed in light of the astute observations of Wanasundera J in the case of ***Velmurugu v The Attorney General and Others*** 1981 1 SLR 406 and Soza J. in ***Vivienne Goonewardene v Hector Perera*** 1983 SLR 1 V 305. In ***Velmurugu,*** his Lordship Justice Wanasundera stated that the test applicable for the standard of proof required to establish a violation of fundamental rights is a "preponderance of probability", as adopted in civil cases. His Lordship further stated that although the standard is not as high as that which is required in criminal cases, there can be different standards of probability within that standard and the degree applicable would depend on the subject-matter of the case concerned. In ***Vivienne Goonewardene***'s case, Soza J held that "*The degree of probability required should be commensurate with the gravity of the allegation sought to be proved...The conscience of the court must be satisfied that there has been an infringement.*"

In my view, the aforementioned *dicta* succinctly capture the standard of proof for an alleged infringement of fundamental rights in an application under Article 126. Accordingly,

although the Petitioner was not required to expel all doubt in the Court's mind that the Respondents had unlawfully, arbitrarily, unreasonably, or unjustly denied her the promotion concerned, the Petitioner was required to produce compelling material which would satisfy the court's conscience on a preponderance of probabilities that the Respondents had engaged in such conduct. In this most essential requirement, the Petitioner has failed.

For the aforementioned reasons, I hold that Petitioner has failed to establish to the satisfaction of this court that the Petitioner's Fundamental Rights guaranteed in terms of Article 12(1) of the Constitution had been violated, and in the circumstances, we hold that the Petitioner is not entitled to the relief prayed.

Application Dismissed.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (F/R) Application No. 221/2015

Warnakuwatthawaduge Surani Lakshika Fernando,

No 8/2, Mahajana Road,

Kadalana,

Moratuwa.

Petitioner

Vs.

1. Police Sergeant Attapattu,

Police Station,

Mount Lavinia.

2. I.P Ramya Silva,

Officer-in-Charge Minor Offences Branch

Police Station,

Mount Lavinia.

3. C.I. Chanaka Iddamalgoda,

Head Quarter Inspector of Police

Police Station

Mount Lavinia.

4.Deputy Inspector General of Police,

Overseeing Mount Lavinia, Nugegoda, Moratuwa and Kalutara Divisions

Police Headquarters,

Colombo 01.

5. N.K Illangakoon,

Inspector General of Police,

Police Headquarters,

Colombo 01.

5A. C.D Wickramaratne,

Inspector General of Police,

Police Headquarters,

Colombo 01.

6.Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondents

BEFORE: Buwaneka Aluwihare P.C, J

Murdu N.B Fernando P.C, J

Mahinda Samayawardhena, J

COUNSEL: Shantha Jayawardena with Thilini Vidanagamage for the Petitioner.

V. Hettige, SDSG for the Hon. Attorney General.

ARGUED ON: 21.03.2022.

WRITTEN SUBMISSIONS: Petitioners on 02.02 2021.

Respondents on 22.03.2021.

DECIDED ON: 24.10.2023.

Judgement

Aluwihare, PC, J.

The Petitioner was an employee of Colombo Montessori Teacher Training Center (Pvt) Ltd. and complained that her Fundamental Rights enshrined in the Constitution were violated by arbitrary, unlawful and overzealous actions of the 1st to 4th Respondents. On 28.04.2016, the Court granted Leave to Proceed for the alleged infringement of the Petitioner's Fundamental Rights under Articles 12(1), and 13(1) of the Constitution.

The Petitioner's Occupation & Employer

The Petitioner completed several professional qualifications in Pre-School Education and was employed as a kindergarten teacher. Subsequently, she was employed in Colombo Montessori Teacher Training Center (Pvt) Ltd (hereinafter Training Center) from 24th July 2014 onwards, as an Instructor - Training Method of Education. According to the Petitioner, she was requested to act the Office Coordinator/Manager at the Training Center from September 2014, on a temporary basis – duties she had performed until her resignation from the post on 13th January 2015. The Petitioner states however, that she was requested by the Chairman of the Training Center to attend to the duties of the Office upto March 2015, until her replacement candidate is adequately trained and would be familiar with the management of the Office. From that point onwards, the Petitioner was employed as a casual employee in the capacity of an Instructor Training Method of Education. However, the Respondents allege that at the time material to the incident, which will be referred to in detail below, the Petitioner acted as the Office Coordinator/Manager and as a teacher as well.

The Training Center is a registered Company under and in terms of the Companies Act No.07 of 2007 and was registered with the Tertiary and Vocational Education Commission (hereinafter TVEC) and the Chairman and the Directors of the Company reside abroad, which is admitted by the Petitioner and the 1st to 3rd Respondents. The Petitioner's position is that the Training Center renewed the registration till 2015, and thereafter requests were made to renew the registration from the TVEC. However, the Respondents state as per the letters dated 12.05.2015 and 15.09.2015, issued by the Acting Director (Standards and Accreditation) of the Tertiary and Vocational Education Commission marked "3R1 and 3R1a", the registration of the Training Center stood terminated since 20.12.2013. The Respondents further state that, although assessments to renew registrations were made by the TVEC, the Training Center failed to satisfy the requisite requirements, therefore the renewal was not granted. Hence, the Respondents' position is that from 20.12.2013 onwards, the conduct of business by the Centre was not lawful.

It is also pertinent that according to the Petitioner, the Training Center maintains two accounts with the Commercial Bank of Mount Lavinia and the usual practice adopted is for the students to pay the fees directly into these accounts. When the deposit slips are presented, the date and amount is inserted into the Students' Record Sheets by the attendant present at the Office. The only monies that are accepted are the fees paid by certain students who are not aware of the payment method adopted by the Training Center. Such fees are collected by the Office attendant and then credited to the bank accounts by the Office staff. This position is also accepted by the 1st to 3rd Respondents.

<u>The Incident</u>

On 22nd April 2015, the Petitioner received a Telephone call, and the caller had alleged that the Training Center was not registered with the TVEC. Thereafter the Petitioner allegedly informed the caller that she was merely a teacher and to raise the concern with the Directors of the Training Center. The identity of the caller is disputed. According to the Petitioner, the caller was unknown to her, but the Respondents state that the caller was a complainant by the name of N.A.D Eranga Nishshanka, (hereinafter 'Nishshanka') who lodged a complaint marked "3R5j" on the 26.04.2015 at the Mount Lavinia Police.

According to the version of the Respondents she was a student at the Training Center and presented the certificates she obtained from the Training Center to the TVEC for due certification, upon which she was informed that the Training Center's registration was terminated. Thereafter, Nishshanka phoned and informed the Petitioner regarding the termination and allegedly, the Petitioner brushed aside the concern stating they were acts of "political vindication".

The Petitioner's avers that on 25.04.2015 she headed to the Office to conduct her lectures in the capacity of a teacher and that at the Training Center, she was confined, detained and intimidated by a mob of students that claimed the Training Center was illegally conducting training courses and receiving payments. The Petitioner attempted to explain to the students that she was merely a teacher and phoned the Chairman of the Training Center, a person by the name of Ranjith Bandra Thalakiriyawe. The Chairman informed her that he had submitted the Prospectus to the TVEC and that necessary steps will be taken to have the registration of the Training Center renewed.

The students had, however, refused to disperse and demanded refunds. Thereafter, on the instructions of the Chairman, at around 4.00 p.m., she phoned the Mount Lavinia Police Station to resolve the issue. According to the Petitioner, by that time students had lodged individual complaints at the Police Station and the 1st Respondent (Sergeant Atapattu) along with another unknown policewoman arrived at the Training Center to escort the Petitioner to the Mount Lavinia Police Station. Thereafter, she was produced before the O.I.C, Minor Offences Branch (2nd Respondent), and it is alleged that the 2nd Respondent accused the Petitioner of deceiving the students and obtaining payments illegally, to which the Petitioner had responded that the payments made by the students are deposited in the bank account of the Training Center and that she is merely a teacher of the said Center.

<u>The Arrest</u>

As asserted by the Petitioner, the 2nd Respondent disregarded the explanation given by her, and instead threatened to arrest the Petitioner. Around that time the Petitioner's husband arrived at the Police Station being informed of the situation by her and when her husband attempted to intervene the 2nd Respondent had berated and had chased him

away. Allegedly, the 2nd Respondent could not be reasoned with and had refused to speak with the Chairman of the Training Center, and instead dictated several letters to the Petitioner. Purportedly 2nd Respondent made the Petitioner draft a letter stating she accepted payments illegally from the students and credited the funds to the Company account and that she will coordinate the refunds for the students. The 2nd Respondent supposedly accompanied the Petitioner to the Office of the Training Center around 10.15 p.m and directed her to affix the seal of the "Manager" on the letter. The 2nd Respondent thereafter provided the photocopies of the letter to the students.

The Petitioner states that the 2nd Respondent was not satisfied even with the letter that was allegedly coerced. Thereafter, the 2nd Respondent informed the Petitioner to notify the Chairman to draft individual letters for the students and attend the Mount Lavinia Police Station on the 28.04.2015 to handover the said letters. It is further alleged by the Petitioner that the 2nd Respondent recorded a statement from her, this alleged statement was not produced before the Court. Subsequently, she was permitted to leave the Police Station at about 11.00 p.m on 25.04.2015 but the 2nd Respondent informed her husband to visit the Police Station the following day. Shortly thereafter, the Petitioner emailed the Chairman of the Training Center and informed him of the demand of the 2nd Respondent and requested him to return to Sri Lanka.

The Respondents deny the above events, and according to their version of events, the 1st Respondent and another unknown female police officer never went to the Training Center on the 25.04.2015. As per the contention of the 1st Respondent, he never visited the Training Center and, in any event, the Respondetn states that he could not visit the Training Center as he was on duty wearing civilian clothing, and that due to health conditions prevailing at the time, he could not adorn the uniform and in those circumstances, he would not have been able to escort the Petitioner to the Police Station. The 1st Respondent provided a medical report marked "1R2" as proof of this position.

The 1st Respondent, however, admits that the Petitioner approached him at the Police Station and that he was delegated the duty to record complaints, subsequent to which, he had produced the Petitioner before the 2nd Respondent. The 2nd Respondent denies that he harassed, intimidated, or threatened the Petitioner. Instead, the 2nd Respondent states

that he informed her that "if it transpires that the offence of cheating had in fact been committed, action would be taken in respect of the party responsible for same". The 2nd Respondent further denies the alleged incident with the husband of the Petitioner and the events relating to the letters and her alleged coerced statement. He further denies ordering the Petitioner to visit the Police Station on the 28.04.2015 and that he informed her husband to visit the Police Station the following day. His version is that he terminated his duties on the 25.04.2015 at 08.42 p.m and left the Police Station as per the Routine Information Book (hereinafter RIB) extract marked "2R2".

The Subsequent Visit to the Police Station

In any event, the Petitioner states that her husband visited the Mount Lavinia Police Station the next day, which was on the 26.04.2015. It is alleged by the Petitioner that when her husband visited the Police Station, the 2nd Respondent sought a bribe to delay the complaints till 18th of May. The Petitioner's husband had avoided the payment of the bribe, avoided the issue and has produced an affidavit ("P 40(x)") as proof. Meanwhile, the 2nd Respondent denies the alleged incident and states that he never met the Petitioner's husband on that day or that he informed the Petitioner's husband to visit the Police Station.

Thereafter, the Petitioner states that the Chairman of the Training Center emailed a letter on the morning of 28.04.2014 to be given to the students as ordered by the 2nd Respondent. The Petitioner made copies of the letters and inserted the individual details of the students and went to the Mount Lavinia Police Station with an Attorney–at–Law to hand over the letters to the students ("P32(a) – P 32(t)"). The 2nd Respondent allegedly made her write on each letter that she will individually coordinate with the Chairman and ensure to refund the students. Further, the Petitioner states that the 2nd Respondent made her write another letter ("P 32(u)") addressed to the students who made complaints after 25.05.2015 to the effect that the Petitioner had charged fees from the students and credited the fees to the Training Center's Company account and will coordinate with the Chairman to refund the said funds. Moreover, the Petitioner states that she was informed that 26 students made complaints against her, and the 1st and 2nd Respondents ordered her to visit the Police Station on the 29th, 30th of April and 1st, 3rd, and 4th of May to give

statements. The Petitioner states she was compelled to provide individual statements and in all her statements she categorically denied that she was responsible for the management of the Training Center and that she was not allowed to read the statements before signing them.

It is further contended by the Petitioner that the Chairman of the Training Center sent the 3rd Respondent, the Officer-in-Charge of the Mount Lavinia Police Station a letter dated 28.04.2015 ("P 33") and certain documents attached to the letter by registered post. The said letter sets out the facts regarding the registration of the Training Center and states that the Training Center was duly registered till 2014 and that in January 2015, the Training Center received notice to renew registration for the year 2015, and that the Chairman faxed the necessary information to renew registration to TVEC. The documents annexed to the said letter were proof of these facts. It is further contended by the letter that there is confusion between the two directors of the TVEC, regarding the registration of the Training Center.

The events of 28.04.2014 as narrated by the Petitioner are disputed by the Respondents. The 3rd Respondent admits that the Petitioner visited the Police Station on that day with an Attorney-at-Law. The 3rd Respondent states that "it was my considered view that there should be deliberations between the complainants and the Petitioner on the matter in issue and also that accordingly I instructed the 2nd Respondent to instruct the Petitioner to come to the Police station to explore the same and record statements of her" (per paragraph 14 of the Statement of Objections). Accordingly, the 3rd Respondent states that deliberations did take place and her statement was recorded on 30th April ("1R3 to 1R3h) and on 4th May ("1R3i").

Meanwhile the 2nd Respondent states that he requested the Petitioner to visit the Police Station on 28.04.2014 as per the directions of the 3rd Respondent but denies that he attempted to bring about a settlement between the Petitioner and the students and that the Petitioner by her own volition attempted to reach a settlement (*vide* paragraph 14 of his Statement of Objections).

It is further disputed by the Respondents the receipt of "P 33" and the documents attached to that letter. The 3rd Respondent states that he did not receive the said letter and annexed

the leaves of the Register for the period 21st April to 5th May 2015 ("3R2"), maintained by the Mount Lavinia Police Station as proof. The said document provides the details of the Registered Post Articles received by the Mount Lavinia Police Station. Further, the 2nd Respondent denies dictating letters marked "P 32(a) to P32(u)" and that he coerced the Petitioner to endorse the said letters.

Thereafter, on 06.05.2015 the Petitioner received a telephone call from the 1st Respondent, instructing her to visit the Mount Lavinia Police Station. On arrival at the Police Station, the Petitioner alleges that 1st Respondent stated that she was being arrested on the instructions of the 4th Respondent. Immediately, the Petitioner contacted her husband and the Chairman of the Training Center, and her husband attempted to intervene by explaining to the 3rd Respondent that the Petitioner is merely a teacher of the Training Center.

Proceedings before the Magistrate's Court

The next day (07.05.2015), the Petitioner was produced before the Learned Magistrate of Mount Lavinia and the 3rd Respondent requested that the Petitioner be remanded till 21.05.2015 on the basis that she committed the Offences punishable by Sections 386, 389 and 403 of the Penal Code.

The Petitioner states that on 24.05.2015, she visited the Mount Lavinia Police Station accompanied by her husband in compliance with the bail conditions. Thereafter, the Petitioner signed the registry and then the 2nd Respondent informed the Petitioner's husband to revisit the Police Station to discuss the progress of the investigation. According to the Petitioner, following her husband's visit to the Police Station, the 2nd Respondent purportedly made an effort to pressure her husband into providing transportation for a visit to a funeral in Kirindiwela. This funeral was for a deceased relative of a Police Officer associated with the Mount Lavinia Police Station. However, the husband refused the demand. A transcript and recording of this alleged conversation were marked "P 40(y) and P40(z)" and produced before this Court the Court granted permission to the Petitioner to produce the said transcript and recording. The 2nd Respondent, however, takes up the position that he never informed the husband to revisit the Police Station on 24.05.2015 and denied that he attempted to coerce transportation from the husband. He

further refuted the authenticity of his voice in the recording marked "P40(y)" produced by the Petitioner.

In relation to the above events, the 3rd Respondent states that he directed the 2nd Respondent to arrest the Petitioner on 14.05.2015 and denies that he was acting on the orders of the 4th Respondent. The 3rd Respondent produced the arrest notes marked "3R3" as proof of this position. The Respondents further alleged that the Student Record Sheets and the bank slips were not produced by the Petitioner for them to peruse. On 27.05.2015 the Petitioner made a complaint to the Human Rights Commission marked "P 41", stating that her arrest was arbitrary, illegal, unreasonable and male fide. The present application relates to the above events. I will now consider the alleged violations.

Alleged Violation of Article 12(1) of the Constitution

Article 12(1) protects persons from any unlawful, arbitrary or mala fide executive or administrative actions or omissions. The Petitioner states that the Respondents actions from 25.04.2015 to 07.05.2015, resulted in a continuous infringement and/or infringement of her rights enshrined in Article 12(1) of the Constitution.

The Petitioner alleges that on 25.04.2015 the 1st to 3rd Respondents failed to act promptly to contain the situation at the Training Center and alleged that the 2nd Respondent threatened to arrest the Petitioner, and that therefore, the Respondents had acted arbitrarily. However, the 1st Respondent denies visiting the Training Center due to his health condition. As proof he provided a medical report marked "1R2". The Petitioner argues in her Counter Affidavit that the medical report relates to injuries sustained by the 1st Respondent in November 2011, which is more than 3 years before the arrest, therefore, is irrelevant and of no evidentiary value. Although the medical report relates to incidents in November 2011, the report is dated 23.07.2013, the time in which the medical evaluations were done. Moreover, it appears that the injury the 1st Respondent had sustained were quite serious and he had to seek leave of absence for nearly two months. In those circumstances I am inclined to agree that the 1st Respondent did not effect the arrest of the Petitioner.

The allegation that the 2nd Respondent dictated several letters and harassed the Petitioner on that day should also be considered in this background. The contention is that the 2nd Respondent escorted the Petitioner to the Training Center around 10.00 p.m, however, RIB extract marked "2R2" states that the 2nd Respondent terminated his duties at 08.42 p.m and left the Police Station. Although the Petitioner in her Counter Affidavit argued that the RIB extract was a "self-serving" document, this Court cannot doubt its credibility, and on the face of the document, it appears genuine. Therefore, I am not inclined to agree with the events on that day as stated by the Petitioner.

The Petitioner had further alleged that the 2nd Respondent attempted to solicit multiple favours or bribes from the Petitioner and acted for a collateral purpose. In particular, the Petitioner states that the 2nd Responded attempted to solicit a bribe from her husband on 26.04.2015. This allegation, on a scrutiny of all the material before the Court, is an allegation of "word against word" and in these circumstances, in arriving at a just and equitable decision in the realm of the fundamental rights jurisdiction, this Court necessarily has to apply the test of probability to the factual matters placed before us.

In this regard, I wish to cite with approval the opinion expressed by His Lordship Justice Wanasundera in the case of ***Velmurugu v The Attorney General and Others*** **[1981] 1 SLR 406**, where his Lordship stated that the test applicable is a "preponderance of probability" adopted in civil cases. It was stated that although the standard is not as high as that required in criminal cases, there can be different standards of probability within that standard and the degree applicable would depend on the subject-matter. Further, His Lordship Justice Soza in ***Vivienne Goonewardene v Hector Perera*** **[1983] SLR 1 V 305** stated;

"The degree of probability required should be commensurate with the gravity of the allegation sought to be proved. This court when called upon to determine questions of infringement of fundamental rights will insist on a high degree of probability as for instance a Court having to decide a question of fraud in a civil suit would. The conscience of the court must be satisfied that there has been an infringement."

An allegation of bribery, if proved, is a significant blow to the reputation of any person and would also result in criminal liability. Therefore, the allegation will require a high

degree of probability to be established, and an allegation based on the word of the Petitioner alone may not suffice. It was also alleged by the Petitioner that the 2nd Respondent sought a "favour" on 24.05.2015 and requested transport to visit a funeral. The alleged transcript and the voice recording marked "P 40(y)" and "P 40(z)" are denied by the 2nd Respondent. In the absence of any voice comparison, specialist comparison or expert evidence to corroborate the alleged "favour", the Court is hesitant to rely on the recording alone produced by the Petitioner.

Moreover, if the 2nd Respondent attempted to solicit a bribe, the Petitioner could have made a complaint to the relevant authorities, but no such attempt was made. Further, the alleged bribe is not mentioned in the complaint made by the Petitioner to the Human Rights Commission marked "P 41", and in fact, the alleged events of 26.04.2015 and 24.05.2015 are completely omitted from the complaint. Although the complaint on its face is dated 24.05.2015, even the Petitioner accepts that the complaint was made on the 27.05.2015. The Petitioner has not provided reason as to why the Petitioner omitted to state these events. In those circumstances, I find that the Petitioner has failed to establish a violation of Article 12(1) of the Constitution.

Alleged Violation of Article 13(1) of the Constitution

Article 13(1) of the Constitution ensures that the personal liberties of a person are protected from arbitrary arrest. The obligations enshrined in Article 13(1) are twofold. First, is that an arrest must be made in accordance with the procedure established by law and secondly, every person arrested must be informed of the reason for the arrest.

Justice Sharvananda states the purpose to inform the reason for the arrest in his treatise, "Fundamental Rights in Sri Lanka" on page 141 as;

"…Meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for the arrested person to know exactly what allegation or accusation against him is so that he can consult his attorney-at-law and be advised by him."

A particular form is not required for the notification, nor does it require a complete or detailed description of the charges against the suspect. The requirement is for the arrested person to be told in simple, non-technical language the essential legal and factual grounds for the arrest at the earliest reasonable opportunity. It is apparent that the Respondents informed the Petitioner the reasons for the arrest *vide* the arrest notes marked "3R3" which state that the Petitioner was arrested for committing the Offence of Criminal Breach of Trust and that she was informed of the reasons. However, the crux of the Petitioner's argument is that the arrest was not according to the procedure established by law.

The procedure established by law for arresting a person without a Warrant is set out in Chapter IV B (Sections 32-43) of the Code of Criminal Procedure. Section 32(1)(b) of the Code of Criminal Procedure Code provides that;

"(1) Any peace officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who in his presence commits any breach of the peace;

(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;"

The Petitioner submits that she was arrested on a vague and general suspicion and that the Respondents arrested the Petitioner without forming a reasonable suspicion to charge the Petitioner for an Offence in terms of Section 32 of the Criminal Procedure Code or Tertiary and Vocational Education Act No.20 of 1990. The Petitioner further contends that the Respondents were overzealous as well as despotic in arresting her.

In order to effect an arrest, a reasonable suspicion must be in entertained in the mind of the Police Officer. The test is objective, and an arrest made purely on subjective grounds or on a general or vague suspicion would be arbitrary. The requirement is limited and is not equated with prima facie proof of the commission of the Offence. As observed by Lord Devlin in ***Hussein v. Chong Fook Kam*** **[1970] AC 942 at 948**,

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end".

However, the suspicion of the Police Officer must be reasonable, and a Police Officer cannot act on mere conjecture or surmise. As stated by His Lordship Justice Amarasinghe in *Channa Pieris and Others v. Attorney General and Others* [1994] 1 Sri L.R 1 at p. 46 - 47

"A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources."

"However, the officer making an arrest cannot act on a suspicion founded on mere conjecture or vague surmise. His information must give rise to a reasonable suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence".

Similarly, in *Gamlath v Neville Silva and Others* [1991] 2 Sri L.R 267 it was held by His Lordship Justice Kulatunga that;

"A suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the Police Officer's own knowledge or on statements made by other persons in a way which justify him giving them credit."

A Police Officer must form a reasonable suspicion founded upon his own knowledge such as personally observing the commission of an Offence or by statements made by others in a manner which justifies him giving credit to those statements. For instance, if the statements are corroborated by additional evidence or if there are a number of complaints received by the Police Officer corroborating the same events, or by a combination of both personal knowledge of the Police Officer and credible statements made by others.

Plainly, the threshold for the foundation of a reasonable suspicion is limited and must be assessed on the facts of each case and suspecting a person of having committed an Offence falls a short of having demonstrable proof of the commission of the Offence.

It was held in ***Piyasiri v Fernando*** **[1981]1 Sri L.R 173** at 184 that an arrest would be illegal if the arrest was based on speculation or a vague and general suspicion or effected to ascertain whether *some* offence was committed. His Lordship Justice H.A.G De Silva held that;

"The arrest of the Petitioners in my view was highly speculative and was for the purpose of ascertaining whether any of them-could be detected to, have committed a bribery offence. No Police Officer has the right to arrest a person on vague general suspicion, not knowing -the precise crime suspected but hoping to obtain evidence of the commission of some crime for which they have the power to arrest."

In ***Piyasiri v Fernando*** [Supra], the Bribery Commissioner received a complaint alleging that the Customs Officers at the airport were soliciting bribes. It was a general complaint without identifying any particular Customs Officers and the Respondent Police Officers effected the arrest once the Customs Officers were leaving the airport. Therefore, the Court held that the Police Officers acted on a vague and general suspicion.

However, in the instant Application, the Mount Lavinia Police Station received 24 complaints from 25.04.2015 to 28.04.2015 marked "3R5 to 3Rw" and all the complaints alleged that the Training Center ceased to be duly registered with TVEC and stood terminated since 20.12.2013, and that the monies of the students were misappropriated. The letters dated 12.05.2015 and 15.09.2015, provided by the Acting Director (Standards and Accreditation) of the TVEC, although issued after the Petitioner's arrest, marked as "3R1 and 3R1a" provide credit to the Respondents' stance that the Training Center's valid registration had ceased.

While I would not definitively settle the matter that the Training Center was conducting its business illegally, within the context of this case, the Court concurs that the Respondents held a reasonable suspicion that the Training Center was engaged in unlawful operations. It is also pertinent that of the 24 complaints, the complaints marked "3R5f, 3R5h, 3R5j to 3R5n, 3R5p, 3R5q, 3R5u, 3R5v" made specific references to the Petitioner by name and identified her as the Office Coordinator/Manager or as an employee of the Training Center.

The complaints also alleged that she received the receipts and monies that were deposited into the Training Center's account. On that basis, I cannot agree that the Respondents arrested the Petitioner on a vague and general suspicion which was speculative. As admitted by the Petitioner, even on the day she was placed in custody (06.05.2015), the Police were in the process of recording statements from three former students of the institute.

Even if the Respondents did not effect the arrest on a vague general suspicion, did the Respondents act overzealously? In this regard the Petitioner states that the Respondents admit that she functioned as a teacher and that the Petitioner is not a director of the said Training Center. Moreover, the Petitioner alleged that the Respondents admit that fees of the students are credited to the accounts of the Training Center maintained with the Commercial Bank branch in Mount Lavinia and that she produced the relevant bank deposits along with the Student Record Sheets (although the Respondents dispute the production of the bank deposit slips and the Student Record Sheets) as proof that none of the monies were deposited in her personal account. Hence, the Petitioner states that any suspicion would have been purged from the minds of the Respondents and the arrest was overzealous.

In response the Respondents state that the complaint made by Nishshanka, marked "3R5j" explicitly mentions that the Petitioner brushed aside the concerns of Nishshanka, when she called the Petitioner. The Petitioner's response was that these are merely acts of "political vindication" and that the Training Center was duly registered. The Respondents argue that the response given by the Petitioner demonstrate the *means rea* of the Petitioner since she was well aware of the fact that the Training Center was not duly registered and remained to function as an Office Coordinator/Manager and colluded with the Chairman by receiving funds and conducting the management of the Training Center.

The Respondents further state that had the Petitioner been a victim of circumstances, she would have immediately terminated her employment and ascertained the veracity of the allegation.

In *Ganeshan Samson Roy v M.M. Janaka Marasinghe* (S.C (F/R) 405/2018, S.C Minutes of 20.09.2023), I emphasized that 'reasonable suspicion' entails an executive discretion and that an element of prudence is required when making an arrest for 'white collar' crimes. The reason being, it needs to be ascertained whether the impugned transaction is purely a commercial transaction which had gone awry or whether the suspect bore the intent to defraud. I stated in *Ganeshan Samson Roy v M.M. Janaka Marasinghe* [supra] that;

"…..the principle laid by Lord Devlin in Shaaban Bin Hussien v Chong Fook Kam [1969] 3 All ER 1626 at 1630 is relevant to the instant case. As a general rule, an arrest should not be made until the investigation is complete. Still, the legislature allows police officers to affect an arrest before the completion of the investigation in certain circumstances; this is to avoid the investigation process being hampered and in order to maintain the law and order in the country. But to give the power to arrest on a reasonable suspicion does not mean that it should always be or even ordinarily be exercised. It means that there is executive discretion. In the exercise of such discretion, many factors must be considered. Besides the strength of the case, the possibility of escape, obstruction of the investigation, prevention of further crimes, and the threat of the accused to the public are some of the factors a police officer may consider. Thus, it appears the 'strength of the case' is a critical factor in making an arrest."

The exercise of executive discretion upon a reasonable suspicion entails a dual obligation for a Police Officer. On one hand, it involves the responsibility to detect and prevent crimes, while on the other, it entails a duty to be cautious in order to avoid mistaking the innocent for the guilty. Even when an arrest is made upon a reasonable suspicion, the presumption of innocence operates to a modified degree. In the word of Lord Scott in *Dumbell v Roberts* [1944] 1 All ER at 329;

"The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest – in a very modified degree, it is true, but at least to the extent requiring them to

be observant, receptive and open-minded and to notice any relevant circumstances which points either way, either to innocence or to guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who has ex hypothesi aroused their suspicion, the he probably is an "offender" attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. I am not suggesting a duty on the police to try to prove innocence; that is not their function; but that they should act on the assumption that their prima facie suspicion may be ill-founded. The duty attaches particularly where slight delay does not matter because there is no probability, in the circumstances of the arrest or intended arrest, of the suspect person running away".

I am unable to agree that the Respondents acted overzealously in arresting the Petitioner. The Respondents had received numerous complaints to justifiably bear a suspicion that an offence was committed at the Training Center, and as admitted by the Petitioner, the Respondents were recording complaints from former students even on the day she attended the Police Station. Although the Petitioner states that she resigned as the Office Coordinator/Manager around January 2015, at the time of the complaints, the complainants identified the Petitioner as the Office Manager/Coordinator, and the Respondents cannot be faulted for relying on the complaints which were credible.

I also do not doubt the credibility of the complaint made by Nishshanka ("3R5j"), and it appears from the response of the Petitioner that she had the knowledge that the Training Center's registration was dubious. Although the Respondents should have acquired the letters issued by the TVEC before effecting the Petitioner's arrest, the letters procured in the course of investigations indicate that the registration of the Training Center stood terminated from 2013. Given those circumstances, it is reasonable to infer that the Petitioner should have harbored suspicions regarding the questionable activities of the Training Center at some point after 2013, considering her role as the Office Manager/Coordinator of the Center. Therefore, the Petitioner cannot claim ignorance.

However, it is reasonable to presume that the Petitioner produced the bank deposits and Student Sheet Record for the Respondents to peruse, which would have been the natural reaction of a person innocent of the alleged misappropriation of monies, I am unable to agree that the production of the documents would have purged a reasonable suspicion of the Respondents. It is evident that the Petitioner acted as a liaison of the Chairman who was residing abroad in America. The statement of the Petitioner dated 30.04.2015 marked "1R3" states that;

"අප ආයතනයේ හිමිකරු වන්නේ රන්ජිත් කල්කිරියාගම යන අයයි. ඔහු දැනට ඇමෙරිකාවේ ඉන්නේ ඔහුගේ ලිපිනය මා දන්නේ නැහැ. 2014 ඔක්තෝම්බර් 01 දින ඔහු විසින් මා හට කිව්වා ආයතනයේ තිබෙන වැඩ මම දුරකථනයෙන් හෝ විද්‍යුත් තැපෑලෙන් දැනුම් දෙනවා ඒවා මගේ උපදෙස් පරිදි කරන්න කියල. ඒ අනුව ඔහු කියන ඒවා මම ඒ විදිහට ඉටු කලා"

Even though the Petitioner asserts that she was denied the opportunity to review the statements provided to the Respondents, before affixing her signature, the above facts in the statement marked "1R3" are not disputed. The Petitioner also admits that the Chairman and the Directors of the Training Center reside abroad, and it logically follows that if the Directors resided abroad, the Petitioner would act as the local liaison for the Training Center.

Although according to the Petitioner she resigned from her position in January 2015, her own admission states that she was engaged in the administrative duties of the Office Coordinator/Manager at least till March 2015, which was one month before the arrest. As the Office Coordinator/Manager she would have naturally been delegated the administrative tasks of the Center. In those circumstances, it is difficult to state that it was unreasonable for the Respondents to suspect that the Petitioner was colluding with the Chairman and the Directors at least till a point of time recent to the incident.

Therefore, considering the Petitioner's degree of involvement in the organization, and the suspected collusion with the Directors resident abroad, arresting the Petitioner, to prevent the investigation from being hampered is, in my view, reasonable. Hence, I

declare that the Petitioner has failed to establish that the Respondents violated her fundamental rights enshrined in Article 13(1) of the Constitution.

Conclusion

Considering the totality of the evidence I hold that the Petitioner has failed to establish a violation of Article 12(1) and 13(1) of the Constitution.
Application dismissed.

JUDGE OF THE SUPREME COURT

MURDU N.B FERNANDO PC, J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal against the Judgement dated 10.10.2014 in Case No. WP/HCCA/COL/06/2014 under and in terms of Section 5(c)(1) of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

SC Case No.: **SC/APPEAL/69/2016**
Formerly : SC/HCCA/614/2014
HC Case No.: WP/HCCA/COL/06/2014
DC Case No.: 20155/MR

I.M.D. Bandara,
No. 10/3B, 'Amila'
Ranawakawatta Road,
Kalalgoda,
Pannipitiya.

PLAINTIFF

Vs.

1. Director of Health Services,
   No. 355, Deans Road,
   Colombo 10.

2. Thilak Kumara Buddhadasa,

Main Street,
Mahawa.

3. Charitha Samiddhi Dewapura,
No. 34, 33rd Lane,
Colombo 06.

4. Sumith Devapura,
No. 41/1B, Kawdana Road,
Attidiya Road,
Dehiwela.

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

DEFENDANTS

AND THEN BETWEEN

3. Charitha Samiddhi Dewapura,
No. 34, 33rd Lane,
Colombo 06.

4. Sumith Devapura,
No. 41/1B, Kawdana Road,
Attidiya Road,
Dehiwela.

DEFENDANT-PETITIONERS

Vs.

I.M.D. Bandara,
No. 10/3B, 'Amila'
Ranawakawatta Road,
Kalalgoda,
Pannipitiya.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

3. Charitha Samiddhi Dewapura,
   No. 34, 33rd Lane,
   Colombo 06.

4. Sumith Devapura,
   No. 41/1B, Kawdana Road,
   Attidiya Road,
   Dehiwela.

DEFENDANT-PETITIONERS-APPELLANTS

Vs.

I.M.D. Bandara,
No. 10/3B, 'Amila'
Ranawakawatta Road,
Kalalgoda,
Pannipitiya.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J
S. Thurairaja, PC, J
Arjuna Obeyesekere, J

COUNSEL: Kushan D' Alwis, PC with Prasanna De Silva and Milinda Munidasa for the 3rd and 4th Defendants-Petitioners-Appellants.
Shiral Lakthilaka for the Plaintiff-Respondent-Respondent.

WRITTEN SUBMISSIONS: 27.05.2016 & 23.06.2017 for the 3rd and 4th Defendant-Petitioner-Appellants.
24.06.2016 & 22.06.2017 for the Plaintiff-Respondent-Respondent.

ARGUED ON: 02.08.2023.

DECIDED ON: 24.10.2023.

JUDGEMENT

Aluwihare, PC, J,

This is an appeal against a Judgement of the of the Provincial High Court of the Western Province. The Plaintiff-Respondent-Respondent (hereinafter referred to as the 'Plaintiff) instituted an action by Plaint dated 17th September 1997 in the District Court of Colombo against the Defendants in that matter, including the 3rd and 4th Defendant-Petitioners-Appellants (hereinafter 'Defendants'), seeking *inter alia* a sum of Rs. 1,000,000 as damages. The Plaintiff had also prayed for interest on damages from the date of the Plaint till the date of the Decree as well as legal interest on the aggregate sum awarded as Damages by the Decree, from the date of the Decree till

the date of payment (vide 'P 1', the Plaint at p. 228 of the brief).

The learned District Judge pronounced Judgement on the 2nd February 2007, against the Defendants, granting the Plaintiff damages in a sum of Rs. 421,665 together with legal interest until payment in full and costs of suit. The Defendants filed an appeal against this judgement. However, the appeal was dismissed. Acting in terms of the said Judgement, the Defendants deposited in Court a sum of Rs. 421,665. This is evidenced by Journal Entry No. 58 dated 28th February 2011 (at p. 222 of the brief).

Subsequently, by way of Motion dated 7th August 2012, the Plaintiff made an application presenting a Bill of Costs and calculation of interest ('P5' at pages 262 and 264). According to the said calculation, the amounts that the Defendants were required pay was as follows.

- Rs. 344, 367.16 as legal interest from the date of filing the Plaint (17th September 1997) to the date of judgement.
- Rs. 386,390.58 as legal interest from the date of judgement (2nd February 2007) to the date of submission of the disputed Bill of Costs and Calculation of legal interest (15th October 2012).

According to the calculation, a sum of Rs. 730,757.74 was due.

The Defendants objected to the said Bill and calculation of interest by the Statement of Objections dated 3rd April 2013 and took up the position that the court did not award interest to the Plaintiff from the date of filing action up to the date of judgment and the Plaintiff is entitled to interest only from the date of judgement up to the date of the payment of damages awarded by the court. The matter was fixed for inquiry by way of written submissions and on the 23rd January 2014, the learned Additional District Judge made Order that the Plaintiff is entitled to a sum of Rs. 47,750 as the costs of suit, and a sum of Rs. 730,757.74 as legal interest and directed the Registrar of the District Court to act in terms of the said Order (*vide* 'P6' at p. 287 of the Brief).

Thereafter, the Defendants sought Leave to Appeal and Leave to Appeal was granted by the Civil Appellate High Court on the question of whether the Order of the learned Additional District Judge (P6) was in conformity with the Judgement of the learned District judge who granted relief to the Plaintiff. The learned Judges of the High Court

delivered judgement on the 10th October 2014 dismissing the Defendant's appeal. Aggrieved by the said judgement, the Defendants sought leave to appeal from this Court and upon the same being supported this Court granted Leave to Appeal on the following questions of Law: -

(a) Have the learned Judges of the High Court misinterpreted the provisions of Section 192 of the Civil Procedure Code in holding that although not specifically mentioned in the judgement, the Plaintiff is entitled to recover legal interest from the date of the action?

(b) Did the learned Judges of the High Court err in failing to take into consideration that the learned Additional District Judge had awarded legal interest for a period after the 28th February 2011 notwithstanding that the sum awarded as damages had been released to the Plaintiff on the said date?

(c) In any event, is the Plaintiff not entitled to move Court to take steps with regard to the recovery of legal interest without tendering a Decree to be filed of record?

The questions of law which merit determination by the Court are addressed below.

(a) Have the learned Judges of the High Court misinterpreted the provisions of Section 192 of the Civil Procedure Code in holding that, although not specifically mentioned in the judgement, the Plaintiff is entitled to recover legal interest from the date of the action?

Relief provided by the Learned Trial Judge

Since the corpus of this appeal directly relates to the relief granted by the learned Trial Judge, it is prudent at this stage to conclusively clarify the relief which was provided by the Judge. The relevant issues, and the answers provided by the Judge to those issues are as follows:

Issue No. 7 as framed by the Plaintiff:

"විසඳිය යුතු ප්‍රශ්න පැමිණිල්ලේ වාසියට විසඳෙ නම් පැමිණිල්ලේ ඉල්ලා ඇති සහන ලබා

ගැනීමට පැමිනිලිකරුට හිමිකම් තිබේද?"

The Learned Trial Judge had answered Issue No. 7 as follows;
"**තීන්දුවේ සඳහන් පරිදි** ලබා ගත හැකිය."

The Trial Judge, instead of merely answering issue number 7 in the affirmative, has proceeded to answer it in a detailed manner indicating that relief should be granted according to his judgement ['P2'].

In terms of the Judgement, the relief that was granted is as follows:
"*පැමිනිලිකරුට අහිමි වූ ආදයම රු 120,000/- ක මුදලක්ද, වෛද්‍යය වියදම් රු 1,665/- ක මුදලක්ද සහ අත්විඳීමට සිදු වූ අපහසුතා සහ ශරීරික වේදනා සඳහා 300,000 මුදලක්ද වශයෙන් රු 421,665/- මුදල් නඩු ගාස්තුද* **<u>එම මුදල ගෙවන තෙක් නෛතික පොලියද</u>** *3, 4 විත්තිකරුවන්ගෙන් එක්ව හ වෙන් වෙන්ම අය කර ගැනීමට අයිතිවාසිකම් ඇති බවට තීන්දු කරමි.*" [emphasis added]

The phrase '**එම මුදල ගෙවන තෙක් නෛතික පොලියද', followed by or preceded by no other reference to legal interest ('නෛතික පොලිය')** clearly indicates that the trial judge only awarded legal interest from the date of the decree, till the date of payment of decreed amount. Therefore, when the trial judge stated that relief is granted in favour of the Plaintiff as stated in the judgment ('**තීන්දුවේ සඳහන් පරිදි** ලබා ගත හැකිය'), there can be no doubt or contention that he only intended to award legal interest from the date of decree, till the date of payment of the decreed amount.

The question which remains is whether the Additional District Judge and the learned judges of the Provincial High Court erred in determining that the Plaintiff was owed legal interest from the date of filing of the Plaint.

<u>Was the denial of legal interest from the date of suit an oversight/error on the part of the Trial Judge?</u>

The learned Judges of the Provincial High Court in their Judgement dated 10th October 2014 ('P8') provides limited reasoning for their position that the Plaintiff is entitled

to legal interest from the date of instituting action. In the four-paragraph Judgement of the learned Judges of the High Court, consideration has only been adverted to Section 192(1) of the Civil Procedure Code and the case of ***Colombo Municipal Council v. Junkeer*** 71 NLR 85.

Despite arriving at the conclusion that Section 192 *permits* the court to award interest from the date of instituting action, and that the Judgement of the Trial Judge 'does not specifically mention' that the Plaintiff is entitled to recover legal interest from the date of action, the learned Judges of the High Court held that the Plaintiffs were entitled to recover legal interest from the date of action, affirming the Order of the additional District Judge.

Section 192(1) states that;
"When the action is for a sum of money due to the plaintiff, **the court may**, in the decree **order interest** according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement at the rate of twelve per centum per annum **to be paid on the principal sum adjudged from the date of the action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the court thinks fit**."

Section 192(3) states that;
"Where such decree is **silent with regard to the payment of further interest** on such aggregate sum as aforesaid **from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have refused such interest**, and a separate action therefor shall not lie."

It would be correct to comprehensively interpret Section 192 as follows:
The court retains the discretion to award legal interest. Where the court decides to award legal interest, it may order that such interest be paid on the principal sum adjudged **from the date of the action to the date of the decree, in addition to** any interest to be paid **for a period prior to the institution of the action,** along with further interest to be paid **from the date of the decree to the date of payment, or to such earlier**

date. However**, where the decree is silent on the payment of further interest** to be paid **from the date of the decree to the date of payment, or to any earlier date, the court is deemed to have refused such further interest.**

Accordingly, the court may award interest for three periods:

i. Interest for a period prior to filing of suit
ii. Interest from the date of institution of the action to the date of decree (pendency)
iii. Interest from the date of decree till payment/earlier specified date.

The principal contention of the Defendants relates to the Additional District Judge's failure to award of interest from the date of institution of the action. In other words, the principal point of divergence between the Judgement of the learned Trial judge and the subsequent Order of the learned Additional District Judge is 'Interest *pendente lite'* up to the date of suit.

At the outset, it must be understood that legal interest is not a penalty, but is the normal accretion on capital, calculated for a particular period (vide ***Alok Shanker Pandey vs Union of India & Others*** **[2007] AIR SC 1198**). Per Justice Markandey Katju at p. 1199; "*For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B.*"

It appears to me that the debate on whether *interest pedente lite* must be awarded in suits for unliquidated damages is most strongly evident in Indian Jurisprudence. In fact, in ***The Colombo Municipal Council v. Junkeer*** **[Supra]** a case cited and relied on by both the Defendants and the Plaintiff in their submissions), the court referred to the contrasting opinions held by Indian Courts on the matter.

It was observed that a series of cases including ***Crewdson v. Ganesh Das 1(1920) AIR (Cal.)*** and ***Ratanlal v. Brijmohan (1931) AIR (Bom.),*** the Courts held the opinion that

interest for damages does not run from the date of suit because the obligation or compensation to be paid has not yet been reduced to a definite sum of money, and interest accrues to the principle sum decreed to be damages from the date of decree.

In ***Ramalingam v. Gokuldas Madavji & Co.*** **(1926) AIB (Mad.)**, the court held the opinion that denying the Plaintiff interest from the date of the Plaint is akin to stating that "*the Plaintiff must be deprived of the fruits of his success to the extent of losing interest from day to day during the pendency of his suit on the sum that he was entitled to at the date of his going to Court*". Twenty years later, in ***Anandram Mangturam v. Bholaram Tanumal*** **1 (1946) AIR (Bom.)**, it was held, interpreting Section 34 of the Indian Civil Procedure Code, that "*the matter is clear beyond any doubt because under section 34 of the Civil Procedure Code it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for the payment of money.*"

S. 34(1) of the Indian Civil Procedure Code is almost identical to the Section. 192(1) of our Civil Procedure Code, with the latter perhaps deriving inspiration for its form from the former. Section 34(1) of the Indian Code of Civil Procedure, 1908 states:
"*Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.*"

The only difference between the two sections appears to be that the Indian Code proscribes discretion where the court decrees a '*payment of money*', whereas the Sri Lankan Code proscribes permissible discretion '*when the action is for a sum of money due to the plaintiff*'.

The Plaintiff cited Justice Spencer's dictum in ***Ramalingum v. Gokuldas Madavji*** **(1926) 51 MLJ 243**, which was referred to in ***The Colombo Municipal Council v. Junkeer*** **[Supra]** to argue that interest should be granted from the date of suit as of an

entitlement. When considering this holding, one must bear in mind that while it may be applicable to interest on capital sums that one may be entitled to at the time at which the suit is brought due to contractual agreements, it may not necessarily be applicable to cases such as the instant, where no capital sum as damages or entitlement is determined at the time of suit.

It must also be noted that despite citing the holding in ***Ramalingam's*** case [supra], Fernando, J, in ***Colombo Municipal Council v. Junkeer*** [supra], went onto hold that "*The Court is not bound to give interest; for, it must be noted, that* **the section gives a discretion to give or refuse interest; and whatever the nature of the claim is, whether it is a claim to a fixed sum of money or to unliquidated damages, the Court is bound in every case to exercise a sound discretion**. *The mere fact that the decree is for payment of damages cannot by itself be a bar to the plaintiff being awarded interest.*" and also that "*Notwithstanding- the difference in the language employed in section 192 of our Code as compared with section 34 of the Indian Code, we do not consider that our section limits the power of the court to award interest to cases seeking decrees in respect of liquidated debts.*" [at p. 87]. The Court then answered the question whether interest **should not have been awarded** from the date of the action **in that case** in the negative.

Although I have alluded to the position of our jurisprudence relating to the province of *interest pedente lite* to enrich my reasoning, I am conscious that in the present appeal, the Court must not engage in a deduction or discernment as to whether the learned District Judge had *reasonably* exercised his discretion. Such an inquiry is not within the ambit of this appeal. This appeal only requires the Court to determine **whether the learned District Judge bore a discretion to refuse legal interest from the date of the action, and whether the Judge's silence on the matter is to be interpreted as refusal of such interest.**

Furthermore, looking beyond *stare decisis*, I observe that it is academically understood that where a decree is silent regarding any further legal interest (any legal interest beyond that which is already expressly awarded), the decree must be interpreted to have denied such further interest.

According to K.D.P Wickremasinghe,
"If the decree is silent as to further interest, the Court is deemed to have refused such interest." [***Civil Procedure Code in Ceylon*** at page 227].

Therefore, although it is understood that legal interest may be provided, and in most cases, is provided from the date of the institution of the action, as per Section 192(1) of the CPC, Judges are not mandatorily obligated to grant such relief. The drafters of Section 192(1), being conscious of the myriad of considerations before the Judge, bestows upon the Judge, a discretion in the matter.

In this respect, it was argued on behalf of the Plaintiff that generally, if the District Court decides to hold in favour of the Plaintiff, relief prayed by that Plaintiff in the Plaint is granted, and if in some case, the Court wishes to vary such relief prayed and only grant some relief and not the rest, then what the Plaintiff would be entitled to is relief that is specifically referred to in the judgement. In my view, this is precisely what the learned District Judge had done when he said that relief is granted "**තීන්දුවේ සඳහන් පරිදි" [in the manner specified in the judgement].**

It is perplexing that the Plaintiff would not have discovered that legal interest had not been awarded from the date of the plaint, and then canvassed that ground before the Additional District Judge before filing a Bill of Costs claiming interest from the date of the plaint. If the Plaintiff wished to impugn the judgement of the learned trial judge, by canvassing the opinion that legal interest should have been granted from the date of suit to the date of decree, in addition to the legal interest granted from the date of decree till the date of payment, the Plaintiff ought to have resorted to the recourse provided by the law. Instead, at a subsequent date, after the Defendants had already deposited damages per the judgement, the Plaintiff filed a Bill of Costs, and the calculation of legal interest therein was not in conformity with the judgement.

Regrettably, the learned Additional District Judge, operating under the assumption that he could, by another Order remedy the purported defect in the Judgement of the learned Trial Judge without expressly addressing such defect as a question of law, ordered that legal interest must be paid per a sum calculated from the date the action was instituted. Thereafter, the learned Judges of the High Court affirmed the said

calculation of the Additional District Judge.

That judges retain discretion over the awarding of relief for damages indeterminate at the date of filing the action is not a position unique to our jurisdiction. The examination of Indian Jurisprudence and the Civil Procedure Laws of India affirms that a Judge retains discretion regarding the award of legal interest from and till whichever stage of the action or decree.

Therefore, for all the reasons elucidated above, I answer this question of law [(a)] in the positive. That is to say that, yes, the learned Judges of the High Court misinterpreted the provisions of Section 192 of the Civil Procedure Code in holding that although not specifically mentioned in the judgement, the Plaintiff is entitled to recover legal interest from the date of the action.

(b) Did the learned Judges of the High Court err in failing to take into consideration that the learned Additional District Judge had awarded legal interest for a period after the 28th February 2011 notwithstanding that the sum awarded as damages had been released to the Plaintiff on the said date?

In the Calculation of Legal Interest submitted with the Bill of Costs before the Additional District Judge, legal interest has been calculated up to 05.10.2012. It is acknowledged by the learned Judges of the High Court that the decreed amount was promptly deposited by the Defendants on 28.02.2011. This is evidenced by Journal Entry No. 58 of the brief. However, the learned Judges of the High Court affirmed the Order of the Additional District Judge which orders payment of legal interest up to 05.10.2012.

There can be no rational argument that the Plaintiff was entitled to legal interest beyond the date of payment of damages. Such a position is anathema to the concept of Legal Interest. Therefore, I answer this question [(b)] too in the affirmative. The learned Judges of the High Court erred in failing to consider that the learned Additional District Judge had awarded legal interest for a period after the 28th February 2011 notwithstanding that the sum awarded as damages had been released to the Plaintiff on the said date.

For the reasons setout above, the Appeal is allowed. The Plaintiff is only entitled to legal interest from the date of the judgement of the trial judge (2nd February 2007) to the date wherein the Defendants deposited the sum awarded as damages to the Plaintiff (28th February 2011).

Accordingly, the order of the learned Additional District Judge dated 23rd January 2014 and the judgement of the High Court of Civil Appeals dated 10th October 2014 are set aside. The learned District Judge is directed to calculate the component of interest payable to the Plaintiff as stipulated in the judgement of the learned District judge dated 2nd February 2007 and in line with the views expressed in this judgment.

The respective parties to bear the costs of this case.
Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC, J
I agree.

JUDGE OF THE SUPREME COURT

JUSTICE ARJUNA OBEYESEKERE, J
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

2. Bothalage Ajith Shantha.
3. Bothalage Sanjeewa Kumara.

Accused – Appellants – Appellants

SC Appeal No. 128/2022
SC SPL LA. 186/2019
CA Appeal No. CA 266-268/2015
HC Chilaw Case No. 102/2005

Vs.

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

Prosecutor – Respondent - Respondent

BEFORE : P. PADMAN SURASENA, J.,
YASANTHA KODAGODA, PC, J., and
KUMUDINI WICKREMASINGHE, J.,

COUNSEL : Chathura Amarathunga for the 2nd and 3rd Accused-Appellant-Appellant.
Janaka Bandara, DSG for the Respondent- Respondent.

ARGUED & DECIDED ON: 24th October 2023

Yasantha Kodagoda, PC, J.,

In this matter, having heard learned counsel in support and against the corresponding Application seeking *Special Leave to Appeal,* on 20th October 2022 this Court had granted *Special Leave to Appeal* in respect of the following question of law.

> *"Did the learned High Court Judge and the learned Justices of the Court of Appeal err in considering and evaluating the evidence for the prosecution in relation to the identity of the 2nd and 3rd Accused - Appellants?"*

In this matter the two Appellants along with one Dharmajothige Aruna Jeewantha and Gama Arachchilage Siriwardhena alias Ranne were indicted for having committed murder of one Warnakulasooriya Pathiranahalage Shantha Gunathilake, and for having caused grievous hurt to Handugala Dewagae Anoma Indrani and Warnakulasuriya Pathiranahalage Nirasha Madulatha, both of whom being prosecution witnesses. They stood as the concubine and the daughter respectively of deceased Shantha Gunathileka.

According to the evidence presented by the prosecution, the committing of the murder and infliction of grievous hurt had taken place on 10th April 1999 at the residence of the deceased. At the end of the trial held in the High Court presided over by a Judge of the High Court sitting without a jury, the 4th Accused had been acquitted. The 1st, 2nd and the 3rd Accused (of whom the 2nd and the 3rd accused being respectively the 1st and the 2nd Appellants before this Court) were convicted of having committed murder and for having committed the 2nd and the 3rd charges in the indictment, which related to the committing of grievous hurt.

Consequently, the 1st, 2nd and 3rd Accused appealed to the Court of Appeal. Having heard learned counsel, the learned Justices of the Court of Appeal by their judgment dated 3rd April 2019 affirmed the convictions and dismissed their Appeals. It is consequent to that judgment, that all three Accused - Appellants sought *Special Leave to Appeal* to this Court. The Application of the 1st Accused – 1st Appellant – 1st Petitioner seeking *Special Leave to Appeal* was dismissed.

We have heard and benefited from extensive submissions made to this Court on behalf of the 1st and 2nd Appellants and from the submissions of learned Senior Deputy Solicitor General who appeared for the Respondent Attorney - General.

We have considered the evidence in this case. According to the evidence of H.D. Anoma Indrani the concubine of the deceased, on the night of 10th April 1999 after they had gone to sleep, they were woken up due to someone shouting from outside the house, and soon thereafter several persons had come into their residence and attacked the deceased, herself and her daughter W.P. Nirosha Madulatha. As regards the identity of the attackers, she has testified that she was able to identify the 1st and 2nd Appellants at the Identification Parade held on 8th June 1999, which

had been held approximately two months after the incident, while the incident was still fresh in her mind. The notes of the Identification Parade had been produced at the trial and marked in evidence as "X2".

Learned counsel for the Appellant did not contest in this Court the procedure pertaining to the conduct of that Identification Parade, the integrity of the process and the reliability of the findings.

The other victim (W.P. Nirasha Madulatha) in her testimony has stated that in addition to the identification of the 1st Accused, she identified the 2nd and 3rd Accused as well. She has further testified that all three of the Accused had been previously seen by her in their area on several occasions. She has testified to the factual background based upon which she had come to know of their existence and seen them prior to the date of the incident. Those factual circumstances have not been impugned by learned counsel for the Accused when she was cross-examined. She has also stated that she was able identify all three Accused at the identification parade held on 8th June 1999. Once again, learned counsel for the Appellant did not impugn the procedure followed at the Identification Parade, the integrity of the process or the reliability of the identification.

This Court has also considered the history given by the afore-stated witnesses Anoma Indrani and Nirasha Madulatha to the Judicial Medical Officer who conducted the clinical forensic examination pertaining to the injuries sustained by both of them. It appears very evidently that they have taken up the inferential position that all four perpetrators were known to them. They (the injured examinees) have also given the perpetrators' alias names to the doctor. This aspect

has not been contested during the trial stage. In our view, that lends support to their oral testimony pertaining to the identification of the Appellants.

Learned counsel for the Appellant did impugn the integrity of the identification of the Accused by Sameera Sampath Gunathilleka, the son of the deceased. The ground on which learned counsel for the Appellant challenged the identification by that witness was on the footing that he (the witness) had seen the accused being detained inside a police cell when the witness went to the police station. Learned Deputy Solicitor General submitted that in support of the judgment of the High Court as well as the judgment of the Court of Appeal, he does not rely on the identification provided by witness Sameera Sampath Gunathilleka under such circumstances. We are of the view that given the position taken up by the learned Deputy Solicitor General, for the determination of this Appeal, it will not necessary for this Court to arrive at a finding on this matter. It is necessary to observe that the ground on which learned counsel for the Appellant's challenged the evidence of identification given by Sameera Sampath Gunathilleka is quite valid. Therefore, the evidence of witness Sameera Sampath Gunathilleka pertaining to the identification of the Accused will not be taken into account in the determination of this Appeal.

We have considered the basis on which both the learned Judge of the High Court and the leaned Justices of the Court of Appeal have satisfied themselves regarding proof of identity of the two Appellants before this Court, and we are of the view that the said findings should not be disturbed as the said judges have correctly concluded that the identities of the 1st and the 2nd Appellants have been established by the prosecution beyond reasonable doubt.

Learned Senior Deputy Solicitor General drew the attention of this Court to the testimony of Nawadankulame Medhananda Thero who had visited the scene of the crime soon after the perpetration of the murder and the infliction of injuries to the two prosecution witnesses. He had testified that even as at the time he visited the crime scene, child witnesses Nirasha Madulatha and Sampath Gunathileka were still hiding under a bed. This shows the very nature of the attack inflicted, and the fear generated by the perpetrator in the minds of these two child witnesses. This supports the narrative of the incident as provided by witnesses Anoma Indrani and Nirasha Madulatha.

It is to be noted that according to Nirasha Madulatha, prior to the incident, she had seen and known only the 1st and the 3rd Accused. She has admitted that she had no prior knowledge of the 2nd Accused. This lends support to the learned Deputy Solicitor General's submission that this witness was not hell-bent on implicating all the Accused, and was a truthful witness who only went to the extent of providing identification evidence relating to the two persons who were actually known to her from a time prior to the incident.

In view of the totality of the evidence placed before this Court as well submissions made by learned counsel, this Court of the view that the 1st and the 2nd Appellants have been correctly identified by the two witnesses referred to previously, namely Anoma Indrani and Nirasha Madulatha and that their testimony is reliable.

This Court has also given its anxious attention to the dock statements made by the two Appellants before the High Court. Apart from making very bland unsupported statements from the dock which may tantamount to an unsuccessful attempt at creating an alibi defence, this Court is of the view that no credence can be attached

to the said dock statements which stand untested via cross-examination and uncorroborated. That is particularly in view of the fact that intrinsically the said dock statements lack detail and cogency, and as the positions taken up in the dock statements have not been subjected to cross-examination. In the circumstances, this Court is of the view that the said dock statements do not give rise to a reasonable doubt and should necessarily be rejected.

In the circumstances, this Court proceeds to answer the question of law in respect of which special leave had been granted in the following way.

> *The learned Judge of the High Court and the learned Justices of the Court of Appeal have not erred in considering and evaluating the prosecution evidence relating to the identity of the 2nd and 3rd Accused appellants.*

In the circumstances, this Court while affirming the judgment of the Court of Appeal, dismiss this Appeal. No order for costs is made. Court wishes to appreciate the assistance given by both learned counsel in the dispensation of this appeal.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.,

I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.,

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S. Amirthanathan
60, Cascade St. X
Balwyn North, VI
C 3104,
Australia.

Petitioner

S.C.(FR) Application No, 236/2013

Vs.

1. Commander of the Army
Army Headquarters, Colombo 03.

1A General Shavendra Silva
Commander of the Army
Army Headquarters,
Sri Jayawardenepura,
Colombo.

2. Commanding Officer
Security Forces, Jaffna Division, Palaly.

2A. Major General W.L.P.W. Perera
Commanding Officer
Security Forces, Jaffna Division, Palaly.

3. Chief Co-ordinator,
Civil Affairs Unit, Sri Lanka Security Forces,
Hospital Road, Jaffna.

4. The Secretary- Ministry of Defence and Urban Development,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

4A. General G.D.H. Kamal Gunaratne (Retd.)
The Secretary- Ministry of Defence and State Ministry of National Security, Home Affairs and Disaster Management,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

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

6. Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna. (Opposite St. John 's College Jaffna).

6A. Mr. Kanapathipillai Mahesan
Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna. (Opposite St. John 's College Jaffna).

7. Land Commissioner General
Land Commissioner General's Department,

"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.

7A. R.P.R. Rajapaksha
Land Commissioner General
Land Commissioner General's
Department,
"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.

Respondents

****

BEFORE : P. **PADMAN SURASENA, J.**

ACHALA WENGAPPULI, J.

MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Viran Corea with Pasindu Silva &
Ms. Thilini Vidanagamage for the Petitioner instructed by Sanjeewa Kaluarachchi.
Ms. Kanishka de Silva Balapatabendi
SSC for the Hon. Attorney General.

ARGUED ON : 21st October, 2021

DECIDED ON : 27th October, 2023

****

ACHALA WENGAPPULI, J.

The Petitioner in SC (FR) No. 236 of 2013, *Surendrani Amirthanathan,* is alleging continued infringement of her fundamental rights guaranteed to her under Articles 12(1) and 14(1)(h) of the Constitution. The impugned act of administrative or executive action is that one or more of the Respondents forcefully and illegally seized her property located in *Jaffna* town, over which she has paper title.

It was stated by the Petitioner that her father bought the said property in 1969 and built a dwelling house on it. She lived in that house with her parents until her marriage in 1987, after which she moved to *Peradeniya* with her husband. In 1988, her parents too had come to live with her after renting out their house in *Jaffna* to an elderly couple. In 1990, their house became uninhabitable due to damages it had sustained consequent to the war situation that erupted between the LTTE and *Sri Lanka* Army. With hostilities continuing unabated, it was not possible for the Petitioner to repair their house at that point of time. The Petitioner further states that due to the situation that prevailed at the time in the *Jaffna* peninsula, she and her family had moved to *Australia* in 2003, but her father had arranged a caretaker to look after the said property during their absence.

The Petitioner alleges that in October 2012, the *Sri Lanka* Army had illegally entered into her property and occupied same by erecting a fence around the property denying any access to the land by her agent. The Petitioner claims that her property had not been acquired by the State in terms of law and therefore asserts that she still is its lawful owner. It is also alleged by the Petitioner in SC (FR) No. 236/2013 that, in addition to her property, the Army had fenced off two other allotments of land that abuts her land. These two allotments of land are also depicted in Plan No. 665A by T. *Candiah,* as lot Nos. 2B and 3 respectively (said plan was annexed to the petition marked "P1(b)").

The Petitioners in SC (FR) Nos. 237 of 2013 and 238 of 2013, *Constance Selvaranee Niles* and *Thevanayaki Kunanayagam,* made similar allegation in their respective petitions claiming that the Army had unlawfully seized their lands by fencing off them. These Petitioners

further allege that the Army, with its continued illegal occupation of their lands, infringed fundamental rights guaranteed to them under Article 12(1) of the Constitution.

The Petitioner in SC (FR) No. 237 of 2013, *Constance Selvaranee Niles* claims that she and her late husband, *Rev. Wesley Dayalagunan Niles,* purchased lot No 2B (as depicted in Plan No. 665A dated 9th July 1969 (drawn by *Tirunavukarasu Candiah,* Licensed Surveyor and also depicted in Plan No. 2021 by *Perimpanayagam* Licensed Surveyor dated 23rd June 1973), which is in an extent of about 17 perches, on Deed of Transfer No. 810 attested by *Gnanapragasam* Notary Public on 26th October 1970. The Petitioner, *Thevanayaki Kunanayagam,* had purchased the southern half of lot No 3 on Deed of Transfer No. 801, attested by *Devarajan* Notary Public on 3rd August 1969. Northern half of the same Lot was purchased on Deed of Transfer No. 1351, attested by Notary Public *Saravanamuttu Selvarajah* on 27th November 1961 and thus became the owner of Lot No. 3, which is in an extent of about 40 perches, in its entirety. These two Petitioners support the claim of the Petitioner in SC (FR) No. 236/2013, that in 2012, the Army had illegally entered their lands and continued to occupy them.

After hearing the parties, this Court granted leave to proceed under Article 12(1) of the Constitution, in respect of SC(FR) No. 236 of 2013 and fixed the matter for hearing along with the other two applications. On 21st October 2021, when the three applications were taken up for hearing, learned Counsel who represented the three Petitioners as well as the learned Senior State Counsel, who represented the Respondents, invited this Court to amalgamate the three applications and to pronounce a common Judgment in respect of them,

in view of the fact that the attendant circumstances are almost identical to each other, except for the three separate allotment of lands in respect of which the three Petitioners claim title.

The Respondents have resisted the three applications and in the Statement of Objections of the 1st Respondent, it is stated after 1996, the year in which Operation *Riviresa* was conducted by *Sri Lanka* Army, *Jaffna* Town was liberated from the clutches of LTTE and civil administration in *Jaffna* peninsula was restored. It is further averred by the 1st Respondent that, after the termination of military operations against LTTE on 19th May 2009, the Army had periodically released such private lands it had to occupy for strategic reasons in order to minimize inconvenience caused to those land owners, but, it did so only after conducting threat assessments and redeployment of its troops to other locations.

However, it was decided by the Army that the *Jaffna* town had to be secured with deployment of military units stationed at strategic locations and, with a view to achieve this objective, an abandoned land near *Jaffna* Hospital, that adjoins the playground of *Sinhala Maha Vidyalaya,* was occupied. The said occupied parcel of land which is in an extent of about 20 perches is located within the larger land depicted in Plan No. 665A dated 09.07.1969 and situated within the *Grama Niladhari* division of J 73 *Jaffna*. After occupying the land, it was utilised by constructing a building on it, which is being used as the official residence of the 512 Brigade Commander of the 51 Division.

The 1st Respondent also disclosed that the Minister of Land and Land Development had, by letter dated 7th May 2014, directed the 6th Respondent, Divisional Secretary of *Jaffna,* to publish a public notice in

terms of Section 2 of the Land Acquisition Act with a view to acquire the said parcel of land for the public purpose described therein. It is asserted by the 1st Respondent that once the acquisition process is completed in terms of law, compensation would be paid to the rightful owner of the land under the occupation of the Army.

The Petitioners in their counter affidavits, denied of any pending acquisition process in respect of their lands and further asserted that they had not received any such notice.

At the hearing, it was contended by the learned Counsel for the Petitioners that the material presented by them clearly established that the lands belong to them were illegally occupied by the Army in view of the fact that there was no legally sanctioned process of acquisition. It was therefore submitted that the continued illegal occupation of their lands is an infringement of their fundamental rights under Article 12(1) of the Constitution. Learned Counsel further submitted that if the lands under occupation of the Respondents could not be released back to the Petitioners, they must at least be compensated adequately in order to mitigate the loss of their property.

Learned Senior State Counsel sought to counter the said contention by submitting that the Petitioners could have vindicated their rights before the District Court by instituting action, which is the proper legal remedy in a situation where any one of them were denied of their rights to property, consequent to an act of illegal occupation. It appears that, in advancing the said contention, the Petitioners seek to differentiate themselves from a litigant, who had been illegally dispossessed from his or her property by a trespasser, by placing

reliance on the fact that the Respondents, in depriving them of their rights, had acted under the colour of office.

The three Petitioners, in the prayer to their respective petitions, had prayed for the grant of following reliefs;

a. declare that any one or more of the Respondents violated their fundamental rights guaranteed to them under Articles 12(1) and or 14(1)(h) of the Constitution,
b. direct any one or more of the Respondents to release the property reflected in the respective petitions with vacant possession forthwith.

In view of the allegation of the Petitioners of an illegal denial of their right to property, I wish to quote from the judgment of ***Manawadu v The Attorney General*** (1987) 2 Sri L.R. 30, where *Sharvananda* CJ held that (at p. 43) *"[A]mong the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17 (1) of which states that everyone has the right to own property and Article 17(2) guarantees that no one shall be arbitrarily deprived of his property*." Thus, this Court had recognised the traditional right to own property, although not included in Chapter III of the Constitution as a fundamental right, and it could only be denied by a process prescribed by law.

In view of the nature of the declaratory reliefs sought by the Petitioners, it becomes their responsibility to satisfy this Court on a balance of probability that they hold valid legal title to the individual tenements in respect of which such declarations were sought, and that one or more Respondents are in illegal occupation of each of these

specific parcels of land. If those factors had been established to the required degree of proof, the Petitioners are entitled to a declaration that they were arbitrary deprived of their right to property in denial of equal protection of law, a fundamental right guaranteed to them by Article 12(1).

The Petitioners had relied on their title deeds to establish ownership over the three individual tenements referred to in them. The Petitioner in SC (FR) No. 236/2013, *Surendrani Amirthanathan,* had relied on Deed of Gift No. 107, executed by her father *Reginald Jeremiah Dharmaratnam Ariyaratnam* and attested by *Sharmini Mecheta Dushanthi Kamaragoda,* Notary Public on 1st March 1991, in proof of her legal ownership to a parcel of land in an extent of two *Lachcham* (20 perches), described in its schedule as lot No. 2A of Plan No. 665A, drawn by *Tirunavukarasu Candiah*, Licensed Surveyor, on 9th July 1969.

Land claimed to be owned by *Constance Selvaranee Niles* (the Petitioner in SC (FR) No. 237/2013) and her late husband, Rev. *Wesley Dayalagunan Niles,* is depicted as Lot No. 2B in Plan No. 665A, together with rights over the road reservations depicted therein as Lot Nos. 1C and 2C. She relied on Deed of Transfer No. 810, attested by *David Gnanapragasam,* Notary Public, on 26th October 1970, in proof of her title to the said land. The Petitioner in SC (FR) No. 238/2013, *Thevanayaki Kunanayagam,* also claims that her land is occupied by the *Sri Lanka* Army and relied on Deeds of Transfer Nos. 1351 and 801, through which she received title to both northern and southern half of lot No. 3, as depicted in the Plan No. 665A. The said Deed of Transfer No. 1351 was attested by S. *Selvarajah*, Notary Public, on 27th November 1961. The said Deed conferred title to the said lot in favour of her father

Mylvaganam Sabaratnam, who died without leaving a will. The Petitioner, being the only child of *Mylvaganam Sabaratnam*, claims to be his sole heir.

In his Statement of Objections, the 1st Respondent specifically denied the claim of title made by the Petitioners to the three allotments of lands and put them in strict proof of same. The title deeds that were relied upon by the three Petitioners were notarially executed instruments and registered in the relevant Land Registries. Except for the Deed of Gift No. 107 (relied on by the Petitioner in SC (FR) No.236/2013), other deeds were executed more than thirty years ago. Therefore, the Petitioners have placed material before this Court seeking to establish title to the individual allotments of lands referred to in their respective petitions.

Perusal of plan No. 665A, relied on by both parties, indicate that it had been drawn for the purpose of subdivision of a larger land, which was in an extent of 13 *Lachchams* and 06 *Kulies* (over 130 perches). The said larger land was since subdivided into six individual allotments consisting of lot Nos. 1A, 1B, 2A, 2B, and 3, along with the road reservation shown as Lot Nos. 1C and 2C. The three Petitioners claim title to Lot Nos. 2A, 2B and 3, that are located adjacent to each other and separated by a common boundary, forming the southern part of the said larger land, while lot Nos. 1A, 1B consists of the northern part. The Lot No. 2A is about 20 perches in extent, Lot No. 2B is about 17 perches and Lot No. 3 is about 40 perches. Collectively these three allotments form a land area of 77 perches from the total extent of the said larger land of over 130 perches.

The 1st Respondent admitted in his Statement of Objections that a building was constructed by the Army on the 20 perch parcel of land it occupied. The 1st Respondent further stated that the said 20 perch land is located within the *Grama Niladhari* Division of J 73 *Jaffna*–West, and depicted in Plan No. 665A, marked as "RX-1". This is the identical plan relied on by the three Petitioners in support of their claims. The 1st Respondent, despite making a reference to Plan No. 665A, did not make any reference to a particular lot number, in order to denote a particular parcel of land under occupation, in relation to the said plan.

The three Petitioners collectively assert that the Army had occupied their land and erected fences around them. It is observed that the Petitioners did not carry out any survey in order to indicate the exact location of these fences in relation to their respective lands *vis a vis* the 20 perch land occupied by the Army. The difficulties of the Petitioners in making out such a survey plan, demarcating the exact location of the fences, is understandable given the practicalities involved in such an exercise.

However, none of the Petitioners thought it fit to indicate the location of the fences that have been erected around their properties or to the location of the buildings put up by the Army in relation to their respective lots, either by way of a sketch or an indication of same on Plan No. 665A itself, in view of the bare admission made by the 1st Respondent in his Statement of Objections. The Petitioner in SC (FR) No. 236/2013, in fact did refer to a sketch in her letters P2 to P5 but did not think it necessary to annex same to the instant petition. When the Respondents claim that they built a residence for the Brigade Commander on that 20 perch land, the Petitioners have merely

reiterated what they alleged in the petitions in their counter affidavits that the land was fenced off and did not make any reference to a building erected on any of their lands.

With the said admission of the 1st Respondent in his Statement of Objections, it becomes clear that the Army is in fact occupying a parcel of land in extent of 20 perches within the larger land depicted in Plan No. 665A, with a building constructed by it. The fact of Army occupying a land in extent of only 20 perches from the said larger land is supported by the direction issued by the Minister of Lands to the 6th Respondent, directing the latter to initiate acquisition process. Each of the three Petitioners claim that the Army is occupying their lands. The question whether the land admittedly occupied by the Army belong to any of the three Petitioners.

In the absence of a specific admission to that effect, a question necessarily arises whether the land occupied by the Army belongs to any one or more of the Petitioners. The determination of the exact location of the said occupied land in relation to the three parcels of land to which the Petitioners individually claim title could be one way of determining that issue. It must be noted that the admission made by the 1st Respondent in turn give rise to several probabilities that this Court should consider before it ventures to answer the said question.

Lot No. 2A consists of 20 perches in extent and accordingly the occupied land could well fit into that parcel of land. That is one probability. The occupied 20 perch could also be located completely within the demarcated Lot No. 3, which is over 40 perches in extent and thus presents another probability. The occupied land could also be

located in lot No. 2B consuming it in totality as the said parcel of land is only about 17 perches. There exists another probability that the 20 perch land is located well within land area covered by all three lots. It appears that the likelihood of occurring any one of these probabilities are of equal in value.

In addition to the probabilities that are referred to, there is yet another probability that exists. The larger land, as per Plan No. 665A, consists of about 130 perches in total. As already noted, the three lots to which the Petitioners claim ownership, forms the southern part of the said larger land. The said three allotments are about 77 perches in its total extent, leaving a balance of 53 perches for the remaining lot Nos. 1A and 1B, which forms its northern part. It could well be that the said 20 perch lot with a building standing on it is located within the land area forming the said northern part, to which none of the Petitioners could claim title to. If the 20 perch land, occupied by the Army, is located within the said northern part of the larger land, then none of the Petitioners are entitled to the declaration they sought from this Court.

The 1st Respondent specifically avers that the Army had carried out construction work on the said occupied land and had annexed building plans and several photographs of the buildings that had been put up on that land to his Statement of Objections (photographs marked RX2 to RX5). The photographic evidence tends to indicate that the construction activities of the building are already completed. The building plan of the said construction is annexed to the Statement of Objections as RX-8 and is indicative of the fact that the Army had constructed the said building from its foundation level as totally a new

construction and not merely repaired a damaged or an uninhabitable building that stood on the occupied land.

Strangely, none of the Petitioners did offer any additional material to indicate that the 20 perch land occupied by the Army with a building on it falls within the boundaries of any or more of the three lots to which they claim title. In other words, it was imperative for the Petitioners to satisfy this Court that any one or more of them had title to the 20 perch land occupied by the Army. The Petitioners have filed their petitions in 2013. Statement of Objections of the 1st Respondent were tendered to Court in 2017 and the Petitioners countered the assertions made in the objections with their counter affidavits filed in 2018.

Given the fact that the existence of a building is clearly visible through a fence, unlike a building constructed within a premises surrounded by high parapet walls and thereby totally blocking any visual access, the reason as to why none of the Petitioners referred to a building put up by the Army on their lands and thus limiting their allegation only to the act of fencing is somewhat intriguing. If the building was constructed after the petitions were tendered to this Court, the Petitioners could have easily clarified that position, despite the absence to any reference to a construction in their original petitions.

In these circumstances, I am of the considered view that each of the Petitioners have failed to satisfy this Court on a balance of probabilities that their lands were occupied by one or more of the Respondents as alleged. Their failure to exclude the probability of the location of the 20 perch land under occupation within the northern part

of the larger land depicted in plan No. 665A, makes the 1st Respondent's claim that no land belonged to any of the Petitioners is being occupied by Army, a more probable one when compared with the others.

In view of the above considerations, the Petitioners in SC (FR) Nos. 236/2013, 237/2013 and 238/2013, have either individually or collectively failed to satisfy their allegation that the Respondents have deprived their rights to property by illegally occupying their lands infringing their fundamental rights, guaranteed under Article 12(1) of the Constitution, as described in the three petitions.

Accordingly, I dismiss the said three petitions without costs.

JUDGE OF THE SUPREME COURT

PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Thevanayaki Kunanayagam
No.25, 42nd Lane,
Wellawatta.

Petitioner

S.C.(FR) Application No. 238/2013

Vs.

1. Commander of the Army
Army Headquarters, Colombo 03.

1A General Shavendra Silva
Commander of the Army
Army Headquarters,
Sri Jayawardenepura,
Colombo.

2. Commanding Officer
Security Forces, Jaffna Division, Palaly.

2A. Major General W.L.P.W. Perera
Commanding Officer
Security Forces, Jaffna Division, Palaly.

3. Chief Co-ordinator
Civil Affairs Unit, Sri Lanka Security Forces,

Hospital Road, Jaffna.

4. The Secretary- Ministry of Defence and
Urban Development,
No. 15/5, Baladaksha Mawatha,
Colombo 03

.

4A. General G.D.H. Kamal Gunaratne (Retd.)
The Secretary- Ministry of Defence and
State Ministry of National Security,
Home Affairs and Disaster Management,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

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

6. Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna. (Opposite St. John 's
College Jaffna).

6A. Mr. Kanapathipillai Mahesan
Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna.(Opposite St. John 's
College Jaffna).

7. Land Commissioner General
Land Commissioner General's Department,
"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.

7A. R.P.R. Rajapaksha

Land Commissioner General
Land Commissioner General's Department,
"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.

Respondents

****

BEFORE : P. **PADMAN SURASENA, J.**

ACHALA WENGAPPULI, J.

MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Viran Corea with Pasindu Silva &
Ms. Thilini Vidanagamage for the Petitioner
instructed by Sanjeewa Kaluarachchi.
Ms. Kanishka de Silva Balapatabendi
SSC for the Hon. Attorney General.

ARGUED ON : 21st October, 2021

DECIDED ON : 27th October, 2023

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ACHALA WENGAPPULI, J.

The Petitioner in SC (FR) No. 236 of 2013, *Surendrani Amirthanathan,* is alleging continued infringement of her fundamental rights guaranteed to her under Articles 12(1) and 14(1)(h) of the Constitution. The impugned act of administrative or executive action is that one or more of the Respondents forcefully and illegally seized her property located in *Jaffna* town, over which she has paper title.

It was stated by the Petitioner that her father bought the said property in 1969 and built a dwelling house on it. She lived in that house with her parents until her marriage in 1987, after which she moved to *Peradeniya* with her husband. In 1988, her parents too had come to live with her after renting out their house in *Jaffna* to an elderly couple. In 1990, their house became uninhabitable due to damages it had sustained consequent to the war situation that erupted between the LTTE and *Sri Lanka* Army. With hostilities continuing unabated, it was not possible for the Petitioner to repair their house at that point of time. The Petitioner further states that due to the situation that prevailed at the time in the *Jaffna* peninsula, she and her family had moved to *Australia* in 2003, but her father had arranged a caretaker to look after the said property during their absence.

The Petitioner alleges that in October 2012, the *Sri Lanka* Army had illegally entered into her property and occupied same by erecting a fence around the property denying any access to the land by her agent. The Petitioner claims that her property had not been acquired by the State in terms of law and therefore asserts that she still is its lawful owner. It is also alleged by the Petitioner in SC (FR) No. 236/2013 that, in addition to her property, the Army had fenced off two other allotments of land that abuts her land. These two allotments of land are also depicted in Plan No. 665A by T. *Candiah,* as lot Nos. 2B and 3 respectively (said plan was annexed to the petition marked "P1(b)").

The Petitioners in SC (FR) Nos. 237 of 2013 and 238 of 2013, *Constance Selvaranee Niles* and *Thevanayaki Kunanayagam,* made similar allegation in their respective petitions claiming that the Army had

unlawfully seized their lands by fencing off them. These Petitioners further allege that the Army, with its continued illegal occupation of their lands, infringed fundamental rights guaranteed to them under Article 12(1) of the Constitution.

The Petitioner in SC (FR) No. 237 of 2013, *Constance Selvaranee Niles* claims that she and her late husband, *Rev. Wesley Dayalagunan Niles*, purchased lot No 2B (as depicted in Plan No. 665A dated 9th July 1969 (drawn by *Tirunavukarasu Candiah,* Licensed Surveyor and also depicted in Plan No. 2021 by *Perimpanayagam* Licensed Surveyor dated 23rd June 1973), which is in an extent of about 17 perches, on Deed of Transfer No. 810 attested by *Gnanapragasam* Notary Public on 26th October 1970. The Petitioner, *Thevanayaki Kunanayagam,* had purchased the southern half of lot No 3 on Deed of Transfer No. 801, attested by *Devarajan* Notary Public on 3rd August 1969. Northern half of the same Lot was purchased on Deed of Transfer No. 1351, attested by Notary Public *Saravanamuttu Selvarajah* on 27th November 1961 and thus became the owner of Lot No. 3, which is in an extent of about 40 perches, in its entirety. These two Petitioners support the claim of the Petitioner in SC (FR) No. 236/2013, that in 2012, the Army had illegally entered their lands and continued to occupy them.

After hearing the parties, this Court granted leave to proceed under Article 12(1) of the Constitution, in respect of SC(FR) No. 236 of 2013 and fixed the matter for hearing along with the other two applications. On 21st October 2021, when the three applications were taken up for hearing, learned Counsel who represented the three Petitioners as well as the learned Senior State Counsel, who represented the Respondents, invited this Court to amalgamate the three applications and to pronounce a

common Judgment in respect of them, in view of the fact that the attendant circumstances are almost identical to each other, except for the three separate allotment of lands in respect of which the three Petitioners claim title.

The Respondents have resisted the three applications and in the Statement of Objections of the 1st Respondent, it is stated after 1996, the year in which Operation *Riviresa* was conducted by *Sri Lanka* Army, *Jaffna* Town was liberated from the clutches of LTTE and civil administration in *Jaffna* peninsula was restored. It is further averred by the 1st Respondent that, after the termination of military operations against LTTE on 19th May 2009, the Army had periodically released such private lands it had to occupy for strategic reasons in order to minimize inconvenience caused to those land owners, but, it did so only after conducting threat assessments and redeployment of its troops to other locations.

However, it was decided by the Army that the *Jaffna* town had to be secured with deployment of military units stationed at strategic locations and, with a view to achieve this objective, an abandoned land near *Jaffna* Hospital, that adjoins the playground of *Sinhala Maha Vidyalaya,* was occupied. The said occupied parcel of land which is in an extent of about 20 perches is located within the larger land depicted in Plan No. 665A dated 09.07.1969 and situated within the *Grama Niladhari* division of J 73 *Jaffna*. After occupying the land, it was utilised by constructing a building on it, which is being used as the official residence of the 512 Brigade Commander of the 51 Division.

The 1st Respondent also disclosed that the Minister of Land and Land Development had, by letter dated 7th May 2014, directed the 6th Respondent, Divisional Secretary of *Jaffna,* to publish a public notice in terms of Section 2 of the Land Acquisition Act with a view to acquire the said parcel of land for the public purpose described therein. It is asserted by the 1st Respondent that once the acquisition process is completed in terms of law, compensation would be paid to the rightful owner of the land under the occupation of the Army.

The Petitioners in their counter affidavits, denied of any pending acquisition process in respect of their lands and further asserted that they had not received any such notice.

At the hearing, it was contended by the learned Counsel for the Petitioners that the material presented by them clearly established that the lands belong to them were illegally occupied by the Army in view of the fact that there was no legally sanctioned process of acquisition. It was therefore submitted that the continued illegal occupation of their lands is an infringement of their fundamental rights under Article 12(1) of the Constitution. Learned Counsel further submitted that if the lands under occupation of the Respondents could not be released back to the Petitioners, they must at least be compensated adequately in order to mitigate the loss of their property.

Learned Senior State Counsel sought to counter the said contention by submitting that the Petitioners could have vindicated their rights before the District Court by instituting action, which is the proper legal remedy in a situation where any one of them were denied of their rights to property,

consequent to an act of illegal occupation. It appears that, in advancing the said contention, the Petitioners seek to differentiate themselves from a litigant, who had been illegally dispossessed from his or her property by a trespasser, by placing reliance on the fact that the Respondents, in depriving them of their rights, had acted under the colour of office.

The three Petitioners, in the prayer to their respective petitions, had prayed for the grant of following reliefs;

a. declare that any one or more of the Respondents violated their fundamental rights guaranteed to them under Articles 12(1) and or 14(1)(h) of the Constitution,
b. direct any one or more of the Respondents to release the property reflected in the respective petitions with vacant possession forthwith.

In view of the allegation of the Petitioners of an illegal denial of their right to property, I wish to quote from the judgment of ***Manawadu v The Attorney General*** (1987) 2 Sri L.R. 30, where *Sharvananda* CJ held that (at p. 43) *"[A]mong the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17 (1) of which states that everyone has the right to own property and Article 17(2) guarantees that no one shall be arbitrarily deprived of his property*." Thus, this Court had recognised the traditional right to own property, although not included in Chapter III of the Constitution as a fundamental right, and it could only be denied by a process prescribed by law.

In view of the nature of the declaratory reliefs sought by the Petitioners, it becomes their responsibility to satisfy this Court on a balance of probability that they hold valid legal title to the individual tenements in respect of which such declarations were sought, and that one or more Respondents are in illegal occupation of each of these specific parcels of land. If those factors had been established to the required degree of proof, the Petitioners are entitled to a declaration that they were arbitrary deprived of their right to property in denial of equal protection of law, a fundamental right guaranteed to them by Article 12(1).

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and relied on Deeds of Transfer Nos. 1351 and 801, through which she received title to both northern and southern half of lot No. 3, as depicted in the Plan No. 665A. The said Deed of Transfer No. 1351 was attested by S. *Selvarajah*, Notary Public, on 27th November 1961. The said Deed conferred title to the said lot in favour of her father *Mylvaganam Sabaratnam,* who died without leaving a will. The Petitioner, being the only child of *Mylvaganam Sabaratnam*, claims to be his sole heir.

In his Statement of Objections, the 1st Respondent specifically denied the claim of title made by the Petitioners to the three allotments of lands and put them in strict proof of same. The title deeds that were relied upon by the three Petitioners were notarially executed instruments and registered in the relevant Land Registries. Except for the Deed of Gift No. 107 (relied on by the Petitioner in SC (FR) No.236/2013), other deeds were executed more than thirty years ago. Therefore, the Petitioners have placed material before this Court seeking to establish title to the individual allotments of lands referred to in their respective petitions.

Perusal of plan No. 665A, relied on by both parties, indicate that it had been drawn for the purpose of subdivision of a larger land, which was in an extent of 13 *Lachchams* and 06 *Kulies* (over 130 perches). The said larger land was since subdivided into six individual allotments consisting of lot Nos. 1A, 1B, 2A, 2B, and 3, along with the road reservation shown as Lot Nos. 1C and 2C. The three Petitioners claim title to Lot Nos. 2A, 2B and 3, that are located adjacent to each other and separated by a common boundary, forming the southern part of the said larger land, while lot Nos. 1A, 1B consists of the northern part. The Lot No. 2A is about 20 perches in extent, Lot No. 2B is about 17 perches and Lot No. 3 is about 40 perches.

Collectively these three allotments form a land area of 77 perches from the total extent of the said larger land of over 130 perches.

The 1st Respondent admitted in his Statement of Objections that a building was constructed by the Army on the 20 perch parcel of land it occupied. The 1st Respondent further stated that the said 20 perch land is located within the *Grama Niladhari* Division of J 73 *Jaffna*–West, and depicted in Plan No. 665A, marked as "RX-1". This is the identical plan relied on by the three Petitioners in support of their claims. The 1st Respondent, despite making a reference to Plan No. 665A, did not make any reference to a particular lot number, in order to denote a particular parcel of land under occupation, in relation to the said plan.

The three Petitioners collectively assert that the Army had occupied their land and erected fences around them. It is observed that the Petitioners did not carry out any survey in order to indicate the exact location of these fences in relation to their respective lands *vis a vis* the 20 perch land occupied by the Army. The difficulties of the Petitioners in making out such a survey plan, demarcating the exact location of the fences, is understandable given the practicalities involved in such an exercise.

However, none of the Petitioners thought it fit to indicate the location of the fences that have been erected around their properties or to the location of the buildings put up by the Army in relation to their respective lots, either by way of a sketch or an indication of same on Plan No. 665A itself, in view of the bare admission made by the 1st Respondent in his Statement of Objections. The Petitioner in SC (FR) No. 236/2013, in

fact did refer to a sketch in her letters P2 to P5 but did not think it necessary to annex same to the instant petition. When the Respondents claim that they built a residence for the Brigade Commander on that 20 perch land, the Petitioners have merely reiterated what they alleged in the petitions in their counter affidavits that the land was fenced off and did not make any reference to a building erected on any of their lands.

With the said admission of the 1st Respondent in his Statement of Objections, it becomes clear that the Army is in fact occupying a parcel of land in extent of 20 perches within the larger land depicted in Plan No. 665A, with a building constructed by it. The fact of Army occupying a land in extent of only 20 perches from the said larger land is supported by the direction issued by the Minister of Lands to the 6th Respondent, directing the latter to initiate acquisition process. Each of the three Petitioners claim that the Army is occupying their lands. The question whether the land admittedly occupied by the Army belong to any of the three Petitioners.

In the absence of a specific admission to that effect, a question necessarily arises whether the land occupied by the Army belongs to any one or more of the Petitioners. The determination of the exact location of the said occupied land in relation to the three parcels of land to which the Petitioners individually claim title could be one way of determining that issue. It must be noted that the admission made by the 1st Respondent in turn give rise to several probabilities that this Court should consider before it ventures to answer the said question.

Lot No. 2A consists of 20 perches in extent and accordingly the occupied land could well fit into that parcel of land. That is one

probability. The occupied 20 perch could also be located completely within the demarcated Lot No. 3, which is over 40 perches in extent and thus presents another probability. The occupied land could also be located in lot No. 2B consuming it in totality as the said parcel of land is only about 17 perches. There exists another probability that the 20 perch land is located well within land area covered by all three lots. It appears that the likelihood of occurring any one of these probabilities are of equal in value.

In addition to the probabilities that are referred to, there is yet another probability that exists. The larger land, as per Plan No. 665A, consists of about 130 perches in total. As already noted, the three lots to which the Petitioners claim ownership, forms the southern part of the said larger land. The said three allotments are about 77 perches in its total extent, leaving a balance of 53 perches for the remaining lot Nos. 1A and 1B, which forms its northern part. It could well be that the said 20 perch lot with a building standing on it is located within the land area forming the said northern part, to which none of the Petitioners could claim title to. If the 20 perch land, occupied by the Army, is located within the said northern part of the larger land, then none of the Petitioners are entitled to the declaration they sought from this Court.

The 1st Respondent specifically avers that the Army had carried out construction work on the said occupied land and had annexed building plans and several photographs of the buildings that had been put up on that land to his Statement of Objections (photographs marked RX2 to RX5). The photographic evidence tends to indicate that the construction activities of the building are already completed. The building plan of the said construction is annexed to the Statement of Objections as RX-8 and is

indicative of the fact that the Army had constructed the said building from its foundation level as totally a new construction and not merely repaired a damaged or an uninhabitable building that stood on the occupied land.

Strangely, none of the Petitioners did offer any additional material to indicate that the 20 perch land occupied by the Army with a building on it falls within the boundaries of any or more of the three lots to which they claim title. In other words, it was imperative for the Petitioners to satisfy this Court that any one or more of them had title to the 20 perch land occupied by the Army. The Petitioners have filed their petitions in 2013. Statement of Objections of the 1st Respondent were tendered to Court in 2017 and the Petitioners countered the assertions made in the objections with their counter affidavits filed in 2018.

Given the fact that the existence of a building is clearly visible through a fence, unlike a building constructed within a premises surrounded by high parapet walls and thereby totally blocking any visual access, the reason as to why none of the Petitioners referred to a building put up by the Army on their lands and thus limiting their allegation only to the act of fencing is somewhat intriguing. If the building was constructed after the petitions were tendered to this Court, the Petitioners could have easily clarified that position, despite the absence to any reference to a construction in their original petitions.

In these circumstances, I am of the considered view that each of the Petitioners have failed to satisfy this Court on a balance of probabilities that their lands were occupied by one or more of the Respondents as alleged. Their failure to exclude the probability of the location of the 20

perch land under occupation within the northern part of the larger land depicted in plan No. 665A, makes the 1st Respondent's claim that no land belonged to any of the Petitioners is being occupied by Army, a more probable one when compared with the others.

In view of the above considerations, the Petitioners in SC (FR) Nos. 236/2013, 237/2013 and 238/2013, have either individually or collectively failed to satisfy their allegation that the Respondents have deprived their rights to property by illegally occupying their lands infringing their fundamental rights, guaranteed under Article 12(1) of the Constitution, as described in the three petitions.

Accordingly, I dismiss the said three petitions without costs.

JUDGE OF THE SUPREME COURT

PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.S. Niles
16 Village Drive, Quincy MA,
02169, USA.

Petitioner

S.C.(FR) Application No, 237/2013

Vs.

1. Commander of the Army
Army Headquarters,
Colombo 03.

1A General Shavendra Silva
Commander of the Army
Army Headquarters,
Sri Jayawardenepura, Colombo.

2. Commanding Officer
Security Forces, Jaffna Division, Palaly.

2A. Major General W.L.P.W. Perera
Commanding Officer
Security Forces, Jaffna Division, Palaly.

3. Chief Co-ordinator
Civil Affairs Unit, Sri Lanka Security Forces,
Hospital Road, Jaffna.

4. The Secretary- Ministry of Defence and Urban Development,

No. 15/5, Baladaksha Mawatha,
Colombo 03.

4A. General G.D.H. Kamal Gunaratne (Retd.)
The Secretary- Ministry of Defence and
State Ministry of National Security,
Home Affairs and Disaster Management,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

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

6. Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna. (Opposite St. John 's
College Jaffna).

6A. Mr. Kanapathipillai Mahesan
Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna. (Opposite St. John 's
College Jaffna).

7. Land Commissioner General
Land Commissioner General's
Department,
"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.

7A. R.P.R. Rajapaksha
Land Commissioner General
Land Commissioner General's Department,
"Mihikatha Madura", No.1200/6,

Rajamal Waththa Road, Battaramulla.

Respondents

****

BEFORE : P. **PADMAN SURASENA, J.**

ACHALA WENGAPPULI, J.

MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Viran Corea with Pasindu Silva &
Ms. Thilini Vidanagamage for the Petitioner
instructed by Sanjeewa Kaluarachchi.
Ms. Kanishka de Silva Balapatabendi
SSC for the Hon. Attorney General.

ARGUED ON : 21st October, 2021

DECIDED ON : 27th October, 2023

****

ACHALA WENGAPPULI, J.

The Petitioner in SC (FR) No. 236 of 2013, *Surendrani Amirthanathan,* is alleging continued infringement of her fundamental rights guaranteed to her under Articles 12(1) and 14(1)(h) of the Constitution. The impugned act of administrative or executive action is that one or more of the Respondents forcefully and illegally seized her property located in *Jaffna* town, over which she has paper title.

It was stated by the Petitioner that her father bought the said property in 1969 and built a dwelling house on it. She lived in that house with her parents until her marriage in 1987, after which she moved to *Peradeniya* with her husband. In 1988, her parents too had come to live

with her after renting out their house in *Jaffna* to an elderly couple. In 1990, their house became uninhabitable due to damages it had sustained consequent to the war situation that erupted between the LTTE and *Sri Lanka* Army. With hostilities continuing unabated, it was not possible for the Petitioner to repair their house at that point of time. The Petitioner further states that due to the situation that prevailed at the time in the *Jaffna* peninsula, she and her family had moved to *Australia* in 2003, but her father had arranged a caretaker to look after the said property during their absence.

The Petitioner alleges that in October 2012, the *Sri Lanka* Army had illegally entered into her property and occupied same by erecting a fence around the property denying any access to the land by her agent. The Petitioner claims that her property had not been acquired by the State in terms of law and therefore asserts that she still is its lawful owner. It is also alleged by the Petitioner in SC (FR) No. 236/2013 that, in addition to her property, the Army had fenced off two other allotments of land that abuts her land. These two allotments of land are also depicted in Plan No. 665A by T. *Candiah,* as lot Nos. 2B and 3 respectively (said plan was annexed to the petition marked "P1(b)").

The Petitioners in SC (FR) Nos. 237 of 2013 and 238 of 2013, *Constance Selvaranee Niles* and *Thevanayaki Kunanayagam,* made similar allegation in their respective petitions claiming that the Army had unlawfully seized their lands by fencing off them. These Petitioners further allege that the Army, with its continued illegal occupation of their lands,

infringed fundamental rights guaranteed to them under Article 12(1) of the Constitution.

The Petitioner in SC (FR) No. 237 of 2013, *Constance Selvaranee Niles* claims that she and her late husband, *Rev. Wesley Dayalagunan Niles,* purchased lot No 2B (as depicted in Plan No. 665A dated 9th July 1969 (drawn by *Tirunavukarasu Candiah,* Licensed Surveyor and also depicted in Plan No. 2021 by *Perimpanayagam* Licensed Surveyor dated 23rd June 1973), which is in an extent of about 17 perches, on Deed of Transfer No. 810 attested by *Gnanapragasam* Notary Public on 26th October 1970. The Petitioner, *Thevanayaki Kunanayagam,* had purchased the southern half of lot No 3 on Deed of Transfer No. 801, attested by *Devarajan* Notary Public on 3rd August 1969. Northern half of the same Lot was purchased on Deed of Transfer No. 1351, attested by Notary Public *Saravanamuttu Selvarajah* on 27th November 1961 and thus became the owner of Lot No. 3, which is in an extent of about 40 perches, in its entirety. These two Petitioners support the claim of the Petitioner in SC (FR) No. 236/2013, that in 2012, the Army had illegally entered their lands and continued to occupy them.

After hearing the parties, this Court granted leave to proceed under Article 12(1) of the Constitution, in respect of SC(FR) No. 236 of 2013 and fixed the matter for hearing along with the other two applications. On 21st October 2021, when the three applications were taken up for hearing, learned Counsel who represented the three Petitioners as well as the learned Senior State Counsel, who represented the Respondents, invited this Court to amalgamate the three applications and to pronounce a common Judgment in respect of them, in view of the fact that the attendant

circumstances are almost identical to each other, except for the three separate allotment of lands in respect of which the three Petitioners claim title.

The Respondents have resisted the three applications and in the Statement of Objections of the 1st Respondent, it is stated after 1996, the year in which Operation *Riviresa* was conducted by *Sri Lanka* Army, *Jaffna* Town was liberated from the clutches of LTTE and civil administration in *Jaffna* peninsula was restored. It is further averred by the 1st Respondent that, after the termination of military operations against LTTE on 19th May 2009, the Army had periodically released such private lands it had to occupy for strategic reasons in order to minimize inconvenience caused to those land owners, but, it did so only after conducting threat assessments and redeployment of its troops to other locations.

However, it was decided by the Army that the *Jaffna* town had to be secured with deployment of military units stationed at strategic locations and, with a view to achieve this objective, an abandoned land near *Jaffna* Hospital, that adjoins the playground of *Sinhala Maha Vidyalaya,* was occupied. The said occupied parcel of land which is in an extent of about 20 perches is located within the larger land depicted in Plan No. 665A dated 09.07.1969 and situated within the *Grama Niladhari* division of J 73 *Jaffna*. After occupying the land, it was utilised by constructing a building on it, which is being used as the official residence of the 512 Brigade Commander of the 51 Division.

The 1st Respondent also disclosed that the Minister of Land and Land Development had, by letter dated 7th May 2014, directed the 6th

Respondent, Divisional Secretary of *Jaffna,* to publish a public notice in terms of Section 2 of the Land Acquisition Act with a view to acquire the said parcel of land for the public purpose described therein. It is asserted by the 1st Respondent that once the acquisition process is completed in terms of law, compensation would be paid to the rightful owner of the land under the occupation of the Army.

The Petitioners in their counter affidavits, denied of any pending acquisition process in respect of their lands and further asserted that they had not received any such notice.

At the hearing, it was contended by the learned Counsel for the Petitioners that the material presented by them clearly established that the lands belong to them were illegally occupied by the Army in view of the fact that there was no legally sanctioned process of acquisition. It was therefore submitted that the continued illegal occupation of their lands is an infringement of their fundamental rights under Article 12(1) of the Constitution. Learned Counsel further submitted that if the lands under occupation of the Respondents could not be released back to the Petitioners, they must at least be compensated adequately in order to mitigate the loss of their property.

Learned Senior State Counsel sought to counter the said contention by submitting that the Petitioners could have vindicated their rights before the District Court by instituting action, which is the proper legal remedy in a situation where any one of them were denied of their rights to property, consequent to an act of illegal occupation. It appears that, in advancing the said contention, the Petitioners seek to differentiate themselves from a

litigant, who had been illegally dispossessed from his or her property by a trespasser, by placing reliance on the fact that the Respondents, in depriving them of their rights, had acted under the colour of office.

The three Petitioners, in the prayer to their respective petitions, had prayed for the grant of following reliefs;

a. declare that any one or more of the Respondents violated their fundamental rights guaranteed to them under Articles 12(1) and or 14(1)(h) of the Constitution,
b. direct any one or more of the Respondents to release the property reflected in the respective petitions with vacant possession forthwith.

In view of the allegation of the Petitioners of an illegal denial of their right to property, I wish to quote from the judgment of ***Manawadu v The Attorney General*** (1987) 2 Sri L.R. 30, where *Sharvananda* CJ held that (at p. 43) *"[A]mong the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17 (1) of which states that everyone has the right to own property and Article 17(2) guarantees that no one shall be arbitrarily deprived of his property*." Thus, this Court had recognised the traditional right to own property, although not included in Chapter III of the Constitution as a fundamental right, and it could only be denied by a process prescribed by law.

In view of the nature of the declaratory reliefs sought by the Petitioners, it becomes their responsibility to satisfy this Court on a

balance of probability that they hold valid legal title to the individual tenements in respect of which such declarations were sought, and that one or more Respondents are in illegal occupation of each of these specific parcels of land. If those factors had been established to the required degree of proof, the Petitioners are entitled to a declaration that they were arbitrary deprived of their right to property in denial of equal protection of law, a fundamental right guaranteed to them by Article 12(1).

The Petitioners had relied on their title deeds to establish ownership over the three individual tenements referred to in them. The Petitioner in SC (FR) No. 236/2013, *Surendrani Amirthanathan,* had relied on Deed of Gift No. 107, executed by her father *Reginald Jeremiah Dharmaratnam Ariyaratnam* and attested by *Sharmini Mecheta Dushanthi Kamaragoda,* Notary Public on 1st March 1991, in proof of her legal ownership to a parcel of land in an extent of two *Lachcham* (20 perches), described in its schedule as lot No. 2A of Plan No. 665A, drawn by *Tirunavukarasu Candiah*, Licensed Surveyor, on 9th July 1969.

Land claimed to be owned by *Constance Selvaranee Niles* (the Petitioner in SC (FR) No. 237/2013) and her late husband, Rev. *Wesley Dayalagunan Niles,* is depicted as Lot No. 2B in Plan No. 665A, together with rights over the road reservations depicted therein as Lot Nos. 1C and 2C. She relied on Deed of Transfer No. 810, attested by *David Gnanapragasam,* Notary Public, on 26th October 1970, in proof of her title to the said land. The Petitioner in SC (FR) No. 238/2013, *Thevanayaki Kunanayagam,* also claims that her land is occupied by the *Sri Lanka* Army and relied on Deeds of Transfer Nos. 1351 and 801, through which she

received title to both northern and southern half of lot No. 3, as depicted in the Plan No. 665A. The said Deed of Transfer No. 1351 was attested by S. *Selvarajah*, Notary Public, on 27th November 1961. The said Deed conferred title to the said lot in favour of her father *Mylvaganam Sabaratnam,* who died without leaving a will. The Petitioner, being the only child of *Mylvaganam Sabaratnam*, claims to be his sole heir.

In his Statement of Objections, the 1st Respondent specifically denied the claim of title made by the Petitioners to the three allotments of lands and put them in strict proof of same. The title deeds that were relied upon by the three Petitioners were notarially executed instruments and registered in the relevant Land Registries. Except for the Deed of Gift No. 107 (relied on by the Petitioner in SC (FR) No.236/2013), other deeds were executed more than thirty years ago. Therefore, the Petitioners have placed material before this Court seeking to establish title to the individual allotments of lands referred to in their respective petitions.

Perusal of plan No. 665A, relied on by both parties, indicate that it had been drawn for the purpose of subdivision of a larger land, which was in an extent of 13 *Lachchams* and 06 *Kulies* (over 130 perches). The said larger land was since subdivided into six individual allotments consisting of lot Nos. 1A, 1B, 2A, 2B, and 3, along with the road reservation shown as Lot Nos. 1C and 2C. The three Petitioners claim title to Lot Nos. 2A, 2B and 3, that are located adjacent to each other and separated by a common boundary, forming the southern part of the said larger land, while lot Nos. 1A, 1B consists of the northern part. The Lot No. 2A is about 20 perches in extent, Lot No. 2B is about 17 perches and Lot No. 3 is about 40 perches.

Collectively these three allotments form a land area of 77 perches from the total extent of the said larger land of over 130 perches.

The 1st Respondent admitted in his Statement of Objections that a building was constructed by the Army on the 20 perch parcel of land it occupied. The 1st Respondent further stated that the said 20 perch land is located within the *Grama Niladhari* Division of J 73 *Jaffna*–West, and depicted in Plan No. 665A, marked as "RX-1". This is the identical plan relied on by the three Petitioners in support of their claims. The 1st Respondent, despite making a reference to Plan No. 665A, did not make any reference to a particular lot number, in order to denote a particular parcel of land under occupation, in relation to the said plan.

The three Petitioners collectively assert that the Army had occupied their land and erected fences around them. It is observed that the Petitioners did not carry out any survey in order to indicate the exact location of these fences in relation to their respective lands *vis a vis* the 20 perch land occupied by the Army. The difficulties of the Petitioners in making out such a survey plan, demarcating the exact location of the fences, is understandable given the practicalities involved in such an exercise.

However, none of the Petitioners thought it fit to indicate the location of the fences that have been erected around their properties or to the location of the buildings put up by the Army in relation to their respective lots, either by way of a sketch or an indication of same on Plan No. 665A itself, in view of the bare admission made by the 1st Respondent in his Statement of Objections. The Petitioner in SC (FR) No. 236/2013, in

fact did refer to a sketch in her letters P2 to P5 but did not think it necessary to annex same to the instant petition. When the Respondents claim that they built a residence for the Brigade Commander on that 20 perch land, the Petitioners have merely reiterated what they alleged in the petitions in their counter affidavits that the land was fenced off and did not make any reference to a building erected on any of their lands.

With the said admission of the 1st Respondent in his Statement of Objections, it becomes clear that the Army is in fact occupying a parcel of land in extent of 20 perches within the larger land depicted in Plan No. 665A, with a building constructed by it. The fact of Army occupying a land in extent of only 20 perches from the said larger land is supported by the direction issued by the Minister of Lands to the 6th Respondent, directing the latter to initiate acquisition process. Each of the three Petitioners claim that the Army is occupying their lands. The question whether the land admittedly occupied by the Army belong to any of the three Petitioners.

In the absence of a specific admission to that effect, a question necessarily arises whether the land occupied by the Army belongs to any one or more of the Petitioners. The determination of the exact location of the said occupied land in relation to the three parcels of land to which the Petitioners individually claim title could be one way of determining that issue. It must be noted that the admission made by the 1st Respondent in turn give rise to several probabilities that this Court should consider before it ventures to answer the said question.

Lot No. 2A consists of 20 perches in extent and accordingly the occupied land could well fit into that parcel of land. That is one

probability. The occupied 20 perch could also be located completely within the demarcated Lot No. 3, which is over 40 perches in extent and thus presents another probability. The occupied land could also be located in lot No. 2B consuming it in totality as the said parcel of land is only about 17 perches. There exists another probability that the 20 perch land is located well within land area covered by all three lots. It appears that the likelihood of occurring any one of these probabilities are of equal in value.

In addition to the probabilities that are referred to, there is yet another probability that exists. The larger land, as per Plan No. 665A, consists of about 130 perches in total. As already noted, the three lots to which the Petitioners claim ownership, forms the southern part of the said larger land. The said three allotments are about 77 perches in its total extent, leaving a balance of 53 perches for the remaining lot Nos. 1A and 1B, which forms its northern part. It could well be that the said 20 perch lot with a building standing on it is located within the land area forming the said northern part, to which none of the Petitioners could claim title to. If the 20 perch land, occupied by the Army, is located within the said northern part of the larger land, then none of the Petitioners are entitled to the declaration they sought from this Court.

The 1st Respondent specifically avers that the Army had carried out construction work on the said occupied land and had annexed building plans and several photographs of the buildings that had been put up on that land to his Statement of Objections (photographs marked RX2 to RX5). The photographic evidence tends to indicate that the construction activities of the building are already completed. The building plan of the said

construction is annexed to the Statement of Objections as RX-8 and is indicative of the fact that the Army had constructed the said building from its foundation level as totally a new construction and not merely repaired a damaged or an uninhabitable building that stood on the occupied land.

Strangely, none of the Petitioners did offer any additional material to indicate that the 20 perch land occupied by the Army with a building on it falls within the boundaries of any or more of the three lots to which they claim title. In other words, it was imperative for the Petitioners to satisfy this Court that any one or more of them had title to the 20 perch land occupied by the Army. The Petitioners have filed their petitions in 2013. Statement of Objections of the 1st Respondent were tendered to Court in 2017 and the Petitioners countered the assertions made in the objections with their counter affidavits filed in 2018.

Given the fact that the existence of a building is clearly visible through a fence, unlike a building constructed within a premises surrounded by high parapet walls and thereby totally blocking any visual access, the reason as to why none of the Petitioners referred to a building put up by the Army on their lands and thus limiting their allegation only to the act of fencing is somewhat intriguing. If the building was constructed after the petitions were tendered to this Court, the Petitioners could have easily clarified that position, despite the absence to any reference to a construction in their original petitions.

In these circumstances, I am of the considered view that each of the Petitioners have failed to satisfy this Court on a balance of probabilities that their lands were occupied by one or more of the Respondents as

alleged. Their failure to exclude the probability of the location of the 20 perch land under occupation within the northern part of the larger land depicted in plan No. 665A, makes the 1st Respondent's claim that no land belonged to any of the Petitioners is being occupied by Army, a more probable one when compared with the others.

In view of the above considerations, the Petitioners in SC (FR) Nos. 236/2013, 237/2013 and 238/2013, have either individually or collectively failed to satisfy their allegation that the Respondents have deprived their rights to property by illegally occupying their lands infringing their fundamental rights, guaranteed under Article 12(1) of the Constitution, as described in the three petitions.

Accordingly, I dismiss the said three petitions without costs.

JUDGE OF THE SUPREME COURT

PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Article 126 of the Constitution.

Niluka Dissanayake,
Attorney-at-Law,
No. 218, Basement,
Hulftsdorp Street,
Colombo 12.

SC/ FR Application No. 556/2009

On behalf of Captain Ambawalage Dammika Senaratne de Silva of 74, Jayasumanarama Road, Ratmalana.
Currently held at the Polhengoda Military Police Headquarters.

Petitioner

Vs.

1. Major Mahesh Kumara,
   Sri Lanka Military Police Corps,
   Military Police Headquarters,
   Sri Lanka Army,
   Polhengoda.

2. Colonel Etipola, SS,
   Commanding Officer,
   Military Police Headquarters,
   Sri Lanka Army,
   Polhengoda

3. Fernando
   Officer of Sri Lanka Military Police
   Military Police Headquarters,
   Sri Lanka Army,
   Polhengoda.

4. Provost- Marshal Dias
   Officer of Sri Lanka Military Police
   Military Police Headquarters,
   Sri Lanka Army,
   Polhengoda.

5. Colonel Ediriweera,
   Commanding Officer,
   Sri Lanka Army,
   Alampilli Mulativu Camp,
   Mulativu.

6. Army Commander,
   Sri Lanka Army Headquarters,
   Colombo 01.

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

Respondents

Before: B. P. Aluwihare, PC, J
Priyantha Jayawardena PC, J
P. Padman Surasena, J

Counsel: Saliya Pieris PC with Danushka Rahubedda for the Petitioner

Suharshi Herath, Senior State Counsel for the Attorney General

Argued on: 26th June, 2019

Decided on: 30th October, 2023

Priyantha Jayawardena PC, J

Petition

The instant application was filed by an Attorney-at-Law (hereinafter referred to as "the petitioner") on behalf of Captain Ambawalage Dammika Senaratne de Silva (hereinafter referred to as "the detainee"), who was detained in military custody at the time of filing the instant application. The petitioner stated that the detainee was serving as a Captain in the Sri Lanka Army at the time material to the application.

The petitioner further stated that the 1st respondent is a Major of the Military Police of the Sri Lanka Army, in whose custody the detainee was kept. The 2nd respondent is the Commanding Officer of the Military Police. The 3rd and 4th respondents are officers attached to the Military Police Headquarters, the 5th respondent is the Commanding Officer of Alampili Army Camp (hereinafter referred to as "the Army camp"), where the detainee was serving and the 6th respondent is the Commander of the Sri Lanka Army.

The petitioner stated that a soldier named Lance Corporal K.G. Saman Kumara (hereinafter referred to as "the deceased soldier") died of gunshot injuries on the 22nd of April, 2009 at the Nandikal Army Camp, where the detainee was serving as the 'Officer Commanding'. Further, the 5th respondent was the 'Commanding Officer' of the said Army Camp at that time. However, the deceased soldier was serving in a different Company at the time of his death.

The petitioner stated that in the log book at the Anuradhapura Army camp, which records the deaths of officers and soldiers of the Army, the cause of death of the deceased soldier was recorded as gunshot injuries sustained from the discharge of his own weapon.

The petitioner further stated that on the 30th of May, 2009 the detainee was ordered by the 5th respondent to take the body of another soldier attached to his Company who died of gunshot injuries, which were similar to the injuries suffered by Lance Corporal K.G. Saman Kumara a few days earlier. However, when the detainee was returning to his camp, he was informed that he had been relieved of his duties as the 'Officer Commanding' from the camp.

Thereafter, due to the adverse environment at the Army Camp that arose after the deaths of the said soldiers, the detainee requested the 5th respondent to relieve him from his duties at the said camp and sought permission to report to the Regimental Headquarters at Panagoda.

The 5th respondent permitted the said request of the detainee, and accordingly, the detainee reported to the Regimental Headquarters on the 10th of June, 2009. Thereafter, the detainee took medical leave on the 13th and 14th of June, 2009 and reported back to duty on the 15th of June, 2009. On the same day, the detainee informed his mother *via* telephone that he was unable to come home as he was "facing a problem".

The petitioner stated that following the said telephone conversation, the detainee's parents visited the Regimental Headquarters on the 16th of June, 2009 to inquire about their son, and they were informed that the detainee was arrested based on an anonymous letter received by the Army stating that the detainee was responsible for the murder of the deceased soldier, named Lance Corporal K.G. Saman Kumara. Further, they were informed that the detainee was taken to the Sri Lankan Army Military Police Headquarters at Polhengoda.

The petitioner further stated that even though the relatives of the detainee attempted to visit him, they were not given access to him. Thereafter, the mother of the detainee made a complaint to the Human Rights Commission of Sri Lanka (hereinafter referred to as the "Human Rights Commission") on the 3rd of July, 2009 requesting permission for the relatives of the detainee to visit him. On the 7th of July, 2009 the Human Rights Commission requested the 1st respondent to permit the relatives of the detainee to visit him. Thereafter, the relatives of the detainee visited him at the Military Police Headquarters. The petitioner stated that during the said visit, the detainee informed his relatives that he was falsely implicated for a crime that he did not commit because of

the animosity that the 5th respondent had with him. Further, the Military Police were trying to forcibly obtain a confession from him.

Furthermore, it was stated that the detainee's mother had received an anonymous telephone call on the 21st July, 2009 alleging that the detainee was blindfolded and severely assaulted with clubs while in the custody of the Military Police. Further, the said anonymous caller had informed her that the 1st, 3rd and 4th respondents were responsible for the assault of the detainee. The petitioner stated that the detainee's mother complained to several authorities about the arbitrary and unfair treatment of the detainee and requested to conduct a fair investigation into the incident.

The petitioner stated that a soldier named Hewapalliyaguruge Dilum Sanjeewa was forced to give a statement stating that the detainee gave his weapon and asked him to shoot the deceased soldier, and that he shot in the direction of the deceased soldier. However, as he missed the target, the detainee took the weapon and shot at the deceased soldier.

The petitioner further stated that if the detainee committed the murder, he should have been handed over to the civil authorities to take steps under the procedure established by law, as the offence of murder is not an offence that comes within the purview of either the Army Act or the military law and the regulations promulgated thereunder.

In the circumstances, the petitioner stated that the arrest and detention of the detainee without reasonable grounds were unlawful, arbitrary and contrary to the procedure established by law and are an infringement of the Fundamental Rights guaranteed to the detainee.

The petitioner prayed, *inter alia*, for a declaration that one or more of the respondents have infringed the detainee's Fundamental Rights guaranteed to him by Articles 11, 12(1), 13(1), 13(2), and 13(3) of the Constitution, and to grant compensation in a sum of Rs. 1,000,000/-.

Leave to Proceed

The court granted leave to proceed for the alleged violation of Articles 12(1) and 13(2) of the Constitution. It is pertinent to note that the court did not grant leave to proceed for the alleged violation of Article 11 of the Constitution. Thus, the allegations regarding assault and torture will not be considered in this judgment.

Objections of the 1st respondent

The 1st respondent filed objections and stated that the deceased soldier, Lance Corporal K.G. Saman Kumara, served in Company 'A' of the 20th Battalion of Sri Lanka Light Infantry, of which the detainee functioned as the 'Officer Commanding' at the time material to the instant application.

The 1st respondent further stated that the deceased soldier ran away from the said Company on the 16th of April, 2009 and reported to the Battalion headquarters on the following day. Thereafter, the deceased soldier made a written complaint of sexual harassment committed by the detainee. Further, as the deceased soldier refused to report back to the detainee's Company, he was transferred to Company 'D' of the same Battalion.

The 1st respondent stated that Company 'D' was moved to a different location on the 22nd of April, 2009 and to reach the said camp, it was necessary to pass Company 'A'. Further, the death of the deceased soldier occurred when he was passing the location where Company 'A' was stationed.

The 1st respondent denied the allegations that access to the detainee was refused and that the detainee was assaulted while in custody. The 1st respondent stated that an Order was made by the Human Rights Commission requesting the relatives of the detainee to visit him, and the said Order was complied with.

He further stated that the investigation carried out by the Military Police revealed evidence against the detainee with respect to the murder of the deceased soldier. Hence, the Police was informed to take over the investigation with regard to the death of the deceased soldier.

In support of the above statement, the 1st respondent produced a letter dated 3rd of July, 2009 addressed to the Deputy Inspector General of Police of the Criminal Investigations Department, marked as **'1R1'** which contained the facts revealed during the investigation conducted by the Military Police in respect of the death of the deceased soldier.

The 1st respondent stated that in terms of sections 47(1) and 131(2) of the Army Act No. 17 of 1949, a court martial may be held when an offence is committed by a member of the Army during active service. It was further stated that as the alleged offence was committed by the detainee during active service, the detainee was detained under section 35 of the Army Act and subsequently handed over to the Police on the 6th of August, 2009 for further investigation.

The 1st respondent stated that the detainee was handed over to the Police after the investigation conducted by the Military Police concluded. Thereafter, the Police produced the detainee and Hewapalliyaguruge Dilum Sanjeewa in the Magistrate's Court, and the learned Magistrate remanded them. Later, they were released on bail by the High Court of Anuradhapura on the 18th of January, 2010.

Objections of the 5th respondent

In addition to the averments contained in the objections filed by the 1st respondent, the 5th respondent stated the following in his statement of objections;

The deceased soldier made a complaint of sexual harassment against the detainee on the 17th of April, 2009 which was produced marked as '**5R1**'. In the said complaint, the deceased soldier stated that the detainee summoned him to his room in the night on the 15th of April, 2009 and sexually harassed him. Further, the alleged sexual harassment commenced with the detainee ordering him to massage his feet.

It was further stated that the cause of death of the deceased soldier was initially considered to be an accidental discharge of his personal weapon, and hence, the letters and messages with regard to his death were issued to that effect. A copy of the message sent by the 5th respondent's battalion informing the headquarters about the death of the deceased soldier and a copy of the convening order of the Court of Inquiry appointed by his battalion to inquire into the death of the deceased soldier dated 23rd of April, 2009 were produced marked as '**5R2**' and '**5R3**', respectively.

He further stated that as another soldier named R. Silva, attached to the detainee's Company, also died due to gunshot injuries on the 30th of May, 2009 in similar circumstances that the deceased soldier died, the detainee was removed from his position as the 'Officer Commanding' of Company 'A' with effect from the 1st of June, 2009.

The 5th respondent stated that a military investigation was initiated into the death of the deceased soldier, Lance Corporal Saman Kumara. Subsequently, upon the request of the detainee on the 9th of June, 2009 the detainee was transferred to the Regimental Headquarters of the Sri Lanka Light Infantry at Panagoda.

The investigation conducted by the Army revealed a *prima facie* case against the detainee and soldier, Hewapalliyaguruge Dilum Sanjeewa. Hence, he was handed over to the Criminal Investigations Department for further investigations on the 6th of August, 2009. Thereafter, the Police produced the detainee and the other soldier in the Magistrate's Court in respect of the death of the deceased soldier, and the learned Magistrate remanded both of them. Subsequently, the detainee was released on bail by the High Court of Anuradhapura on the 18th of January, 2010. He stated that a Court Martial can be held against the detainee under sections 47(1) and 131(2) of the Army Act for the alleged offence of murder of the deceased soldier.

Counter Affidavit of the detainee

The detainee filed a counter affidavit and stated that he was not informed of the deceased soldier's alleged complaint of sexual harassment dated 17th of April 2009, produced marked as '**5R1**'. He further stated that an allegation of sexual harassment by a Commissioned Officer on a Non-Commissioned Officer is a serious offence under Military Law, which would have resulted in immediate action being taken against him by the 5th respondent as his Commanding Officer.

In the circumstances, the detainee stated that the failure on the part of the 5th respondent to immediately act on the alleged complaint of sexual harassment raises doubts about the veracity of the said complaint. In view of the above, the said complaint marked '**5R1**' is either a forged document or had been forcibly obtained from the deceased soldier prior to his death.

The detainee further stated that the 1st respondent assaulted him with pipes filled with sand and forcefully tried to get him to confess that he shot the deceased soldier. Moreover, on the 20th of June, 2009 the 1st, 3rd and 4th respondents blindfolded and assaulted him. The detainee stated that, consequent to the assault, he was bleeding from the ear and the nose.

The detainee stated that he still has a difficulty in eating and his feet get numb when he tries to run. He further stated that after he was released on bail, he obtained medical treatment from the Army Hospital and the Kalubowila Government Hospital and produced medical records marked as 'P15A', 'P15B' and 'P15C' as proof of the treatment given to him by the said hospitals.

Further, the detainee stated that the statement of the soldier, Hewapalliyaguruge Dilum Sanjeewa, had been obtained under duress. Moreover, he is falsely implicated in the death of the deceased soldier due to the animosity that the 5th respondent has with the detainee.

The detainee stated that he was illegally kept in detention for 52 days, where he was severely assaulted by the officers of the Sri Lanka Military Police, including the 1st respondent.

Submissions on behalf of the detainee

The learned President's Counsel for the detainee submitted that the detainee's Fundamental Rights enshrined under Article 12(1) of the Constitution has been infringed as he was deprived access to his relatives and lawyers until the intervention of the Human Rights Commission.

It was further submitted that the said detention in military custody for 52 days without either producing the detainee before a Magistrate or handing him over to civilian authorities is a violation of his Fundamental Rights guaranteed under Article 13(2) of the Constitution.

The learned President's Counsel for the detainee submitted that the words *"procedure established by law"* in Article 13(2) of the Constitution requires a person arrested to be produced before a Magistrate in a court of law. Thus, even though the initial arrest and detention were made under section 35 of the Army Act, further steps should have been taken in accordance with the provisions of the Constitution, which applies to every State institution.

Furthermore, it was submitted that under section 40(1) of the Army Act, the investigation against the detainee should have been conducted *"without unnecessary delay"* after he was taken into military custody and that steps should have been taken either to initiate proceedings against the detainee under section 40(1)(b) of the Army Act or to have the charges against the said detainee dismissed under section 40(1)(a) of the Army Act. In the alternative, to hand over the detainee to the Police to take steps under the law.

The learned President's Counsel further submitted that this court has given a strict interpretation to the term "time limit" in respect of producing persons detained before the nearest judge of a competent court.

In support of the above submissions, the learned President's Counsel cited ***Selvakumar v Devananda (*SC/FR/150/93, Supreme Court Minutes 13th of July, 1994),** where it was held;

> "*if the victim of an unconstitutional arrest may run the risk of such grave harm while in police custody, it seems to me that what a "reasonable time" for production before a Magistrate must necessarily be given a strict interpretation…"*

Thus, it was contended that the term *"without unnecessary delay"* stipulated in section 40 of the Army Act should be given a strict interpretation.

Further, the learned President's Counsel cited the case of ***Sunil Rodrigo v De Silva* (1997) 3 SLR 265,** where the court held that the rights under Article 13(2) of the Constitution to produce a suspect before a judge cannot be taken away unless expressly provided by the Constitution itself.

Moreover, the decision was taken by the Army headquarters to hand over the detainee to the Police on the 3rd of July, 2009 marked as '1R1'. Therefore, the Sri Lanka Army had no viable reason to keep the detainee in custody after the said date. However, the detainee had been kept in military custody until he was handed over to the Police on the 6th of August, 2009 when the instant application was supported in the Supreme Court.

In the circumstances, it was submitted that the procedure established by law as set out in section 40 of the Army Act requiring steps to be taken without unnecessary delay had been violated by the Army.

Furthermore, the learned President's Counsel submitted that military personnel are entitled to the protection of Fundamental Rights enshrined in the Constitution. In support of the said submission, the learned President's Counsel cited ***Channa Peiris v Attorney General* (1994) 1 SLR 51 at 81,** where it was held:

> *"Constitutional guarantees cannot be removed or modified except in accordance with the Constitution. That, I believe is a proposition that commends itself to general acceptance. I believe it is still a well-established and universally conceded principle. One might say that it is axiomatic."*

Moreover, it was submitted that in ***Edirisuriya v Navaratnam* (1985) 1 SLR 100,** it was held:

> *"if it is intended to restrict the requirement of 13 (2) …… this must be specifically done. Article 13 (2) cannot be restricted without a specific reference to it. ..... In*

the result, the Constitutional requirement that a detained person shall be brought before the judge of the nearest competent court remains unaffected ……"

In the circumstances, it was submitted that the Fundamental Rights of the detainee guaranteed under Article 13(2) has been infringed by the 1st to the 6th respondents.

Submissions of the respondents

The learned Senior State Counsel for the respondents submitted that the arrest of the detainee was made based on the findings of the preliminary investigation conducted by the preliminary Court of Inquiry, which gave rise to a reasonable suspicion of murder of the deceased soldier by the detainee.

It was further submitted that the arrest of the detainee was beyond a mere surmise of a general suspicion, as the findings of the preliminary investigation report contained material to suspect the commission of the offence by the detainee. Thus, the arrest of the detainee was lawful.

In support of the above submissions, she cited the case of ***Perera v Attorney General*** **(1992) 1 SLR 99**, which held;

"…. The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. On the other hand, for an arrest, a mere reasonable suspicion or a reasonable complaint of the commission of an offence suffices."

The learned Senior State Counsel contended that the detainee was detained by the Military Police under section 35 and other relevant provisions of the Army Act, and as such, the detention in the instant application is subject to 'the special procedure prescribed by law'. Similarly, the operation of Article 13 is subject to the restrictions stipulated in Article 15(8) of the Constitution for members of the Armed Forces, in the interest of the proper discharge of their duties and the maintenance of discipline among them.

In the circumstances, it was submitted that the detention by the Military Police is in accordance with the provisions of the Army Act and there was no violation of Articles 12(1) and 13(2) of the Constitution.

Were the Fundamental Rights guaranteed to the detainee by Articles 12(1) and 13(2) of the Constitution infringed?

Was the arrest illegal?

The deceased soldier, Lance Corporal Saman Kumara, ran away from Company A on the 16th of April, 2009 and reported to the Battalion headquarters on the 17th of April, 2009. He made a written complaint on the 17th of April, 2009 against the detainee, stating that he was sexually abused by the detainee on the 15th of April, 2009. Hence, he refused to report back to Company A where he was attached to. Accordingly, he was transferred to Company D, which was situated close to the Camp that he was serving previously. The deceased soldier was found dead on the 22nd of April, 2009 from gunshot injuries. On the 23rd of April, 2009 the Army appointed a Court of Inquiry to investigate the death of the deceased soldier. The Court of Inquiry concluded by stating that the deceased soldier died due to an actual discharge of his personal weapon.

By letter dated 17th of May, 2009 addressed to the 6th respondent, a group of soldiers from Company A complained that the detainee committed the murder of the deceased soldier, as he had complained against the detainee for sexually abusing him. Thereafter, on the 30th of May, 2009 another soldier attached to the same Company died due to gunshot injuries under similar circumstances.

The detainee was removed from his appointment as the Officer Commanding in the said camp on the 1st of June, 2009. Subsequently, upon a request made by the detainee, he was transferred to the Regimental Headquarters of the Sri Lanka Light Infantry in Panagoda on the 9th of June, 2009.

The Military Police commenced investigating into the death of the deceased soldier on the 17th of June, 2009 under section 40(1) of the Army Act. Further, on the same day the detainee and another soldier named Hewapalliyaguruge Dilum Sanjeewa were arrested on suspicion of the death of the deceased soldier on the same day. The said soldier, Hewapalliyaguruge Dilum Sanjeewa has given a statement to the Military Police stating that the detainee requested him to ask the deceased soldier to come to his room in the night on or around the 15th of April, 2009. When the deceased soldier entered the detainee's room, he heard the detainee asking him to massage his feet. After about half an hour, he saw the deceased soldier leaving the detainee's room. On the next day, the deceased soldier ran away from the Company where he was attached to and reported to the Battalion

headquarters on the following day. When the detainee heard about it, he told him that "he will not let him eat rice in the Army, for what he did to me".

In his statement, he had further stated that, on the 22nd of April, 2009 he saw the detainee talking to the deceased soldier but did not hear their conversation. Thereafter, the detainee asked him to bring the detainee's T-56 weapon and a bucket of water, stating that he wanted to go to the jungle to relive himself. He further stated that he brought the detainee's gun and handed it over to him. Thereafter, they followed the deceased soldier, and the detainee gave the gun to him and ordered to shoot the deceased soldier. However, as he missed the target, the detainee took the gun from him and shot the deceased soldier, who fell to the ground.

The detainee alleged that he was illegally arrested and detained by the respondents and thereby, his Fundamental Rights guaranteed by Articles 12(1) and 13(2) of the Constitution were infringed.

Article 15(8) of the Constitution states:

> *"The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them."*
>
> (emphasis added)

Thus, in terms of Article 15(8) of the Constitution, the Fundamental Rights guaranteed by Articles 12(1), 13 and 14 are subject 'to the restrictions as prescribed by the laws'. The Army Act No. 17 of 1949 and the Army Disciplinary Regulations 1950 (hereinafter referred to as the "Army Disciplinary Regulations") are applicable to all military personnel, including the detainee. Hence, the applicability of Articles 12(1), 13 and 14 of the Constitution are subject to the provisions of the Army Act and the regulations promulgated thereunder.

Further, the detainee being an officer of the regular force is subject to the military law in terms of section 34 of the Amy Act.

The detainee was detained under section 35 of the Army Act, which states as follows:

> *"A person subject to military law who commits any military or civil offence may be taken into military custody."*

Further, under section 47(1) read with section 131(2) of the Army Act, a court martial can be held against the detainee in respect of an offence of murder committed by an Army personnel.

As stated above, the evidence transpired during the investigation conducted by the Military Police, established a *prima facie* case against the detainee and the soldier, Hewapalliyaguruge Dilum Sanjeewa. Hence, the arrest of the detainee and Hewapalliyaguruge Dilum Sanjeewa in connection with the death of the deceased soldier is justified.

Further, it is pertinent to note that, after the detainee was handed over to the Criminal Investigations Department of the Police, the Police informed the Magistrate's Court that there is evidence to suspect the detainee and the soldier, Hewapalliyaguruge Dilum Sanjeewa, for the murder of the said deceased soldier. Having considered the material filed in court by the Police, the learned Magistrate remanded the detainee and the soldier, Hewapalliyaguruge Dilum Sanjeewa pending further investigations in respect of the offence of committing murder of the deceased soldier.

An investigation commences where there is reason either to suspect the commission of the offence.

The sole purpose of the investigation is to gather evidence from which they could form an opinion whether there is material to institute criminal proceedings. Hence, investigation officers are conferred with the power that may be necessary for the discovery of evidence and arrest of the suspects. Further, an investigation has a fact-finding character. At the conclusion of the investigation, it needs only to decide whether there is sufficient material to suspect a particular person or persons committing an offence. Furthermore, a preliminary investigation is not concerned with the issue of actual guilt.

Moreover, a person can be arrested if a credible complaint is received or an information has been received or if a reasonable suspicion exists of committing an offence.

In view of the facts revealed at the investigation carried out by the Military Police and the Criminal Investigations Department of the Sri Lanka Police, I am of the opinion there were sufficient material to arrest the detainee in respect of the offence of murder of the deceased soldier.

Further, the cases of ***Selvakumar v Devanada***, ***Channa Pieris v Attorney General, Edirisyriya v Navaratnam*** and ***Sunil Rodrigo v De Silva*** cited by the learned President's Counsel for the detainee are not applicable to the instant application as the petitioners in those applications were arrested by the Police under the Criminal Procedure Code and not by the Military Police under the Army Act and the Regulations promulgated thereunder.

Therefore, I am of the view that the Fundamental Rights of the detainee enshrined under Article 12(1) of the Constitution has not been infringed by the respondents by arresting the detainee.

Whether the detention (confinement) is unlawful?

As stated above, the Military Police commenced the investigation with regard to the death of the deceased soldier consequent to the aforementioned letter sent by the soldiers of the Camp A where the deceased soldier and the detainee were serving. Once the investigations were concluded by the Military Police, the evidence revealed that the detainee and soldier, Hewapalliyaguruge Dilum Sanjeewa were responsible for the murder of the deceased soldier. Hence, the Criminal Investigations Department was informed by letter dated 3rd of July, 2009 marked and produced as '1R1', the findings of the investigations carried out by the Military Police on the death of the deceased soldier, Lance Corporal Saman Kumara. Further, as the said investigations found evidence against the detainee and soldier, Hewapalliyaguruge Dilum Sanjeewa, the Police was requested to take over the investigations with regard to the said death of the deceased soldier. Thereafter, the detainee was handed over to the Criminal Investigations Department on the 6th of August, 2009 for further investigations.

Moreover, the Police filed a B report in the Magistrate's Court of Anuradhapura on the 7th of August, 2009. In the said report, the Police has named the detainee and the soldier, Hewapalliyaguruge Dilum Sanjeewa, as suspects is respect of the murder of the deceased soldier. Further, the said report filed by the Police in the Magistrate's Court stated that there is evidence to suggest that the detainee and the soldier, Hewapalliyaguruge Dilum Sanjeewa, committed the murder of the deceased soldier. Hence, the learned Magistrate remanded both of them as the investigations were pending. Later, the detainee was released on bail on the 18th of January, 2010 by the High Court of Anuradhapura.

It was submitted by the learned President's Counsel for the detainee that the detention of the detainee during the time of the investigation by the Military Police without producing him before a Magistrate was a violation of his Fundamental Rights guaranteed under Article 13(2) of the Constitution.

Article 13(2) of the Constitution states:

> *"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order made by such judge in accordance with procedure established by law."*

However, as stated above, the Fundamental Rights of the detainee enshrined under Articles 12(1), 13 and 14 of the Constitution are subject to restrictions prescribed in the military law. Section 18(2) of the Army Disciplinary Regulations states:

> *"No officer or warrant office shall be kept in military custody, unless his commanding officer is satisfied on investigation that it will be necessary to proceed with the case and report it to the Commander of the Army."*
>
> (emphasis added)

Thus, it is evident that the detainee was kept in military custody during the course of the investigation and thereafter, pending a review from his Commanding Officer as to whether or not to proceed with the case against the detainee and soldier, Hewapalliyaguruge Dilum Sanjeewa. As the evidence revealed that the detainee and the Army were responsible for the death of the deceased soldier, the Army has sent a letter dated 3rd of July, 2009 marked '1R1' addressed to the Deputy Inspector General of Police of the Criminal Investigations Department, to take over the investigations in respect of the death of the deceased soldier. Thereafter, the detainee was handed over to the Criminal Investigations Department on the 6th of August, 2009.

The material filed in this court shows that there was no undue delay on the part of the respondents in handing over the detainee and soldier, Hewapalliyaguruge Dilum Sanjeewa to Police custody. Further, there was no intentional violation of the Fundamental Rights of the detainee.

A similar view was expressed in ***Wijesinghe v Attorney General and Others*** **(1978-80) 1 SLR 102 at 106** it was held;

> *"Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption, negligence or error of judgement, I do not think a person can be allowed to come under Article 126 and allege that there has been a violation of constitutional guarantees. There may also be other instances where mistakes or wrongful acts are done in the course of proceedings for which ordinarily there are built-in safe-guards or adequate procedures for obtaining relief."*

Therefore, I am of the view that the Fundamental Rights of the detainee enshrined under Article 13(2) of the Constitution has not been infringed by the respondents.

Accordingly, the application is dismissed without costs.

Judge of the Supreme Court

B. P. Aluwihare PC, J

I agree **Judge of the Supreme Court**

P. Padman Surasena, J

I agree **Judge of the Supreme Court**

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

SC APPEAL NO. 191/2017
SC No. SC HC CA LA. 152/2016
HCCA No. UVA / HCCA/ BDL / 01/13/F
DC Badulla Case No. M 6896/2010

In the matter of an Application for Leave to Appeal under and in terms of the Provisions of Section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended, read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka

The People's Bank,
No. 75,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Plaintiff

Vs.

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya
3. Chamila Dilanthi Wijesekera
   All at
   No. 66 and 68.
   Bazaar Street,
   Badulla.

Defendants

AND BETWEEN

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya
3. Chamila Dilanthi Wijesekera

All at
No. 66 and 68.
Bazaar Street,
Badulla.

Defendants- Appellants

Vs.

The People's Bank
No. 75,
Sir Chittampalam A. Gardier Mawatha,
Colombo 02.

Plaintiff-Respondent

AND BETWEEN

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya

All at
No. 190/3,
Peter De Perera Mawatha,
Dutugamunu Street,
Kohuwala.

1st and 2nd Defendants-Appellants-Petitioners

Vs.

The People's Bank
No. 75,
Sir Chittampalam A. Gardier
Mawatha,
Colombo 02.

Plaintiff-
Respondent-Respondent

AND NOW BETWEEN

1. M. H. Saman Wijesekera
2. V. Chithrani de Silva Jayasuriya

All at
No. 190/3,
Peter De Perera Mawatha,
Dutugamunu Street,
Kohuwala.

1st and 2nd
Defendants-Appellants-
Petitioners-Appellants

Vs.

The People's Bank
No. 75,
Sir Chittampalam A. Gardier
Mawatha,
Colombo 02.

Plaintiff-
Respondent-Respondent-
Respondent

And

3. Chamila Dilanthi Wijesekera
No. 29,
Jambugasmulla Mawatha,

Nugegoda.
3rd Defendant-Appellant-Respondent-Respondent

BEFORE: **B.P ALUWIHARE, PC, J.**
K.KUMUDINI WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL: Faisza Musthapha Markar with Zainab Markar with Dilini Gamage instructed by Sanjeewa Kaluarachchi for the Defendants-Appellant-Petitioners-Appellants.

Kaushalya Nawaratne with Aravinda Rajapaksa and Eshan Sandungahawatta for the Plaintiff- Respondent- Respondent Respondent.

WRITTEN SUBMISSIONS: By 1st and 2nd Defendants-Appellants-Petitioners- Appellants on 14.11.2017.

By the Plaintiff- Respondent-Respondent Respondent on 27.05.2020.

ARGUED ON: 30.09.2022

DECIDED ON: 30.10.2023

K.KUMUDINI WICKREMASINGHE, J.

This is an appeal from an order of the Provincial High Court of Civil Appeal of the Uva Province holden in Badulla dated 24.02.2016 which dismissed the application made by the Appellants to re-list the Appeal bearing No. UVA/HCCA/BDL/ 01/13/F, after the said appeal was dismissed by the same court on 09.10.2013 for want of appearance of the Appellant, or their Attorney-at-Law.

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the "Respondent") instituted the initial action in the District Court of Badulla against the 1st and 2nd Defendants-Appellants-Petitioners-Appellants (hereinafter referred to as the "Appellants") and the 3rd Defendant-Appellant-Respondent-Respondent seeking to recover a sum of Rs. 7,126,338.17 and interest thereon. The Respondent stated that the said sum was owed by way of temporary overdrafts granted to one M.H.B Company of which Appellants were partners. The Appellant together with the 3rd Defendant-Appellant-Respondent-Respondent sought the dismissal of the Respondent's action and contended that there was a case filed earlier by them before Commercial High Court bearing No. L/C/Civil/268/09/MR seeking to recover damages against the Respondent.

When the case was taken up for trial in the District Court, the Appellant raised a preliminary objection that the District Court of Badulla has no jurisdiction to hear the case, and the case should be transferred to the Commercial High Court of Colombo having regard to the value of the claim. The said preliminary objection was overruled by the District Court by an order dated 31.05.2012 stating that the Appellant has accepted the jurisdiction of the District Court in their answer and any objection on such should have been raised at that stage. The Learned District Court Judge also refused two more applications made by the Appellants to postpone the trial pending a Leave to Appeal application

bearing No.UVA/ HCCA/ BDL/LA/13/2012 and a Revision Application bearing No. HC/RA/14/12 being made by the Appellants against the said District Court order and for postponements to cross-examine a witness.

The District Court delivered the judgment dated 28.09.2012 in favour of the Respondent. In the judgment, the Learned District Court stated that in the absence of a stay order, there was no legal obligation to await the outcome of the Revision and Leave to appeal applications and although the witnesses were not cross-examined, the Appellant's counsel was present in court on all trial dates. Thereafter, the High Court delivered the order dated 18.10.2012 dismissing the said Leave to Appeal and Revision applications.

Aggrieved by the judgment of the Learned District Court Judge of Badulla, the Appellants appealed to the High Court of Civil Appeal of the Uva Province, Badulla. The Appellant were served with notice to be present before the High Court on 09.10.2013 and on the said date neither the Appellants nor their attorney-at-law were present. The Provincial High Court of Civil Appeal dismissed the appeal of the Appellants stating that "it appears that the Appellants are not proceeding with the appeal with due diligence". (page 488 of the brief) Thereafter, the Appellants filed an application to re-list the said appeal and the Provincial High Court of Civil Appeal refused the application for re-listing by the order dated 24.02.2016.

The Appellant is before this court challenging the said order. This court by order dated 03.10.2017 granted Leave to Appeal on the questions of law stated in paragraph 19 (a) to (e) of the Petition dated 04.04.2016, as set out below.

1. Did the Civil Appellate High Court err by the omission to take cognizance of the fact that its order dated 09.10.2013 dismissing the appeal for want of appearance contains no consideration whatsoever of the merits of the

said appeal and as such has been made in breach of Section 769 (2) of the Civil Procedure Code?

2. Did the Civil Appellate High Court misdirect itself in law by the failure to consider that it was not competent for the said court to have made an order of dismissal inasmuch as the said appeal did not come up for "hearing" as contemplated by Section 769 (1) of the Civil Procedure Code?

3. Did the High Court of Civil Appeal misdirect itself by its failure to take cognizance of the fact that the Petitioners had paid the brief-fees and instructed their Attorney-at-Law to appear on their behalf before the said court, and thereby, err in holding that the petitioners had not prosecuted the civil appeal with due diligence?

4. Did the Civil Appellate High Court fail to take into consideration the attendant circumstances in making the said order of dismissal?

5. In making the said orders, did the Civil Appellate High Court fail to take into account the relevant circumstances and as such err in not exercising the discretion vested in court judicially?

In addition, the Learned Counsel for the Respondent has raised the following issues.

a) Whether the order of the Lordships of the High Court appeal dated 24.02.2016 is in compliance with the provisions of Section 769 of the Civil Procedure Code in view of the non-appearance of the Petitioners before court?

b) In such an event, are the petitioners bound and obliged to comply with proviso of Section 769 of the Civil Procedure Code to produce sufficient cause in making an application for re-listing?

The first matter for consideration by this court is whether the High Court erred in law by the failure to take cognizance of the fact that its order dated 09.10.2013 dismissing the appeal for want of appearance contains no consideration of the merits of the appeal and as such has been made in breach of Section 769 (2) of the Civil Procedure Code.

In order to ascertain the above question of law, it is pivotal to analyze Section 769 (2) of the Civil Procedure Code which states as follows,

"(2) If the appellant does not appear either in person or by an Attorney-at-Law to support his appeal, the court shall consider the appeal and make such order thereon as it thinks fit.

Provided that, on sufficient cause shown, it shall be lawful for the Court of Appeal to reinstate upon such terms as the court shall think fit any appeal that has been dismissed under this subsection".

The position of the Appellant is that the court has a duty under the aforementioned section to consider the appeal before making any order thereon, in instances where the Appellant does not appear and the Learned High Court Judge has failed in his duty. In support of this position, the counsel for the Appellant has relied on the decision in the case of **M. H. M. Suweyal Vs. Pandigamage Podinona, [S.C. Appeal No. 92A/2008]** decided on 05.07.2017. In this judgment, Hon. Justice Aluwihare set aside the order of the High Court dismissing the Appeal and emphasized on the duty of the court to consider the merits of the appeal before making an order for dismissal.

The aforesaid judgment has no application here as the facts and the circumstances in the above case differ from that of the case at hand. In the above cited case, there was a delay in receiving notice to appear in the court as the Defendant had shifted from his original address and at the time he was informed, the appeal had already been dismissed. Nevertheless, the Appellants in the present case were served with notice to be present before the Provincial High Court of Civil Appeal of Uva Province on 09.10.2013. The Appellant has submitted to this court that they notified their attorney-at-law of the date and they were unable to be present on the said date as they reside in Colombo. The said Attorney-at-Law in his affidavit has failed to disclose any reasonable cause for his absence but rather has stated that, 'as this was the very first date **it was taken for granted** that it was only to be mentioned for the purpose of granting the next step namely a date for the written submissions of the Defendant-Appellants'. (page number 517 of the brief)

The above reason given by the said Attorney-at-Law in his affidavit itself clearly establishes that he has failed to carry out his bounden duty as the legal representative of the Appellants.

In **Packiyanathan Vs. Singarajah [1991] 2 Sri L.R 205,** Kulatunga, J. held that in page number 209 that,

"Relief will not be granted for default in prosecuting an appeal where —
(a) the default has resulted from the negligence of the client or both the client and his attorney-at-law,
(b) the default has resulted from the negligence of the attorney-at-law in which event the principle is that the negligence of the attorney-at-law is the negligence of the client and the client must suffer for it."

It was further emphasized in this case at page 205 that,

"A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. ***The Court will in granting relief ensure that its order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law****."* [emphasis added]

Similarly, in **Pakir Mohideen Vs. Mohamadu Casim [1900] 04 N.L.R 299,** Bonser, C.J. held that,
"If the Proctor did not do his duty, he is to blame for the absence of the defendant and the defendant must suffer for the fault of his position."

This sentiment is similarly echoed in **Schareguivel v Orr [1926] 11 N.L.R 302,** where Lyall Grant J. held that,

"To my mind facts indicate that there was negligence on the part of the proctor and not personal negligence on the part of the Plaintiff. That however is immaterial. The plaintiff must suffer for his proctor's negligence. This is clearly laid down by Bonser CJ in Pakir Mohideen v Mohamadu Cassim (4 NLR 299)."

In the present case, both the Appellant and their Attorney-at-Law were informed of the date to appear in advance. However, neither of them appeared in court on the due date. It must be noted that they were not prevented from attending by an unavoidable cause. The reason given by the Appellant is that they reside in Colombo and could not come to Badulla on the date the appeal was taken. They further state that they informed their attorney and the attorney states he took the date as 'granted'. Both the Appellants and their attorney have 'assumed that their presence was not necessary as this was only a calling date'. (page 517 and 518 of the brief) In my view, these reasons given by the Appellants are absurd and the negligence on their side is unjustifiable.

With regard to the first question of law, I direct my focus to the case of **Appuhamy Vs. Appuhamy [1911] 14 N.L.R. 233,** where Wood Renton, J. held at page 236 that,

"The Court has undoubtedly a discretion as to whether or not an appeal shall be dismissed, when it is first called for hearing, on the ground of non-appearance, and we exercise that discretion every day".

I am of the opinion that the learned High Court judge in the present case has wielded the said discretion in the interest of justice. Therefore, I answer the first question of law in negative on the ground that the duty to consider the appeal before dismissal on default of appearance of the Appellant does not become a mandatory duty in situations where there is negligence on the part of the Appellants.

The second matter for consideration by this court is whether the High Court erred in law by dismissing the appeal as the said appeal did not come up for "hearing" as contemplated by Section 769 (1) of the Civil Procedure Code.

The position of the Appellant on this regard is that the said appeal was not taken up for 'hearing' under Section 769 (1) of the Civil Procedure Code on 09.10.2013 but was merely a calling date. Therefore, the appeal is not liable to be dismissed.

Nonetheless, in **The General Insurance Company Ltd Vs. T.A.Don Abraham [1957] 59 N.L.R 282,** Basnayake, C.J, in page 284 stated that,

"For the purpose of section 769 an appeal " comes on for hearing " each time it is on the daily list. If the appellant or his counsel is not present when the appeal is called in Court whether for the purpose of hearing the submissions of counsel or ***for. any other purpose, it is liable to be dismissed****". [emphasis added]*

In **Jinadasa and another Vs. Sam Silva and Others [1994] 1 Sri L.R. 232**, Amerasinghe J, stated at page 248 that,

"A judge must ensure a prompt disposition of cases, emphasising that dates given by the court, including ***dates set out in "lists" published by a court's registry, for hearing or other purposes, must be regarded by the parties and their counsel as definite court appointments****. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for." [emphasis added]*

In the same judgment, Amerasinghe, J. has cited the **Abdul Aziz v. Punjab National Bank [AIR 1929 Lahore 96, 99, 100]**., where Jai Lai, J. has stated that,

*"In this connection due regard must be had to the nature of duties of counsel towards his other clients and the other courts. At the same time the court cannot be expected to give unlimited or unreasonable latitude to counsel in this respect. Counsel is ordinarily expected to be ready in court when the case is called and i****t is no good excuse to say he was busy elsewhere****." [emphasis added]*

As previously mentioned, the Appellants as well as their attorney assumed that their presence was not necessary as this was only a 'calling date'. (page 517 and 518 of the brief) Thus, the attorney has stated that he went out of Badulla on the date the case was taken into consideration. (page 517 of the brief) I must emphasize that every attorney has a duty towards his client as well as to the court and attorneys must assist the Judges in prompt disposition of cases. As stated in the case of **Jinadasa and another Vs. Sam Silva and Others** (above cited) every date where the case comes for hearing or for any other purpose, including, 'calling dates' must be regarded by the parties and their

attorneys as definite court appointments which the absence will not be excused without a justifiable cause.

In the present case, the reason that the attorney was out of Badulla on the day that the case was taken cannot under any circumstance be excused. Therefore, I am of the opinion that every 'calling date' of a case must be considered as a date for 'hearing' under Section 769 (1) of the Civil Procedure Code and the second question of law must also be answered in negative.

The third question for consideration is whether the High Court erred in holding that the petitioners had not prosecuted the civil appeal with due diligence when the Appellant had paid the brief-fees and instructed their Attorney-at-Law to appear on their behalf.

In order to examine the legal issue raised above, it is important to first define 'due diligence' expected from an Appellant in an appeal. The phrase 'due diligence' has been defined in the **Black's Law Dictionary, 2nd Ed**. as,

"Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

The Appellant has paid brief fees and has received notices to appear before the court on 09.10.2013. However, the Appellant or their attorney did not appear on the said date as they 'thought it was not necessary' since it was only a calling date. The standard of due diligence expected from an Appellant does not stop once he has paid the brief fees and retained an attorney. It is the assiduity expected from a person whose rights have been violated and such assiduity must continue until he or she receives justice.

In **Kanagasabai Vs. Kirupamoorthy [1959] 62 N.L.R. 45,** while stating that if parties are required by law or by court to be present, then they must be present Bansanayake CJ held at page 58 that,

"Where, as in this case, the party is required to appear in person and he does not do so then he must suffer the consequences of his non-appearance. ***It is not sufficient to say that he gave a proxy to a Proctor and that the Proctor failed to appear by an " oversight"****. [emphasis added]*

In the present case, the Appellant's cannot avert their duty to proceed with due diligence merely by stating that they paid the brief fees and retained an attorney. The Appellants are required to appear in the court on the given date either in person or through their attorney. If neither of them appear, there is no way for the court to determine whether there is a case to proceed or not. In the case at hand, the Appellant's attorney has stated that they thought their presence was not necessary. (page 518 of the brief) The Appellants have stated that they were unable to present on the said date on the sole reason of them being residents of Colombo. (the petition of the Appellants to this court)

Thus,as I have already discussed, the reason given by the Appellant's attorney for his absence is absurd and intolarable. Hence, even if it was the absence of due diligence of the Appellant's attorney which alone resulted in the challenged decision of the High Court, such is indefensible according to "the negligence of the proctor is in law the negligence of the client" and "the client must suffer for his proctor's negligence" principles as it was discussed in the case of **Packiyanathan Vs. Singarajah** (cited above). As this court has already established in **Pakir Mohideen Vs. Mohamadu Casim** and **Schareguivel v Orr** (cited above) it is the party who suffers when the attorney who was under a duty to have appeared for him fails to appear without sufficient case, yet, that is not a factor to be considered in deciding whether a matter should be considered

Therefore, in relation to the third question of law, I conclude that the learned High Court judge has not erred in law as the Appellants lacked the standard of due diligence expected from them.

The fourth and fifth questions of law which the leave was granted by this court can be considered together. Both these questions consider whether the High Court failed to take into account the relevant and/or attendant circumstances and as such err in not exercising the discretion vested in court judicially.

In this regard, it was held in **D.S Ranaweera Vs. W.W.P Jinadasa and another [1992] BAL Vol.IV, Part II** at page 20 that,

"Dealing instead, in the matter before it, with a mere invocation for the assistance of the Court of Appeal in the exercise of its discretion, the court had an uncontrolled power of disposal, so long as that power was not exercised in transgression of the law and legal principles, and so long as it was not actuated by whim or caprice, and exercised in good faith."

In the same case, Amerasinghe J cited the Indian case of **Shamdasani and others Vs. Central Bank of India, [1938 Bombay 199]**. where Chief Justice Beaumont at page 202 stated that,

"It is, after all, a very serious matter to dismiss a man's suit or summons, or whatever if may be, without hearing it, and that course ought not be adopted unless the court is really satisfied that justice so requires."

If the court is to wield its discretion to dismiss a case without hearing, such must be done to meet the ends of justice. In the above cited **D.S Ranaweera Vs. W.W.P Jinadasa and another** Amerasinghe J. stated that 'the needs of justice' go beyond the narrow interest of justice one or all of litigants in a matter and further held at page 21 that,

"The needs and expectations of the community as a whole in the due administration of justice must be considered. Interest rei publicae ut sit finis litum."

In the same case, it was held at page 23 that the court would order reinstatement in an application dismissed for want of appearance only if the defaulting party furnished the court with a '*comprehensive and satisfactory disclosure of all attendant circumstances'*.

In the present case, the attendant circumstances are not satisfactory as such do not elucidate any reasonable or sensible explanation that justify the absence of the Appellant's attorney at the High Court on the said date. If this court is to allow this sort of irresponsible behavior of an attorney, it will lead to the erosion of professionalism in this noble profession. Even though it is very unfortunate in the present case that the Appellant has to suffer for the fault of their attorney, this one party's grievances must be overridden by the necessity to protect the interests of justice. Therefore, I am of the opinion that the learned High Court judge has correctly exercised his discretion in dismissing the application by the Appellants for re-listing to preserve the interests of justice.

In addition to the above questions of law, the Learned Counsel for the Respondent has two more questions. The first question is whether the order of the High Court appeal is in compliance with the provisions of Section 769 of the Civil Procedure Code in view of the non-appearance of the Petitioners before court. As I have already discussed, the court has wide discretion in relation to the dismissal of cases. However, if the court is to dismiss a case without giving a hearing, such has to be done only when the justice so requires and justice so requires in the present case.

The second question raised by the learned Respondent's counsel is whether the Appellants are bound and obliged to comply with proviso of Section 769 of the Civil Procedure Code to produce sufficient cause in making an application for re-listing.

In the **Jinadasa and another Vs. Sam Silva and Others** (cited above), the court by referring to the provision of Section 769 (2) of the Civil Procedure code held at page 250 that,

"The court may have reinstated the matter upon such terms as to costs or otherwise as it thought fit, yet it could only do so if sufficient cause for reinstatement had been established."

In the same case at page 233 states that,

"A court will hold that there was sufficient cause if the facts and circumstances established as ***forming the grounds for absence are not absurd, ridiculous, trifling or irrational but sensible, sane, and without expecting too much, aggreable to reason.****" [emphasis added]*

The facts and circumstances established in the present case as forming grounds for absence are absurd and irrational. In the absence of sufficient cause, there was no obligation on the High Court to order a reinstatement.

In these circumstances and for the foregoing reasons, the appeal is hereby dismissed.

JUDGE OF THE SUPREME COURT

B.P ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006

SC Appeal No. 45/2013 and 44/2013

SC HC (CA) LA No. 420/12 and 421/12

UVA/HCCA/BDL/LA/03/12 and UVA/HCCA/BDL/REV/04/2012

DC Badulla No. 752/L

Nimal Dhammika Jayaweera,
No. 05, Spring Valley Road,
Hindagoda, Badulla.

Plaintiff

Vs.

T. M. Nandasiri, (Deceased)
No. 03, Spring Valley Road,
Hindagoda, Badulla.

Defendant

1A. Margaret Lokubadusuriya,
No. 51, Spring Valley Road,
Badulla.

1B. Tennakoon Mudiyanselage Shalika,
No. 74, Badulusirigama,
Badulla.

1C. Tennakoon Mudiyanselage Sujeewa,
No. 70, Passara Road,
Hindagoda, Badulla.

1D. Tennakoon Mudiyanselage Saman
Wasantha Kumara,
No 03, Spring Valley Road,
Hindagoda, Badulla.

Substituted-Defendants

And Between

Nimal Dhammika Jayaweera,
No. 05, Spring Valley Road,
Hindagoda, Badulla.

Plaintiff-Petitioner

Vs.

1A. Margaret Lokubadusuriya,
No. 51, Spring Valley Road,
Badulla.

1B. Tennakoon Mudiyanselage Shalika,
No. 74, Badulusirigama,
Badulla.

1C. Tennakoon Mudiyanselage Sujeewa,
No. 70, Passara Road,
Hindagoda, Badulla.

1D. Tennakoon Mudiyanselage Saman
Wasantha Kumara,
No 03, Spring Valley Road,

Hindagoda, Badulla.

Substituted-Defendant-Respondents

And Between

1A. Margaret Lokubadusuriya,
No. 51, Spring Valley Road,
Badulla.

1B. Tennakoon Mudiyanselage Shalika,
No. 74, Badulusirigama,
Badulla.

1C. Tennakoon Mudiyanselage Sujeewa,
No. 70, Passara Road,
Hindagoda, Badulla.

1D. Tennakoon Mudiyanselage Saman
Wasantha Kumara,
No 03, Spring Valley Road,
Hindagoda, Badulla.

Substituted-Defendant-
Respondent-Petitioners

Vs.

Nimal Dhammika Jayaweera,
No. 05, Spring Valley Road,
Hindagoda, Badulla.

Plaintiff-Petitioner-Respondent

And Now Between

1A. Margaret Lokubadusuriya,
No. 51, Spring Valley Road,
Badulla.

1B. Tennakoon Mudiyanselage Shalika,
No. 74, Badulusirigama,
Badulla.

1C. Tennakoon Mudiyanselage Sujeewa,
No. 70, Passara Road,
Hindagoda, Badulla.

1D. Tennakoon Mudiyanselage Saman
Wasantha Kumara,
No 03, Spring Valley Road,
Hindagoda, Badulla.

Substituted-Defendant-Respondent-Petitioner-Appellants

Vs.

Nimal Dhammika Jayaweera,
No. 05, Spring Valley Road,
Hindagoda, Badulla.

Plaintiff-Petitioner-Respondent-Respondent

Before: Buwaneka Aluwihare PC, J.

Murdu N. B. Fernando PC, J.

P. Padman Surasena J.

Counsel: Lakshan Livera for the Substituted Defendant-Respondent-Petitioner-Appellants instructed by Yasas De Silva.

Nuwan Bopage with Manoj Jayasena for the Plaintiff-Petitioner-Respondent-Respondent.

Argued on: 20. 10. 2020

Decided on: 31. 10. 2023

JUDGEMENT

Aluwihare PC, J.,

1. The Plaintiff-Petitioner-Respondent-Respondent (hereinafter referred to as the 'Plaintiff') filed action in the District Court of Badulla seeking a declaration of title to the subject matter of the action and to eject the now deceased, original defendant and all those holding under him. The Substituted Defendant-Respondent-Petitioner-Appellants (hereinafter referred to as the 'Appellants') state that the now deceased original Defendant (the husband and father of the present 1st and 2nd Appellants respectively) filed answer seeking the dismissal of the action. After the trial, by judgment dated 22nd May 2001, the Learned District Judge of Badulla dismissed the action of the Plaintiff.

2. Aggrieved by the said judgment the Plaintiff appealed to the High Court of Civil Appeals (Uva Province), and having considered the appeal the Learned Judges of the High Court by its judgment dated 11.03.2010, held that the Learned District Judge had misdirected himself in his findings. Accordingly, the High Court set

aside the findings of the Learned District Judge and answered the issues in favour of the Plaintiff.

3. The judgment of the High Court was pronounced on 11th March 2010 in open court and the journal entry of that date states as follows;

"*Respondent and his registered Attorney present in court. Appellant and his registered Attorney absent and unrepresented.*

Appellant not present. No appearance. Defendant-Respondent present. Mr. Ratwatte AAL for the Respondent. Judgment pronounced in open court."

From the foregoing, it appears that it was the Plaintiff and his Attorney who were not present and not the Defendant. The record bears out that the learned Attorney-at-Law for the Defendant had informed the court that he might consider appealing against the judgment. It transpired, however, that the Defendant had passed away about 2 months prior to the date on which the judgment of the High Court was delivered and this fact was not disclosed to the court, although the Attorney-at-Law along with another who was representing the Defendant were in court on the day the judgment was delivered.

4. The present Appellants (heirs of the deceased Defendant) state that when the appeal was taken up for the delivery of the judgment, there was no intimation to the Court, of the death of the original Defendant and the Uva Provincial High Court of Civil Appeal delivered its judgment (marked 'C') on 11th March 2010.

5. The Appellants state that immediately upon coming to know of the delivery of the said judgment, the 1D Appellant, the son of the deceased original Defendant, had by way of a motion dated 20th April 2010 (marked 'D') brought to the notice of the Uva Provincial High Court of Civil Appeal that the said judgment has been delivered after the death of the original Defendant and moved that he be substituted in the room of the deceased Defendant. The Plaintiff states that the 1D

Appellant did not seek a re-hearing of the case or a re-pronouncement of the judgment but simply sought to have himself substituted in the room of the deceased Defendant.

6. When the motion referred to was supported before the Uva Provincial High Court of Civil Appeal, the court directed the 1D Appellant to submit written submissions. Thereafter, by order dated 11th May 2010 the High Court refused the 1D Appellant's application on the ground that according to the journal entry dated 11th March 2010, the deceased original Defendant or someone on his behalf was present and that the Registered Attorney-at-Law has represented and taken notice on behalf of the Deceased Defendant.

7. Thereafter, an application was preferred to the Court of Appeal by the 1D Appellant to revise the aforesaid order of the High Court of Civil Appeal. The Plaintiff states that instead of filing an appeal to the Supreme Court challenging the original judgment of the Civil Appellate High Court, and subsequent order dated 11th March 2010 relating to substitution, the Appellant sought to set aside both the judgment and the order by a revision application to the Court of Appeal.

8. The Appellants state that they withdrew the said application (before the Court of Appeal) subsequently, as it was the duty of the Plaintiff to take the necessary steps to substitute the proper person in the room of the deceased original Defendant. The Plaintiff, however, maintains in the written submissions that the Plaintiff took up a preliminary objection to the application on the grounds that as per the provisions of the Civil Procedure Code and the High Court of the Provinces (Special Provisions) Act No. 54 of 2006, the Court of Appeal does not have the jurisdiction to hear and determine the appeal. The Plaintiff states that it was due to the said preliminary objection, the counsel for the Appellants had withdrawn the said appeal.

9. On 30th June 2011, the Plaintiff made an application to the District Court of Badulla under section 341 of the Civil Procedure Code to substitute the Appellants

in the room of the deceased original Defendant. The Appellants state that they were purportedly substituted in the room of the deceased original Defendant for the purpose of executing the decree and thereafter the Plaintiff filed a Petition dated 30th September 2011 to execute the decree.

10. The Learned District Judge directed those notices be issued on the Petitioners (the present Appellants) on 06th January 2012, on which date the Appellants filed statement of objections to the Plaintiff's application on the basis that since the judgment of the Uva Provincial High Court of Civil Appeal was delivered after the death of the deceased Defendant, there is no valid judgment in favour of the Plaintiff. The Learned District Judge had made an order on the same day, rejecting the objection of the Appellants and ordered the execution of the writ.

11. To have the said order of the District Judge referred to above set aside, the Appellants filed an application for leave to appeal in the High Court of Civil Appeal. The application was supported on 12th July 2012. After hearing submissions from both parties, the Learned High Court Judge, by order dated 06th September 2012, dismissed the application.

12. Being aggrieved by the said dismissal, the Appellants preferred two Leave to Appeal applications to this court and were granted Leave to Appeal. The Leave to Appeal application numbered SC HC CA LA No. 420/2012 was concerned with the application UVA/HCCA/BDL/LA/03/2012 while the Leave to Appeal application SC HC CA LA No. 421/2012, was concerned with the revision application UVA/HCCA/BDL/REV/04/2012. Leave to Appeal was granted for SC HC CA LA No. 420/2012 as SC Appeal 45/2013 and for SC HC CA LA No. 421/2012 as SC Appeal 44/2013. In addition, interim relief was granted to the Appellant as per prayer (g) of the Petition staying the execution of the decree until the final determination of this application. SC Appeal 44/2013 and SC Appeal 45/2013 i.e. the present matter, were supported together. The parties having agreed to abide by a single judgement, the decision in the present matter should be considered as concluding SC Appeal 44/2013 as well.

13. The questions of law on which Leave to Appeal was granted are stated in paragraph 19 of the petition as follows;

Paragraph 19

i. *Whether the Learned High Court Judges have erred in law by failing to consider the fact that the judgement dated 11. 03. 2010 of the Uva Provincial High Court of Civil Appeal of Badulla has no effect in law and is a nullity as the same has been delivered after the death of the original Defendant before the steps being taken to substitute the heirs?*

ii. *Whether the Learned High Court Judges have erred in law by failing to consider the fact that the District Court has no jurisdiction to execute a decree in which the judgment was delivered after a death of a party and in the absence of a substitution, it is of no consequence that the proceedings had been formally conducted for are* coram non judice*?*

iii. *Whether the Learned High Court Judges have erred in law by failing to consider the fact that the judgment entered against the dead party is void and a nullity?*

iv. *Whether the Learned High Court Judges have erred in law by failing to consider the fact that the proceedings being void, there is no judgment and a decree to be executed under section 341 of the Civil Procedure Code?*

v. *Whether the Learned High Court Judges have erred in law by failing to consider the fact that due to the failure on the part of the Respondent to substitute the Defendant at the correct stage the appellants have been deprived of their statutory right to prefer an appeal against the judgment of the appeal bearing No. UVA/HCCA/BDL/18/2001 (F)?*

vi. *Whether the Learned High Court Judges misconceived in law in holding that the application of the Appellants is* res judicata*?*

14. Upon considering the questions of law referred to in the preceding paragraph, it appears that the issues raised in the said questions of law are intrinsically interwoven and the crux of the matter is contained in the questions no. (i) and (iii) of paragraph 19. That is, *whether a judgment entered against a dead party is void and a nullity* and if so, *whether the judgement of the High Court of Civil Appeal has no effect in law and is a nullity.*

15. The death of the original Defendant prior to the delivery of the judgment of the Provincial High Court of Civil Appeal means that there was no (live) defendant before the court. As such the judgment of the Provincial High Court of Civil Appeal is a nullity and is *coram non judice*. In ***Ittepana v. Hemawathie*** 1981 1 SLR 319 at page 483, Justice Sharvananda recognized the 'jurisdiction of persons' as one of the three heads of jurisdiction necessary for a judgment to be valid. His Lordship, as he then was, cited **Black on Judgments** at page 261 to explain the 'jurisdiction of persons'; "*It [the court] cannot act upon persons who are not legally before it, upon one who is not a party to the suit… upon a defendant who has never been notified of the proceedings.*" His Lordship further cited Black to illuminate the effect that the lack of jurisdiction would have on a judgment. "*If the court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are* coram non judice*. A judgment entered by such court is void and a mere nullity.*"

16. In the present case, at the stage of the first appeal, the original Defendant had passed away after the conclusion of the proceedings, but before the delivery of the judgment. As such the Defendant, being alive upto the point of the judgment being reserved, has been present and represented before the High Court. Although there was no live defendant before the court at the time of the delivery of the judgment, the Defendant having been present and represented before the High Court in the abovementioned manner, the judgment, rather than becoming an outright nullity, became abated. Subsequently, it becomes necessary to effect

substitution and repronounce the judgment, allowing the dissatisfied party to appeal against the judgment if it so wishes and the right to sue survives.

17. The Appellants submit that the death or change of status of a party to an appeal makes the case record defective. To support this contention section 760A of the Civil Procedure Code is cited;

"760A. *Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid.*"

18. I would like to refer to a judgment of the Court of Appeal ***Rannaide v. Priyanka*** CA Appeal No 1015/1993(F) decided on 26.10.2007 (2007 Bar Association Law Reports at page 97) where the effect of section 760A was considered. **Black's Law Dictionary** (8th Edition) was cited to state that an 'absolute nullity' is incurable, and that an 'absolute nullity' could be defined as "*an act that is void because it is against public policy, law or order.*" On that basis the decision of the appellate court was held to be an absolute nullity due to being against law as not effecting a substitution was contrary to section 760A.

19. The Appellants relied on the decision of ***Gamaralalage Karunawathie v. Godayalage Piyasena and Others*** (2011) 1 SLR 171 in support of their arguments. As the facts of the case in ***Gamaralalage Karunawathie*** (*supra*) are somewhat similar to the present case, I wish to refer to the facts of that case before discussing the ratio of ***Gamaralalage Karunawathie*** (*supra*). This was a partition action and during the pendency of the case and prior to the delivery of the judgement by the District Court, the 15th Respondent had died and no steps were taken to substitute the said party. Thereafter, the judgement was challenged before the High Court

of Civil Appeals and while the appeal was pending, the 2nd Respondent had passed away, before the judgement was delivered. Again, no substitution was effected before the delivery of the High Court Judgement. Her Ladyship Shirani Bandaranayke CJ, upon analyzing Section 760A of the Civil Procedure Code, and two decisions of the Indian Supreme Court, which I have referred to below, held *"Accordingly, it is evident that both those judgments are ineffective and therefore each judgment would be rejected as a nullity. For the said reason the judgment of the High Court dated 13.10.2009 and the judgment of the District Court of Kegalle dated 20.05.2005 are both set aside".*

20. In the case of ***Gamaralalage Karunawathie*** (*supra*) Her ladyship observed further that; "*When a party to a case has died during the pendency of that case, it would not be possible for the court to proceed with that matter without bringing in the legal representatives of the deceased in his place. No sooner a death occurs of a party before court, his counsel loses his position in assisting court, as along with the said death and without any substitution he has no way in obtaining instructions.*"

21. Drawing from the Indian case law the Appellants cited the ***State of Punjab v. Nathu Ram*** (AIR 1962 SC 89) judgment to state that after the death of a party, the proceedings against the party abates. Chief Justice Shirani Bandaranayake in ***Gamaralalage Karunawathie*** (*supra*) cited an analysis of the ***State of Punjab v. Nathu Ram*** provided in ***Swaran Singh Puran Singh and another v. Ramditta Badhwa (dead) and others*** (AIR 1969 Punjab & Haryana 216). Two propositions made therein are relevant to the present case. Firstly, "*On the death of a respondent, an appeal abates only against the deceased, but not against the other surviving respondents.*" which specifies that an appeal abates on the death of the respondent. Secondly, that "*the abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the Appellate Court cannot in any way modify that decree directly or indirectly. At that stage, the question arises, as to how and what are the steps that have to be taken in order to cure the defect.*"

22. Explaining the steps to take after the abatement of appeal, Her Ladyship referred to the Indian judgments ***Kanailal Manna and Others v. Bhabataran Santra and Others*** (AIR 1970 Calcutta 99) and ***Achhar Singh and Others v. Smt. Ananti*** (AIR 1971 Punjab & Haryana 477). In both these judgments it was held that where an appeal becomes a nullity due to being passed in ignorance of the death of one of the defendants during the pendency of that appeal (as in the present case, subject to the distinction that in the present case the Defendant had passed away only after the judgment was reserved) and when that appeal had abated totally, the proper course is to set aside the decree and to remand the case to the court where the abatement took place. It was further stated in both cases that if there is an entitlement, it could be kept open for the parties concerned to take steps to get the abatement set aside. On the strength of these judgments, the case was sent back to the District Court for the appellant to take steps for substitution.

23. The ***Gamaralalage Karunawathie*** (*supra*) judgment was later declared *per incuriam* by a five-judge bench of the Supreme Court in ***Bulathsinhala Arachchige Indrani Mallika v. Bulathsinhala Arachchige Siriwardane of Dummalasooriya*** SC Appeal 160/2016 [SC minutes 02.12.2022] as the decision was made without considering the applicable provisions of the Partition Act. In the case of ***Bulathsinhala Arachchige Indrani Mallika*** (*supra*), the court observed; "*The judgment of the Supreme Court is based on a series of Indian authorities which* ***are irrelevant in the teeth of our express statutory provisions.*** (emphasis added)" (at page 26). Although the *ratio* in ***Gamaralalage Karunawathie*** (*supra*) may not be applicable to partition actions in view of the domestic statutory provisions exclusively applicable to such actions, I am of the view, however, that the decision in ***Gamaralalage Karunawathie*** (*supra*) is sound law as far as the instant case is concerned.

24. While the position is such, I would like to consider here the contention of the Plaintiff that the provisions of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 are applicable to the present matter.

25. The Plaintiff contends that by virtue of section 5 of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006, if a party is dissatisfied with a judgment and/or an order of the Civil Appellate High Court the only forum available to them to challenge the said judgment is the Supreme Court. Section 5 of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006 reads as follows;

"5C. (1) *An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by section 5A of this Act, with leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court, where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.*

(2) *The Supreme Court may exercise all or any of the powers granted to it by paragraph (2) of Article 127 of the Constitution, in regard to any appeal made to the Supreme Court under subsection (1) of this section.*"

26. The Appellants cited the *ratio* of the judgment of the Court of Appeal in ***Abeysinghe v. Abeysekera*** (1995) 2 SLR 104 to contend that where the judgment entered is void and a nullity "*the person affected can apply to have the same set aside* ex debito-justitiae *in the exercise of the inherent jurisdiction of the court."* However, this *ratio* has to be considered with ***Abeygunasekara v. Wijesekara*** (2002) 2 SLR page 269 on which the Plaintiff relied. In the latter case the court held that where specific provisions have been made, the court cannot exercise its inherent powers contrary to such specific provisions. "*I am inclined to take the view that inherent power of Court could be invoked only where provisions have not been made, but where provision has been made and are provided in s. 754 (2) CPC inherent power of this Court cannot be invoked; inherent powers cannot be invoked to disregard express statutory provisions.*" (Somawansa, J.)

27. I am of the view that the contention of the Plaintiff- Respondent that by virtue of section 5 of the High Court of the Provinces (Special Provisions) Act the Supreme Court is the exclusive forum available to a party dissatisfied with a judgment and/or order of a Civil Appellate High Court pronounced in the exercise of its jurisdiction granted by section 5A, is correct. Section 5A confers Provincial High courts with "*appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be*." In light of the specific provisions made in that regard by the High Court of the Provinces (Special Provisions) Act, the inherent jurisdiction of the Court of Appeal cannot be invoked.

28. The present case warrants to be dealt with in view of the effect of the above legal provisions. It is unfortunate that the learned Judges of the High Court of Civil Appeals took an easy way out when they were put on notice that the Defendant-Respondent had already passed away at the point they delivered the judgement. It is rudimentary that in such an eventuality the proceedings become abated until such time substitution is effected. The court had only to direct the parties to substitute the deceased party and re-pronounce the judgement which step, regrettably, the learned judges were not bothered to take. Furthermore, as the High Court had overturned the decision of the District Court, the Defendants were deprived of their legal entitlement of pursuing the remedies that were available to them under the law. This case has taken a long and winding path from one Court to another due to the learned High Court Judges lightly brushing aside the application made before it to have the deceased Defendant substituted.

29. I note with dismay the observation made by the learned judges of the High Court in their order in refusing the application for substitution made by the son of the Defendant in spite of the fact that they were put on notice that the Defendant had passed away. The learned judges stated that "*the Registered Attorney-at-Law has represented and taken notice of the judgement on behalf of the Deceased*

Defendant." It is fundamental that with the demise of a party to a case, the proxy granted to an Attorney loses its force and in effect the Defendant could not have been represented by an 'instructing attorney'. Section 27(2) of the Civil Procedure Code clearly stipulates the circumstances under which an appointment of a registered attorney may lose its force. The said subsection makes it clear that, one such instance would be after an appointment under subsection (1) is filed, the appointment of the registered attorney shall only be in force until 'the client dies'.

30. In order to appreciate the arguments placed before us on behalf of the Plaintiff, for ease of reference I shall restate the sequence of the judgements delivered and orders made by different courts;

(i) Judgement delivered by the High Court of Civil Appeals dated 11th March 2010, in favour of the Plaintiff, overturning the judgment of the District Court.

(ii) Order made by the High Court of Civil Appeals dated 11th May 2010 refusing the application to substitute the deceased defendant.

(iii) Order made by the District Court of Badulla dated 6th January 2012 overruling the objection raised by the substituted-Defendants against executing the decree on the basis that there is no valid judgement.

(iv) Order made by the High Court of Civil Appeals dated 6th September 2012, refusing the leave to appeal application of the substituted-Defendants challenging the order of order of the learned District judge referred to (iii) above.

31. The present application was filed challenging the dismissal of the leave to appeal application made before the Provincial High Court of Civil Appeal Badulla [(iv) above] seeking to have the Bench Order by the District Court of Badulla [(iii) above] ordering the execution of writ following the Provincial High Court of Civil Appeal judgment dated 11th March 2010 [(ii) above]. The Plaintiff-Respondent to the present application contends that the instant application should be confined to reversing the said order dated 06th January 2012, and not extend to reversing the said judgment (dated 11th March 2010).

32. The Plaintiff relied on ***Candappa v. Ponnambalampillai*** (1993) 1 SLR 184 to state that a party cannot be permitted to present in appeal a case different from that presented to the lower court. In ***Candappa*** (*supra*) it was held that "*A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.*"

33. In the matter before us, I do not think the issue of reversing the judgement of the High Court of Civil Appeals (dated 11th March 2010) would arise, and as such there is no necessity to consider the arguments placed before this court on behalf of the Plaintiff, regarding the said issue.

34. For the reasons set out above, I hold that with the death of the original Defendant, the proceedings became abated and what proceeded thereafter has no legal effect. I hold further that a judgment entered against a dead party after the judgment is reserved but prior to the delivery of the same is abated and as such the judgement of the High Court of Civil Appeal dated 11th March 2011 has no effect in law. Accordingly, I answer the questions of law referred to in subparagraphs (i) and (ii) of paragraph 19 of the Petition referred to above in the affirmative. Accordingly, the appeal is allowed.

35. Upon perusal of the proceedings before the High Court of Civil Appeals, it is clear that the written submissions in connection with the appeal challenging the District Court judgement in DC L/752 had been filed on 28th October 2008 and the matter had been taken up for argument on 23rd July 2009. The arguments had been concluded on the same day and judgement was reserved. Not only the original Defendant had been alive but was also represented before the court. Thus, there is no question about his interest in the appeal being adequately safeguarded.

36. In the circumstances I make the following orders;

(a) The order made by the Uva High Court of Civil Appeals holden in Badulla dated 11.05.2010 in case No. UVA/HCCA/BDL/18/2001(F) refusing the application to effect substitution is hereby set aside.

(b) In the event an application for substitution is filed, the Uva High Court of Civil Appeals is directed to take all steps to effect the substitution after satisfying itself that the original Defendant in the case referred to in paragraph (a) above, in fact had passed away before the pronouncement of the judgement.

(c) After effecting the aforesaid substitution of the original Defendant, the Uva High Court of Civil Appeals is directed to repronounce the judgement of the case referred to in paragraph (a) above by the present judges of the Uva High Court of Civil Appeals.

(d) Order made by the Uva High Court of Civil Appeals dated 06.09.2012 in case No. UVA/HCCA/BDL/LA03/2012 is hereby set aside.

(e) With the re-pronouncement of the judgment as per paragraph (c) above, the learned District Judge of Badulla is free to consider according to law, any fresh application for enforcement of the decree.

JUDGE OF THE SUPREME COURT

Murdu N. B. Fernando PC, J.

I agree.

JUDGE OF THE SUPREME COURT

P. Padman Surasena J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution of The Democratic Socialist Republic of Sri Lanka

1. D.H. Liyanage,
   No. 654/1, Balagolla,
   Kengalle.

2. M. Asarudeen,
   No. 668/1A, Balagolla,
   Kengalle.

3. I.M. Kaleel,
   No. 668B, Balagolla,
   Kengalle.

PETITIONERS

SC/FR Application No. 338/2011

-Vs-

1. Mahaweli Authority of Sri Lanka.

2. D.M.C. Dissanayake, Director General

2A. Keerthi B. Kotagama, Director General.

3. Director-Lands

   The 1st to 3rd Respondents of;
   Mahaweli Authority of Sri Lanka,
   No. 500, T.B. Jayah Mawatha,
   Colombo 10.

4. Resident Project Manager – Victoria Project,
   Mahaweli Authority of Sri Lanka,
   Victoria Resident Project Manager's

Office,
Digana-Nilagama.

5. S.R.K. Aruppola,
Engineer in Charge,
Head Woks Administration Operation & Maintennance Division,
Mahaweli Authority of Sri Lanka,
Victoria, Gonagantenna,
Adhikarigama.

6. Janaka Bandara Tennekoon,
Hon. Minister of Lands and Land Development,
"Govijana Mandiraya",
No. 80/5, Rajamalwatta Lane,
Battaramulla.

6A. S.M. Chandrasena,
Hon. Minister of Land,
"Mihikatha Medura",
Land Secretariat,
No. 1200/6, Rajamalwatta Avenue,
Battaramulla.

6B. Harin Fernando,
Hon. Minister of Tourism and Land,
"Mihikatha Medura",
Land Secretariat,
No. 1200/6, Rajamalwatta Avenue,
Battaramulla.

7. Hon. Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

RESPONDENTS

BEFORE: Hon. Buwaneka Aluwihare, PC, J.
Hon. Kumudini Wickremasinghe, J.
Hon. Janak De Silva, J.

COUNSEL: Pulasthi Hewamanna with Ms. Fadhila Faroze for the Petitioners.

Ms. Yuresha De Silva, DSG for the Respondents.

ARGUED ON: 02.12.2022.

WRITTEN SUBMISSIONS: 13th January 2023 for the Petitioners.
28th April 2023 for the Respondents.

DECIDED ON: 31.10.2023.

Judgement

Aluwihare, PC, J,

The Facts

1) The 1st, 2nd and the 3rd Petitioners took up temporary residence at No. 654/1, Balagolla, Kengalle, No. 668/1A, Balagolla, Kengalle and No. 668B, Balagolla, Kengalle respectively between the years 1992 and 1994. They have not relocated to any other residence since then and are currently residing in the same. All of the aforementioned dwellings are situated in State lands belonging to the Victoria Reservoir Project, adjacent to the Reservoir. This fact is admitted and forms the basis of contention for the detailed submissions made by all parties in this case.

2) The Balagolla Division had been initially used for settling persons whose houses were acquired for the purpose of constructing the Victoria Reservoir. The Petitioners are 3, among 55 other Occupants of settlements which were added to the Balagolla settlement area and permitted to reside in the vicinity of the Division. The Petitioners annexed a map titled "Blocking Out Diagram – Pallekalle Estate – Balagolla Division", and this map demarcates the lots allocated to the Petitioners.

3) At various points of time, the Petitioners had made several pleas and requests to the 1st Respondent Authority (hereinafter referred to as the 'Mahaweli Authority)

seeking a plot of land to construct permanent housing. In response, the Mahaweli Authority informed the Petitioners by letter dated 30th May 2005 ('P1' in the brief), that they were requested to be present for an inquiry to regularise their residencies.

4) Pursuant to the above letter, a Land Kachcheri had been held on 17th June 2005 and on the same day, lands had been allocated to 298 individuals including the Petitioners. A separate list titled "අනවසර නියමානුකූල කිරීමේ නිදෙර්ශිත නාම ලේඛණය" [Recommended list of unsanctioned dwellings to be Regularised] ('P2' in the brief) was prepared and displayed around the Petitioners' neighbourhood. The list, comprising in total 55 individuals' names had also included the Petitioners' names. Per the list, the Petitioners had been granted the lots they were already in occupation.

5) In 2006, the Petitioners had constructed permanent houses in the lots granted and had made substantive improvements to the lands by obtaining electricity and water lines. The petitioners had also had lands they occupied surveyed in 2007 and the maps issued, with the specific demarcations and extent (20 Perches) of the plots have been produced ('P5(a)-(c)' in the brief). By letters dated April 2007, the Licensed Surveyor informed the Mahaweli Authorities that the survey conducted on the instructions of the Petitioners was completed ('P4' in the brief). Although the Petitioners had thereafter repeatedly inquired from the Respondent Authority regarding the regularisation of lands they occupied, no further steps had been taken by the Authority.

6) On or around the same time, the Petitioners became aware of the regularisation of other lands and residences which were published in P2. The Petitioners claimed to be aware that several officers of the Respondent Mahaweli Authority have taken up residence in lots of the Division. Specifically, the Petitioners claimed that the 2nd Respondent is living in one of those lands, and was, at the time of the application, constructing a large house therein. The petitioners also claimed to be aware that one of the lands in the Division was granted without a Land Kachcheri to a 'Police Constable Costa' who is related to a 'Linton Wijesinghe', a member of the Central Provincial Council.

7) On 23rd July 2008, by way of a letter ('P7'), the Petitioners were informed that;
   - they had been selected for regularisation of their residences;
   - they were required to contract the services of a Licensed Surveyor to survey the lands in order to facilitate an issuance of relevant permits; and
   - that the surveying of the lands had been delayed due to a shortage of surveyors on the part of the Authority.

   The Petitioners then informed the Authority that lands they occupied had already been surveyed.

8) Thereafter, on or around January 2011, an 'Application for Ejectment' had been filed in the Magistrate's Court of Kandy by the 5th Respondent, the Engineer in Charge, under Section 5 of the State Lands (Recovery of Possession) Act, No. 07 of 1979 in respect of the Petitioners. The relevant Case references are as follows;
   - Case No. 35033/11 against the 1st Petitioner
   - Case No. 35028/11 against the 2nd Petitioner
   - Case No. 33069/11 against the 3rd Petitioner

   In June and July 2011, the Magistrate's Court of Kandy issued Orders to eject the 2nd and 3rd Petitioners from their residences and at the time of this application, the 1st Petitioner stated that he bore a reasonable apprehension that an order for ejectment would be issued against him too.

9) On 7th August 2011, the Petitioners filed a petitioner in this Court, alleging the violation of their Fundamental Rights Guaranteed under Articles 12(1) and 14(1)(h) of the Constitution. This Court granted leave to proceed under Article 12(1) on 23rd September 2011 and *vide* Supreme Court Minutes dated 23.09.2011, cases instituted against the Petitioners were stayed until the determination of this case.

10) During the pendency of proceedings before this Court, the Respondents appraised the Court and the Petitioners of the possibility of offering alternative land in the Ambakote area, pursuant to the 'alternative relief' sought in the Petition. However, the Petitioners declined this offer [vide Journal Entries dated 10.11.2021 and 28.07.2021].

The Position of the Petitioners

11) The Petitioners contended that the Petitioners bore a legitimate expectation due to repeated assurances of the Mahaweli Authority that their residences would be regularised and acting on such expectation, the Petitioners set up permanent residence and made substantial improvements to their respective houses and lands. In such context, the Petitioners argued that the attempt to evict or eject the Petitioners was arbitrary, done for collateral purposes such as offering those lands to favoured individuals, and in a manner contrary to principles of natural justice. The Petitioners submitted that the conduct of the Respondents so impugned violated the Petitioners Fundamental Right to equal protection of the Law guaranteed under Article 12(1).

12) Moreover, the learned Counsel for the Petitioners argued that the right to be adequately housed, including having secure tenure, right to respect for home and family life are crucial to the dignity of the Petitioners and are therefore rights which would fall within the ambit of rights to be safeguarded by Article 12(1).

13) The Petitioners contended that the move to eject the Petitioners from their residences was contrary to principles of natural justice and the legitimate expectation borne by the Petitioners due to repeated and consistent assurances of the Mahaweli Authority, and if allowed, would cause great injustice to the Petitioners and also (relying on the judgement of ***Dayarathna v. Minister of Health and Indigenous Medicine*** **[1999] 1 SLR 393**) amount to a violation of their Fundamental Right to equal protection of Law guaranteed under Article 12(1).

14) Adverting to the jurisprudential evolution of the concept of 'equal protection', and relying on the decisions of ***Karunathilaka v. Jayalath de Silva*** **[2003] 1 SLR 35** and ***Wijerathna v. Sri Lanka Ports Authority*****, S.C F.R 256/2017, S.C Minutes of 11.12.2020**, the learned Counsel noted that it is now understood that reasonableness and fairness are conceptual elements the court may take cognizance of when considering an alleged violation of Article 12(1).

15) It was the submission of the Petitioners therefore that, in considering this application, the Court would be mindful of the injustice caused to the Petitioners by the Respondents and also that relief could be granted in respect of any arbitrary or mala fide exercise of power vide ***Rajavarothiam Sampanthan & Others v. The Attorney General & Others***, SC FR 351-361/2018, S.C Minutes of 13.12.2018.

The Position of the Respondents

16) The Respondents submitted that the Petitioners were and continue to remain in unauthorised occupation of State Land and the Petitioners have converted the temporary residences into permanent residences prior to them being issued with any Permit, Grant or Document permitting such occupation.

17) The Respondents contend that the said residences were illegal as the construction of houses on private lands adjacent to Reservoirs is monitored and are subject to guidelines ('4R3') and in terms of the Regulations promulgated under Section 54 of the Mahaweli Authority Act of Sri Lanka ('4R1') vide Section 7.7(b), construction of buildings and structures in and around a Reservoir without prior approval is prohibited.

18) It is also the position of the Respondents that although a Land Kachcheri was held, and a List was prepared, no steps were taken to issue 'Permits, Grants or any written authority' regularising the unauthorised occupation of the Petitioners.

19) The Respondents claimed that the move to eject the Petitioners was taken pursuant to, and in deference to a judgement of this Court. The said judgement being ***Environmental Foundation Limited & Others v. Mahaweli Authority of Sri Lanka & Others*** [2010] 1 SLR 1. This Fundamental Rights Application was filed in the Public Interest complaining of a violation of Article 12(1) of the Constitution by the alienation of the lands and the granting of permission for construction of buildings on lands in an arbitrary and ad hoc manner in violation of the applicable legal provisions and guidelines. The said lands were within the

"Special Area" declared in terms of Section 3(1) of the Mahaweli Authority Act No. 23 of 1979 and also fell within the 100-metre reservation from the full supply level of the Victoria Reservoir. In this case, having upheld a violation of Article 12(1) on the part of the Mahaweli Authority, the Court made the directions listed below.

"(b) Court directs that a proper investigation be conducted by the 2nd Respondent and suitable action be taken against the officials responsible for the unauthorized alienations and the granting of permission to construct buildings in violation of the applicable legal provisions,

(c) Court holds that no further allocation of lands in the subject area be made without following the procedure laid down under Part IV C of the National Environmental Act No. 47 of 1980, and the regulations made their under,

(d) Court also holds that the guidelines contained in the document annexed marked as "P12" to the petition be followed in the future when granting permission for the construction of residential buildings".

20) In the same judgement [supra], this Court had also observed that the Mahaweli Authority had failed to comply with Guidelines issued on 18.06.1997 for the Construction of Houses in Private Lands [4R3] formulated by a Special Committee appointed by the Director General of the Mahaweli Authority. Per the Guidelines, there should be a minimum land area of around 20 meters between two houses. It was also observed in the judgement that the Hon. Attorney General had advised the Director General of the Mahaweli Authority that the Director General has no legal authority to permit any construction in derogation of these guidelines and that the alienation of lands and the granting of permission to construct housing as it pertained to that case, had been done in violation of the guidelines.

21) Another matter which was addressed by this Court in the aforementioned judgement was that the regulations promulgated in terms of Section 23Z of the National Environment Act as amended had not been complied with. The

regulations contain a schedule of projects for which approval is required under Part IV of the Act and defines the term 'reservoir' as follows:

"reservoir" means an expanse of water resulting from manmade constructions across a river or a stream to store or regulate water. Its "environs" will include that area extending up to a distance of 100 meters from full supply of the reservoir inclusive of all islands falling within the reservoir.

Subsequently, the regulations had been amended by Gazette No. 859/14 dated 23.12.1995 to include a 100-meter boundary from a lake as well.

"*within 100 meters from the high flood level contour of, or within, a public lake as defined in the Crown Lands Ordinance including those declared under Section 71 of the said ordinance*."

22) The Respondents averred that the steps taken to evict the Petitioners were taken pursuant to cognizance of the aforementioned judgment which highlighted the failure on the part of the Mahaweli Authority to comply with the provisions of the Mahaweli Authority of Sri Lanka Act, the National Environment Act and the Regulations promulgated under the Act to alienation of State Land situated within 100-meter reservation adjacent to the Victoria Reservoir.

23) The Respondents also relied on the interpretation provided to 'unauthorised possession or occupation' in the State Lands (Recovery of Possession) Act to substantiate the contention that the Petitioners were residing illegally, in a manner liable to being issued a Quit Notice in terms of Section 3 of the Act, and if such notice is not complied, eviction proceedings being instituted under Section 5 of the Act. Section 18 of the Act defines 'unauthorised possession or occupation' as follows:

"Except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includes possession or occupation by encroachment upon State Land."

24) The Respondents also submitted that per the State Lands (Recovery of Possession) Act, a person on whom the quit notice is issued bears an opportunity to appear and show cause to establish lawful possession or occupation of State Land based on a valid permit or other written authority of the State granted in accordance with any written law. Essentially, it was the submission of the learned Deputy Solicitor General that without a valid permit or other written authority, the Petitioners were in unlawful occupation of state land and were therefore liable to be ejected in the manner prescribed by the Act, and if the Petitioners wished to demonstrate a contrary position, they may do so as prescribed by the Act, before the learned Magistrate. The Respondents also relied on the judgements of *Nirmal Paper Converters (Pvt.) Ltd v. Sri Lanka Ports Authority & Another* [1993] 1 SLR 219, *Aravindakumar v. Alwis & Others* [2007] 1 SLR 316, *Senanayake v. Damunupola* [1982] 2 SLR 621 and *Muhandiram v. Chairman, Janatha Estate Development Board* [1992] 1 SLR 110 to further substantiate their position.

25) Furthermore, responding to the Petitioners' claim that while they were not issued permanent permits, other persons, one 'Police Constable Costa' who is related to a 'Linton Wijesinghe', a member of the Central Provincial Council and the 2nd Respondent, the Director General of the Mahaweli Authority, the 4th Respondent, in his affidavit, states that the Petitioners were not issued with temporary permits, the Petitioners were 'squatters' and that the permits issued to the 2nd Respondent and Police Constable Costa were by way of the Crown Lands Ordinance ad the State Lands Ordinance respectively.

Determination

26) The Petitioners' complaint is primarily twofold. First, the Petitioners complain that despite repeated, consistent assurances, both verbal and written, the Mahaweli Authority reneged on such assurances and instead, attempted to evict the Petitioners from their residences. Secondly, that the Petitioners were treated differently in that lands they occupied were not regularised while other the lands in the same neighbourhood were regularised, and such lands are now occupied by a 'Police Constable Costa' and an Officer of the Respondent Mahaweli Authority.

27) Upon examining the provisions of the State Lands (Recovery of Possession) Act, I am of the opinion that the conduct of the Respondents in attempting to evict the Petitioners was not unlawful. The petitioners were unlawful occupants of State Land per the scheme of the Act and the Respondents were lawfully entitled to seek ejectment per Section 5 of the Act.

28) The Learned Counsel for the Petitioners argued that Article 12(1) encompasses a fundamental right to secure housing. I do not think a fundamental right to 'secure housing' rests within the ambit of rights offered by Article 12(1). A qualified right to remain housed without arbitrarily, mala fide, unlawful interference or hindrance may however exist within the equal protection the law guarantees under Article 12(1) of our Constitution. In that regard, I cannot more strenuously state how greatly a person's state of residence affects their dignity. Every person aspires to be secure in their residence devoid of compulsion to relocate. Our lives are invariably defined by where we reside, and this truth forms the core of the Petitioners' complaint. For all intents and purposes, these families considered these lands their home. It is therefore imperative that this Court examines whether the Petitioners were sought to be evicted arbitrarily, in bad faith, unlawfully or in a manifestly unjust manner.

29) I must admit that the Court is placed in a difficult position. On the one hand, the Respondents have not traversed the law in attempting to evict the Petitioners, and they claim to have undertaken such action in deference to a judgement of this Court. On the other hand, despite the lawfulness of such attempt, the Petitioners' complaint is remarkably genuine and tragic. The Petitioners were first told by way of a published list [P1] that there lands have been selected for regularisation, giving rise to the expectation that they would be able to securely reside in the lands they occupied and thereafter, upon seeking persistent clarifications, they were repeatedly assured that there would be no cause for insecurity, their residences would be regularised, and the evident delay was due to an insufficiency of resources on the part of the Authority. This is most evident in the letter dated 23rd July 2008 'P7'. The letter is reproduced here to demonstrate the gravity of the assurance given.

P7

මගේ අංකය: විආර්එස්/01/1707
ශ්‍රී ලංකා මහවැලි අධිකාරිය,
නේවාසික ව්‍යාපාර කළමනාකාර කාර්යාලය,
වික්ටෝරියා ව්‍යාපෘතිය,
දිගත - තිලගම.

2008.[illegible]....

[illegible]...මයා/මිය,
[illegible]
[illegible]....
[illegible]...

මහත්මයාණෙනි/මහත්මියනි,

අනවසර තියමානුකූල කිරීම.

ඔබ විසින් අනවසරයෙන් භුක්තිවිඳින ලද [illegible]... ජනාවාසයේ පර: [illegible] 15/20 ක් වූ බිම් කැබැල්ල සඳහා බලපත්‍රයක් ලබාදීමට 2005 වර්ෂයේ පැවැති අනවසර තියමානුකූල කිරීමේ පරීක්ෂණයෙන් ඔබ තෝරාගෙන ඇත. එ අනුව බලපත්‍රය ලබාදීමට පෙර ඉඩම් මැන සැලසුම් සකස් කළයුතුව ඇති නමුත් මෙම කාර්යාලයේ මිතිඳෝරුවන් තොමැති බැවින් මෙම කාර්යය ප්‍රමාදවී තිබේ. එබැවින් බලයලත් මිතිඳෝරුවන් මඟින් ඉඩම් මැන සැලසුම් සකස් කිරීමට යන වියදම් ඔබ දැරීමට එකඟ නම් එ බව මෙම ලිපිය ලැබී සතියක් ඇතුලත ලිපියක් මඟින් දන්වා එවන මෙන් කාරුණිකව දන්වා සිටිමි.

ස්තුතියි.

මෙයට - විශ්වාසී,

(ජේ.එල්.එච්.අයි.කුමාරිහාමි)
නේවාසික ව්‍යාපාර කළමනාකාර,
වික්ටෝරියා ව්‍යාපෘතිය.

ගාස/අතු.

15 AUG 2011

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for Petitioners

30) Acting upon the mentioned assurances, the Petitioners took steps to enhance their quality of life by obtaining a secure supply of water and electricity and

making substantial improvements to their houses. Subsequently, without forewarning, the Petitioners were issued a Quit Notice and ordered to remove themselves from their homes.

31) It is of import that P7 is dated 23rd July 2008. The Judgement in ***Environmental Foundation Limited & Others v. Mahaweli Authority of Sri Lanka & Others*** **[2010] 1 SLR 1** was delivered on 17th June 2010 (*vide* S.C Minutes of 17.06.2010), and the Petitioners were sought to be ejected from the lands they occupied in January of 2011. Therefore, I find the submission of the Respondents-that the move to eject the Petitioners was taken pursuant to and in deference to the aforementioned judgement of this Court, compelling, and considering the lack of any material impeaching the claim, on a balance of probabilities, acceptable.

32) However, this submission expressly admits that the Mahaweli Authority had not been complying with the law and relevant regulations until the pronouncement of the said judgement. Therefore, it logically follows that the representation made to the Petitioners by way of P7 too was ill-formed in that it was based on an illegality. Put simply, no officer of the Respondent Mahaweli Authority was legally entitled to approve or convey any assurance of such approval of the regularisation of lands or structures constructed in violation of the 100-meter reservation regulation.

33) A crucial point of law is to be addressed here. What requires adjudication is whether the verbal and written assurances given to the Petitioners gave rise to a legitimate expectation on the part of the Petitioners that lands they occupied would be regularised. It is the submission of the Petitioners that the assurances of the Respondents gave rise to a substantive legitimate expectation that the lands they occupied would be regularised and they would be issued permits. However, it is now settled in our law that a legitimate expectation cannot arise upon an illegality and that a representation which in itself is *ultra vires* cannot bind a public authority. His Lordship Sarath N. Silva, CJ in ***Tokyo Cement (Company) Ltd Vs. Director General of Customs*** **[2005] BLR 24 (at p.27-28)** cited the judgement of the Court of Appeal of England in ***Regina Vs. Secretary of State for***

Education and Employment, Ex parte Begbie [WLR 2000 Vol. 1, p. 115] which held that "*courts would not give effect to a legitimate expectation if it would require a public authority to act contrary to the terms of the statute*". This approach was subsequently followed by the Court of Appeal in *Ceylon Agro-Industries Ltd Vs. Director General of Customs* [CA Writ 622/2009] C.A Minutes14.02.2011 at p.8, *Manufacturers (Pvt) Ltd Vs L.K.G Gunawardena & Others* [CA /Writ/242/2015] C.A Minutes 15.12.2016 at pp.6-7 and in *Pushparaja Vs. UC Of Nawalapitiya* [CA PHC No. 161/2008] C.A Minutes15.03.2019 at p.6. Therefore, it is my considered opinion that P7 and any other verbal assurances given to the Petitioners to the effect that the lands occupied by the Petitioners would be regularized and the Petitioners would be granted permits was devoid of any force in law, as it was *ultra vires* from inception.

34) It is the bounden duty of the Court to adjudicate a matter with complete fidelity to the law and the set of facts or circumstances germane to the case before it. Assuming an authority not bestowed on me and deviating from established principles of our law in order to disseminate what I consider just per the context of the dispute, beyond the set of circumstances presented for adjudication would be most improper, and unjust. If Justice must be done, and must be seen to be done, parties to proceedings and their advocates cannot be uncertain of the law at the time they advocate their case. The success or failure of the legal arguments of Counsel irreparably affect the rights of the parties they represent, and any deviation from the settled understanding of this Court, in order to accommodate the grievances of the Petitioners beyond the scope of what was lawful would invariably lead to a debate on what may not give rise to a legitimate expectation law. Hence, in my view, I am not permitted to determine the rights and entitlements of the present parties in view of a larger social context, without regard to the confines of the law. Such a pursuit would unfailingly impede Justice. This does not however mean that the Court should restrain itself in a manner which renders itself ineffectual in the face of grave injustice.

35) It is now evident that the 1st Respondent (the Mahaweli Authority) had made several representations which were inconsistent with the laws and regulations

applicable to the subject matter. To permit such disregard for the law by public authorities, who are beneficiaries and trustees of public resources would, in my view be an abdication of this Court's duty. Therefore, while I do not hold that the Petitioners bore a legitimate expectation of being granted permits to occupy the lands they presently occupy, I hold that the Mahaweli Authority has been remiss in permitting unlawful representations to be made. These representations have led to the Petitioners harbouring hopes and expectations which, had they been clarified in the first instance, the Petitioners would not have borne.

36) The Petitioners' central grievance before this Court is that the failure on the part of the Mahaweli Authority to give effect to the assurances given, breached their legitimate expectations and that constitutes a violation of Article 12(1) of the Constitution and that the Respondents were attempting to unlawfully evict the Petitioners in violation of their Fundamental Rights. In the preceding paragraphs, I have demonstrated how a legitimate expectation cannot arise upon an *ultra vires* assurance or representation. Therefore, it follows that without a 'legitimate expectation' to be breached, the assurances of the Respondents, however misconceived, or the failure to give effect to them, could not have violated the Petitioners' fundamental rights to equal protection of the law and equality before the law guaranteed under Article 12(1). Furthermore, I observe that since the Respondents had complied with the statutory scheme imposed by the State Lands (Recovery of Possession) Act, they have not acted unlawfully in attempting to evict the Petitioners. Therefore, I hold that the Respondents have not violated the fundamental rights of the Petitioners.

37) This Court is vested with the jurisdiction to grant "such relief or make such directions as it may deem just and equitable in the circumstance" [*vide* Article 126(4)] and it is now understood that the Court is not constrained in its competence by the finding of a violation of a fundamental right in order to award such relief [*vide* ***Noble Resources International Pte Limited Vs. Hon. Ranjith Siyambalapitiya, Minister of Power and Renewable Energy & Others***, **S.C F.R No. 394/2015, S.C Minutes 24.06.2016**]. What is 'just and equitable' cannot surely be interpreted to include what may be contrary to Stature, but it does include, in my view, efforts to alleviate persons from unjustly bearing the consequences of

unreasonable, arbitrary, or unlawful conduct of Public Authorities. I am conscious that the 1st Respondent authority had provided *ultra vires* assurances on a matter so significant as a person's housing.

38) In view of the above, and for or all the reasons enumerated in the preceding analysis, I direct the 1st Respondent Authority to once again offer alternative lands to the Petitioners for relocation, pursuant to the 'alternative relief' sought in the Petition. Should the Petitioners choose to accept such relief, the 1st Respondent must direct its officers and personnel to facilitate the granting of any permits lawfully, per the requirements and stipulations of the National Environmental Act and all the regulations promulgated therein. In the circumstances, I make order retracting the stay-order issued *vide* Supreme Court Minutes dated 23.09.2011 on the proceedings of the Magistrate's Court of Kandy in the following cases:

- Case No. 35033/11 against the 1st Petitioner
- Case No. 35028/11 against the 2nd Petitioner
- Case No. 33069/11 against the 3rd Petitioner.

A violation of fundamental rights has not been established.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

AND NOW

SC/Appeal/ 144/2019

SC (HCCA) LA/58/2019

Civil Appellate High Court No:
EP/HCCA/TCO/FA208/17

Leave to Appeal Application No:
EP/HCCA/LA/39/16

DC Muttur Case No:
DC SPL/138/16

In the matter of an application for substitution in the place of deceased 4th Defendant-Respondent-Respondent

Ven. Aludeniye Subodhi Thero,
Chief Incumbent,
Seruwila Mangala Raja Maha Viharaya,
Seruwila.

Party sought to be substituted in place of the deceased 4th Defendant-Respondent-Respondent Ven. Munhene Meththarama Thero.

PETITIONER

Vs.

1. Ven. Kotapola Amarakiththi Thero,
   Seruwila Buddhist Center,
   Shanthi Foundation, Bauddhaloka Mw,
   Colombo 07.

1st DEFENDANT-PETITIONER-APPELLANT-RESPONDENT

2. R.P. Sooriyapperuma,
   Chairman,
   Seruwila Mangala Maha
   Chaithyawardena Samithiya,
   Seruwila
   And
   No. 318/8, Shanthiwatta, Siyambalape.

3. G.P. Mataraarachchi,
   Secretary,
   Seruwila Mangala Maha
   Chaithyawardena Samithiya,
   Seruwila
   And
   No. 46, Madigodallawatta, Ruwanwella.

4. Liyanage Jayathunge Perera,
   Co-Secretary,
   Seruwila Mangala Maha
   Chaithyawardena Samithiya,
   Seruwila
   And
   No 330/30, Pulliadi, Trincomalee.

PLAINTIFF-RESPONDENT-
RESPONDENT-RESPONDENTS

1. Kapugollewe Anandakiththi Thero,
   Seruwila Mangala Raja Maha Viharaya,
   Seruwila
   And

Jayasumanaramaya, Trincomalee.

2. Kithalagama Dhammalankara Thero,
Seruwila Mangala Raja Maha Viharaya,
Seruwila
And
Seruwila Buddhist Center,
Shanthi Foundation, Bauddhaloka Mw,
Colombo 07.

2nd and 3rd DEFENDANT-PETITIONER- RESPONDENT - RESPONDENTS

Before: Buwaneka Aluwihare PC J
Vijith K. Malalgoda PC J
Mahinda Samayawardhena J

Counsel: Manohara de Silva PC with Harithriya Kumarage and Kaveesha Gamage instructed by Anusha Perusinghe for the 1st Defendant-Petitioner-Petitioner.

Sanjeewa Jayawardena PC instructed by Amila Kumara for the Plaintiff-Respondent-Respondent.

Chathura Galhena with Dharani Weerasinghe instructed by Continental Law Associates for the 2nd and 3rd Defendant-Petitioner-Respondents.

Palitha Kumarasinghe PC with Sanjeewa Dasanayake for the party sought to be substituted in place of the deceased 4th Defendant-Respondent-Respondent.

Written Submissions: Written submissions of the Plaintiff-Respondent-Respondents on 03.01.2023.

Written submissions of the 1st Defendant-Petitioner-Appellant-Petitioner on 16.12.2022.

Written Submissions of the Petitioner sought to be substituted in place of the deceased 4th Defendant-Respondent-Respondent on 15.12.2022.

Considered on: 09.01.2023

Decided on: 31.10.2023

ORDER

Aluwihare PC. J,

The present order is concerned with whether the Petitioner, Ven. Aludeniye Subodhi Thero can be substituted in the room and place of the deceased 4th Defendant-Respondent-Respondent, Ven. Munhene Meththarama Thero (hereinafter referred to as the 4th Defendant) in the instant case. The 4th Defendant was the Viharadhipathi (Chief Incumbent) of the Seruwila Mangala Raja Maha Viharaya in Trincomalee until his expiration on 11th May 2021.

The Petitioner is purporting to be the 4th Defendant's successor as the Viharadhipathi, having been appointed by a group of laymen representing the Seruwila Mangala Maha Chaithyawardena Society (hereinafter the 'Chaithyawardena Society'). Whereas the 1st Defendant-Petitioner-Appellant-Respondent (hereinafter the 1st Respondent) claims that he was appointed as the Viharadhipathi by the Chief Prelate of the Kalyanawansa Sect of the Amarapura Chapter as per the powers vested on the

Chief Prelate in terms of the Constitution of the Kalyanawansa Sect (as supported by letter of the Commissioner General of Buddhist Affairs marked 'D2A' which states that the appointment of the 1st Respondent was accepted by the Commissioner General).

The main application of the instant matter arises from the following events. When Ven. Seruwila Saranakiththi Thero, in the role of Viharadhipathi, was ill and hospitalized for treatment, the 1st Respondent along with the 2nd and 3rd Defendant-Petitioner-Respondents (hereinafter the 2nd and 3rd Defendants) attempted to interfere in the administration of the Seruwila Mangala Raja Maha Viharaya without a proper appointment to the said Chief Incumbency and regardless of the fact that the Viharadhipathi was alive.

In order to maintain peace within the temple, three key office bearers of the Chaithyawardena Society instituted an action bearing No. SPL/138/16 in the District Court of Muttur praying for permanent injunction, interim injunction and enjoining order. The 1st to 4th Defendants named in the said application were the pupils of Ven. Seruwila Saranakiththi Thero. The now deceased Ven. Munhene Meththarama Thero was named as the 4th Defendant while Ven. Seruwila Saranakiththi Thero was named as the 5th Defendant.

In the said action, the District Court of Muttur issued an enjoining order against the 1st to 4th Defendants restraining them from interfering in the administrative affairs of the Seruwila Mangala Raja Maha Viharaya. Before summons could be served, the Viharadhipathi, Ven. Seruwila Saranakiththi Thero [who was cited as the 5th Defendant] passed away on or about 02nd May 2016 and the Chaithyawardena Society consisting of the 1st and 2nd Plaintiffs appointed the 4th Defendant as the Viharadhipathi and communicated the fact of the appointment to the Chief Prelate of the Kalyanawansa Sect. Although the Plaintiffs had originally sought relief against the 4th Defendant, the Plaintiffs moved to withdraw the enjoining order against the 4th Defendant, facilitating such appointment. The matter proceeded against the rest of the Defendants and an interim injunction was issued against the 1st to 3rd Defendants on 19th October 2016.

Challenging the aforementioned order of the District Court of Muttur, the 1st to 3rd Defendants filed a leave to appeal application in the Civil Appellate High Court of the Eastern Province holden in Trincomalee. The Civil Appellate High Court in turn, affirmed the interim order of the District Court. Being aggrieved thereby, the 1st Respondent filed a leave to appeal application before the Supreme Court. Leave to appeal being granted, the appeal was fixed for hearing. While the appeal was pending the 4th Defendant passed away on or about 11th May 2021 and the current Petitioner, Ven. Aludeniye Subodhi Thero sought to be substituted in the place of the deceased 4th Defendant.

At the time of the delivery of the High Court of Civil Appeal decision on 11th January 2019 the 4th Defendant had acceded to the role of the Viharadhipathi having been appointed in that role by the previous Viharadhipathi, 5th Defendant by virtue of Deed No. 3011 dated 11th September 2006. His appointment as the Viharadhipathi, however, had been subsequently cancelled. Challenging the cancellation, the 4th Defendant had filed action in the District Court of Colombo against the 5th Defendant. (An interim injunction had been issued against the cancellation by the District Court of Colombo.

The substitution of the Petitioner in the room and place of the deceased 4th Defendant in the present matter was objected to by the Respondents alleging that the Petitioner, Ven. Aludeniye Subodhi Thero was attempting to get undue recognition of the Supreme Court as the Viharadhipathi of the Seruwila Mangala Raja Maha Viharaya. The substance of the objections was mainly that there is no need for the substitution of the Petitioner as his appointment as Viharadhipathi is unacceptable being contrary to the existing procedure and, that the Petitioner is not a party that stands to be affected by the interim injunction issued by the District Court of Muttur.

The 1st Respondent stated that the three appointments of Viharadhipathi made in the years 1984, 2016 and 2021 were effected either through a Deed of Appointment or by resorting to the procedure set out in the relevant provisions of the Constitution of the Amarapura Chapter. The 1st Respondent contends that as per the Constitution of

the Amarapura Chapter the Chaithyawardena society is merely empowered to make a recommendation to the Chief Prelate of the Kalyanawansa Sect, which can then be considered or disregarded at the discretion of the Chief Prelate. The appointment is at the sole discretion of the Chief Prelate. The 1st Respondent further stated that the purported appointment of the Petitioner has received neither the required administrative recognition nor recognition by the *Maha Sangha*.

Furthermore, the 1st Respondent submitted that the interim injunctions which are the subject matter of the present appeal were issued against the 1st to 3rd Defendants and that the deceased 4th Defendant has never been a party affected or benefitted by the said order. It was further contended that the 4th Defendant was named in the personal capacity in the actions before the District Court of Muttur and not in the capacity of the Viharadhipathi of the Seruwila Mangala Maha Viharaya and therefore any successor to the office of the Viharadhipathi of the said Viharaya has no right to be substituted.

The Petitioner, on the contrary, stated that he was appointed by the Chaithyawardena Society in accordance with the temple tradition and/or custom of appointing the Viharadhipathi of the Seruwila Mangala Raja Maha Viharaya. The claim of the Petitioner is that the relevant provisions of the Constitution of the Kalyanawansa Sect are such as to allow the Chaithyawardena Society to appoint a Viharadhipathi of their choice.

Furthermore, the Petitioner submitted that as the District Court application principally related to the management, control and decision making of the Chaithyawardena Society in respect of the Seruwila Mangala Raja Maha Viharaya and since the deceased 4th Defendant was the then Viharadhipathi, it is necessary to substitute his successor in office i.e. the Petitioner, as the present Viharadhipathi, for the purpose of prosecuting the present appeal as well as in the interests of justice.

It was further submitted that any order made by the Supreme Court substituting the Petitioner can no way be construed as a judicial pronouncement of the Viharadhipathiship as alleged by the 1st Respondent and that the said question is a

different cause of action for a different application. The Petitioner brought to the notice of this court that in fact such an application, bearing no. DSP 145/2021, has been instituted in the District Court of Colombo by the Petitioner. It was emphasized that the present substitution is intended for the limited purpose of prosecuting the appeal.

The context of the matter and the contentions of the parties are such, and what remains to be seen is whether the substitution sought by the Petitioner can be allowed. Section 760A of the Civil Procedure Code read with Rule 38 of the Supreme Court Rules 1990 makes provision for the substitution of parties in appeals in civil matters.

Section 760A of the Civil Procedure Code states that "*Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective, by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court is the proper person to be substituted or entered on the record in the place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid.*"

Rule 38 of the Supreme Court rules states that "*The Supreme Court may, on application in that behalf made by any person interested, or ex mero motu, require such applicant or the petitioner or appellant, as the case may be, to place before the Court sufficient materials to establish who is the proper person to be substituted or entered on the record in place of, or in addition to the party who had died or undergone a change of status;…*"

Upon a plain reading of Rule 38, it is evident that any person interested can make an application to be substituted in the place of the person who has died, and that determining who the proper person to be substituted is at the discretion of the court. As reiterated in ***Chandana Hewavitharane v. Urban Development Authority*** (*2005*) 2 SLR 107 at page 110, by Rule 38, the court is given the discretion to determine who the proper person to be substituted is. There is no requirement for a person making

such application to be a legal heir, administrator, or executor, as the section envisages applications "*by any person interested*."

Furthermore, substitution is in the interests of the continuation of the case and plays no role in deciding the rights of the parties. In the Court of Appeal decisions of ***Kusumawathie v. Kanthi*** (2004) 1 SLR 350, at page 354, and ***Careem v. Sivasubramaniam and Another*** (2003) (2) SLR 197 which are relevant to the case at hand, it was observed that substitution is solely for the purpose of ensuring the continuation of the appeal after the change of status and not to decide the rights of the parties. It was submitted on behalf of the 1st Respondent that where there are more Defendants than one and one of them dies and if the cause of action survives against the other Defendants alone, the Plaintiff can continue the action without bringing in the legal representative (*vide* ***Duhilanomal and Others v. Mahakanda Housing Company Limited*** (19 82) 2 SLR 504).

In the present case, the 1st Respondent avers that Rule 38 cannot be applied to make a mandatory substitution since the case record will not become defective by the demise of the 4th Defendant who has been named as a party for the reason of notice, who is neither a beneficiary nor an affected party by the interim injunctions canvassed before the Supreme Court. However, even though the case record does not become defective by the demise of the 4th Defendant it is necessary to consider other reasons that warrant the substitution of the Petitioner in place of the deceased 4th Defendant.

The 1st Respondent submitted that in an action filed in the personal capacity the successor to such person's office need not be substituted. It is pertinent to note, however, that after the death of the 5th Defendant Viharadhipathi Thero, the 4th Defendant has, in fact, been considered in the capacity of the Viharadhipathi rather than in his personal capacity before the Doctrict Court. This was indicated by the Motion dated 15th May 2016 by which the Plaintiffs had informed the District Court that they will not proceed against the 4th Defendant as he had become the Viharadhipathi. Therefore, the Plaintiffs considering it necessary to make the

incumbent Viharadhipathi a party to the action, following his demise there is no impediment for his successor to be substituted in the capacity of the Viharadhipathi.

The District Court case DC SPL/138/16 sought to be appealed against, principally relates to the interference in the management and the affairs of the Seruwila Mangala Maha Viharaya. In ***Dheerananda Thero v. Ratnasara Thero*** 60 NLR 7 at page 9, it was observed that "*the temple and the temporalities,… by operation of law, belong to the Viharadipathi of the temple.*" As the management, control and administration of the Seruwila Mangala Raja Maha Viharaya and its temporalities vests with the Viharadhipathi, an action relating to the interference with the management and affairs of the temple can hardly be said not to have an impact on the Viharadhipathi in his official capacity.

We are inclined to override the contention of the 1st Respondent that the 4th Defendant has never been a party affected or benefited by the issuance of the interim injunctions against the 1st to 3rd Defendants. For the limited purpose of substitution, we take heed of the fact that, on the face of it, it seems that the Petitioner has *de facto* discharged certain functions of the Viharadhipathi, following the demise of the 4th Defendant (as per the souvenir issued for the *Katina Pinkama* 2021 marked 'X1'). The present matter, arising from the said District Court of Muttur cases, will have an impact on the management and the affairs of the Seruwila Mangala Maha Viharaya. Therefore, as the outcome of the appeal before the Supreme Court will affect the Petitioner in the role of purported Viharadhipathi succeeding the 4th Defendant, and in light of the application for substitution made by the Petitioner it will serve the interests of justice to allow the Petitioner to represent his interest in the matter.

While it is not mandatory to make a substitution, whether to make a substitution or not is at the discretion of the court. This is either *ex mero motu* or by consideration of an application for substitution made by any person interested (*vide* Rule 38 of the Supreme Court Rules) As set out in ***Chandana Hewavitharane v. Urban Development Authority*** (*supra*) Rule 38 confers on the Court the discretion to determine who the proper person to be substituted is. As there is no identifiable impediment to the

continuation of the matter by the impugned substitution, and in view of the application to be substituted made by the Petitioner, it is in the interests of justice to substitute the Petitioner in the place of the deceased 4th Defendant.

It is to be noted that the substitution of the present Petitioner is not in any way a judicial pronouncement on the legality or otherwise of the appointment to Viharadhipathiship of the Petitioner, Ven. Aludeniye Subodhi Thero.

Accordingly, the application for substitution as pleaded in the instant application is allowed and the Petitioner is directed to file an amended caption within 3 weeks from today, with notice to other parties.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda PC

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution read with the Supreme Court Rules of 1990 and Section 5(2) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996.

Jaqa Lanka International (Pvt) Ltd
No. 46/1, Fife Road,
Colombo 05.

Petitioner

SC. APPEAL 50/A/2013
SC/(CHC) Appeal/50/2013
HC (Civil) 4/2008/CO

-Vs

Bank of Ceylon
No. 04, Bank of Ceylon Mawatha,
Colombo 01.

Respondent

AND NOW BETWEEN

Bank of Ceylon
Formerly at No. 04, Bank of Ceylon Mawatha, Colombo 01
And presently at, 'BOC Square'
No. 01, Bank of Ceylon Mawatha,
Colombo 01

Respondent-Petitioner-Appellant

-Vs-

Jaqa Lanka International (Pvt) Ltd
No. 46/1, Fife Road,
Colombo 05.

Petitioner-Respondent

BEFORE: Hon. Buwaneka Aluwihare, PC, J.
Hon. Murdu N.B. Fernando, PC, J.
Hon. Yasantha Kodagoda, PC, J.

COUNSEL: Milinda Gunetilleke, ASG, PC with Ms. N. N. P. Sandeepani for the Respondent-Appellant.
Avindra Rodrigo, PC with Ms. Nishika Fonseka instructed by M.J.S. Fonseka for the Petitioner-Respondent.

ARGUED ON: 07.02.2023.

WRITTEN SUBMISSIONS: Respondent-Petitioner-Appellant on 19.11.2013 and 24.08.2018
Petitioner-Respondent on14.06.2018 and 27.02.2023

DECIDED ON: 31.10.2023.

Judgement

Aluwihare, PC, J.,

1) This is an appeal against an Order of the Commercial High Court of the Western Province holden in Colombo, relating to the winding up and liquidation of a company, and payment of its Creditors according to their character. Before examining the questions of law, I find it prudent to note the factual matrix of this case.

The Facts

2) The Petitioner-Respondent (hereinafter referred to as the Respondent) had obtained five banking facilities from the Respondent-Petitioner-Appellant Bank (hereinafter referred to as the Appellant) including an overdraft facility, a term loan, a hypothecation loan and a trust receipt. The overdraft facility for USD 40,000 had been secured by way of mortgage over leasehold property of a Factory Building and a Corporate Guarantee. For that purpose, a Mortgage Bond bearing No. 443/219 dated 06.12.1990 and a Corporate Guarantee was entered into between the parties. The **present dispute relates to this facility**.

3) The Respondent subsequently made an application before the Commercial High Court to be wound up by court under **Section 270(a) and 270(e) of the Companies Act**. The Winding Up order was issued on 29th April 2008 and a liquidator was appointed by the Court. Subsequently, the Appellant bank made a statement of claim to the liquidator and was recognised in the liquidator's report (marked 'A' in the Petition of Appeal) as a 'secured creditor' in respect of the factory building, among other things. Thereafter, the liquidator by letter dated 04.12.2009 (marked 'D' in the Petition) informed the Appellant Bank that the entire machinery and equipment of the Company situated in the Factory Building have been disposed of and the only remaining asset is the building itself. He further informed the bank that as the building is mortgaged to the bank, **proceeds of the disposal of the factory building are payable to the bank subject to the deduction of expenses and fees**. The letter also noted the

direct expenses incurred by the Liquidator in respect of insurance amounting to Rs. 30,647 (for three months) and security charges amounting to Rs. 102,583 (per month) for safeguarding the building and requested the Appellant Bank to reimburse the costs borne for those expenses with effect from 01.01.2010.

4) On or around 8th October 2009, the Appellant Bank filed a Statement of Objections to a Report filed by the Liquidator on 31st August 2009 objecting to the Liquidator deducting a sum of Rs. 806,268.15 as fees and expenses incurred by the Liquidator in relation to the sale of machinery mortgaged by the Respondent to the Appellant Bank. The sale proceeds amounted to Rs. 518,000.00. The Liquidator had also stated a sum of Rs. 288,268.15 as being due from the Appellant in the Report dated 31st August 2009. On or around 4th December 2009, the Liquidator requested the Appellant to meet the expenses relating to insurance and security of the factory building of the Respondent under liquidation, which had been mortgaged to the Appellant. **The Appellant did not respond.**

5) On 06.01.2010, the Appellant Bank sent a letter to the Liquidator stating that in 'voluntary winding up' matters, the cost of winding up including for the safeguarding of assets should be borne by the company and its directors. Responding to that letter, the Liquidator wrote back (letter marked 'E') noting that the proceedings were not in the nature of a 'voluntary winding up', but a 'winding up by court' in terms of Section 270 of the Companies Act. The letter further informs the Appellant Bank that a sum of Rs. 2,272,617.41 has been paid to cover expenses pertaining to insurance, security, maintenance and other expenses, and that these expenses "*should be reimbursed from the proceeds that would be realized on the disposal of the said building and premises in the course of liquidation proceedings.*"

6) Thereafter, the liquidator, acting in terms of Section 358(8) of the Companies Act sent a letter (marked 'G' in the Petition) requiring the Appellant Bank, as a secured creditor, to elect which of the Powers under Section 358(1) it wished to exercise, within 20 working days. **The Appellant Bank did not respond to**

this letter either. By motion dated 3rd March 2010 the Appellant contended that the Liquidator's letters aforementioned had created a dispute between the Liquidator and the Appellant and sought an inquiry from the Court. The Court inquired into the issue by way of written submissions and delivered its Order (marked 'H') stating that:

1. Where a secured creditor has not acted in terms of Section 358(1), the Liquidator is entitled to recover costs and expenses from the assets, including assets mortgaged to the Bank;
2. The objection that the Liquidator cannot deduct costs and expenses from the proceeds realised from the sale of the mortgaged assets cannot be accepted;
3. The application of the Bank that the Liquidator's letters must be withdrawn cannot be accepted.

This Order has not been appealed against by the Appellant.

7) Thereafter, with the permission of the High Court and the Appellant bank, the Liquidator sold the factory building which had been mortgaged to the Appellant Bank for a sum of USD 375,000 out of which **USD 56,761.29 (Rs. 6,597,644.21), being the sum secured by Mortgage Bond** No. 443/219 in favour of the Appellant, **was directly paid to the Appellant by the Purchaser** (documents marked 'J, K1, K2, L' in the brief). On 22nd September 2011, the Liquidator wrote to the Appellant Bank (marked 'M') informing the Bank of the amounts due after the realisation of the machinery and factory building was realised. The amounts were stated as follows:

Mortgaged Machinery	Rs. 518,000.00	
Mortgaged Building	Rs. 6, 597,644.21	Rs. 7,115,644.21
Less:-		
Paid to Bank of Ceylon as Secured Creditor		Rs. (6,597,644.21)
		Rs. 518,000.00
Less:-		
Fees and Expenses incurred		

by the Liquidator and
Remuneration of the
Liquidator as at 22.09.2011 Rs. 2,573,445.75
Factory Building Insurance Rs. 436,925.96
Factory Building Security Rs. 4,611,871.60 Rs. (7,622,243.31)

Net Amount Receivable from BOC as at 22.09.2011 Rs. (7,104,243.31)

8) In a subsequent report filed by the Liquidator before the Commercial High Court, dated 9th May 2012, the Liquidator reported the costs and expenses incurred in relation to the sale of the factory building which included Liquidator's fees, insurance of the building and provision of security for the building aggregating Rs. 7,622,243.31. The Report further states that the net amount receivable from the Appellant Bank as at 22.09.2011 was Rs. 7,104,243.31. The Liquidators' said report alleges that although the Appellant Bank was called upon to meet the said amount by letters dated 14.07.2010 and 22.09.2011, the Liquidator had not received a responde from the Appellant Bank. The Liquidator also informed the Appellant that this sum was due. The Liquidator sought to recover the said sum from the Appellant Bank; claiming that the proceeds of the sale now formed part of the general pool of assets of the Company as the Appellant had lost its character as a Secured Creditor.

9) The Appellant Bank objected to the Liquidator's report referred to I the preceding paragraph and sequel to which and inquiry was held, andthe High Court made an Order (dated 7th June 2013 marked 'P'). **The Order stated that the Appellant Bank be treated as a 'unsecured creditor' and that the money paid to the Appellant bank must be recovered from the Appellant Bank, to be returned to the liquidation pool**. Aggrieved by the said Order, the Appellant made an application for leave to appeal on 18th July 2013. This court granted Special Leave to Appeal on the questions of law referred to in sub-paragaraphs (i)-(xiii) of paragraph 24 of the Petition of the Appellant Bank.:

(i) Did the Learned High Court Judge err in law holding that a creditor in winding up proceedings is under an obligation to reimburse the liquidator for

expenses incurred, from moneys already recovered via a winding up process?
(ii) Did the Learned High Court Judge misdirect himself in fact and/or law by failing to consider that the entire proceeds of the sale were paid to the Respondent?
(iii) Did the Learned High Court Judge err in law in holding that the rights of parties in relation to the dispute referred to in written submissions dated 09.07.2012 and 21.09.2012 has been conclusively determined by the Order of the Commercial High Court dated 07.06.2013?
(iv) Did the Learned High Court Judge err in fact and/or law in failing to recognise that the liquidator had by his own admission and conduct admitted that the Appellant is a secured creditor?
(v) Did the Learned High Court Judge err in fact and/or law in holding that the Appellant should be treated as an unsecured creditor in terms of Section 358(1)(c) of the Companies Act, No. 07 of 2007?
(vi) Did the Learned High Court Judge err in fact and/or law in failing to recognise the right conferred on the Appellant Bank by Mortgage Bond No. 443/219 dated 06.12.1990?
(vii) Did the High Court err in law in failing to consider that the Mortgage over the relevant property had been released on the basis that the sums secured by the said Mortgage be paid to the Appellant?
(viii) Did the High Court err in fact and/or law in failing to consider that the transaction for the sale of the property subject to Mortgage Bond No. 443/219 was carried out upon the condition that the Appellant's rights under the said Mortgage would be given effect to?
(ix) Is the Order of the Learned High Court Judge in contravention of Section 365 and the Ninth Schedule to the Companies Act, No. 07 of 2007?
(x) Did the learned High Court Judge err in failing to recognise that the liquidator has failed to substantiate his claim?
(xi) Did the Learned High Court Judge err in failing to recognise that the liquidator has failed to recover all costs incurred by him in the manner provided in the Section 365 and the Ninth Schedule to the Companies Act, No. 07 of 2007?
(xii) Did the Learned High Court Judge err in failing to recognise that the liquidator's demands are illegal, unreasonable and are inconsistent with the

purpose of liquidation?

(xiii) Did the Learned High Court Judge err in failing to recognise that the liquidator has no legal right/power to demand repayment of any sum duly paid to a creditor in a liquidation action?

10) In the course of argument of this matter, the parties focused on two questions of law and as such, I wish to confine this judgement to to the two issues relating to which submissions were made by the learned Counsel for the respective parties as the two questions would succinctly address all questions of law on which special leave was granted. The two questions are reproduced below..

1. Did the Appellant become an Unsecured Creditor by operation of and under and in terms of Section 358 of the Companies Act, No. 07 of 2007?
2. Is the Liquidator entitled to deduct expenses including the sum paid for the discharge of mortgage from and out of the sums realised from the sale of assets of the Company under liquidation?

Analysis

1. **Did the Appellant become an Unsecured Creditor by operation of and under and in terms of Section 358 of the Companies Act, No. 07 of 2007?**

I wish to reproduce Section 358 of the Companies Act in its entirety for ease of reference as I would be referring to several limbs of that Section in this judgement.

Section 358 states:

"(1) A secured creditor may—

(a) seize, attach and realise, issue execution against or appoint a receiver in respect of property subject to a charge, if entitled to do so;

(b) value the property subject to the charge and claim in the liquidation—

(i) as a secured creditor for the amount of his claim, up to the value of the security; and
(ii) as an unsecured creditor for the balance due, if any; or

(c) surrender the charge to the liquidator for the general benefit of creditors, and claim in the liquidation as an unsecured creditor for the whole debt

(2) A secured creditor may exercise the power referred to in paragraph (a) of subsection (1) whether or not the secured creditor has exercised the power referred to in paragraph (b) of subsection (1).

(3) A secured creditor who realises property subject to a charge—

(a) may claim as an unsecured creditor for any balance due after deducting the net amount realised;

(b) shall account to the liquidator for any surplus remaining from the net amount realised after satisfaction of the debt, including interest payable in respect of that debt up to the time of its satisfaction and after making any proper payments to the holder of any other charge over the property subject to the charge.

(4) If a secured creditor values the security and claims as a secured creditor, the valuation and claim shall be made in the prescribed form and shall—

(a) contain full particulars of the valuation and claim;
(b) contain full particulars of the charge including the date on which it was given; and
(c) identify any documents that substantiate the claim and the charge,

and the provisions of sections 359, 360 and 362 shall apply to any claim as

a secured creditor.

(5) The liquidator may—

(a)require production of any document referred to in paragraph (c) of subsection (4); and

(b)require a claim under subsection (4) to be verified by affidavit.

(6) Where a claim is made by a secured creditor under subsection (4), the liquidator shall either—
(a) accept the valuation and claim; or

(b) reject the valuation and claim in whole or in part, but—

(i) where a valuation and claim is rejected in whole or in part, the creditor may make a revised valuation and claim within ten working days of receiving notice of the rejection; and

(ii) the liquidator may if he subsequently considers that a valuation and claim was wrongly rejected in whole or in part, revoke or amend that decision.

(7) Where the liquidator—

(a) accepts a valuation and claim under paragraph (a) of subsection (6);

(b) accepts a revised valuation and claim under subparagraph (i) of paragraph (b) of subsection (6); or

(c) accepts a valuation and claim on revoking or amending a decision to reject a claim under subparagraph (ii) of paragraph (b) of subsection (6),

the liquidator shall unless the secured creditor has realised the property,

redeem the security on payment of the amount of the claim or the assessed value, whichever is the less.

(8) The liquidator may at any time by notice in writing, require a secured creditor within twenty working days after receipt of the notice—

(a) to elect which of the powers referred to in subsection (1) the creditor wishes to exercise; and

(b) if the creditor elects to exercise the power referred to in paragraph (b) or paragraph (c) of that subsection, to exercise the power within that period.

(9) A secured creditor on whom notice has been served under subsection (8) and who fails to comply with the notice shall be taken to have surrendered the charge to the liquidator under paragraph (c) of subsection (1) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for the whole debt.

(10) A secured creditor who has surrendered a charge under paragraph (c) of subsection (1) or who is deemed to have surrendered a charge under subsection (9) may, with the leave of the court or the liquidator and subject to such terms and conditions as the court or the liquidator thinks fit, at any time before the liquidator has realised the property charged—

(a)withdraw the surrender and rely on the charge; or

(b)submit a new claim under this section.

(11) Every person who—

(a) makes or authorises the making of a claim under subsection (4) that is false or misleading in a material particular knowing it to be false or misleading; or

(b) omits or authorises the omission from a claim under subsection (4) of any matter knowing that the omission makes the claim false or misleading in a material particular,

shall be guilty of an offence and be liable on conviction to a fine not exceeding one million rupees or to a term of imprisonment not exceeding five years or to both such fine and imprisonment."

11) In my view, the procedural Scheme provided by Section 358 attempts to reconcile the needs of efficient administration of liquidation with reasonable opportunity for recognition of a claim of a secured creditor, by providing rights, options, and duties for the secured creditors. It is a known fact that our Companies Act of 2007 drew inspiration from the New Zealand Companies Act of 1993 [K. Kanag-Isvaran and Dilshani Wijayawardana, *Company Law* (2014), at p. vii], and Section 305 of the New Zealand Companies Act, although not identical, is similar to Section 358. Section 305(1) of the New Zealand Companies Act contemplates three courses of action for the secured creditor;

1. Realising the property subject to a charge, if entitled to do so;
2. Valuing the property subject to the charge and claiming in the liquidation as an unsecured creditor for the balance due, if any; or
3. Surrendering the charge to the liquidator for the general benefit of creditors and claiming in the liquidation as an unsecured creditor for the whole debt.

12) It is recognized under the Companies Act of New Zealand that a secured creditor who does not prove a claim in accordance with Section 305 is excluded from distribution. The principle was recognized in ***Re H (a Bankrupt)*** **[1968] NZLR 231** at 237–238, 241 and subsequently it was incorporated under Section 305 of the Companies Act of 1993 of New Zealand [Lisele Theron, *Guide to Company Liquidation* (Lexis Nexis 2013) at p. 63].

13) In my opinion, similar to that of the scheme laid down in Section 305 of the

New Zealand Act, as per Section 358(1)(a)(b) and (c) of our Act, a secured creditor may claim his dues in the liquidation **in the manner prescribed.** Section 358(8) provides the process by which a secured creditor may elect which of the powers referred to in Section 358(1) he wishes to exercise. Section 358(9) states that a Creditor who has been noticed, yet '*who fails to comply with the notice shall be taken to have surrendered the charge to the liquidator under paragraph (c) of subsection (1) for the general benefit of creditors and may claim in the liquidation* ***as an unsecured creditor for the whole debt' [emphasis added].*** It is by virtue of this provision that a Creditor who fails to respond to the Liquidator, loses his character as a Secured Creditor and is then compelled to claim in the liquidation process as an Unsecured Creditor. Section 358(10) allows a Secured Creditor who had surrendered a charge under Section 358(1)(c), or who is deemed to have surrendered the charge as per Section 358(9) (as in the instant case), to withdraw the surrender and rely on the charge or submit a new claim before the liquidator realises the property '*with the leave of the court or of the liquidator*'.

14) The Appellant Bank had not responded to the notice sent by the Liquidator ('BOC 2') requesting the Appellant to **elect which of the powers mentioned in subsection (1) of Section 358 the Appellant Bank wished to exercise within 20 working days**. It is therefore, correct to state, that as per Section 358(9) the Appellant's failure to make a selection resulted in the surrendering of the charge to the Liquidator for the general benefit of all Creditors, and the Appellant could then only claim in the liquidation as an Unsecured Creditor for the whole debt. The character of the Appellant effectively changed thereupon from that of a Secured Creditor to that of an Unsecured Creditor.

15) The learned ASG argued however that the manner in which the Liquidator treated the Appellant Bank clearly tantamount to the treatment of a Secured Creditor and as such, the Liquidator's conduct constituted an admission that the Appellant Bank was in fact a Secured Creditor. In the circumstances, he argued, that the Appellant Bank therefore entitled to all Rights and Privileges bestowed upon Secured Creditors under the Companies Act. Importantly, the learned ASG noted the fact that the Liquidator sought the

'approval' of the Appellant Bank to sell the property mortgaged, reaffirmed the Appellant's position as a Secured Creditor.

16) It was submitted by the learned President's Counsel appearing for the Respondent that the purpose of Section 358(9) is to ensure that Creditors in Liquidation are not prejudiced by the inaction on the part of Secured Creditors and that the Liquidation process is not hampered by inordinate delay. It was also submitted that having been allowed the option of exercising its powers, the Appellant Bank's failure to do so should not permit the Appellant Bank to retain the monies erroneously conveyed to the Appellant by the Purchaser for the sole purpose of obtaining the discharge of the mortgage in order to facilitate the sale of the mortgaged building. Additionally, the learned President's Counsel noted that such conduct would be wholly contrary to the procedural scheme set out in Section 358(8) and 358(9) of the Act.

17) This Court is in agreement with the submissions of the learned President's Counsel for the Respondent and also wishes to add that the legislature has set out an exhaustive procedural scheme under Section 358 for Secured Creditors to exercise their Rights. Subsections (3) to (7) of Section 358 of the Act provide an exhaustive and meticulous detailing of the procedures to be adopted and performed by Secured Creditors where they wish to exercise their Rights. This court cannot therefore accept the submissions of the learned ASG for the Appellant Bank that the Liquidator has by conduct and action inferred the nature of the Appellant to be that of a Secured Creditor. The purpose of Section 358 is to provide a procedural scheme by which the Rights of a Secured Creditor are exercised and where such procedural scheme is not adhered to and followed by a Secured Creditor, as spelled out in Section 358(9), the Creditor is "*taken to have surrendered the charge to the liquidator under paragraph (c) of subsection (1) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for the whole debt".*

18) In the hearing of oral submissions, the learned ASG for the Appellant Bank argued that Section 358(1)(b), 358(1)(c) and 358(2) and 358(9) have no practical application to a situation where the entire debt can be recovered from

the sale of the secured asset, and that in the present case, as the secured asset was worth enough to realise more than the sum secured by the mortgage, the court should interpret the aforesaid sections of the Companies Act in a manner which provides opportunity for the Creditor to practically resolve claims. The learned High Court Judge addresses this contention in his Order dated 7th June 2013 where he notes that where the law specifically provides for the manner in which a secured creditor may realise/surrender its security, the creditor and the liquidator or a third party cannot enter into private arrangements for the realisation of the security beyond the procedural scheme set out in the Act. I am in agreement with the observation of the learned High Court Judge and also wish to note that **it is not for the court to presume that the legislature overlooked the practical application of the relevant sections.** To do so would be to operate on the assumption that the Legislature committed a mistake, which would be violative of fundamental principles of statutory interpretation. As **Lord Halsbury** stated in ***Commissioners for Special Purposes of Income Tax v. Pemsel*** **[1891] AC 531**, at p. 549:

"…a Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said…"

And, as Bindra states in **N.S. Bindra's Interpretation of Statues, 12th Edition,** at p. 205 "*Even where there is a casus omissus, the remedy lies not with the court, but with the legislature.*"

19) In my opinion, it would be incorrect to state that the there is a *casus omissus* at all since the procedural scheme of the Act laid down in Section 358 is exhaustive and thorough in its statement of procedures to be adopted for the exercise of a Secured Creditor's rights in liquidation proceedings.

20) Additionally, I wish to note that where the scheme of the Act also provides an opportunity for Secured Creditors to act upon their security diligently via Section 358, the Appellant's **failure to act** upon such security **according to the procedure mandated by the Act, cannot subsequently be allowed to benefit** the

Appellant as though he was still a Secured Creditor. If such consequence is permitted to be **rationalised** based on the **conduct or behaviour of actors**, as opposed to being **determined** by **procedure,** the procedural scheme of the act would lose all meaning.

21) It was also contended on behalf of the Appellant Bank that the learned High Court Judge erred in holding that the Appellant Bank had to obtain leave of the Liquidator or the Court to withdraw the surrender of its charge *before* the realisation of the property. This argument is not consonant with the wording of subsection (10) as it clearly states that "*A secured creditor who has surrendered a charge under paragraph (c) of subsection (1) or who is deemed to have surrendered a charge under subsection (9) may, with the leave of the court or the liquidator and subject to such terms and conditions as the court or the liquidator thinks fit,* ***at any time before the liquidator has realised the property charged****—*

a. withdraw the surrender and rely on the charge; or

b. submit a new claim under this section."

22) Therefore, it can be settled that the Appellant Bank lost its character as a Secured Creditor by failing to act per the notice under Section 358(8) and did not regain such character as it failed to obtain the leave of the court or the liquidator to withdraw the charge surrendered as mandated by Section 358(10).

2. Is the Liquidator entitled to deduct expenses including the sum paid for the discharge of mortgage from and out of the sums realised from the sale of assets of the Company under liquidation from a Creditor who lost its character as a Secured Creditor?

23) It is the Liquidator's position that the sum expense of Rs. 7,622,243.31 was incurred by the Liquidator as a direct result of the Liquidator having had to secure the assets of the Company that had been mortgaged to the Bank. In the Liquidator's letter to the Appellant Bank dated 04.12.2009, the Liquidator requested the Bank to meet the said expenses (*vide* 'G'). This request was

refused. In his subsequent letter to the Bank ('BOC 2'), the Liquidator clarifies his position, notes that he has reserved the right to recover Rs. 2,272,617.41 spent on Insurance and Security charges, requests the Appellant Bank to notify him within 20 working days which of the Powers referred to in S. 358(1) of the Companies Act it wishes to exercise, and requests that should the Appellant elect to use powers referred to in (b) or (c) of S. 358(1), to do so within the mentioned period.

24) The Appellant Bank maintains that it is a secured creditor, and as such, the Bank is entitled to full payment of the secured claim regarding the mortgaged property. The Appellant contends that the secured assets of the Company under liquidation do not fall within the ordinary asset pool of the Company and that expenses in relation to insurance and security of the mortgaged asset must be met by the Liquidator without it being set off against the Bank's security. Since it is now settled that the Appellant Bank lost its character as a Secured Creditor and effectively became an Unsecured Creditor by operation of the law, the questions which remains are whether the (now) Unsecured Creditor loses any right to make preferential claims as per the Companies Act, and whether the Liquidator is entitled deduct expenses incurred including the amounts paid to secure the assets before their realisation.

25) Section 365 of the Companies Act states:

"(1) The liquidator shall pay out of the assets of the company the expenses, fees, and claims set out in the Ninth Schedule to the extent and in the order of priority specified in that Schedule and that Schedule shall apply to the payment of those expenses, fees, and claims according to its tenor.

(2) Without limiting paragraph 7(b) of the Ninth Schedule, the terms "assets" in subsection (1) shall not include assets subject to a charge, unless— (a) the charge is surrendered or taken to be surrendered or redeemed under section 358; or (b) the charge was when created, a floating charge in respect of those assets."

26) The Ninth Schedule, detailing the manner in which preferential claims must be

addressed by the Liquidator states:

"1. The liquidator shall first pay, in the order of priority in which they are listed: —

a. *the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator and the remuneration of the liquidator;*
b. *the reasonable costs of a person who applied to the court for an order that the company be put into liquidation, including the reasonable costs of a person appearing on the application whose costs are allowed by the court;*
c. *the actual out-of-pocket expenses necessarily incurred by a liquidation committee.*

27) Therefore, it is apparent that the Act mandates the sum deduction of costs and expenses incurred by the Liquidator in the procuring of assets subject to a charge for their realisation, **deemed to have been surrendered for the general benefit of Creditors under Section 358(1) of the Act**. Essentially, the collated meaning of the scheme is such that assets subject to a charge are excluded from the general pool of assets from which the liquidator may deduct his expenses and comprise the preferential claim of the relevant secured creditor **unless the charge is surrendered or deemed to have been surrendered as per Section 358(9)**. Accordingly, when a charge is deemed to have been surrendered, such asset forms part of the general pool of assets of the company out of which the claims of unsecured creditors are satisfied upon equal footing as per the '*pari passu*' principle under and in terms of Section 366 which deals with the 'Claims of other Creditors and distribution of Surplus assets'.

28) Furthermore, it is observed that the expenses for the preservation of the Mortgaged building was borne out of the funds generated by the sale of the assets of the company. [Liquidator's letters marked, D, D2 & E] These funds ought to have been distributed among the Creditors in order of priority as mandated by the Companies Act. The Liquidator was compelled to use the funds of the general pool of assets to cover the expenses as the Appellant had ignored the Liquidator's request to pay for the security and insurance charges

of the building. Therefore, it was submitted that the Appellant's refusal to reimburse these expenses is unfairly detrimental and prejudicial to other creditors.

29) By failing to respond to the letter issued to the Appellant Bank which requested it to elect which powers it wished to exercise under S. 358(1) of the Companies Act, the Appellant Bank surrendered its authority to claim treatment as a secured creditor and the consequences of its own inaction must not be borne by another. Effectively, the whole liquidation process is hampered by the Appellant's inaction and refusal to return to the liquidation the proceeds paid to it for the discharge of the mortgage and its refusal to reimburse the liquidator's expenses.

30) Furthermore, it must be noted that the learned High Court Judge, in his wisdom, comprehensively analysed the procedural impropriety which had ensued at the hands of the Appellant Bank and noted the distinction between sum amounts paid for the setting off and discharge of a mortgage and that of sums paid as result of pursuing the procedural scheme set out for the realisation of security and preferential claims set out in Section 358 of the Companies Act. Importantly, the learned High Court Judge notes that if the Appellant Bank claims to have acted as a Secured Creditor, it should have done so after making a valuation and claim in the manner prescribed in Section 358(4) and the Liquidator should have, upon receipt of the claim in the prescribed form, either accepted, revised or rejected the valuation as per Section 358(6) and 358(7). As correctly observed by the learned High Court Judge, the fact that the Appellant Bank had not pursued this procedural scheme would therefore indicate that the Appellant Bank was not, in fact, and by operation of the law, a Secured Creditor and that the proceeds of the realisation paid to the Appellant Bank to set off and discharge the mortgage should be returned to the liquidation process.

31) The order of the learned High Court Judge dated 7th June 2013 states that the expenses incurred by the Liquidator (including the amount paid for the discharge of the mortgage) must be recovered from the sale proceeds of

property released from the mortgage. It also states that in the event the sale proceeds are insufficient to recover the Liquidator's expenses, the liquidator is entitled to recover the expenses from the Appellant Bank, in an amount not exceeding the amount paid for the discharge of the mortgage.

32) **The Liquidator is therefore entitled to deduct expenses from the proceeds of the realisation of assets** which were previously mortgaged to the Appellant Bank and now surrendered for the general Benefit of Creditors under Section 358(1) of the Act, **in an amount not exceeding the amount paid for the discharge of the mortgage. The Appellant may claim any sums due and owed from the general pool of assets of the Respondent along with other creditors.** Accordingly, **I uphold the order made by the learned High Court Judge dated 7th June 2013** directing the Appellant to **return the monies which were paid to it by the Purchaser amounting to Rs. USD 56,761.29 (Rs. 6,597,644.21), to the Liquidator** to be used for the general benefit of all creditors. Accordingly, the appeal is dismissed,

Appeal dismissed.

Judge of the Supreme Court.

MURDU FERNANDO, PC, J

I agree.

Judge of the Supreme Court.

YASANTHA KODAGODA, PC, J

I agree.

Judge of the Supreme Court.

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

In the matter of an application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC/FR 546/ 2012

Captain Ambawalage Dammika
Senaratne De Silva,
No.74, Jayasumanarama Road,
Rathmalana.

PETITIONER

-Vs-

1. Lieutenant General Jagath Jayasuriya,
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 01

1A. A.W.J.C. De Silva (RWP.USP)
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 01.

1B. Lieutenant General
N.U.M.M.W. Senanayake
RWP. RSP.USP.PSC
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters
Colombo.

1C. Lieutenant General
N.U.M.M.W. Senanayake
RWP. RSP.USP.PSC
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters
Colombo 1.

1D. Lieutenant General Shavendra Silva
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 1.

1E. Lieutenant General H.L.V.M Liyanage
(RWP.RSP.ndu)
Commander of Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 1.

2. Lieutenant Colonel Ediriweera,
Regimental Headquarters,
20th Sri Lanka Infantry,
Panagoda.

3. Regimental Centre Commandant,
20th Sri Lanka Light Infantry,
Regimental Headquarters,
Panagoda.

4. Major G.S.M. Perera,
Chairman of the Court of Inquiry
held against the Petitinor,
20th Sri Lanka Light Infantry,
Akkarayakulam Army Camp,
Pooneryn.

5. 2nd Lieutenant K.A. Roshan,
Member of the Court of Inquiry held
against the Petitioner,
20th Sri Lanka Light Infantry,
Akkarayakulam Army Camp,
Pooneryn.

6. Sergeant J.M.T.H. Perera
Member of the Court of Inquiry held
against the Petitioner,
20th Sri Lanka Light Infantry,
Akkarayakulam Army Camp,
Pooneryn.

7. Major Mahesh Kumara,
Sri Lanka Military Police
Headquarters,
Polihengoda, Colombo 5.

8. Secretary
Ministry of Defence and Urban
Development

Ministry of Defence, Colombo 02.

9. Mr. Lalith Weeratunge
Secretary to His Excellency the
President
Presidential Secretariat,
Colombo 1.

9A. Mr. P.B. Abeykoon,
Secretary to His Excellency the
President
President Secretariat, Colombo 01.

9B. Mr. Austin Fernando,
Secretary to His Excellency the
President,
President Secretariat, Colombo 01.

9C. Mr. Udaya Ranjith Seneviratne,
Secretary to His Excellency the
President,
Presidential Secretariat, Colombo
1.

9D. Mr. P.B. Jayasundara,
Secretary to His Excellency the
President
Presidential Secretariat,
Colombo.

9E. Mr. Gamini Sedara Senarath
Secretary to His Excellency the
President,
Presidential Secretariat,
Galle Face Centre Road,
Colombo 01.

10. Honourable Attorney General,
Department of the Attorney
General,
Colombo 12.

RESPONDENTS

BEFORE : **B. P. ALUWIHARE, PC, J**
S. THURAIRAJA, PC, J AND
JANAK DE SILVA, J

COUNSEL : Saliya Peris PC with Thanuka Nandasiri for the Petitioner
M. Gopallewa SDSG for 1st-10th Respondents

WRITTEN SUBMISSIONS : Petitioner on 1st April 2021
Respondent on 27th April 2021

ARGUED ON : 18th November 2022

DECIDED ON : 31st October 2023

S. THURAIRAJA, PC, J.

The Petitioner namely, Captain Ambawalage Dammika Senaratne De Silva (hereinafter referred to as "the Petitioner") served in the rank of Captain in the Sri Lanka Army attached to the 20th Sri Lanka Light Infantry. The Petitioner has made the instant application seeking relief in respect of the infringement of his Fundamental Rights guaranteed under and in terms of the Constitution, in the manner hereinafter more fully set out, against the Respondents.

The 1st Respondent is the Commander of the Sri Lanka Army. The 2nd Respondent was the Commanding Officer of the Alampil Army Camp (Nandikadal) where the Petitioner served at the time the alleged incident took place. The 3rd Respondent is the Centre Commandant of the Regimental Headquarters of the 20th Sri Lanka Light Infantry. The 4th Respondent is the Chairman of the Court of Inquiry held against the Petitioner as described below, while the 5th and 6th Respondents are members of the said Court of Inquiry. The 7th Respondent is the officer who conducted the investigation against the Petitioner at the Sri Lanka Military Police Headquarters. The 8th Respondent is the Secretary to the Ministry of Defence and the 9th Respondent is the Secretary to His Excellency the President. The 10th Respondent is the Hon. Attorney General who has been made a party to this application in compliance with the law.

The Petitioners instituted this action under Article 126 of the Constitution, through Petition dated 14th September 2012 against the 1st-10th Respondents claiming that the Fundamental Rights of the Petitioner as guaranteed by Articles 12(1), 13(3), 13(5) and 14(1)(g) of the Constitution have been infringed by the Respondents and further requesting to quash the recommendation of the 1st Respondent to withdraw the commission of the Petitioner from the rank of Captain of the Sri Lanka Army.

This matter was supported before this court on 24th October 2012 and the Court was inclined to grant Leave to Proceed for the alleged violations of Article 12(1) and Article 14(1)(g) of the Constitution.

I find it pertinent to refer to the factual matrix of this application as enumerated by the parties in order to ascertain whether the Petitioner's Fundamental Rights guaranteed under Article 12(1) and 14(1)(g) of the Constitution have been violated by the 1st-10th Respondents. However, as there are substantial disparities between the narration of facts provided by the parties, I find it necessary to narrate both positions.

The Facts as recounted by the Petitioner

The Petitioner asserts that on 5th December 1990, he joined the Sri Lanka Army as a solider. As claimed by the Petitioner, due to his exemplary performance in the said operations he was enlisted as a Cadet Officer and upon completion of a training course at the Diyathalawa Army Camp he was commissioned in the rank of 2nd Lieutenant on 13th October 1997 and was attached to the 20th Sri Lanka Infantry of the Sri Lanka Army. Following this, the Petitioner was promoted as a Lieutenant on 13th April 2001 and as a Captain on 2nd August 2004 and has served in several operational areas of the country continuously for a period of 19 years, participating in various operations.

As per the Petitioner, in January 2009 he was appointed as the Officer Commanding of one of the companies of the 20th Light Infantry, namely Alfa Company, while the 2nd Respondent was the Commanding Officer. It was the position of the Petitioner that during his period of service in the said Company, differences of opinion arose between the Petitioner and the 2nd Respondent with regard to military strategies adopted by the 2nd Respondent. This had resulted in heavy losses both to soldiers and material and as a result the 2nd Respondent had harboured an animosity towards the Petitioner.

The Petitioner states that while the Petitioner was serving as the Officer Commanding of the aforesaid Company of the 20th Light Infantry, on 22nd April 2009, a soldier named Saman Kumara died from gunshot injuries at the Nandikadal Army Camp area which gunshots were fired from the said Saman Kumara's own weapon. Further the Petitioner states that at the time of his death, said Saman Kumara was

serving in a different company to that of the company where the Petitioner was the Officer Commanding.

As claimed by the Petitioner, with the report of the said gunshots, on the directions of the 2nd Respondent and one Major Weerakoon, the Petitioner searched the area and discovered Saman Kumara (hereinafter sometimes referred to as "the deceased") fallen in the jungle with gunshot injuries 300 meters away from where the Petitioner stood. Following which, the Petitioner had dispatched Saman Kumara to the Camp upon instructions, and after informing, the 2nd Respondent. Thereafter, the Petitioner came to know that Saman Kumara had succumbed to his injuries.

It is the position of the Petitioner that on or about 31st May 2009, while he was serving in the aforementioned Company, the Petitioner was directed by the 2nd Respondent to take the body of a deceased soldier named Silva to the Vavuniya Army Camp. As soon as the Petitioner had left the Army Camp the 2nd Respondent had relieved him of his duties as the Commanding Officer of the Alfa Company and replaced him with a much junior officer without a valid reason.

According to the Petitioner, his belongings had been removed and kept under the custody of the 2nd Respondent. Upon the request of the Petitioner, due to the adverse environment created at the army camp, he was permitted to report back to the Regimental Headquarters, Panagoda.

According to the Petitioner, on 9th June 2009 he had come home and had reported back to the Regimental Headquarters on 10th June 2009. However, on or about 12th June 2009, the Petitioner returned home on medical advice to rest, as he was suffering from an eye infection and soon after reported back to Headquarters on the 14th June 2009. Subsequently, the Petitioner was informed by the then Regimental Centre Commandant that there was an anonymous petition made against him and he was detained in a cell in the said Camp.

As asserted by the Petitioner, on 16th June 2009, the Petitioner was brought to the Sri Lanka Military Police Headquarters on the allegation that he had committed the murder of aforementioned Soldier Saman Kumara. Moreover, on 17th June 2009 around 9.45 am, the Petitioner was handed over to the 7th Respondent who carried out the investigation against the Petitioner. The Petitioner further contends that, the officers attached to the Sri Lanka Military Police, including the 7th Respondent threatened to shoot the Petitioner if he fails to tell the truth. Additionally, the Petitioner alleges that the 7th Respondent had brutally assaulted and threatened to kill him in an attempt to obtain a forcible confession to the effect that the Petitioner had shot the said Saman Kumara.

Consequent to the above, the Petitioner was kept under the custody of the 7th Respondent and was denied any visits by his family members despite their continuous requests. As a result, the Petitioner's mother wrote a complaint (marked P1) to His Excellency the President regarding the manner in which the purported investigation was being conducted against the Petitioner. Additionally, she lodged a complaint to the Human Rights Commission of Sri Lanka bearing no. HRC 2855/09 dated 3rd July 2009 (marked P2a) regarding the same. Subsequently, on 7th July 2009, the officers attached to the Human Rights Commission telephoned the 7th Respondent and requested him to allow the family members of the Petitioner to visit him, to which the 7th Respondent agreed to comply with. Accordingly, the Petitioner was allowed to meet his family for the first time on 7th July 2009 after 23 days of arrest.

The Petitioner states that, his aide Dilum Sanjeewa, had also been detained by the Military Police and had been forced to give a statement to the effect that he had shot the deceased on the direction of the Petitioner. Petitioner contends that this statement was given by the said Dilum Sanjeewa under the influence of the officers attached to the Military Police, the 2nd Respondent and the 7th Respondent.

The Petitioner states that the investigation conducted against him was illegal as he was subjected to torture, cruel, inhuman and degrading treatment by the Military

Police. Therefore, the Petitioner's Attorney at Law Ms. Niluka Dissanayake had filed a Fundamental Rights Application bearing No. SC/FR/556/2009 on behalf of the Petitioner, against the 7th Respondent, 2nd Respondent, Commanding Officer of the Sri Lanka Military Police and several other responsible officers on the alleged infringement of the violation of the Fundamental Rights of the Petitioner as guaranteed by Articles 11, 12(1), 13(1), 13(2), and 13(3) of the Constitution.

As enumerated by the Petitioner, on 6th August 2009 around 10.30 am, he was handed over to the Criminal Investigation Department with the aforesaid Dilum Sanjeewa. Following which, on 7th August 2009, the Petitioner was produced before the learned Magistrate of Aunradhapura under B report bearing No. B/1228/09 on the allegation that, the Petitioner and the said Dilum Sanjeewa committed the murder of the deceased, an offence punishable under Section 296 of the Penal Code. Eventually, the Petitioner was remanded.

Consequently, on 18th January 2010, the Petitioner's mother filed a Bail Application bearing No. HCBA 125/2009 on behalf of the Petitioner in the Provincial High Court of Anuradhapura. On consideration of the said bail application, the learned High Court Judge had released the Petitioner on bail. Upon being enlarged on bail, the Petitioner had reported back to the Regimental Headquarters. Accordingly, on 18th March 2010, the Petitioner had received a message (marked P14) that he was interdicted with effect from 18th March 2010.

As per the Petitioner, while he was detained in the Sri Lanka Military Police Headquarters, he was questioned by the officers on allegations of sexual assault against the deceased in reference to a letter addressed to the 2nd Respondent by the deceased (marked P15), which alleged that the Petitioner had sexually abused the deceased on 15th April 2009. As revealed from investigations, the deceased had been subject to sexual harassment by the Petitioner on 14th April 2009. Accordingly, the said deceased had given a statement to the 2nd Respondent confirming the said sexual harassment, following which the 2nd Respondent had reprimanded the Petitioner on

18th April 2009. However, it is the position of the Petitioner that the said allegation was a fabrication of the 2nd Respondent or was obtained under duress.

Challenging the purported statement of the 2nd Respondent, the Petitioner asserts that he was in the Anuradhapura Military Hospital from 17th to 18th April 2009 in order to obtain his medical reports (marked P16) for his next promotion to the rank of Major. Therefore, he had reported back to the Camp only on the 19th April 2009. The Petitioner further states that if such a complaint had been made against him on an allegation of sexual harassment, the 2nd Respondent should have taken steps according to the Military Law rather than merely issuing a warning. As such the Petitioner questions the credibility of the 2nd Respondent's statement.

The Petitioner states that the non-summary inquiry in respect of the alleged murder of the said Saman Kumara commenced in the case bearing No. 29204. However, on 24th April 2012, the said Dilum Sanjeewa whom the prosecution claimed to be the assassin of the deceased, was discharged from the proceedings on the instructions of the Hon. Attorney General. While the Petitioner was held in custody of the Military Police, he became aware that there was a Court of Inquiry held against him and his aide Dilum Sanjeewa. Dilum Sanjeewa had informed the Petitioner that he gave a statement at the said inquiry, however, the Petitioner is of the position that no such statement was recorded nor was he summoned before a Court of Inquiry. Therefore, the Petitioner had no knowledge of the said Court of Inquiry held whilst they were in custody.

Subsequently, the Petitioner discovered that the 1st Respondent had convened a Court of Inquiry and the 4th Respondent was appointed the Chairman, whilst the 5th and 6th Respondents were appointed members to the said Court of Inquiry. Accordingly, by letter dated 18th August 2011 (marked P18), the Petitioner was informed by the Centre Commandant of the 20th Light Infantry, that the said Court of Inquiry was scheduled to be held on the 8th September 2011 and the Petitioner was instructed to be present.

At the said Court of Inquiry, the Petitioner had given a written statement (marked P-18a). Furthermore, as per the Petitioner, the statement given by his aide Dilum Sanjeewa (marked P-18b) was in total contradiction with his previous statements given to the Court of Inquiry and/or the Military Police and/or the Criminal Investigation Department.

Moreover, the Petitioner claims that he was not given an opportunity to cross examine any of the witnesses and his signature was never obtained to the proceedings of the Court of Inquiry except to the statement made by him. Additionally, the eye witnesses to the alleged incident categorically stated that the Petitioner had no involvement to the said incident. The Petitioner further states that the persons who have been named as witnesses had testified before the Court of Inquiry in his absence and therefore, the 4th, 5th and 6th Respondents have acted contrary to the army Regulations in relation to Court of Inquiry and claims that it is a violation of the principles of Natural Justice.

Upon the conclusion of the said Court of Inquiry, its members had submitted their findings to the 1st Respondent for his determination and recommendation. Despite the Petitioner's requests for a copy of the said findings and convening order of the 1st Respondent, he has not been furnished a copy up to date. Further, the Petitioner states that at the said Court of Inquiry, he was not questioned about the alleged sexual assault against the deceased.

The Petitioner states that on or about the 7th September he was informed by his Regimental Headquarters that, after submitting the findings of the Court of Inquiry, the 1st Respondent had decided to discharge him from his service in the Sri Lanka Army and to withdraw his rank of Captain. The said recommendation had been sent to His Excellency the President for the purpose of withdrawing the commission of the Petitioner.

It is the position of the Petitioner that, as per the Army Courts of Inquiry Regulations 1952, punishments cannot be imposed on a Respondent Officer upon

findings of a Court of Inquiry. In terms of Section 2 of the said Regulations, it is only convened to collect and record evidence, hence it cannot be equated to a trial. Therefore, the Petitioner states that the 1st Respondent has no authority to discharge the Petitioner by recommending a withdrawal of his commission, without having recourse to a Court Martial in terms of law. Accordingly, the Petitioner believes that the said decision of the 1st Respondent is arbitrary, capricious, ultra vires, unlawful, illegal and has no force in law, as the Court of Inquiry was held contrary to the procedure set out in the Army Court of Inquiry Regulations.

Based on the above submissions, the Petitioner claims that his Fundamental Rights guaranteed under Articles 12(1), 13(3), 13(5) and 14(1)(g) of the Constitution have been violated.

Variations in facts as per the Respondents

It is the position of the 1st and 2nd Respondents that, on 22nd April 2009 around 6.45 pm, a soldier named Lance Corporal Saman Kumara was found dead with gunshot injuries, which was initially treated as an accidental discharge of his own weapon. However, prior to his death, the deceased had complained to his superior officers that the Petitioner had sexually assaulted him, and upon the request of the 2nd Respondent, the deceased made a complaint in writing. Following which, his Commanding Officer had taken steps to remove him from the Petitioner's command and assign him to the Headquarters Camp.

Therefore, suspicion had arisen as to whether the Petitioner was involved in the shooting of the deceased and by June 2009, sufficient evidence had surfaced with regard to his involvement, as a result of which, the Petitioner was arrested.

Furthermore, the 1st Respondent states that, in terms of Regulation 3(7)(a) of the Army Court of Inquiry Regulation 1952, in an event where a member of the Army dies, it is mandatory to appoint a Court of Inquiry to determine the cause of death. Accordingly, a Court of Inquiry was convened and in the said Inquiry, the Petitioner's

aide Dilum Sanjeewa testified that on the night of 14th April 2009 around 11.30 pm, the Petitioner had forced the deceased to massage his legs, following which the deceased had deserted the camp on 16th April 2009. Moreover, as alleged by the said Dilum Sanjeewa, on 22nd April 2009 around 6.30 pm he had seen the Petitioner shooting the deceased. Consequent to that, at around 9:00 pm, the petitioner asked and threatened Dilum not to tell anyone about the incident, and the petitioner said that if he did, he and the entire family would be killed with the help of the underworld (As per the document marked R3- the testimony given by the Dilum Sanjeewa on 16/6/2009 before Army Court of Inquiry).

As asserted by the 7th Respondent, on 17th June 2009, the Provost Marshal had submitted to him an anonymous letter that was received by the Army Commander, regarding the death of the said Saman Kumara. As per the contents of the letter, the Petitioner was accused of being responsible for the death of the said Saman Kumara. Accordingly, the 7th Respondent initiated a Military Police investigation and arrested the Petitioner. Furthermore, the 7th Respondent denies all allegations made by the Petitioner against him, with regard to him assaulting the Petitioner and treating him arbitrarily and illegally whilst in the custody of the Military Police.

With regards to the Court of Inquiry, the 1st Respondent states that, it is an internal inquiry held to determine whether an officer is fit to hold his office when criminal charges are preferred against him in a court of law. A pending criminal case in a court of law is not a bar to the conduct of an inquiry with regard to the Petitioner's acts of misconduct. Therefore, the second Court of Inquiry was convened for this purpose. At the said inquiry, the Petitioner was given an opportunity to respond to the allegations against him, he had testified under oath and denied any knowledge of the incident and further stated that his statement to the Military Police was obtained under duress. Having considered the reports of the said two Courts of Inquiries, the 1st Respondent came to the conclusion that the retention of the Petitioner was not desirable for the maintenance of good order and discipline in the Army, hence decided

to recommend to His Excellency the President to withdraw the commission of the Petitioner.

Validity of the decision to discharge the Petitioner from the Army and to withdraw his commission

In deciding upon the merits of this case, I find it pertinent to examine the matter of contention claimed by the Petitioner that the actions of the Respondents are in violation of Article 12(1) and Article 14(1)(g) of the Constitution.

Article 12(1) reads as follows:

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

Article 14(1)(g) reads as follows:

> *"The freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise."*

In the instant case, a Petition had been submitted to the Commander of the Army on 17th May 2009 by the 20th Battalion of the Sri Lanka Light Infantry where the deceased was served requesting the Commander to carry out justice to their deceased brother (deceased Lance Corporeal Saman Kumara) who succumbed to the gunshot injuries on 22nd April 2009.

In terms of Regulation 3(7)(a) of the Army Courts of Inquiry Regulation 1952, where a member of the Army dies, it is mandatory to appoint a Court of Inquiry to ascertain the cause of the death and to determine whether the death is duty related or not. Accordingly, a Court of Inquiry was convened to investigate to the circumstances leading to the said soldier's death.

However, it is the position of the Petitioner that he was not informed that a Court of Inquiry had commenced against him and was only made aware of it when his aide Dilum Sanjeewa had informed him that a statement was recorded from him at the

said Inquiry. He further alleges that he was not allowed to cross examine the witnesses that testified before the Court of Inquiry. The Petitioner alleges that several other witnesses who have given adverse evidence against the Petitioner had testified in the absence of the Petitioner. The Petitioner submits that it is a violation of fundamental principles of natural justice, which should be followed in such kind of inquiries and Fundamental Rights guaranteed in the Constitution of Democratic Socialist Republic of Sri Lanka.

With regard to the Court of Inquiry, the 1st Respondent states that, it is an internal inquiry held to determine whether an officer is fit to hold his office when criminal charges are preferred against him in a court of law. The second Court of Inquiry was convened for the purpose of determining the criminal liability of the Accused. At the said second inquiry, the Petitioner was given an opportunity to respond to the allegations against him, he had testified under oath and denied any knowledge of the incident and further stated that his statement to the Military Police was obtained under duress. In **Y.B.A.M. Premakumara vs Army Commander and others** (CA WRIT/1153/2006 CA minutes dated 29/10/2009), discussed about the difference between a Court of inquiry and Disciplinary Inquiry which reads as follows,

> "*A Court of Inquiry is different from a disciplinary inquiry. In a disciplinary inquiry a charge sheet will be served and the person accused will have an opportunity to answer the charges and defend himself. In a Court of Inquiry there is no accused or charge sheet, all those who appear before the Court of Inquiry are witnesses as it is a fact finding inquiry*."

As such, whether the opportunity of cross examination was given or denied will not change the character of the Court of Inquiry as it is a fact finding inquiry conducted to unveil the surrounding facts and circumstances. Hence, I am of the view that the Petitioner was given a fair hearing and the Principles of natural justice was followed as the Petitioner has no contentions against the conduct of the disciplinary inquiry.

As per the evidence adduced by the witnesses before the Court of Inquiry it is revealed that the deceased who initially belonged to the Alfa Company had been transferred to the Delta Company after the allegation was made that he was sexually assaulted by the Petitioner, who at the time functioned as a Commanding Officer of the Alfa Company. The written statement of the deceased explaining the said sexual assault is marked 2R1. Following this complaint, the deceased was relocated in the Southern part of the defence line and he was found shot dead on 22nd April 2009 enroute towards the South of the line of defence.

The Petitioner was arrested for the death of the deceased. Petitioner alleges that he was seriously physically assaulted whilst in the custody of Military Police. On the date of his release from the Military Police he had been produced for a physical examination at the Institute of Legal Medicine and Toxicology in Colombo where the medical practitioner who examined him stated the following in the Medico-Legal Examination Report dated 21st August 2009 (Marked RX10).

> *According to the details given by the examinee he had been kept in a cell. He had been assaulted on several occasions with a wooden club and hand. He has experienced pain in the mouth and there had been bleeding from the mouth.*
>
> *General conditions – He was conscious and rational and talked freely, no physical deformities detected.*
>
> *External examination – Examination of the mouth did not reveal damaged teeth or mucosal injuries.*
>
> *Opinion: 1. The examinee was conscious and rational and was in good physical and mental state*
>
> *2. No injuries or scars related to the present incident detected during the examination.*

Therefore, as divulged above, no signs of physical injury are evident, hence, the Petitioner's claim of physical assault cannot be considered before this court.

The initial Court of Inquiry was convened on 16th June 2009 (marked 2R2). According to the evidence adduced by Staff Sergeant Premathilaka (1st Witness), the deceased was on movement with one Private Soldier named Rukmal, towards the Southern area of the defence line where the Delta Company was to be relocated. The route of relocation was passing through the front headquarters of the Alfa Company.

As per the evidence adduced by Private Soldier Rukmal (4th Witness), while passing the front headquarters of the Alfa Company, the Petitioner officer had inquired from him about the deceased, who then had met him. The relevant portion of evidence testified by the 4th witness is quoted below.

ප්‍ර05:- ඔබ එසේ ප්‍රකාශ කලාට පසුව කපිතාන් සිල්වා කුමක් පැවසුවෙද?

පි05:- ලාන්ස් කොර්පරල් සමන් කුමාරට කතා කරන්න කීවා. මා ඉන් පසු ලාන්ස් කොර්පරල් සමන් කුමාර යැයි කතා කර කපිතන් සිල්වා කතාකරන බව පවසා සිටියා.

ප්‍ර06:- ලාන්ස් කොර්පරල් සමන් කුමාර කපිතන් සිල්වා වෙත එනවා ඔබ දුටුවාද?

පි06:- ඔව් මට ඉදිරියෙන් සිටි නිසා මා පසුකරගෙන පැමිනියා.

ප්‍ර08:- ඔබ ඒ කන්ඩායම අසලින් පැමිනෙන විට කපිතන් සිල්වා සිටින ස්ථානය අසල වෙන අයෙකු සිටියාද?

පි08:- නැත. කපිතන් පමණයි සිටියේ.

ප්‍ර11:- ඔබ ලාන්ස් කොර්පරල් සමන් කුමාරට වෙඩි වැදී තිබූ භූමි ප්‍රදේශය දන්නවද?

පි11:- ඔව් කපිතන් සිල්වා ඔහුට කතාකරන විට පෙට්ටිටිය බිම තබා ආ ස්තනයෙදී.

The unofficial English translation of the above is as follows:

Q05:- What did Captain Silva say after you said so?

A05:- He asked me to call Lance Corporal Saman Kumara. Thereafter, I called out to Lance Corporal Saman Kumara and told him that Captain Silva was looking for him.

Q06:- Did you see Lance Corporal Saman Kumara come towards Captain Silva?

A06:- Yes, he (Saman Kumara) passed me because he (the Captain) was in front of me.

Q08:- When you were coming past that company, was there anyone near Captain Silva?

A08:- No, it was only Captain Silva.

Q11:- Do you know the place where Lance Corporal Saman Kumara was shot?

A11:- It's the place where he left the box and came when Captain Silva called for him.

The question arises as to who fired the two gunshots which caused the death of Lance Corporal Saman Kumara. As revealed in the evidence that transpired before the Court of Inquiry, there was no terror attack in close proximity of the incident of death on that particular day. The cause of death was revealed to be two gunshots fired at a close range. Hence, the death cannot be as a result of an attempt of suicide as the deceased could not have fired two shots at himself.

With the above reasoning together with the testimony of the 4th witness, a reasonable inference could be drawn that the Petitioner officer with the support of his aide Dilum Sanjeewa would have shot at Lance Corporal Saman Kumara, from the anger instigated when the deceased had complained of and reported the sexual assault caused to him, to the superior officers of the Petitioner's Regiment.

In terms of Regulation 3(7)(a) of the Army Courts of Inquiry Regulation 1952, where a member of the Army dies, it is mandatory to appoint a Court of Inquiry to ascertain the cause of the death and to determine whether the death is duty related

or not. A Court of inquiry as laid down in Regulation 2 of The Army Courts of Inquiry Regulations 1952 means:

> *"an assembly of officers or, of one or more officers together with one or more warrant or non-commissioned officers, directed to collect and record evidence and, if so required, to report or make a decision with regard to any matter or thing which may be referred to them for inquiry under this regulation."*

Accordingly, a Court of Inquiry was convened to investigate the circumstances leading to the death of Lance Corporal Saman Kumara. At the said Court of Inquiry, the Petitioner's aide Dilum Sanjeewa had testified that on 22nd April 2009 around 6.30 pm he had seen the Petitioner shooting the deceased and therefore he was threatened to be killed, if he divulged the said incident.

Having considered the reports of the two Courts of Inquiry, the Army Commander came to the conclusion that the retention of the Petitioner was not desirable for the maintenance of good order and discipline (which is mandatory in the military), in the Army and hence declared to recommend to His Excellency the President to withdraw the commission of the Petitioner. The Respondents further submit that, the Petitioner has not sought for a relief to quash the findings of the two Courts of Inquiry.

However, the question arises as to whether the Commander of the Army is authorised upon the findings of the Court of Inquiry to make recommendations seeking the discharge and withdrawal of commission of the Petitioner officer. In terms of Regulation 2 of the Army Disciplinary Regulation 1950 read with Section 8 of the Army Act No. 17 of 1949, the Commander of the Army is vested with the responsibility of maintaining discipline in the Army and has a paramount public duty to ensure that the soldiers are commanded by fit and proper officers. Furthermore, in terms of Regulation 2 of the Army Officer Service Regulations (Regular Force) 1992 the

Commander of the Army is authorised to forward recommendations to the Minister of Defence for the approval of His Excellency the President.

As per Justice Vijith K. Malagoda PC, in the case of **Major K.D.S. Weerasinghe vs Colonel G.K.B. Dissanyake and others (SC minutes dated 31.10.2017)**

> *"the Commander of the Army shall be vested with general responsibility for discipline in the Army and in the case in hand the Commander acting under the above position had sought a direction from His Excellency the President regarding the further retention of Petitioner. As revealed before us, the above conduct of the Commander of the army when seeking a directive from His Excellency the President was an independent act and was done for the best interest of the Army, in order to maintain the discipline of the Army."*

This is further supported by the Extraordinary Gazette bearing No. 780/7-1993 dated 17th August 1993 which reads as follows:

> *38. In forwarding an application from an officer to retire or resign his commission, a commanding officer shall, when such application, is the result of misconduct or anything affecting the officer's honour or character as gentleman, state all circumstances and particulars of the case, the Commander of the Army shall ensure that the statement contains a complete account of the case before forwarding it to the Secretary.*
>
> *39. An officer may be called upon to retire or resign his commission for misconduct or in any circumstances which in the opinion of the President, require such action. An officer so called upon to retire or to resign his commission may request an interview with the Secretary, in order that he may be given an opportunity of stating his case.*

Accordingly, the Respondents are empowered to forward the said recommendation to withdraw the commission of the Petitioner to the President.

Since the Petitioner is a Presidential appointee who has been granted his commission in terms of Section 9(1) of the Army Act No.17 of 1949, he holds the said commission during the pleasure of the President in terms of Section 10 of the same Act. In the case of **Air Vice Marshall Elmo Perera vs Liyanage and Others (2003) 1 Sri L R 331** the Court held that:

> *"It was open to the President to terminate the services of the petitioner on the basis that the petitioner holds office at the pleasure of the President.*
>
> *The 1st respondent was merely carrying out a fact-finding inquiry and the findings or recommendations of the respondent would not be binding on the President."*

Therefore, in the instant case, although the 1st Respondent made the recommendation regarding the Petitioner's withdrawal, the authority to withdraw the Petitioner's commission is on the President.

Based on the above submissions, it is the position of the Respondents that the application of the Petitioner cannot be instituted in this Court as what is sought to be challenged in an indirect manner is the right conferred on His Excellency the President to grant and withdraw a commission to an Army Officer under Section 9(1) of the Army Act No.17 of 1949. Since such acts qua President which directly flows from Article 4(1)(b) read with Article 30 of the Constitution, it cannot be challenged in a Court of Law in view of the provisions contained in Article 35 of the Constitution. The Respondents further claim that this application has been filed out of time.

Furthermore, the Petitioner's service was suspended with half pay with effect from 15th March 2010 upon the commencement of the non-summary inquiry bearing No. N/S 29204 before the Magistrate's Court of Anuradhapura. The Petitioner's services were suspended in adherence to the Special Army Order bearing No. 3/75. Hence, although the Petitioner's services were suspended, he continued be paid in accordance with Regulation 2(2) of the Army Pay Code of 1982 which reads as follows:

"when an officer is suspended from exercising the duties and functions of his office, other than on any ground referred to in the sub-paragraph (b) here to, such officer shall receive in respect of each month for the period during which he is so suspended one half of the consolidated pay payable to him."

As per Regulation 3(1)(b) of the Army Pension and Gratuities Code of 1981, an officer shall retire on the expiry of the period in the substantive rank he holds unless he is promoted to the next higher rank within that period. As per the said Regulation the relevant period for a Captain to hold office is 11 years. Accordingly, the Petitioner in the instant case had reached the maximum period permissible within the said rank with effect from 4th August 2015 (he was promoted as a Captain on 2nd August 2004).

Decision

As such, upon careful consideration of all relevant facts and circumstances of the immediate case, I see no reason to allow the Petitioner's application based on the violations of his Fundamental Rights guaranteed under Articles 12(1) and 14(1)(g).

Article 126(4) empowers the Supreme Court "to grant such relief or make such directions as it may deem just and equitable" depending on the facts and circumstances of each individual case. Hence, this court can overlook certain objections in order to serve justice. As evident from the facts above the Petitioner did commit an act which is unbecoming of the character of an officer and did thereby commit an offence punishable under Section 107 of the Army Act No.17 of 1949.

Considering all, it is my view that the 1st Respondent's decision to recommend the withdrawal of the Petitioner's commission is not in violation of his Fundamental Rights as it is required to maintain good order and discipline in the Army.

Application Dismissed.

JUDGE OF THE SUPREME COURT

B. P. ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THEDEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka in respect of violation and/or imminent violation of Articles 12(1) and 14(1)(g) of the Constitution.

Jebarajes Krishnamoorthy nee Kumarasingam,
8B, Nalandarama Road,Nugegoda.

Petitioner

SC FR Application No. 192/2019

-Vs-

1. Dharmasena Dissanayake,
Chairman,
Public Services Commission.

1a. Hon. Justice Jagath Balapatabendi,
Chairman,
Public Services Commission.

2. Prof. Hussain Ismail,
Member,
Public Services Commission.

2a. Indrani Sugathadasa,
Member,
Public Services Commission.

3. Sudharma Karunarathna,
Member,
Public Services Commission.

3a. V. Shivagnanasothy,
Member,
Public Services Commission.

4. Dr. Prathap Ramanujan,
Member,
Public Services Commission.

4a. T.R.C. Ruberu,
Member,
Public Service Commission.

5. V.Jegarasasingam,
Member,
Public Services Commission.

5a. Ahamod Lebbe Mohamed Saleem,
Member,
Public Services Commission.

6. G.S.A.De Silva,
Member,
Public Services Commission.

6a. Leelasena Liyanagama
Member,
Public Services Commission.

7. S. Ranugge,
Member,
Public Services Commission.

7a. Dian Gomes,
Member,
Public Services Commission.

8. D.Laksiri Mendis,
Member,
Public Services Commission.

8a. Dilith Jayaweera,
Member,

Public Services Commission.

9. Sarath Jayatilaka,
Member,
Public Services Commission.

9a. W.H.Piyadasa,
Member,
Public Services Commission.

All of:
No.1200/9,
Rajamalwatta Road,
Battaramulla.

10. The Secretary,
Public Service Commission,
No.1200/9,
Rajamalwatta Road,
Battaramulla.

11. The Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils
and Local Government,
Independence Square,
Colombo 07.

11a. The Secretary,
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Colombo 07.

12. The Secretary,
Ministry of Internal Trade, Food Security and Consumer Welfare,
Level 22,West Tower,
World Trade Center,

Colombo 01.

12a. The Secretary,
State Ministry of Rattan, Brass, Pottery, Furniture, and Rural Industrial Promotion.

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

14. V. Yoosuf
Divisional Secretary,
Divisional Secretariat,
Eravur Town.

15. M.Y Saleem,
Commissioner,
Eastern Province-Department of Local Government,
Kanniya Road, Varothayanagar,
Trincomalee.

16. W.A Hemantha,
Senior Assistant Secretary,
Ministry of Internal & Home Affairs and Provincial Councils & Local Government. No 330, Union Place, Colombo 02.

17. W.A.D Karunathilake,
Director,
Ministry of Health, Nutrition & Indigenous Medicine,
385, Ven.Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

18. P.M.H Priyadarshini,
Commissioner, Department of Land Title Settlement, No 1200/6, Mihikatha Medura, Rajamalwatta Road, Battaramulla.

19. B.P.C Kularathne,
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20. R.M Dayananda,
Provincial Land Commissioner,
Uva Provincial Council,
Raja Vidiya,
Badulla.

21. A.M.P Arampath,
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22. T.A.D.W Dayananda,
Divisional Secretary,
Divisional Secretariat,
Doluwa.

23. M.A.T Senarath,
Deputy Director General (Admin.),
Ministry of Health, Nutrition and Indigenous Medicince,
385, Ven. Baddegama Wimalawansa Thero Mawatha,
Colombo 10.

24. R.M.P Rathnayake,
Divisional Secretary,
Divisional Secretariat,
Mallawapitye.

25. H.M Nandasena,
Divisional Secretary,
Divisional Secretariat,
Padukka.

26. C. Tennakoon,
Municipal Commissioner,
Central Province,
Municipal Council,
Pallekelle, Kundasale, Kandy.

27. J. M. T Jayasundara,
Acting Director General,
Department of Public Finance,
Room 112, General Treasury,
Ministry of Finance,
Colombo 01.

28. O. M. Jabeer
Director,
Sri Lanka Customs,
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29. N. W. Yapa
Divisional Secretary,
Divisional Secretariat,
Thangalle.

30. A. K. N. Wickramasinghe,
Commissioner,
Department of Agrarian Development,
42, Sir Marcus Fernando Mw,
Colombo 07.

31. E. M. P. Ekanayake Divisional

Secretary, Divisional Secretariat, Nikaweratiya.

32. M. Warnakulasooriya Divisional Secretary, Divisional Secretariat, Udunuwara.

33. M. N. P Gunarathne
Senior Assistant Secretary,
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34. H. M. B. P. Herath
Senior Assistant Secretary,
Presidential Secretariat
Galle Face, Colombo 01.

35. E. K. A. Sunitha Divisional Secretary, Divisional Secretariat, Hambanthota.

36. R. M. R. Rathnayake,
Additional District Secretary,
District Secretariat, Kurunagale.

37. C. S. Weerasinghe,
Senior Assistant Secretary,
Ministry of Defence,
15/5, Baladaksha Mawatha,
Colombo 03.

38. N. S. M. L. P. Nanayakkara
Commissioner,
Western Provincial Council,
Department of Local Government,
No.204, Denzil Kobbekaduwa Mawatha, Battaramulla.

39. K. G. Wijesiri,
Senior Assistant Secretary,
Ministry of Education,
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40. R. H. Kamal,
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District Secretariat, Galle.

41. C. K. Wijemanna,
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42. N. A. Egodawela,
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43. U. G. V. Kariyawasam,
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Divisional Secretariat, Matara

46. W. M. Ananda
Divisional Secretary,
Divisional Secretariat,
Nuwara Eliya

47. N. H. M. W. W. N. Herath Kumari
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53.D.A.H Piyathilake
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54.U.B.R Rajapakshe
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67.A.K.R Alawatta
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Divisional Secretariat,
Negombo.

68.L.P Liyanage
Director,
Ministry of Mahaweli Development and Environment,
Sobadam Piyasa,
No. 416/C/1,Robert Gunawardana Mawatha,Battaramulla.

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Divisional Secretariat,
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76.G.P.N.M Abeysekara
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Divisional Secretariat,
Yakkalamulla.

80.S.J Kahawatta,
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Department of Fisheries & Aquatic Resources,
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81.S.B.Udowita
Addl Disctrict Secretary,
District Secretariat,
Ratnapura.

82.S.P. Liyanage
Senior Asst Secretary.
Ministry of Health, Nutrient & Indegenous
Medicine
385, Ven Baddegama Wimalawansa Thero
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83.S.D.N.U. Senadheera
Senior Advisor
Sri Lanka Institute of Development

Administration,
28/10, Malasekara Mw.,
Colombo 07.

84.A.H.M.L.Abeyrathna,
Commissioner,
Department of Agrarian Development, 42 Sri Marcus Fernando Mw, Colombo 07.

BEFORE: Hon. Buwaneka Aluwihare, PC, J.
Hon. Yasantha Kodagoda, PC, J.
Hon. Janak De Silva, J.

COUNSEL: Harsha Fernando with Chamith Senanayake and Yohan Cooray instructed by Jagath Talgaswattage for the Petitioner.

M. Gopallawa DSG for the 01st to 13th Respondents.

ARGUED ON: 16.07.2021.

WRITTEN SUBMISSIONS: 09.07.2021 for the 1st -13th Respondents.
16.07.2021 for the Petitioner.
20.08.2021 for the 1st -13th Respondents.

DECIDED ON: 31.10.2023

Judgement

Aluwihare, PC, J,

When the jurisdiction of this Court was invoked by the Petitioner, she was an officer in Grade I of the Sri Lanka Administrative Service (hereinafter 'SLAS'). The Petitioner sought leave to proceed under Articles 12(1) and 14(1)(g) of the Constitution. It was the contention of the Petitioner that her Fundamental Rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution had been infringed by the

Respondents by their arbitrary and unlawful failure to call her for interview for promotion from Grade I to the Special Grade of the SLAS. Having formed the opinion that the application merits adjudication, this Court granted Leave to Proceed under Articles 12(1) and 14(1)(g) of the Constitution on 20th June 2019. The 1st to 13th Respondents were represented by the learned Deputy Solicitor General, the other Respondents, however, were absent and unrepresented.

The Facts

The merits of the instant case directly correlate to the factual circumstances of Petitioner's Service in the Sri Lanka Administrative Service. Therefore, the facts have been set out below in their warranted detail.

(1) The Petitioner joined the Public Service as a Science Teacher on 10th December 1986. Thereafter, the Petitioner was appointed to the SLAS Class II – Grade II with effect from 10th September 1990 (letter marked 'P1A'). The said appointment was made under and in terms of the 1988 Minutes of the SLAS. The Petitioner held the post of 'Assistant Divisional Secretary' in Ambagamuwa Korale, Ginigathhena.

(2) Thereafter, in October 1992, in terms of the 1988 SLAS Service Minutes (referred to above), the Petitioner duly completed the 1st Efficiency Bar Examination (letter 'P4'). In November 1992, the Petitioner married Mr. V. Krishnamoorthy, who at the time was a career officer of the Sri Lanka Foreign Service. In 1992, upon the Petitioner's Husband being posted as the Third Secretary to the Sri Lankan Embassy in Beijing, China, the Petitioner sought and obtained no pay leave from the SLAS under and in terms of Chapter XII-Section 36 of the Establishments Code to join her husband and relocate to Beijing, China. The said leave, to have effect from 1st December 1992 to 1st December 1995 was approved by letter dated 24th November 1992 (marked 'P5A'). The Petitioner therefore had actively served approximately 2 years and 3 months at the time of obtaining the said leave.

(3) While resident in China, the Petitioner gave birth to her two daughters, in August 1993 and December 1994 respectively. The Petitioner's Husband's period of service was extended by the Foreign Service to 31st December 1997. The Petitioner's no pay leave too, was extended till 31st December 1997 (marked 'P5B-P5D'). In the

meantime, the Petitioner duly completed the 2nd Efficiency Bar Examination as stipulated in the 1988 SLAS Service Minutes. A copy of the results sheet dated 31st January 1996 was produced ('P6').

(4) In December 1997, the Petitioner's family returned to Sri Lanka as her Husband was attached to the Ministry of Foreign Affairs in Colombo. Thereafter, the Petitioner resumed actively working in the SLAS, and worked as an Assistant Secretary to the Judicial Service Commission and thereafter as Assistant Divisional Secretary, Thimbirigasyaya from 1st January 1998 to 4th March 2001, for a period of 3 years and 3 months.

(5) In 2001, the Petitioner's Husband was appointed to the Embassy of Sri Lanka in the Hague, the Netherlands. The Petitioner once again obtained no pay leave in terms of Chapter XII – Section 36 of the Establishments Code. The said no pay leave was obtained from 1st March 2001 to 31st August 2004. The relevant approval and extension letters were produced (marked 'P7A-P7D'). Upon completion of that assignment, the Petitioner's Husband was reassigned to the Ministry of Foreign Affairs in Colombo with effect from 1st September 2004. The Petitioner reported to work with effect from 1st September 2004 as the Assistant Secretary/Director of the Ministry of Social Services. The Petitioner served in this capacity for approximately 2 years.

(6) Thereafter, the Petitioner's Husband was once again posted to Bangladesh to serve as Sri Lanka's High Commissioner with effect from 1st June 2006. The Petitioner once again accompanied her Husband with her two daughters and relocated to Bangladesh. The Petitioner left the country utilising her accumulated leave under the Establishments Code. Upon arrival, the Petitioner was selected to follow a postgraduate program at Dhaka University, leading to a Master of Social Sciences in Public Administration. Upon completion of her Master's degree, as the Petitioner's Husband continued to serve as the Sri Lankan High Commissioner to Bangladesh, the Petitioner obtained no pay leave once more in terms of Chapter XII – Section 36 of the Establishments Code from 4th April 2008 to 16th June 2009. The letters of approval were produced (marked 'P8A and P8B').

(7) Upon conclusion of the Petitioner's Husband's term in Bangladesh, the Petitioner returned to Sri Lanka with her Eldest Daughter while the Husband and the Younger Daughter relocated to Chennai, India for the Husband's new posting. The Petitioner states that this was done because her children were then old enough to live with one of their parents and the Petitioner wished to return to active service in the SLAS. Upon her return, the Petitioner was appointed the Director, National Secretariat for Elders, Ministry of Social Services.

(8) On 27th April 2010, the Petitioner was promoted to SLAS Grade II (letter marked 'PIC') and on 01st July 2010, to SLAS Grade I (letter marked 'PID'). These appointments were made pursuant to the Sections of the 2005 Service Minute of the SLAS. Thereafter, the Petitioner served as the Director, Presidential Task Force for Trilingual Sri Lanka from 18th June 2012 to 23rd February 2013 and as Additional Director General (Admin and Finance) of the Department of Technical Education and Training from 27th February 2013 to 29th April 2016. From 2nd May 2016 to 1st November 2016, the Petitioner served as the Food Commissioner and thereafter, till 31st December 2018, she served as the Director (Acting) to Department of Textile Industries. On 1st January 2019, she was appointed as the Additional Secretary (Acting) to the Ministry of Public Enterprises, Kandyan Heritage and Kandy Development. At the time the present application was filed, on 23rd May 2019, the Petitioner was serving as the Food Commissioner as well as Additional Secretary (Acting) to the Ministry of Public Enterprises, Kandyan Heritage and Kandy Development. Accordingly, from July 2009 to May 2019, the Petitioner was in active service approximately 10 years in active service. In aggregate, the Petitioner has served approximately 19 years in active service. This fact is not disputed by the Respondents.

(9) Upon completion of 18 years in active service, the Petitioner had requested that she be appointed to the Special Grade of the SLAS [letter dated 14th March 2018 addressed to the Secretary, Public Services Commission (marked 'P10')]. This request received a response in the form of a letter dated 30th May 2018 from the Senior Assistant Secretary of the Ministry of National Policies and Economic Affairs (with the Secretary of the PSC being copied) stating that if the Petitioner so wishes to apply for the promotion, she can do so once applications are called by the SLAS for the

promotion (marked 'P10B'). In a further letter dated 07th June 2018 and addressed to the Secretary, PSC through the Senior Assistant Secretary of the Ministry of National Policies and Economic Affairs, the Petitioner detailed the status of her eligibility for promotion to the Special Grade, in particular that she has completed 18 years of active service and as per the 2013 Service Minute of the SLAS, she is eligible for promotion to the Special Grade. The Petitioner further mentions that as per Section 36.4.1 of Chapter XII of the Establishments Code, the period of no pay leave taken by her should not have affected her seniority (marked 'P10C').

(10) On the 20th June 2018, the Senior Assistant Secretary of the PSC, on behalf of the Secretary, wrote to the Petitioner, and wrote to the Secretary of the Ministry of Public Administration, Law and Peace, stating that the Petitioner has indicated in her prior appeals that she has achieved the necessary qualifications for the promotion to the Special Grade as per the Extraordinary Gazette No. 1842/2 dated 23rd December 2013, and that she should be informed that she may apply for an interview for the said promotion (marked 'P10D'). Thereafter, the Additional Secretary of the Ministry of National Policies and Economic Affairs, on behalf of the Secretary wrote to the Petitioner, in a letter dated 03rd July 2018 (marked 'P10E') that she may apply for interview for the said promotion, as per the direction of the aforementioned letter from the PSC.

<u>The Position of the Petitioner</u>

The Petitioner filed the present application alleging that she was arbitrarily denied of her right to be called for interviews for promotion to the vacancies of the Special Grade of the SLAS on 1st July 2018, and that such denial was in violation of her Fundamental Rights Guaranteed under Article 12(1) and Article 14(1)(g). It must be noted that after the filing of the application, promotions were made to the Special Grade of SLAS on several occasions and the Petitioner too, was promoted to the Special Grade with effect from 1st January 2020. The Petitioner thereafter amended the relief sought to reflect her change in post and prayed for the date of her promotion the Special Grade of SLAS to be ante-dated to the 1st July 2018. Thus, the scope of the application was narrowed down to the issue of whether the failure to back-date the promotion to 1st July 2018 amounts to a violation of her fundamental rights, as alleged.

It is the Petitioner's position that Section 36 of Chapter XII of the Establishments Code applies to the Petitioner in a manner such that her seniority would not have been affected by the no-pay leave taken by her. The Petitioner also submitted that her 'seniority' should be assessed based on her total period of service, as 'period of active service' has a distinct existence. Consequently, it was argued that her eligibility for promotion would have been assessed based on her total period of service, and she would have been called for interview. Although the Petitioner submitted that there is a difference between "Seniority" and "Active service", the Petitioner did not specify the root of such difference or how such difference would have any pragmatic effect on promotions.

The Petitioner argued that under Section 36 of Chapter XII of the Establishments Code she entertained a legitimate expectation that her seniority would be safeguarded despite the no-pay leave taken. She further maintained that the 2013 SLAS Service Minute (marked '11R1' and '11R2'), persons will be called for interviews based on their seniority, and as such, the Petitioner should have been called for interviews. To further buttress this argument, the Petitioner noted that as per the Service Minute, the Interview Board was only required to satisfy themselves of the applicants 'eligibility and seniority' for affirmation of post. The Petitioner argued that, by extension, if there was an issue regarding her seniority, such issue should have been addressed by the Interview Board and not the Respondents who prepared the list of persons being called for interview.

The Petitioner also relied on the contention that Section 36 of the Establishments Code embodies the 'Right to Family' and the recognition of the Family as the fundamental unit in society as envisaged by Article 27(12) of the Constitution as a Directive Principle of State Policy. Citing dicta in ***Kirahandi Yeshin Nanduja De Silva and Another v. Principal of Dharmashoka Vidyalaya Ambalangoda and Others*** **[2017] SC FR 50/2015,** and ***Ravindra Gunawardena Kariyawasam v. Cnetral Environmental Authority & Others*** **[2019] SC FR 141/2015,** the Petitioner argued that this Directive Principle must be interpreted and upheld in favour of the Petitioner's position that the law does not permit the seniority of officers who are spouses of diplomats to be affected.

The Position of the 1st to 13th Respondents

It was the submission of the Respondents that the eligibility criteria and method of promotion to the Special Grade of the SLAS were prescribed in Clause 13.3 of the 2013 SLAS Service Minute (marked '11R1'), with the eligibility criteria being specified in Clause 13.3(a) and the method of promotion being in Clause 13.3(b). The Respondents adverted to the fact that the method of promotion (Clause 13.3(b)) was amended in 2018, and that at the time the promotion in question was being sought, the method of promotion was governed by Clause 13.3(b) as amended. The Clause is reproduced below prior to amendment, and as it appears after amendment for ease of reference.

Prior to amendment:

13.3.(b) Method of promotion:
An officer who completes the above qualifications will be promoted to the Special Grade by the Public Services Commission as per vacancies available as at 1st July and 1st January every year.
Recommendations for appointment to the Special Grade will be made following an evaluation made by a Board of Selection consisting of three members appointed by the Public Services Commission. In making its recommendations the said Board of Selection will act on the basis an overall evaluation of the seniority and merits of the officers concerned. For this purpose, officers who have obtained the qualifications stipulated in 13.3(a) above and whose number does not exceed twice the number of existing vacancies shall be subjected to the interview.

After amendment (as it presently appears):

'13.3 *(b) Method of promotion :*

An officer who completes the above qualifications will be promoted to the Special Grade by the Public Service Commission according to vacancies available as at the 1st of July and the 1st of January every year :

Notes

1. Only a number of officers in Grade I who have completed the qualifications in 13.3(a) not exceeding the aggregate of both the number of vacancies and a quantum of 25% of such vacancies will be called for the interview according to the seniority of such officers as at the date on which the vacancies are taken into account.
2. The Board of Interview will examine only the basic qualifications and seniority of the officers who are called for the interview.
3. *The Public Service Commission will promote a number of officers equivalent to the number of vacancies existed in the Special Grade according to the order of seniority of officers in Grade I to the Special Grade as at the date on which the vacancies are taken into account on the recommendations made by the Board of Interview constituting three members appointed by the Public Service Commission.*

In response to the Petitioner's contention that the 2013 SLAS Service Minute contemplated two types of service, being the 'total period of service' and 'period of active service', the Respondents submitted that as per Clauses 13.3(a)(ii) and (iii), the period of service required to be eligible for promotion is only computed in terms

of 'period of active service' and no other criteria is used to measure period of service. Consequently, the learned Deputy Solicitor General argued that the differentiation sought to be established was misconceived and contrary to unambiguous language in Clause 13.3(a).

In lieu of the above, it was also submitted on behalf of the Respondents that it is the 'period of active service' which must be considered to determine the 'seniority' of officers when effecting promotions under Clause 13.3(b) of the Service Minute.

It was the Petitioner's contention that she had satisfied the minimum eligibility criteria stipulated in Clause 13.3(a) and that she was entitled to be interviewed. Responding to this contention, the Respondents argued that such position is untenable and misconceived, as there is no 'right' of being interviewed for the following reasons:

- The SLAS is a 'cadre-based service';
- As per Clause 8.2 of the Service Minute, the Special Grade had 301 assigned posts;
- At the time the impugned promotion was due, as per the Seniority List (marked '11R5'), there were 799 officers in Grade I;
- Promotions to the Special Grade are contingent upon vacancies available (vide Clause 13.3(b));
- Note No.1 to Clause 13.3(b) prescribes that "*only a number of officers in Grade I who have completed the qualifications in 13.3(a) not exceeding the aggregate of both the number of vacancies and a quantum of 25% of such vacancies will be called for interview according to the seniority of such officers as at the date on which the vacancies are taken into account*".

Additionally, the Respondents furnished the Court with the following information regarding the promotion:

<u>Should the Petitioner have been called for Interview for promotion to the Special Grade?</u>

The crux of the Petitioner's submission that her Fundamental Rights guaranteed under Article 12(1) were violated rests on the contention that the Respondents had

arbitrarily and unlawfully failed to call the Petitioner for interviews. Therefore, the central question which warrants determination is whether the Respondents had acted as per the mandated procedures, specifically, as per the SLAS Service Minute and the Establishments Code, as applicable.

The SLAS Service Minute

Section 13. 3(b) of the Sri Lanka Administrative Service Minute, regarding the promotion of officers to the Special Grade states that a total aggregate of the vacancies available as at 01st January or 1st July, as well as 25% of persons fulfilling that aggregate shall be called for interviews based on seniority. Accordingly, although 128 applications were received, only 71 officers were called for interviews.

The Establishments Code

The Petitioner relies on Section 36:1:4 of Chapter XII of the Establishments Code to contend that she, as the Spouse of an Officer posted abroad, bore a Legitimate Expectation that her seniority would not be affected by virtue of any no-pay leave approved under the Section. Section 36:1:4 of Chapter XII of the Establishments Code reads as follows:

"Subject to the following provisions, the seniority of such an officer [an officer who is the Spouse of an Officer posted abroad] will not be affected as a result of obtaining this no pay leave.

i. An officer who is granted no-pay leave under this section should not be considered for any promotion to any vacancies which may arise during the period of his no pay leave.

ii. Where a scheme of recruitment specifies a minimum period of service as a qualification for promotion, ***the period of no-pay leave granted under this section should not be reckoned for computing the minimum period of service."*** [parenthesis and emphasis added]

It is correct to state therefore that Section 36:1:4 of Chapter XII of the Establishments Code provides that where a promotion to a specific grade is dependent on the completion of a minimum period of service, the period of no-pay leave taken by such officer should not be counted for the purposes of ascertaining the minimum period

of service completed by such officer.

Process of Promotion

The Respondents provided the following details of the process of promotion to the Special Grade in July 2018.

1. By Notice dated 13th March 2018 (marked 'P11' and 'P11A'), the Secretary, Ministry of

Public Administration and Disaster Management called for applications to the Special Grade of the SLAS.

2. As at 01st January there were 19 vacancies in the SLAS Special Grade and as at 01st July 2018 there were 38 vacancies, amounting to a total of 57 vacancies as at 01st July.
3. Applications were received from 128 Grade I officers of the SLAS, including that of the Petitioner (marked 'P12' and 'P12A').
4. Since the number of applications received exceeded the number of available vacancies, candidates were shortlisted for promotion interviews as specified in Note 1 to Clause 13.3(b) of the SLAS Service Minute, based on the seniority of the officers who had tendered applications.
5. Seniority of the officers was determined by the official 'Seniority List' maintained by the Secretary, Ministry of Public Administration (marked '11R5' and referred to above).
6. Accordingly, 71 officers were shortlisted for interviews and a notice listing the names of such officers was published on the 24th of April 2019 (letter marked 'P13A'). The list of names was revised by changing 4 names. The revised list (marked as 'P13C') contains 67 names as 4 officers were listed for both interviews in respect of vacancies available as at 01st January 2018 and 01st July 2018.
7. For the aforementioned reason, the list of names was once again revised by substituting the names of the 81st, 82nd, 83rd and 84th Respondents in place of the 4 officers who were double counted, the 77th to 80th Respondents. The Respondents submitted that the 81st and 82nd Respondents were included as the Administrative Appeals Tribunal had quashed the disciplinary orders made against them while the 83rd and 84th Respondents had been included subsequent

to concessions being granted to them in respect of their Efficiency Bar Examinations from the Public Service Commission for the antedating of their appointment to SLAS Grade I.

8. Subsequently, interviews were conducted, and approval was granted by the Public Service Commission to promote 19 officers with effect from 1st January 2018 and 37 officers with effect from 01st July 2018.
9. The Respondents also submit that all the officers who were called for interviews and subsequently promoted were senior in service to the Petitioner for the reason that although most of them had joined the SLAS after the Petitioner, they had surpassed her in seniority at the time of her promotion to Grade II, due to their accumulation of service whilst the Petitioner had obtained an extensive period of no-pay leave. Accordingly, all such officers had secured their promotion to the Grade II by the 15th February 2010 while the petitioner had secured her promotion to Grade II by the 27th April 2010. The same officers had maintained such seniority above the Petitioner in Grade I.
10. The Petitioner was not considered for interviews even though she had tendered an application as she was ranked 208th in the Seniority List, which is considerably lower than the seniority ranks of the officers who had been called for interview.

<u>The 'Seniority List'</u>

The Seniority List (marked '11R5') lists the Petitioner at No. 208 and therefore places her far beyond the number of SLAS officers within contention of being called for interview for the promotion. The Petitioner disputes the veracity of the 'Seniority List' produced by the Respondents (*vide* para 25 of the written submission dated 12.08.2021). The Petitioner claims that although it is conceded that 11th Respondent is responsible for 'maintaining' the list, the author of the list is not revealed and therefore its originality or authenticity is unacceptable. The Respondents maintain that this list was maintained in documentary form since 1978 and since 2001, it was maintained in electronic form in the official website of the Ministry of Public Administration, which was publicly accessible and had been updated at least once every three months on the website, and functions as the central roll or register of SLAS officers.

Provided that this 'Seniority List' is key in determining whether the Petitioner was

within the list of officers and applicants (an interviewee must be both) who could be called for interview, I find it prudent to reiterate the position in our Jurisprudence on who bears the Burden of Proof. Our Courts have strenuously followed the core maxim of '*affirmanti non neganti incumbit probatio*' in holding that the **burden of proof lies upon him who asserts and not who denies**. This is trite law. Applying the principle to the present case, it becomes evident that the burden of proving that the 'Seniority List' cannot be accepted as an official record of the seniority of officers in the SLAS rests firmly with the Petitioner.

It is the Petitioners contention that her legitimate expectations and Fundamental Right to Equality before the Law guaranteed under Article 12(1) have been violated. It logically follows that it is the Petitioner who asserts that she was within the list of officers who were eligible for promotion to the Special Grade by 1st July 2018 and consequently, should have been called for interview. In effect, it is the Petitioner who must prove that she was in such a position. In order to do so, the Petitioner cannot merely dispute the veracity of *the list produced to dispute the Petitioner's position* by the Respondents, she must establish before court, on her own accord, independent to the material produced by the Respondents, that she was placed in the Seniority ist of the SLAS in a manner making her not eligible for promotion, but also that the Respondents were bound to call her for interview above and before other applicants. The position of the Petitioner falls further beyond the ambit of merit when considering that, as the Petitioner was a senior officer in the SLAS who had received promotions to Grade II and Grade I which were also conditioned on Seniority and therefore *based on the same list*, had there been any issue with regard to her positioning on the list, she could have raised the matter at any time prior the calling of applications for vacancies for the Special Grade.

Secondly, it is also worth noting that provisions of the Evidence Ordinance provide for producing duly certified copies of Public Documents as proof of the contents therein and the Court can presume that the Seniority List of the SLAS was produced as genuine. Once the contents therein were proven by operation of the law, the burden of showing its contents are not accurate fell on the Petitioner. Besides noting that no one officer has claimed responsibility for creating the list, the Petitioner has not produced any material which could establish why she should not have been

placed 208th in such list by referring to her service record. The Court, therefore, can rely on the Seniority List that was produced by the Respondents as a genuine and accurate document, in the absence of any proof to the contrary.
Accordingly, the following facts must be observed in determining the Respondents compliance with the Establishments Code and the SLAS Service Minute:

The No. of Vacancies for the SLAS Special Grade as at 01st July 2018 = 57
The No. of Persons who were shortlisted for Interview [57 + (25% of 57)] = 71
The Seniority Rank of Petitioner according to the List = 208

Clause 13.3(a)(iii) of the SLAS Service Minute lists 'an active period of service not less than eighteen years as at the date of promotion' to be eligible for promotion to the SLAS Special Grade. Although the Petitioner sought to submit the view that the service minute contemplates the 'total period of service' and seniority, for the purpose of calling officers for interview, must be determined by such 'total period', and not 'active period', it must be observed that **Clause 13.3 does not require an examination of the entire period of service**. Therefore, it must be understood that any 'minimum period of service' contemplated under the Clause refers to 'active service' alone.

By extension, the aforementioned conclusion also leads to the view that Section 36 of the Establishments Code did affect the seniority of the Petitioner. Importantly, Section 36 begins by stating that "*Subject to the following provisions, the seniority of such an officer [an officer who is the Spouse of an Officer posted abroad] will not be affected as a result of obtaining this no pay leave…"* and the 2nd Proviso reads as follows:

"*Where a scheme of recruitment specifies a minimum period of service as a qualification for promotion, the period of no-pay leave granted under this section should not be reckoned for computing the minimum period of service."*

Accordingly, it can be understood that the 'minimum period of service' contemplated in Clause 13.3 of the Service Minute for the promotion of officers to the Special Grade is stated in Clause 13.3(a)(iii) wherein '*an active period of service not less*

than eighteen years as at the date of promotion' is required. I therefore subscribe to the view advanced on behalf of the Respondents, that the Petitioner's seniority was duly affected by operation of the law and that she was not arbitrarily or unlawfully denied an opportunity to interview for promotion to the Special Grade.

In the absence of any arbitrary or unlawful action by the Respondents, I hold that the Petitioner has failed to establish a violation of Fundamental Rights guaranteed in terms of Article 12(1) of the Constitution, and the Petitioner is not entitled to the relief prayed. Accordingly, the application is dismissed.

However, taking into account the circumstances of this case, I order no costs.

Application dismissed.

Judge of the Supreme Court

Yasantha Kodagoda, PC, J
I agree.

Judge of the Supreme Court

Janak De Silva, J
I agree.

Judge of the Supreme Court

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

In the matter of an Application in the Supreme Court of Democratic Socialist Republic of Sri Lanka for special leave under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C Appeal 02/2021

S.C Application No: SC/SPL/LA/63/2017

Court of Appeal No: CA 713/2000(F)

D.C Colombo :3711/SLP

Hettiarachchige Dominic Marx Perera,

No. 276/B/45/A,

Morawake Watta, Pahalabomiriya,

Kaduwela.

Plaintiff

Vs.

1) Kuruwita Arachchige Mulin Perera (Deceased)

2) Milroy Christy Kasichetty,

Dalugama,

Kalaniya

3) National Savings Bank

Galle Road, Collpetty,

Colombo 03

Defendants

-And Between

Hettiarachchige Dominic Marx Perera,

No. 276/B/45/A,

Morawake Watta, Pahalabomiriya,

Kaduwela

Plaintiff- Appellant

Vs

1) Kuruwita Arachchige Mulin Perera (Deceased)

1A) Kuruwita Arachchige Jeramious Perera

No. 542, Nugamugoda,

Kalaniya

1B) Kuruwita Arachchige Violet Perera,

No. 184, Hospital Junction,

Akaegama

1C) Leela Thilakaratne,

No. 636, Sri Vijaya Mawatha,

Arawwala, Pannipitiya

1D) Kuruwita Arachchige Sandya Chandani Perera,

No. 33 Maheshi Uyana,

Kahathuduwa,

Polgasowita

1E) Kuruwita Arachchige Thamara Dinadari Perera,

No. 708, Ambillawatta Road,

Katuwawala Mawatha,

Boralasgamuwa

1F) Kuruwita Arachchige Jayalatha Perera,

No. 638, Sri Vijaya Mawatha,

Arawwala, Pannipitiya

1G) Kuruwita Arachchige Ranil Sanath Kumara Perera,

No 47/12A, Bandaragama – West,

Bandaragama

Substituted Defendant – Respondents

2) Milroy Christy Kaischetty,

Dalugama, Kalaniya

3) National Savings Bank,

Galle Road, Collpetty,

Colombo 03

Defendant – Respondents

-And Between

Hettiarachchige Dominic Marx Perera,

No.276/B/45/A,

Morawake Watta, Pahalabomiriya,

Kaduwela

Plaintiff – Appellant – Petitioner

Vs.

1) Kuruwita Arachchige Mulin Perera (Deceased)

1A) Kuruwita Arachchige Jeramious Perera,

No. 542, Nungamugoda,

Kalaniya

1A1) Jayasooriya Kuranage Mary Maglin Daisy Perera,

No. 542, Nungamugoda,

Kalaniya

1B) Kuruwita Arachchige Violet Perera,

No. 184, Hospital Junction,

Akaegama.

1C) Leela Thilakarathne,

No.636, Sri Vijaya Mawatha,

Arawwala, Pannipitiya

1D) Kuruwita Arachchige Sandya Chandani Perera,

No. 33, Maheshi Uyana,

Kahathuduwa, Polgasowita

1E) Kuruwita Arachchige Thamara Dinadari Perera,

No.708, Ambillawatta Road,

Katuwawala Mawatha,

Boralasgamuwa

1F)Kuruwita Arachchige Jayalatha Perera,

No.638, Sri Vijaya Mawatha,

Arawwala, Pannipitiya

1G) Kuruwita Arachchige Ranil Sanath Kumara Perera,

No. 47/12A, Bandaragama – West,

Bandaragama

Substituted Defendant - Respondents - Respondents

-And Now Between-

Hettiarachchige Dominic Marx Perera

No. 276/B/45/A,

Morawake Watta, Pahalabomiriya,

Kaduwela

Plaintiff – Appellant - Petitioner – Appellant

Vs.

1) Kuruwita Arachchige Mulin Perera (Deceased)

1A) Kuruwita Arachchige Jeramious Perera (Deceased),

No. 542, Nungamugoda,

Kalaniya

1A1) Jayasoorya Kuranage Mary Magilin Daisy Perera,

No.542, Nungamugoda,

Kalaniya

1B) Kuruwita Arachchige Violet Perera (Deceased).

No. 184, Hospital Junction,

Akaegama

1B1)Haputhanthige Don Thilitha Dorin,

No.184, Hospital Junction.

Akegama

Party sought to be substituted as 1B1 substituted Defendant – Respondent – Respondent – Respondent

1C) Leela Thilakarathne,

No.636, Sri Vijaya Mawatha,

Arawwala,

Pannipitiya

1D)Kuruwita Arachchige Sandya Chandani Perera,

No.33 Maheshi Uyana,

Kahathuduwa,

Polgasowita

1E)Kuruwita Arachchige Thamara Dinadari Perera,

No.708, Ambillawatta Road,

Katuwawala Mawatha,

Boralasgamuwa

1F)Kuruwita Arachchige Jayalatha Perera,

No.638, Sri Vikaya Mawatha,

Arawwala,

Pannipitiya

1G)Kuruwita Arachchige Ranil Sanatha Kuamara Perera,

No.47/12A, Bandaragama – West,

Bandaraga,

Substituted Defendant Respondent – Respondent – Respondents

2) Milroy Christy Kasichetty,

Dalugama, Kalaniya

3)National Savings Bank

Galle Road, Collpetty,

Colombo 03

Defendant – Respondent – Respondent – Respondents

BEFORE: Buwaneka Aluwihare, P.C, J.

Kumudini Wickremasinghe, J.

Janak De Silva, J.

COUNSEL: Anura Gunaratne for the Plaintiff – Appellant – Petitioner – Appellant

Yasas Silva for the 2nd Defendant – Respondent – Respondent

ARGUED ON: 13.03.2023.

WRITTEN SUBMISSIONS: Plaintiff – Appellant – Petitioner – Petitioner on 19.04.2023 and 23.06.2021

2nd Defendant – Respondent – Respondent on 06.10.2022

DECIDED ON: 31.10.2023.

Judgement

Aluwihare, PC, J.

The instant Appeal is a result of protracted litigation culminating in a series of legal proceedings. The Plaintiff – Appellant – Petitioner – Appellant (hereinafter referred to as the Plaintiff) filed action No. 3711/Special in the District Court of Colombo against the original 1st Defendant – Respondent – Respondent – Respondent, the said *Kuruwita Arachchige Mulin Perera* (hereinafter the 1st Defendant) and against the 1st and 2nd Defendant – Respondent – Respondent – Respondents (hereinafter referred to as the 2nd and 3rd Defendants respectively) on 11.05.1993 and sought *inter alia*;

1) A declaration that deed No. 259 of 26th May 1992 is null and void/not a legally valid deed and/or a fraudulent deed

2) A declaration that the 1st Defendant does not have a legally valid title to the land depicted in the First Schedule to the Plaint

3) The transfer of the land depicted in the 2nd Schedule of the Plaint by the 1st Defendant to the 2nd Defendant was not valid

4) The mortgage of the land in the 2nd Schedule, by the 2nd Defendant to the 3rd Defendant bank is not legally valid

5) A declaration that the Plaintiff is the legal owner of the Corpus by virtue of deed No. 363 of 13th February 1988

The Plaintiff also made a complaint to the Colombo Fraud Investigation Bureau and parallel proceedings were initiated before the Magistrate Court, during the pendency of the action in the District Court against the original 1st Defendant and two other co-accused, who were the witnesses to the said deed. The charge was that the deed bearing No. 259 executed on 26.05.1992 was a forgery, which was allegedly executed in favour of the 1st Defendant by the Plaintiff Appellant. In the District Court and Magistrate Court (as the virtual complainant), the Plaintiff has contended that the 1st Defendant had fraudulently executed deed No. 259 and the Corpus described in the 1st Schedule to the Plaint in the District Court as a gift of transfer. Thereafter, the 1st Defendant transferred

the land to the 2nd Defendant, who subsequently mortgaged the land to the 3rd Defendant Bank.

The Plaintiff concluded his case on 02.07.1997 at the District Court and the Learned Judge of the District Court by judgement dated 21.07.2000 dismissed the action of the Plaintiff. However, on 25.05.1999 the Magistrate Court entered a conviction against the 1st Defendant and the two other co-accused on the basis that deed No. 259 was fraudulently executed. This evidence was not available for the Learned Judge of the District Court. It is also pertinent that the 1st Defendant preferred an appeal to the Provincial High Court against the conviction of the Magistrate Court, but during the pendency of the appeal, the 1st Defendant passed away. The other two co-accused did not challenge the conviction entered by the Magistrate's Court.

The Plaintiff preferred an appeal from the judgement of the District Court to the Court of Appeal on 18.09.2000. Certain attempts to reach a settlement between the parties and the death of the parties delayed the matter for numerous years but on 18.03.2014 the Plaintiff informed Court that he intends to introduce fresh evidence, namely the conviction of the 1st Defendant in the Magistrate Court by way of an application under Section 773 of the Civil Procedure Code. Accordingly, by way of Petition and affidavit, the Plaintiff on 18th July 2014 made a formal application to have fresh evidence adduced. The Court of Appeal having considered the said application, by Order dated 13.02.2017 dismissed the application of the Plaintiff to adduce fresh evidence. Thereafter, the Plaintiff sought Special Leave to Appeal from this Court. This Court granted special leave on 11.01.2021 on the questions of law referred to in paragraphs 16(c) and (d) of the Petition of the Plaintiff dated 17.10.2017, which are as follows;

c) Did the Learned Judges of Court of Appeal has totally disregarded the fact that the conviction of the 2nd accused (2nd Defendant) and 3rd accused stands since there was no appeal?

d) Did the Learned Judges of Court of Appeal interpreted section 41 A1 of the Evidence Ordinance (Amended Act No. 33 of 1998) incorrectly?

It appears that due to inadvertence the formulation of the questions of law appears to be incorrect. There was no conviction against the 2nd Defendant nor was the 2nd Defendant a party before the Magistrate Court proceedings, the conviction was against the 1st Defendant and Bentara Mudumanthrige Ranjith (1st witness to deed No. 259) and Kankanamge Padmadasa (2nd witness to deed No. 259). Further, Section 41A (1) of the Evidence Ordinance, relates to relevancy of a conviction in an action for defamation, hence, the relevant section of the instant Appeal should be Section 41A (2). Also, the parties in their written submission had made no mention of Section 41A (1), therefore, for the purpose of this appeal, the questions of law reformulated to the extent necessary in order to address the issues raised in the appeal and they are as follows;

1) Did the Learned Judges of the Court of Appeal disregard the fact that the conviction of 2nd accused, and 3rd accused stands since there was no appeal?

2) Did the Learned Judge of the Court of Appeal interpret Section 41A (2) of the Evidence Ordinance (Amended Act No. 33 of 1998) incorrectly?

I wish to commence by addressing the second question of law as formulated above.

Question of Law 02: Did the Learned Judge of the Court of Appeal interpret Section 41A (2) of the Evidence Ordinance (Amended Act No. 33 of 1998) incorrectly?

Section 773 of the Civil Procedure Code enables the Court of Appeal to admit fresh evidence in appeal and provides as follows;

"*Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree, or order, according to law, or to pass such judgment, decree or order therein between and as regards the parties, or to give such direction to the court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit,* ***or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial.***" [Emphasis added]

A similar power is granted by Article 139(2) of the Constitution to the Court of Appeal. These statutory and Constitutional Provisions permit the Court of Appeal to admit fresh evidence subsequent to a trial. However, to ensure the finality of litigation, the Courts are cautious in abducing fresh evidence. Another reason is stated by Lord Hodson in ***Ladd v Marshall*** **[1954] 3 All ER 745 at p. 751,** and he cited with approval the dicta of Lord Loreburn LC in ***Brown v Dean*** **[1910] A.C 373** and held as follows;

"When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds"

On the other hand, however, if fresh evidence that is to be adduced would make a material difference to the case already decided, and the justice demands, in view of the court to permit fresh evidence, then adducing fresh evidence should be permitted to avoid a miscarriage of justice. The principles to be applied in adducing fresh evidence are namely those enunciated by Lord Denning in ***Ladd v Marshall*** **[supra] at p. 748** where the court held that;

"***The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.***"

These principles were adopted by the Court in ***Beatrice Dep v Lalani Meemaduwa*** **[1997] 3 Sri L.R 379** and subsequently affirmed in a series of decisions. Therefore, in order to adduce fresh evidence, three conditions must be satisfied, which are as follows;

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive.

(3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

Reasonable Diligence

The first criterion requires the Appellant to satisfy the Court that the evidence could not have been obtained with reasonable diligence for use at the trial. Our system is one of adversarial, the litigant must present before the Court with the evidence to prove his or her case to satisfy the evidentiary burden embodied in the provisions of Chapter IX of the Evidence Ordinance as applicable. Fresh evidence will not be admitted merely because the result of the first trial was or may have been occasioned by the unsuccessful party's inattention, or due to an innocent mistake. The opposing party has no duty to atone for the litigant's mistakes, and the blame falls squarely on the shoulders of the errand litigant.

In the instant Appeal, however, it is apparent that the evidence was not available, as the Plaintiff concluded his case on 02.07.1997 and the convictions against the 1st Defendant, namely for forgery and the other two co-accused were entered on 25.05.1999, in the Magistrate Court. Therefore, I am of the opinion the first condition referred to above, is satisfied.

Influence of the Evidence

The Amendment to the Evidence Ordinance by Act No. 33 of 1998, made a conviction in a Criminal Court a relevant fact in a Civil Court. A conviction is admissible evidence in a civil suit where the fact that he (the person who is so convicted) has committed the acts constituting the offence is a fact in issue.

The 1st Defendant and the co-accused were convicted in the Magistrate Court [in case No. 59322/1 **(marked F 1)**] of the following charges;

a) Falsely representing a person unknown to the complaint as Hettiarachchige Dominic Marx Perera and endeavored to deceive one Gamini Harischandra Premasundra

Notary Public thereby committed the offence of cheating under Section 400 of the Penal Code

b) Making a false document which was dead No. 259 and thereby committed the offence forgery, punishable under Section 454 of the Penal Code

In my opinion, this evidence would have influenced the result of the case since the authenticity of deed No.259 is central to the Plaintiff's case. The Plaintiff sought a declaration in the District Court that deed No. 259 of 26.05.1992 was fraudulently executed by the 1st Defendant and she along with the two other co-accused were convicted in the Magistrate Court. I am further of the view that the offence for which the 1st Defendant was convicted, and the subject matter complained of by the Plaintiff in the District Court are the same, therefore, would have an important influence if not direct, on the outcome of the case.

Credibility of the Evidence

Needless to say, a judgement of a competent Court would be credible evidence. A competent Court would enter judgment after careful evaluation of the facts and relevant legal principles. Moreover, a criminal conviction, as in the instant Appeal, would carry a higher burden of proof and would be a credible item of evidence in a subsequent civil proceeding if the judgement is relevant.

In my view, the conjunctive criteria provided above are satisfied by the Plaintiff. The Court of Appeal, however, held that once the 1st Defendant passed away the Appeal was left in "limbo" and Section 41A (2) of the Evidence Ordinance has no application. the Court of Appeal held that;

"*The provision makes it clear that only two categories of convictions become relevant. The phrase "being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant" makes it crystal clear that for a conviction to become relevant, it must be*

(a) a conviction that has not been appealed against (it must be an unappealed conviction) or

(b) a conviction that has been affirmed in appeal (it must be an affirmed conviction)"

The Court of Appeal held further that;

"*What the Plaintiff-Appellant seeks to have admitted is a conviction that appealed against but not adjudicated upon or affirmed as a result of the demise of 1st Defendant. Had the eventuality of the death of the 1st Defendant not intervened, there would have been two possibilities. Either the conviction would have been affirmed or it would have been set aside. Such a conviction which was left in limbo cannot fall within either category (a) or (b) contemplated by Section 41A (2). When the 1st Defendant (who was the 1st accused in the MC prosecution) passed away, her conviction was neither unappealed nor can it be said to have been affirmed in appeal."*

I do agree with the observation of his Lordship that Section 41A (2) contemplates two categories of convictions, but in my opinion, once the 1st Defendant passed away, the appeal was abated. The appeal cannot be left in a state of "limbo." The legal principles in this regard are aptly summarized in reference to several Indian authorities by Her Ladyship Chief Justice Dr. Shirani Bandaranayake in ***Gamarallage Karunawathie of Mahena, Warakapola v. Godayalage Piyasena of Boyagama, Ambanpitiya*** **S.C. Appeal No.09A/2010 (S.C Minutes 05.12.2011).** However, the judgement was declared *per in curium* in in ***Bulathsinhala Arachchige Indrani Mallika v. Bulathsinhala Arachchige Siriwardane of Dummalasooriya*** SC Appeal 160/2016 (SC minutes 02.12.2022) as the decision was made without considering the applicable provisions of the Partition Act. Although the ratio in Gamaralalage Karunawathie (supra) may not be applicable to partition actions, I am of the view, however, that the decision in Gamaralalage Karunawathie (supra) is sound law as far as the instant case is concerned. It was held in Gamaralalage Karunawathie (supra) at p.8 as follows;

"*Reference was made to the decision in State of Punjab v Nathu Ram (Supra) in Swaran Singh Puran Singh and another v Ramditta Badhwa (dead) and others (AIR 1969 Punjab & Haryana 216). In Swaran Singh (Supra), the decision in Nathu Ram (Supra) was clearly analyzed and the Court had laid down the following proposition on the basis of the decision given in Nathu Ram (Supra):*

1. On the death of a respondent, an appeal abates only against the deceased, but not against the other surviving respondents;

2. in certain circumstances an appeal on its abatement against the deceased respondent cannot proceed even against the surviving respondents and in those cases the Appellate Court is bound to refuse to proceed further with the appeal and must, therefore dismiss it;

3. the question whether a Court can deal with such matters or not will depend on the facts and circumstances of each case, and no exhaustive statement can be made about those circumstances;

4. the abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the Appellate Court cannot in any way modify that decree directly or indirectly."

In my opinion with the death of the 1st Defendant, the appeal in the Provincial High Court abated and once the appeal abated the conviction in the Magistrate Court against the 1st Defendant became final. Therefore, the conviction of the 1st Defendant falls under abovementioned first limb. A contrary interpretation would be quite illogical. For example, in similar parallel proceedings, a defendant may appeal against a conviction to the Provincial High Court and subsequently withdraw the appeal. When civil proceedings are brought against the defendant and an attempt is made to lead evidence concerning the conviction, the defendant may argue that the appeal was in "limbo", therefore, the conviction is not admissible. On this basis, I am of the opinion that the Court of Appeal erred in interpreting Section 41A (2) of the Evidence Ordinance.

Question of Law 01: Did the Learned Judges of the Court of Appeal disregard the fact that the conviction of 2nd accused and 3rd accused stands since there was no appeal?

As mentioned in ***Gamarallage Karunawathie of Mahena, Warakapola v. Godayalage Piyasena of Boyagama, Ambanpitiya*** [supra], on the death of a respondent, the appeal only abates against the deceased but not against the surviving respondents but, as the 1st and 2nd defendants in the Magistrate Court did not appeal against the conviction, the conviction remains final. However, it would not be necessary to consider this question of law in view of the opinion expressed by this Court in respect of the question of law No. 02.

Conclusion

In view of the conclusions arrived at by this court on the question of law No.1 on which Special Leave was granted, I answer the said question of law in the affirmative and accordingly the Order of the Court of Appeal dated 13th February 2017 is set aside. In the instant case the Plaintiff [Appellant] should be permitted to produce the evidence in

relation to the conviction of the 1st Defendant for forgery before the Court of Appeal in terms of Section 773 of the Civil Procedure Code and the Court of Appeal is directed to consider the appeal (in case No.CA/713/2000/F) of the Plaintiff on its merits inclusive of the fresh evidence permitted by this court.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Kumudini Wickramasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT

NOVEMBER

2023

JUDGMENTS

NOVEMBER INDEX

1.	SC/APPEAL/11/2014	3338
2.	SC/FR/63/2018	3353
3.	SC/CHC/APPEAL/44/2014	3364
4.	SC/APPEAL/77/2018	3373
5.	SC/APPEAL/128/2018	3387
6.	SC/APPEAL/166/2017	3397
7.	SC/FR/298/2013	3419
8.	SC/APPEAL/55/2020	3494
9.	SC/FR/178/2014	3523
10.	SC/APPEAL/65/2021	3546
11.	SC/APPEAL/74/2014	3574
12.	SC/APPEAL/150/2016	3588
13.	SC/APPEAL/61/2008	3601
14.	SC/APPEAL/192/2017	3623

15.	SC/APPEAL/78/2014	3637
16.	SC/SPL/LA/40/2022	3666
17.	SC/APPEAL/107/2015	3732
18.	SC/APPEAL/11/2021	3762
19.	SC/APPEAL/113/2019	3884
20.	SC/FR/91/2021	3901
21.	SC/FR/710/2012	3939
22.	SC/FR/374/2017	3950
23.	SC/APPEAL/158/2018	3976
24.	SC/APPEAL/92/2018	4009
25.	SC/APPEAL/35/2018	4022
26.	SC/FR/195/2022	4049
27.	SC/FR/135/2020	4314
28.	SC/CONTEMPT/02/2023	4367

29.	SC/CHC/APPEAL/74/2013	4382
30.	SC/APPEAL/120/2013	4386
31.	SC/APPEAL/64/2019	4404
32.	SC/FR/335/2021	4421
33.	SC/APPEAL/118/2010	4436
34.	SC/CHC/72/2013	4449

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

In the matter of an application for Leave to Appeal against the Judgment of the Provincial High Court of Western Province dated 26/08/2013 in the Case No. WP/HCCA/GPH/113/2008(F), DC Gampaha Case No. 39800/P.

Chandra Warusapperuma,
No. 280,
Temple Road,
Wabada.

Plaintiff

SC Appeal No: 77/2014
SC/HCCA/LA No. 390/2013
WP/HCCA/GPH/113/2008/F
DC Gampaha Case No. 39800/P

Vs.

A.H. Alice Nona,
Dolekade,
Wabada-South.

Defendant

BETWEEN

A.H. Alice Nona,
Dolekade,
Wabada-South.

Defendant-Appellant

Vs.

Chandra Warusapperuma,
No. 280,
Temple Road,
Wabada.

Plaintiff-Respondent

AND NOW BETWEEN

A.H. Alice Nona,
Dolekade,
Wabada-South.

Defendant-Appellant-Appellant

Vs.

Chandra Warusapperuma,
No. 280,
Temple Road,
Wabada. **(Deceased)**

Plaintiff-Respondent-Respondent

1(A). Abeysinghe Arachchige Chaminda Upul Shantha

1(B). Lakshman Sri Mangalika

1(C). Shrimathie Mangalika

1(D). Vikum Sri Jayantha

All of No. 280,
Temple Road, Wabada.

<u>Substituted 1A, 1B, 1C & 1D Plaintiff-Respondent-Respondents</u>

Before: **Justice P. Padman Surasena**

Justice Kumudini Wickremasinghe

Justice A.L. Shiran Gooneratne

Counsel: Sudarshani Coorey for the **Defendant-Appellant-Appellant.**

Saman Liyanage with Janaka Gamage for the **Plaintiff-Respondent-Respondents** instructed by Harshika Godamulla.

Argued on: 25/05/2023

Decided on: **02/11/2023**

A.L. Shiran Gooneratne J.

By Plaint dated 08/07/1996, the Plaintiff-Respondent-Respondent (hereinafter referred to as the "Plaintiff-Respondent") filed Case bearing No. D.C. Gampaha 39800/P against the Defendant-Appellant-Appellant ("the Defendant-Appellant"), and sought a declaration that the Plaintiff-Respondent and the Defendant-Appellant are each entitled to half share, to the land to be partitioned called Gonnagahawatta *alias* Batadombagahawatta, in extent, 1A and 6P depicted in Village Plan No. 849/P, dated 26/07/1957, made by M.S. Perera, Licensed Surveyor, More fully described in the schedule to the Plaint.

In paragraph 7 of the said Plaint the Plaintiff-Respondent states that the said land sought to be partitioned is Lot No. 4, an unallotted portion of land in the Final Plan dated 26/07/1957, in Gampaha District Court Case No. 4095/P, of the land called Gonnagahawatta *alias* Batadombagahawatta, in extent, 1A 0R 6P, more fully described in the schedule to the Plaint. Admittedly, the land sought to be partitioned is depicted as Lot No. 4 in the said Plan No. 849/P dated 26/07/1957, is an unallotted potion of land in partition Case No. 4095/P of the District Court of Gampaha.

In the Amended Statement of Claim dated 29/11/2000, the Defendant-Appellant contends *inter alia*, that she and her predecessors in title possessed the unallotted Lot No. 3 in extent of 2R and 8.20P, depicted in Preliminary Plan No. 1175/P, dated 30/07/1998, made by A.C.P. Gunasena, Licensed Surveyor, for a period of over 60 years and thereby acquired prescriptive title to the said Lot No.3 in the said Plan No. 1175/P. On that basis, the Defendant-Appellant contends that presently, she is in possession and has prescribed to in excess of half share of the land to be partitioned.

Having considered the oral and the documentary evidence led by the respective parties, the learned Additional District Judge by Judgment dated 24/09/2008, held that the

Plaintiff-Respondent and the Defendant-Appellant are each entitled to a half share of the unallotted portion of land as depicted in the Preliminary Plan No. 1175/P, dated 30/07/1998, made by licensed surveyor A.C.P. Gunasena. The Court also held that the Defendant-Appellants claim based on prescriptive possession to a portion in excess of half share of the unallotted portion was not proved and accordingly, the Court granted relief to the Plaintiff-Respondent as prayed for.

Being aggrieved by the said Judgment, the Defendant-Appellant, by Petition of Appeal dated 21/11/2008, appealed to the High Court of the Western Province exercising civil appellate jurisdiction holden in Gampaha ("the Civil Appeal High Court"). The Civil Appeal High Court, after hearing also considering the question of title of the Plaintiff-Respondent and the claim of prescriptive possession acquired by the Defendant-Appellant to the relevant portion, by Judgment dated 22/08/2013, held that;

a) the Defendant-Appellant is entitled only to a half of the unallotted land and that the Defendant-Appellant has failed to establish any amount in excess of such or established prescriptive title to any portion of the said land.
b) the Plaintiff-Respondent had purchased the rights of the 7 children of Punchi Singho and his wife.
c) the Plaintiff-Respondent has established the rights which devolved from Punchi Singho to the Plaintiff-Respondent.
d) the Deeds marked V1, V2 and V3 produced at the trial before the District Court by the Defendant-Appellant were not in conformity with the extent of the land which was claimed by the Defendant-Appellant.
e) the Defendant-Appellant failed to establish prescriptive title to a defined portion of the corpus.
f) the Defendant-Appellant is entitled only to a half share of the corpus.

Accordingly, the Civil Appeal High Court affirmed the said Judgment of the Additional District Judge dated 24/09/2008, and dismissed the appeal.

The Plaintiff-Appellant, by Petition dated 04/10/2013 is before this Court, to set aside the said Judgment dated 22/08/2013, delivered by the Civil Appeal High Court.

By Order dated 21/06/2019, this Court granted leave to appeal on the following questions of law;

1) Whether the Plaintiff has established title to a half share of the corpus?
2) If the answer to the above question of law is in the negative, what is the share that the Plaintiff is entitled to?
3) Whether the Defendant-Appellant-Appellant was allocated the shares according to the evidence and the documents led at the trial?

At the commencement of the trial before the District Court, both parties admitted that the land described in the schedule to the Plaint is the same land as depicted in the Preliminary Plan No. 1175/P, prepared by licensed surveyor A.C.P. Gunasena. They also admitted that Patikiri Arachchige Simon Singho and Patikiri Arachchige Andi Singho were the original owners of the land to be partitioned and were each entitled to an equal share. At the trial, only the Plaintiff-Respondent and the Defendant-Appellant testified before the District Court.

The Plaintiff-Respondent's position was that both the Plaintiff-Respondent and the Defendant-Appellant be declared entitled to a half share each to the land described in the said Preliminary Plan No. 1175/P, dated 30/07/1998.

It is in evidence that Patikiri Arachchige Simon Singho, one of the original owners, by Deed No. 15767 dated 17/01/1945, marked 'P2', transferred his undivided half share to Patikiri Arachchige Punchi Singho. When the said Punchi Singho died, his share

devolved on his widow Mahavithanage Helenahamy and their six children according to inheritance under the pedigree. One child died issueless and his share devolved on Helenahamy and the rest of the siblings. The said Helenahamy, by Deed No. 23247 marked 'P3', transferred all her rights to the Plaintiff-Respondent, and the rest of the children also transferred their rights to the Plaintiff-Respondent by Deeds No. 25483 marked 'P7', and No. 24132 marked 'P4', respectively. Accordingly, the Plaintiff-Respondent purchased the undivided half share of Patikiri Arachchige Punchi Singho which devolved on his wife Helenahamy and their seven children, thereby claimed entitlement to half share to the said land.

The Defendant-Appellants position is that;

a) By the Deeds marked P1 to P8, the Plaintiff-Respondent gets title to the said land only on Deed Nos. 25483 (P7) and 24277 (P8), referred to in the Plaint and accordingly, would be entitled only to 9/20 share and not half share, as claimed.
b) having possessed the said divided Lot No.3 depicted in Preliminary Plan No. 1175/P dated 30/07/1998, for over 10 years, the Defendant-Appellant has acquired prescriptive title to a divided and a defined portion of the said land.
c) when the Defendant-Appellant obtained title to the said land by Deed No. 2690 dated 01/06/1973, marked 'V1', a fence was in existence, as shown in Plan No. 1705 dated 30/11/1973, marked 'V4' (not referred to in the said title Deed No. 2690), which establish that the Defendant-Appellant possessed and prescribed to the said Lot 3 of the said Plan No. 1175/P.
d) Patikiri Arachchige Amarasena is also a child of Patikiri Arachchige Punchi Singho and therefore, the Plaintiff-Respondent's pedigree is challenged on the basis that Patikiri Arachchige Punchi Singho had seven children and not six as revealed in the Plaint and the name of Patikiri Arachchige Amarasena has been completely left out from the Plaint.

As noted earlier, Deed No. 2690 from which the Defendant-Appellant claims title to her land, makes no reference to the said Plan No. 1705 dated 30/11/1973. In evidence, the Defendant-Appellant states that the said plan was made after the land was purchased by the said Deed No. 2690. It is claimed that the fence depicted in the said Plan No. 1705 is the same fence shown in the Preliminary Plan No. 1175/P, and that the said fence was in existence for over 20 years by which prescriptive rights were acquired over Lot 3 of Plan No. 1175/P.

However, based on Plan No. 849/P dated 26/07/1957, produced in the District Court Case No. 4095/P, the Plaintiff-Respondent denies the above position on the basis that in 1957, there was no fence across Lot 4, and therefore, not seen in the said Plan No. 849/P.

The land to be partitioned was shown by the parties to the surveyor, and the Preliminary Plan No. 1175/P was prepared by superimposing Lot 4 of Plan No. 849/P. Surveyor A.C.P. Gunasena was not called to give evidence. However, according to the surveyor report dated 15/09/1998, the Defendant Appellant has been in possession of 00.26P towards the western boundary of Lot 4 of Plan No. 849/P. The said report also speaks of a fence in existence, as claimed by the Defendant Appellant. It is claimed that putting up of the fence had been the cause for dispute between the parties. However, it is pertinent to note that, there is no fence depicted in Plan No. 849/P.

Now I will deal with the question, whether the Defendant-Appellant was allocated shares according to inheritance under the pedigree and the evidence led at the trial.

It was the contention of the Plaintiff-Respondent that the Deeds submitted by the Defendant-Appellant claiming title to 95P does not relate to the land in question but another land, and therefore is not entitled to an extent of 95P of the corpus, but in fact

is entitled only to half share, the remaining half of Lot 3 in Plan No. 1175/P, as mentioned above.

As observed earlier, Patikiri Arachchige Andi Singo and Patikiri Arachchige Simon Singho were the original co-owners of the land to be partitioned, each entitled to half share of an undivided land. It is undisputed that the said original owners possessed half share each of the said land depicted as Lot 3 in Plan No. 1175/P, dated 30/11/1973. Patikiri Arachchige Simon Singho, by Deed No. 15767 dated 17/01/1945 (P2), transferred his half share to Patikiri Arachchige Punchi Singho. Punchi Singho died intestate leaving his wife, Mahavithanage Helenahami, and 7 children.

As noted earlier the Defendant-Appellant questions the inheritance under the pedigree of the Plaintiff-Respondent on the basis that Mahavithanage Helenahami had seven children and not 6 namely, Sriyawathie, Chandradasa, Dayarathna, Dharmasena, Steven, Senevirathne, and Amarasena. It is contended that Amarasena is not disclosed in the Plaint as one of the children of Helenahami.

The Plaintiff-Respondent's position is that the said Helenahami and Dayaratna transferred their rights to the Plaintiff-Respondent by Deed No. 23247 dated 02/04/1980, marked 'P3'. Senevirathne died issueless, restoring his inherited rights back to his mother Helenahami and by Deed No. 194 dated 01/02/1997, marked 'P5', the said Helenahami and Sriyawathie transferred their rights to the Plaintiff-Respondent. Dayarathna, Dharmasena, and Steven have also transferred their rights to the Plaintiff-Respondent by Deed No. 24132 dated 13/02/1981 marked 'P4'. Amarasena and Chandrasdasa transferred their rights by Deed Nos. 24168 dated 27/02/1981 marked 'P6', and Deed No. 24277 dated 28/03/1981 marked 'P8', respectively, in favour of the Plaintiff-Respondent. Sriyawathie transferred her rights to the Plaintiff-Respondent by Deed No. 25483 dated 05/06/1982, marked 'P7'.

Accordingly, by the said Deeds, the Plaintiff-Respondent claims to have acquired the rights to the land from the said Helenahami and her children.

The dispute regarding the number of children Helenahami had surfaced in evidence given by the Defendant-Appellant. As mentioned earlier, it was claimed that Punchi Singho and Helenahami had 7 children and not 6, namely, Sriyawathie, Chandradasa, Dayarathna, Dharmasena, Steven, Senevirathne, and Amarasena. The Civil Appeal High Court in its Judgement dated 26/08/2013, dealt with the said issue in the following manner.

> *"It refers to Patikiri Arachchige Amarasena as the Vender and he alienated the rights derived from Punchi Singho as paternal inheritance. The quibble of the Defendant is that the name Amarasena is not referred to in the plaint. In those circumstances, though the Plaintiff does not refer to seven children of the said Punchi Singho there is no doubt that the Plaintiff has purchased rights of 7 children of Punchi Singho and his wife."*

Both parties admitted that the land depicted in Plan No. 1175/P is the land sought to be partitioned. As noted earlier, Sriyawathie and Helenahami transferred their rights by Deed No. 194 dated 01/02/1997, to the Plaintiff-Respondent. It is also observed that Sriyawathie, by Deed No. 25483 dated 05/06/1982, marked 'P7' had independently transferred her rights to the Plaintiff-Respondent. However, Sriyawathie could not have transferred any right in excess of what she inherited through Helenahami. Therefore, it is safe to conclude that in any event, by the said Deed No. 25483, anything in excess of half share of the corpus would not have transferred to the Plaintiff-Respondent.

Furthermore, the said Deeds were produced in evidence at the trial without a contest, which makes the Plaintiff-Respondent's claim that both parties to this action were equally entitled to half share each, that much stronger. Therefore, through the said

documents, the Plaintiff-Respondent has clearly established inheritance under the pedigree acquiring the rights of all 7 children of Punchi Singho and his wife Helenahami.

Therefore, the Civil Appeal High Court was correct in deciding that, after the death of Punchi Singho his rights devolved on Helenahami and their seven children.

For all the reasons stated above, I am of the view that the Plaintiff-Respondent purchased half share of an undivided land from the Plaintiff-Respondent's predecessors in title.

On this issue, the District Court and the Civil Appeal High Court were of the same view that the Plaintiff-Respondent had purchased all the rights of Helenahami and her seven children. Having considered the evidence placed before Court, I do not see any reason to disturb the said findings.

Therefore, I answer the 1st question of law in the affirmative.

Accordingly, the 2nd question of law on which leave to appeal to this Court has been granted need not be considered.

The Defendant-Appellant tendered in evidence Deed No. 2690 dated 01/06/1973, as 'V1', Deed No. 14288 dated 22/03/1971, as 'V2', Deed No. 952 dated 06/04/1964, as 'V3', to establish inheritance under the pedigree from Patikiri Arachchige Andi Singo.

The Defendant-Appellant claims title to a portion in extent 95P by Deed No. 2690 dated 01/06/1973, marked 'V1' (the said claim is not supported by the said Deed No. 2690). Plan No. 1705 dated 30/11/1973 marked 'V4', shows the total extent of land in Lot 4 as '95P'. In evidence before the District Court, the Defendant-Appellant stated that by Deed No 14288, a divided portion in extent, 2R 15P was transferred to her in 1973, and during that time the Defendant-Appellant with the consent of the Plaintiff-Respondent

had put up a barbed wire fence to demarcate the boundary line between Lots 1 and 3 of Preliminary Plan No. 1705. It is observed that by the said Deed No. 14288, the Defendant-Appellant was entitled to an undivided portion of land in extent 2R 15P of a larger land, approximately in extent of 2A.

At the commencement of the trial both parties admitted that the land to be partitioned is depicted in Plan No. 1175/P, more fully described in the schedule to the Plaint. Therefore, the question arises as to whether the land described in Deeds marked 'V1', 'V2', and 'V3' and the said Plan No. 849/P dated 26/07/1957, produced in evidence in the District Court Case No. 4095/P, relate to the same land that is sought to be partitioned. The documents submitted by the Defendant-Appellant refers to a land in extent of 2A. However, according to the final decree based on the previous partition Plan No 849/P, filed of record in the District Court Gampaha Case No. 4095/P, the extent of land to be partitioned, in the instant action, is in extent, 1A and 6P, which is evidenced by document marked 'P9'. Even though the Defendant-Appellant claims that a lawful consideration was paid for 95P, and therefore is entitled to a portion in excess of half share, in evidence in examination in chief, the Defendant-Appellant was not certain of the extent of land which she claims and thereby failed to justify such claim. In that context, it is important to note the learned District Judge's observation that the schedules to the survey plans submitted by the Defendant-Appellant too, does not identify the corpus sufficiently and therefore failed to prove the extent of land, as claimed.

It is also noted that the Deeds marked 'V1', 'V2', and 'V3' relied upon by the Defendant-Appellant in order to prove entitlement in excess of a half share, does not sufficiently indicate a precise extent of land, as claimed by the Defendant-Appellant. Accordingly, the findings of the learned District Judge and the Civil Appeal High Court,

to the effect that the existence of a discrepancy in the extents given in the documents relied upon by the Defendant-Appellant, cannot be faulted.

In the said background, it was the contention of the Plaintiff-Respondent that the Deeds submitted by the Defendant-Appellant claiming title to 95P from an undivided potion of land does not relate to the corpus sought to be partitioned and therefore the Defendant-Appellant is not entitled to an extent of 95P, but in fact is entitled only to a half share, which is the remaining half of Lot 3 of Plan No. 1175/P.

Therefore, from the documents tendered to Court and for the reasons stated above, I am of the view that the Defendant-Appellant is entitled only to a half share of the land, that is the remaining half of Lot 3 in Plan No. 1175/P.

The Plaintiff-Respondent has also made extensive submissions in this regard, in the written submissions filed in this Court, that the relief sought by the Defendant-Appellant is untenable in Law, with which I agree.

Therefore, the 3rd question of law is answered in the affirmative.

Apart from the three questions on which leave to appeal to this Court have been granted, it was also the contention of the Defendant-Appellant, that the Civil Appeal High Court disregarded her claim on prescriptive rights. She claims that the said prescriptive rights are based on an identifiable fence depicted in Plan No. 1705 dated 14/10/1973, also visible in the preliminary Plan No. 1175/P dated 30/07/1998, which she claims to be in existence for the past 20 years. The Defendant-Appellant contends that she obtained the consent of Helenahami to construct the said fence and thereby has prescribed to the said portion of land in Lot 3 in the said Plan No. 1175/P.

The said stand is totally denied by the Plaintiff-Respondent.

In the written submissions, dated the 15/06/2023, the Plaintiff-Respondent refers to the case of ***Corea Vs. Appuhamy***, a Judgment delivered by the Privy Council reported in (1911) 15 NLR 65, which states in the head note that-

> *"A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."*

In ***Sirajudeen and two others vs. Abbas (1994) 2 SLR 365***, G.P.S. De Silva C.J. stated;

> *"as regards the mode of proof of prescriptive possession, mere general statements of witnesses that the Plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided by thereupon by Court"*

In the course of the Judgment in this case, the Supreme Court observed that this principle was best stated in the words of Gratiaen J. in ***Chelliah Vs. Wijenathan 54 NLR 337*** in the following terms.

> *"where a party invokes the provisions of Section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squirely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights"*

In view of the above and from what has been stated earlier in this Judgement, it is clear that in order to prove prescriptive title, the Defendant-Appellant has failed to fulfill the obligations and duties in duly discharging the burden of proof, in order to set up an

uninterrupted and an adverse possession against the Plaintiff-Respondent by necessary evidence and therefore has failed to establish prescriptive title.

In these reasons, the Judgement dated 24/09/2008 of the Additional District Judge and the Judgement dated 26/08/2013, of the Civil Appeal High Court are hereby affirmed and this Appeal is dismissed. No order for Costs.

Judge of the Supreme Court

P. Padman Surasena, J

I agree

Judge of the Supreme Court

Kumudini Wickremasinghe, J

I agree

Judge of the Supreme Court

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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F/R) 63/2018

Darmaraja Nilithi Prasadi (Minor)

Appearing by her Next friend

Guardian ad litem

Perumal Darmaraja

Both of No.55, Walpitawatta,

Balgoda, Poddala.

PETITIONER

vs.

1. Ms. Sandhya Airani
   Pathiranawasam
   The principal,
   Southlands College,
   Galle.
2. Director of National Schools
   Ministry of Education,
   "Isurupaya", Battaramulla.

3. The Secretary,
   Ministry of Education,

"Isurupaya", Battaramulla.

4. C.C. Jayasinghe
   Parent/Guardian of N.N.
   Jayasinghe,
   No. 130/C, Hakkanawatha,
   Kumme Baddegama.

5. J.V.P. Darshana
   Parent/ Guadian of J.V. Rishadhi, Dinlini,
   No. 124/3, Elliot Road,
   Galle.

6. H.M.N. Dhilrukshi,
   Parent/ Guardian of H.T.S.
   Nethusara,
   Keenaduwa, Gonapura, Poddala.

7. K.M. Manimekala,
   Parent/ Guardian of Isil
   Nethusadhi,
   No 70/12, Sri Panyaloka Mawatha,
   Ginthota,
   Galle.

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

RESPONDENTS

BEFORE : **JAYANTHA JAYASURIYA, PC, CJ**
B. P. ALUWIHARE, PC, J AND
S. THURAIRAJA, PC, J

COUNSEL : M. P. Ganeshwaran with P. A. J. Dilan Perera for the Petitioners.
Parinda Ranasinghe, PC, ASG with Ms. Nayomi Kahawita SC for the 1st, 2nd, 3rd an 8th Respondents.
Lakshan Dias with Ms. Maneesha Kumarasinghe for 5th and 7th Respondents instructed by Ms. Nayanathara Weerasinghe.

WRITTEN SUBMISSIONS : 1st, 2nd, 3rd and 8th Respondents on 20th May 2021.
5th and 7th Respondents on 09th May 2023.

ARGUED ON : 17th July 2019.

DECIDED ON : 3rd November 2023.

S. THURAIRAJA, PC, J.

The instant case pertains to an Application filed in terms of Articles 17 and 126 of the Constitution by the Petitioner, namely Darmaraja Nilithi Prasadi, a minor appearing through her Next Friend, Guardian ad litem, namely Perumal Darmaraja (hereinafter referred to as the "Petitioner"). The Petitioner sought redress in connection with an alleged infringement of Fundamental Rights guaranteed under Articles 12(1) and 14(1)(e) of the Constitution by one or more of the Respondents to this Application.

The Respondents in this matter comprise the 1st Respondent, the Principal of Southlands College, Galle; the 2nd Respondent, the Director of National Schools,

Ministry of Education; the 3rd Respondent, the Secretary to the Ministry of Education; the 4th, 5th, 6th, and 7th Respondents, who are Parents/Guardians of students admitted to Southlands College, Galle; and the 8th Respondent, the Attorney General, who has been included as a Respondent in accordance with constitutional requirements.

This matter was supported before this Court on 9th May 2018, and leave was granted under Article 12(1) of the Constitution.

Factual Matrix

The narrative of this case unfolds against the backdrop of the Petitioner's pursuit of admission by application dated 21st June 2017 to Grade One of Southlands College, Galle for the academic year commencing on 1st January 2018. This application was made on the grounds of the Petitioner's affiliation with the Christian faith and under the quota allocated for the admission of students belonging to said faith. The Petitioner's application was supported by a letter issued by Rev. A. Ravindra Kumar, the Superintendent Minister of Methodist Church, Galle Circuit, dated 23rd June 2017 (marked "P5b"), and a letter issued by the Cavalry Church dated 4th March 2017 (marked "P5c"), serving as evidence of the Petitioner and her family's Christian faith.

Subsequently, the Petitioner's father was invited to participate in an interview to appraise the qualifications of his daughter for admission to Grade One at Southlands College, Galle by letter dated 2nd August 2017 and issued by the 1st Respondent (marked "P6").

Following the interview, the Petitioner was informed that her application had received a total score of 75 marks. In particular, under clause 6.1(b)(iii) of the "Instructions regarding the Admission of Children to Grade One in Government Schools for the year 2018," issued by the Ministry of Education (hereinafter referred to as the "Instructions" and marked' "P4"), the admissions application had scored 45 out of a total of 50 marks under the "Proximity of Residence" category.

Thereafter, the Petitioner, through her father, appealed to the 1st Respondent by letter dated 20th November 2017 (marked "P10"). The grounds for the appeal were two-fold: firstly, the Petitioner asserted the provision of proof of residence in light of the fact that her elder sister was attending the same school, as per section 6.1(b)(ii) of the Instructions; secondly, the contention was raised that, within the administrative District of Galle, there were no schools apart from Southlands College that offered non-Roman Catholic Christianity, as per section 6.1(b)(iii) of the Instructions.

Furthermore, the Petitioner, through her father, submitted a letter of objection dated 30th November 2017 (marked as "P11") to the 1st Respondent regarding the children of the 5th, 6th, and 7th Respondents, who were ranked higher than the Petitioner in the provisional list of successful candidates. The Petitioner alleged the use of fraudulent letters and the ineligibility of these students to be classified as Christian candidates.

The Petitioner contended that the 1st Respondent did not provide a response to the Petitioner's appeal, as stipulated by the guidelines outlined in section 10 of the Instructions issued by the Ministry of Education in the year 2018. Instead, the Petitioner asserted that she was made aware of her unsuccessful candidacy only upon the display of the final list of successful candidates on the Notice Board of Southlands College, Galle by the 1st Respondent on 8th January 2018.

The Petitioner further averred that the 1st Respondent had failed to adhere to clause 3.2 of the Instructions, which mandates that schools vested in the government, in accordance with the provisions of the Assisted Schools and Training Schools (Special Provisions) Act No. 05 of 1960 and the Assisted Schools and Training Schools (Supplementary Provisions) Act No. 08 of 1961, maintain the original ratio of students belonging to different religious faiths at the time of the school's vesting in the government. In the case of Southlands College, Galle, the percentage of non-Roman Catholic Christian students was determined to be 6.9%, which would amount to 16 seats if a total of 240 students were to be admitted.

Thereby, the Petitioner posited that her non-admission to Grade One of Southlands College, Galle, is violative of Article 12, as the 1st Respondent failed to give regard to clauses 3.2 and 6.1 of the Instructions.

Conversely, the 1st Respondent averred that as per section 7.0 of the School Admission Circular No. 22/2017 (marked "R1"), 50% of the quota assigned for students of the Christian faith was to be selected from those applying under the "Proximity of Residence" category (comprising 8 students), and the remaining 50% was to be selected from other categories (also 8 students).

The 1st Respondent further asserted that, for the admissions cycle of 2018, only 4 students of the Christian faith applied under the other admission categories for Non-Catholic Christian students in terms of the Circular. Consequently, the remaining unutilised quota (4 seats) was made available to students of the Christian faith applying under the Proximity of Residence category, thereby increasing the total number of possible applicants from 8 to 12 students, under the said category.

According to the 1st Respondent, the deduction of 5 marks under the "Proximity of Residence" criteria from the Petitioner's application stemmed from the 1st Respondent's assumption that Christudeva Balika College, Galle, which also accepts students belonging to the Non-Roman Catholic Christian faith, was in closer proximity to the Petitioner's residence. Thereby, the application of the Petitioner scored below the cut-off mark (79.75 marks) for Grade One admissions in the year 2018.

In February 2020, during the course of these proceedings, the Court was informed of a vacancy on the list of successful candidates admitted to Grade One of Southlands College, Galle due to the 9th successful candidate leaving the school in Grade Five. The Petitioner, through her father and by letter dated 6th December 2022, requested for the admittance of the Petitioner to fill this vacancy under the quota assigned to non-Roman Catholic Christian students. The same had been refused by the school. The Additional Solicitor General maintained that admitting the Petitioner to Grade Six of

Southlands College, Galle would transgress the provisions of the government Circular No. 17 of 2023, dated 25th April 2023, which regulates the entry of students from Grades Two to Eleven. This submission was made in light of the fact that the Petitioner had not obtained sufficient marks to pass the Grade Five scholarship examination.

Analysis

I observe that it is an undisputed fact that the mandated percentage of non-Roman Catholic Christian students to be admitted to Grade One at Southlands College, Galle stands at 6.9% as per the provisions of the Assisted Schools and Training Schools (Special Provisions Act) No. 05 of 1960, and the Assisted Schools and Training Schools (Supplementary Provisions) Act No. 08 of 1961.

In the present case, this is administered by Section 4.2 of Circular No. 22/2017 which states that:

> *"1960 අංක 05 දරන උපකෘත පාඨශාලා සහ අභ්‍යාස විද්‍යාල (විශේෂ විධිවිධාන) හා 1961 අංක 08 දරන උපකෘත පාඨශාලා සහ අභ්‍යාස විද්‍යා (පරිපූරක විධිවිධාන) යන පනත් අනුව රජයට පවරා ගන්නා ලද පාසල්වල පුරප්පාඩු පිරවීමේ දී පවරා ගන්නා ලද අවස්ථාවේ තත් පාසලේ සිටි ආගමික සිසු අනුපාතය සැළකිල්ලට ගෙන පුරප්පාඩු සංඛ්‍යාව ආගම් අනුව හා එක් එක් ගණ අනුව බෙදා වෙන් කළ යුතු ය."*

An approximate translation would read as follows:

> *"In filling vacancies in schools vested to the government under the Assisted Schools and Training Schools (Special Provisions) Act No. 05 of 1960 and Assisted Schools and Training Schools (Supplementary provisions) Act No. 08 of 1961, the proportion of children belonging to different religions at the time of vesting the school to the government will be taken into consideration and the number of vacancies in the said school shall be divided proportionately among different religions and the categories."*

The learned Counsel for the Petitioner relied on ***M.K. Wijethunga and others vs. The Principal Southlands College, Galle (SC/FR Application 612/2004, decided on***

07.11.2005), wherein Shirani Bandaranayake J (as her Ladyship was then) observed that, in terms of the extracts of the proceedings of the Methodist Church Synod held in January 1969, there had been 53 Christian students out of the total of 760 students at Southlands College, Galle working out a percentage of 6.9%.

However, it is prudent to inquire whether or not this stipulated ratio is to be maintained beyond the conclusion of the admissions period. I will address this issue following the examination of the 1st Respondent's review of the admission applications.

The 1st Respondent conceded that the score allocated to the Petitioner was erroneous; it was explained to this Court that the 5-mark deduction suffered by the said application was grounded in the incorrect assumption that Christudeva Balika College, Galle, accepted a quota of 10% or more of non-Roman Catholic Christian students.

Pertaining to clause 7.2.3 of Circular No. 22/2017, it is explicitly delineated that the maximum marks under the "Proximity of Residence" category shall be awarded only if the applicant's place of residence is substantiated and no other Government schools with primary sections exist in closer proximity to the applicant's residence than the school to which they have applied. In instances where other Government schools with primary sections, suitable for the child's admission and in closer proximity to the place of residence than the chosen school, are present, marks shall be deducted at the rate of 05 marks for each such school.

The said clause further stipulates:

> *"අදාළ දරුවාට ඇතුළත් වීමට හැකි ප්‍රාථමික අංශ සහිත වෙනත් රජයේ පාසලේ යනුවෙන් අදහස් කරන්නේ එම දරුවාට ඇතුළත්වීමට අවශ්‍ය ඉගෙනුම් මාධ්‍ය අය සහිත පාසලක් ද, තමන්ට අදාළ ගැහැණු හෝ පිරිමි පාසලක් ද, මිශ්‍ර පාසලක් ද යන්න සහ අදාළ* ***ළමයා අයිති ආගම වෙනුවෙන් 10% හෝ ඊට වැඩි ප්‍රතිශතයක් ඇතුලත් කර ගන්නා රජයේ පාසල් වේ."***
>
> (Emphasis added)

An approximate translation of the above would read as follows:

> *"Other Government primary schools that the child could be admitted implies a school that provides the learning medium the child has applied for, a girls', boys' or mixed school as appropriate for the child and* ***a school that admits 10% or more children of the religion to which the child belongs****."*
>
> (Emphasis added)

In light of the above, it is evident that a 5-mark deduction under the "Proximity of Residence" category is applicable only if a school that admits 10% or more students belonging to the candidate's affiliated religion—in this instance, Christianity—is situated closer to the candidate's residence.

The 1st Respondent has admitted to erroneously deducting marks based on the incorrect assumption that Christudeva Balika College, Galle, accepted a quota of 10% or more of non-Roman Catholic Christian students. In fact, the actual figure of accepted Christian students at that institution stood at a mere 2%. However, the 1st Respondent has contended the reversal of this deduction, the cut-off mark would be raised to 82.5 marks, while the recalculated score of the application submitted by the Petitioner would amount to 80 marks, and thereby, the Petitioner would continue to rank below the successful applicants admitted to Grade One.

At this juncture, it is important to clarify that this Court does not intend to question nor intervene in the admission of the 12 successful candidates, based on the revised cut-off mark of 82.5 marks following the rectification of the erroneous 5-mark deduction.

Nonetheless, the Petitioner's application was unsuccessful due to the fact that it did not fulfil the requirements to be admitted. However, I observe that had the school authority properly inquired into the allegation made with regard to the admission of the children belonging to the 5th,6th and 7th Respondents, there would have been a

high likelihood that those students would have disqualified for admission under the quota assigned to non-Roman Catholic Christian students, in which event the Petitioner's application and admittance would have been successful.

While I do not wish to delve extensively into the matter regarding the eligibility of the applications of the children belonging to the 5th, 6th and 7th Respondents to Southlands College, Galle, it is important to underscore that, notwithstanding the contentions of the 1st Respondent to the contrary, it is indeed the duty of the school administration to ensure the validity and accuracy of admissions applications and their accompanying documentation before admitting students. Nevertheless, this Court refrains from intervening in the ongoing education of the children of the 5th, 6th and 7th Respondents, and thus, no order shall be issued in this regard.

Under these circumstances, I am of the view that the Petitioner's fundamental rights to equality guaranteed under Article 12(1) of the Constitution have been violated. Therefore, I direct the 1st Respondent, or the incumbent holder of the office of the 1st Respondent, and the 3rd Respondent to admit the Petitioner in S.C. (F/R) 63/2018, namely, Darmaraja Nilithi Prasadi, to the appropriate corresponding Grade of Southlands College, Galle forthwith.

Application Allowed.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ

I agree.

CHIEF JUSTICE

B. P. ALUWIHARE, PC, J

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, against a judgment pronounced by the High Court exercising its jurisdiction under section 2 of the said Act.

SC (CHC) Appeal No. 44/2014
Commercial High Court
Case No: 322/2009/MR

Lanka Orix Leasing Company PLC,
100/1, Sri Jayawardhanapura Mawatha,
Rajagiriya.

PLAINTIFF

Vs.

Kaluarachhilage Osmond Bandula
8L, Housing Scheme,
Hanthana,
Kandy.

DEFENDANT

AND NOW BETWEEN

Lanka Orix Leasing Company PLC,
100/1, Sri Jayawardhanapura Mawatha,
Rajagiriya.

PLAINTIFF-APPELLANT

Vs.

Kaluarachhilage Osmond Bandula
8L, Housing Scheme,
Hanthana,
Kandy.

DEFENDANT-RESPONDENT

Before: **P. PADMAN SURASENA, J**

KUMUDINI WICKREMASINGHE, J

ARJUNA OBEYESEKERE, J

Counsel: Sumedha Mahawanniarachchi with Binara Silva for the Plaintiff-Appellant instructed by Santhoshi S. Herath Associates. (Dipika Herath, AAL)

W.D. Weeraratne for the Defendant-Respondent.

Argued on : 06.12.2022

Decided on : 03.11.2023

P Padman Surasena J

The Plaintiff-Appellant (hereinafter referred to as the Plaintiff) had entered into the Agreement bearing No. 163 dated 17-04-2008 produced marked **P1**[1] with the Defendant-Respondent (hereinafter referred to as the Defendant) for the lease of the property described in its schedule. Parties have inter alia agreed on the followings,

[1] Produced marked "P1" in the Petition of Appeal dated 20-12-2013, filed before the Supreme Court and produced marked "A" in the Plaint dated 13-07-2009 filed in the Commercial High Court.

a) The Defendant will lease the relevant property to the Plaintiff for a period of five years commencing from 01-06-2008 and ending on 31-05-2013 for a total consideration of Rs. 5,400,000/=.

b) The lease rental shall be Rs. 90,000/= per month,

c) Out of the total consideration of Rs. 5,400,000/= , a sum of Rs. 3,240,000/= shall amount to the total lease rentals for the period of first three years (36 months) i.e., for the period commencing from 01-06-2008 ending on 31-05-2011.

d) Out of the said total lease rentals for the period of first three years (Rs. 3,240,000/=), a sum of Rs. 3,140,000/= shall be given to the Defendant as an advance.

e) The balance sum of Rs. 100,000/= from the first three years' rental shall be retained with the Plaintiff to spend for any minor repairs that may be needed during the operative period of the lease.

f) The Defendant shall renovate the said premises in the agreed manner and handover the same to the Plaintiff on or before 01st June 2008.

g) The Plaintiff shall pay to the Defendant, the balance sum of Rs. 2,160,000/= as lease rentals at the rate of Rs. 90,000/= per month for the balance 24 months commencing from 01st June 2011 and ending on 31-05-2013.

h) At the expiry of the full term of the lease, the Plaintiff shall pay back the aforesaid retained sum of Rs. 100,000/= to the Defendant after deducting any expenses that may have been incurred.

The Plaintiff has pleaded that its officers visited the relevant premises from time to time and it was made clear for the said officers (as per their observations with regard to the progress of the work), that the Defendant was not in a position/or was not planning to hand over the possession of the relevant premises to the Plaintiff before the agreed date, i.e., 01-06-2008. The Plaintiff has also stated that the relevant premises was not ready even by 10-11-2008. It was on that basis that the plaintiff had requested the Defendant to allow the Plaintiff to finish the remaining work in a manner that could suit the carrying out of the Plaintiff's business at the Plaintiff's expense and thereafter to deduct the said cost from the lease rentals of the balance two years.

As a second cause of action, the Plaintiff has averred in the Plaint that it had lost the opportunity of conducting its business as it had lost the opportunity of opening a branch at Ampara, because of the failure of the Defendant to hand over the possession of the relevant premises to the Plaintiff by the due date. The plaintiff on the said second cause of action had sought to recover a sum of Rs. 2,000,000/- from the Defendant.

The case for the Plaintiff is based on an allegation that the Defendant had entered into the aforesaid Agreement only with the intention of getting the afore-stated advance money. It was in the above circumstances that the Plaintiff had sent through its Attorney-at-Law a Letter of Demand to the Defendant demanding the re-payment the aforesaid advance with interest and damages at the rate of Rs. 3,000/- per month as per the Agreement. It was in the light of the above background that the Plaintiff in its plaint filed in the Commercial High Court of Colombo had prayed *inter alia* :

a) that a judgement and decree against the Defendant be entered in favour of the Plaintiff to recover a sum of Rs. 3,140,000/= and Rs. 3,000/- per day from 01st June 2008, until the aforesaid sum is paid in full to the Plaintiff;

b) a judgement and decree against the Defendant be entered in favour of the Plaintiff to recover a sum of Rs. 2,000,000/= and legal interest thereon from the date of the decree, until the aforesaid sum is paid in full to the Plaintiff,

The Defendant had filed an answer taking up the following positions:

I. The Defendant had carried out and completed the relevant renovations and/ or alterations as requested by the Plaintiff as per the Agreement at a cost of Rs. 982,500/-

II. After the said completion, the Defendant had informed the Plaintiff to take over the possession of the relevant building on 01-06-2008 as previously agreed, upon which the officers of the Plaintiff had visited the premises and became satisfied with the renovations/ alterations carried out by the Defendant.

III. Despite the aforesaid, the Plaintiff in breach of the Agreement had failed and neglected to take over the possession of the relevant premises.

The Defendant has also stated that the Plaintiff had sent the Letter of Demand to him only after a lapse of nine months. The Defendant had stated that this was designed to show falsely, a failure to hand over

the possession by the due date by the Plaintiff to the Defendant. The Defendant has also stated that his Attorney-at-Law, by the letter dated 26-03-2009 had responded to the Letter of Demand he had received from the Plaintiff.

The Defendant in his answer had prayed for dismissal of the Plaintiff's action. Submitting a Claim in Reconvention, the Defendant had sought to recover from the Plaintiff, a sum of Rs. 2,210,000/- together with legal interest thereon from 01-06-2008, being the loss and damage suffered by him as he was compelled to terminate the lease of three other lessees who were occupying the said premises in order to handover the vacant possession of the said premises to the Plaintiff. It was on that basis that the Defendant had prayed for judgment and decree against the Plaintiff on the Claim in Reconvention, in a sum of Rs. 2,210,000/- together with legal interest thereon from 01-06-2008 until the date of the decree and thereafter legal interest on the decreed sum until payment in full, together with costs.

The Plaintiff filed replication on 09-03-2010 and the case was taken up for trial on eight Admissions and seventeen issues.

The afore-stated eight Admissions are as follows:[2]

1) *Paragraph 01 of the plaint is admitted.*

2) *The fact that the parties entered into the agreement marked "A" produced with the plaint, is admitted.*

3) *The fact that a sum of Rs. 3,140,000/- being the rent in advance for a period of thirty six months commencing from 01st June 2008, was paid to the Defendant by the Plaintiff in terms of the agreement marked "A" produced with the plaint, is admitted.*

4) *The fact that the Plaintiff paid to the Defendant, a sum of Rs. 100,000/-being a deposit, to be refunded after deducting any costs for repairs, is admitted.*

5) *The fact that the Plaintiff agreed to pay the Defendant an aggregate lease rental of Rs. 5,400,000/- for a period of 5 years commencing from 01st June 2008 at the rate of Rs. 90,000/- per month in terms of the agreement marked "A" produced with the plaint, is admitted.*

[2] Vide Consolidated Admissions and Issues at page 135 of the brief.

6) *The fact that the Plaintiff requested the Defendant to carry out certain alterations and/or renovations to the said premises in order to suit the Plaintiffs business requirements and to provide vacant possession of the said premises by 01st June 2008, is admitted.*

7) *The fact that the Defendant sent the letter marked "B" produced along with the plaint to the Plaintiff, is admitted.*

8) *The bare receipt by the Defendant, of the document marked "C" produced along with the plaint, is admitted.*

At the conclusion of the trial, the learned Judge of the Commercial High Court by his judgment dated 29-10-2013, had concluded that the Plaintiff had failed to establish his case against the Defendant and dismissed the Plaintiff's action. The learned Judge of the Commercial High Court also dismissed the Defendant's Claim in Reconvention.
Being aggrieved by the judgment of the learned Commercial High Court judge, the Plaintiff has lodged the instant appeal to this Court seeking to set aside judgment of the Commercial High Court dated 29-10-2013.

Let me now examine whether there is merit in this Appeal. The Plaintiff had led the evidence of four witnesses and produced documents marked **P1** to **P40**. Thereafter, the Defendant had led evidence of two witnesses and produced documents marked **V1** to **V4(අ)**.

At the outset, I must observe that the learned Judge of the Commercial High Court by its judgment dated 29-10-2013 had dismissed the action of the Plaintiff mainly because he had not believed the evidence of the witnesses called by the Plaintiff.

The Plaintiff in order to prove that the Defendant had failed to complete the required renovations and/or alterations as per the Agreement by the due date i.e., 01-06-2008, had relied on the evidence of its first witness who is the Plaintiff's Chief Regional Manager (Sirikkaduge Yanik Sajanaka Fernando). He had produced his evidence in chief by way of an Affidavit. This witness in paragraph 17 of the said Affidavit dated 03-03-2011 had stated as follows:

> *"I state that thereafter, I inspected the said premises on 01st and 20th of April 2009 to ascertain the correctness in P22 and instructed Mr. Jayasundara Dissanayake of the Plaintiff to obtain photographs depicting the status of the premises on the said two dates."*

*True copies of 3 such photographs showing the status of the premises on 01st April 2009 are annexed hereto and produced in evidence as **P23** to **P25** and 5 such photographs showing the status of the premises as at 20th April 2009 are annexed hereto and produced in evidence as **P26** to **P30**."*

However, during the cross examination, this witness had admitted that although he had stated in paragraph 17 of his affidavit that he had inspected the premises personally on 01-04-2009 and 20-04-2009 and had requested Mr. Jayasundara to take pictures of the premises, this was not true. He stated in the cross examination that his final visit was in fact in September of 2008. This can be seen in the following excerpts produced from the proceedings pertaining to the cross-examination of this witness.

"ප්‍ර : දිවුරුම් ප්‍රකාශයේ 17 වන ඡේදයේ තමා කියා තිබෙනවා තමා ඔය පරිශ්‍රය පරීක්ෂා කරන්න ගියා කියා 2009 අප්‍රේල් මාසේ. දැන් මහත්මයා කියපු සාක්ෂි අනුව මේ 17 වන ඡේදයෙන් කියා තිබෙන කරුණු වැරදියි. මහත්මයා දෙවතාවක්ම ප්‍රකාශ කළා 2008 සප්තම්බර් වලට පසු ඔය ස්ථානය බලන්න ගියෙ නැහැ කියා?

උ : එහෙමයි. මගේ අවශ්‍යතාවය මත තමයි ජයසුන්දර දිසානායක මහතා පින්තූර ටික ලබා දුන්නේ.

ප්‍ර : තමා පරීක්ෂා කලා කියන එක වැරදියි?

උ : වැරදියි.

ප්‍ර : තමා එතැන බොරුවක් කියා තිබෙන්නේ?

උ : වැරදියි.

ප්‍ර : දිවුරුම් ප්‍රකාශය 17 වන ඡේදයේ තමා එම පරිශ්‍රය පරීක්ෂාකර දිනත්සඳහන් කර තිබෙනවා. බලල තමයි තමන් කීවේ ජයසුන්දර මහතාට පින්තූර ගන්න කීවේ කියා?

උ : ඒක වැරැද්දක්.

ප්‍ර : එසේනම් මහත්මයාගේ දිනපොත් තියාගෙන ඉන්න එකයි මේ ආයතනයෙන් නීති අංශයේ මහතුන්ට ඊමේල් පණිවුඩ යැව්වා කියන එක බොරු. මොකද මෙතන දින සඳහන් කරම කියා තිබෙනවා?

උ : අනෙක් කාරණා සත්‍යය බවට මම කියා සිටිනවා.

ප්‍ර : හැබැයි මෙතන සඳහන් වෙලා තිබෙන්නේ බොරුවක්?

උ : වැරැද්දක්.

ප්‍ර : තමා කියන හැටියට දිනපොත් පිළියෙල කරනවා නම් ඊමේල් පණිවුඩ යවා තිබෙනවා නම් මේ වගේ බොරු ප්‍රකාශයක් කියන්න අවශ්‍ය නැහැනේ දිනයක් සඳහන් කර තමන් ගිහින් බැලුවා කියා?

උ : මෙතන ප්‍රකාශ කර තිබෙන එක වැරදියි බවට පිළිගන්නවා. නමුත් අනෙක් කරුණු සත්‍ය බවට ප්‍රකාශ කරනවා."

Thus, the Plaintiff had relied on three photographs **P23** to **P25** to show the status of the premises as at 01st April 2009 and five photographs **P26** to **P30** to show the status of the premises as at 20th April 2009 with an attempt to prove that the Defendant had failed to complete the required renovations and/or alterations as per the Agreement by the due date i.e., 01-06-2008. The Defendant had not disputed that the photographs depict the relevant premises but had taken up the position that the dates shown on the photographs are fabricated. It is the position of the Defendant that these photographs are ones that had been taken some time back when the renovation work was in progress. In these circumstances, the dates on which these photographs have been taken have assumed the greatest importance. Thus, they have become directly relevant to the main fact in issue in this case, i.e., the issue whether the Defendant was ready to hand over the possession of the relevant premises to the Plaintiff before the agreed date, i.e., 01-06-2008. However, the Plaintiff's main witness himself has established before Court, the fact that these photographs had not been taken on the dates asserted by him .

The Plaintiff has also called witness Jayasundera Mudiyanselage Dissanayake to give evidence on its behalf. According to the Plaintiff's Chief Regional Manager (Yanik Sajanaka Fernando), the witness Jayasundera Mudiyanselage Dissanayake is the person who has taken three photographs **P23** to **P25** on 01st April 2009 and five photographs **P26** to **P30** on 20-04-2009. This witness in his evidence has stated that the photographs were taken on the dates printed on them. However, in view of the admission by Yanik Sajanaka Fernando that his assertion that the photographs were taken on those dates is false, the decision by the learned Commercial High Court Judge not to rely on the evidence of these witnesses is justified.

The Plaintiff has also called Muthupora Thotage Joseph Mary Anthony Perera to give evidence on its behalf. The said witness is the architect attached to the Plaintiff company. According to this witness's evidence, when he had visited the premise on 15-05-2008 there was only very little work to be completed and that work would have only taken about fifteen days for completion. Therefore, I observe that this witness has not established the Plaintiff's case but has been helpful to establish the position taken up by the Defendant.

Thus, the cumulative effect of all the above circumstances are directed towards justifying the conclusion arrived at by the learned Judge of the Commercial High Court that the Plaintiff has made an abortive attempt to convince Court that the Defendant had failed to complete the required renovations and/or alterations as per the Agreement by the due date i.e., 01-06-2008. Moreover, the Defendant does not accept that the Plaintiff's witnesses had visited the premises on the dates they claimed to have visited the said premises. The learned Judge of the Commercial High Court for the reasons set out in his

judgment had accepted the position taken up by the Defendant. I too have no reason to deviate from that conclusion either. This too no doubt has affected the credibility of the Plaintiff's case presented before Court. I agree with the above conclusion arrived at by the learned Judge of the Commercial High Court.

There are numerous other reasons which the learned Judge of the Commercial High Court had given in his judgment for his final conclusion. I am in agreement with those conclusions also. Since the above reasoning is sufficient to dispose this appeal, I would not endeavour to analyse all those reasons in detail again.

For the foregoing reasons, I see no merit in this appeal. I affirm the judgment dated 29-10-2013 pronounced by the learned Judge of the Commercial High Court and proceed to dismiss this appeal. The Defendant is entitled to costs in both Courts.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J

I agree,

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J

I agree,

JUDGE OF THE SUPREME COURT

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

SC/APPEAL/77/2018

SC/HCCA/LA/409 & 410/2017

NWP/HCCA/KUR/40/2015/LA

DC Kurunegala case No.8009/L

In the matter of an application for Leave to Appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act, No.1990 as amended by Act, No.54 of 2006 to set aside the judgment dated 27/07/2017 of the Provincial High Court of Civil Appeals of the North Western Province.

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Mahen Susantha Madugalle

No.168/16, Siripura Gardens, Rajamaha Vihara Mawatha, Kotte

PLAINTIFF

VS

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Chula Swarna Madugalle

No. 185/1, Epitamulla Road, Pita-Kotte.

DEFENDANT

AND

Land Reform Commission

C 82, Hector Kobbekaduwa Mawatha, Colombo 07.

INTERVENIENT-PETITIONER

VS

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Mahen Susantha Madugalle

No.168/16, Siripura Gardens, Rajamaha Vihara Mawatha, Kotte

PLAINTIFF-RESPONDENT

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Chula Swarna Madugalle

No. 185/1, Epitamulla Road, Pita-Kotte.

DEEFENDANT- RESPONDENT

AND

Land Reform Commission

C 82, Hector Kobbekaduwa Mawatha, Colombo 07.

INTERVENIENT-PETITIONER-PETITIONER

VS

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Mahen Susantha Madugalle

No.168/16, Siripura Gardens, Rajamaha Vihara Mawatha, Kotte

PLAINTIFF-RESPONDENT-RESPONDENT

AND

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Chula Swarna Madugalle

No. 185/1, Epitamulla Road, Pita-Kotte.

DEFENDANT-RESPONDENT-RESPONDENT

AND NOW BETWEEN

Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Mahen Susantha Madugalle

No.168/16, Siripura Gardens, Rajamaha Vihara Mawatha, Kotte

PLAINTIFF-RESPONDENT-RESPONDENT-PETITIONER

VS

1. Land Reform Commission
   C 82, Hector Kobbekaduwa Mawatha, Colombo 07.

INTERVENIENT-PETITIONER-PETITIONER-RESPONDENT

2. Karunatilleka Jayasundera Wickramasekara Rajapakse Wahalanayake Nisi Mudiyanselage Chula Swarna Madugalle

   No. 185/1, Epitamulla Road, Pita-Kotte.

DEFENDANT-RESPONDENT-RESPONDENT-RESPONDENT

Before : Buwaneka .P. Aluwihare PC., J.

E.A.G.R. Amarasekara J.

Yasantha Kodagoda PC., J.

Counsel : Lakshman Perera, PC with Radeema Gunawardane for the Plaintiff-Respondent-Respondent-Appellant.

Hemasiri Withanachchi with Shantha Karunadhara and Shehan de Vas Gunawardene for the Defendant-Respondent-Respondent-Respondent.

Dr. Sunil Cooray for the Intervenient-Petitioner-Petitioner-Respondent

Argued on : 02/02/2021

Decided on : 09/11/2023

E. A. G. R. Amarasekara, J.

The Plaintiff-Respondent-Respondent-Petitioner (hereinafter referred to as the Plaintiff) instituted action in the District Court of Kurunegala by plaint dated 24.10.2013 against the Defendant-Respondent-Respondent (hereinafter referred to as the Defendant) seeking inter alia for a declaration of title to the paddy lands described in the schedule to the plaint (hereinafter referred to as the subject matter), for a permanent injunction preventing the Defendant, his servants, agents, or anyone acting under his authority from disturbing the Plaintiff's possession and from entering into the subject matter and/or engaging in any agricultural cultivation in the subject matter, for a judgment and decree setting aside the deed of declaration executed by the Defendant, bearing No.2091 dated 18. 06. 2012, attested by F.M. Rasheed Notary Public.

The Plaintiff, among other things, stated in the plaint as follows;

- that the original owner of the said lands was one Mrs. Chandrasekara Ekanayake Basnayake Mudiyanse Ralahamilage Mildred Sudarmha Madugalle (hereinafter Sudarma Madugalle), who was the mother of both the Plaintiff and the Defendant and she had gifted several lands including the subject matter in suit to the Defendant by deed No. 25719 dated 26.01.1972.
- that the said Sudharma Madugalle was subject to the Kandyan Law and she had revoked the gift made by the said deed in respect of the subject matter by deed No. 60073 dated 16.05.1991 and gifted the same to the Plaintiff by deed No. 60074 on the same day reserving her life interest.
- that with the demise of their mother Sudarmha Madugalle on 15. 07. 1996, the Plaintiff became the absolute owner of the subject matter.
- that the Defendant, in or around the year 2011, applied to get his name registered as the owner of the subject matter in the Agricultural Land Register.
- that the Defendant had prepared a deed of declaration No.2091 dated 18.06.2012 disputing the ownership of the Plaintiff.

The Defendant in his answer averred inter alia as follows;

- that with the revocation of the gift effected as mentioned above, Sudharma Madugalle exceeded the total extent of agricultural lands which could be owned by an individual and the subject matter in suit by operation of law got vested in the Land Reform Commission in terms of the provisions of the Land Reform Law No.1 of 1972.
- that Sudharma Madugalle did not have any rights to make the said gift by deed no. 60074 in favour of the Plaintiff.

Thus, the Defendant sought among other things a dismissal of the plaint and an order from court in terms of Section 18 of the Civil Procedure Code to add the Land Reform Commission, Intervenient Petitioner Respondent Respondent (hereinafter L.R.C.) as a necessary party to the action.

The Plaintiff filed a statement of objections against the application which sought to add the L.R.C. as a party stating that the L.R.C is not necessary to adjudicate all the matters relating to the action completely and effectually. In this regard, the Plaintiff has stated in his objection marked X3 that the Defendant, in his answer, had already admitted paragraph 1,2,3,4, 5 and 6 of the Plaint. The said admissions include that their mother who was subject to Kandyan Law, was the original owner and she gifted the subject matter reserving her right to revoke it and the said gift was accepted as a valid gift by the L.R.C by its decision dated 04.01.1974 and, further, their mother revoked the said gift as aforesaid and later gifted to the Plaintiff and after that the Defendant has no right whatsoever to the subject matter.

The Plaintiff in the said statement of objections(X3) further averred that the Chairman of the L.R.C had written to the Regional Agrarian Development Officer stating that the Defendant was the owner of the subject matter in suit and, as per the letter dated 22.10.2012 written by the Commissioner General of Agrarian Services, it was informed that, based on that letter issued by the Chairman of L.R.C, an inquiry would be held. The Commissioner General of Agrarian services has informed its decision by a letter dated 01.11.2012 that the title to the subject matter is with the Defendant. The Plaintiff in the said statement of objections had further taken up the position that the Defendant had acted in collusion with the officers of the L.R.C. Moreover, it is stated that the judgment in the present action only binds the Defendant and the Plaintiff and if L.R.C has any right, it is not bound by the Judgment and it can use its powers in terms of the Land Reform Law. The Plaintiff further averred in his said objections filed against the application for addition of parties, that addition of an unnecessary party would prolong the litigation and hinder the process of administration of justice.

It appears that, later on, even the L.R.C also has preferred an application moving it to be added as a party in terms of section 18 of the Civil Procedure Code, which application was lastly amended by petition dated 16.12.2014. According to the amended petition of the L.R.C, neither the Plaintiff nor the Defendant has any right to the subject matter in suit but it is the L.R.C which has title to it. In this regard, it had stated that as per the section 18 of the Land Reform Law, statutory declaration was made on 16.11.1972 and on 03.05.1974, the extent of land belonging to said Sudharma Madugalle was conveyed to her. It was also revealed that the statutory determination relating that extent which was 50 acres and 20 perches was gazetted on 29.03 1976 in the Gazette no.206/3. In that regard, among other things, L.R.C had stated that prior to the statutory declaration, the said Sudharma Madugalle executed deed of gifts No. 25719,25720, and 25718 but the gift given by deed No. 25720 to the Plaintiff is not valid since the Plaintiff was a minor at that time and it was not accepted by anyone on behalf of the Plaintiff. It was further stated that even

the other two gifts made by deeds No. 25719 and 25718 to the Defendant and a mentally deceased daughter also had not been accepted and therefore they are not valid. Furthermore, when the deed of gift given to the Defendant was cancelled by Sudharma Madugalle, the extent of paddy land exceeded the limit that one can keep for oneself and therefore, the L.R.C. became the owner again and that Sudharma Madugalle became the statutory lessee. It is also stated that, in that backdrop, the gift made to the Plaintiff after the revocation of the gift given to the Defendant is not valid. It is also stated in the said amended petition that another case, namely No. 7873, has been filed by the Plaintiff against the L.R.C on the basis that said Sudharma Madugalle prescribed to another land around 8 1/2 acres. Thus, it appears that the position of the L.R.C. now is that the Plaintiff and the Defendant are not entitled to the subject matter in suit but the L.R.C is entitled to it, since Sudharma Madugalle, even though a statutory determination was made, had paddy lands exceeding the limit at the time when the impugned gift was made.

Before attending to the matter in issue, whether L.R.C is a necessary party to be added in the action or whether, as far as the action before the District Court is concerned, it can be completely and effectually solved through leading evidence, it must be noted that the L.R.C has placed contradictory positions before different forums. As said before, it has written to the Regional Officer of the Agrarian Services saying that the deed No.25719, by which the gift was made to the Defendant, is valid. It appears that, based on such communications, the Commissioner General of Agrarian Development has decided to remove the name of the Plaintiff from the Registers and insert the name of the Defendant. It is clear from the plaint that the Plaintiff's cause of action is based on the Defendant's conduct challenging the title claimed by the Plaintiff by his attempt to get his name inserted in the agricultural land register as the owner and by execution of his deed of declaration to indicate that he is the owner. When the Plaintiff filed the action to establish his title against the animosities caused by the Defendant to his title, now the L.R.C attempts to intervene and the Defendant attempts to get the L.R.C added as a Defendant to defeat the claim of the Plaintiff. However, if the L.R.C wants to get a declaration of title against the Plaintiff as well as the Defendant after the intervention, it must be stated here that a claim in reconvention cannot be prayed in this case against the Defendant as a claim in reconvention cannot be made against another Defendant in the same case. It must be noted that in terms of sections 73 and 75(e) of the Civil Procedure Code, a defendant can include a claim in reconvention in reply to the claim in the Plaint when the defendant does not admit the said claim made by the Plaintiff. In **Muthucumarana Vs Wimalaratne and another (1999) 1 Sri L R 139** Wigneswaran, J. held as follows;

"*Opposing parties who are at variance with each other are allowed to set off their individual claims against each other in the same action, there is no express provision in the Civil Procedure Code holding out that such a right of set off extends to defendants inter se*"

On the other hand, it must be noted that as mentioned above, in a different forum, for some reason, L.R.C through letters has supported the Defendant to get his name registered as the owner in the Agricultural land registers. If the intention of the L.R.C is to establish its title against the Defendant also through a decree, it cannot be achieved here by intervention and thus, allowing the intervention will not effectually and completely solve all matters relating to L.R.C's title with regard to the subject matter in suit where L.R.C had communicated letters admitting the title of the Defendant and a decision made in relation to the Defendant's deed by the L.R.C. Thus, against the Defendant, L.R.C may have to resort to another action, since for some reason, it has already admitted Defendant's title before a different forum. Anyhow, as per the submissions and the questions of laws raised, it is clear that now the L.R.C has instituted an

action in the Colombo District Court against the Plaintiff and the Defendant in this action. It is pertinent to note that addition of parties in an action is to avoid multiplicity of action. Furthermore, maintaining different cases in different forums on the same issue may give rise to different decision on the same issue and complicating the matters and causing hardships to the parties.

However, if the application for intervention by the L.R.C and the application by the Defendant to add L.R.C were intended only to defeat the claim made by the Plaintiff, it is not necessary to add L.R.C as a party since the Defendant also has now taken up the position that the subject matter in suit belongs to the L.R.C, and that, if correct, can be proved by adducing evidence in that regard. The action filed by the Plaintiff is a kind of *quia temet rei vindicatio* action based on his alleged ownership while anticipating intrusions by the Defendant. In such a situation, proof of the fact that the title is with a third party *(jus tertii*) is sufficient to defeat the claim made by the Plaintiff, and the Defendant even need not prove his title. As far as the Plaintiff's case is concerned, his case is based on an alleged cause of action that was arisen due to the conduct of the Defendant challenging his title by attempting to get his name included as the owner in the Agricultural Register and the Defendant's act of executing a deed of declaration. The Defendant's position in this regard in his answer was that the title is with L.R.C. Since *Jus tert*i is a valid defence in a *rei vindicatio* action, to completely and effectively adjudicate the case presented by the Plaintiff and the Defendant, I do not think that there is any necessity to add L.R.C as a party as it can be decided by leading evidence in relation to the ownership of the L.R.C. If it is a separate cause of action accrued to L.R.C against the Defendant and the Plaintiff, L.R.C has to institute a separate action based on that cause of action as L.R.C cannot make a claim in reconvention against the Defendant in this action.

If the confirmation of the Defendant's entitlement to the Agrarian Services Development Department by the L.R.C is a mistake or an error, it is questionable as to why the L.R.C is silent about any steps taken with regard to the correction of the outcome of that mistake or the error. Perhaps, L.R.C has not taken any meaningful step in that regard and in the event any step has been taken to correct the decision made for the benefit of the Defendant due to an act of the L.R.C, the Plaintiff may not even proceed with the present action, because mere deed of declaration made by the Defendant himself cannot have any effect on the rights of the Plaintiff. If the L.R.C conveyed its present position to the inquiry in relation to the correction of Agricultural Land Register and L.R.C was inserted as the owner, the Plaintiff could have advised himself whether to institute an action against L.R.C in that regard. The Defendant with the assistance of communication from the L.R.C has taken steps to get his name registered as the owner in the agricultural land register and as such, the Defendant has created a situation that may pose a threat to the alleged ownership rights of the Plaintiff. *Rei Vindicatio* action is basically to evict the Defendant who is in possession against the rights of ownership. As per the Plaint, it appears, the Defendant is not in possession. As said before, it is filed as a *quia timet* action anticipating threats to the alleged rights of ownership while praying for a permanent injunction against the Defendant. In my view it is not necessary to add all who assisted the Defendant in his attempt get his name inserted in the Agricultural Land Registry. Impending threat is from the Defendant. Therefore, the action is against the Defendant.

It is true in some of the decided judgments,[1] *rei vindicatio* action has been described as an action in rem. This may be based on the Johannes Voet's explanations in his *Commentary on the Pandects* (6.1.1) and (6.1.2) which read as follows;

[1] See Latheef Vs Mansoor (2010) 2 Sri L R 333 at 350

"*To vindicate is typically to claim for oneself a right in re. All actions in rem are called vindications, as opposed to personal actions or condictions*".

"*From the right of ownership springs the vindication of a thing, that is to say, an action in rem by which we sue for a thing which is ours but in the possession of another*."

It must be observed that a *rei vindicatio* action is based on ownership which is held against all others as proof of ownership of a third party makes the action unsuccessful. However, like in a partition action, no wider publicity through public notices is given in *rei vindicatio* actions in Sri Lanka. Thus, in my view one cannot say that the whole world is bound by a decision given in a *rei vindicatio* action. Hence, the L.R.C will not be prejudiced by not making it a party in this action as it is not bound by the decision between the Plaintiff and the Defendant when it is not a party.

Whether the gifts made by Sudharma Madugalle were accepted by the relevant donee or on behalf of them can be ascertained through evidence. It must be noted that acceptance of a gift can be done in many ways and not limited to the placing of the signature on the deed itself. Whether Sudharma Madugalle had lands or paddy lands exceeding the ceiling also can be ascertained through evidence. On the other hand, allowing intervention may extend the case beyond the cause of action presented by the Plaintiff and the case presented by the Defendant in reply when no relief has been prayed against the L.R.C by the Plaintiff. Even if intervention is allowed it is questionable whether the L R C can make a claim in reconvention since there is no direct relief prayed against the L R C in the Plaint since no cause of action against the L R C is revealed in the Plaint. It must be observed that what is allowed in claim in reconvention is what can be set off or mutually adjusted with the claim made by the Plaintiff- vide **Silva V Perera 5 N L R 265, Muthucumarana Vs Wimalaratne and Another (1999) 1 Sri L R 139.**

DC Order

The learned Additional District Court Judge of Kurunegala after considering the applications to add and intervene, by order dated 18.09.2015 refused to add L.R.C as a party intervenient. The learned Additional District Judge's conclusion is that since *Jus Tertii* is available as a defense and it is for the defendant to prove it and place evidence in that regard, it is not necessary to add L.R.C to proceed with the action.

High Court (Civil Appellate) Judgment

Being aggrieved by the order of the learned Additional District Judge dated 18.09.2015, the L.R.C. preferred an Appeal in the High Court of the Northwestern Province Holden in Kurunegala (Exercising Civil Appellate Jurisdiction) to set aside the order of the Learned Additional District Judge and upon the parties making their respective written submissions and upon considering the said submissions of the parties the Learned Judges of the said High Court delivered the Judgment dated 27.07.2017. By that Judgment learned High Court judges set aside the order of the Learned Additional District Judge and held that the L.R.C be made a party to the District Court action in terms of Section 18 (1) of the Civil Procedure Code. The learned High Court Judges while referring to narrow and wider constructions applied by courts in various decisions in relation to addition of parties and indicating its preference to apply wider or liberal approach, has stated following among other things in its judgment;

- The Plaintiff has stated that the L.R.C and the Defendant took contradictory positions before the officers of Agrarian Services Department and they are acting in collusion.

- The L.R.C has instituted a declaration of title case no. DLA 16/2016 in the District Court of Colombo after withdrawing the previous case no. DLA 55/2015 filed by the L.R.C.
- The Plaintiff, while relying on **Appuhamy V Lokuhamy (1892) 2 Cey. L.R. 57, Sinnalebbe et. Al, V Mustapha et.al, 51 N L R 541, and The Chartered Bank V L. N. De Silva and others 67 N L R 135,** has contended that since the L.R.C claims title against the Plaintiff and Defendant now, L.R.C cannot be made a party.
- The Defendant's position is that the L.R.C is a necessary party under section 18 of the Civil Procedure Code and wider construction should be applied and the narrow construction should be rejected.

After referring to the case laws on narrow construction and wider construction and what has been stated in those cases, at the end, the learned High Court Judges have stated that the cases referred to by the Plaintiff are based on the narrow constructions which had been denied by Superior Courts. While stating that the learned District Judge ought to have considered the wider construction, the High Court set aside the order made by the learned District Judge and ordered to add L.R.C as a party.

It appears while commenting on wider construction relating to addition of parties that the learned High Court Judges have highlighted following matters;

- If the Court see that, in the transaction brought before it, rights of one of the parties will or may be affected and other actions may be brought in respect of that transaction, the Court has power to bring all the parties before it and determine the rights of all in one proceeding.
- Where there is one subject matter out of which several disputes arise, all parties may be brought before the court and all those disputes may be determined at the same time without the delay and expenses of several trials.
- A necessary party means a party whose presence before the court may be necessary for effectual and complete adjudication of all the questions involved in the action and the Court has the jurisdiction to add such a party and not otherwise. Such added party is bound by the result of the action and the question to be settled must be a one that cannot be effectually and completely settled unless he is a party. What the Court ought to see is whether there is anything which cannot be determined owing to the absence of the party proposed to be added or he will be prejudiced by not being joined as a party.
- Addition of parties is there to avoid multiplicity of actions and to diminish the cost of litigation.
- In the instant case, the Defendant has taken the defence of *Jus Tertii*. Though the Plaintiff has stated that L.R.C has filed an action in District Court of Colombo for a declaration of title, that fact has not been agitated before the trial judge. Since the matter before the Colombo District Court had not been decided by that time 'Res Judicata' would not be applied.
- As per the Plaintiff's stance the L.R.C has taken two contradictory stances, if added this can be clarified and combated by the Plaintiff, hence his rights would not be prejudiced.
- If the L.R.C is not added the final outcome would affect the rights of the L.R.C.

Above shows that the learned High Court Judges identified certain criteria for addition of parties which are discussed under wider construction, namely;

- Avoidance of multiplicity of actions,
- The need to save money and time,
- The need to adjudicate matters in issue effectually and completely,

- The need to add only the necessary parties for such effective and complete adjudication etc.

The above criteria are reflected in the decisions in **Byrne Vs Brown and Diplock (1889) 22 QBD 657** and **Montgomery Vs Foy, Morgan and Co. (1895) 2 QB 321** which have been referred to in the learned High Court Judges' Judgment as well as in the written submissions of the Defendant. The learned High Court Judges in their judgment as well as the Defendant in his written submissions has mentioned **Weeraperuma Vs De Silva 61 N L R 481**, **The Charted Bank Vs De Silva 67 N L R 135**, **Arumugam Coomaraswamy Vs Andiris Appuhamy (1985) 2 Sri L R 219**, **Hilda Perera V Somawathi (2000) 3 Sri L R 219** etc. to indicate that lately our courts also have preferred wider construction. Even the relevant section, namely section 18 of the Civil Procedure Code empowers the court to add *any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved* in the action. However, it must be said that, as per the plaint, this is an action to establish the alleged ownership of the Plaintiff and to vindicate such rights but not an action to get the different stances taken by the L.R.C clarified.

In my view, the question is not whether the narrow construction or wider construction should have been applied but whether the learned High Court Judges correctly applied the said criteria in evaluating the order of the original court. As said before in this judgment, the cause of action contained in the plaint based on the Defendant's alleged acts and the defence contained in the answer in reply to averments in the plaint can be completely and effectually solved without adding the L.R.C but by allowing to lead evidence to prove that the title is with a third party, namely L.R.C. because the defence taken by the answer is *Jus Tertii*. *Jus Tertii* is one of the defence that can be taken in a *rei vindicatio* action which has to be proved by the Defendant and it can be proved by placing necessary evidence. A Court need not add the third party who is said to have title merely because *jus tertii* is pleaded. By adding L.R.C, what happens is that the Court opens the gate to adjudicate a cause of action that the L.R.C may have against the Plaintiff and the Defendant, to meet which the Plaintiff may have to amend its pleadings. Such a situation may change the complexion of the case from a case against the Defendant based on his alleged acts to a case based on the added defendant's cause of action or a cause of action against the added defendant.

On the other hand, as explained above, owing to the fact that the L.R.C cannot make a claim in reconvention against the Defendant, addition of L.R.C may not solve all the questions that may be brought in with the intervention of L.R.C. To solve issues against the Defendant, the L.R.C may need another action to be filed against the Defendant and it also may have to take steps to correct the decision made by the officers of Agrarian Development Department.

It is pertinent to note, if no other action is filed by the L.R.C, but intervene and file an answer only to defeat the claim of the Plaintiff, and as a result Plaintiff loses his case, the Defendant will be able to enjoy the fruits of the decision by the Officers of the Agrarian Development Department even if the said decision is based on a misrepresentation made by the L.R.C. As per the stances taken by the Defendant and the L.R.C in the matter at hand the representation made by the L.R.C at the inquiry before the said department cannot be a correct stance. From the facts, it appears that the L.R.C intervention in the matter at hand was unwarranted.

On the other hand, as said before, in the matter at hand, the L.R.C cannot make a claim in reconvention against the Defendant. A claim in reconvention has the same effect as a plaint- vide section 75 (e) of the

Civil Procedure Code. In a situation where the L.R.C cannot make a claim in reconvention against the Defendant, if it intervenes and make a claim in reconvention only against the Plaintiff in the guise of settling all the disputes involved, the L.R.C may be placed in a precarious position with regard its claims against the Defendant due to section 34(2) of the Civil Procedure Code as no other action is available for what is omitted or relinquished.

Anyhow, by the time the High Court was hearing the appeal, the L.R.C had filed an action in the Colombo District Court. However, all these factors indicate that the intervention or addition of L.R.C would not serve to avoid multiplicity of action. However, now, due to the case filed in the District Court Colombo, the addition of the L.R.C in the case at hand may pose the danger of having contrastive decisions from different forums which is one factor that may be considered in deciding whether the addition would help effectual and complete adjudication. It is pertinent to mention the principal *nemo debet bis vexari pro una et eadem causa* which translates as "No one should be tried twice in respect to the same matter". This principle is behind the doctrine of *Res Judicata* as well as *lis alibi pendence- See* ***Mudiyanse et al V Appuhamy (1937) C.L.Rec 254, 256.*** In this regard, to indicate that two actions can be maintained, the Counsel for the L.R.C has referred to **Muthuranee V Thuraisingham (1984) 1 Sri L R 381** and **Mudiyanse et al V Appuhamy (1937) C.L. Rec 254,255**. The relevant statement of law cited from **Muthuranee** case refers to the seeking of same relief against same party in two different actions but based on different causes of action. **Mudiyanse et al V Appuhamy** relates to two different situations, namely one action based on section 247 of the Civil procedure Code and the other as a *rei vindicatio* action. It appears actions filed under section 247 had been withdrawn with liberty to file fresh action subject to objections that can be taken against the fresh institution. There is no indication that the action in the District Court of Colombo would be withdrawn. Thus, those two cases can be distinguished. On the other hand, it is worthwhile to observe that in **Mudiyanse et al V Appuhamy at 256 and 257**, in relation to the right to litigate before different tribunals, it is said that such a right is subject to the control of court to prevent its process being abused.

This Court observes that the learned Additional District Judge has made the impugned order in the matter at hand on 18.09.2015. The L.R.C had tendered its original petition dated 10.10.2014 praying for intervention. It appears that L.R.C had filed its first plaint in DLA/55/15 dated 08.06.2015 before the District Court of Colombo prior to the aforesaid decision dated 18.09.2015 made by the learned District Judge Kurunegala. Therefore, it cannot be said that due to the refusal of intervention, the L.R.C filed the application in the District Court of Colombo. One may argue that institution of another action, namely DLA/16/2016, before the District Court of Colombo was not a fact before the Learned Additional District Judge of Kurunegala when he made the impugned order refusing the intervention of L.R.C to support the correctness of that order. However, as per the written submissions filed on behalf of L.R.C before the District Court, case No. DLA/55/15, which appears to have been withdrawn to file DLA/16/2016, was pending before the Colombo District Court against the Plaintiff and the Defendant. Thus, the application for intervention does not appear to be for the avoidance of multiplicity of actions. However, learned Additional District Judge has refused to allow the intervention on a different ground.

While referring to the case of **Appuhamy V Lokuhamy 2 Cey. L.R** 57 **K.D.P. Wickremesinghe** in his **Civil Procedure in Ceylon states** as follows;

"*Before a third person can be added as a party to a pending action, he must show-*

(i) that he has an interest in the litigation and that he would be prejudiced by judgment being entered either for plaintiff or defendant;

(ii) that his admission would prevent the same question being tried twice over; and

(iii) that the subject matter of the action is the same as the subject matter claimed by him.

And as a general rule, a party claiming adversely to both plaintiff and defendant is not added as a party."

It is true that the L.R.C has an interest in the litigation and it is also the subject matter of the matter at hand that it now claims. However, as explained above, as far as it is not a party, the result of this action will not prejudice the L.R.C as the Judgment between the Plaintiff and the Defendant cannot bind it. Furthermore, as clarified above in this judgment, since L.R.C cannot make a claim in reconvention against the Defendant, all matters involved with regard to the stance of the L.R.C cannot be completely and effectually solved in this action filed in the District Court of Kurunegala. Thus, the intervention cannot prevent multiplicity of actions and in fact there is another action filed by the L.R.C in the Colombo District Court. However, the case presented by the plaint and the case presented in reply by the answer can be completely and effectually solved by submitting evidence regarding the title of the third party, namely L.R.C. Moreover, an addition may change the complexion of the case which is based on alleged acts of the Defendants to a case based on a cause of action accrued to the L.R.C or Cause of action accrued to the Plaintiff against L.R.C.

The learned High Court Judge appears to have refused to follow **Appuhamy V Lokuhamy** stating that it is a case that gives a narrow construction approach to the addition of parties without giving adequate reasons. What is quoted above indicates that the said decision considers many aspects such as prejudice that may be caused to the third party who is proposed to be added as a party, prevention of multiplicity of action etc. On the other hand, as at present, if it is permitted, addition of L. R. C may allow two separate proceedings to be conducted in two forums giving an opportunity to reach different conclusions at the end which may be averse to the requirement contained in section 18 of the Civil Procedure Code, namely effectual and complete adjudication. In my view, even if one does not consider the fact that there is another litigation, namely DLA/16/2016, before the Colombo District Court as that fact was not before the Learned Additional District Judge of Kurunegala, still the learned Additional District Judge was correct in refusing to add L.R.C as a party as the dispute L.R.C wants to present cannot be completely and effectually solved as L.R.C cannot make a claim in reconvention against the Defendant. However, as a matter of fact, case No. DLA/ 55/2015 was pending before the District Court of Colombo at the time written submissions were tendered to District Court. If the intention for intervention is only to defeat the claim of the Plaintiff, presenting evidence of third-party title (*Jus Tertii*) as identified by the learned Additional District Judge would completely and effectually solve the matter presented before the District Court by the Plaintiff and the Defendant. Finally, the general principal referred to above which states that a party claiming adversely to both plaintiff and defendant shall not be added as a party, in my view, does not emanate from the narrow construction but may relates to the incapability of a Defendant in our law to make a claim in reconvention against another Defendant except in special actions such as partition actions where statements of claims that pray for partition are treated as plaints.

In the Supreme Court

Being aggrieved by the Judgment of the High Court, the Plaintiff has appealed to this Court and leave to appeal was granted on the following questions of law raised in subparagraphs e, f (i), (ii)(a)(b)(c) and (d) of paragraph 13 of the petition dated 06.09.2017. They are answered as follows;

e) has the Learned Judge of the High Court erred in his failure to recognize the fact that the Intervenient Petitioner who disputes the rights of both the Plaintiff and Defendant cannot be made a party to this action?

A. Answered in the affirmative

f) (i) has the Court failed to consider that the Land Reform Commission is claiming adversely to both the Plaintiff and the Defendant and therefore, ought not, as a general rule to be added as a necessary party?

A. Answered in the affirmative

(ii) (a) has the Court failed to consider that the land Reform Commission filed action in DC Colombo case No. DLA 16/2016 for the same land forming the corpus in DC Kurunegala case No. 8009/L?

A. Case no. DLA 16/2016 has been filed after the decision of the Learned Additional District Judge. Thus, it could not have been considered in evaluating the correctness of the decision of the learned Additional District Judge. Therefore, this question of law does not arise. However, learned High Court Judge failed to observe that there had been a previous case pending, namely DLA/55/15, filed in the Colombo District Court prior to the decision of the Learned Additional District Judge.

(b) in view of the land Reform Commission filing action in DC Colombo Case No. DLA 16/2016, is the land reform Commission not a necessary party as it is not bound by the determination of the pending action?

A. Since DLA 16/2016 was filed after the decision of the learned Additional District Judge, the Learned High Court Judges could not have considered it in evaluating the correctness of the impugned order before it. However, the learned High Court Judges failed to recognize that L.R.C is not a necessary party and it is not bound by the decision of the case filed by the Plaintiff, if it does not become a party.

(c) in view of DC Colombo case No. DLA 16/2016, is the Land Reform Commission not a necessary party since the determination of the pending action will not affect the Land Reform Commission's Legal Rights?

A. As indicated in answers above, case No. DLA 16/2016 could not have been considered in evaluating the correctness of the decision of the learned Additional District judge. However, as for the reasons given above in the judgment, Learned High Court Judges failed to recognize that L.R.C is not a necessary party and it is not bound by the judgment of the Action filed in the District Court as far as it is not a party.

(d) in view of DC Colombo case No. 16/2016, will the Land Reform Commission not be a necessary party since the determination of this action will not affect the pecuniary interest of the Land Reform Commission?

A. As stated above learned High Court Judges could not have considered D.C. Colombo case No. 16/2016 in evaluating the correctness of the impugned order before them as it was filed after the impugned decision of the learned Additional District Judge. However, as explained above in the judgment, the decision between the Plaintiff and the Defendant cannot prejudiced the rights of the L.R.C as far as it is not made a party.

For the reasons given above in the Judgment, I allow the appeal with costs and set aside the judgment of the Civil Appellate High Court of Kurunegala dated 27.07.2017 while affirming the Decision of the Additional District Judge of Kurunegala dated 18.09.2015. The Parties in the connected matter SC.HC.CA.LA.No. 409/2017 have agreed to abide by this decision in SC. Appeal No. 77/2018.

Appeal allowed.

Judge of the Supreme Court

Buwaneka Aluwihare PC,J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda,PC,J

I agree.

Judge of the Supreme Court

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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

SC Appeal 128/2018

CA Appeal No. CA 206/2013

HC Kaluthara Case No. 134/2002 -Vs-

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused

And then between

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused-Appellants

-Vs-

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

Complainant-Respondent

And now between

Weerasinghe Pedige Ajith Kumara Weerasinghe

2nd Accused-Appellant-Petitioner

-Vs-

Hon. Attorney-General,
Attorney-General's Department,
Colomb0 12.

Complainant-Respondent-Respondent

Democratic Socialist Republic of Sri Lanka

Complainant

SC Appeal 129/2018
CA Case No. CA 206/2013
HC Kaluthara Case No. 134/02

-Vs-

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused

And then between

1. Badde Kankanamage Chinthaka Kumara Ruwan.
2. Weerasinghe Pedige Ajith Kumara Weerasinghe.

Accused-Appellants

-Vs-

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

And now between

Badde Kankanamage Chinthaka Kumara Ruwan

1st Accused-Appellant-Petitioner

-Vs-

Hon. Attorney-General,

Attorney-General's Department,

Colomb0 12.

Complainant-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, PC, J

A.H.M.D. Nawaz, J

Janak De Silva, J

COUNSEL: Chathura Amarathunga for the 2nd Accused-Appellant in SC Appeal 128/2018.

M.C. Jayaratne, PC with H.A. Nishani, H. Hettiarachchi instructed by M.D.J. Bandara for the 1st Accused Appellant in SC Appeal 129/2018.

Lakmali Karunanyake, DSG for the Complainant-Respondent-Respondent.

ARGUED ON: 24.05.2022

WRITTEN SUBMISSIONS: 26.03.2019 for the 1st Accused Appellant in SC Appeal 129/2018.

09.06.2022 for the 2nd Accused-Appellant in SC Appeal 128/2018.

01.07.2022 for the Complainant-Respondent-Respondent in SC Appeal 128/2018 and SC Appeal 129/2018.

DECIDED ON: 09. 11.2023

Judgement

Aluwihare, PC, J

The 1st Accused-Appellant-Appellant in SC Appeal No. 129/2018 and the 2nd Accused-Appellant-Appellant in SC Appeal No. 128/2018 (hereinafter sometimes referred to as the 'Appellants') were indicted in the High Court of Kalutara on the following Counts:

1. That on or about 26.03.2000 the two accused along with one Edirisinghe Arachchige Gemunu Ranjith who is now deceased, committed **the offence of Robbery** of Rs. 37,579/- from the Pelpola Co-Operative Rural Bank, an offence punishable **under Section 4 of the Offences Against Public Property Act, No. 12 of 1982 read with Section 32 of the Penal Code**; and
2. In the course of the same transaction in the aforementioned count, the two accused along with the said Edirisinghe Arachchige Gemunu Ranjith **Possessed a Firearm without a license, and thereby committed an offence punishable under Section 22(1) read with Section 22(3) of the Firearms Ordinance as amended by Act, No. 22 of 1996**; and
3. In the course of the same transaction in the aforementioned count, the two accused along with said Edirisinghe Arachchige Gemunu Ranjith **Possessed a Hand Grenade without lawful authority and thereby committed an offence punishable under Section 2(1)(b) of the Offensive Weapons Act, No. 18 of 1996.**

At the conclusion of the trial, the two Appellants were convicted of all counts referred to above and accordingly were imposed the following sentences.

Count 1: 20 Years of rigorous imprisonment with a Fine of Rs. 112, 737/= with a default term of 6 months.

Count 2: Imprisonment for life.

Count 3: 10 Years rigorous imprisonment with a Fine of Rs. 10,000 with a default term of 3 months.

In consideration of the Appellants' commendable services in the Army during a time of war, and the fact that the 1st Accused-Appellant-Appellant is disabled, the learned High Court Judge ordered that the terms of imprisonment imposed to run concurrently.

Being aggrieved by the Judgement of the High Court, the two Appellants appealed to the Court of Appeal against the same. In the Court of Appeal, the learned Counsel for the Appellants submitted that they would confine their challenge in relation to the conviction and the sentence imposed in respect of Count 2, [possession of the firearm] and the Judgement of the Court of Appeal therefore addresses matters relating to Count 2 alone. By its judgement dated 17.03.2017, the Court of Appeal affirmed the judgement of the High Court. Being aggrieved by the said Judgement, the Appellants sought special leave to appeal from this Court and special leave was granted on the following question of Law in respect of both appeals.

Did the Court of Appeal err in holding that the Petitioner was guilty of the offence of 'possessing a firearm' under the provisions of the Firearms Ordinance without it being established that what was possessed by the Petitioner was a 'firearm' within the meaning of the Firearms Ordinance?

This judgement shall apply to both appeals, that is SC Appeal No. 128/2018 as well as SC Appeal No. 129/2018. Before addressing the question of law, I will briefly state the factual narrative relating to the 2nd count in both appeals.

The version of the Prosecution, per the evidence adduced at the trial was that the Police had recovered a Pistol from the trouser pocket of the 1st Appellant at the time of his arrest. The Officer-in-Charge [Rex Jensen] gave evidence to the effect that after taking the pistol into custody, it was handed over to the Police reserve but had then been misplaced, and that an inquiry regarding the misplacement was pending. The prosecution stated that the gun could not be located and as such it was not sent to the Government Analyst for examination and report, and that therefore, the Government Analyst's report could not be produced at the trial. The non-production of the Pistol and the Government Analyst's Report forms the crux of this appeal.

Submission of the Appellants

The learned President's Counsel for the 1st Accused-Appellant-Appellant in SC Appeal No. 129/2018 contended that the convictions were bad in law as the said Pistol (alleged by the Prosecution to have been possessed by the Appellants without license), and the Government Analyst's Report which would have affirmed possession were not

produced at the trial. Essentially, the Counsel argued that a prosecution for an offence of possession of a firearm under the Firearms Ordinance could not succeed without the production of the supposed Firearm, and the Government Analyst's Report on the said Firearm as it could not be proven beyond reasonable doubt that what was possessed was actually a 'Firearm' within the meaning of the Ordinance. Learned Counsel for the 2nd Accused-Appellant-Appellant in SC Appeal No. 128/2018 took up a similar position and associated himself with the submissions made by the learned President's Counsel.

Section 2 of the Firearms Ordinance as amended defines an 'Automatic Gun' as "a gun which repeatedly ejects an empty cartridge shell, and introduces new cartridge on the firing of the gun". Since the pistol was not produced, the learned Counsel for the Appellants argued that the prosecution had necessarily failed to prove that the item which was possessed by the Appellants was in fact a Firearm, and an 'automatic gun' within the meaning of Section 2 of the Ordinance, and that it follows therefore that the prosecution had failed to prove that the Appellants were in possession of a Firearm without a license punishable under Section 22(1) read with Section 22(3) of the Firearms Ordinance as amended by Act, No. 22 of 1996. The learned President's Counsel also noted that the High Court relied on the proviso to Section 22 of the Ordinance as amended and argued that as the count 2 on the indictment does not allege possession of "an automatic gun or a repeater shotgun" but merely refers to "a gun", even if the prosecution had succeeded in establishing that the Appellants possessed a firearm, the Appellants could not have been sentenced to Life Imprisonment upon conviction of said count.

The proviso to Section 22(3) stipulates that "Provided that where the offence consists of having the custody or possession of, or of using, an automatic gun or repeater shotgun, the offender shall be punished with imprisonment for life".

Submission of the Prosecution

The learned DSG contended that the facts of the case are of a distinct nature in that the mere absence of the Pistol or the Government Analyst's Report in evidence should not defeat the conviction. At the High Court, and the Court of Appeal, the learned DSG sought to prove that the evidence led at the trial by way of Witnesses, particularly the

evidence of Captain Bandara of the Ganemulla Army camp was sufficient to prove possession of the pistol, and that it was a Firearm within the meaning of the Ordinance. The fact that specific oral evidence in relation to the recovery of the Pistol was only provided by the arresting officers is significant.

Drawing attention of the court to Section 47 of the Evidence Ordinance which makes the opinions of persons who are not experts relevant when it comes to identification of hand writing, the learned DSG submitted that the evidence of Captain Bandara should be considered with regard to the firearm in issue. In my view, the application of Section 47 of the Evidence Ordinance relates to handwriting and handwriting alone and by any stretch of imagination Section 47 cannot be applied to other fields where expert opinion is required.

Judgement of the Court of Appeal

Their Lordships of the Court of Appeal have relied on the judgements in ***Sudubanda v. The Attorney General*** **[1998] 3 SLR 375** and ***Suduweli Kondage Sarath and Another v. The Attorney General*** **(decided on 26.10.1998)** to hold that the non-production of a material object is not necessarily fatal to a conviction and that a conviction can be sustained upon the description of instruments in the hands of the accused by lay witnesses respectively.

I will now consider the question of law upon which submissions were made by Counsel.

Determination

In my opinion, while the non-production of material in the prosecution of offences which only require a literal understanding of certain words or phrases may not be essential, it is only logical that material which are provided specific interpretations by legislation and form the pith and substance of the offence is *sine qua non*. The rationale for this view lies in the fact that the nonproduction is merely a symptom of the larger defect of the lack of evidence to prove the allegation that the pistol claimed to have been possessed by the Appellants was of a nature, make, model and function as that of an 'automatic gun' or a 'repeater shotgun' within the meaning of the Firearms Ordinance. Their Lordships in the Court of Appeal have therefore been remiss in failing to note this glaring defect of the impugned conviction.

The judgement of ***Sudubanda v. The Attorney General*** **[1998] 3 SLR 375** merely discusses the non-production of a material object in respect of an offence which did not require the object to conform to a particular interpretation. For example, in ***Sudubanda's*** case [supra], the accused was prosecuted for *Attempted Murder*. The Court drew a distinction between 'real evidence' and oral evidence which may serve to establish the use of such real evidence in the commission of the offence. In fact, the Court referred to the rationale for the exclusion of 'real evidence' from our evidentiary regime as explained by Sir Fitzgerald Stephen, the author of our Evidence Ordinance. "*Sir Fitzgerald Stephen …in his speech in the Indian Parliament, in introducing the Act, has stated categorically that he did not, in defining evidence, include real evidence as part of the definition of evidence. He has said that omission was deliberate and intentional so that the law in India would be different to the law in Great Britain... However, in proviso 2 to section 60 of the Evidence Ordinance he has made provision for the adduction of real evidence subject to a condition. Section 60 proviso 2 sets out thus: Provided also that if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection*" [at pages 377-378].

The proviso referred to in the above extract merely provides the Court the discretion to call for a production, i.e.: 'real evidence', when it deems it necessary. The prosecution in relation to Count 2 in the present case is for the *possession of a firearm without license* whereby the specific firearm alleged to have been possessed by the two accused is an 'automatic gun' as defined by the Firearms Ordinance. Thus, the consideration in ***Sudubanda*** is manifestly different to the consideration before this Court. As stated before, what is crucially lacking in the present conviction is evidence to establish beyond a reasonable doubt that the pistol claimed to have been possessed by the Appellants was of a nature, make, model and function as that of an 'automatic gun' or a 'repeater shotgun' within the meaning of the Firearms Ordinance, which is a fact- in- issue in the case, as opposed to the weapon used to cause the injury in a case of attempted murder as referred to in Sudubanda [supra] . Therefore, the conclusions drawn above are consonant with the views of Sir Fitzgerald Stephen.

Material which bears a literal meaning for the operation of law do not require the establishment of their use by specific evidence are wholly distinctive from material

with a specific legal meaning-such as a 'gun' as defined in the Firearms Ordinance. Crucially, what both the learned High Court Judge and their Lordships in the Court of Appeal have failed to note is that the Firearms Ordinance imposes what may be referred to as the 'Straw Board Test' to determine whether an ordnance is in fact 'a gun'. Per Section 2 of the Ordinance as amended, 'a gun' is only 'a gun' "if any barrelled weapon of any description from which any shot, pellet or other missile can be discharged with sufficient force to penetrate not less than eight straw boards, each of three-sixty-fourth of an inch thickness placed one-half of an inch apart, the first such straw board being at a distance of fifty feet from the muzzle of the weapon, the plane of the straw boards being perpendicular to the line of fire". Accordingly, if the projectile fired from a weapon is not capable of penetrating the straw boards in the manner set out above, the weapon would not fall within the types of Ordnances regulated by the Firearms Ordinance. The evidence that a weapon so alleged to have been possessed was in fact a weapon which falls within the definition of 'a gun' as aforesaid must be presented from an expert, who in cases such as these is ballistic expert.

The aforementioned distinction does not have to be established, for instance, where a person alleges that he was robbed at gun point and charged under Section 383 of the Penal Code for Robbery with attempt to cause death or grievous hurt. Even if the firearm is not produced, or no evidence is led to establish the make, model, function or other specification of the firearm, the suspect may be convicted since the Penal Code does not impose a specific interpretation for the word 'gun' and therefore the word only bears a literal meaning and does not carry a specific legal meaning.

It is to be noted that the Court of Appeal made the cardinal error in misdirecting itself by failure to appreciate the distinction of the non-production of a 'material object' with that of "lack of proof" to establish a fact-in-issue. The failure on the part of the prosecution here is not the non-production of the pistol alleged to have been recovered from the Accused before court *per se*, but the lack of evidence to establish that, what was recovered from the accused falls within the meaning of a 'a gun' under the Firearms Ordinance. Assuming that, as in the instant case, the firearm was misplaced after it was forwarded and examined by the Government Analyst, yet the prosecution could have proceeded, as then expert evidence would have been available

to ascertain this fact.

For the reasons stated above, I am of the view that the absence of evidence of a ballistic expert [Government Analyst] is fatal to the conviction in respect of Count No. 2 and that it was not proven beyond a reasonable doubt that the 1st Accused-Appellant-Appellant in SC Appeal No. 129/2018 and the 2nd Accused-Appellant-Appellant in SC Appeal No. 128/2018 committed the offence of Possessing a Firearm without a license punishable under Section 22(1) read with Section 22(3) of the Firearms Ordinance as amended by Act, No. 22 of 1996. Accordingly, the conviction of the Appellants on Count No. 2 of the indictment and the term of life imprisonment imposed on them by the learned High Court judge are hereby set aside. The convictions entered and sentences imposed on the other Counts are to remain intact.

Appeal allowed.

JUDGE OF THE SUPREME COURT

A.H.M.D. Nawaz, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT

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

W.M. Dhanapala Menike,
Galkorutuwa, Udahavupe,
Kahawatte.
Petitioner

SC APPEAL NO: SC/APPEAL/166/2017
SC LA NO: SC/SPL/LA/258/2016
CA NO: CA/WRIT/26/2014

Vs.

1. Dayananda Colombage,
   Divisional Secretary,
   Divisional Secretariat,
   Kahawatte.
1A. Gayani I. Karunarathna,
   Divisional Secretary,
   Divisional Secretariat,
   Kahawatte.
2. R.P.R. Rajapakse,
   Commissioner General of Land,
   Land Commissioner General's
   Department, No. 1200/6,
   Rajamalwatta Road,
   Battaramulla.
3. P. Wasantha,

Assistant Land Commissioner,
Land Commissioner General's
Department,
No. 1200/6, Rajamalwatta Road,
Battaramulla.

4. Provincial Commissioner General
of Land,
Sabaragamuwa Province,
Office of Provincial Commissioner
of Land, Provincial Council
Building, New Town, Ratnapura.
5. Ven. Palmadulla Dhammagaweshi
Thero, Athugalkanda Aaranya
Senanasanaya, Lellopitiya Wehera,
Godakawela.
6. Wellakkutti Mudiyanselage
Wasantha Kumara,
Welihindawatte, Indiketiya Road,
Pelmadulla.
7. Registrar of Lands,
Land Registry, Ratnapura.

Respondents

AND BETWEEN

W. M. Dhanapala Menike,
Galkorutuwa, Udahavupe,
Kahawatte.

Petitioner-Appellant

Vs.

1. Dayananda Colombage,
   Divisional Secretary,
   Divisional Secretariat,
   Kahawatte.

1A. Gayani I. Karunarathna,
   Divisional Secretary,
   Divisional Secretariat,
   Kahawatte.

2. R. P. R. Rajapakse,
   Commissioner General of Land,
   Land Commissioner General's
   Department, No. 1200/6,
   Rajamalwatta Road,
   Battaramulla.

3. P. Wasantha,
   Assistant Land Commissioner,
   Land Commissioner General's
   Department,
   No. 1200/6,
   Rajamalwatta Road,
   Battaramulla.

4. Provincial Commissioner General
   of Land, Sabaragamuwa Province,
   Office of Provincial Commissioner
   of Land, Provincial Council
   Building, New Town,
   Ratnapura.

5. Ven. Palmadulla Dhammagaweshi
   Thero, Athugalkanda Aaranya
   Senanasanaya,
   Lellopitiya Wehera, Godakawela.

6. Wellakkutti Mudiyanselage
Wasantha Kumara,
Welihindawatte,
Indiketiya Road,
Pelmadulla.
7. Registrar of Lands,
Land Registry,
Ratnapura.
Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandaratne, P.C., with Dulna de Alwis for the Petitioner-Appellant.
Manohara Jayasinghe, D.S.G., for the 1st to 4th and 7th Respondent-Respondents.
H. Withanachchi with Shantha Karunadhara and Pasindu Widyananda for the 6th Respondent-Respondent.

Argued on: 16.01.2023

Written Submissions:

By the Petitioner-Appellant on 20.01.2021
By the 1st to 4th and 7th Respondent-Respondents on 27.01.2023
By the 6th Respondent-Respondent on 15.02.2023

Decided on: 09.11.2023

Samayawardhena, J.

Background facts

The father of the Petitioner-Appellant, namely Podi Bandara, was issued two grants in respect of two parcels of land in terms of the Land Development Ordinance, No. 19 of 1935, as amended. His wife predeceased him. They had five children. The first two are sons and the other three are daughters. The eldest son is the 5th Respondent. The second son, namely Wickramasekara Bandara, was not a party to this case. The Petitioner is the eldest daughter.

There is a difference between a "permit" and a "grant".

In terms of section 2 of the Land Development Ordinance, land alienated by grant under the Land Development Ordinance is known as a "holding".

The "owner" means the owner of a holding whose title thereto is derived from a grant issued in terms of the Ordinance and includes a permit-holder who has paid all sums which he is required to pay under section 19(2) and has complied with all the other conditions specified in the permit.

Section 19(6)(b) enacts that the owner of a holding shall not dispose of such holding except with the prior approval of the Government Agent. However, section 19(7) recognises that the approval of the Divisional Secretary is not required when mortgaging such holding to some institutions including licensed commercial banks. According to section 46, a permit-holder cannot dispose of the land alienated to him on the permit without the written consent of the Government Agent. As section 2 defines, "disposition" means any transaction of whatever nature affecting land or the title thereto, and "title" means right, title, or interest to or in the land or holding.

Nomination of successors

A permit-holder or an owner of a holding can nominate a successor to the land or holding under the provisions of the Land Development Ordinance.

Section 49 states:

> *Upon the death of a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19, or of an owner of a holding, without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to the land alienated to that permit-holder on the permit or holding or upon the death of such spouse, a person nominated as successor by such permit-holder or owner shall succeed to that land or holding.*

While this section does not specify any condition precedent for succeeding to a parcel of land alienated on a permit, other than the entitlement of the spouse to succeed, section 84 appears to impose an additional requirement. It requires that the successor should obtain a permit from the Government Agent to occupy the land.

Section 84 states:

> *Upon the death of a permit-holder who at the time of his or her death was paying annual instalments under section 19 for the land alienated to him or her on the permit, then-*
>
> *(a) if that permit-holder is survived by his or her spouse, the spouse shall be entitled to succeed to that land;*
>
> *(b) if that permit-holder is not survived by his or her spouse or if the spouse does not succeed to the land, any other person who is a duly*

> *nominated successor of the deceased permit-holder shall be entitled to succeed to that land <u>on such person obtaining a permit from the Government Agent under the provisions of this Ordinance to occupy that land</u>.*

According to section 51, a permit-holder or owner of a holding cannot nominate any person at his will. He needs to nominate a person who belongs to one of the groups of relatives enumerated in Rule 1 of the Third Schedule of the Ordinance. Section 51 reads as follows:

> *No person shall be nominated by the owner of a holding or a permit-holder as his successor unless that person is the spouse of such owner or permit-holder, or belongs to one of the groups of relatives enumerated in rule 1 of the Third Schedule.*

The procedural provisions in relation to, *inter alia*, nomination of a successor, cancellation of a nomination, and registration thereof are set out in sections 52-67 of the Land Development Ordinance. In addition, there are a number of provisions in the Ordinance regulating the procedure.

Right to succession by the spouse

However, in terms of sections 48A and 48B, the spouse of a permit-holder or an owner of a holding is entitled to succeed to the land or holding solely by virtue of being the spouse, regardless of whether such spouse is nominated as a successor.

> *48A(1). Upon the death of a permit-holder who at the time of his or her death was required to pay any annual instalments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such instalments, the spouse of that permit-holder, whether he or she has or has not been nominated as*

successor by that permit-holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to that spouse.

(2) If, during the lifetime of the spouse of a deceased permit-holder who has succeeded under subsection (1) to the land alienated on the permit, the terms and conditions of the permit are complied with by such spouse, such spouse shall be entitled to a grant of that land subject to the following conditions:-

(a) such spouse shall have no power to dispose of the land alienated by the grant;

(b) such spouse shall have no power to nominate a successor to that land;

(c) upon the death of such spouse, or upon his or her marriage, the person, who was nominated as successor by the deceased permit-holder or who would have been entitled to succeed as his successor, shall succeed to that land:

Provided that the aforesaid conditions shall not apply to a grant of any land to be made to a spouse who has been nominated by the deceased permit-holder to succeed to the land alienated on the permit.

(3) Any disposition or nomination made by a spouse in contravention of the provisions of subsection (2) shall be invalid.

48B(1). Upon the death of the owner of a holding, the spouse of that owner shall be entitled to succeed to that holding subject to the following conditions:-

(a) upon the marriage of such spouse, title to the holding shall devolve on the nominated successor of the deceased owner or, if there was no such nomination, on the person who was entitled to succeed under rule 1 of the Third Schedule;

(b) such spouse shall have no power to dispose of that holding;

(c) such spouse shall have no power to nominate a successor to that holding:

Provided that the aforesaid conditions shall not apply to a spouse who has been nominated by the deceased owner of the holding to succeed to that holding.

(2) Any disposition or nomination made by a spouse in contravention of the provisions of subsection (1) shall be invalid.

Succession by the nominated successor

If the spouse of the deceased permit-holder or owner of the holding is among the living, the nominated successor cannot succeed to the land or holding soon after the death of the permit-holder or owner of the holding. In terms of section 49, the nominated successor can succeed to the land if the spouse fails to succeed or upon the death of the spouse.

Failure to succeed by the spouse or nominated successor

What is meant by failure to succeed by the spouse or nominated successor is stated in section 68. In short, if the spouse "refuses to succeed" or does not enter into possession of the land or holding within six months from the death of the permit-holder or owner, it constitutes "failure of succession".

68(1). The spouse of a deceased permit-holder, who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19, or the spouse of an owner, fails to succeed to the land held by such permit-holder on the permit or to the holding of such owner, as the case may be-

(a) if such spouse refuses to succeed to that land or holding, or

(b) if such spouse does not enter into possession of that land or holding within a period of six months reckoned from the date of the death of such permit-holder or owner.

(2) A nominated successor fails to succeed to the land held on a permit by a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19 or to the holding of an owner if he refuses to succeed to that land or holding, or, if the nominated successor does not enter into possession of that land or holding within a period of six months reckoned-

(i) where such permit-holder or owner dies without leaving behind his or her spouse, from the date of the death of such permit-holder or owner; or

(ii) where such permit-holder or owner dies leaving behind his or her spouse, from the date of the failure of such spouse to succeed, such date being reckoned according to the provisions of paragraph (b) of subsection (1), or of the death of such spouse, as the case may be.

Succession by operation of law

If no successor has been nominated or if the nominated successor fails to succeed or if the nomination of a successor contravenes the provisions of the Ordinance, subject to the spouse being succeeded to the land or

holding, the land or holding shall devolve as prescribed in Rule 1 of the Third Schedule read with section 72 of the Ordinance.

> *72. If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual instalment by virtue of the provisions of section 19 or to the holding of an owner shall, upon the death of such permit-holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule.*

The order of succession

Prior to the amendment brought in by Act No. 11 of 2022, the devolution of succession was in the following order of priority.

(a) Sons
(b) Daughters
(c) Grandsons
(d) Granddaughters
(e) Father
(f) Mother
(g) Brothers
(h) Sisters
(i) Uncles
(j) Aunts
(k) Nephews
(l) Nieces

Act No. 11 of 2022 eliminated gender-based discrimination in favor of males over females. Following this amendment, devolution in terms of Rule 1 of the Third Schedule shall take place in the following order, the older being preferred to the younger where there are more relatives than one in any group.

(a) Children
(b) Grand children
(c) Parents
(d) Siblings
(e) Uncles and aunts
(f) Nephews and nieces

However, according to Rule 1(d), where any person in the order of priority has developed such land, the title to the holding or the land shall not devolve on the older person but on the person who developed such land.

In terms of section 170, no other law relating to succession of land is applicable in respect of land alienated under the Land Development Ordinance.

Failure to succeed by a statutory nominee

Although section 68 of the Land Development Ordinance provides for the "failure to succeed" by the spouse or nominated successor, it is silent on the failure to succeed by a relative who is entitled to succeed in terms of Rule 1 of the Third Schedule.

What happens if the successor in terms of Rule 1 of the Third Schedule fails to succeed? Rule 2 of the Third Schedule provides the answer:

> *If any relative on whom the title to a holding or land devolves under the provisions of these rules is unwilling to succeed to such holding*

or land, the title thereto shall devolve upon the relative who is next entitled to succeed subject to the provisions of rule 1.

Rule 2 provides for a situation where a relative is "unwilling to succeed". This can be distinguished from "failure to succeed". "Unwilling to succeed" implies a conscious decision to avoid succession, while "failure to succeed" can occur without deliberate intent and may result from various factors. Nevertheless, according to section 68(1)(a), "failure to succeed" includes "refusal to succeed". "Unwilling to succeed" and "refusal to succeed" connote similar meaning. In summary, failure (අසමත්) to succeed, refusal (ප්‍රතික්ෂේප) to succeed and unwilling (අකමැති) to succeed are not contradictory but complimentary to each other.

There is no indication in Rule 2 for how long the next in line needs to wait to assume that the first in line is "unwilling to succeed" when it is not manifested by a positive act. It cannot be for an unlimited time or until the death of the first person.

In my view, the law applicable to failure to succeed by a spouse or a nominated successor as stated in section 68 shall be applicable when a relative who is entitled to succeed in terms of Rule 1 of the Third Schedule is unwilling to succeed. In the result, if such relative refuses to succeed or does not enter into possession of the land or holding within a period of six months reckoned from the date of the death of the permit holder or owner, it should be regarded as failure to succeed or unwilling to succeed.

Failure to succeed by the 5th Respondent

In the instant case, Podi Bandara died without nominating a successor to the holding. In that eventuality, the succession should take place in terms of section 72 read with Rule 1 of the Third Schedule of the Land Development Ordinance. Accordingly, the 5th Respondent, being the eldest son of Podi Bandara was to succeed to the holding by operation of

law. However, he did not succeed within six months from the date of the death of Podi Bandara (his father). Wickramasekara Bandara (his younger brother and the second in the family) had been in possession of the holding.

Thereafter, the 5th Respondent, nearly one year after the death of his father executed a Deed of Renunciation with the written sanction of the 1st Respondent Divisional Secretary manifesting his unwillingness to succeed to the holding. By this Deed the 5th Respondent renounced his rights and interests in the holding in favour of Wickramasekara Bandara. Wickramasekara Bandara had also executed a Deed of Declaration (P6) with the written sanction of the 1st Respondent Divisional Secretary pursuant to the execution of P5. All these deeds were registered in the Register maintained under the Land Development Ordinance at the Land Registry (P7).

In my view, P5-P7 are all redundant and unnecessary. If the 5th Respondent did not succeed within six months of the death of Podi Bandara, Wickramasekara Bandara was entitled to succeed to the holding by operation of law.

However, I will refer to P5. P5 *inter alia* states as follows:

<u>ඉන්නිසා සියලු දෙනාම මෙයින් දැනගත යුතුයි.</u>

ඉඩම් සංවර්ධන ආඥාපණත් 162(1) වගන්තිය යටතේ අසවර ලබා ඇති ඉහත කී වෙල්ලක්කට්ටු මුදියන්සේලා ගේ මද්දුම බණ්ඩාර වන මට රත්/ප්‍ර/700 සහ රත්/ප්‍ර/4318 දරණ ස්වර්ණභූමි පත්‍රය යටතේ අයිතිය හිමිවූ මෙහි පහත උපලේඛණයෙහි විස්තර කරන දේපල සහ ඊට අයිති සියලු දෙයිනුත් මා හට සතු සියලුම සියල්ලම මෙයින් අතහැර දැමුවෙමි.

එසේ හෙයින් මෙම අත්හැර දැමීම කාරණ කොට ගෙන එකී දේපල සහ එයට අයිති සියලු දේත් ගැනීමට නිබෙන අයිතිවාසිකම්, හිමිකම් නොඉල්ලන බවත් එකී දේපළ බුක්ති විඳින ලබන වෙල්ලක්කට්ටු මුදියන්සේලාගේ වික්‍රමසේකර බණ්ඩාරට හා ඔහුගේ උරුමක්කාර ලැබුම්කාරාදීන්ටත් ඕනෑම මනාපයන් කර ගැනීමට පුලුවන් මුලු බලය මෙයින් සලස්වාදෙන බවත් මා වෙනුවටත් මාගේ පොල්මඃකාර අද්මිනිස්ත්‍රාධිකාර බලකාර ලැබුම්කාරායන්ටත් සමග මෙයින් ප්‍රකාශ කර ස්ථීර කරමි.

As seen from P11 and P12, the ownership of the holding had thereafter been transferred in the name of Wickramasekara Bandara.

The 5th Respondent then entered into monastic life and was ordained as a Bhikkhu.

Wickramasekara Bandara later died unmarried and issueless.

Thereafter, as seen from 1R3(a) and 1R3(c), the Petitioner (the eldest daughter of Podi Bandara and the third in the family) on the one hand and the 5th Respondent Bhikkhu (the eldest son of Podi Bandara) on the other, made separate applications to the 1st Respondent Divisional Secretary to transfer the holding to them.

The decision of the Deputy Land Commissioner

As a result, the 3rd defendant Deputy Land Commissioner has informed the Petitioner by P10 that alienations without the approval of the Divisional Secretary are void; deeds of declarations are unknown to the Land Development Ordinance; Wickramasekara Bandara had not acquired rights to the holdings; and therefore ownership should devolve on the 5th Respondent in his lay name as the eldest son of the grantee. P10 reads as follows:

> දිමනාපත්‍ර නිකුත් වී ඇති නිසා අයිතිය පිළිබඳ ප්‍රශ්නය ඉඩම් සංවර්ධන ආඥා පණත අනුව විසඳාගත යුතු වේ. ප්‍රාදේශිය ලේකම් අනුමැතිය නොලබා බැහැර කිරීම් සිදු කරනු ලැබුවහොත් ඒවා බල රහිත වේ. ප්‍රකාශන ඔප්පු ගැන නීතියේ සඳහන් නොවන බවත් එවැනි ලේඛණ රජයේ ඉඩම් ආඥා පනතට අනුකූල නොවන බැවින් ඒවා නීත්‍යානුකූල නොමැත. එබැවින් අවිවාහක මියගිය සොයුරාට නීත්‍යානුල උරුමය අදාල තොරතුරු අනුව ලැබී නොමැත. එබැවින් එහි නියම උරුමකරු වැඩිමහල් මද්දුම බණ්ඩාර බැවින් ඒ අනුව ඔහු වෙත උරුම පවරා ඇති බව කාරුණිකව දන්වා සිටිමි.

Thereafter the 1st Respondent by P11 and P12 has informed the Land Registrar to register the Certificates of Confirmation of Original Ownership in the lay name of the 5th Respondent.

It appears that the 3rd Respondent had been under the impression that alienations were effected without the consent of the Divisional Secretary but it was not correct. The 3rd Respondent has highlighted only the Deed of Declaration but not the Deed of Renunciation, which preceded it. Even if both the Deed of Renunciation and the Deed of Declaration were declared null and void, it is not correct to say that the second son did not succeed to the holding. When the eldest son failed to succeed or manifested his unwillingness to succeed, the second son became entitled to succession by operation of law.

All in all, the contents/findings/final decision in P10 are inaccurate, misleading and unsustainable in law.

Writ application in the Court of Appeal and its decision

The Petitioner filed a writ application in the Court of Appeal seeking to quash *inter alia* P10-P12 by certiorari. The Court of Appeal held that the Land Development Ordinance does not prohibit the execution of Deeds of Renunciation. It further held that the 5th Respondent did not renounce his rights absolutely but did so only in favour of Wickremasekara Bandara, and therefore upon the death of Wickremasekara Bandara, the 5th Respondent shall succeed to the holding.

Questions of law

This Court had on 06.02.2017 granted leave to appeal on five questions of law but thereafter on 12.03.2021 has narrowed down the argument to two questions of law in the presence of counsel for all the parties:

(a) Has the 5th Respondent validly renounced his right to succession to the holding in favour of his brother Wickramasekara Bandara by the Deed of Renunciation?

(b) Does the said renunciation prevent the 5th Respondent from making any claim in relation to succession of the holding?

Renunciation of rights

I have already stated that when the 5th Respondent did not succeed within six months from the death of his father Podi Bandara, in the order of priority, the second son Wickramasekara Bandara should succeed to the holding.

The Land Development Ordinance does not provide for renunciation of right to succession. Significantly, as the Court of Appeal has pointed out, nor does the Land Development Ordinance prohibit it. In *Hevavitharana v. Themis De Silva* (1961) 63 NLR 68 it was stated that Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by law, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed.

The renunciation of right to succession by the 5th Respondent by P5, albeit redundant, is valid in law. Such conduct or manifestation can easily be accommodated under "unwilling to succeed".

Estoppel or waiver

The next question is, can the 5th Respondent make a claim for succession again after renouncing his right to it? In my view, he cannot. The doctrine of estoppel and/or doctrine of waiver prevents him from doing so. Of these two doctrines, the former has been the subject of more intense discussion than the latter.

The doctrine of waiver is a legal principle that allows an individual to voluntarily relinquish or abandon a right or benefit that is otherwise available to him.

The doctrine of estoppel stems from the maxim '*allegans contraria non est audiendus'*, which means a person establishing contradictory facts shall not be heard. It is evident that this doctrine finds its foundation in equity and justice in that a man should not be allowed to blow hot and cold, approbate and reprobate, and affirm and disaffirm the same to suit the occasion. The doctrine of estoppel is also connected to the doctrine of legitimate expectation, which is primarily a concept within administrative and constitutional law.

For the purpose of this appeal, I will only consider the applicability of doctrine of estoppel.

Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd edn, London Butterworths, 1977) page 4, defines estoppel as follows:

> *Where one person (the representor) has made representations to another person (the representee) in words or by acts or conduct, or (being under a duty to speak to the representee) by silence or inaction, with the intention (actual or presumed) and with the result, of inducing the representee on the faith to alter his position to his detriment, the representator, in any litigation which may come afterwards, is estopped from making or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner, objects thereto.*

Section 115 of the Evidence Ordinance reads as follows:

> *When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.*

E.R.S.R. Coomaraswamy, *The Law of Evidence*, Volume I (2nd edn, Lake House Investments Ltd Book Publishers, 1989) page 184, sets out the following essential elements for a plea of estoppel to succeed under section 115 of the Evidence Ordinance:

(a) A representation made by a person by means of a declaration, act or omission (the omission being to act or speak when there was a duty to act or speak)
(b) The representation must have been made with the intention that it should be acted upon
(c) Discrepancies between representation then made and the assertion now sought to be made
(d) The effect of the representation must be to cause or permit the other person to believe the thing to be true
(e) The effect of the representation must also be that the other person has acted upon such belief (to his detriment or damage)
(f) The question must arise in the suit or proceeding between the same persons or their respective representatives (privies)

If these six elements are met, Coomaraswamy states, the first person or their representative will be barred from contradicting the veracity of the matter that forms the representation.

In the facts of this case, the argument that the 5th Respondent made a qualified renunciation only in favour of his brother is an afterthought.

The fallacy of this argument is made clear when the learned Deputy Solicitor General for the Respondent state officials and the learned counsel for the 6th Respondent admit that, if the said brother of the 5th Respondent, namely Wickremasekara Bandara, nominated a successor, the 5th Respondent or his son the 6th Respondent could not have reclaimed succession to the holding.

I am unable to agree with the finding of the Court of Appeal that, since Wickremasekara Bandara died without nominating a successor, the 5th Respondent becomes entitled to succession of the holding by operation of Rule 1 of the Third Schedule of the Ordinance. This finding of the Court of Appeal is contradictory to its earlier findings that (a) since the 5th Respondent did not succeed to the holding, Wickremasekara Bandara succeeded to it by operation of law, and (b) the Land Development Ordinance does not prohibit renunciation of rights.

All the six elements necessary for a successful plea of estoppel do exist in this case.

In the course of the argument, it was also asserted that even if the 5th Respondent renounced his rights and interests in the holding, the 6th Respondent, who is the son of the 5th Respondent, is not bound by such renunciation. This is covered under the last element of section 115 of the Evidence Ordinance mentioned above, i.e. the question must arise in the suit or proceeding between the same persons or their representatives (privies). In elaborating the last element, Coomaraswamy at page 192 states, "*this means that estoppels are usually binding upon parties and their privies*." It is further stated that privies can be privies in blood such as heirs, privies by estate such as lessees and assignees, and privies in law such as executors and administrators.

According to Spencer Bower and Turner (op. cit.) at page 116 "representee" is not limited to parties directly involved but includes any party to whose notice the representation should reach as per the intention of the "representor"; this intention may be inferred if the representor had knowledge that such representation would reach the third party in the ordinary course of business.

The 5th Respondent made the representation directly to Wickramasekara Bandara. Yet it is reasonable to assume that the act of renouncing interest in the holding is one which would reach the other heirs in the line of succession within his family.

After the renunciation of the right to succession by the 5th Respondent in favour of Wickramasekara Bandara and after the death of Wickramasekara Bandara, the Petitioner had a legitimate expectation that she should succeed to the holding according to Rule 1 of the Third Schedule.

If the 5th Respondent failed/showed unwillingness/renounced his right to succeed, the 6th Respondent being the son of the 5th Respondent cannot claim right to succeed in terms of Rule 1 of the Third Schedule of the Land Development Ordinance since *inter alia* (a) the chain of succession had been severed, and (b) by operation of the doctrine of estoppel.

The 6th Respondent who is the son of the 5th Respondent is bound by the representation made by his father.

Conclusion

For the aforesaid reasons, I answer both questions of law in the affirmative and set aside the judgment of the Court of Appeal.

I quash P10, P11 and P12 by writ of certiorari. The subsequent documents prepared based on them and mentioned in the petition have no force or avail in law.

As the 5th Respondent renounced his right to succession, after the death of Wickramasekara Bandara, the Petitioner being the eldest daughter and third child of Podi Bandara, shall succeed to the holding by operation of Rule 1 of the Third Schedule of the Land Development Ordinance.

The appeal is accordingly allowed but without costs.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court

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

In the matter of an application under Articles 17 and 126 of the Constitution of Sri Lanka.

1. Priyankara Witharanage Chandika Lalith Kulathunga,
No. 68, Dela, Ratnapura

2. Jagath Warnaka Ranathunga
"Wasana", Devalamulla,
Puhulwella.

3. Hapuachchige Lalani Chandrakanthi,
No.101, Pelpitigoda,
Poruwadanda.

S.C.(F.R.) Application No. 298/2013.

4. Hapurugala Gamladdalage Samantha Kumara Jayaratha,
Suhadha Mawatha,
Erathna Road, Eknaligoda,
Kuruwita.

5. Weligamage Don Bandu Kumari Shiromani,
No.327/7a, Moragala Road,
Bulugahapitiya, Eheliyagoda.

6. Darmasri Pathirajage Sudath Madusanka,
17th Post, Suriyagoda,
Bamunakotuwa.

7. Mahadurage Premakeerthi,
Jamburegoda Road,
Mudugamuwa, Weligama.

8. Agampodi Malani Mendis,
Kadegedara,
Thiyaduwa, Akurassa.

9. Anusha Niranjala Ranawaka,
Mirissagedarawatta,
Henegama, Akurassa.

10. Udagama Rankothgedara Vajira
Nilanshani Wijerathna,
32nd Post, Hunganwela,
Nalanda.

11. Medagam Medde Gedara
Kanchana Geethamali
Premachadra,
No.235, Yatihalagala,
Pallegama, Haloluwa.

12. Kahakotuwa Chitra Padma
Kumari
Kalinguarachchi,
"Geethani", 1 Ela Road,
Polonnaruwa.

13. Aluthgedara Swarna Manel
Aluthgedara,
529/B, Danduwagolla,
Bambaragaswewa, Galewela.

14. Charitha Prathapasinghe,
"Pathuma", Makandura,
Mathara.

15. Sesiya Wasam Batuwattage
Indumathi Sriyani,
"Karunasiri", Nawela,
Merihawatta,
Bandarawela.

16. Edirisinghe Mudiyanselage
Shriwanthi Dammika Kumari
Edirisinghe,
No.02, Weragama Kaikawala (Off
Mathale).

17. Ranepura Hewage Chandrika
Malkanthi
"Amarasiri" C/O Wijesiri,
Diyalape North, Diyalape,
Akuressa.

18. Wijesekara Gamachchige
Sanjeewani
"Sousiri", Pathegama, Weligama.

19. Hettiachchi Mudiyanselage
Sagarika Dmayanthi,
Meda Kadigamuwa, Ihala
Kadigamuwa.

20. Kuruppu Achchi Ralalage
Dammika Shriyani Kuruppu,
No.1/3, Oyabodawatta,
Galamuna,
Kaleliya.

21. Weerasooirya Wijesundara
Rajapaksha Wasala
Mudiyanselage Udaya Bandara
Weerasooriya,
62/7. Uda Peradeniaya,
Peradeniya.

22. Ranasinghe Kodikara Kilipitige
Dulpathmendra,
Ukwattagoda, Thiyaduwa,
Akurassa.

23. Ekanayake Mudiyanselage Manel
Kumari Ekanayake,

Galagedara, Wariyapola.

24. Kulathunga Mudiyanselage
Nishanthi Priyadarshani Kumari,
Temple Road, Kumbuk Wewa.

25. Muthukuda Arachchilage Dona
Priyanka Mariya Deepthi,
Maeliya, Kuda Maeliya.

26. Wanasinghe Arachchige
Chaminda Jayalal Wanasinghe,
"Sampath Sewana", Galthuna,
Manikdiwela.

27. Siriwardena Pathiranage
Dayapala,
No.159/6, Moraketiya Road,
Embilipitiya.

28. Indeera Wijerathna
Weerabaddana,
No.112/1, Danhena, Deyyandara.

29. Sakrage Banumathie
Swarnathilaka
Indigolwatta, 6th Post,
Humbuluwa, Alawwa.

30. Nadakandige Kanchana Anupa
Kandage,
"Irosha", Pallegama,
Kolawenigama.

31. Rajapaksha Wahalawannaku
Mudiyanselage Kamani
Rajapaksha,
"Dananjaya", Dalupathyayawatta,
Maspotha.

32. Gattiyawala Yatinuwarage
Anusha Jeewanee Darmakeerthi,
No.233, Pallemulla, Halloluwa.

33. Parawahera Kankanamge Rasika
Sanjeewani,
"Gamage", Yatigala,
Modarawana.

34. Aruni Kanchana Jasinghe,
"Jayani", Diddenipotha,
Makandura,
Matara.

35. Rathnayaka Mudiyanselage
Shyama Sewwandi Rathnayake,
C/O Darmasena Rathnayake,
Behind of Upali Cushion, Hospital
Junction, Hingurakgoda.

36. Dilani Nilangika Kumari
Jayawickrama,
A/18/B, Railway Quarters,
Kotalawalapura, Rathmalana.

37. Mahawela Gamage Sunil Santha,
No.88, Nikawewa, Thanamalwila.

38. Sanjaya Kumara Kekilla Arachchi,
No.12, Allewela Village,
Sirimalgoda, Badulla.

39. Jayawardana Kankanamge
Menaka,
Jamburegoda Road,
Mudugamuwa,
Weligama.

40. Wijethunga Mudiyanselage
Nandasiri Wickramasekara,
10th Mile Post, Ridimaliyadda,
Mahiyanganaya.

41. Kottwalniyage Sampath Siri Kapila Kumara,
No.75, Ginganga Mawatha,
Gintota.

42. Athukoralalage Champika Nishanthi Athukorala,
No.340/A/1, Wilegoda,
Eheliyagoda.

43. Weerasinghe Kankanamge Mala Nishanthi,
Kahatapitiya Mawatha,
Panapitiya, Kaluthara.

44 Weediya Hewage Indika Priyadarshani,
Balagollagama, Balalla.

45. Paththinihewage Nalani Priyanka,
Karangamuwa, Katupotha.

46. Kariyapperuma Mudiyanselage Wimali Ramyakumari Kariyapperuma,
Rekogama, Balalla, Mahawa.

47. Kandekumbure Mudiyanselage Praba Dayanthi Bandara Kandekumbura,
No.04, Eramuduliyadda,
Sangarajapura.

48. Kalyani Dayarathna,
Dewalagalawatta,
Pahala Kottamulla, Weuda.

49. Herath Mudiyanselage Anula Kumari,
No.21/9A, Aruppala, Kandy.

50. Adikari Arachchilage Volga Shamindani Adikari,
Pandiwela, Kuliyapitiya.

51. Nanayakkara Aparekkage Vindya lshanthi,
No.326/25, Samagipura,
Pelenwatta, Pannipitiya.

52. Sudesh Dillimuni
Dilena, Kuwe, Kamburupitiya.

53. Gama Ralalage
Ranganasandaruwan Bandara,
"Ratnapaya", Kandegedara,
Maharachchimulla.

54. Sella Hennadi Galappaththige
Piyumika Dinushini Gayathrei,
Pepiliyana Road, Gangodawila,
Nugegoda.

55. Dayawansha Giniwellage Anoma Sandamali Priyarathna,
"Shanthi", Gonna, Kohilegedara.

56. Buddrage Anusha Udayangani Gunasena,
Mahagama, Kohilegedara,
Kurunegala.

57. Jayasekara Withanage Kemika Nilmini,
"Sameera", Nanawalawatta,
Midigama, Ahangama.

58. Yapa Mudiyanselage Champika Niroshani Abeyrathna,
No.7/2, Muthukude Walauwa,
Narampanawa.

59. Perumpulle Mudiyanselage
Chamila Udayangani Bandara,
No. 191/1a, Paligedra, Mihira
Mawatha, Piliyandala.

60. Jayasekara Siriwardana
Dissanayaka Mudiyanselage
Chathura Tharanga Bandara,
"Rathnawila", Lahugala.

61. Hewa Gamage Padmasiri
Ampitigoda, Beragama,
Makandura, Mathara.

62. Achini Widanagamage
"Rathna Sewana",
Koramburuwana,
Ransagoda.

63. Jawara Gedara Sunethra
Damayanthi,
No.129/2/A, Bulugahalanda
Watta,
Gaspe, Banduragoda.

64. Sandya Padma Kanthi
Kambikoratuwa, Mawarala Road,
Mulatiyana.

65. N.G. Pradeeth Milanka
No.40/10, Hiththetiyameda,
Mathara.

66. Warnakula Kankanamlage
Priyantha Shobani Rathnasiri,
Udakumbura, Kanangama,
Dehiowita.

67. Wijesinghe Mahawattage
Chandrani,

No. 3/170, Steewan Mawatha,
Dampe, Meegoda.

68. Wetthasinghe Pathiranage
Anusha Shyamalee
Wimalarathna,
No. 143/1, Wanathawatta,
Wilekumbura, Meethirigala.

69. Wageesha Ranmali Wijedeera,
121, Lebima, Kadurupokuna-East,
Tangalle.

70. Dedigama Mudiyanselage Mallika
Dedigama,
1 Mile Post, Medaweragama,
Kaikawala, Mathale.

71. Tennakoon Pathiranage Nirmala
Tennakoon,
Elhena, Hunganwela, Nalanda.

72, Thilakarathana Mudiyanselage
Manel Damayanti Thilakarathna,
No.136/4, Thawalankoya,
Ukuwela.

73. Karunarathnage Yasantha
Niroshana,
No.53, Awariwatta,
Alubomulla.

74. Deldeniya Ralalage Dhammika
Neranjala Kumari Deldeniya.
No.63, B.O.P.313,
Pulasthigama,
Polonnaruwa.

75. Jayakody Pathirannehelage
Anusha Thilani Jayakody,
No.273/7, Samagi Mawatha,

Annasiwatta, Galoluwa,
Minuwangoda.

76. Yapa Mudiyanselage Wathsala
Jeewani Kumari,
Pallegama, Kuda Elibichchiya.

77. Ranathunga Mudiyanselage
Buddhika Saman Jayawardana,
Ehalagama, Theppanawa,
Kuruwita.

78. Maraka Mudiyanselage Renuka
Kumari Jayasena,
No.110, Shasthrawelliya,
Kekirawa.

79. Bandara Gedara Herath
Mudiyanselage Eranga Suresh,
No. 86, Dehigama Junction,
Akiriyankumbura.

80. Indika lsurusiri Senevirathna,
No.145, Kekirawa Road,
Galenbindunuwewa.

81. Ilamperuma Arachchilage
Ayirangani,
"Sandakelum",
Panakanniya, Landewela.

82, Wijethunga Mudiyanselage
Malani Wijethunga.
"Jayasiri",
Dawunpatina Mawatha,
Diyathalawa.

83. Koralegedara Shantha
Rupasinghe Koralegedara,
Miniranketiya, Laggala,
Pallegama.

84. N.P. Rukmani Therangama,
Sumithra Niwasa,
Gawilipitiya,
Aranayaka.

85. Henaka Rallage Chandrika
Nishani Samaranayaka,
"Chandrika",
Uggala,
Degalathiriya,
Undugoda.

86. Sathkumara Mudiyanselage
Chaminda Hemantha
Sathkumara,
Thonigala, Anamaduwa.

87. Wehalla Gamage Chandrani,
No.270, Mahawatta,
Alubomulla.

88. Ediriweera Arukattu Patabendige
Jayanthi Ashoka,
165, V.C. Mawatha,
Ehala Walahapitiya,
Naththandiya.

89. Diluka Shyamali Pathirage,
No.94/A, Madampe,
Halthota.

90. Dehinga Gawuri Hamanthi
Mendis,
No. 23/520, Dikhena, Urban
Houses,
Munagama, Horana.

91. Ireshika Udayangani Abeysinghe,
No.32/2, Kuppana, Pokunuwita.

92. Godawa Pathiranage Rasanga Sampath,
Pathirawana, Wilpita,
Akuressa.

93. Nadeeka Mali Samarasinghe Gunasekara,
"Kalyani", Mulana Road,
Makandura, Mathara.

94. Dilani Shanika Amaradiwakara Samarasinghe,
No.256/1, Diddenipotha,
Makandura, Mathara.

95. Manjula Jathunga Dahanayaka,
No.25, Raja Uyana, Makandura.

96. Godakanda Kankanamge Lashantha Ranjana,
"Gorakagahawatta",
Wijayananda Mawatha,
Anangoda, Galle.

97. Henrath Piyathissage Lakshman Jayakody,
"Sunethra Niwasa",
Meegahawatta, Atugoda,
Damunupola, Kegalle.

98. Heenkenda Mudiyanselage Sriyani Kumari Heenkenda,
Sathipola Asala, Hettipola,
Wilgamuwa.

99. Rathnayaka Mudiyanselage Chandrarathna Bandara,
Udatanna Watta Kade,
Dulgolla, Bandarawela.

100. Desika Padmini Manatunga,

No, 07, Suwinithagama, Badulla.

101. Abeyranasinghe Mudiyanselage Chathuri Rangika Gunathilaka, No.57, Digogedara, Eheliyagoda.

102. Welagama Gedara Indrani Menike, No.69, Nawakadadora, Pussellawa.

103. Hennayaka Mudiyanselage Janaka Chaminda, Madame Kandura, Kandana, Springweli.

104. Kathgoda Tanthirige Naleesha Jeewani Kumari, No.02, Wiwekarama Mawatha, Godakanda.

105. Wahumpura Dewage Priyantha Pushpa Kumara Karunarathna, No.234/1, Waga- South, Thummodara.

106. Nanayakkara Bandungodage Chandima, "Sandapaya", Pinaduwa, Sandarawala, Baddegama.

107. P.P.G. Thilak Priyantha, Dallanda, Akuramboda.

108. Delpagoda Gamage Sarath Kumara Jayaweera, Ketapala, Ganegoda, Elpitiya.

109. Krishani Kumasaru, Nawalakanda, Uda Hawupe, Kahawatta.

110. Wickramasinghe Mudiyanselage
Nishanka Bandara,
Arangala, Naula.

111. Mannapperuma Mudiyanselage
Nayanananda Bandara
Abeyrathana,
Akkarawatta, Mahananneriya.

112. Dissanayaka Mudiyanselage
Renuka Kumari,
Aluthwatta, Wilawa, Balalla.

113. Pitiduwa Koralage Manjula
Kumari,
No.249/1, Tourist Bangalore,
Industrial Ministry, Bambarakele,
Nuwara Eliya.

114. Hewa Anthonige Dilani
Chathurika Premakeerthi,
"Vishmitha", Kapukoratuwa,
Narawelpita -South, Hakmana.

115. W. Nilusha Sampath Sirimanna,
No. 117/3, Pararadupara,
Balangoda.

116. Senarath Rathnayaka Sujatha
Priyadarshani,
"Thilina", Nikaattagoda,
Ambagasdowa.

117. Ganga Krishanthi Kannagara,
No.208, "Mihiraya Pokuna",
Kommala, Bentota.

118. Hitihami Mudiyanselage
Indrakumari,
No.40, Sirimalwatta,

Gunnapana.

119. Harshani Samarakoon,
Kurunduwatta, Beragama-North,
Makandura.

120. Kekunawela Pathiranage Sandya Kumari,
No.377, Walliwala,
Weligama.

121. Wijesundara Nallaperuma Niranjala Priyani,
No.141/5, Bogaha Koratuwa,
Saddhatissa Mawatha, Walgama,
Mathara.

122. Pushpa Samarasinghe,
"Singhawila", Diddenipotha,
Mulana, Makandura.

123. Hewa Halpage Nirosha Sanjeewani,
"Githmini", Deniyawatta,
Mulana, Makandura.

124. Maheeka Chathurangi Kumasaru,
No.629/15, Weda Niwasa,
Isuru Mawatha, Walgama,
Mathara.

125. Nishadi Nirupama Nanayakkara Yapa,
"Sanjaya", Polgahamulla,
Dickwella.

126. Dammanthota Gedara Amali Lashanthika Dammanthota,
No. 101, Aralaganwila,
Polonnaruwa.

127. Ranawaka Herath Mudiyanselage
Nishanthi Ranawaka Herath,
No.42, Koruppa, Mahiyanganaya.

128. Parawahera Kankanamge Tekla
Harshani Prasangika,
Walakuluge Watta, Thusitha
Sewana, Akurugoda, Thelijjawila.

129. Rampati Dewage Jagathsiri
Kulathunga,
No.52/C, "Wedagedara",
Niyadurupola.

130. Kurugoda Gamlathge Chamila
Manohari Priyangika,
No.319, Malasinghegoda Road,
Hokandara-East, Hokandara.

131. Nupehewage Mangalika
Nishanthi,
"Vipula", Thalpawila,
Kakanadura, Mathara.

132. Shilpadi Pathilage Rishani
Niranjala Maduwanthi,
Pahala Gedara,
Galpothtepola, Alawwa.

Petitioners

Vs.

1. Wasantha Ekanayaka,
Former Secretary,
Ministry of Culture and Arts,
8th Floor, Sethsiripaya,
Battaramulla.

1A. D. Swarnapala,
Former Secretary,

Ministry of Internal Affairs,
Wayamba Development and
Cultural Affairs,
8th Floor, Sethsiripaya,
Battaramulla.

1B. J.J. Rathnasiri,
Former Secretary,
Ministry of Higher Education and
Cultural Affairs,
8th Floor, Sethsiripaya,
Battaramulla.

1C. Bernad Wasantha Silva,
Former Secretary,
Housing Constructions and
Cultural Affairs,
8th Floor, Sethsiripaya,
Battaramulla.

1D. Bandula Harischandra,
Secretary,
Ministry of Buddasasana,
Cultural, Religious Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

1E. Professor Kapila Gunawardana,
Secretary,
Ministry of Buddasasana,
Cultural, Religious Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

1F. Somarathna Vidanapatirana
Secretary,
Ministry of Buddasasana,
Cultural, Religious Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

2. Central Cultural Fund,
No.212/1, Bauddhaloka
Mawatha,
Colombo 7.

3. T.B. Ekanayaka,
Former Minister of Culture and
Arts,
8th Floor,
Sethsiripaya, Battaramulla.

3A. S.B.Navinna,
Former Minister of Internal
Affairs, Wayamba Development
and Cultural Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

3B. Wijedasa Rajapaksha,
Former Minister of Higher
Education and Cultural Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

3C. Sajith Premadasa,
Former Minister of Housing
Constructions and Cultural
Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

3D. Mahinda Rajapaksa,
Minister, Buddasasana, Cultural
and Religious Affairs,
8th Floor,
Sethsiripaya, Battaramulla.

3E. Vidura Wickramanayake,
Minister, Buddasasana, Religious
and Cultural Affairs,
8th Floor,

Sethsiripaya, Battaramulla.

4. Prof. Dayasiri Fernando,
Former Chairman,

5. Srima Wijeratne,
Former Member,

6. Palitha Kumarasinghe,
Former Member,

7. S.C. Mannapperuma,
Former Member,

8. Ananda Seneviratne,
Former Member,

9. N. H. Pathirana,
Former Member,

10. S. Thillanadarajah,
Former Member,

11. M.D.W. Ariyawansa,
Former Member,

12. A. Mohamed Nahiya,
Former Member,
All of the Public Service Commission,
No.177, Nawala Road,
Narahenpita, Colombo 5.

13. M.E. Lionel Fernando,
Former Co-Chairman,
National Salaries and Cadre Commission.

14. K.N.S. Wimalasuriya Mathew,
Former Co-Chairman,

National Salaries and Cadre Commission,

15. Ariyapala de Silva,
Former Member,

16. S.H. Siripala,
Former Member,

17. Sunil Chandra Mannaperuma,
Former Member,

18. D.W. Subasinghe,
Former Member,

19. Gunapala Wickramaratne
Former Member,

20. M. Mackey Hashim,
Former Member,

21. Carlo Fonseka,
Former Member,

22. H.M. Somawathie Kotakadeniya,
Former Member,

23. Don Gnanaratna Jayawardena,
Former Member,

24. Lloyd Fernando,
Former Member,

25. Leslie Devendra,
Former Member,

26. S. Sivanandan,
Former Member,

27. B. Wijeyaratne,
Former Secretary,

All c/o National Salaries and
Cadre Commission,
Room Nos. 2-116, B.M.I.C.H.,
Bauddhaloka Mawatha,
Colombo 7.

28. Director General of
Establishments,
Ministry of Public Administration,
Colombo 7.

29. Attorney General
Attorney General's Department,
Colombo 12.

30. Neville Piyadigama,
Co-Chariman,

31. J.R. Wimalasena Dissanayake,
Co-Chariman,

32. Wimaladasa Samarasinghe,
Member.

33. V. Jegarasasingham,
Member,

34. G. Piyasena,
Member,

35. Rupa Malini Peiris,
Member,

37. Dayananda Widanagamachchi,
Member,

38. B.K. Ulluwishewa,
Member,

39. Sujeewa Rajapakse,
Member,

40. H.W. Fernando
Member,

41. Prof. Sampath Amaratunga,
Member,

42. Dr. Ravi Liyanage,
Member,

43. W. K. H. Wegapitiya,
Member,

44. Keerthi Kotagama,
Member,

45. Reyaz Mihular,
Member,

46. Priyantha Fernando,
Member,

47. Leslie Shelton Devendra,
Member,

48. W.W.D.S. Wijesinghe,
Member,

49. G.D.S. Chandrasiri,
Member,

50. W.H. Piyadasa,
Member,
All of the National Pay Commission,
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Colombo 7.

51. Sathya Hettige,
Former Chairman,

Public Service Commission,
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Narahenpita.

52. Kanthi Wijetunga,
Former Member,

53. Sunil A. Sirisena,
Former Member,

54. I.N. Soyza,
Former Member,
All of the Public Service Commission,
No.177, Nawala Road,
Narahenpita.

55. Dharmasena Dissanayaka,
Chairman,

56. A. Salam,
Member,

56A. Prof. Hussain Ismail,
Member,

57. V. Jagarajasingham,
Member,

58. Nihal Seneviratne,
Member,

58A. Sudharma Karunathilaka,
Member,

59. Dr. Prathap Ramanujam,
Member,

60. S. Ranugge,
Member,

61. D.L. Mendis,
Member,

62. Sarath Jayathilaka,
Member,

63. Dhara Wijethilaka,
Member,

63A. G.S.A.de Silva,
Member,
All of the Public Service
Commission,
No.177, Nawala Road,
Narahenpita, Colombo.

64. K.L.L. Wijeratne,
Former Chariman,

65. Nimal Bandara,

66. Dayananda Widanagamachchi,

67. Charitha Ratwatte,

68. Prof. Kithsiri Liyanage,

69. Lesly Devendra,

70. Suresh Shah,

71. Sanath Jayantha Ediriweera,

72. T. Regunathan,

73. Thamal Musthapaha,

74. Prof. Gunapala Nanayakkara,

75. Nandapala Wickramasuriya,

76. Sujatha Cooray,

77. Jerrey Jayawardena,

78. S. Thilleinadaraja,

79. Dr. AnuraEkanayaka,

80. Sembukutti Swanajothi,

81. P.K.U. Nilantha Piyaratne,

82. N.H. Pathirana,

83. W.T. Dayananda,

84. T.B. Maduwegedara,

85. Dr, Wimal Karandagoda,

86. A. Kadirawelupillai,
Former Members,
All of the National Pay Commission,
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Colombo 7.

87. S. Ranuge,
Chairman,
National Salaries and Cadre Commission,

88. C.P. Siriwardena,

89. Damitha de Soysa,

90. Lalith Kannangara,

91. Janaka Sugathadasa,

92. C. Wagishwara,

93. C. Senarathne,

94. Kingsly Fernando,

95. G.S. Edirisinghe,

96. M.C. Wickramasekara,

97. Palitha Abeykoon,

98. D. Abeysuriya,

99. Leslie Devendra,
Members of the National Salaries and Cadre Commssion,
Room Nos.2-116, B.M.I.C.H.
Bauddhaloka Mawatha,
Colombo 7.

100. Upali Wijayaweera,
Chairman,
National Pay Commission,

101. Chandrani Senaratne,

102. Gotabhaya Jayaratne,

103. Sujatha Cooray,

104. Madura Wehalle,

105. M.S.D. Ranasiri,

106. Dr. Ananda Hapugoda,

107. Sanjeewa Somaratne,

108. Ajith Nayanakantha,

109. Dr. Ravi Liyanage,

110. Sanath Ediriweera,

111. prof. Ranjith Senarathna,

112. RM. Amarasekara,

113. Major Gen. (Rtd.) Siri Ranaweera,

114. W.H. Piyadasa,
All of the National Pay Commission,
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Bauddhaloka Mawatha,
Colombo 7.

115. Dharmasena Dissanayake
Chairman, Public Service Commission,

116. Dr. P. Ramanujam,

117. V. Jegarasasingam,

118. S. Ranuge,

119. D. Laksiri Mendis,

120. Sarath Jayathilake,

121. Sudarma Karunaratna,

122. G.S.A. De Silva,
All of the Public Service Commission,
No.177, Nawala Road,
Narahenpita, Colombo.

123. Jagath Balapatabendi
Chairman,

Public Service Commission.

124. Indrani Sugathadasa,

125. V. Shivaganasothy,

126. T.R.C. Ruberu,

127. Mohamed Lebbe Mohomed Saleem,

128. Leelasena Liyanagama,

129. Dian Gomes,

130 Dilith Jayaweera,

131. W.H. Piyadasa,
All of the Public Service Commission,
No.1200/9,
Rajamalwatta Road,
Battaramulla.

Respondents

BEFORE : **BUWANEKA. P. ALUWIHARE, PC.,** J.
ACHALA WENGAPPULI, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Manohara de Silva PC with Ms. Kaveesha Gamage for the Petitioner.
Ms. Indika Demuni de Silva, PC, SG with Ms. Indumini Randeny, SC for the Respondents.

ARGUED ON : 16th June, 2022.

DECIDED ON : 09th November, 2023

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ACHALA WENGAPPULI, J.

The 132 Petitioners, who are currently serving as Assistant Cultural Development Officers while being attached to their respective Regional Cultural Centres, established by the Ministry of Culture and Arts, have collectively invoked jurisdiction conferred on this Court under Articles 17 and 126 of the Constitution, on an alleged infringement of their fundamental rights guaranteed under Article 12(1) of the Constitution. Their complaint of infringement is based on categorisation of the post of Assistant Cultural Development Officer as Management Assistant – Non Technical – Segment 2 and placement of that post in salary scale of MN-1-2006-A in the approved Scheme of Recruitment. The Petitioners further complain that the National Salaries and Cadre Commission (hereinafter referred to as "NSCC") had infringed their fundamental right to equality by its decision to reject the 1st Respondent's request to grant approval to amend the Scheme of Recruitment (hereinafter referred to as "SOR"), in which they were categorised as Supervisory Management Assistant and placing in salary scale of MN-3- 2006-A. They allege their rights were further infringed by the NSCC, by approving the said SOR, which contain the impugned categorisation and placement and recommending same to the Public Service Commission, in terms of Public Administration Circular No. 6/2006.

The Petitioners have named the members of the NSCC as 13th to 27th Respondents and, by way of an amended petition dated 13.02.2014, added the members of its succeeding entity, National Salaries Commission, as the 30th to 50th Respondents.

The Petitioners, in their amended petition have prayed for *inter alia* the following reliefs from this Court;

i. a declaration that the Petitioners fundamental rights guaranteed by Article 12(1) of the Constitution has been infringed;

ii. to declare *null* and void the decision/recommendation of the National Salaries Commission and/or the 13th to 27th Respondents to refuse the proposal of the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and place them in Salary scale MN-3-2006-A;

iii. to declare *null* and void the decision of the 1st and/or 3rd Respondent to implement the recommendation of the National Salaries and Cadre Commission to categorise Assistant Cultural Development Officers as Management Assistants – Non-Technical – Segment 2 and place them in salary scale MN-1-2006-A;

iv. to declare *null* and void the decision of the 1st and/or 3rd Respondent to categorise Assistant Cultural Development Officers as Management Assistants – Non- Technical – Segment 2 and place them in salary scale MN-1-2006-A;

v. to make order directing the NSCC and/or the 13th to 26th Respondents and/or the 3rd and/or 28th Respondents to recommend the proposal of the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and to place them in salary scale MN-3- 2006-A;

vi. to make order directing the 1st Respondent and/or the 3rd Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and to place them in salary scale MN-3-2006-A;

vii. in the event the proposed Scheme of Recruitment, by which the educational qualifications required for recruitment to the post of Assistant Cultural Development Officer was brought down to one pass at the GCE(A/L) Examination has been approved by the Public Service Commission, make order cancelling the decision of the Public Service Commission (4th to 12th Respondents) to approve the same inasmuch as it is contrary to the policy decision taken by the Cabinet of Ministers acting under Article 55(4) of the Constitution;

viii. to declare *null* and void the decision of the 1st and/or 3rd Respondent to make recruitments to the post of Assistant Cultural Development Officers from among those who have passed only one subject at the GCE(A/L) Examination, contrary to the policy decision taken by the Cabinet of Ministers acting under Article 55(4) of the Constitution;

ix. to direct the National Pay Commission and/or the 30th to 50th Respondents to recommend the proposal of the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and place them in salary scale MN-3-2006-A.

It is evident from the wide spectrum of reliefs sought by the Petitioners, that their complaint of infringement of right to equality stems from the decision of the NSCC, in refusing to accept a proposal submitted by the 1st Respondent to categorise the post of Assistant Cultural Development Officers as Supervisory Management Assistants and place them in salary scale MN-3-2006-A by amending the approved SOR for that post. They also challenge the recommendation made by NSCC to the Public Service Commission to lower the qualifications required for recruitment to the post of Assistant Cultural Development Officers.

When the instant petition was supported for leave to proceed, learned Solicitor General, who represented the Respondents, raised a preliminary objection on their behalf and sought for its dismissal *in limine*. Her objection was that the placement of the Petitioners in salary scale of MN-1-2006 was made by the NSCC in the year 2006, as evidenced by the appointment letters issued to them at the time of confirmation of their appointments to the post of Assistant Cultural Development Officer. Therefore, she contended that the challenge on the validity of the decision to place them in the said salary scale, being the core complaint of the Petitioners before this Court, is clearly time-barred. The learned President's Counsel sought to counter the said objection by presenting a contention that the Petitioners became aware of the decision made by the NSCC only on 09.10.2012, when it rejected the proposed amendment to the Scheme of Recruitment, which sought to place them in salary scale MN-3-2006-A.

After hearing submissions of the parties on the said preliminary objection, this Court made order on 24.02.2014, that the issue of time bar

would be re-considered upon completion of pleadings, in order to satisfy itself whether the material presented before Court discloses the fact that there had been a failure to invoke jurisdiction within the prescribed time period.

It must be noted that at that stage of the proceedings, only the amended petition and its annexures were available before Court and none of the Respondents had tendered their Statement of Objections. The 27th Respondent tendered his Statement of Objections on 16.02.2016 and the 55th Respondent tendered Objections on 29.02.2016, followed by counter affidavit of the Petitioners tendered on 20.06.2017.

Hence, this Court should consider the said preliminary objection at the very outset of this judgment, in the light of factors disclosed by the completed set of pleadings and make an appropriate determination on the question of time bar.

The prayer to the amended petition of the Petitioners, as quoted above, sets out the nature of multiple reliefs sought from this Court. The entitlement to the substantial relief prayed by the Petitioners, being a declaration of infringement of their fundamental rights guaranteed to them under Article 12(1), is dependent on the validity of the impugned decision to place them on salary scale of MN-01-2006-A and categorisation of the post of Assistant Cultural Development Officers as Management Assistant – Non Technical – Segment 2, as they also seek annulment of these decisions. In addition, the Petitioners challenge the validity of the rejection of the proposed amendments to the SOR. There had been a series of subsequent decisions made by the Respondents, consequent to the said initial decision, by which the impugned categorisation and applicable salary scale were determined after the

issuance of Public Administration Circular No. 06/2006 (hereinafter referred to as P.A. Circular No. 6/2006), culminating with the decision to reject the proposed amendment to the SOR (P17). The NSCC decided to continue with its earlier decision, even after having re-considered the issue upon representations made by the concerned parties (P22).

The Petitioners seek annulment of all these decisions. Table No. 1, that appears below contain the nature of the reliefs along with the dates on which the impugned decisions were arrived at.

Table No. 1

Sub-Paragraph of the prayer	**Nature of the relief**	**Date of the impugned decision**
(c)	Annulment of the decision to refuse the proposal to categorise Petitioners as Supervisory Management Assistants in MN-3-2000-A	09.10.2012 (P19)
(d)	Annulment of the decision to implement the categorisation of Petitioners as Management Assistants – Non Technical – Segment 2 in MN-1-2006-A	22.06.2012 (27R11)
	Annulment of the decision to categorise Petitioners as Management Assistants – Non- Technical – Segment 2 in MN-1-	1st – with PA Circular

(e)	2006-A	No. 6/2006 2nd – with approval of SOR on 22.06.2012 (27R11)
(h)	If a decision is taken to bring down the educational qualifications to one pass at G.C.E.(A/L) its annulment	Date of approval of SOR (P10) 22.06.2012 (27R11)
(i)	Annulment of the decision to make recruitment to the post of Assistant Cultural Development Officers from those with one pass at G.C.E.(A/L)	Date of SOR (P10) on 22.06.2012 (27R11)

The decision to place the Petitioners in salary scale MN-01-2006 after re-categorisation, in terms of the P.A. Circular No. 6/2006, was made in the year 2006 itself. This is evident from the Letters of Appointment issued to 3rd and 36th Petitioners on 24.07.2006 (P8C) and 04.08.2006 (P8A) respectively. This placement was made on the recommendation of the 1st Respondent and pending approval by the NSCC. The Petitioners claim they did voice their objections to the said placement at that point of time but was told that it would be rectified with the finalisation of their SOR. However, the Petitioners did not annex any document to their amended petition, which tends to indicate either they did make representations against that decision after it was

made known to them or was told that their concerns would be addressed to, once the formulation of the SOR (P10) in finalised.

The 27th Respondent, being the Secretary to National Salaries Commission (hereinafter referred to as NSC), refuted the claim of the Petitioners that only in 2012 a SOR was formulated for the post of Assistant Cultural Development Officers, as the draft SOR was first submitted to the NSCC by the 1st Respondent in the year 2005 and an amended SOR was once again submitted with the same salary scale MN-1-2006 in the year 2006 (27R3D).

According to the Petitioners, the Scheme of Recruitment (P10) was presented for consideration and approval of the NSCC by the 1st Respondent on 25.05.2012. However, the 1st Respondent had already tendered a proposed Scheme of Recruitment to NSCC on 19.05.2006 seeking its approval (27R3D) on identical terms. Be that as it may, the NSCC conveyed its approval to the SOR (P10) by letter dated 22.06.2012 (27R11) to the Director General of Establishments. The said SOR contained categorisation of Assistant Cultural Development Officers as Management Assistant – Non -Technical – Segment 2, in terms of the P.A. Administration Circular No. 6/2006 and placed them in salary scale of MN-1-2006-A. The NSCC also conveyed its decision to the 1st Respondent by letter dated 09.10.2012 (P19).

The Petitioners made representations to the 1st Respondent against the said SOR only on 17.05.2012 (P16A). This is the first time that the Petitioners have ever indicated their opposition in any form to their categorisation and salary scale. The contents of P16A does not refer to the fact that the Petitioners did present their grievances to any of the Respondents any time prior to that particular instance, either on

the question of categorisation or on the applicable salary scale, after the implementation of P.A. Circular No. 6/2006.

The proposed SOR (P17), with which the Petitioners agree, was also prepared by the 1st Respondent and submitted to NSCC on 13.09.2012 and the decision to reject the said proposed Scheme of Recruitment was arrived at by the Commission on 09.10.2012 (P19).

The 3rd Petitioner and some of her colleagues have lodged a complaint with HRCSL on 06.11.2012 (P20) alleging that, despite having been assigned with multiple duties, they were placed in salary scale MN-01-2006 instead of MN-03-2006, disregarding their objections. The 3rd Petitioner's complaint to the HRCSL was made within a month of the rejection of the 2nd proposed amendment to the SOR (P17). However, the NSCC had, by then, already made its decision on 04.10.2006, to place the Assistant Cultural Development Officers in salary scale MN-01-2006-A (27R2C) and approved the said categorisation as reflected in SOR (P10). The NSCC, by letter addressed to the Director General of Public Administration on 22.06.2012 (27R11) conveyed its approval. The 1st Respondent too had recommended the said categorisation and the salary scale throughout but entertained a different view and indicated it to NSCC only in the latest of his recommendation (P18).

The 1st Respondent, by his letter dated 21.11.2012 (P21), requested the NSCC to re-consider its decision (P19). The NSCC had re-considered its decision and informed the 1st Respondent on 17.01.2013 that the Commission found no reason to change its already reached decision as to the categorisation, as reflected in the Scheme of

Recruitment, and the salary scale in relation to the post of Assistant Cultural Development Officer (P22).

In view of the interrelatedness of the contents of the recommendation and directions and the dates on which the said decisions were arrived at by the Respondents, it is helpful if the said series of decisions, made in relation to the categorisation of the Petitioners as Management Assistants – Non- Technical – Segment 2 with salary scale of MN-1-2006-A, are arranged in a chronological order for the consideration of the time bar objection in its proper context. Table No. 2, which appears below, should satisfy that requirement.

Table No. 2

Date	**Requests made to NSCC by the 1st Respondent and Petitioners on categorisation and salary scale and the decisions made by NSCC**	**Marking given to the documents**
19.05.2006	Proposed SOR endorsed by the 1st Respondent to be sent to NSCC after P.A. Circular No.6/2006, with salary scale MN-01-2006	27R3D
13.12.2006	Proposed SOR tendered to NSCC with salary scale MN-01-2006 (27R3D)	27R3
20.09.2007	Approval of NSCC on salary scale MN-01-2006	27R2B

17.05.2012	Request of Petitioners to the 1st Respondent to place them on a higher salary scale	P16A
25.05.2012	Proposed SOR sent to NSCC with the categorisation of Management Assistants who perform "Single Functional" duties with salary scale MN-01-2006	P10
22.06.2012	Recommendations of NSCC with categorisation of Management Assistant – Non Technical – Segment 2 and salary scale MN-01-2006 sent to Director General of Establishments	27R 11
15.08.2012	Report of the Committee appointed by the 1st Respondent with recommendation to place Petitioners in the categorisation of Supervisory Management Assistants and salary scale MN3-2006-A	P16B
13.09.2012	Proposed amended SOR with the categorisation of Supervisory Management Assistants and salary scale MN3- 2006-A in line with P16B	P17
21.09.2012	Recommendation by the 1st Respondent to the proposed amendment to SOR P17	P18

09.10.2012	Rejection of P17 and 18 by NSCC	P19
06.11.2012	Complaint to HRCSL by 3rd Petitioner and Others	P20
21.11.2012	Request of 1st Respondent to re-consider its decision P19	P21
17.01.2013	Rejection of the request to re-consider the decision P19 made by P21	P22

The Petitioners tendered their petitions before this Court, alleging infringement of their fundamental rights, only on 28.08.2013. Thus, at first glance, it would appear that the Petitioners have invoked jurisdiction of this Court well after the stipulated time period of one month from the date of the last decision in the said series of the decisions, against each of which infringements of fundamental rights are alleged. However, an in-depth review of the available material, as revealed from the pleadings itself, indicate that at least one of the reliefs prayed for by the Petitioners, namely the impugned decision of the NSCC to reject P17 and 18 (paragraph (c) to the prayer), is not time barred and therefore could be considered by this Court.

The reasons are as follows;

The original petition of the Petitioners is lodged with the Registry of this Court on 28.08.2013 whereas their amended petition, by which the members of the newly constituted NSC are added to its caption (30th to 50th Respondents), was tendered on 13.02.2014. Of the several Petitioners who are before this Court, only the 3rd Petitioner had challenged the decision of the NSCC (P19) to reject the proposed amendments to SOR before the Human Rights Commission of Sri Lanka (hereinafter referred to as "HRCSL") within the statutorily specified period of time (P20). Nonetheless, the 3rd Petitioner failed to annex any communication or at least an acknowledgement issued by the HRCSL on her complaint indicating that the matter is under its consideration. More importantly, the 3rd Petitioner failed to disclose the names of other collegues who joined with her in the complaint to HRCSL (P20). There is no material placed before this Court indicating whether there are any Petitioners among those who joined with her in the lodgment of the said complaint to the HRCSL. It could be that another group of Assistant Cultural Development Officers, who opted not to join the Petitioners in the instant application, supported the 3rd Petitioner with her in that complaint.

Paragraphs 64 and 65 of the amended petition of the Petitioners indicate that the inquiry into the 3rd Petitioner's complaint had been concluded and recommendations of the said Commission is pending. No supporting material were placed before this Court to indicate this position. However, the written representations of the NSCC, tendered to the NSCC (P23A) confirms that an inquiry into complaint by the 3rd Petitioner, under reference No. HRC/4070/201 to HRCSL was conducted by the said Commission. The 27th Respondent further

admits in his Statement of Objection that the said Commission is yet to make its recommendation.

As already noted, the alleged infringements complained to this Court are in relation to the placement of the Petitioners in salary scale MN-01-2006-A and rejection of the proposed amendment to the SOR(P17), which meant to categorise their post as Supervisory Management Assistant and to place them in the salary scale of MN-03-2006-A. In view of the objection of time bar taken up by the learned Solicitor General, only the relief prayed for in sub paragraph (c) of the prayer of the Petitioners qualifies to be considered. If the Petitioners are successful in establishing their entitlement to paragraph (c) of the prayer, then they are also entitled to succeed in obtaining relief as prayed for in paragraph (f) to the prayer as well.

This is due to the reason that the letter conveying the rejection of the proposed amendment to the SOR is dated 21.09.2012 (P18) and the 3rd Petitioner had lodged a complaint with the HRCSL on 06.11.2012, within a month of the said decision, in terms of Section 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996. Therefore, she is entitled to the benefit of the statutory provision which states that *" … the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."*

It is relevant to note in this context, the manner in which the Petitioners have described the alleged infringement in their amended petition. Paragraph 67 of the said amended petition reads thus;

"[T]he Petitioners state that … the decision of the 13th to 26th Respondents (National Salaries and Cadre Commission) to refuse the recommendation of the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and placed them in salary scale of MN-03-2006-A and the decision of the 1st to 3rd Respondents to make recruitment to the post of Assistant Cultural Development Officers from among those who have passed only one subject at the G.C.E. (A/L) is arbitrary, capricious, unreasonable …".

The Petitioners did not present their allegation of infringement of their fundamental rights by executive or administrative action of the Respondents as a continuing act of violation. The paragraph quoted above is clear that the executive and administrative complained of by the Petitioners is restricted to "*refuse the recommendation of the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and place them in salary scale of MN-03-2006-A"*. The said refusal by NSCC was conveyed to the 1st Respondent on 09.10.2012 (P19) and the original petition was lodged only on 29.08.2013.

The resultant position therefore is that only the 3rd Petitioner is entitled to pursue the infringement of her fundamental rights before this Court, and that too is confined to the relief prayed for in paragraph (c) and (f), which could be related to the complaint made to the HRCSL within one month of the said decision. As rightly contended by the learned Solicitor General, the decisions that were made thereafter and impugned in the instant application are clearly time barred in terms of the Article 126(2) of the Constitution, which imposes a mandatory requirement to invoke jurisdiction of Court, within one month since the

infringement committed by executive or administrative action. The 2nd request of the 1st Respondent made to the NSCC, subsequent to the one already made in P18, urging it to reconsider the decision P19, was on 21.11.2012 (P21). The NSCC rejected that request on 17.01.2013 (P22). The decision P 22 is also caught up with the time bar objection and on that account, should be excluded from consideration. Hence, the decisions of the NSCC, contained in 27R3D, 27R3, 27R2B, P10 and P22 could not be considered for its validity.

The decisions that are to be considered by this Court are thus restricted to the refusal by the NSCC to re-consider its decision on P17 and P18, which was conveyed to the 1st Respondent by letter dated 09.10.2012 (P19).

In view of the above findings, this Court must then consider the entitlement of the 3rd Petitioner to the reliefs prayed by her. The claims of other petitioners ought to be dismissed, owing to the fact that they failed to present their claim of infringement of fundamental rights before this Court within the stipulated time period imposed by Article 126(2). Since the 3rd Petitioner is one among many who presented an identical allegation of infringement of her fundamental rights along with the other Petitioners, for convenience in the presentation of this judgment, the term 'Petitioners' used in the preceding part of the judgment, would be continued in the latter part as well.

In paragraph (c) of her prayer, the 3rd Petitioner seeks a declaration from Court stating that the decision and/or recommendation of the National Salaries and Cadre Commission (13th to 27th Respondents) to refuse the proposal of the 1st Respondent to categorise Assistant Cultural Development Officers as supervisory

Management Assistants and place them in salary scale of MN-3-2006-A is *null and void*, whereas in paragraph (f) she seeks an order of Court directing the National Salaries and Cadre Commission (13th to 27th Respondents) and 28th Respondent to recommend the proposal of the 1st Respondent for an amended SOR, as contained in P17.

In order to consider the allegation of the Petitioners that their right to equality was infringed in the context of the decisions of the NSCC that are not time barred, it is necessary for this Court to consider the circumstances under which the post of Assistant Cultural Development Officer was originally created, the nature of the responsibilities that were conferred on the said post, the parameters under which the said post was categorised as Management Assistants – Non Technical – Segment 2 and placed in salary scale MN-1-2006-A in terms of Public Administration Circular No. 6 of 2006 and the reasonableness of the refusal of the proposal by the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and place them in Salary scale MN-3-2006-A and the reasonableness of the decision to lower the entry qualifications.

In the year 1988, the Ministry of Cultural Affairs and National Heritage, initiated an island wide programme to establish 300 Regional Cultural Centres with a view to arrest the gradual erosion of cultural values and practises from our society and to preserve them for future generations. These Cultural Centres were intended to provide opportunities for youth to enhance their innate aesthetic talents and also meant to dissuade them from engaging in anti-social activities. Each of these Cultural Centres were to be staffed by four employees, i.e., a Cultural Development Officer, a Cultural Assistant, an Office

Assistant and a Security Officer. Recruitment process to fill the said posts commenced in the year 1999 with public notices inserted in the national newspapers calling for applications.

The Petitioners, having fulfilled the eligibility criterion for the post of Cultural Assistants (P2) by successfully completing four subjects at the G.C.E.(A/L) Examination and six subjects at the G.C.E.(O/L) Examination with four Credit passes including Mathematics and Sinhala, along with pass in Sinhala Typing at the G.C.E.(O/L) Examination or completion of a typing/computer course at a recognised institute, and being below 45 years of age, applied for the said post. After interviewing the Petitioners, they were recruited as Cultural Assistants by the Central Cultural Fund (2nd Respondent) on contract basis and were assigned to the newly established Regional Cultural Centres. Recruitment of Cultural Assistants continued after the first batch of recruitment had taken place in the year 1999, as and when new Cultural Centres were established.

On 08.12.2004, in addressing the grievance of these Cultural Assistants, the Cabinet of Ministers approved their absorption into Public Service. They were initially recruited by the Central Cultural Fund on contract. The said decision was made consequent to the recommendations of a Cabinet Sub-Committee on Establishment Matters (P6), which was established to resolve certain issues faced by the Ministry and Cultural Assistants, who served in their posts for several years without being confirmed in their posts.

The said report included following recommendations;

a. Cultural Officers and other staff who have been recruited on contract basis in accordance with the Scheme of Recruitment and who have already satisfied the requisite qualifications be absorbed into such posts on permanent basis with effect from the date of the Cabinet decision,
b. The said officers are to be placed two increments above the relevant salary scale applicable to theirs posts, but personal to them in consideration of their experience along with previous service in the field,
c. The recruitment of remaining staff to be made in a phased-out basis and a total of 300 Assistant Cultural Development Officers to be recruited from among those who have passed the G.C.E.(A/L) Examination.

Consequent to the Cabinet decision on 22.12.2004, (P7) made on the recommendation of its sub Committee the Petitioners were absorbed into the Public Service, appointed to the post of Assistant Cultural Officers of the Ministry of Cultural Affairs and National Heritage and were confirmed in their posts (P8D). Thus, the post of Cultural Assistant was thereafter re-designated as Assistant Cultural Officers in terms of the said Cabinet decision. However, the appointment letters issued to the Petitioners described the post as Assistant Cultural Development Officer (P8A).

The Assistant Cultural Development Officers were tasked to assist the Cultural Officer, who was placed as the Officer-in-Charge of the several Cultural Centres (vide proposed Scheme of Recruitment in 2006 (27R3D);

> "අනුයුක්තව සිටින සංස්කෘතික මධ්‍යස්ථානයේ ආයතනික කටයුතුවලට සහ මධ්‍යස්ථාන භාර නිලධාරියාට සහායවීම, පුස්තකාලය භාරව කටයුතු කිරීම, හා සාරධර්ම පිරී සමාජයක් ගොඩනැගීමේ කාර්යයට සම්බන්ධව කටයුතු කිරීම, සංස්කෘතික මධ්‍යස්ථානයේ ස්ථාන භාර සංස්කෘතික ප්‍රවර්ධන නිලධාරී නොමැති අවස්ථාවල සියලුම අධීක්ෂණයන් සිදුකිරීම."

The Petitioners primarily relied on three factors in mounting their challenge on the correctness of the decisions to place the post of Assistant Cultural Development Officer in the salary scale of MN-1-2006-A, alleging that the said decision was made arbitrarily and unreasonably. First, they contended that they ought to have been categorised as Supervisory Management Assistants in view of the supervisory functions they perform. Secondly, they contended the post of Assistant Cultural Development Officer should have been categorised as Supervisory Management Assistant instead of their current categorisation as Management Assistants – Non Technical - Segment 2, as they perform multiple duties, which would make them entitled to be placed in salary scale MN-3-2006-A. In support of these two factors, Petitioner relied on a comparison with the categorisation adopted by the NSCC in relation to the post of Postal Services Officers along with the salary scale approved for that service. Thirdly, Petitioners contended that the SOR recommended by the NSCC had lowered the entry qualifications.

Learned Solicitor General, representing the Respondents, strongly resisted the contention of the Petitioners to place themselves in the salary scale of MN-3-2006-A and to re-categorise their post as Supervisory Management Assistant.

Having considered the circumstances under which the post of Assistant Cultural Development Officer was created, the nature of the responsibilities that were conferred on to the said post in the preceding paragraphs, it is opportune at this stage to consider the reasonableness of the decisions of the NSCC to reject the proposal by the 1st Respondent to categorise Assistant Cultural Development Officers as Supervisory Management Assistants and place them in Salary scale MN-3-2006-A, in the light of the parameters set by the P.A. Circular No. 6 of 2006, under which the said post was categorised as Management Assistants – Non Technical – Segment 2 and to place them in salary scale MN-1-2006-A.

In view of the contention placed before this Court by the learned President's Counsel on behalf of the Petitioners, the issue of applicable salary scale arose with the implementation of the Government policy through P.A. Circular No. 6/2006, and therefore it is relevant to devote some space in this judgment to consider the changes made to the public service as a whole by the said circular.

With a view to implement the budget proposals approved by the Parliament in the year 2006, the Government decided to set up a new salary structure for the employees in Public Service based on a systematic categorisation of various posts and, issued Public Administration Circular No. 06/2006. The said circular was revised from time to time to address issues that had arisen in its implementation. The underlying policy consideration of the Government in the issuance of the said Circular was not only to increase salaries of the Public Service, but also to implement a scheme in which each of the posts in the service are re-categorised into 16 pre-

specified groups with a attribution of a new nomenclature to describe such posts.

The P.A. Circular No. 6/2006 also intended to place the public employees of a particular post within an appropriate salary scale, selected among a set of 36 pre-determined salary scales, as indicated in Annexure III of that circular and thereby reducing the 137 different salary scales that existed under the scheme put in place by the Public Administration Circular No. 9/2004.

This Court, in ***Padma Akarawita and Others v Dr. Nanda Wickramasinghe and Others*** (SC(FR) Application No. 320/2007 – decided on 02.11.2010), made the following observation on P.A. Circular No. 6/2006;

> *"It is important to note that PA Circular, No. 06/2006, which deals with the Budget proposals is not a document prepared merely for the purpose of increasing the salary of government employees. On the contrary, the said document had been prepared for the purpose of restructuring the Public Service salaries based on Budget proposals for 2006. Accordingly, the proposal referred to in PA Circular, No. 06/2006 is different to all the other Circulars referred to by the petitioners. By these proposals, as stated by the 5th respondent, 126 different salary scales that had existed previously had been reduced to 37."*

In terms of the P.A. Circular No. 6/2006, all posts in the Public Service needed to be re-categorized based on the definitions given in Annexure II and in terms of Annexure III which provided an index to

salary conversion. However, the post of Assistant Cultural Development Officer was not included in the said list of posts set out in Annexure III and therefore did not receive its categorisation under Annexure II. In terms of the said circular, any posts/service that are not included in the annexure III, the relevant Ministry/Department ought to take prompt action to submit their proposals to the National Salaries and Cadre Commission (NSCC) for its recommendations to the Public Service Commission with a SOR in accordance with the appropriate definition set out in the Annexure II. That requirement was fulfilled by the 1st Respondent in the year 2006 but eventually received approval of NSCC and was recommended to the Public Service Commission only in the year 2012. Incidentally, the SOR of the Postal Services Officers of the Unified Postal Services (55R1) which the Petitioners compared themselves with also had been recommended by the NSCC to the Public Service Commission on 30.11.2011 (55R1).

It is already noted, in terms of P.A. Circular No.6/2006, each Ministry and Department is expected to re-categorise/re-group all posts/services of public officers under its employment, based on the definitions given in the Annexure II and in terms of Annexure III – "Index to Salary Conversion". The said Circular identified four Service Levels and admittedly the Petitioners are considered as Secondary Level public officers and are accordingly categorised as Management Assistants. In terms of the special set of instructions issued for recruitment of Management Assistants – Non Technical – Segment 2 with salary scale MN-01-2006-A (P11), Management Assistants are generally defined as public officers who facilitate and assist the administrative, managerial and executive grades. Their entry

qualifications would differ in keeping with the duties assigned to them and are accordingly further divided to form two sub-categories, i.e. Management Assistants – Non Technical and Management Assistants – Technical.

The Management Assistants – Non Technical, are recruited purely on educational qualifications. No technical expertise was required for that post at the point or recruitment. The Service Level of Management Assistants – Non Technical are further divided into two segments by the said Circular. Segment 1 consists of Management Assistants – Non Technical, whose basic educational qualifications at the recruitment are G.C.E. (O/L) or (A/L) and should possess skills of a defined nature, in addition to the said educational qualifications and are assigned with multi-duties. Circular referred to the posts such as Department of Posts Clerks, typists, stenographers, storekeepers, shroffs, bookkeepers etc. as posts that fall under this categorisation. Segment 2 in which the Petitioners are categorised into, consists of employees whose basic educational qualifications, in terms of the SOR, are a pass at the GCE- OL or AL examination and not required to possess skills of any defined nature as an entry qualification but assigned to perform multi-functional duties. There is no dispute that as at present, the Petitioners are categorised as Management Assistants – Non Technical - Segment 2.

In relation to Service Level of Management Assistants, Annexure II of P.A. Circular No. 6/2006, also creates and recognises yet another distinct category, termed as Supervisory Management Assistants, who are defined therein as Supervisory Management Assistants (Non Technical/Technical). In the said set of special instruction to complete

the recruitments to the posts fall under the said categorisation (P13) the category of Supervisory Management Assistant is broadly defined as follows;

> " ආයතනයන්හි විධායකයේ කාර්යයන්ට උපස්ථම්භක වන සේ විධායකය විසින් නිශ්චිත කොට පවරනු ලබන පිරිස් පාලනය, මුදල් භාරකාරිත්වය හා මුදල් පරීහරණය අධීක්ෂණය හා මෙහෙයුම් යන කර්යයන් ඇතුළත් බහුකාර්ය (Multi-Functional) ස්වරූපයේ කාර්යයන් ඉටුකරන සේවා ගණයකි".

The qualifications that are set out in P13 in relation to Supervisory Management Assistants (Non Technical) are, passes in six subjects at the G.C.E.(O/L) examination, with credit passes for Sinhala/Tamil/English, mathematics and two other subjects in one attempt. In addition, pass in G.C.E. (A/L) examination in one attempt along with completion of a course, recognised by Vocational Training Commission, in word processing/ typewriting/stenography.

Thus, if a post held by an employee was to be categorised as Supervisory Management Assistant (Non Technical) Segment 1, then the post he or she hold should possess the following qualifications;

a. In addition to passing G.C.E.(O/L) in six subjects with credit passes for Sinhala/Tamil/English, mathematics and two other subjects in one attempt, passing G.C.E.(A/L) in three subjects in one attempt,
b. should possess skills of a defined nature at the time of recruitment,
c. being assigned supervisory functions,
d. being assigned with multi -functional duties.

The dispute presented to Court by the Petitioners, in their entitlement of being categorised as Supervisory Management Assistants, arises from the assertion that they fulfil all of these qualifications. They relied heavily on the factors of having the entry qualifications to be categorised as such and being assigned with "supervisory" functions coupled with multiple duties. The Respondents however strongly contend that the post of Assistant Cultural Development Officer does not satisfy all of these qualifications, which made the Petitioners disqualified to be categorised as Supervisory Management Assistants. Learned Solicitor General particularly relied on the job description to impress upon this Court that the Petitioners do not function in a supervisory capacity and are not assigned with multiple duties, in terms of P.A. Circular No. 6/2006.

The first of the two contentions referred to above shall be considered now.

Learned President's Counsel's contention was that the post of Assistant Cultural Development Officer, instead of categorising as Management Assistants (Non Technical) Segment 2, who are expected to perform a single function, should have been correctly categorised as Supervisory Management Assistants, in view of the multiple nature of functions they perform, which are also supervisory in nature. It was also submitted on behalf of the Petitioners that in terms of the P.A. Circular No. 6/2006, a Management Assistant who perform supervisory functions, irrespective of whether they are of Non Technical or Technical, should be categorised as Supervisory Management Assistants and as such, they should have been placed at salary scale MN-3-2006-A. The Petitioners averred in their pleadings that they

"supervise" the Office Assistant attached to the Cultural Centre. In their counter affidavit, the Petitioners stated that they have been assigned with duties of managing finances of Cultural Centres, managing affairs of the stores, to take part in the annual inventory inspections and also to serve in various units of the Ministry and Universities, in support of the said claims.

Learned President's Counsel, invited our attention to the duties that are assigned to Assistant Cultural Development Officers by making reference to contents of P12, where it is specifically stated that the sole responsibility of managing the library of the Centre is vested with the Assistant Cultural Development Officer, in addition to them being given the 'supervisory' responsibility of keeping the Cultural Centre and its premises clean, and by placing the Office Assistants under their 'supervision'. He further referred to the observation made by the Committee appointed by the 1st Respondent in its report (P16B) stating that the Assistant Cultural Development Officers function as the 'supervising officer' of the Office Assistant and the Security Officer, who are attached to each Centre. Learned Counsel further submitted that this factor was highlighted by the 1st Respondent, in his recommendation, forwarded to the NSCC to categorise the Petitioners as Supervisory Management Assistants (P21).

The Petitioner's claim of performing supervisory functions is based on the factual assertion that the Office Assistant and Security Officer attached to Cultural Centres are placed under their supervision. However, in terms of the assignment of official duties (P12), an Assistant Cultural Development Officer must discharge his duties under the direct supervision of the Cultural Officer, who was appointed

as the Officer-in-Charge of the Centre and invested with its overall responsibility. As submitted by learned Solicitor General, paragraph 4 of P12 indicates that it is the Assistant Cultural Development Officer's "*responsibility*"- "(වගකීම)" to ensure the cleanliness of the Centre through the Office Assistant assigned to that Centre. No reference to any supervision over the members of minor staff was made in P12.

In the report of the Committee, appointed by the 1st Respondent which inquired into and made recommendation on the grievances of Assistant Cultural Development Officers, the only reference of them performing a supervisory function is made in relation to the placement of the Office Assistant and the Security Officer attached to the Cultural Centre. However, the document P12, which sets out the responsibilities of the Office Assistant, indicate a contrary position. Both these documents confirm the fact that the Office Assistant was placed under the direct supervision of the Officer-in-Charge, and not under the "supervision" of the Assistant Cultural Development Officer. In the proposed amendment to the SOR (P17) of the 1st Respondent, a similar position is reflected in relation to the job description of the Office Assistant as well as of the Security Officer assigned to a Cultural Centre. Documents 27R3G and 27R3H describe the job description of the Office Assistants and Security Officers, respectively and indicate that the Office Assistant and Security Officer, assigned to a Cultural Centres, are placed under the direct supervision of the Cultural Officer, negating the Petitioner's assertion.

There is another perspective in which the validity of the Petitioner's claim of performing supervisory functions should be considered. The document containing the job description of the

Assistant Cultural Development Officers (P12) specifies the time period they should function in their respective Cultural Centres. The Cultural Centre should be kept open from 8.00 a.m. to 8.00 p.m. for a period of 12 hours on a daily basis. In any given day, the Cultural Officer and the Assistant Cultural Development Officer are expected to function at the Centre for a period of nine hours, including 1-hour lunch break. The Assistant Cultural Development Officers are expected to report to work at 11.30 a.m. and remain in the centre until 8.30 p.m. The Cultural Officer, being the Officer-in-Charge of the Cultural Centre, who should report to work at 8.30 a.m., will remain at the Centre until 5.30 p.m. and only from that time onward the Assistant Cultural Development Officer will function without the former's physical supervision and that too for the remaining three hour period until closing time of the Centre at 8.30 p.m. This is the only time the Petitioners are expected to perform any form of 'supervision' over the two members of minor staff and that too in the acting capacity and on behalf of the Cultural Officer. This factor does not make the Petitioners are assigned with supervisory duties in terms of P.A. Circular No. 6/2006, because, anyway they are expected to cover duties of the Cultural Officer during his absence, being the normal working arrangement for this type of establishments, that are manned by a limited staff.

In view of the above, I am more inclined to accept the submissions of the learned Solicitor General that the post of Assistant Cultural Development Officer is not conferred with any supervisory functions over the Office Assistant or the Security Officer of the Centre and therefore are not entitled to be considered as Management

Assistants who are "*in charge of supervisory functions*" in terms of P.A. Circular No. 6/2006.

Learned President's Counsel's contention on the issue of performing multifunctional duties was that the relevant documentation clearly indicate that they do perform multi-functional duties, in terms of the special set of instructions issued for recruitment of Supervisory Management – Non Technical with corresponding salary scale MN-03-2006-A (P13). The contention that the post of Assistant Cultural Development Officer was erroneously categorised as Management Assistants – Non Technical – Segment 2 and were placed in salary scale MN-1-2006-A by the NSCC, was founded on the claim that they are expected to perform "*multi-functional* " duties and supervises other employees. In support of the said contention, learned President's Counsel had listed out different functions the Assistant Cultural Development Officers are expected to perform, which included functions related to managing finances, field duties, library management, "supervisory" functions and assignment of other duties. Thus, they contend, the performance of these multiple duties should satisfy the definition contained in paragraph 3.2 at page 2 of Annexure II for "*multi-functional"* duties and thereby made them entitled to be placed at the salary scale of MN-03-2006-A.

The Respondents challenged the validity of the said contention, which meant to impress upon this Court that the said categorisation is an erroneously made decision by the NSCC. Learned Solicitor General, in her submissions contended that the fact of assignment of several duties does not mean the Petitioners are in fact assigned with "*multi-functional"* duties in terms of P.A. Circular No. 6/2006. She further

submitted that the recommendations made by the Committee appointed by the 1st Respondent in P16B, did so only upon an erroneous application of the definition of "*multi-functional"* duties in the said P.A. Circular No. 6/2006 and therefore the NSCC was correct in rejecting the 1st Respondent's recommendations, which in effect was made based on that report.

If the decision to categorise the Petitioners as Management Assistants (Non Technical) Segment 1 is found to be made on an erroneous basis as they claim, then that factor would support the position that they should have been categorised as Supervisory Management Assistants. In order to qualify to be categorised as Supervisory Management Assistants, the Petitioners must satisfy this Court that they are assigned with "*multi-functional"* duties in terms of the P.A. Circular No. 6/2006, in order to qualify for such a categorisation.

The Petitioners contend that they possess all four qualifications referred to above to be categorised as Supervisory Management Assistants, a claim consistently refuted by the Respondents.

The job description for the post of Assistant Cultural Officer as contained in the draft SOR prepared by the 1st Respondent in 2006 (27R3D), indicates that the Assistant Cultural Development Officers are assigned with following functions;

> "අනුයුක්තව සිටින සංස්කෘතික මධ්‍යස්ථානයේ ආයතනික කටයුතුවලට සහ මධ්‍යස්ථාන භාර නිලධාරියාට සහායවීම, පුස්තකාලය භාරව කටයුතු කිරීම, හා සාරධර්ම පිරී සමාජයක් ගොඩනැගීමේ කාර්යයට සම්බන්ධව කටයුතු කිරීම, සංස්කෘතික මධ්‍යස්ථානයේ ස්ථාන භාර සංස්කෘතික

ප්‍රවර්ධන නිලධාරී නොමැති අවස්ථාවල සියලුම අධීක්ෂණයන් සිදුකිරීම."
(emphasis added)

What are these "*supervisory*" functions that are expected of the Petitioners?

The approved SOR of 2012 (P10), under its paragraph 4 sets out the job description of the Assistant Cultural Development Officers are assigned with. The said paragraph describes 11 different duties. These duties indicate functions related to library activities, clerical work in relation to all correspondence, preparation of vouchers, maintaining attendance registers of students and to act for the Cultural Officer during his absence. The summary description of the post is described in the said job description as "**අනුයුක්තව සිටින සංස්කෘතික මධ්‍යස්ථානයේ ආයතනික කටයුතුවලට මධ්‍යස්ථාන භාර නිලධාරියාට සහායවීම, පුස්තකාලය භාරව කටයුතු කිරීම, සංස්කෘතික සේවා සැපයීම හා සාරධර්ම පිරී සමාජයක් ගොඩනැගීමේ කාර්යයට සම්බන්ධව කටයුතු කිරීම**".

It is important to note in this context of the general instructions issued in terms of P.A. Circular No. 6/2006, in completion of the Scheme of Recruitment for Management Assistants – Non Technical Segment 2 who are entitled to be placed in the salary scale of MN-1-2006-A, (55R5A). In the said set of instructions, the general definition given to Management Assistants – Non Technical Segment 2 are as follows:-

> "**ආයතනයන්හි විධායක කළමණාකරණ හා පරිපාලන කාර්යයන්හි නියුතු වූවන්ගේ කාර්යයන්ට උපස්ථම්භක හා/හෝ පහසුකාරක කර්තව්‍යයන් අතුරින් තාක්ෂණික ස්වභාවයේ නොවන්නාවූද, ඒක ස්වරූපයේ වූද** (Single Functional) **කාර්යයන් මෙම සේවා ගණයට පැවරේ. මෙම ගණයේ කාර්යයන් අතුරින් පත්කිරීම් බලධරයා විසින් විශේෂයෙන්**

නියම කොට දක්වන ලද කාර්යයන් මෙම සේවා ගණයට අයත් නිලධරයන් විසින් ඉටුකරනු ලැබිය යුතුය."

It is evident from the above quoted descriptions, the assignment of official functions to the post of Assistant Cultural Development Officer are of single functional in terms of the P.A. Circular No. 6/2006, although they are expected to carry out the functions that are specifically assigned to them by the relevant appointing authority (පත්කිරීම් බලධරයා විසින් විශේෂයෙන් නියම කොට දක්වන ලද කාර්යයන් මෙම සේවා ගණයට අයත් නිලධරයන් විසින් ඉටුකරනු ලැබිය යුතුය), which may include the ones that are referred to in the approved SOR of 2012 (P10), under paragraph 4. It seemed that the Petitioners had no serious objection to the said categorisation at that point of time, although they merely stated in their petition that when they made representations over this issue and it was promised to rectify same with formulation of the SOR for the post of Assistant Cultural Development Officers. This was eventually done in the year 2012.

Then only a Collective of Assistant Cultural Development Officers made representations to the 1st Respondent by letter dated 17.05.2012 (P16A) registering their protest for the said categorisation and placement of the impugned salary scale of MN-01-2006. It is stated therein that when the Assistant Cultural Development Officers were recruited in the year 2000, their entry qualifications were set well above the entry qualifications of Management Assistants, but their salary scale is placed lower to that of the other Management Assistants. It is also stated that the said grievance is a direct result of their absorption to the State Management Service. The Committee appointed by the 1st Respondent, after hearing the trade unions who made representations

before them, made recommendation to place the Assistant Cultural Development Officers in the salary scale of MN-03- 2006-A and made a factually erroneous observation that the Office Assistant and Security Officer of the Cultural Centres were being supervised by them, in accepting the Petitioner's claim that they do perform supervisory functions. The Committee further recommended that the SOR should be amended to reflect the changes they recommend.

In the proposed amendments to SOR (P17), the general job description for the post of Assistant Cultural Development Officer, re-categorised as Supervisory Management Assistant – Non Technical (MN-03-2006-A) reads "ආයතනයන්හි විධායකයේ කාර්යයන්ට උපස්ථම්භක වන සේ විධායකය විසින් නිශ්චිත කොට පවරනු ලබන පිරිස් පාලනය, මුදල් භාරකාරිත්වය හා මුදල් පරිහරණය අධීක්ෂණය හා මෙහෙයුම් යන කර්යයන් ඇතුළත් බහුකාර්ය (Multi-Functional) ස්වරූපයේ කාර්යයන් ඉටුකරන සේවා ගණයකි". This description is identical to the one provided in the general guidelines issued to complete the Scheme of Recruitment to Supervisory Management Assistants – Non Technical (MN-03-2006-A), (55R5C). However, the functions that are assigned to the said post under the proposed amended SOR differed from the functions that are already assigned under the approved SOR (P10), only in respect of two aspects. In relation to the functions that are associated with the library, the proposed amended SOR made it the sole responsibility of the Assistant Cultural Development Officer and in relation to the Office Assistant and Security Officer, he was expected only to "*assist*" the supervision of minor staff. Clearly, there was no assignment of supervisory function to the Petitioners even in the said proposed amendment to SOR but only

an assignment to "assist" the Cultural Development Officer, in the supervision of minor staff.

The NSCC, by its letter dated 09.10.2012 rejected the said proposed amendments to SOR, indicating there was no sufficient reasons to change its decision to place them in the salary scale MN-1-2006 (P19). Within a month of the said letter, the 3rd Petitioner and others lodged a complaint with the HRCSL under reference HRC/4070/2012 (P20). During the ensuing inquiry before the Commission, the NSCC provided further reasons for its decision in P23A, by way of a reply to specific issues that had been raised. In that letter the NSCC clarified its position that although the Petitioners were placed initially under TB 2-1, before placing them under MN-1-2006 in terms of P.A. Circular No. 6/2006, the mere fact of placement of some others who too were initially under salary scale TB 2-1 in MN-2-2006, does not make the Petitioners entitled to be placed under the salary scale MN-2-2006. This is due to the reason that subsequent salary revisions implemented under different Circulars had introduced changes in the applicable salary scales and with the implementation of P.A. Circular No. 6/2006, and it was therefore imperative for the categorisation of posts/service of the entire Public Service into several categories as stipulated in that circular.

During the process of re-categorisation, the relevant Ministries and Departments were expected to take into consideration the responsibilities that are assigned to each of such posts/services. The NSCC cites an example to highlight its point by stating that no direct comparison could be made to the former salary scales to the new set of salary scales introduced by the P.A. Circular No. 6/2006, by way of a

particular salary scale corresponding to the former salary scale. As a result, some of the posts that were placed under the former salary scale TB 2-1 were subsequently placed under MN-2-2006 while several others were not. It was further stated by the NSCC that Schedule 1 to P.A. Circular No. 6/2006 specifically provides under item 6, by stating in order to be categorised as Supervisory Management Assistants, the post/service should have G.C.E.(O/L)/(A.L) with supervision responsibilities as basic qualifications.

Moreover, it is stated in the general instruction to setting up the Scheme of Recruitment for Management Assistants (Non-Technical) who are placed in the salary scale MN-3-2006-A (55R5C), they should perform functions that are classified as "ආයතනයන්හි විධායකයේ කාර්යයන්ට උපස්ථම්භක වන සේ විධායකය විසින් නිශ්චිත කොට පවරනු ලබන පිරිස් පාලනය, මුදල් භාරකාරිත්වය හා මුදල් පරිහරණය අධීක්ෂණය හා මෙහෙයුම් යන කර්යයන් ඇතුළත් බහුකාර්ය (Multi-Functional) ස්වරූපයේ කාර්යයන්" .

It is observed that, in relation to the duties that are connected with the library of the Cultural Centre, job description P12 expects an Assistant Cultural Development Officer to carry them out as his "*primary*" function, but that too under the supervision of the Cultural Officer, who was placed with overall responsibility for the affairs of the Centre, including its library.

In this context, it is opportune at this stage to consider another important aspect highlighted by the learned President's Counsel for the Petitioners during his submissions. The Petitioners, in their attempt to establish that they were treated differently to another group of employees, who are similarly circumstanced as they are, pointed out that the Postal Services Officers – Grade 1B of Segment B of the Unified

Postal Services, who also have similar entry qualifications and perform multifunctional duties as the Petitioners, were placed in the higher salary scale MN-3-2006-A. To illustrate their point, the Petitioners relied on a paper advertisement inserted by Postmaster General (P15), calling for applications for the said post by which it is indicated that applicants to the post of Postal Services Officer - Grade 1B of Segment B, once appointed, were entitled to be placed in salary scale MN-3-2006-A.

This particular contention of the Petitioners appears to have been founded on an erroneous assumption regarding the nature of the criterion employed in the categorisation of posts. It appears that the Petitioners are under a misapprehension that the entry level educational qualifications are the sole criterion. Clearly the entry level qualification is not the sole criterion that is considered for the purpose of categorisation, but only one among several others. Annexure II of P.A. Circular No. 6/2006, sets out the multiple criteria that should be employed for the re-categorisation and re-grouping of posts. Item 1 of the said Annexure II reads thus;

"The categorisation of employees has been based on the following criteria;

a) Entry Qualifications/Scheme of Recruitment
b) Promotional Procedures
c) Nature of Duties
d) Simplicity
e) Practicability
f) Consistency/Compatibility."

It may be a fact that when the Petitioners were recruited, their entry qualifications were comparable to the ones applicable to the recruitment for the Postal Services Officers. But the subsequent change of the policy of the Government, implemented through the P.A. Circular No. 6/2006, had introduced a paradigm shift in the categorisation of posts in the Public Service by adopting the several distinct criteria, as set out therein. This particular aspect was recognised in ***Padma Akarawita and Others v Dr. Nanda Wickramasinghe and Others*** (supra)

Learned Solicitor General highlighted the differences in the entry qualifications, assignment of responsibilities and instances which clearly indicate the supervisory character of the duties that are assigned to Postal Services Officers of Grade 1B of Segment B in the Unified Postal Service. She thus contended that the two posts could not be compared and are distinct in all aspects, in terms of the P.A. Circular No. 6/2006. She relied on the applicable Scheme of Recruitment to the said post, 55R1.

Perusal of 55R1 and P15 revealed that the entry requirements to the post of Postal Services Officer - Grade 1B of Segment 2 were that each applicant must pass six subjects in G.C.E.(O/L) examination in not more than two attempts and should have at least four credit passes for subjects including Sinhala/Tamil/English literature and Mathematics. The applicants also must pass three subjects in G.C.E.(A/L) examination and, in addition, must be computer literate in a specified area of a study program which is not less than 720 hours and conferred by an institution approved by the Tertiary and Vocational Education Commission.

In contrast, the entry qualifications for the post of Assistant Cultural Development Officer in terms of the SOR (P10) and proposed SOR (P17) are six passes in G.C.E.(O/L) examination in one sitting and at least a pass in one subject in G.C.E.(A/L) examination. In relation to professional qualification, an applicant must have either followed a course in word processing and typewriting in an institution accepted by Tertiary and Vocational Education Commission or achieved competency to a similar level.

The comparison referred to above as to the entry requirements concerns one of the criteria adopted to the categorisation of Supervisory Management Assistants. That criterion is possession of a skill of a defined nature at the time of recruitment. The SOR of the Unified Postal Services (55R1) as well as the advertisement referred to by the Petitioners, calling for applications for the Unified Postal Services and in setting out the required qualifications for recruitment for the post of Postal Services Officer of that service, clearly specifies under the heading "professional qualifications" that each applicant must possess a qualification of a study programme on a specified area, which is of not less than 720 hours of study, approved by the Tertiary and Vocational Education Commission. None of the Petitioners nor any of the new recruits that are to be selected under the SOR (P10) were expected to fulfil such an entry requirement at the time of recruitment.

It seems that the contention that the SOR (P10) had lowered the entry level educational qualifications is directly relevant to their contention based on the claim of differential treatment with the Postal Services Officers. The Petitioners were recruited with the educational qualifications (as per P2) and with the approved SOR (P10), the lowered

entry level qualifications would only apply to new recruits and not to the Petitioners, who were already confirmed in their service. This was made on a policy decision to align with the present categorisation of Assistant Cultural Development Officers with the categorisation of a Management Assistant – Non Technical – Segment 2. Even if the said entry level qualifications on which the Petitioners were recruited are retained, that factor alone will not qualify the post of Assistant Cultural Development Officer to be categorised as Supervisory Management Assistant – Non -Technical.

Thus, it seems that the entry qualifications and professional qualifications that are applicable to the two posts are not comparable. Even if it is comparable, the Respondent's contention is that the educational qualifications are not the sole criterion considered by the NSCC in recommending a salary scale to a post or service in terms of the P.A. Circular No.6/2006, and it is one among five other different factors that should be taken into consideration. Thus, the perceived similarity between the entry requirements between the two posts, as entertained by the Petitioners by placing reliance on entry qualifications that were applied at the time they were recruited on contract basis with that of the entry requirement of the Postal Services Officer, would not advance their cause any further.

This is primarily because, the nature of the duties that are assigned to an Assistant Cultural Development Officer, a criterion imposed by Annexure II for re-categorisation of the posts**,** indicate a striking dissimilarity between that post and the post of Postal Services Officer. In the applicable SOR (55R1) to the Postal Services Officers, the definition of functions to the said post is stated as follows;

"ශ්‍රී ලංකා තැපැල් දෙපාර්තමේන්තුව යටතේ පවත්නා තැපැල් කාර්යාල, පාලන ගිනුම් කාර්යාල, ඇතුළු සියළුම දෙපාර්තමේන්තු ඒකක වල විධායක කළමණාකරණ සංවර්ධන හා සේවා කාර්යයන් හි නියැලී කාර්ය මණ්ඩලයේ ක්‍රියාවලීන් සඳහා අවශ්‍ය වන්නාවූ පරිපූරක පහසුකරණ හා සහායක කාර්යයන් මෙහෙවීම හා අධීක්ෂණයෙහිලා ගැනෙන පිරිස් පාලන, මූල්‍ය හා වාණිජ කටයුතු, සම්බන්ධීකරණ හා මෙහෙයුම් කටයුතු, පරිපාලන හා ගිණුම් කටයුතු ඇතුළු බහු කාර්ය ස්වභාවයේ කාර්යයන් ඉටු කිරීම, අධීක්ෂණය හා මෙහෙයවීම ඉටු කරනු ලබන නිලධාරී ගණයකි."

The functions that are assigned to the post of Postal Services Officer in the said SOR are as follows;

"කාර්යයන්

අ. තැපැල් කාර්යාලවල සමස්ථ කාර්යභාර නලධාරියා ලෙස කටයුතු කිරීම

ආ. තැපැල් සේවා ඵලදායී ලෙස පවත්වාගෙන යාමට අදාළ සියළුම සේවා කටයුතු ඉටු කිරීම

ඇ. තැපැල් භණ්ඩ අළෙවිය, ගිණුම් තැබීම, මූල්‍ය භාරකාරත්වය, ගනු දෙනු ඉටුකිරීම, සන්නිවේදන කටයුතු අධීක්ෂණය

ඈ. වත්කම් හා දේපල වල භාරකාරත්වය, පරිපාලනය හා ආරක්ෂාව සැපයීම

ඉ. කාර්ය මණ්ඩල පරිපාලනය හා අධීක්ෂණය

ඊ. පාලන/ගිනුම් හා අනෙකුත් දෙපාර්තමේන්තු ඒකක වල විධායක හා කළමණාකරණ ක්‍රියාවලීන්ට සහාය දැක්වීම

උ. ලිපි හා තැපැල් භාණ්ඩ තේරීම් කටයුතු මෙහෙයවීම හා අධීක්ෂණය

ඌ. ලිපි හා තැපැල් භාණ්ඩවල භාරකාරත්වය හා ආරක්ෂාව සඳහා අවශ්‍ය කටයුතු කිරීම

ඔ. තැපැල් භුවමාරුව, බෙදාහැරීම හා තේරීමට අදාල විධායක හා කළමණාකරණ ක්‍රියාවලීන්ට සහාය වීම

ඒ. තනතුරට අදාලව දෙපාර්තමේන්තු ප්‍රධානියා විසින් කලින් කලට පවරනු ලබන වෙනත් රාජකාරී. "

It is clear from the list of functions reproduced above from the relevant SOR, the post of Postal Services Officer is placed as the senior most officer who is placed in charge of a Post Office and is expected to

supervise its sales, accounts, financial, transactions, communications, staff, sorting of postal items and their custody. The term "**අධීක්ෂණය**" appears in three specific instances, in addition to placing the responsibility of overall supervision of the Post Office and its entire staff on the Postal Services Officer and thus conceding to the supervisory nature of the functions in the definition section itself.

The document containing the assignment duties to the post of Assistant Cultural Development Officer (P12) lists out following duties;

01. **ඔබ ප්‍රාදේශීය සංස්කෘතික මධ්‍යස්ථානයේ සංස්කෘතික නිලධාරීගේ සෘජු අධීක්ෂණය යටතේ රාජකාරී කල යුතුය.**

02. **සංස්කෘතික මධ්‍යස්ථානයේ හා එහි බඩු බාහිරාදියේ වගකීම සංස්කෘතික නිලධාරී වෙත පැවරී ඇතත්, එම ගොඩනැගිලි හා බඩු බාහිරාදිය පරිහරණය කිරීමේදී ඔබගේද සම්පූර්ණ වගකීම යටතේ පරිහරණය විය යුතුය.**

03. **සංස්කෘතික නිළධාරී බොහෝ විට විවිධ රාජකාරී කටයුතු සඳහා මධ්‍යස්ථානයෙන් බැහැරව යන පුද්ගලයකු බැවින් සියළුම බඩු බාහිරාදිය සම්බන්ධයෙන් ඔබද වගකීමට බැඳී සිටී. එබැවින් එම බඩු බාහිරාදියේ ආරක්ෂා පිළිබඳව වඩාත් සැලකිල්ලෙන් කල යුතුය.**

04. **සංස්කෘතික මධ්‍යස්ථානයට අයත් සියළුම ගොඩනැගිලි ශාලා භූමිය පවිත්‍රව තබා ගැනීමේ වගකීම ඔබ සතුවන අතර, එම කටයුතු සංස්කෘතික මධ්‍යස්ථානයට අනුයුක්ත කර ඇති කාර්යාල කාර්ය සහායක මගින් ඉටුකරවා ගැනීම ඔබගේ වගකීම වේ.**

05. **පුස්තකාලය භාරව කටයුතු කිරීම හා ස්ථානභාරගේ අධීක්ෂණය යටතේ එය විධිමත්ව පවත්වාගෙන යාම ඔබේ රාජකාරී අතුරින් ප්‍රමුඛ රාජකාරියකි.**

06. **කාර්යාලීය කටයුතු ලිපිගොනු පවත්වා ගැනීම, පාඨමාලා සඳහා සංස්කෘතික නිලධාරීන්ගේ උපදෙස් පරිදි අවශ්‍ය ලියකියවිලි සහ වෙනත් අවශ්‍යතා ඉටු කිරීම, විවිධ ක්‍රියාකාරකම් සඳහා පැමිණෙන සියළුම දෙනාගේම**

අවශ්‍යතාවයන් ඉටු වන පරිදි කටයුතු කිරීම ඇතුළු එදිනෙදා කටයුතු නොපිරිහෙලා ඉටු කිරීමද ඔබගේ කාර්ය වේ.

07. ඔබගේ ප්‍රධානියා වශයෙන් කටයුතු කරන්නේ සංස්කෘතික නිලධාරී බැවින් ඔහුගේ උපදෙස් පරිදි කටයුතු කල යුතු අතර කළමණාකරණ මණ්ඩලය ප්‍රාදේශීය ලේකම් හා සංස්කෘතික ඒකකයේ අධ්‍යක්ෂකගේ උපදෙස් පිලිපැදීම අත්‍යාවශ්‍ය වේ.

08. සංස්කෘතික නිලධාරීගේ අනුදැනුමක් නැතිව කිසිදු ආයතනයකට හෝ කෙනෙකුට ලිපි එවීම එම අයගේ උපදෙස් අනුව කටයුතු කිරීම වැනි ක්‍රියාකාරකම් වලින් වැළකිය යුතුය. සංස්කෘතික මධ්‍යස්ථානයේ ආරක්ෂාව විනය හා ගෞරවය රැකෙන පරිදි කටයුතු කිරීම ඔබගේ විශේෂ වගකීම වේ.

09. ඉහත සඳහන් රාජකාරී වලට අමතරව සංස්කෘතික නිලධාරී, ප්‍රාදේශීය ලේකම් සංස්කෘතික නිලධාරී, ප්‍රාදේශීය ලේකම් හා සංස්කෘතික ඒකකයේ අධ්‍යක්ෂ විසින් වරින් වර පවරනු ලබන රාජකාරී ඉටු කිරීම ඔබගේ වගකීම වේ.

It is very evident from the considerations that are referred to above, the attempt made by the Petitioners to compare themselves with the post of Postal Services Officers in support of their contention that they were treated unequally when compared with others who are similarly circumstanced should necessarily fail for the reason that the very nature of functions that are assigned to Postal Services Officers are clearly of supervisory in nature in terms of the P.A. Circular No.6/2006, whereas the functions that are assigned to the Petitioners are not.

When the nature of responsibilities of the Postal Services Officer is compared with that of Assistant Cultural Development Officers, in relation to the applicable salary scale, the 27th Respondent states at paragraph 39(e) in his Statement of Objections that prior to implementation of the Government policy reflected in the P.A. Circular No. 6/2006, the applicable circular in relation to determination of the

salary scale was Public Administration Circular No. 9/2004. In terms of said circular, the Petitioners were absorbed into Public Service in 2006, and were placed on the salary scale of TB-2-1 (Rs. 101, 880 – 14X1,320 – 6X1,160 – 129,720), whereas the officers of the Public Management Assistants Service, had already been placed at a higher salary scale of TB 2-2 (Rs. 108,480 – 9X1,320 – 8X1,560 – 134,500). The Petitioners merely denied this statement of the 27th Respondent by paragraph 45 of their counter affidavit. They only reiterated their claim that they perform both supervisory functions and multiple duties but did not make any specific statement as to applicable salary scale to the post of Assistant Cultural Development Officers in terms of the Public Administration Circular No. 9/2004, contradicting the 27th Respondent's position.

Since the Petitioners grievance over the categorisation and salary scale is founded on the claims that they perform multi-functional and supervisory duties, it is of interest to peruse Annexure III to P.A. Circular No. 6/2006, to have a general overview as to the other posts that are placed in salary scale of MN- 01- 2006-A with the Petitioners along with the posts that had been placed in the salary scale of MN-03-2006.

The posts of Sub Post Masters, Welfare Officers, Co-operative Inspectors, Court Clerks, Court Interpreters, Court Stenographers, Court Typists and Grama Niladhari Class I are placed in the salary scale of MN- 01- 2006-A, whereas officers of the Unified Postal Service Group A Grade III Segment B, Group B, Grade I and Grade II are placed in the salary scale of MN-03-2006, along with Station Master of Supra Grade, Class I and II, and Librarians (non-graduates).

Learned Solicitor General, in her submissions contended that the fact of assignment of several duties does not by itself make the Petitioners as Public Officers who are assigned with "*multi-functional*" duties in terms of P.A. Circular No. 6/2006 and the Index to Salary Conversion seem to indicate that it had been the underlying rationale adopted uniformly by the NSCC in the determination of salary conversions between posts that are placed in salary scales MN-01-2006 and MN-3-2006.

Thus, the NSCC in determining not to accept the proposed Scheme of Recruitment (P17) not only considered the nature of duties, a criterion set out by P.A. Circular No. 6/2006, that are assigned to the post of Assistant Cultural Development Officers, but also considered and applied the other different criteria as well, as the 27th Respondent avers in his Statement of Objections.

In view of the foregoing, it is evident that the 3rd Petitioner failed to establish that the impugned decision made by the NSCC (P19) to reject the proposed amended Scheme of Recruitment (P17) recommended by the 1st Respondent by his letter dated 21.09.2012 (P18), was not made on the scheme set out by the set of guidelines that had been laid down in the P.A. Circular No. 6/2006 as amended in the re-categorisation of the post of Assistant Cultural Development Officer and in the determination of the applicable salary conversion.

Since the scope of this application is to consider whether the rejection of the proposed Scheme of Recruitment (P17) to amend the existing Scheme of Recruitment (P10) is violative of the fundamental right to equality of the 3rd Petitioner, it is very relevant to refer to the pronouncement made by *Sripavan* CJ in ***Disanayake and Others v***

Secretary, Ministry of Public Administration and Home Affairs and Others (2015) 1 Sri L.R. 362. His Lordship stated (at p. 367) that *"[A] scheme of recruitment once formulated is not good forever, it is perfectly within the competence of the appropriate authority to change it, rechange it, adjust it and re-adjust it according to the compulsions of changing circumstances. The Court cannot give directions as to how the Public Service Commission should function except to state the obligation not to act arbitrarily and to treat employees who are similarly situated equally Once the Public Service Commission lays down a scheme, it has to follow it uniformly."*

In the judgment of ***Gunaratne and Others v Ceylon Petroleum Corporation and Others*** (1996) 1 Sri L.R. 315, *Fernando* J stated (at p. 324) in relation to Article 12 of the Constitution that it *"prohibits arbitrary, capricious and/or discriminatory action".*

The basis on which the NSCC decided not to accept the proposed amended Scheme of Recruitment for the post of Assistant Cultural Development Officers indicative from the contents of the letter P19, which states;

> "ඔබ අමාත්‍යාංශයේ තනතුරු වල බඳවා ගැනීමේ පරිපාටි පිළිබඳව මීට පෙර කරන ලද සාකච්ජා වලදී හුවමාරු වූ අදහස්ද, සහකාර සංස්කෘතික ප්‍රවර්ධන නිලධාරීන්ගේ රාජකාරී හා වගකීම් ආදී කරුණු ද සලකා බැලීමෙන් පසු එම තනතුර සඳහා MN-01-2006 යන වැටුප් පරිමානය යෝජනා කරන ලදි. එම තීරණය වෙනස් කිරීමට තරම් කරුණු ඉදිරිපත් වී නොමැති බව කාරුණිකව දන්වමි".

Therefore, it is my considered view that the impugned decision in P19, cannot be termed as an arbitrary, capricious, or discriminatory decision, and it did not discriminate among persons who are similarly circumstanced.

The petition of the 3rd Petitioner is accordingly dismissed without costs, along with the petitions of the other Petitioners, whose grievances are time barred.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal against a judgment of the Court of Appeal under Article 128 of the Constitution.

Kusalanthi Fernando
Kandawala,
Rathmalana.

Plaintiff

Vs.

1. Weerasekara Hettiarachchige Gertrude Perera
   No. 275, Ubayasenapura,
   Rajagiriya.

2. Weerawarnakulasuriya Boosabaduge Shamaline Fernando
   Beruwala.

Defendants

SC Appeal No. SC Appeal 55/2020
Court of Appeal No. CA/1111/00(F)
D.C. Panadura Case No. 22300/MB

AND

Weerasekara Hettiarachchige Gertrude Perera
No. 275, Ubayasenapura,
Rajagiriya.

1st Defendant – Appellant

Vs.

Kusalanthi Fernando
Kandawala,
Rathmalana.

Plaintiff – Respondent

Weerawarnakulasuriya Boosabaduge
Shamaline Fernando
Beruwala.

2nd Defendant - Respondent

AND NOW BETWEEN

Weerawarnakulasuriya Boosabaduge
Shamaline Fernando
Beruwala.

2nd Defendant – Respondent – Appellant

Vs.

Kusalanthi Fernando
Kandawala,
Rathmalana.

Plaintiff – Respondent – Respondent

Weerasekara Hettiarachchige Gertrude Perera
No. 275, Ubayasenapura,
Rajagiriya.

1st Defendant – Appellant - Respondent

Before: **B.P. Aluwihare, P.C., J.**
Yasantha Kodagoda, P.C., J.
Janak De Silva, J.

Counsel: Dr. Sunil Cooray with Ms. Diana S. Rodrigo for the 2nd Defendant – Respondent – Appellant

Ms. Daphne Peiris Vissundara instructed by Ms. Hasanthi Dias for the 1st Defendant – Appellant – Respondent

Argued on: 7th July 2021

Decided on: 9th November, 2023

Yasantha Kodagoda, P.C., J.

This judgment relates to an Appeal against a judgment of the Court of Appeal, originating from a judgment pronounced by the District Court of Panadura.

Background and institution of civil proceedings

On 23rd June 1987, the Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as "the Plaintiff") instituted action in the District Court of Panadura against the 1st Defendant – Appellant – Respondent (hereinafter sometimes referred to as "the 1st Defendant" and at other times referred to as "the 1st Defendant - Appellant") on the premise that on 2nd September 1986 she gave a loan of Rs. 25,000/= to the 1st Defendant at an interest rate of 24% per annum. As security for the loan, the 1st Defendant mortgaged to her a property owned by her, which mortgage she alleged is depicted in mortgage bond No. 8643 dated 17th June 1986 attested by Notary Public Lasantha Stembo. The Plaintiff alleged that the 1st Defendant defaulted the repayment of the loan and interest amounting to Rs. 6,000/=, and accordingly prayed for a decree for the total amount due being Rs. 31,000/=. She also prayed for a decree for the sale by auction under the supervision of court the mortgaged property to recover the afore-stated amount due to her.

On 15th July 1994, the Plaintiff filed an amended Plaint. In addition to the 1st Defendant, the 2nd Defendant – Respondent – Appellant (hereinafter sometimes referred to as "the 2nd Defendant" and at times referred to as "the 2nd Defendant - Appellant") was cited as the 2nd Defendant. The amended Plaint contained the same allegation against the 1st Defendant. However, the Plaintiff averred that the property referred to in the Plaint (also referred to in the schedule to mortgage bond No. 8643) had been previously subjected to a primary mortgage in favour of the 2nd Defendant and that the said primary mortgage was reflected in mortgage bond No. 8425 dated 12th March 1986 which had also been attested by Notary Public Lasantha Stembo. Accordingly, the Plaintiff averred that mortgage bond No. 8643 (the mortgage in favour of the Plaintiff)

was a secondary mortgage and was subject to mortgage bond No. 8643 (a primary mortgage in favour of the 2nd Defendant).

On 19th June 1995, the 2nd Defendant filed Answer, in which she averred that the 1st Defendant had obtained a loan of Rs. 50,000/= from her at an annual interest rate of 24%. As security, the 1st Defendant mortgaged her property to the 2nd Defendant, which is reflected in mortgage deed No. 8425. The 2nd Defendant alleged that the 1st Defendant defaulted re-payment of the loan. She claimed that the mortgage given by the 1st Defendant in her favour (mortgage deed No. 8425), should be treated as a primary mortgage and hence her claim against the 1st Defendant should gain priority over the claim of the Plaintiff against the 1st Defendant. The 2nd Defendant also prayed for a decree against the 1st Defendant for the payment of Rs. 50,000/= to her, together with interest at the rate of 24% till the date of judgment. As a means of recovering the said amount, the 2nd Defendant prayed for an order for the sale of the afore-stated property, and should there be an amount remaining from the sales proceeds, payment of the sum due from the 1st Defendant to the Plaintiff.

On 9th March 1998, the 1st Defendant filed Answer denying that she obtained a loan from either the Plaintiff or the 2nd Defendant. She also denied having mortgaged her property to either the Plaintiff or to the 2nd Defendant. She averred that she obtained Rs. 15,000/= from 'Stembo's finance company' and that she signed 'some incomplete deed forms and several incomplete documents'. She pleaded illiteracy. She prayed that the Plaint be dismissed.

At the commencement of the trial, parties recorded one admission. That was to the effect that mortgage bond No. 8643 was signed by the 1st Defendant. Issues raised were as per the averments in the pleadings.

Evidence at the trial

Plaintiff - The Plaintiff testified and said that Lasantha Stembo ran an organization at which money was lent on interest. In June 1986, as promised by Stembo, she gave Rs. 25,000/= to him in order to obtain monthly interest thereon. She subsequently clarified that through Lasantha Stembo, she gave the money as a 'loan – mortgage' to the 1st Defendant. In return Lasantha Stembo gave her "P1", a mortgage deed bearing No. 8643. [At the time of producing "P1", no objection to it was raised on behalf of the defendants.] Subsequently, she did not receive either the money so given or the interest thereof.

2nd Defendant - The 2nd Defendant testifying stated that Lasantha Stembo inquired from her whether she would like to invest money in return for the mortgage of a land situated in Rajagiriya. He agreed. In March 1986, she invested Rs. 50,000/= in the organization of Lasantha Stembo. Accordingly, the mortgage deed was executed. Stembo introduced to her the 1st Defendant at the time the mortgage bond was executed. Two witnesses, the 1st Defendant and Stembo singed the deed. Stembo gave Rs. 25,000/= in cash to the 1st Defendant and another Rs. 25,000/= by way of a cheque. Later she received the mortgage bond. The 2nd Defendant produced marked "2V1" mortgage deed No. 8425. At this stage, on behalf of the 1st Defendant, her counsel indicated that the 1st Defendant is not contesting the fact that the deed was attested by the Notary Public, but was contesting the contents thereof.

1st Defendant - The testimony of the 1st Defendant was that in 1986, she wanted to obtain some money by mortgaging her land. Thus, she went to Stembo's office (which she referred to as a 'the finance company of Stembo') and sought an 'arrangement'. She did not meet either the Plaintiff or the 2nd Defendant or directly obtain money from them. She saw them for the first time in court. She initially obtained Rs. 35,000/= from Stembo by cheque and subsequently obtained another Rs. 15,000/=. She then signed some documents that had blank spaces. According to her testimony, she did not sign deed "P1". She further testified that though she has paid over Rs. 10,000/= as interest fees to Stembo's company, she did not pay any interest to either the Plaintiff or to the 2nd Defendant. Under cross-examination the 1st Defendant admitted that both "2V1" and "P1" contain her signature.

Judgment of the District Court

By his judgment dated 26th September 2000, the learned District Judge held in favour of both the Plaintiff and the 2nd Defendant.

The judgment of the District Court contains the following reasoning: In view of the 1st Defendant having contradicted herself (in comparison with the position she has taken up in the Answer) regarding obtaining a particular amount of money as a loan (as stated by her, from 'Stembo's finance company') and the number of occasions on which she obtained loans, it is not possible to place any reliance on the 1st Defendant's testimony and accordingly her testimony must be rejected. In comparison thereof, the learned judge has accepted the testimony of both the Plaintiff and the 2nd Defendant.

The learned district judge has arrived at the finding that the 2nd Defendant had through Lasantha Stembo lent Rs. 50,000/= to the 1st Defendant (a part of which by cheque and the other part in cash) in consideration of which the 1st Defendant had mortgaged property to her, which transaction is depicted in mortgage deed produced marked "2V1".

In view of the foregoing, the learned judge has answered the issues in favour of the Plaintiff and the 2nd Defendant. Accordingly, the learned judge of the District Court has held that the Plaintiff and the 2nd Defendant are entitled to the relief prayed for by them. He has also concluded that the mortgage held by the 2nd Defendant is a primary mortgage and subject to that the mortgage held by the Plaintiff is a secondary mortgage. He thus ordered the sale of the property referred to in the schedule of the two mortgage bonds (one and the same) for the recovery of the monies due from the 1st Defendant to the 2nd Defendant and the Plaintiff.

Appeal to the Court of Appeal

The 1st Defendant appealed to the Court of Appeal against the judgment of the District Court. It is the judgment of the Court of Appeal dated 10th May 2019 pronounced following the hearing of the said Appeal, which is the subject matter of the instant Appeal.

Judgment of the Court of Appeal

The learned Justice of the Court of Appeal has approached this matter on the footing that the issue to be determined is whether the two mortgage bonds "P1" and "2V1" are valid and effectual. Having taken into consideration the oral evidence of the 1st Defendant on the one hand and the evidence given by the Plaintiff and the 2nd Defendant on the other, the learned justice of the Court of Appeal has concluded that the documents marked and produced as "P1" and "2V1" which are ostensibly mortgage bonds are shams and are illusionary, fictitious and colourable instruments. In the circumstances, the learned Judge has concluded that the 1st Defendant has neither initially mortgaged her property to the 2nd Defendant nor thereafter mortgaged the same property to the Plaintiff. In this regard, the learned Judge has noted that Notary Public Lasantha Stembo had been operating a clandestine 'finance company'.

The learned judge has further observed that when "2V1" was sought to be marked and produced at the trial, counsel for the 1st Defendant objected to it. In that regard, it has been observed that the position of the 1st Defendant was that what she signed were several 'blank' papers, and that she has contradicted the testimony of the 2nd Defendant.

The position of the learned judge is that in the circumstances, the 2nd Defendant should have called at least one witness of "2V1" to prove the due execution of the document. The learned judge opined that the failure to do so was fatal to the admissibility of the deed.

The learned judge has noted that both the 2nd Defendant and the Plaintiff have not discharged the burden cast on them by section 68 of the Evidence Ordinance read with section 2 of the Prevention of Frauds Ordinance, which required them to prove that the two documents "P1" and "2V1" had been duly executed.

In conclusion, the learned Justice of the Court of Appeal has held that the 1st Defendant has not executed the purported mortgage bonds "P1" or "2V1". He has held that they are nullities. The Court of Appeal has also concluded that there was no 'loan agreement' between the Plaintiff and the 1st Defendant and the 2nd Defendant and the 1st Defendant. Therefore, the 1st Defendant had no obligation towards either the Plaintiff or the 2nd Defendant. It was Notary Stembo who had loaned money to the 1st Defendant. Therefore, the 1st Defendant could not have executed real and effectual mortgages in favour of the Plaintiff and the 2nd Defendant.

Accordingly, the claims of both the Plaintiff and the 2nd Defendant were rejected. Based on this reasoning, the Court of Appeal allowed the Appeal of the 1st Defendant and set aside the judgment of the District Court.

Appeal to the Supreme Court and questions of law

Being aggrieved by the judgment of the Court of Appeal, the 2nd Defendant (hereinafter sometimes referred to as "the 2nd Defendant - Appellant") appealed to the Supreme Court. Notice of Appeal was served on both the 1st Defendant – Appellant – Respondent (hereinafter sometimes referred to as "the 1st Defendant - Respondent") and the Plaintiff – Respondent – Respondent. By letter dated 4th November 2019, the Plaintiff – Respondent – Respondent informed this Court that she is not objecting to the granting of leave. Thereafter, the Plaintiff – Respondent – Respondent did not participate in the proceedings held before this Court. The 1st Defendant – Respondent was represented by counsel who objected to the grant of leave. On a consideration of the Petition seeking *special leave to appeal* and submissions made by both learned counsel, on 25th June 2020 this Court granted leave. Both before and following leave being granted, the 1st Defendant – Appellant – Respondent participated fully in the proceedings held before this Court through learned counsel.

Vide journal entry of 25th June 2020, in this matter, leave was granted by this Court on the following questions of law:

(i) *Did the Court of Appeal err in law by holding that the mortgage bond No. 8425 dated 12th March 1986 has not been proved?*

(ii) *Did the Court of Appeal err in law by holding that the consideration has not been paid by the 2nd Defendant?*

During the hearing, both counsel submitted to this Court that the outcome of this Appeal will rest on the answer this Court arrives at with regard to the first question of law, and that, should this Court conclude that mortgage bond No. 8425 has been proved, the appellant would succeed and that an opposite finding will result in the Appeal being dismissed.

Submissions on behalf of the 2nd Defendant – Appellant

Learned counsel for the 2nd Defendant – Appellant drew the attention of this Court to the following items of evidence, those being that the 1st Defendant admitted (i) the execution by her mortgage deed No. 8425 and (ii) that her brother had signed mortgage deed No. 8643 as a witness. At the time deed No. 8425 ("2V1") was produced by the 2nd Defendant, no objection was raised on behalf of the 1st Defendant. Learned counsel pointed out to the explanation to section 154 of the Civil Procedure Code. He further submitted that as the 1st Defendant admitted the due execution of the mortgage deed No. 8425, proof of due execution under section 68 of the Evidence Ordinance was not necessary. In the circumstances, learned counsel stressed that it was incorrect for the learned Justice of the Court of Appeal to have insisted on compliance with section 68, and thus he submitted that the rejection of deed No. 8425 was an error of law and fact.

Learned counsel for the Appellant cited two judgments of this Court, namely the judgment of Justice Vijith K. Malalgoda in ***Mohamed Naleem Mohomed Ismail v. Samsulebbe Hamithu*** and the judgment of Justice Sisira de Abrew in ***Kadireshan Kugabalan v. Sooriya Mudiyanselage Ranaweera and Another,*** which he submitted was ostensibly against his submissions, though the facts of those cases could be distinguished from the facts pertaining to the instant Appeal. He pointed out that Justice E.A.G.R. Amarasekara had pronounced a dissenting opinion in ***Kadireshan Kugabalan v. Sooriya Mudiyanselage Ranaweera and Another***, which was in his favour.

In conclusion, learned counsel for the Appellant moved that this Court be pleased to set aside the impugned judgment of the Court of Appeal and affirm the judgment of the District Court.

Submissions on behalf of the 1st Defendant – Respondent

Citing certain excerpts of the proceedings of the trial, learned counsel for the 1st Defendant – Respondent submitted that it was erroneous to assert that the 1st Defendant did not object to "2V1" at the time it was produced. She insisted that even if one were to assume that "2V1" was admitted by the District Court without any objection from the 1st Defendant, nevertheless, the 2nd Defendant could not have been relieved of the burden of proving "2V1" as laid down in section 68 of the Evidence Ordinance. Learned counsel elaborated on that submission by asserting that if at all, what was admitted was the 'attestation' of the deed, and not the 'execution' of it. It was submitted that the evidence of the 2nd Defendant stands alone without proof of the execution of deed No. 8425.

Learned counsel submitted that notwithstanding the *ratio* of earlier cases such as ***Cinemas Limited v. Sounderarajan***, ***Sri Lanka Ports Authority and Another v. Jugolinija – Boal East*** and ***Balapitiya Gunananda Thero v. Talalle Methananda Thero*** which contained the view that where documents have not been objected or opposed to by the opposing party at the close of the case, those documents are deemed to have been duly proved, in recent times an exception to that principle has been identified by superior courts. Learned counsel submitted that this Court has recently held that, if documents are required to be proved in terms of section 68 of the Evidence Ordinance, then notwithstanding absence of objection by the opposing party, those documents must be proved as required by section 68. In support of that contention, learned counsel submitted the judgment of Justice Prasanna Jayawardena, PC, in ***Amerasinghe Arachchige Don Dharmaratne v. Dodangodage Premadasa and Others*** and the judgment of Justice Sisira J. de Abrew in ***Dadallage Anil Shantha Samarasinghe v. Dadallage Mervin Silva and Another***.

Learned counsel also drew the attention of this Court to the findings of the Court of Appeal that as regards the purported loan said to have been obtained by the 1st Defendant from the Plaintiff and from the 2nd Defendant, there was no *muutum*, and as such, there could not have been a mortgage of property by the 1st Defendant to the Plaintiff and to the 2nd Defendant, as a mortgage bond is only an accessory to another obligation.

In view of the foregoing, learned counsel for the Respondent moved this Court to be pleased to affirm the impugned judgment of the Court of Appeal and dismiss this Appeal with costs.

Consideration of evidence and submissions of counsel, conclusions reached and findings of the Court

In this part of the judgment, on a consideration of the evidence led before the District Court by the 1st and 2nd Defendants and submissions made before this Court by learned counsel, I propose to deal in detail with the first question of law in respect of which leave was granted, *i.e.* whether the Court of Appeal had erred in law by holding that mortgage bond No. 8425 dated 12th March 1986 had not been proved. I shall thereafter, briefly though deal with the second question.

I wish to commence this analysis by observing that an examination of the issues raised on behalf of the 1st Defendant at the trial reveals that she has not raised an issue challenging the validity of mortgage bond No. 8425. Furthermore, through the issues, she has not required the 2nd Defendant to prove the said mortgage bond.

It is pertinent to also note that the 8th issue raised before the District Court, required the learned district judge to answer the following question:

"Through mortgage bond No. 8425 written and attested by L.T.K. Stembo, did the 1st Defendant mortgage property referred to in the schedule to the Plaint and obtain a sum of Rs. 50,000/= as a loan at an annual interest rate of 24%?"

It is to be noted that this issue has been raised on the footing that mortgage bond No. 8425 is a valid document. However, in order to answer the said issue in favour of the 2nd Defendant, the learned district judge should have impliedly though concluded that mortgage bond No. 8425 has been proved in terms of the law. The learned district judge has answered this issue in the affirmative.

Furthermore, the 12th issue raised before the District Court, required the learned district judge to answer the following question:

"Has any transaction occurred between the 2nd Defendant and the 1st Defendant, founded upon Deed No. 8425 referred to in the issues raised by the 2nd Defendant?"

The learned district judge has answered this issue also in the affirmative.

A consideration of the judgment of the District Court also reveals that the learned district judge has concluded that the execution of mortgage bond No. 8425 has been duly proved by the 2nd Defendant.

During the trial, at the time Mortgage Bond No. 8425 was sought to be produced by the 2nd Defendant marked in evidence as "2V1", learned counsel for the 1st Defendant has submitted to court that the 1st Defendant was not disputing the fact that the Notary wrote

and attested (certified) the document, but was disputing (only) the contents thereof. Thus, the proceeds of the trial do not show that "2V1" was produced by the 2nd Defendant 'subject to proof'. Further, when learned counsel for the 2nd Defendant closed the case, he has once against marked document "2V1", and on that occasion, learned counsel for the 1st Defendant has not raised any objection to "2V1". Nor has the 1st Defendant required the 2nd Defendant to prove the document "2V1".

It was in this factual backdrop and the provisions of section 154(1) of the Civil Procedure Code and the Explanation thereto, that learned counsel for the 2nd Defendant - Appellant submitted that the 2nd Defendant was not required by law to prove "2V1" as provided by section 68 of the Evidence Ordinance. In response, the position of the learned counsel for the 1st Defendant - Respondent was that notwithstanding the provisions of section 154 of the Civil Procedure Code, if the law requires a particular document to be proved in terms of section 68 of the Evidence Ordinance, strict compliance with that provision of law was necessary, before inviting court to treat the contents of such document as evidence.

A consideration of these two opposing submissions must necessarily commence by considering the legal background to the evidential requirement contained in section 68 of the Evidence Ordinance.

I must take note of the fact that, of the four categories of evidence presently recognized by the law of Evidence of this country, namely 'oral evidence', 'documentary evidence', 'contemporaneous audio-visual recordings' and 'computer evidence', documentary evidence plays a critical part in civil cases. Chapter V of the Evidence Ordinance has been devoted to 'Documentary Evidence', and section 61 provides that the contents of a document may be proved by either 'primary evidence' or 'secondary evidence'. While section 62 describes what is primary evidence relating to a document, section 63 describes what is secondary evidence relating to a document. Sections 64 and 65 relate to the admissibility of primary and secondary forms of documentary evidence, which emphasize on original evidence (evidence relating to the contents of a document being presented through primary evidence) being presented, save and except permitted forms of secondary evidence (authorized forms of copies and other means by which evidence relating to the contents of a document can be given) and instances where the presentation of such secondary evidence would be permissible. These provisions so evidently have been crafted to ensure that genuine documents are produced in judicial proceedings, and thus go into the very root of the integrity of documentary evidence.

Provisions of the Evidence Ordinance contained in sections 61 to 65 though of no special relevance to the instant case, are of importance to bear in mind, as in the scheme of the law relating to proof of a document, it is necessary to first ensure that the document is admissible prior to proving its due execution and thereby inviting court to treat its contents as evidence. The document must be first made admissible, and thereafter it should be proved. To that extent, this Court takes note of the fact that it was not argued either at the trial or in the instant Appeal that the original of deed No. 8425 or an authorized copy thereof was not produced. To that extent, the genuineness of the deed is not in doubt and thus, the document is admissible.

Sections 67 relates to proof of handwriting and signature of documents, irrespective of whether or not the law requires the document to be attested. Section 68 provide for the manner in which a document the execution of which law requires to be attested should be proved. This distinction arises out of the fact that the law mandatorily requires certain documents to be 'attested' and as regards some others, no such imperative requirement existing. Section 68 relates to the manner of proving documents the execution of which are **required by law to be attested**.

Before proceeding any further, at this stage itself, it would be useful to consider section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 (as amended), which provides as follows:

> *"No sale, purchase, transfer, assignment or* ***mortgage of land*** *or other immovable property and no promise, bargain, contract or agreement for effecting any such object or for establishing any security, interest or incumbrance affecting land or other immovable property (other than a lease at will or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership,* ***shall be of force or avail in law unless the same shall be in writing and signed by the party making the same*** *or by some person lawfully authorized by him or her* ***in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such*** *writing,* ***deed*** *or instrument* ***be duly attested by such notary and witnesses****."* [Emphasis added.]

It would thus be seen that for mortgage deed No. 8425 to be of **force or avail in law** (valid in the eyes of the law and enforceable through judicial proceedings), section 2 of the Prevention of Frauds Ordinance requires the following to be satisfied:

(i) The mortgage should be in writing.

(ii) The mortgage should have been signed by the party who made the mortgage (in the instant appeal by the 1st Defendant being the mortgagor) who is the executant of the deed.

(iii) The mortgagor should have signed the mortgage in the presence or a Notary Public and two or more witnesses who were present at the same time.

(iv) The mortgage should have been duly attested by the Notary and the afore-stated two witnesses.

In ***Weerappuli Gamage Gamini Ranaweera v Matharage Dharmasiri and others*** *[SC Appeal 56/2020, SC Minutes of 20.05.2022]*, Justice Samayawardhena has held that in the execution of deeds, the requirements under section 2 of the Prevention of Frauds Ordinance are mandatory, and that non-compliance renders a deed invalid.

At this point, it would be necessary to consider section 68 of the Evidence Ordinance, which was at the epicenter of the arguments presented before us during the hearing of the Appeal.

Section 68 provides as follows:

> "***If a document is required by law to be attested****, it shall* ***not be used as evidence*** *until* ***one attesting witness at least has been called for the purpose of proving its execution****, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."*

Sir James Fitzjames Stephen, the undisputed author of the Indian Evidence Act (the Evidence Ordinance of this country being a virtual clone copy of the Indian Evidence Act, subject only to a few changes) in his *Digest to the Indian Evidence Act* has described the rule contained in Section 68 of the Indian Evidence Act (original section), stemming from an ancient rule of English common law which is inflexible in its operation. Thus, strict compliance with this provision is required in situations where the opposing party denies the due execution of the document.

In essence, what section 68 requires to be done by the party presenting the document and seeking that the contents thereof be treated as evidence, is, if the document is one which is required by law to be attested, then, (i) if at least one attesting witness is alive, (ii) such witness is subject to the jurisdiction of the court, and (iii) if such witness is capable of giving evidence, then to call such witness to testify for the purpose of

proving the due execution of the document. Non-compliance with this requirement is fatal to the use of the contents of the document as evidence.

As pointed out above, section 2 of the Prevention of Frauds Ordinance requires *inter-alia,* a deed pertaining to an immovable property to be duly attested by a licensed Notary and by two witnesses. Thus, a mortgage deed is a document the execution of which the law requires to be attested: Hence, the applicability of section 68 of the Evidence Ordinance. Therefore, ordinarily, for the contents of deed No. 8425 to have been used as evidence, it would have been necessary for the party presenting the deed as evidence (namely the 2nd Defendant) to have called either or both the attesting witnesses (Weerasekera Hettiarachchige Stanley Perera and Hiniduma Kapuge Gamini) to give evidence for the purpose of proving the due execution of the deed. Their names appear on the list of witnesses submitted on behalf of the 2nd Defendant. However, neither of them have been called to testify.

In the very early case of ***Bandiya v. Ungu et. al*** *(15 NLR 263),* Chief Justice Lascelles explained that the requirements contained in section 68 of the Evidence Ordinance is a *"wholesome rule"* and held that, a notarially attested Deed shall not be used as evidence, until one attesting witness at least has been called for the purpose of proving its execution, subject to the circumstances that an attesting witness is alive, he is capable of giving evidence and is subject to the process of the court.

It has been held in ***L. Marian v. Jesuthasan et. al*** *[59 NLR 348],* that for the purposes of proof under section 68, in addition or in the alternative to calling the 'attesting witnesses' to testify, the Notary who attested the deed can also be called to testify (treating such Notary also as an 'attesting witness'), provided he is capable of testifying that the signature is that of the executant, and is therefore able to testify that the executant placed his signature on the document in his presence. For that purpose, the executant must have been known to the Notary. In the Notarial attestation of Deed No. 8425, Notary Lasantha Stembo does not certify that he knew the executant. In fact, his certification indicates that he knew the two attesting witnesses and that they had claimed that they knew the executant - mortgagor. Thus, in the instant matter it would not have been possible for the 2nd Defendant to have called Notary Lasantha Stembo to testify regarding the due execution of deed No. 8425 by the 1st Defendant. However, he could have been called to prove that the other formalities relating to the deed were duly performed. In fact, it appears that the 2nd Defendant had listed Notary Lasantha Stembo as a witness, though he was not called to testify.

In view of the attendant facts and circumstances of this case, what is contemplated by 'due execution' is that the 1st Defendant signed deed No. 8425 as a consenting party (upon a correct understanding of the contents of the mortgage deed) and that the signature of the purported mortgagor is that of the 1st Defendant. Admittedly, the 2nd Defendant (Appellant) did not take steps in terms of section 68 of the Evidence Ordinance to prove the due execution of mortgage deed No. 8425. As stated above, the position advanced on behalf of the 2nd Defendant is that it was not necessary for him to prove the deed in terms of section 68, as the 1st Defendant did not initially object to the deed being produced in evidence (when it was marked "2V1" and did not reiterate that objection when the 2nd Defendant closed her case).

Therefore, this Court needs to consider whether the law exempted the 2nd Defendant from proving Deed No. 8425 in terms of section 68. There are six primary exceptions to the rule of proof contained in section 68. They are found in sections 69, 70, 71, 89, and 90 of the Evidence Ordinance. In view of the positions that were taken up by learned counsel for the 2nd Defendant - Appellant and the learned counsel for the 1st Defendant - Respondent, it is only necessary for this Court to consider the applicability of the exception found in section 70, which reads as follows:

> *"The **admission of a party to an attested document of its execution by himself** shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."*

Therefore, the admission by a party to an attested document that it was executed by him, will, so far as such party is concerned, supersede the duty cast on the party which produced the document and is seeking that the contents of the document be treated as evidence, of either calling the attesting witness or of giving any other evidence of its due execution. Thus, section 70 serves as a proviso to section 68. In the circumstances, it is necessary to consider whether the 1st Defendant had admitted the execution of mortgage deed No. 8425. If the 1st Defendant has admitted to the execution of deed No. 8425, then it would not have been necessary for the 2nd Defendant to have complied with the rule of proof contained in section 68.

In this matter, prior to the commencement of the trial, the 1st Defendant has not admitted the execution of Deed No. 8425. Thus, this Court must consider whether some other admission recognized by law of the due execution of the deed exists.

Section 154(1) of the Civil Procedure Code provides that *"Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the*

course of proving his case at the time when its contents or purport are first immediately spoken to by a witness. …" In the instant case, there is no challenge that the 2nd Defendant had not complied with this requirement.

The explanation to section 154 provides as follows:
*"**If the opposing party does not, on the document being tendered in evidence, object to its being received**, and if the document is not such as is forbidden by law to be received in evidence, **the court should admit it**.*
If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for court:
Firstly, whether the document is authentic – in other words, is what the party tendering it represents it to be, and
Secondly, whether supposing it be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.
The latter question in general is a matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of the opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.
If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.
Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it." [Emphasis added.]

It would be seen that section 154(1) contains a procedural requirement (as opposed to an evidential requirement) as to the time at which a document should be tendered by a party to civil proceedings governed by the Civil Procedure Code. The document should be tendered by the party intending to use the document as evidence, when its contents or purport are first immediately spoken to by a witness. The 'explanation' to section 154 highlighted above, provides guidance which is imperative for the court to follow, on what the court should do when a document is sought to be produced by a party. If the opposing party does not object to the document being received, the court should admit the document, unless the document is such that its production is prohibited by law.

In view of the afore-stated 'explanation' to section 154 and the *cursus curiae* of civil courts, the issue which arises for consideration is whether, **if at the time the document is sought to be produced the opposing party does not object to the document being tendered,**

and or, at the time the party that produced the document seeks to close its case and reads in evidence the contents of the document, the opposing party does not reiterate its objection, and if the document is such that the law requires it to be attested, does the party seeking to produce the document become exempted from the requirement of proving the document as stipulated in section 68 of the Evidence Ordinance?

In search of an answer to this question, I shall now consider the applicable judicial precedent, giving special attention to the judgments cited by learned counsel for the Appellant and the Respondent.

In ***Sri Lanka Ports Authority and Another v. Jugolinija – Boal East*** *[(1981) 1 Sri L.R. 18]*, in clear *obiter* Chief Justice Samarakoon observed with regard to a document that the law did not require attestation (and therefore not a document which comes within the scope of the documents provided in section 68), that, though the opposing party (at the time the document was first produced) had objected to the marking of the document without calling its author to testify, since the opposing party had not once again objected to the document when counsel who produced the document closed the case and read in evidence the documents marked and produced, the contents of the document in issue is evidence for all purposes of the law. His Lordship proceeded to observe that this was the *cursus curiae* of original civil courts. Thus, he held that in appeal it was too late to object to contents of such document being accepted as evidence.

In response to the submissions made by learned counsel for the Appellant, it would be difficult for this Court to accept the proposition that ***Sri Lanka Ports Authority and Another v. Jugolinija – Boal East*** is authority to the principle asserted by him, that if a deed is not objected to by the opposing party when the case for the party who sought to produce the document is closed, proof of the document becomes unnecessary, notwithstanding non-compliance with the requirement of proof contained in section 68 of the Evidence Ordinance. That is because, it must be borne in mind that Chief Justice Samarakoon made the afore-stated observation in respect of a document which did not come within the purview of section 68, as the document in issue was not a document which was required by law to be attested. In fact, the judgment does not even make a reference (quite rightfully) to section 68 of the Evidence Ordinance.

In ***Balapitiya Gunananda Thero v. Talalle Methananda Thero****, [(1997) 2 Sri L.R. 101],* His Lordship the then Chief Justice G.P.S. De Silva referring to a handbill (announcing a Buddhist religious festival at which certain lay persons were to be ordained and robed as Buddhist monks), which document was produced at the trial 'subject to proof', although

was read in evidence at the closure of the case for the party that produced the document without objection from the opposing party and the learned district judge having ruled that the document had not been proved, held following ***Sri Lanka Ports Authority and Another v. Jugolinija – Boal East*** that, in view of the *cursus curiae* of civil courts, the document becomes evidence in the case.

It is necessary to observe that though the documents in issue in ***Sri Lanka Ports Authority and Another v. Jugolinija – Boal East*** and ***Balapitiya Gunananda Thero v. Talalle Methananda*** were similar in that both documents were such that the law did not require attestation, the facts were slightly different. In the first case, the opposing party had not objected to the admission of the document at both stages, *i.e.* when it was originally marked and produced and when the case for the party who produced the document being closed and the contents of the document being read in evidence. The objection was taken only in Appeal. Whereas, in the second case, when the document was originally produced, it was objected to and the document was produced 'subject to proof', and when the case was closed for the party who produced the document, the objection was not reiterated. In both Appeals, the Supreme Court has held that in the circumstances, the documents in issue must be treated as having been duly proved and hence their contents be taken into consideration as evidence. I would respectfully express agreement with both these findings, as in both matters, the court was not required to adjudicate in appeal regarding proof of a document which was required by law to be attested. Thus, it is my considered opinion that both these judgments are of no particular relevance to the instant matter, as in this Appeal consideration need be given regarding proof of a deed, which is a document the execution of which is required by law to be attested, and thus coming within the scope of section 68.

In ***Cinemas Limited v. Sounderarajan*** *[(1998) 2 Sri L.R. 16]* Justice F.N.D. Jayasuriya dealing with the admissibility of a document issued by a competent authority of a foreign country, held that, when an objection to a document is not taken up at the trial or inquiry and is raised for the first time in appeal or revision the court must consider the effect of the Explanation to section 154 of the Civil Procedure Code. Justice Jayasuriya proceeded to point out that "*… in civil proceedings it is of paramount importance for the opponent to object to a document if it is inadmissible having regard to the provisions of the Evidence Ordinance. Where he fails to do so, the objections to admissibility cannot be raised for the first time in appeal. … Had objection been taken, the party proposing to adduce the document would have tendered to the court evidence aliunde and by the failure to take the objection the opposing party has waived the objection. … In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has*

to admit the document, unless the document is forbidden by law to be received, and no objection to its admission can be taken up in appeal."

It is observable that ***Cinemas Limited v. Sounderarajan*** also does not deal with proof of a document which comes within the scope of section 68 and furthermore, the judgment makes no reference to the impact of either presenting or not presenting an objection to a document when the party that produced the document seeks to close its case and read in evidence the contents of the document.

In ***Samarakoon v. Gunasekera and Another*** *[(2011) 1 Sri L.R. 149],* Justice Gamini Amaratunga referring to proof relating to four deeds produced at the trial 'subject to proof', and no witness having been called for the purpose of proving the deeds in compliance with section 68 of the Evidence Ordinance, and when at the closure of the case the contents of the deeds were read in evidence the opposing side having objected and moved court to exclude such evidence, held as follows:
"In the course of giving evidence, if a witness refers to a document which he proposes to use as evidence, it shall be marked in evidence. If the party against whom such document is sought to be used as evidence, does not object to it being received in evidence, and if the document is not one forbidden by law to be received in evidence, the document and its contents become evidence in the case. On the other hand, if the opposing party objects to the document being used as evidence, it is to be admitted subject to proof. When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if no objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document, it becomes evidence in the case. On the other hand, if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it.

A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence."

Thus, it would be seen that, in ***Samarakoon v. Gunasekera and Another*** this Court has insisted on strict compliance with the requirement of proof contained in section 68 with regard to documents which the law requires to be attested (such as a deed), <u>if</u> the opposing party objects to the document when it is initially produced (thus, produced 'subject to proof') <u>and</u> the objection is reiterated when the party who produced the

document closes its case and reads in evidence the contents of the document. It would also be noted that the court has also not disregarded the explanation to section 154 of the Civil Procedure Code and the *cursus curiae* of civil courts relating to the practice adopted when the case for the opposing party that produced the document is sought to be closed.

In ***Amerasinghe Arachchige Don Dharmaratne v. Dodangodage Premadasa and Others*** *[SC Appeal 158/2013, SC Minutes 12th October 2016],* the Plaintiff had produced 'subject to proof' three deeds based upon which he was claiming title to a land, and was required by the Defendant in the Answer to prove the three documents. However, no issue had been raised by the Defendants disputing the validity of the three deeds. The Plaintiff called only one out of the three Notaries who had attested the three deeds. The court concluded that the Notary who was called had also not known the executant of that particular deed. None of the attesting witnesses were called to testify. While concluding that compliance with section 68 of the Evidence Ordinance was an imperative requirement, Justice Prasanna Jayawardena held that, the Plaintiff's case must fail, as he had not proved the three deeds as required by law.

I wish to now consider ***Mohamed Naleem Mohomed Ismail v. Samsulebbe Hamithu*** *[SC Appeal 04/2016, SC Minutes 2nd April 2018 (reported in BASL Law Journal Vol. XXIV, 2018/19)]*, wherein, Justice Malalgoda also considered proof of a document which the law required to be attested. However, the facts of this case differ from the facts of ***Samarakoon v. Gunasekera and Another*** and ***Amerasinghe Arachchige Don Dharmaratne v. Dodangodage Premadasa and Others***. In this case, when the deed was produced, the opposing party objected to its production, but when the party that produced the document closed its case without having called any witness to prove the deed, the opposing party did not raise any specific objection regarding the failure on the part of the party who produced the deed to prove the document. Justice Malalgoda held that in the absence of any written admission recorded at the trial, and an objection recorded when the document was initially marked and produced, it is difficult to ignore the provisions of section 68 of the Evidence Ordinance, even though no specific objection was raised when the party that produced the document closed its case producing several documents including the document in issue.

It would thus be seen that in ***Mohamed Naleem Mohomed Ismail v. Samsulebbe Hamithu*** this Court has recognized the importance of strict compliance with section 68, if an objection to the deed was raised either when the document was initially sought to be produced or when that party closed its case. Thus, impliedly holding that when a document that is required by law to be attested (such as a deed) is produced at a trial,

strict compliance with the requirement of proof contained in section 68 would not be necessary, only if, an objection to the document was not raised when the document was sought to be initially produced and when the party that produced the document closed its case and read in evidence the contents of such document. If in either of these situations, an objection was raised by the opposing party, the party that produced the document must prove it in terms of section 68 of the Evidence Ordinance.

In ***Dadallage Anil Shantha Samarasinghe v. Dadallage Mervin Silva and Another*** *[SC Appeal 45/2010, SC Minutes 11th June 2019],* at the trial, the Plaintiff had produced a deed 'subject to proof', and at the closure of the case for the Plaintiff, the Defendant had not objected to the document. Justice Sisira de Abrew observed that although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved in terms of section 68 of the Evidence Ordinance. Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the court will have to follow the procedure laid down in law. Justice de Abrew held that, when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence 'subject to proof', but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. He held further that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved. Acts performed or not performed by parties in the course of a trial do not remove the rules governing the proof of documents.

I shall now consider ***Kadireshan Kugabalan v. Sooriya Mudiyanselage Ranaweera and Another*** *[SC Appeal 36/2014, SC Minutes 12th February 2021].* In this matter, the plaintiff sought to establish that he had acquired title to the land in issue through a deed by which he alleged that the defendant transferred title to him. The defendant denied having transferred title to the plaintiff and also denied that he signed the relevant title deed. Further, he denied the signature which appears on the deed. The defendant also denied that he knew the relevant Notary. When the plaintiff produced the deed in question, the defendant objected to it being produced, and therefore it was produced marked 'subject to proof'. In this backdrop, the plaintiff called the relevant Notary as a witness. However, he did not call the two attesting witnesses to testify. The Notary's position was that the executant of the deed was unknown to him. Further, in the attestation, the Notary has

failed to record that the two attesting witnesses were known to him, and that they knew the defendant. However, when the plaintiff closed his case and read in evidence the contents of the deed, the defendant did not reiterate his objection to the production of the deed and its contents being treated as evidence.

Expressing the majority view, Justice Sisira de Abrew quoting ***Marian v. Jethuthasan*** held that as the defendant was not known to the Notary and as the witnesses were not known to the defendant either, the Notary could not vouch for the due execution of the deed by the defendant. Therefore, the Notary Public cannot be regarded as an attesting witness. In the circumstances, Justice de Abrew held that the deed in issue had not been proved in terms of section 68 of the Evidence Ordinance. He observed that "*… although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved. If the principle enunciated in Sri Lanka Ports Authority and Another v. Jugolinija Boal East is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence if it is not objected by the opposing party at the close of the case of the party which produced it. In such a situation, one can argue that courts will have to disregard section 68 of the Evidence Ordinance. … Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the courts will have to follow the procedure laid down in law. … when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. … failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved.*". In the circumstances, the Appeal of the Plaintiff was dismissed.

Pronouncing a concurring judgement as regard the outcome of the Appeal (that the Appeal should be dismissed), nevertheless expressing different reasons therefor, Justice E.A.G.R. Amarasekara quoting the legal maxim *cursus curiae est lex curiae* ("*the practice of court is the law of the court*") held that if a particular practice of court is not inconsistent with a rule laid down by a statute or a long-standing practice or usage, that practice has the force of law. He highlighted the importance of not invalidating in Appeal, long-standing practices of original courts, as such rulings could have far-reaching and serious implications and repercussions to litigants. Citing several judgements of the Supreme Court, Justice Amarasekara who in my respectful view is ideally suited to comment on practices of original civil courts, held that if no objection is taken when a document is tendered in evidence for the first time and marking it, for all purposes of the case, it

becomes evidence, even if it is a deed. In such circumstances, it is not necessary to prove the deed in accordance with section 68. However, as the objection to the reception of the deed as evidence had not been taken in the original court (at the time of the closure of the case for the Plaintiff) Justice Amarasekara held that that objection cannot be taken up for the first time in Appeal. Therefore, he agreed with the majority view that the Appeal should be dismissed.

It would be seen that both ***Dadallage Anil Shantha Samarasinghe v. Dadallage Mervin Silva and Another*** and the majority view in ***Kadireshan Kugabalan v. Sooriya Mudiyanselage Ranaweera and Another*** (majority view) follow the principle contained in the previous two judgments relating to proof of documents which are required by law to be attested (such as deeds), which insist on strict compliance with section 68, save only in situations where the opposing party has not objected to the admission of the document when it was initially sought to be produced thus requiring the document to be produced 'subject to proof' and not having reiterated the objection when the party which produced the document closed its case and read in evidence its contents.

It is my view that, in the light of judicial precedence cited above, it was quite correct in law for the learned justice of the Court of Appeal to have insisted upon strict compliance with section 68 of the Evidence Ordinance as regards proof of mortgage deed No. 8425 ("2V1"), and in the absence thereof conclude that the said mortgage deed and mortgage deed No. 8643 ("P1") were both invalid and unenforceable, as they have not been proved as stipulated by section 68 of the Evidence Ordinance. That was the primary basis for the Court of Appeal having ruled against the 2nd Defendant, and allowed the Appeal of the 1st Defendant.

In my view, judicial precedent pertaining to the applicability of section 68 of the Evidence Ordinance and the necessity of proof of execution of documents required by law to be attested is very clear, consistent and founded upon rational reasoning. The reasoning is aimed at protecting the integrity of evidence stemming from contents of documents, the execution of which are required by law to be attested. The learned judges seem to have been acutely conscious that when contents of documents the execution of which are required by law to be attested such as deeds are received in evidence, oral evidence which contradicts contents of such proven documents which are required by law to be attested, are excluded. Thus, the importance in ensuring that documents required by law to be attested by proved to a high degree of authenticity.

I must now take cognizance of a recent and pertinent legislative development (which took place following the hearing of this Appeal and pending the delivery of this judgment), which caused the addition of a new section numbered "154A" to the Civil Procedure Code by section 2 of the Civil Procedure (Amendment) Act No. 17 of 2022. This Act (No. 17 of 2022), came into operation upon the Speaker having certified the Act on 23rd June 2022.

The new section so introduced to the Civil Procedure Code (section 154A) provides as follows:

> *"(1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, it shall not be necessary to adduce formal proof of the execution or genuineness of any deed, or document which is required by law to be attested, other than a will executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, unless –*
>
> *(a) In the pleadings or further pleadings in an action filed under the regular procedure in terms of this Code, the execution or genuineness of such deed or document is impeached and raised as an issue; or*
>
> *(b) the court requires such proof:*
>
> *Provided that, the provisions of this section shall not be applicable in any event, a party to an action seeks to produce any deed or document not included in the pleadings of that party at any proceedings under this Code.*
>
> *(2) The provisions of subsection (1), shall mutatis mutandis apply in the actions on summary procedure under this Code."*

Thus, it is seen that section 154A(1) of the Civil Procedure Code is a proviso to section 68 of the Evidence Ordinance. Compliance with the requirements of section 68 would become necessary only if (a) in the pleadings or further pleadings the execution or genuineness of the deed or other document (which the law requires to be attested) has been impeached and also raised as an issue, or (b) the court requires the party which produced the deed or other document to provide proof of it. This proviso would not have any application, if the deed or such other document was not pleaded. It would thus be seen that section 154A(1) causes a significant impact on the previous judicial precedent relating to proof of deeds and other documents which the law requires to be attested. The imperative nature of the form of proof insisted upon by section 68 is now significantly narrowed down. Thus, the necessity of proving the contents of a deed as provided by section 68 of the Evidence Ordinance would arise only if (a) the execution or genuineness of the deed has been impeached in the pleadings of the opposing party, and (b) an issue

relating to proof has been raised by the opposing party, or (c) the court requires proof of such deed to be adduced, or (d) the deed in issue has not been included in the pleadings.

Furthermore, section 3 of Act No. 17 of 2022 provides as follows:

> *"Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance,* ***in any case or appeal pending on the date of coming into operation of this Act –***
>
> *(a)*
>
> *(i) if the opposing party does not object or* ***has not objected to it being received as evidence on the deed or document being tendered in evidence****; or*
>
> *(ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but* ***not objected at the close of a case when such document is read in evidence****,*
>
> *the court shall* ***admit such deed*** *or document as evidence* ***without requiring further proof****;*
>
> *(b) if the opposing party objects or* ***has objected to it being received as evidence****,* ***the court may decide whether*** *it is necessary or* ***it was necessary as the case may be, to adduce formal proof of the execution or genuineness of any such deed*** *or document considering the merits of the objections taken with regard to the execution of genuineness of such deed or document."*

[Emphasis added.]

As observed by Justice Priyantha Fernando in ***Wadduwa Palliyagurunnanselage Namal Senanayake v. L.B. Finance PLC*** *(SC/CHC Appeal No. 56/2013, SC Minutes of 14th June 2023)* the afore-stated transitional provision applies to not only pending trials, it applies to pending Appeals (such as the instant Appeal) as well.

In view of this transitional provision, with regard to pending Appeals, the following scheme shall apply:

(i) If the opposing party had not objected to the admission of the deed either when it was initially tendered in evidence or when the party that produced the document closed its case and read in evidence the contents of the document, then the court is required to admit the document without insistence upon complying with the form of proof stipulated in section 68 of the Evidence Ordinance.

(ii) If the opposing party had objected to the deed being received in evidence (ostensibly a reference to an objection being raised either at the time of the deed was initially sought to be produced or at the close of the case of the party that produced the deed), considering the merits of the objection raised, the court may decide on whether or not to require the party producing the deed to tender proof of the genuineness and execution of the deed in the manner provided by law.

It is observable that this amendment to the Civil Procedure Code, has directly impacted upon the principles of law which are contained in the earlier mentioned judgments. The amendment seems to have given statutory recognition to the *cursus curiae* of original courts pertaining to the production and proof of documents such as deeds required by law to be attested. When legislative provisions are inconsistent with legal principles contained in previous judicial precedent, courts are obliged to apply subsequent legislative provisions which may have impliedly repealed legal principles contained in such previous judicial precedent. That is a fundamental legal principle recognized in common law jurisdictions including Sri Lanka.

I shall now revert to the following attendant circumstances of this case pertaining to Mortgage Deed No. 8425.

(i) Vide proceedings of 9th June 1999, when the 2nd Defendant sought to initially produce Mortgage Deed No. 8425 ("2V1"), learned counsel for the 1st Defendant submitted to the trial court that the 1st Defendant was not disputing the fact that the Notary wrote and attested (certified) the document, and was disputing (only) the contents thereof. Further, vide proceedings of 15th February 2000, under cross-examination, upon "2V1" being shown to the 1st Defendant, she has admitted that the signature appearing therein is hers. Furthermore, "2V1" was not produced 'subject to proof'.

(ii) When the learned counsel for the 2nd Defendant closed his case and marked "2V1" in evidence (amounting to reading in evidence the contents of the deed), counsel for the 1st Defendant has not raised any objection to it.

It would thus be seen that the 1st Defendant had neither objected to the production of deed No. 8425 at the stage of its initial production, nor had she objected to the deed at the stage of the case for the 2nd Defendant being closed and the deed was read in evidence. These attendant circumstances in my view require this Court to apply the transitional

provisions contained in section 3(a) of the Civil Procedure (Amendment) Act No. 17 of 2022. Accordingly, I hold that the 2nd Defendant was not required to prove deed No. 8425 in terms of section 68 of the Evidence Ordinance. Therefore, both the genuineness and the due execution of mortgage deed No. 8425 ("2V1") must be taken cognizance of by this Court. Insistence upon proof of the deed as stipulated in section 68 of the Evidence Ordinance was not required.

Furthermore, vide section 92 of the Evidence Ordinance, once a document (such as a deed) pertaining to a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document has been proved, and its contents are treated as evidence, oral evidence led for the purpose of contradicting, varying, adding to, or subtracting from its terms, supersede the contents thereof or substitute such contents must be excluded. Thus, the oral evidence of the 1st Defendant which contradicts the contents of "2V1" must be excluded.

In the circumstances, I hold that the findings contained in the impugned judgment of the Court of Appeal must now be set aside and vacated, for the simple reason that the Civil Procedure (Amendment) Act No. 17 of 2022 has impacted upon the finding quite rightly reached by the learned Justice of the Court of Appeal relating to "2V1".

In the circumstances, it is now necessary to treat the contents of deed No. 8425 as evidence in the case to the exclusion of oral evidence that may be inconsistent with the contents of the deed, as both the genuineness and due execution must be presumed by this Court. According to the contents of "2V1", this Court takes cognizance of the following items of evidence contained in the said deed:

(i) That on 12th March 1986, the 1st Defendant – Respondent had solicited from the 2nd Defendant – Appellant a sum of Rs. 50,000/= as a loan and obtained from her that sum of money, payable at an annual interest rate of 24%.

(ii) That the 1st Defendant – Respondent promised to settle the afore-stated loan, when demanded by the 2nd Defendant – Appellant.

(iii) That in consideration for the obtaining the afore-stated loan, as security, the 1st Defendant – Respondent mortgaged the property described in the schedule of that deed to the 2nd Defendant – Appellant.

Thus, "2V1" is clear and reliable proof of the 1st Defendant having obtained a loan of Rs. 50,000/= from the 2nd Defendant and having mortgaged the property referred to in the schedule to deed No. 8425 as security for the said loan.

In view of the foregoing, I answer the two questions of law in respect of which leave was granted in this matter in the following manner:

(i) Did the Court of Appeal err in law by holding that the mortgage bond No. 8425 dated 12th March 1986 has not been proved?

In view of the law that prevailed when the impugned judgment of the Court of Appeal was delivered, the Court of Appeal did not err in holding that mortgage bond No. 8425 dated 12th March 1986 has not been proved. However, in view of the transitional provision of the Civil Procedure (Amendment) Act No. 17 of 2022, the afore-stated finding must be vacated and set-aside. In view of provisions of section 3 of the said Act, this Court must conclude that the 2nd Defendant – Appellant was not required by law to have proved mortgage bond No. 8425 in terms of section 68 of the Evidence Ordinance, and hence, its contents could have been taken as evidence in the adjudication of the case.

(ii) Did the Court of Appeal err in law by holding that the consideration has not been paid by the 2nd Defendant?

In view of the contents of mortgage bond No. 8425 being treated as evidence, this Court concludes that though at the time of the impugned judgment of the Court of Appeal being delivered there was an evidential basis to conclude that the consideration had not been paid by the 2nd Defendant to the 1st Defendant, in view of the finding of this Court relating to the afore-stated first question of law, this Court must conclude that there is clear evidence (which emanates from the contents of Deed No. 8425) that consideration of Rs. 50,000/= had been paid by the 2nd Defendant – Appellant to the 1st Defendant - Respondent.

Accordingly, the impugned judgment of the Court of Appeal is set-aside and vacated and this Appeal is allowed. The judgment of the District Court shall prevail.

Parties will bear their own costs.

I wish to acknowledge with appreciation the invaluable assistance given by learned counsel for the 2nd Defendant – Appellant and the 1st Defendant – Respondent towards the adjudication of this Appeal.

Judge of the Supreme Court

B.P. Aluwihare, PC, J

I agree.

Judge of the Supreme Court

Janak De Silva, J

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Republic.

SC FR No. 178/2014

1. D. M. C. J. Dissanayaka,
   Officer's Quarters,
   Water Treatment Plant, Mulleriyawa.

2. W. K. Karannagoda,
   308/MC/B01,
   Quarters of Water Board,
   Mount Clifford Estate, Magammana,
   Homagama.

3. Hewa Balamullage CHandrathilaka,
   Officer's Quarters,
   Water Treatment Plant, Mulleriyawa.

Petitioners

Vs.

1. National Water Supply and Drainage Board,
   Main Office, P. O. Box 14,
   Rathmalana.

2. B. W. R. Balasooriya,
   General Manager,
   National Water Supply and Drainage Board,
   Main Office, P. O. Box 14,
   Mt. Lavinia.

2A. Thilina Wijethunga,

General Manager,
National Water Supply and Drainage Board,

Galle Road,
PO Box 14,
Mt. Lavinia

3. N. M. S. Kalinga,
Deputy General Manager (Production),
National Water Supply and Drainage Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

3A. G.K Iddamalgoda,

Deputy General Manager (HR)
National Water Supply and Drainage Board,
Main Office, P.O Box 14,
Mt. Lavinia

3B. N.I.S Abeygunawardena,

Additional General Manager,
(Human Resources)
National Water Supply and Drainage Board,
Main Office, P.O Box 14,
Mt. Lavinia

4. M. R. Nandawathie,
Assistant General Manager (Western North),
National Water Supply and Drainage Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

4A. A.K.K.R Kannagara,

Assistant General Manager,
(Western North),
National Water Supply and Drainage Board,

Main Office, P.O Box 14,
Mt. Lavinia

5. W. A. C. Sriyani,
Assistant General Manager
(Human Resources),
National Water Supply and Drainage Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

05A. M.A.S.S.K Chandrasiri,

Deputy General Manager,
(Human Resources),
National Water Supply and Drainage Board,
Main Office, P.O Box 14,
Mt. Lavinia

6. B. D. M. L. Karunaratne,
Chief Accountant,
Ministry of Water Supply,
Lakdiya Madura,
Pelawatta, Battaramulla.

6A. B.D.M.L Kularatne,

Chief Accountant,

Ministry of Water Supply,

Lakdiya Madura,

Pelawattta,

Battaramulla

7. K. M. N. Perera

8. S. B. Weerasuriya

9. P. A. M. R. Sumanasekara

10. H. M. S. Bandara

11. D. A. M. S. Gunaratne

All c/o
National Water Supply and Drainage Board,
Main Office, P. O. Box 14,
Mt. Lavinia.

12. The Secretary,
Human Rights Commission of Sri Lanka,
No. 165, Kynsey Road,
Colombo 8.

13. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

Before: B. P. Aluwihare PC, J.

Murdu N. B. Fernando PC, J.

Mahinda Samayawardhena J.

Counsel: Manohara de Silva PC with Harithriya Kumarage for the Petitioners

Ms. Viveka Siriwardane DSG for the 1st and 13th Respondents

Argued on: 24.03. 2021

Decided on: 09.11.2023

Judgement

Aluwihare P.C J.

This Fundamental Rights Application relates to the Petitioners' promotion to the post of Engineer – Class II of the 1st Respondent Board. The 1st Petitioner is presently in the post of Engineer Assistant-Special Class and the 2nd and 3rd Petitioners are presently in the post of Engineer Assistant – Class I of the 1st Respondent Board. The principal grievance of the Petitioners is that they were denied the opportunity to be promoted to the post of Engineer – Class II in violation of the Scheme of Recruitment and Promotion hence, the Petitioners' rights enshrined in Article 12(1) of the Constitution was breached by the arbitrary and/or unreasonable actions of the Respondents. On the 01.08.2014 the Court granted Leave to Proceed under Article 12(1) Constitution.

Service Record of the 1st Petitioner

The 1st Petitioner joined the Water Board on 10.08.1992 as an 'Electrician (Power) I' and obtained the National Certificate in Technology (Electrical) (hereinafter referred to as the NCT) on 24.02.1995. He was then appointed as 'Technical Assistant (Electrical)' on 15.05.1996. On 10.08.1997 he was promoted to 'Engineering Assistant-Class III' in consideration of his 5 years of service and the NCT qualification as well as his service as a 'Technical Assistant" as per the Letter of Promotion 'P5' dated 13.01.1998. After 2 years as an 'Engineering Assistant-Class III' the Petitioner was promoted to "Engineering Assistant-Class II" with effect from 10.08.1999 as per the Letter of Promotion 'P6' dated 26.06.2000. Thereafter, upon the completion of 2 years in the aforesaid position, the Petitioner was promoted to "Engineer Assistant-Class I" on 10.08.2001 as per the Letter of Promotion 'P7' dated 29.08.2006.

According to the Scheme of Recruitment a person with 12 years of experience of which 3 years of experience as an Engineering Assistant – Class I are entitled to be promoted to Engineering Assistant – Special Class. It is asserted by the 1st Petitioner that he was entitled to be promoted to that post on 10.08.2004 but his promotion to the post of Engineering Assistant – Special Class was effected only on 04.06.2008 as per the Letter of Promotion 'P8' dated 01.02.2010. The 1st Petitioner states that in promoting the 1st

Petitioner, the 1st Respondent Board has failed to consider the 1st Petitioner's service as an Electrician and has only counted his service since he was promoted to a Technical Assistant in 1996. The 1st Petitioner's request to consider his service as an Electrician and backdate his appointment to the Special Class was rejected by the 1st Respondent Board by Letter dated 23.08.2011 marked 'P9'. Currently, the 1st Petitioner is covering duties in the post of Electrical Engineer as indicated by the letters dated 18.11.2011 and 14.06.2012 marked 'P10A' and 'P10B'.

Service Record of the 2nd Petitioner

The 2nd Petitioner obtained the NCT (Electrical) on 27.05.1992. He joined the 1st Respondent Board as an Electrician (Power) Grade 1 on 10.08.1992 and was confirmed in service with effect from the same date 'P12A' and 'P12B'. Thereafter, the 2nd Petitioner was promoted to the post of 'Technical Assistant (Electrical)-II' with effect from 15.03.1996 as per Letter of Appointment 'P13' dated 11. 03.1996. He was promoted to the post of 'Engineering Assistant (Electrical)-Class III' with effect from 27.05.1997 and then to the post of 'Engineering Assistant-Class II' with effect from 27.05.1999 as per the Letters of Appointment 'P14' and 'P15'. The 2nd Petitioner was promoted to the post of 'Engineering Assistant-Class I' with effect from 09.11.2007. Subsequently by letter dated 15.12.2008, the said promotion was backdated to 08.06.2007. True copies of the said letters dated 18.01.2008 and 15.12.2008 respectively, were marked 'P16A' and 'P16B'.

Service Record of the 3rd Petitioner

The 3rd Petitioner obtained the NCT (Electrical) on 27.06.1996 as evidenced by the certificate 'P17'. In addition to the aforesaid qualification, the 3rd Petitioner obtained the National Diploma in Engineering Technology (Electrical/Electronic Engineering) awarded by the University of Vocational Technology as indicated by 'P18'.

On 15.07.1996, the 3rd Petitioner joined the 1st Respondent Board as an 'Electrician (Power)-Grade I' as per the Letter of Appointment 'P19' and was promoted to the post of 'Technical Assistant (Electrical)' on 10.09.1999 as per the Letter of Appointment 'P20'. Thereafter, the 3rd Petitioner was promoted to the post of 'Engineering Assistant-Class III' with effect from 10.09.2002, and subsequently, to the post of 'Engineering Assistant-

Class II' with effect from 10.09.2004 as per the Letters of Appointment 'P21' and 'P22' respectively. The 3rd Petitioner was promoted to the post of 'Engineering Assistant-Class I' by Letter dated 15.12.2008 and the said promotion was subsequently backdated to 08.06.2007 by the said Letter dated 15.12.2008 marked 'P23'. The below table illustrates the employment history of the Petitioners at the 1st Respondent Board and the eligible dates for promotion to Engineer Class II as alleged by the Petitioners;

(Table 1)

	Electrician	Technical Assistant	Engineering Assistant Class III	Engineering Assistant Class II	Engineering Assistant Class I	Engineering Assistant Special Class	Eligible date for promotion as Engineer Class II
1st Petitioner	10.08.1992	15.05.1996	10.08.1997	10.08.1999	10.08.2001	04.06.2008	10.08.2004
2nd Petitioner	10.08.1992	15.03.1996	27.05.1997	27.05.1999	08.06.2007		10.08.2004
3rd Petitioner	15.07.1996	10.09.1999	10.09.2002	10.09.2004	08.06.2007		15.07.2008

Promotion to the post of 'Engineer-Class II'

According to the Petitioners, the next promotion of the Petitioners is to the post of 'Engineer - Class II' as per the Scheme of Recruitment and Promotion marked 'P 1'. As per the Scheme of Recruitment and Promotion, applicants who possess the NCT and 12 years of experience of which 3 years of experience as an 'Engineering Assistant – Class I'

are eligible to be promoted to the post of 'Engineer – Class II'. It appears from the service record that all three Petitioners fulfilled the requisite requirements.

By a notice dated 19.03.2012 marked 'P 24' applications for the post of Engineer – Class II were called. The applicants were required to possess NCT and 17 years of experience in the 1st Respondent Board of which 3 years as an Engineering Assistant – Class I. According to the Petitioners, they informed the 1st Respondent Board that the Scheme of Recruitment and Promotion only requires 12 years of experience, meanwhile, the notice marked 'P 24' requires 17 years of experience. However, the Petitioners were informed that a decision was taken by the Board of Directors of the 1st Respondent Board to increase the number of years of experience to 17 years. The Petitioners contend that the decision was not communicated to the employees of the 1st Respondent Board. The Petitioners further alleged that the notice marked 'P 24' is based on a proposed Scheme of Recruitment and Promotion, which was not duly approved by the relevant authorities or as per the established procedure. The 2nd Respondent denies this averment and states that the respective trade unions of which the Petitioners are members, were informed of the change effected in the eligibility criteria. The 2nd Respondent admits that although a copy of the relevant board decision was communicated it was not accompanied by a covering letter. In their counter-affidavit, the Petitioners deny that the trade unions were informed and state that the Respondents have failed to submit any proof of informing the trade unions. Furthermore, it was submitted that not being a member of any trade union, the 3rd Petitioner could not have known of the said Board Decision even if it was informed to the trade unions.

In any event, the Petitioners applied for the said post in terms of the Letter marked 'P 24' and according to the Petitioners as of the closing date of the application which is 05.04.2012, they possessed the NCT and had experience at the 1st Respondent Board in the following manner;

(Table 2)

	Initial Appointment as Electrician	Eligible date for promotion as Engineer-Class II	Date of Appointment as	Total years of service as at

		(completion of 12 years)	Engineering Assistant-Class 1	closing date 05.04.2012
1st Petitioner	10.08.1992	10.08.2004	10.08.2001 -10 years as EA I	19 years
2nd Petitioner	10.08.1992	10.08.2004	08.06.2007 -4 years as EA I	19 years
3rd Petitioner	15.07.1996	15.07.2008	08.06.2007 -4 years as EA I	15 years

The Petitioners stated that they were called for an interview and that they faced the interview. The Petitioners submitted, marked 'P25', the 'Recommended Marking Scheme for Internal Promotions to the post of Engineer (Board Grade VII)' for awarding marks at the interview. According to the Petitioners, the Petitioners themselves and the 7th to 11th Respondents and one A.L. Kapila Bandu were called to the interview. The said Kapila Bandu was not named as a Respondent to the present application as he did not present himself at the interview to the best of the knowledge of the Petitioners.

The Petitioners state that on or about 05.02.2013, they became aware that the 7th to 10th Respondents had been promoted to the post of 'Engineer-Class II' with effect from 1st February 2013, and that upon further inquiry they learned that the said Respondents had obtained the following marks.

I. 7th Respondent - 66.5 marks

II. 8th Respondent - 66.5 marks

III. 9th Respondent - 61.5 marks

IV. 10th Respondent - 72 marks

The 2nd Respondent states that these marks are inaccurate. The 2nd Respondent further states that no marks were given at the interviews for the respective periods of service and in any event the Petitioners did not meet the eligibility criteria. The Petitioners contend as per their counter – affidavits that the 2nd Respondent willfully suppressed the interview

marks schedule from this Court as the 2nd Respondent has not submitted the said schedule.

Regarding the marks awarded at the interview, the Petitioners submit that the 1st, 2nd and 3rd Petitioners, on the other hand, had been awarded only a total of 25 marks, 23 marks and 27 marks respectively. The Petitioners state that they made inquiries and discovered that no marks have been awarded to them for their service, although the 1st and 2nd Petitioners had 19 years of service and the 3rd Petitioner had 15 years of service at the closing date of applications. The Petitioners state that to the best of their knowledge, they have been denied marks for service on the basis that they are not eligible to apply, although the 1st and 2nd Petitioners have completed 19 years of service whereas the notice calling for applications requires only 17 years of service. Furthermore, the Petitioners contend that 'P24' is a proposed Scheme of Recruitment and Promotion, which requires 17 years of experience and is not duly approved by the relevant authorities. In contrast, the Approved Scheme of Recruitment 'P 1' requires 12 years of experience, hence, in the aforesaid circumstances, the Petitioners allege that the Interview Panel has acted arbitrarily in denying the Petitioners marks for seniority.

It was further contended that, even in the round of promotions to the post of 'Engineer-Class II' held in 2009 the 1st Petitioner's name was included in the waiting list indicating that the 1st Petitioner was duly awarded marks for his service in terms of the Approved Scheme of Recruitment. Therefore, there is no rationale on which the 1st Petitioner could be denied marks for service in the current round of interviews.

The Petitioners state that they would be entitled to be promoted if marks had been awarded for their service period, with the 1st Petitioner earning 70 marks, the 2nd Petitioner earning 63.5 marks and the 3rd Petitioner earning 50.5 marks. The Petitioners submitted in tabular form a calculation of the marks that they are entitled to receive according to the marking scheme as per their inquiries made at the 1st Respondent Board. The said table is produced below in the following manner however it should be emphasized by the Court that these marks are per the Petitioners' inquiries and no interview mark schedules were produced before the Court by the Respondents.

(Table 3)

	1st Petitioner	2nd Petitioner	3rd Petitioner
Additional qualifications	2 marks	4 marks	4 marks
Performance Evaluations	10 marks	9 marks	10 marks
Management Experience/ Special Skills	3 marks	2 marks	3 marks
Interview	10 marks	8 marks	10 marks
Total Marks Awarded by the Interview Panel	25 marks	23 marks	27 marks
Marks Entitled for Service	45 marks	40.5 marks	23.5 marks
Total Marks Entitled	70 marks	63.5 marks	50.5 marks

Petitioners further submitted that 7 vacancies were available at the time of calling for applications by the 1st Respondent Board. However, the 2nd Respondent in paragraph 16 of his affidavit states that there were only 6 vacancies available at the time. In any event, the Petitioners illustrate the order of their promotions in the following manner if there were 7 impugned vacancies and if they were awarded the purported entitled marks for their service period;

(Table 4)

	Name	Marks Awarded/ Entitled
1	H.M.S Bandara (10th Respondent)	72 Marks
2	1st Petitioner	70 Marks
3	K.M.N Perera (7th Respondent)	66.5 Marks
4	A.S.B Weerasuriya (8th Respondent)	66.5 Marks
5	2nd Petitioner	63.5 Marks
6	P.A.M.R Sumanasekara	61.5 Marks
7	3rd Petitioner	50.5 Marks

<u>Inquiry Before the Human Rights Commission</u>

On becoming aware of the promotion of the 7th to 10th Respondents to the post of 'Engineer-Class II' the Petitioners lodged a complaint on 15.02.2013 before the Human Rights Commission (marked 'P26A', 'P26B' and 'P26C') bearing No. HRC/605/2003. In respect of the said complaint, the Respondents filed Observations before the Human

Rights Commission 'P27' taking up the position that; at a meeting of the Board of Directors of the 1st Respondent Board held on 16.08.2010, the Scheme of Recruitment has been amended to require NCT and 17 years of experience as an Engineering Assistant including 3 years as a Board Grade 7 Engineering Assistant. Furthermore, regarding the 1st Petitioner, he was appointed as a Technical Assistant on 04.06.1996 and he completed 17 years of service on 04.06.2013, therefore has been considered by the Interview Panel as a candidate who has not fulfilled the required qualifications.

On 17.05.2013 the 1st Respondent Board filed Observations 'P28' with regard to the complaint made by the 2nd and 3rd Petitioners by which they took up the position that; the applications were called for the said post in terms of the Scheme of Recruitment applicable at the time, in terms of which the NCT and 12 years of experience of which 3 years' experience in a Board Grade 7 Engineering Assistant post was required, but the Board of Directors considered the representations made by Trade Unions that requiring 12 years of experience from both those possessing NCT and those possessing NDT (National Diploma in Technology) would have the effect of not giving the due recognition to the NDT qualification, and therefore increased the required number of years of service for NCT qualification holders to 17 years. The 2nd Respondent, in his objections, admitted these averments and further clarified that 12 years of experience was considered for applicants with NDT and that NCT cannot be equated with NDT.

A true copy of the purported Board Decision filed by the 1st Respondent before the Human Rights Commission 'P29' was submitted to this court by the Petitioners. The Petitioners, however, state that 'P29' is not a Board Decision as maintained by the 1st Respondent and merely a document containing the proposed Scheme of Recruitment and Promotion. The Petitioners point out that the document carries no indication that the Board of Directors of the 1st Respondent has approved the said proposed Scheme of Recruitment and Promotion. The Petitioners further state that the 1st Respondent failed to produce a certified copy of the purported Board Decision dated 16.08.2010 to the Human Rights Commission. In the circumstances, the Petitioners state that they verily believe that a decision to amend the Scheme of Recruitment was not taken.

In response, the 2nd Respondent states that the document 'P29' was consequent to a Board Decision dated 16.08.2010, a certified extract of which was submitted marked '2R1'. The contents of '2R1' are to the effect that the Board discussed the revision of the Scheme of Recruitment and Promotion with the General Manager and Deputy General Manager (Personnel and Administration) and approved to revise the tenure of experience of the NCT qualified personnel, as shown in the Annexures to the Board Paper when they apply for the posts of Engineering Assistants Class III-(Board Grade 10) and Engineering Assistants (Special)- (Board Grade 7) and Engineer Class II (Board Grade 7). The relevant annexure to '2R1' was submitted later by motion dated 10.02.2016 as the 2nd Respondent had failed to annex the same, along with the objections.

The Petitioners contend that the document '2R1' submitted by the Respondents purported to be the Board Decision to amend the Scheme of Recruitment and Promotion is not in a fit state to be accepted by the Court, stating that it is merely a paragraph printed on scrap paper with a handwritten date and bearing no signatures of the members of the Board of Directors or the Secretary of the Board.

The Petitioners state that the inquiry before the Human Rights Commission commenced on 02.08.2013 and was re-fixed for 16.09.2013. No representations were made on behalf of the 1st Respondent Board. The Petitioners state that thereafter, at the next date of inquiry 04.11.2013, an officer of the Personnel Department of the 1st Respondent Board appeared and admitted that the proposed revisions to the Scheme of Recruitment and Promotion contained in 'P29' have not been approved and that the approval of the Department of Management Services, Director General of Establishments and the then National Salaries and Cadre commission have not been obtained in respect of the same. The said officer is said to have further stated that 7 vacancies were available to the post in question at the time of calling for applications and that at the time of giving evidence at the inquiry three vacancies were remaining. However, as stated earlier the 2nd Respondent in his Statement of Objections denied these averments and maintained that there were only 6 vacancies.

The Petitioners state that these matters were recorded by the inquiring officer of the Human Rights Commission who advised the said officer of the 1st Respondent Board to

settle the matter and report any settlement to the Human Rights Commission within 2 weeks. According to the Petitioners, their complaint was not taken up for inquiry thereafter and to the best of the Petitioners' knowledge, the Human Rights Commission has not made any further recommendations. The 2nd Respondent states that the matter was thereafter referred to the Department of Labour.

The Petitioners contend that in terms of the circulars issued by the Ministry of Finance, the 1st Respondent Board, being a statutory Board, is required to effect all promotions in terms of the approved Schemes of Recruitment and Promotions and obtain the necessary approvals from the Department of Management Services and the Treasury. The copies of Management Services Circulars No. 28 dated 10.04.2006 and 28(II) dated 01.08.2006 were submitted marked 'P31' and 'P32'. The 2nd Respondent states that the restructuring of the National Water Supply and Drainage Board commenced in late 2011 under the supervision of the Department of Management Services and was required to prepare a new scheme of recruitment. Prior to the said restructuring the then scheme of recruitment was amended pursuant to Board decisions.

The Petitioners further state that the 1st Respondent has acted contrary to the direction given by the Attorney General by letter dated November 2011 'P33' that all promotions of the 1st Respondent Board should be made in terms of the approved scheme of recruitment and by conducting interviews duly. The said letter marked 'P33' relates to a settlement reached in SC FR 103/2007 that the Water Board should follow the eligibility criteria in the Scheme of Recruitment in awarding promotions. In response to this contention, the 2nd Respondent maintains that the interviews were duly conducted. The said letter marked 'P33' states as follows;

"ඉදිරියේදී ජාතික ජල සම්පාදන හා ජලාපවහන මණ්ඩලය මගින්, තම ආයතනය තුල උසස්වීම් පිරිනැමීමේදී අදාල තනතුරට බලපවත්වන උසස්වීම් පරිපාටියට අනුකූලව උසස්වීම් පිරිනැමිය යුතු අතර, ඒ සම්බන්දයෙන් සම්මුඛ පරීක්ෂණ නිසි ආකාරයට පැවැත්වීමට අදාල සම්මුඛ පරීක්ෂණ මණ්ඩලයෙන් වග බලාගත යුතු බවද මාගේ මතය වේ."

Answering the 2nd Respondent's statement that no marks were given for the Petitioners' service as they had not met the eligibility criteria, the Petitioners point out that in paragraph 13 of his objections the 2nd Respondent has admitted that as the new Scheme

of Recruitment and Promotion had not come into force, the existing scheme of recruitment was adopted. Whereas the existing scheme of recruitment required only 12 years of service and the Petitioners were all possessed of more than 12 years of experience at the closing date of applications, they were eligible for promotion and therefore could not have been denied marks for service by the Respondents on the basis that the Petitioners were not eligible.

Furthermore, the Petitioners state that the 2nd Respondent's objections are self-contradictory as the existing scheme of recruitment was adopted since the new scheme of recruitment had not come into force, but paragraph 14 of the statement of objections, states that the Petitioners were not eligible for the promotion in terms of the existing Scheme of Recruitment. Therefore, if the existing Scheme of Recruitment was followed, as submitted by the 2nd Respondent, the Petitioners would have been eligible as they had the requisite experience required as per the existing scheme of recruitment. The Petitioners state that this points to arbitrary action by the Respondents in denying them marks for service on the basis that they are not eligible.

Moreover, the 2nd Respondent contended that the 1st Petitioner is not eligible to apply as he does not possess the requisite experience having assumed duties in the post of 'Technical Assistant' only on 15.05.1996. The 2nd Respondent has not set out the reasons as to why the 2nd and 3rd Petitioners would be ineligible for promotion to "Engineer-Class II' except to state that the next promotion of the 2nd and 3rd Petitioners is to the post of 'Engineer Assistant-Special Grade'.

The Petitioners point out that the 2nd Respondent has failed to file the purported Board Decision amending the Scheme of Recruitment and the purported amended Scheme of Recruitment. At the inquiries before the Human Rights Commission and the Department of Labour, the Respondents had produced 'P29' as the purported Board Decision.

Although the 2nd Respondent states that the Petitioners were not eligible for the promotion, the Petitioners were called for the interview. According to the Petitioners, at the interview too they had not been informed that they were ineligible. Furthermore, the 1st Petitioner had even been appointed to cover the duties in the post of Electrical Engineer, as indicated by the documents 'P10A' and 'P10B' and was included in the

waiting list. In response to an appeal submitted by the Petitioner dated 10.08.2010 ('CA3') seeking to be promoted to the post of Electrical Engineer, the then General Manager (Personnel) of the 1st Respondent had informed the 1st Petitioner by letter dated 29.09.2010 ('CA4') that there were no vacancies for the post of Electrical Engineer and requested the 1st Petitioner to apply for the post in the next round of promotions. At no time was the 1st Petitioner informed that he was not eligible for promotion to the impugned post (*vide* 'CA1' and 'CA2' letters sent by the 1st Respondent Board dated 24.06.2009 and 07.05.2008 respectively calling the 1st Petitioner for interviews for the post of 'Electrical Engineer Class II').

Alleged Violation of Article 12(1) of the Constitution

Applications for the post of 'Engineer-Class II' were called under the purported new Scheme of Recruitment and not under the existing Scheme of Recruitment (*vide* 'P24' letter calling for applications dated 19.03.2012 which requires 17 years of experience including 3 years' experience in the post of 'Engineer Assistant-Class 1' from those with the NCT qualification). The 2nd Respondent has taken up contradictory positions in stating which Scheme of Recruitment was resorted to in selecting the Petitioners for the interviews for promotion. By paragraph 13 of his statement of objections the 2nd Respondent has verily accepted that the Scheme of Recruitment resorted to with regard to the Petitioners was the existing Scheme of Recruitment as the purported new Scheme of Recruitment had not come into force by then.

As the 2nd Respondent himself has accepted that the existing Scheme of Recruitment was resorted to regarding the Petitioners, it only remains for this Court to consider whether the Petitioners were in fact possessed of the requisite eligibility to apply for the post of 'Engineer-Class II'. The Court's inquiry is made easier by the fact that all three Petitioners were called for interview by the 1st Respondent Board. The Court is inclined to consider the said fact as a *prima facie* indication that the 1st Respondent Board considered the Petitioners eligible, contrary to the 2nd Respondent's contention that the Petitioners were not eligible to apply. As held by His Lordship Justice Fernando's statement in ***Abeysinghe v. Central Engineering and Consultancy Bureau*** **(1996) 2 SLR 36, at page 47** "…*the fact that he was invited for the interview does suggest that he was,* prima facie*, suitable*…"

regarding a situation where the Petitioners were invited to attend an interview to select a candidate for appointment as Deputy General Manager of the CECB.

The Petitioners submits that at the round of promotions held in 2009, the 1st Petitioner was duly awarded marks for his service and included in the waiting list for the post of 'Engineer-Class II', which further supports the finding that the 1st Petitioner was eligible to apply for the said post. Although the Petitioners have not submitted specific proof that the 1st Petitioner was included in the waiting list, the letter 'CA3' sent by the 1st Petitioner to the Chairman of the Water Board dated 10.08.2010 seeking a promotion to the post of 'Engineer-Class II' mentions that the 1st Petitioner is included in the waiting list. The said position is not contradicted by the Respondents.

However, the Court is mindful that a candidate who was called for an interview may well be found unsuitable for the position following the due completion of the interview process. This could be due to the candidate failing to score the number of marks needed due to various deficiencies in their suitability. In ***Abeysinghe v. Central Engineering and Consultancy Bureau*** (supra) it was observed that in certain circumstances even a candidate who possesses the requisite seniority and merit may be overlooked if it is demonstrated that such candidate does not possess the skills to meet the needs of the institution and the public.

"*The principle of promotion by reference to seniority and merit does not mean that the needs of the Institution and the public, or the demands of the post in question, must be ignored (see Perera v. Ranatunga (1993) 1 SLR 39) Hence even if he had been given high marks, nevertheless the decision not to appoint him, to a post for which he was considered unsuitable, cannot be considered unlawful, unfair or unreasonable.*"

Therefore, although the Court is convinced that the Petitioners are possessed of the requisite qualifications to be called for interview, the Court does not hold the preconception that the Petitioners would score sufficient marks for appointment into the post of 'Engineer-Class II'. If the Respondents were able to demonstrate that the Petitioners were found unsuitable consequent to the interview it would have to be accepted that the Petitioners were indeed unsuitable and were not subjected to unequal treatment. Except for stating that the Petitioners do not possess the requisite experience

for the post, the Respondents have submitted scant justification in support of their rejection of the Petitioners for the said post, leading to the conclusion that the Respondents were acting in an unreasonable and arbitrary manner by overlooking the Petitioners for promotion. Documents that can establish the *bona fides* of the interview process such as the mark sheets of the interviews and/or a marking scheme have not been submitted by the Respondents.

With regard to the period of experience, if the 'Recommended Marking Scheme' marked 'P25' was used to evaluate the Petitioners' suitability, the 2nd Respondent's contention, that marks were not awarded for the Petitioners' period of service, is untenable. It appears that the period of experience and period of service would mean one and the same when it comes to internal candidates of the 1st Respondent Water Board such as the Petitioners, as a specified number of marks are awarded for each year of experience in the respective posts of 'Technical Assistant', 'Engineering Assistant-Class II', 'Engineering Assistant-Class I' and 'Engineering Assistant Special Grade' with the possibility of earning a maximum of 50 marks for the period of experience. In that context, each of the Petitioners stands to earn a considerable number of marks given their service record in the Water Board, which was mentioned at the outset.

On the other hand, the Petitioners have not adduced evidence to demonstrate that the 7th to 10th Respondents possessed the same qualifications as the Petitioners, nor any *mala fides* on the part of the Respondents. The classification theory requires that a positive act of unequal treatment among subjects similarly circumstanced should be demonstrated, if a finding of unequal treatment is to be made. Despite its adoption by a Full Bench in ***Elmore Perera v. Montague Jayawickrama*** **(1994) 2 SLR 90**, this court has thereafter on many occasions sought to distance itself from the classification theory, in favour of the 'new doctrine' formulated in the Indian case of ***Royappa v. State of Tamil Nadu*** **1974 AIR SC 555**. Relief is now freely granted in respect of arbitrary and *mala fide* exercise of executive power.

Although a trend of moving away from the classification theory emerged, the theory is not so faulty as to be completely discarded, given that it is not applied rigidly to mandatorily insist on evidence of differential treatment of similarly situate persons in all

and every occasion, for a finding of inequal treatment to be made. Having made this observation, in the present case, we consider it more appropriate to apply the 'new doctrine' which focuses on whether the impugned act was contrary to the rule of law and reasonableness. After ***Shanmugam Sivarajah v. OIC, Terrorist Investigation Division*** SC FR 15/2010, (SC Minutes of 27.06.2017), it is now settled that 'classification' is not the only basis for relief under Article 12(1) of the Constitution. As held by the Court at p.12,

"*Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal. It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people.*"

In ***Wickrematunga v. Anuruddha Ratwatte*** **(1998) 1 SLR 201**, His Lordship Justice A.R.B. Amerasinghe held that *"'"Law" in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct.*" Accordingly, the Scheme of Recruitment in question which sets out the manner of recruitment for 'Technical Assistants/Engineering Assistants and Engineers' falls within the umbrella of 'law' and should be followed as it is, without deviation by the Water Board.

Denying the Petitioners' eligibility to apply and receive the promotion to 'Engineer-Class II' is accordingly, contrary to law and defeats equality before the law. As elaborated in ***Royappa v. State of Tamil Nadu*** (*supra*) "*From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in the Republic while the other, to the whim and caprice of an absolute monarch... They require that State action must be based on valid, relevant principles applicable alike to all similarly situate and must not be guided by any extraneous or irrelevant considerations because that would be denial of equality*"

<u>Validity of the Purported New Scheme of Recruitment</u>

It is noteworthy that although the call for applications 'P24' advertised the eligibility criteria introduced by the purported revised Scheme of Recruitment, the Respondents

were unable to satisfactorily establish that the said Scheme of Recruitment had entered into force. The purported Board decision '2R1' submitted by the 2nd Respondent appears to be a single paragraph excerpted from a larger document. As submitted by the Petitioners as well, the document does not carry a proper date and signature of approval. Had the document been submitted in its entirety with the requisite features that indicate authenticity, its validity could have been accepted.

The annexure to '2R1' submitted subsequently by way of a motion is a document seeking approval "*to revise the service of experience as 17 years instead of 12 years in the existing scheme of recruitment*". Nowhere in the document is it stated that the recommendation to revise the tenure of experience of the NCT qualified Engineering Assistants when applying for the post of Engineer has been approved. Therefore, it cannot be accepted as evidence of due approval of the purported new Scheme of Recruitment. Furthermore, it can be seen that 'P29' the purported Board Decision filed before the Human Rights Commission by the 1st Respondent Board and submitted to the Court by the Petitioners, contains the existing scheme and the proposed scheme side-by-side and is not a finalized revision of the Scheme of Recruitment. Therefore, the Board's Decision to amend the scheme of recruitment and the amended scheme of recruitment has not been submitted to the Court in a plausible manner.

Restrictions on the Promotion of Internal Candidates to 'Engineer-Class II'

With regard to the 1st Petitioner, without ambiguity, the next promotion available to him is to the post of 'Engineer-Class II' as he is in the 'Engineering Assistant-Special Class'. A perusal of the Scheme of Recruitment 'P1' indicates that although the 2nd Respondent's contention, that the next promotion of the 2nd and 3rd Petitioners could be only to the 'Engineering Assistant (Special) Grade', is incorrect, there are indeed certain restrictions as to how promotions to 'Engineer-Class II' can be made. Those possessing the NCT together with 12 years of experience, including 3 years of experience as an 'Engineering Assistant-Class I' in Board Grade 8, are eligible to apply for the post of post of 'Engineering Assistant-Special Class' (*vide* page 20 of 'P1') as well as to the post of 'Engineer-Class II' (*vide* page 10 of 'P1'). However, with regard to the post of 'Engineer-Class II' internal candidates with a Government Technical Officers' 3rd Examination

qualification together with experience in the relevant field in the NWSDB would have priority over candidates with the NCT qualification (per the note on page 10 of 'P1' and 'P24' Letter calling for applications dated 19.03.2012), whereas with regard to the 'Engineering Assistant-Special Class' there is no such priority explicitly stated. Furthermore, the note on page 20 of 'P1' which reads "*As internal promotions to the Grade of Engineer have been limited to 25% of the total cadre of Engineer-Cl.II (Board Gr. 7), Cadre of Engineer Assistant- Special Class is to be kept opened without any restriction*" evinces that only 25% of the Engineer-Class II vacancies can be filled with internal candidates, as submitted by the 2nd Respondent in his objections.

While it is evident that there are certain restrictions placed on the number of internal candidates that can be promoted to 'Engineer-Class II', the Respondents have not indicated that those restrictions were the cause for the Petitioners to be overlooked for the promotions.

Petitioners' Legitimate Expectations

It was contended by the Petitioners that their legitimate expectations were violated by the Respondents by subjecting the Petitioners to an ad hoc and unsanctioned Scheme of Recruitment and Promotion. In my opinion, the Petitioners had a legitimate expectation that the 1st Respondent Board would follow an established practice in the promotion of the applicants. This is not to state that public authorities cannot change their decisions or policies, but such changes must not be arbitrary or amount to an abuse of power. As His Lordship Justice Prasanna Jayawardena held in ***Ariyarathne and Others v N.K. Illangakoon*** **(S.C F. R No. 444/2012, S.C Minutes 30.07.2019)** at page 56;

"*As evident from the principles I endeavoured to set out earlier, the first characteristic which will sustain a petitioner's claim that he has a substantive legitimate expectation the respondent public authority will act in a particular manner with regard to him, is that the petitioner must establish the public authority gave him a specific, unambiguous and unqualified assurance that it will act in that manner* [*or, alternatively, that the respondent public authority has followed an established and unambiguous practice which entitled the petitioner to have a legitimate expectation the public authority will*

continue to act in that manner or that the facts and circumstances of the dealings between the public authority and the petitioner have created such an expectation]."

I am of the view that the Petitioners had a legitimate expectation that the promotions would be effected as per the approved Scheme of Recruitment and that they would be granted marks for their period of service. In my opinion, for the reasons stated above, the Petitioners' legitimate expectations are violated.

Conclusion

For the reasons set above, I hold that the fundamental right of the Petitioners guaranteed by Article 12(1) of the Constitution was violated by the 1st and the 2nd Respondents. Regrettably, there is a lack of professional display by the Respondents in adhering to the applicable rules and regulations despite the communication of the Hon. Attorney General to the 1st Respondent Board way back in 2011. Needless to say, the 1st Respondent Board should adhere to approved Schemes of Recruitment and Promotions when awarding promotions. This Court observes that the 1st Respondent Board should firmly adhere to established schemes of promotion and requirements without subjecting applicants to arbitrary and ad hoc schemes. In my view, adherence to established schemes of recruitment and promotions is not a complicated task. Moreover, adherence to established schemes ensures a content public service as held by His Lordship Justice Kulatunga in ***Perera and Another v Cyril Ranatunga, Secretary Defence and Others*** **Sri L.R 1 (1993) 39** at page 60;

The service of most public officers is life-time and the guarantee of fair treatment to them enshrined in Article 12 (1) of the Constitution would, if properly enforced, also help in maintaining a contented public service which is vital for its efficient functioning."

If the 1st Respondent Board is of the view that the Scheme of Retirement and Promotions should be streamlined, then it should be done in accordance and in compliance with the established procedure.

In those circumstances, I order the 1st Respondent Board that;

the Petitioners forthwith be appointed to the position of Engineer – Class II, in the event their promotions have not been granted. However if they had been promoted subsequent

to the filing of this application, their promotion should be back dated to the date on which promotions were granted to the 7th to the 10th Respondents to the post of Engineer- class II. The petitioners however, will not be entitled for any back wages.

We also direct the 1st Respondent Board to pay compensation in a sum of Rupees two hundred and fifty thousand to each of the Petitioners.

Application allowed

Judge of the Supreme Court

Murdu Fernando J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree.

Judge of the Supreme Court

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

Joseph Kumar De Silva,
8-5/4, Golf Wing,
Trillium Residencies,
153, Elvitigala Mawatha,
Colombo 08.
Applicant

SC APPEAL NO: SC/APPEAL/65/2021
SC LA NO: SC/HCCA/LA/88/2020
HCA/RA NO: 123/2018 (F)
LT NO: LT/08/188/2017

Vs.

1. Etihad Airways PJSC,
   P.O. Box 35566, Abu Dhabi,
   United Arab Emirates.
   And also of
   752, Dr. Danister De Silva Mawatha,
   Ground Floor, Rigel Building,
   Orion City, Colombo 09.
2. R.H. Douglas,
   Cluster General Manager,
   Etihad Airways PJSC, Level 3,
   East Tower,
   World Trade Center,
   Echelon Square,
   Colombo 01.

Respondents

AND BETWEEN

Joseph Kumar De Silva,
8-5/4, Golf Wing, Trillium Residencies,
153, Elvitigala Mawatha,
Colombo 08.
Applicant-Petitioner

Vs.

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P.O. Box 35566, Abu Dhabi,
United Arab Emirates.
And also of
752, Dr. Danister De Silva Mawatha,
Ground Floor, Rigel Building,
Orion City, Colombo 09.
2. R.H. Douglas,
Cluster General Manager,
Etihad Airways PJSC,
752, Dr. Danister De Silva Mawatha,
Ground Floor, Rigel Building,
Orion City, Colombo 09.
Respondent-Respondents

AND NOW BETWEEN

Joseph Kumar De Silva,
8-5/4, Golf Wing,
Trillium Residencies,
153, Elvitigala Mawatha,
Colombo 08.
Applicant-Petitioner-Appellant

Vs.

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   Etihad Airways PJSC,
   752, Dr. Danister De Silva Mawatha,
   Ground Floor, Rigel Building,
   Orion City, Colombo 09.

   Respondent-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: Nigel Hatch, P.C., with Shiroshini Illangage for the Applicant-Petitioner-Appellant.
Uditha Egalahewa, P.C., with Amaranath Fernando for the 1st Respondent-Respondent-Respondent.

Argued on : 01.12.2022

Written submissions:
by the Applicant-Petitioner-Appellant on 16.08.2021 and 20.12.2022.
by the 1st Respondent-Respondent-Respondent on 09.06.2022 and 10.01.2023.

Decided on: 09.11.2023

Samayawardhena, J.

The appellant's services as the Country Manager in Sri Lanka of Etihad Airways were terminated by Etihad Airways by letter dated 03.07.2017. He filed an application dated 11.12.2017 in the Labour Tribunal of Colombo in terms of section 31B(1) of the Industrial Disputes Act, No. 43 of 1950, as amended, primarily seeking compensation and gratuity on the basis that the termination of his employment was unlawful. Although he filed the application against both Etihad Airways and its Cluster General Manager, at the time of supporting the application, it was informed to this Court that he would not proceed against the Cluster General Manager.

The Minister of Labour acting in terms of section 4(1) of the Industrial Disputes Act referred this dispute for settlement by arbitration by letter dated 28.12.2017. According to P7(a)-(e), the registrar for the arbitrator informed this to the appellant by letter dated 05.01.2018. The appellant surrendered to the jurisdiction of the arbitrator and filed the statement of facts dated 06.02.2018. The respondent Etihad Airways filed a preliminary statement/objection dated 20.03.2018 before the arbitrator seeking dismissal of the proceedings *in limine* on the basis that parallel proceedings cannot be maintained before both the Labour Tribunal and the arbitrator seeking the same relief. The appellant then filed answer dated 20.04.2018 reiterating that the arbitrator has jurisdiction to proceed with the matter and grant him relief.

In the meantime, the respondent filed answer in the Labour Tribunal dated 24.01.2018 and moved *inter alia* to dismiss the application of the petitioner *in limine* in terms of section 31B(2)(b) of the Industrial Disputes Act. The appellant filed answer in reply dated 23.02.2018 reaffirming that the Labour Tribunal has jurisdiction to proceed with the matter and grant him relief. Both parties made oral submissions followed by written

submissions on this preliminary objection. In the written submissions dated 09.07.2018 the appellant concluded that "*Therefore the applicant submits that the objection of the said respondents that this application be dismissed under section 31B(2)(b) be rejected and instead it be suspended under section 31B(3)(a) of the Industrial Disputes Act No. 43 of 1950 as amended with costs to the applicant.*"

The Labour Tribunal by order dated 12.09.2018 upheld the preliminary objection and dismissed the application of the appellant except for the relief on gratuity. The Labour Tribunal based its decision on section 31B(2)(b) and further concluded that section 31B(3)(a) is inapplicable to the facts of this case. The revision application filed against the said order of the Labour Tribunal was dismissed by the High Court of Colombo by judgment dated 27.08.2020. The appellant filed this application before this Court seeking leave to appeal against the said judgment of the High Court. This Court granted leave to appeal to the appellant on four questions of law as formulated by the appellant. They have been reproduced with answers at the end of this judgment.

The respondent relies on section 31B(2)(b) to have the application before the Labour Tribunal dismissed whereas the appellant relies on section 31B(3)(a) to have the application before the Labour Tribunal suspended until the proceedings before the arbitrator are concluded. This is the crux of the matter.

Section 31B(2)(b) reads as follows:

> *A labour tribunal shall-*
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> *where it is so satisfied that such matter constitutes, or forms part of, an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator, or for settlement to an*

industrial court, make order dismissing the application without prejudice to the rights of the parties in the industrial dispute.

In the case of *Upali Newspapers Ltd. v. Eksath Kamkaru Samithiya and Others* [1999] 3 Sri LR 205, the Court of Appeal in interpreting section 31B(1)(b) held "*this provision would apply only to an application made to a Labour Tribunal subsequent to a reference made by the Minister to an arbitrator or to an industrial court for settlement.*" In other words, if the application was made to the Labour Tribunal before the Minister referred the dispute for settlement by arbitration, section 31B(1)(b) would not apply and the Labour Tribunal could proceed with the application.

On appeal, the Supreme Court affirmed this judgment of the Court of Appeal – *vide Eksath Kamkaru Samithiya v. Upali Newspapers Ltd.* [2001] 1 Sri LR 107. In the course of the judgment of the Supreme Court, Ismail J. (with the agreement of M.D.H. Fernando J. and Wijetunga J.) held at 108 "*I accordingly hold that the Court of Appeal has not erred in the interpretation of Article 116(1) of the Constitution and that the Minister had no power to refer the dispute regarding the termination of services for compulsory arbitration when applications in respect of the said dispute were pending in the Labour Tribunal.*" No question of law was raised to reconsider this conclusion of the Supreme Court, and no full submissions were heard in this regard during the course of the argument. The veracity and implications of the said conclusion can be fully explored in a future case.

In my view, there is no necessity for a confrontation between the Labour Tribunal and the Minister on these references. According to section 4(1), the Minister can refer a dispute "*for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal*". If the dispute is already before a Labour Tribunal, the question of further reference by the Minister does not arise. In terms of section 3(1)(d), even the

Commissioner General of Labour can refer such disputes for settlement by arbitration to a Labour Tribunal. In general terms, what practically happens is that when the dispute is referred for settlement by arbitration, the Commissioner General of Labour or the subject Minister is unaware that an application has already been filed by the employee before the Labour Tribunal. This seems to be the case in the instant matter as well. The application was filed by the appellant before the Labour Tribunal on 11.12.2017. As seen from the letter found at page 61 of the appeal brief, the Commissioner General of Labour formulated the question to be tendered to the Minister on 19.12.2017. It appears that they were unaware of the application before the Labour Tribunal. Neither the Commissioner General of Labour nor the Minister is a party to the application before the Labour Tribunal.

Be that as it may, the Labour Tribunal and the High Court are bound by the Supreme Court judgment in *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd*. However, both the Labour Tribunal and the High Court state that this judgment is inapplicable to the facts of the instant case because the application was not "pending" before the Labour Tribunal when the Minister referred the dispute for settlement by arbitration. The learned President of the Labour Tribunal in his order clarified that the Minister had referred the dispute for arbitration before the case was called in open Court (although in point of fact the application before the Labour Tribunal had been filed prior to the said reference).

I have no hesitation in concluding that this is a wrong interpretation. In the context of this appeal, "pending" means "awaiting decision". This begins not from the date the application is called in open Court but from the date the application is filed in the Labour Tribunal (in this case on 11.12.2017) and ends after the satisfaction of the order of the Labour

Tribunal (not even after its pronouncement). *Cf. Ponniah v. Rajaratnam* (1964) 68 NLR 127, *Abeysinghe v. Gunasekara* (1962) 64 NLR 427.

Ideally, the matter should have been laid to rest there. However, it did not happen due to another argument strenuously put forward by learned President's Counsel for the appellant. He argues that, if the Minister referred the dispute for arbitration after the application was filed before the Labour Tribunal, in terms of section 31B(3)(a), the Labour Tribunal shall suspend its proceedings until the proceedings before the arbitrator are concluded. This argument in my view is both unnecessary and unsustainable. This has rightly been rejected by the Courts below.

Section 31B(3) reads as follows:

> *Where an application under subsection (1) [of section 31B] relates-*
>
> *(a) to any matter which, in the opinion of the tribunal, is similar to or identical with a matter constituting or included in an industrial dispute to which the employer to whom that application relates is a party and into which an inquiry under this Act is held, or*
>
> *(b) to any matter the facts affecting which are, in the opinion of the tribunal, facts affecting any proceedings under any other law,*
>
> *the tribunal shall make order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the tribunal shall resume the proceedings upon that application and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law.*

Section 31B(3)(a) cannot be invoked to suspend the proceedings before the Labour Tribunal when the same dispute between the same parties is before the arbitrator and the Labour Tribunal. If the Minister's reference for arbitration precedes the application filed in the Labour Tribunal, in terms of section 31B(2)(b), the application before the Labour Tribunal shall be dismissed; if the Minister's reference for arbitration follows the application filed in the Labour Tribunal, the Labour Tribunal can proceed with the application.

If the argument of learned President's Counsel is accepted, for instance, after a long *inter partes* inquiry, if the arbitrator decides to dismiss the application of the employee on the ground that the termination is justifiable, the Labour Tribunal can thereafter commence a fresh inquiry to decide whether the termination is in fact justifiable. This is patently unacceptable on first principles and is debarred by section 31B(5).

Section 31B(5) reads as follows:

> *Where an application under subsection (1) is entertained by a labour tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and where he has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under subsection (1).*

Vide Ceylon Tobacco Co. Ltd. v. J. Illangasinghe, President, Labour Tribunal and Others [1986] 1 Sri LR 1.

As learned President's Counsel for the respondent correctly points out, section 31B(3)(a) caters for a situation where, for instance, services of several employees have been terminated by the same employer in relation to a specific incident, and an inquiry against some of them is pending

before an arbitrator while others are before the Labour Tribunal, the Labour Tribunal is required to suspend its proceedings until the inquiry before the arbitrator is concluded. The outcome of that inquiry should then be considered in deciding the matter before the Labour Tribunal. In both forums, the dispute and the employer remain the same or identical but the employees may be different. Under section 31B(2)(b), in both forums, the dispute, the employer and the employee are the same.

The finding of the Labour Tribunal, which was affirmed by the High Court, that there is no applicability of section 31B(3)(a) to the facts of this case is flawless.

High-flown technical objections and hair-splitting arguments should as much as possible be avoided in matters that fall under the purview of the Industrial Disputes Act, the purpose and object of which, as repeatedly pointed out by this Court, is the maintenance and promotion of industrial peace. Industrial law is founded on social justice.

The respondent cannot on the one hand say that *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd.* has wrongly been decided before the Labour Tribunal (on the interpretation of section 31B(2)(b)) and on the other hand say that it has rightly been decided before the arbitrator (to say that the Minister has no power to refer the dispute for arbitration when the dispute is pending before the Labour Tribunal for determination) to non-suit the appellant employee. The submission of the appellant is no better. The appellant wants the Labour Tribunal proceedings to be suspended and the arbitration proceedings to be continued. The appellant does not seek a direction to the Labour Tribunal to continue with the proceedings. I cannot be a party to non-suit an employee who says his services were unjustly terminated.

What will then be the outcome of this appeal? If the Labour Tribunal cannot dismiss the application under section 31B(2)(b) and it also cannot suspend the proceedings under section 31B(3)(a), the Labour Tribunal shall proceed with the whole matter without confining the dispute only to the payment of gratuity.

The questions of law upon which leave to appeal was granted and the answers thereto are as follows:

Q: Has the High Court misdirected itself in law in failing to consider that the petitioner's application before the Labour Tribunal was filed on 11.12.2017 prior to the reference to arbitration by the Minister of Labour which was made on 28.12.2017 under section 4(1) of the Industrial Disputes Act, No. 43 of 1950 (as amended)?

A: Yes.

Q: Has the High Court misdirected itself in law in construing sections 31B(2)(b) and 31B(3)(a) of the Industrial Disputes Act having regard to the reference to arbitration being made after the application to the Labour Tribunal?

A: In respect of the first part of the question, i.e. the construction of section 31B(2)(b), the answer is "Yes"; and in respect of the second part of the question, i.e. the construction of section 31B(3)(a), the answer is "No".

Q: Has the High Court misdirected itself in law in failing to apply and/or failing to follow the judgment of the Court of Appeal in *Eksath Kamkaru Samithiya v. Upali Newspapers Ltd and Others* [1999] 3 Sri LR 205 affirmed by the Supreme Court in [2001] 1 Sri LR 105 where it was held that section 31B(3)(a) of the Industrial Disputes Act applies where the reference to arbitration by the Minister is made subsequent to the application filed before the Labour Tribunal which is what transpired in this instance?

A: Those two judgments have not held so.

Q: Has the High Court erred in law in determining that section 31B(3)(a) of the Industrial Disputes Act does not apply to the application of the petitioner and failing to hold that the proceedings before the Labour Tribunal must be suspended until the conclusion of the arbitration proceedings and resumed before the Labour Tribunal thereafter?

A: No.

The judgment of the High Court on the question of the applicability of section 31B(2)(b) is set aside, and the appeal is partly allowed. The Labour Tribunal is directed to hear the application of the appellant in its entirety. The proceedings before the arbitrator shall stand terminated. Let the parties bear their own costs.

Judge of the Supreme Court

Aluwihare, P.C. J.

I had the advantage of reading judgements in a draft of their Lordships, Hon. Justice Gamini Amarasekara and Hon. Justice Mahinda Samayawardhena. His Lordship Justice Amarasekara has arrived at the conclusion that the concurrent findings reached in the case of **Eksath Kamkaru Samithiya v. Upali Newspapers Ltd and Others**, by the Court of Appeal [1999 - 3 SLR 205] and The Supreme Court [2001 – 1 SLR 105] are not correct, in particular the finding that section 31B(2) of the Industrial Disputes Act applies only to applications filed after the reference for arbitration by the Minister.

The focus of the arguments before us were on the four questions of law on which leave to appeal was granted. Sub-paragraphs (a), (b), (c) and (e)

of Paragraph 18 of the Petition. The only question of law that directly touched the reference in issue is the question of law referred to in sub paragraph (c) of Paragraph 18 which is reproduced below;

"Has the High Court misdirected itself in law in failing to apply and/or failing to follow the judgement of the Court of Appeal in ***Eksath Kamkaru Samithiya v. Upali News Papers Ltd. and Others*** *(1999) 3 SLR 205 affirmed by the Supreme Court in (2001) 1 SLR 105, where it was held that Section 31B (3) (a) of the Industrial Disputes Act No. 43 of 1950 (as amended) applies where the reference to arbitration by the Minister is made subsequent to the Application filed before the Labour Tribunal which is what transpired in this instant?"*

Although reference was made to the decision in **Upali News Papers** [supra] In the course of the argument neither party made any serious challenge the decision of the said case that it was decided incorrectly and if that was the case, there would have been a specific question of law on the issue and followed by an in depth argument on the correctness or otherwise of the judgement. I find that the ratio in judgement in issue had been consistently applied over the years and I am of the view that from the standpoint of the parties to this case, it would have been more appropriate had they been put on notice of the issue and the decision in **Upali News Papers** [supra] deliberated fully before arriving at a conclusion.

With all due deference to his Lordship Justice Amarasekara, who had embarked on an analysis of the decision in **Upali News Papers** and had expressed his views of that decision, I take the view that, for the reasons referred to here, it would not be pertinent for me to express my views on the issue.

Having considered the judgement of His Lordship Justice Samayawardhena, I am inclined to agree with his Lordship's conclusion that the appeal should be partially allowed and the Labour Tribunal should be directed to hear the application of the Applicant-Appellant.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I had the opportunity of reading the judgment written by His Lordship Justice Samayawardhena in its draft form. With all due respect to his lordship's views, I expect to express a dissenting view as demonstrated below.

His Lordship in his draft judgment has referred to the Court of Appeal judgment in **Upali Newspapers Ltd v Eksath Kamkaru Samithiya and Others** as well as to the Supreme Court judgment in **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others** which confirmed the said Court of Appeal Judgment, reported in **(1999) 3 Sri LR 205** and **(2001) 1 Sri LR 105** respectively. With all due deference to the views expressed by their Lordships who decided **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others**, I am of the opinion that it was not correctly decided as explained below in this judgment.

In the Court of Appeal case reported in (1999) 3 Sri L R 205, it was held that;

"The combined effect of the provisions of Articles 170, 114, 116 is that the proposition that the Minister has unlimited powers under s. 4 (1) which would enable him to refer a dispute which is pending before Labour Tribunal to an Arbitrator for settlement, is incorrect. A contrary

interpretation would necessarily infringe and violate the principle of independence of the judiciary enshrined in Article 116 of the Constitution which is the paramount law."

In appeal, while confirming the said decision, the Supreme Court as reported in (2001) 1 Sri L R 205 held as follows;

"that the Court of Appeal has not erred in the interpretation of Article 116(1) of the Constitution and that the Minister had no power to refer the dispute regarding the termination of services for compulsory arbitration when applications in respect of the said dispute were pending in the Labour Tribunal."

It appears that such interpretation was reached in the aforesaid case on the premise that such reference for arbitration, while an application made to the Labour Tribunal is pending, interferes with the judicial process of the Labour Tribunal and therefore, is obnoxious to the independence of the Judiciary.

However, in my view, an interference with the judicial process by reference of an industrial dispute for an arbitration by the Minister arises only if following circumstances are established.

a) If the Minister knows that there is a pending application before Labour Tribunal at the time of the reference for arbitration is made; and,
b) The intention of the Minister to refer for compulsory arbitration is none other than to disrupt the proceedings before the Labour Tribunal.

If the intention of the Minister is bona fide and not to disrupt the proceedings before the Labour Tribunal but relates to the best interests of the parties and the community at large as discussed later in this

judgment, it cannot be considered as interference with the judicial process.

Thus, considering the mere reference of disputes for arbitration as causing infringement and a violation of the principle of the independence of the judiciary in the said decision cannot be viewed as correct since such a conclusion cannot be made in general terms but such a conclusion may have to depend on the facts of each case.

The Industrial Dispute Act provides a number of mechanisms to prevent and resolve industrial disputes. Collective agreements, settlement by conciliation and settlement by voluntary arbitration (by reference with the consent of the parties by the Commissioner of Labour), compulsory arbitration and settlement in terms of Section 4 of the Industrial Disputes Act (by reference to arbitration or settlement by the Minister) and filing an application before Labour Tribunal based on alleged unjust termination are among them.

For compulsory arbitration, parties' consent is not necessary. It is necessary to understand why this power is given to the Minister.

It appears that compulsory State intervention in industrial disputes was first introduced to Sri Lanka as a war time measure during the second world war through regulations. Compulsory settlement through a reference to an Industrial Court by an order of the Minister was introduced in a permanent form by section 4 of the Industrial Dispute Act of 1950 as amended by Act no 25 of 1956[1].

The said section read as follows;

[1] See page 185 A General Guide to Sri Lanka Labour Law by S. Egalahewa and Parliamentary Debates (Hansard), Senate Official Report, Volume 4, 1950-1951 June 20, 1950 to March 28,1951 page 228 Speech of Senator, Hon. Mr. Wijeyeratne (Minister of Home Affairs and Rural Development)

"4. *The Minister may, by an order in writing, refer an industrial dispute to an industrial court for settlement if such dispute in an essential industry or if he is satisfied that such dispute is likely to prejudice the maintenance or distribution of supplies or services necessary for the life of the community or if he thinks that it is expedient to do so.*"[2]

Further, acts in furtherance of any lockout or strike after such reference to an Industrial Court had been made punishable[3].

The said section itself indicates that the said compulsory settlement was introduced concerning the interests of the community at large as some disputes may affect the essential services and supplies and services needed for the life of the community at large.

However, with the amendments introduced in 1957, Section 4 of the Industrial Dispute Act now reads as follows;

"*4. (1) The Minister may, if he is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing, for settlement by arbitration to an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding that the parties to such disputes or their representatives do not consent to such reference.*

(2) The Minister may, by an order in writing, refer any Industrial Dispute to an Industrial Court for settlement."

The amendment made in 1957 has made the powers of the Minister to refer disputes for arbitration apparently much wider since the present section 4, unlike the previous one, does not directly refer to dispute in essential industry or dispute that affects the maintenance or distribution of supplies or services necessary for the life of the community. However,

[2] See section 4 of Industrial Dispute Act of 1950 as amended by Act No. 25 of 1956
[3] See section 40 of the same Act

the disputes whether minor or otherwise as contemplated in the present section may necessarily include disputes that relate to supplies and services of essential services and which are necessary for the life of the community.

When compulsory settlement and/or arbitration was introduced in a permanent manner in 1950 or further amended giving wider powers in 1957, number of members of parliament, especially the left-wing members opposed to it on the premise that it was obnoxious to the rights of the working class to stage strikes and it dilutes the bargaining powers of the workers. However, the relevant Minister of Labour who held the office at the relevant time, whether it was in 1950 or 1957, during the relevant debate has indicated that the compulsory arbitration is necessary to serve the interest of the community at large and/or the national interest[4].

In interpreting a statute, a Court cannot presume that the legislature intended to cause harm to the rights of any one or any group of the society such as working class. Thus, it can be understood that this provision for compulsory arbitration was introduced to preserve and balance the interests of the parties involved in the dispute as well as the interests of the community at large. It must also be noted that the compulsion caused by section 4 and the relevant punishments contained in section 40 of the Industrial Dispute Act apply not only to the employee but to the employer as well.

Thus, such powers were given to the Minister not merely to take steps to resolve the dispute between the parties but also to minimize the effect of such disputes on the community at large. An application before the

[4] See the Parliamentary Debates (Hansards), House of Representatives 1950-51 Vol 8, 20.06.1950to 18.08 1950, and Parliamentary Debates (House of Representatives) 1957-58 Vol 30 Sept,3 to Dec, 20, 1957 Part 1. Also see Á General Guide to Sri Lanka Labour Law by S. Egalahewa pages 203 and 204

Labour Tribunal may resolve a dispute between an employer and employee whose employment has been terminated but such process may not address the effect of such dispute that may have been caused on the community at large which requires immediate attention and speedy solutions.

Certain industrial disputes may cause hardship to community at large. For example, if an employer terminates employment of a trade union leader, on an application made to Labour Tribunal, the Labour Tribunal may decide whether the termination is justified or not, and may provide relief on just and equitable grounds. However, such a dispute may trigger a strike action not only within the relevant institution that the trade union leader was employed, but also in other institutions where the same trade union or supporting trade unions have branches. Such a situation may develop to a situation that disrupts the economy and essential needs of the community at large and it may affect the interests of the investors including foreign investors compelling them to withdraw from their investments. The effect of such strike or chain of strikes may harm the interests of community at large. Similarly, even employers can stage lockouts to suppress upcoming trade union activities causing hardships to many employees and their families and even to the community at large. On the other hand, if the interpretation given in the aforesaid case **Eksath Kamkaru Samithiya v Upali News Papers Ltd** is considered as correct, an employer or a trade union with ulterior motives needs only a little bit of pre-planning to impede the minister using his powers for compulsory arbitration. An employer who wants to suppress trade union activities can stage a lockout while getting one of his stooges get involved, thereafter sack him along with few others and getting him to file an application before the Labour Tribunal. Similarly, a trade union with other political motives can stage a chain of strikes to disrupt the economy just after filing an application in the Labour Tribunal. Thus, in my view,

whether the reference for compulsory arbitration is an interference with the independence of the Judiciary or to safeguard the interests of the community at large has to be evaluated depending on the facts pertaining to each occasion.

In my view, the power given to the Minister to refer disputes for compulsory arbitration is interrelated to the needs of life of the community at large. However, I do not intend to say that the Minister has unlimited or absolute power in this regard. If the Minister uses his power arbitrarily, irrationally or illegally, other remedial measures such as writs may be available. However, in the backdrop explained above, in my view, it is illogical to think that such power is vested with the Minister only to use prior to the filing of an application before the Labour Tribunal.

Therefore, it is my view that mere reference for Arbitration by the Minister cannot be considered as an interference with the judicial process, even if there is any application already filed by an employee before Labour Tribunal prior to the reference for compulsory arbitration.

The Section 31B(2)(b) of the Industrial Disputes Acts reads as follows;

"A labour tribunal shall where it is so satisfied that such matter constitutes, or forms part of, an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator, or for settlement to an industrial court, make order dismissing the application without prejudice to the rights of the parties in the industrial dispute".

The plain reading of the said Section does not indicate that the reference by the Minister for compulsory arbitration has to be made prior to the filing of an application before the Labour Tribunal. Even the section 4 of the Industrial Dispute Act quoted above does not limit the power of the Minister to disputes that are not pending before Labour Tribunals.

In the book **Maxwell on The Interpretation of Statutes** (11th Edition) [1962] page 2 states;

"If the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature"

In **N.S. Bindra's Interpretation of Statutes** (12th Edition) [2017] page 317 states that;

"If the words of the section are plain and unambiguous, then there is no question of interpretation or construction. The duty of the court then is to implement those provisions with no hesitation".

To give such an interpretation to say that, to dismiss an application, the reference for arbitration has to be done prior to the filing of the application before the Labour Tribunal, one has to add such words giving that meaning to at least to one of the aforesaid sections in the Industrial Dispute Act.

Therefore, it is my view that it is not correct to view that such power is given to the Minister only to use prior to the filing of an application before the Labour Tribunal.

Outcome of the decisions made by Court of Appeal and the Supreme Court in **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others** indicates that due to Articles 114 and 116 of the Constitution, the section 4(1) has to be interpreted to mean that such reference of the dispute for compulsory arbitration can validly be done only when there is no application pending before the Labour Tribunal. As explained before, unless the Minister refers the dispute for arbitration with an intention of disrupting the proceedings before the Labour Tribunal, it is

difficult to say that it is an interference by the Minister as contemplated by then Article 116 (now Article 111C). The Minister even may not be aware of any pending application before the Labour Tribunal when he decides to refer a dispute for compulsory arbitration. With the reference for Arbitration, it is the law of the country contained in section 31B(2)(b) that requires the application before the Labour Tribunal be dismissed. When the factual position whether there is an interference with the judicial process or not depends on the circumstances of each case as explained above, I do not think relevant sections in the Industrial Dispute Act should be read with necessary adjustments as contemplated by Article 168(1) of the Constitution.

Thus, in my view, conclusion reached in the decision of **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others** that a reference for compulsory arbitration by the Minister in terms of section 4(1) of the Industrial Dispute Act while an application to a Labour Tribunal is pending, is bad in law is not correct unless there are specific facts revealing that such reference was intended to disrupt the proceedings before the Labour Tribunal.

It appears that the only point raised in appeal in the said **Eksath Kamkaru Samithiya Case** was whether the Minister has the power to refer to an industrial dispute for arbitration in terms of said section 4(1) when there is an application pending in the Labour Tribunal. As such, any view expressed stating that section 31B(2)(b) would apply only to an application made to Labour Tribunal subsequent to a reference made by the Minister to an Arbitrator or to an Industrial Court for settlement has to be considered as obiter. The refusal of the request made to revive the dismissals made in the Labour Tribunal in the said **Eksath Kamkaru Samithiya case** further strengthens the fact that the matter that was under consideration in the said case was not the application of section

31B(2)(b) but the validity of the reference for arbitration by the Minister. The Appellant has also referred to the decision in **W.K.P.I Rodrigo Vs Central Engineering Consultancy Bureau SC Appeal No. 228/2017 SC Minutes 02.10.2020.** However, the contents of the decision show that, even though there is reference made to section 31B(2)(b) in the said judgment, the issue in that case also was not related to the application of section 31B(2)(b) but to section 31B (5). Thus, what is stated there referring to section 31B(2)(b), without analyzing section 31B(2)(b) and its application as a matter in issue, also has to be considered as obiter.

The plain reading of the Section 31B(2)(b) indicates that the said section does not contemplate the time at which the relevant application is filed in the office/secretariat of the Labour Tribunal. It contemplates the time the Labour Tribunal take cognizance of the application. In other words, the time at which the President of the Labour Tribunal considers the application. If the President of the Labour Tribunal finds that there is a pending arbitration as per section 4 of the Industrial Dispute Act, the President of the Labour Tribunal has to dismiss the application.

One may argue that the learned High Court Judge as well as the President of the Labour Tribunal were bound to follow the decision of **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others.** It appears from the decision of the learned High Cort Judge that the Learned High Court Judge distinguished the decision in **Eksath Kamkaru Samithiya** stating that the matter in issue in that case was whether the Minister had the power to refer an industrial dispute for arbitration in terms of section 4(1) of the Industrial Dispute Act when there were applications pending in the Labour Tribunal. In other words, the learned High Court Judge identified the matter in issue in the **Eksath Kamkaru Samithiya case** was whether the reference for arbitration by the Minister was valid and not as one relating to the application of section

31B(2)(b). It must be noted that the Counsel for the Appellant in the written submissions dated 20.12.2022 indirectly invites this court to reconsider the correctness of said decision in **Eksath Kamkaru Samithiya** case – vide para 16 – 21. The Counsel for the Respondents also in his written submissions dated 09.06.2022 submits that the views expressed in the said case in relation to section 31B(2)(b) of the Industrial Dispute Act was merely obiter- vide item 4, under the topic Stare Decisis- Section 31B(2)(b) of the Industrial Dispute Act.

However, when the decision of the High Court is challenged in appeal and taken up before this court, this court is not bound to follow the said decision in **Eksath Kamkaru Samithiya** case, if it is not correctly decided and this court has to apply the law as it sees as correct law. In my view, as per the law, dismissal of the application by the learned President of the Labour Tribunal and its confirmation by the Learned High Court is correct as I do not see the said decision in **Eksath Kamkaru Samithiya** case as correct in law and what is relevant is whether the dispute had been referred for arbitration or settlement by industrial court by the Minister when the application was considered by the President of the Labour Tribunal.

His Lordship Justice Samayawardhena has correctly pointed out that section 31B(3)(a) has no relevance to the facts of this case. It applies only for instances where similar or identical dispute exists where the same employer is a party but not to instances where another inquiry is pending on a similar or identical dispute between same parties. If it is interpreted to say that it applies even where another inquiry is pending on a similar or identical dispute between same parties, namely same employer and employee, section 31B(2)(b) may become redundant. Section 31B(3)(b) also has no relevance to the circumstances of this case as that section contemplates proceedings or inquiries pending in terms of any other law.

Compulsory arbitrations are done under the provisions of the same Industrial Dispute Act. My brother judge, honourable Justice Samayawardhena has referred to section 31B (5) in his draft Judgement. In my view, first part of section 31B (5) applies where the dispute has been referred to and concluded by the Labour Tribunal. On such instances, the workman is not entitled to any other remedy. In fact, if the dispute has been attended and concluded by the Labour Tribunal, there cannot be an existing dispute to ask for any other remedy other than an appeal over the decision of the Labour Tribunal. Second part of section 31B (5) refers to instances where the workman has resorted to a different legal remedy other than filing of an application before the Labour Tribunal in terms of section 31B (1). Filing of an action in the District Court may fall within that part but as reference for compulsory arbitration can be done without the consent of the parties, I doubt whether such remedy can be considered as one resorted by the workman. In any case, if the dispute has been referred for compulsory arbitration, application before the Labour Tribunal on the same dispute has to be dismissed in terms of section 31B(2)(b). Anyway, I do not see any relevance of section 31B (5) to the circumstances of this case.

Even though, section 31B(2)(a) of the Industrial Dispute Act has no relevance to the present case before us, as it contemplates concurrent discussions between the employer and the trade union of which the applicant to Labour Tribunal is a member, it is pertinent to note that if the thinking behind the decision of **Eksath Kamkaru Samithiya case** referred above applies to this section, one can argue that such discussions interfere with the judicial process and such suspension of proceedings as contemplated in that section is not warranted. In my view, irrespective of the pending case before the Labour Tribunal, law provides for discussions with the employer through the trade union which has a better bargaining power since solution based on settlement is more

effective than one reached through litigation as far as industrial peace and harmony is concerned.

It appears that the Respondent has taken preliminary objections before Labour Tribunal as well as before the Arbitrator. In my view, it should not be taken as an attempt to nonsuit a party at this moment. A vigilant lawyer may take up such objections in both forums since if he raises his objection only before one forum and fails, his client may have to face two inquiries based on the same dispute before two forums. On the other hand, if the objection before the Arbitrator is that two separate proceedings cannot be maintained on the same issue, it cannot be proceeded with if the Labour Tribunal dismisses the application on the objection raised.

On the other hand, whether the objection before the arbitrator is to nonsuit the appellant or whether it is the correct legal position taken up as a preliminary objection has to be decided when the order relevant to that objection is made and challenged and not in an appeal based on a decision made by a different forum.

Thus, in my view the questions of law have to be answered in the following manner.

Q. Has the High Court misdirected itself in Law in failing to consider that the petitioner's application before the Labour Tribunal was filed on 11.12.2017 prior to the reference to arbitration by the Minister of Labour which was made on 28.12.2017 under section4(1) of the Industrial Dispute Act, No.43 of 1950 (as amended)?

A. Since I view that **Eksath Kamkaru Samithiya** Case was not correctly decided, I answer this in the Negative as what is relevant is whether there is a pending arbitration in terms of section 4 of the Industrial Dispute Act when the application is being considered by the Labour Tribunal.

Q. Has the High Court misdirected itself in Law in construing sections 31B(2)(b) and 31B(3)(a) of the Industrial Dispute Act No. 43 of 1950 (as amended) having regard to the reference to Arbitration being made after the application to the Labour Tribunal?

A. No

Q. Has the High Court misdirected itself in law failing to apply and/or failing to follow the Judgment of the Court of Appeal in **Eksath Kamkaru Samithiya v Upali Newspapers Ltd and Others (1999) 3 Sri LR 205** affirmed by the Supreme Court in **(2001) 1 Sri L R 105** where it was held that section 31B(3) (a) of the Industrial Dispute Act No.43 of 1950 (as amended) applies where the reference to arbitration by Minister is made subsequent to the application filed before the Labour Tribunal which is what transpired in this instance?

A. The said judgments do not relate to section 31B(3)(a). Even if reference to section 31B(3)(a) is a typographical error and it has to be considered as section 31B(2)(b), the learned High Court Judge has distinguished the issue that was in question in the said **Eksath Kamkaru Samithiya** case from the case at hand. It appears that the position of the Learned High Court judge was that the said case was to challenge the validity of the Reference of the dispute in that matter for Arbitration, and since there is no writ issued in this matter the Labour Tribunal's decision to dismiss the present application before the Labour Tribunal is correct.

Q. Has the High Court erred in law in determining that section 31B(3)(a) of the Industrial Dispute Act No.43 of 1950(as amended) does not apply to the application of the petitioner and failing to hold that the proceedings before the Labour Tribunal must be suspended until the conclusion of the arbitration proceedings and resumed before the Labour Tribunal thereafter?

A. No. However, it could have been prudent to suspend the proceeding in relation to the gratuity but not the application in toto, as the result of the Arbitration proceedings may have a bearing on the terminal benefits.

For the reasons stated above this appeal is dismissed. No Costs.

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal from the Judgement pronounced on 08.05.2013 by the High Court of the North Central Province holden in Anuradhapura in High Court Appeal No. 44/201 under Section 9(a) of the High Court of Provinces (Special Provisions) Act, No. 19 of 1990 read with Article 154P of the Constitution and the Supreme Court Rules of 1990.

SC Appeal No. 74/2014

HC MCA 44/2011

MC Kebithigollawa Case No. 67675

W.G.S.L. Wasala,

Public Health Officer,

Mahasenpura.

Complainant

Vs.

Coca-Cola Beverages Sri Lanka Ltd.

Tekkawatta,

Biyagama.

Accused

And then between

Coca-Cola Beverages Sri Lanka Ltd.

Tekkawatta,

Biyagama.

Accused-Appellant

Vs.

1. W.G.S.L. Wasala,

Public Health Officer,

Mahasenpura

Complainant-Respondent

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

And now between

Coca-Cola Beverages Sri Lanka Ltd.

Tekkawatta,

Biyagama.

Accused-Appellant-Appellant

1. W.G.S.L. Wasala,

Public Health Officer,

Mahasenpura

Complainant-Respondent-Respondent

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent-Respondent

BEFORE: Buwaneka Aluwihare P.C, J

Kumudini Wickramasinghe, J

Janak De Silva, J

COUNSEL: Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremasinghe for the Accused-Appellant-Appellant.

Madhawa Tennakoon, DSG with Ganga Wakishta Arachchi, SSC for the Respondent-Respondent.

ARGUED ON: 12.07.2021.

WRITTEN SUBMISSIONS: Accused-Appellant-Appellant on 08.07.2014.

Respondent-Respondent on 18.01.2021.

DECIDED ON: 09.11.2023

Judgement

Aluwihare, PC, J,

1. The Public Health officer, Mahasenpura (Complainant-Respondent-Respondent) on 23rd October 2010, took into custody a bottle of Ginger Beer of 'Lion' brand which was offered for sale at "Aluthkade Welandasela" in Nikawewa. As the bottle of Ginger Beer concerned did not contain a label declaring the batch number, the date of expiry and the date of manufacture, the Public Health Officer (hereinafter referred to as the

'Respondent') instituted criminal proceedings before the Magistrate's court (Kebithigollawa) against the Manufacturer of the bottle, Coca Cola Beverages Sri Lanka Ltd. (the Accused-Appellant-Appellant) for having manufactured or distributed the bottle in in violation of Section 18(1)(c) read with section 2(1) of the Food Act, No. 26 of 1980 as amended and Regulation 04(2) (e), (f) and (d) of the Food (Labelling and Advertising) Regulations published in the Gazette Extraordinary No. 1376/9 of 19th January 2005. The said paragraphs of the Regulation require the label to carry; (e) the date of expiry, (f) date of manufacture and (d) batch number respectively. At the conclusion of the trial, the learned Magistrate convicted Coca Cola Beverages Sri Lanka Ltd. (hereinafter referred to as the Appellant) on all charges.

2. Aggrieved by the said judgement, the Appellant appealed against the conviction to the Provincial High Court of the North Central Province and the learned High Court Judge by his judgement dated 08/05/2013 affirmed the findings of the learned Magistrate of Kebithigollawa and upheld the conviction. The present appeal is from the said judgement of the High Court.

3. This Court granted Special Leave to Appeal on the questions of law referred to in sub-paragraphs in (viii) and (x) of the petition of the Petitioner dated 19.06.2013. The said questions are reproduced below:

1) Are manufacturing and distribution not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005?

2) In any event were the charges levelled against the Accused ambiguous & defective as a result of including two distinct and separate acts i.e. 'manufacturing or 'distribution' in one and the same charges in violation of provisions under Chapter XVI of the Code of Criminal Procedure Act, No.15 of 1979 read with those of Food Act, No.26 of 1980 as amended & Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No.1376/9 of 19th January 2005?

4. The facts of the case presented before the Magistrate's Court were that the Complainant officer detected a bottle of 'Ginger Beer' on which the date of manufacture, the date of expiry and the batch number were not clear, ["පැහැදිලිව නොමැති නිසා එය අත්අඩංගුවට ගැනීම සිදුකලා" *vide* pg.19 of the MC proceedings]. The second witness who testified on behalf of the prosecution, one Buddhika Lakmal, stated that those details were vaguely visible on the bottle ["ඒන නොපෙනෙන ගානට තිබුනේ", *vide* pg. 24 of the MC proceedings]. The fact that only one such bottle was detected is relevant. I will now address the first question of Law.

Are manufacturing and distribution not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005?

5. The Respondent's position, as contended by the learned DSG was that the Appellant committed an offence by manufacturing the Ginger Beer bottle without having a batch number, the date of manufacture and the date of expiry printed on the label of the bottle. The main contention of the learned President's Counsel for the Appellant on the other hand was that the Appellant cannot be held liable for a violation of Regulation 02 of the Regulations made under the Food Act, promulgated in the Gazette bearing number 1376/9 of 19th January 2005, as the said Regulation 02 does not contemplate the manufacturer's liability in respect of what may happen to a product at the hands of a retailer or a third party.

6. While Regulation 02 defines the parameters and purview of the Food (Labelling and Advertising) Regulations 2005, the rest of the Regulations describe details and specific obligations relating to labelling and advertising. It was the contention of the learned President's Counsel that the liability under Regulation 02 of the said Regulations rests on any person who "sells, offers for sale, exposes, or keeps for sale, transports or advertises for sale any food contained in a package" and the said Regulation has no application to distributors and manufacturers and therefore, the

appellant, who was the manufacturer of the bottle of 'Lion' Ginger Beer cannot be held liable.

7. The learned DSG for the Respondents submitted, however, that as per the evidence adduced before Court, labelling is done at the time of manufacture itself by the Appellant, and labelling is therefore an integral part of the manufacturing process. He submitted further that it is the same person who manufactures the product who is responsible for the proper labelling of the product, in terms of Section 2 of the Food Act, therefore, the manufacturer is also liable for any contravention of the Food (Labelling and Advertising) Regulations 2005. Accordingly, it was the position of the learned DSG that the Appellant, being the manufacturer of [bottle of] Ginger Beer becomes liable for non-compliance with Regulation 02 of the aforementioned Regulations and as such, the findings, both of the learned Magistrate and the learned High Court Judge are correct and must be upheld.

8. When considering the arguments placed before the Court, both by the Appellants and the Respondents, it would be necessary to consider both the statutory provisions of the Food Act and the liability imposed upon parties by the Regulations made thereunder.

9. Section 02 of the Food Act spells out the liability in general of various stakeholders who are involved in distinct/different processes, commencing from the point of manufacture to the retailer. It is to be noted, however, that Section 02 is not a penal provision but stipulates a series of conducts that are prohibited. The Regulations, however, not only refer to specific violations, but also spell out penal sanctions that would follow in the event of any breach of the same. In this context, it would be relevant to consider the intention of the legislature in enacting the statutory provisions referred to above and the regulations made thereunder.

10. Section 2(1) of the Food Act, No. 26 of 1980 as amended states:

"No person shall manufacture, import, sell, expose for sale, store or distribute any food –

(a) that has upon it any natural or added deleterious substance which renders it injurious to health;

(b) that is unfit for human consumption;

(c) that consists in whole or in part of any unclean, putrid, repugnant, decayed, decomposed or diseased animal substance or decayed vegetable substance or is insect infected;

(d) that is adulterated;

(e) that has in or upon it any added substance in contravention of the provisions of this Act or any regulation made thereunder; or

(f) in contravention of the provisions of this Act or any regulation made thereunder."

11. As referred to earlier, Section 02(1) lays down certain prohibitions and broadly spells out the mischief the legislature intended to prevent. The legislature, taking cognizance of the fact that various stakeholders are involved across the food chain, that is, production, trade and handling of food, has legislated statutory provisions as well as subordinate legislation to ensure 'food safety' and 'food quality' from the perspective of the public, within the sphere of the industry.

12. Upon further observation, I note that the provisions of the Act and the Regulations identify specific violations in relation to various sectors in the food industry i.e production, trade and handling of food, and therefore, when deciding on whom the liability lies in the present instance, in the context of the compliance imposed, one must necessarily refer to the provisions of the Act and/or the Regulations as the case may be, and identify on whom the liability is imposed and whether it has not been complied with.

13. In the course of the argument, the learned DSG contended that the Appellant is liable under Section 2(1)(f) of the Act, as in terms of the said provision, manufacturing, exposition for sale, storing or distribution of any food in contravention of the provisions of the Act, or any regulation made thereunder is prohibited. When one analyses Section 2 of the food Act [referred to in paragraph 10 above] it is clear from the words used; "No person shall manufacture, import, sell, expose for sale. Store or distribute any food…….in contravention of the provisions of this Act or any regulation made thereunder", that the offences do not impose strict liability, but the liability is pinned on the 'person' who is responsible for the violation alleged. The reason is a rational one. In the 'food chain', different stakeholders in the industry handle 'food' at various points [in the chain] and once a particular stakeholder [in the chain] loses control of that 'food', there is no justification to hold that stakeholder liable for every non-compliance that takes place after that particular stakeholder had lost control of the 'food', unless it can be established that the violation had taken place in the hands of that particular stakeholder.

14. Scrutiny of the legal regime relating to regulation of the food industry makes it clear that the legislature had been alive to this fact and had made clear provisions to ensure that the liability is imposed based on whose responsibility it is to comply with law at a given point. Thus, it is *sine qua non* to consider the statutory provisions and regulations from this perspective to identify who is responsible for compliance.

15. Case to the point is Regulation (4) of the very Regulations under which the Appellant had been charged, which reads, thus; *"no person shall sell, offer for sale, expose or keep for sale any food, transport for sale* ***after the date of expiry thereof****".* The compliance in relation to this Regulation is required from the 'seller'. What the regulation prohibits are the 'acts in connection with sale of food' beyond its shelf life. It would be beyond any stretch of imagination to argue that by virtue of Section

2 of the Food Act, the manufacturer is also liable if the retailer sells an item of food after its expiry date.

16. Regulation 2 of the said Regulations under which the Appellant is charged carry the identical words; *"no person shall sell, offer for sale, expose or keep for sale any food, transport or advertise for sale, any food contained in a package or container, unless such package or container is labelled in accordance with the regulations.*

17. The learned President's Counsel for the Appellant argued that it is clear from the above Regulation that the actors who are responsible for the obligations regarding labelling are persons who "sell, offer for sale, expose or keep for sale, transport or advertise for sale, any food contained in a package or container", that this does not include manufacturers within its scope and therefore, there is no liability on the manufacturer in relation to any of the obligations that are laid down in the said Regulation.

18. The essential element for any prosecution in respect of non-compliance is the availability of evidence establishing liability. When the Food Act and its regulations are examined, it becomes apparent that the drafters of this legislation were conscious of the fact that the industry which was sought to be regulated involved multiple processes, multiple actors, and multiple concerns. The legislation has been meticulously drafted to reflect industrial realities. This is evident in the scheme of the Act. For example, Section 02(1) states that "No person shall manufacture, import, sell, expose for sale, store or distribute any food…" followed by subsection (f) which states "in contravention of the provisions of this Act or any regulation made thereunder" so as to indicate that the manufacture, importation, sale, exposure for sale, storage or distribution of any product in violation of the Regulations promulgated under the Act would constitute an offence.

19. It was also brought to the attention of the Court by the learned President's Counsel for the Appellant that the Act empowers the Minister in charge of the subject to

make Regulations in respect of matters governed by the Act [vide Section 32(1)] and such Regulations have been enacted from time to time. Of those Regulations, 'manufacturing and distribution' have been specifically addressed by other Regulations such as Regulation No. FR 1405/3 published in the Gazette Extraordinary 1405/3 dated 31.12.2005, Regulation No. FR 1420/4 published in the Gazette Extraordinary 1420/4 dated 21.05.2006. This observation is in my view, crucial to this appeal for if the legislature intended liability to be imposed on the manufacturer for matters which may affect the product beyond the scope of control of the manufacturer too, the legislature would have expressed such intention in the Regulations which seem to spare no detail. Charging the manufacturer in relation to a matter which could have occurred at the hands of the retailer or other actor would therefore be futile as it does not serve to enforce the Act or the Regulations. I am reminded of the astute observations of Justice Sharvananda (as he was then) in ***Nandasena v. Senanayake and Another*** **[1981] 1 SLR 238** at p. 245.

"Statutes should be construed, as far as possible, to avoid absurdity or futility. *A statute should be construed in a manner* ***to give it validity rather than invalidity - ut resmagis valeatquam pereat [so that the matter may flourish rather than perish]***".
(parenthesis and emphasis added)

20. No doubt, food labelling is an effective tool to protect consumer health in terms of food safety and nutrition. Food labels convey information about the product's identity and contents, and on how to handle, prepare and consume it safely. This is a universally accepted thesis. For example, the Food and Agriculture Organisation of the UN, states that "the *empowerment* of consumers is necessary through improved and evidence-based health and nutrition information and education to make informed choices regarding consumption of food products for healthy dietary practices". This can be achieved by ensuring the 'information' is made available to the consumer at the time the consumer makes the decision with regard to the purchase, thus the responsibility cast on the seller to ensure that the information is made available at the point of sale.

21. Other than the rationale referred to above, there can be numerous reasons as to why it would be practically possible to make the manufacturer liable in relation to the Regulation in issue. The main reason I see is that, once the product leaves the manufacturer, it loses control of the product and if the product gets deformed due to mishandling of the same by third parties, one cannot hold the manufacture liable. Another would be in instances where the packaging is done by a totally an independent actor over which the manufacture may not have control. This may be true in instances where food is imported in bulk and packaging is done locally. It is for that reason I referred to the fact that the words in section 2 of the Food Act are of vital importance, the liability is on the person who contravenes the Act or the regulation. Whether a person had contravened the provisions can only be decided on evidence and not on surmise.

22. Prior dicta do not offer any discernable guidance regarding the charging of parties within the scheme of the Act. Therefore, I find it prudent to examine the practices of jurisdictions beyond our seas in this respect. In the United States of America, the Federal Food, Drug and Cosmetic Act governs the safety of food products exposed to consumers. The said Act includes a laudable scheme whereby the Secretary of Health and Human Services (Secretary) has the option of giving the alleged violator notice of intention to prosecute and the opportunity to respond orally or in writing before reporting a violation of the Act to a United States attorney for prosecution. This proceeding is commonly known as a "Section 305 hearing" and the opportunity for such hearings is normally made available to targets of prosecution. While our legislation does not imbue a scheme for prior hearing, one aspect that may offer guidance is the criterion adopted to evaluate whether the FDA (the authority) is possessed with the facts and circumstances which warrant the institution of criminal proceedings. These factors were stated by one by Eugene Pfeifer, then Associate Chief Counsel for Enforcement at the FDA, in his article, “Section 305 Hearings and Criminal Prosecutions”, 31 CCH Food Drug Cosmetic Law Journal (1976) 376 at pg. 371-381. In India, I have observed that in addition General Guidelines issued to Food Safety Inspection Officers by the Food Safety and Standards

Authority of India, direction is also given in the form of 'Inspection Matrices' and Checklists which help the Inspection Officers to ascertain whether the elements listed below were evident in the product. Many of the same elements also exist in the 'Compliance and Enforcement Policy' of the Canadian Food Inspection Agency, which is responsible for the enforcement of the Food and Drugs Act of Canada. In my view, these elements must also be considered by Public Health officers prior to the initiation of criminal proceedings under our Food Act:

a) Whether there has been a deliberate or intentional violation of the law.
b) Whether there has been a failure to exercise due diligence. For example, if any product contains any foreign substance, even if it is an isolated incident, then that fact would be relevant and persuasive in the institution of prosecution.
c) Whether alleged violations have exposed the public to some danger.
d) Whether the violation was obvious to a person knowledgeable about the industry.
e) Whether the violation has been a recurrent problem that the alleged suspect has failed to deal with over a period of time.
f) Whether the violation results from the commission or omission of an act which could have been prevented, detected, or corrected. The absence of a quality control system which could have prevented the problem would be relevant and persuasive in the institution of prosecution.
g) Any violation which resulted or may have resulted in significant economic damage to the public.

23. I must stress that these factors are not exhaustive. I also do not suggest that these factors should inhibit or restrain the Public Health officers from initiating prosecution against an accused when the available evidence establishes a nexus between the offence and the members of the body-corporate committing such offence. However, one must employ a general understanding of Corporate Liability when understanding the objectives of the Act. We are not entitled to treat the law as being an entity immune from sense. Particularly, we must bear in mind that when examining the regularization of an industry such as the Food Industry, the Manufacturer, once he has created the product loses control over the product

created in degrees as the product is distributed, offered to retailers and then exposed for sale by shop owners.

24. For the reasoning referred to above, I hold that the Regulation under which the Appellant was charged is not applicable to the manufacture and therefore no liability can be imposed on the Appellant.

25. Accordingly, I set aside the conviction and sentence imposed on the Appellant and Appellant is acquitted. In view of the finding made above, I do not think it would be necessary to address the second question of law on which special leave was granted.

26. I now advert to a matter relating to this appeal which, in my opinion, warrants the attention of the Court. The Court is mindful that the subject of Food Legislation concerns consumer protection and public health. It is a serious issue which affects the public at large and as I pen this judgment, I am much concerned by the fact thought that if the system were to weaken or be undermined by lack of resources, the entire citizenry would suffer. While I commend the efforts and yeoman services provided by the Public Health Officers, I also think that it is important to note that effective enforcement and prosecution of offences under the Food Act and its Regulations is dependent on Public Health Officers possessing the requisite knowledge of the legal landscape for the purpose attributing liability and regulating the industry within the confines of the law.

27. In the circumstances, it is my view that the relevant authorities and agencies, must endeavour to provide such assistance, and should consider the possibility of engaging in capacity-building, aimed towards providing legal training for Public Health Officers, for the effective implementation of the Act and its Regulations.

Conclusion

In view of the observations made above, I answer the question of law of this appeal in the following manner.

1. Are manufacturing and distribution not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005?

   Yes, manufacturing and distribution are not covered by the Food (Labelling and Advertising) Regulations 2005 published in Gazette Extraordinary No. 1376/9 of 19th January 2005.

The conviction set aside and the Appeal allowed.

JUDGE OF THE SUPREME COURT

Kumudini Wickramasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application to the Supreme Court for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006

SC/Appeal 150/2016

SC/HCCA/LA/171/16

CP/HCC/KAN/37/2013(FA)

DMS 11288 (DC Kandy)

D.J.M.G. Kusumawathie,

Rajasinghapura,

Dodanwella

Plaintiff

Vs.

H.M. Tikiri Banda Herath,

No. 53.,

Dehideniya,

Peradeniya

Defendant

AND THEN BETWEEN

H.M. Tikiri Banda Herath,

No. 53.,

Dehideniya,

Peradeniya

Defendant – Appellant

Vs.

D.J.M.G. Kusumawathie,
Rajasinghapura,
Dodanwella
Plaintiff - Respondent

AND NOW BETWEEN
H.M. Tikiri Banda Herath,
No. 53.,
Dehideniya,
Peradeniya
Defendant – Appellant – Appellant

Vs.

D.J.M.G. Kusumawathie,
Rajasinghapura,
Dodanwella
NEW ADDRESS
94B,
Godamuduna
Dodanwela
Murutalawa
Plaintiff – Respondent – Respondent

BEFORE: B.P. Aluwihare, P.C., J
Vijith K. Malalgoda, P.C., J
Murdu N.B. Fernando, P.C., J

COUNSEL:	Harith de Mel with Dulani Peiris and Lakindu Wijesundara instructed by Jayamuditha Jayasooriya for the Defendant-Appellant-Appellant. Charitha N. Jayawickrema instructed by Poornima Gunasekara for the Plaintiff-Respondent-Respondent.
ARGUED ON:	23.06.2020 and 06.07.2020.
WRITTEN SUBMISSIONS:	Written Submissions of the Defendant-Appellant-Petitioner on 28.02.2017 Written Submissions of the Plaintiff-Respondent-Respondent on 25.09.2016
DECIDED ON:	10.11.2023.

Judgement

Aluwihare, P.C., J

The Defendant-Appellant-Petitioner-Appellant (hereinafter the Defendant) sought Leave to Appeal against the Judgement of the Civil Appellate High Court of Kandy, which upheld the Judgment of the District Court of Kandy.

The Plaintiff-Respondent-Respondent (hereinafter the Plaintiff) filed action in the District Court of Kandy under Chapter LIII of the Civil Procedure Code to recover a liquidated sum of Rs. 184, 000 /- on a promissory note together with a further sum of Rs. 36, 800 /- and legal interest until the due execution of the decree. Summons were issued to the Defendant and the Defendant applied to court by way of a petition and affidavit for leave to appear and defend the action. The District Court allowed the Defendant to file an answer upon furnishing security and the Defendant sought to dismiss the action.

The Defendant by way of his answer admitted that the money-transaction took place but denied placing the signature on the Promissory Note and Deed No. 958 and

contended that the signatures are forgeries. Defendant sought by way of a prayer to the Answer an order that the impugned promissory note be forwarded to the Examiner of Questioned Documents (hereinafter the EQD) for examination and a report to be tendered to Court. The contention of the Plaintiff on the other hand was that the Defendant placed his signature on the Promissory Note as well as the Deed No. 958 on the same day. The Deed was for an unrelated transaction and Hapugaskuburegedara Samel was a witness for both transactions.

To issue a Commission on the EQD sample signatures were tendered before the Registrar of the Court by the Defendant on 15.09.2006 but the EQD by a letter dated 27.11.2006 informed the Learned District Judge that the sample signatures were dissimilar from the document in question and requested the signatures of the Defendant in the ordinary course of affairs. Thereafter the Defendant provided the sample signatures along with amended draft Commission papers by way of a Motion dated 29.05.2007. The application was allowed by the Learned District Judge. Subsequently, it was reported that Deed No. 958 had been misplaced which was kept at the Registry for safekeeping and the Commission on the EQD was also not forthcoming. Eventually the document was found in the custody of the Registry. It seems owing to the administrative lapses and the Defendant's conduct a conclusive Commission of the EQD was unavailable.

On 27.08.2012 as the Defendant was absent and unrepresented, the case was fixed for ex-parte trial against the Defendant and the Plaintiff closed his case on that day. The Defendant's contention is that he was unable to retain representation as Attorneys- at- Law in his locality that he approached, refused to take up the matter due to the concerns of a fraudulent Deed executed by a member of the legal fraternity. The Learned District Judge, after considering the evidence, entered judgement in favour of the Plaintiff. The Learned District Judge, came to this conclusion mainly based on the evidence provided by the witness Samel and based on Deed No.958, which was a duly registered instrument in the Land Registry, hence held that the Promissory Note was genuine and was duly presented for payment (vide p. 166 to 168 of the Brief).

The Defendant being aggrieved by the said Judgement preferred an Appeal to the Provincial High Court of Kandy. The Learned Judges of the High Court upheld the judgement of the District Court by judgment dated 02.03.2016.

Consequently, the Defendant filed a Leave to Appeal application to this Court and the Court granted leave on 26.07.2016 for the following questions of law set out in sub-paragraphs (b) and (c) of paragraph 18 of the Petition of the Defendant;

(1) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has satisfactorily proved that a notice of dishonour has been given in respect of an action based on a Promissory note?

(2) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has complied with the mandatory requirements of the Bills of Exchange Ordinance to succeed in enforcing a Promissory note?

Before considering the merits of the Defendant's case I will consider the preliminary objection raised by the Plaintiff. The Plaintiff contends that the Defendant was not entitled to prefer this appeal to this Court as the Defendant had not moved to have the ex-parte judgement of the District Court set aside in terms of Section 84 of the Civil Procedure Code and that in terms of Section 88(1) no appeal lies against any judgement entered upon default .

It was argued that as per Section 88(1) of the Civil Procedure Code an ex-parte judgement is not appealable and the party in default must apply against the judgement in the same Court for an order setting aside judgment. As held by His Lordship Justice Samayawardhena in *Geethika Sudhirani Samaraweera v Uduruwangala Gedarage Charaka* SC/APPEAL/78/2021 (S.C Minutes 21.11.2022) at p. 6;

"In terms of section 88(1) 'No appeal shall lie against any judgment entered upon default.' This means a final appeal cannot be filed from an ex parte judgment entered against a defendant for failure to file answer or for want of appearance of the defendant on the trial date. A final appeal also cannot be filed from a judgment entered against a plaintiff for want of appearance on the trial date. In such a situation, if the defaulter is the defendant an application under section 86(2) or if the defaulter is the plaintiff an application under section 87(3) shall first be made to purge the default before contesting the case of the opposite party on the merits."

However, as stated earlier, the Plaintiff for reasons best known for her never took up this objection when the matter was argued before the High Court of Civil Appeals and chose to participate in the proceedings before it.

This Court is now called upon to consider the impugned judgement of the High Court of Civil Appeals which was an *inter-parte* proceeding. When this matter was supported for leave to proceed, neither the preliminary objection taken at the outset nor did the Defendant- Respondent raise a question of law on this point when the matter was supported.

In my view, the failure to object to the jurisdiction of the Provincial High Court amounts to a waiver and the Plaintiff is estopped by their conduct. It was held in ***Nawinna Kottage Dona Lalitha Padmini v. N.K.D. Pradeepa Nishanthi Kumari*** **SC/HC/CA/LA No. 134/2016 (S.C Minutes 07.09.2018)** that a party that failed to object to an appeal filed out of time amounts to waiver of such objections. It was held by His Lordship Priyantha Jayawardena at p.13 that;

"*The Petitioners raised the time bar objection for the first time in the Supreme Court. Therefore, it must be considered if the Petitioners are estopped by their conduct from raising the time bar objection before the Supreme Court.*

According to C.D. Field's 'Law relating to estoppel' revised by Gopal S. Chaturvedi, 3rd Ed, page 166;

'In order to constitute abandonment or waiver, it must be a voluntary act on the part of the person possessing the rights. Acquiescence or standing by when there is a duty to speak or assert a right creates an estoppel. In such cases knowledge of the act must be brought by the acquiescing party. Acquiescence does not mean simply an intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done.'

Therefore, waiver of an objection by a party aggrieved does not afford them the right to raise such objection at a later stage, as they are estopped by their prior conduct."

Similarly, once the Plaintiff failed to object to the jurisdiction of the Provincial High Court, the Plaintiff is estopped. For the aforementioned reasons I shall proceed to consider the questions of law on which leave to appeal was granted without considering the preliminary objection.

The only contention of the Defendant was that a notice of dishonour was not given by the Plaintiff within a reasonable period of time. The Defendant, however, did not

assert this position in the District Court or the High Court and took up the position for the first time before this Court.

A promissory note is defined in Section 85(1) of the Bills of exchange Ordinance as;

"*A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.*"

The principal differences of a promissory note from other bills as stated by William and Richard Hedley "*Bill of Exchange and Bankers Documentary Credits*" (4th edn at p. 148) is that

"*The basic difference between a promissory note and any other bills is that a note is a promise by the maker to pay, whereas an ordinary bill is an order to someone else (that is the drawee) to pay.*"

Meanwhile, the object of notice of dishonour is to prevent prejudice to the drawer or indorser, as stated in *"Byles on Bills of Exchange and Cheques*" (27th Edition at page155);

"***The object of notice is to inform the party, to whom notice is given that the holder or the party giving notice looks to him for payment. The rationale being that, where the bill has not been accepted or paid the drawer or indorser will be prejudiced if no such notice is given. There is no need though for the drawer or indorser to show prejudice, since the requirement to give notice is an absolute one***"

The requirement to give a notice of dishonour is stipulated in Section 48 of the Bills of Exchange Ordinance. The Section provides;

"*Subject to the provisions of this Ordinance, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:*

Provided that-

(a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequently to the omission, shall not be prejudiced by the omission;

(b) where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted."

Therefore, it is explicit that, as in the case of dishonour by non-acceptance, so also in that of dishonour by non-payment, notice of dishonour must be given to the drawer and each indorser; otherwise, the drawer or any indorser to whom such notice is not given is discharged. However, in certain circumstances a party can be excused from providing a notice. Section 50(2) of the Bills of Exchange Ordinance provides that a notice can be dispensed with if;

"Notice of dishonour is dispensed with -

(a) When, after the exercise of reasonable diligence, notice as required by this Ordinance cannot be given to or does not reach the drawer or indorser sought to be charged ;

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice ;

(c) As regards the drawer in the following cases, namely -

(i) where drawer and drawee are the same person,

(ii) where the drawee is a fictitious person or a person not having capacity to contract,

(iii) where the drawer is the person to whom the bill is presented for payment,

(iv) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill,

(v) where the drawer has countermanded payment;

(d) As regards the indorser in the following cases, namely -

(i) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill,

(ii) where the indorser is the person to whom the bill is presented for payment,

(iii) where the bill was accepted or made for his accommodation"

A notice of dishonour can be dispensed when the drawee and the drawer are the same person. When the drawer is also the drawee and the drawee refuses payment obviously the drawer will already know, hence there is no need to give notice of dishonour. That situation corresponds where a promissory note is made between the maker of the note and another. In this regard, *"Byles on Bills of Exchange and Cheques*" (27th Edition at page178) states;

"As set out in S.5(2) of the 1882 Act where in a bill the drawee and the drawer are the same person the holder may treat the instrument either as a bill or as a note. If the holder elects to treat the instrument as a bill there is no reason why he should be given notice of dishonour, in his capacity as drawer, since, in his capacity as drawee, he is responsible for the non-acceptance or non-payment of the bill. Thus, notice is expressly dispensed with ***(Equally no notice need be given if the instrument is treated as a note, since the person is the maker of the note and thereby corresponds with the acceptor of a bill, to whom notice need not be given)"***

The above position also corresponds under the Bills of Exchange Ordinance. As stated in Section 91(2);

"*In applying those provisions the* ***maker of a note shall be deemed to correspond with the acceptor of a bill,*** *and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order*"

Hence, the contention of the Defendant is without merit as there is no requirement to provide a notice of dishonor for a promissory note. The Defendant heavily relied on ***Senanayake v Abdul Cader*** **74 N.L.R. 255** and ***Ceylon Estate Agency v De Alwis*** **70 N.L.R 30.** The case of ***Senanayake*** [supra] was an action upon a cheque where no notice of dishonour was averred in the plaint and the Court dismissed the action owing to the defect. However, that judgment is not applicable to the instant appeal since the present action is upon a promissory note and not a cheque. In ***Ceylon Estate Agency*** [supra], a notice of dishonour was not given in an action for a promissory note and the Court dismissed the cause of action owing to the defect. That judgement can be distinguished from the present appeal since the Court was concerned with

notice to the indorser of the note. His Lordship Justice L.B. De Silva in ***Ceylon Estate Agency*** at page 39 stated;

"We hold that in an action on a promissory note where presentment for payment is necessary, to ***make the maker and indorsers liable,*** *it is a necessary averment in the plaint that the promissory note was duly presented for payment and was dishonoured. If there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded. As against the indorsers, the plaint must further aver that notice of dishonour was given to them, unless there was an excuse for not giving such notice, when such excuse should be pleaded. Even if the court is to take a liberal view of the pleadings, the defect should at least be cured by raising the appropriate issues on these matters unless these facts are admitted by the defendants."*

In the present case the Defendant is the maker of the note and not the indorser, hence the judgement of ***Ceylon Estate Agency*** is not applicable.

In any event, I am of the view that the Defendant was provided with sufficient notice. The Defendant admits the receipt of a Letter of Demand dated 22.06.2003 (vide. Admissions of the Parties p. 90 of the Brief marked 'E'). However, the Defendant contends that the said Letter of Demand was not marked at the trial by the Plaintiff because the said Letter of Demand was misplaced, and the Learned Judge could not evaluate or analyze the contents. Further, it was stated by the Defendant that contents of the documents cannot be proved by oral evidence as per Section 59 of the Evidence Ordinance (as amended). It was also argued by the Defendant that Section 49(5) of the Bills of Exchange Ordinance requires the notice of dishonor to sufficiently identify the bill and intimate the bill was dishonored by non-acceptance or non-payment. In the absence of the said Letter of Demand, the Defendant contends that Section 49(5) of the Bills of Exchange Ordinance, is not complied with by the Plaintiff.

As held by His Lordship Justice Nawaz in ***T.M Tennakoon v Seemitha Nuwara Eliya District Sakasuruwam and Naya Ganudenu Samupakara Samithiya*** **C.A. Case No. 751/2000 (F) (C.A Minutes 20.05.2016)** at p. 7 a notice of dishonor must be distinguished from a Letter of Demand.

"Notice of dishonor must be distinguished from a 'Letter of Demand'. It is necessary to make a demand by way of a 'Letter of Demand' but it is equally necessary to give

notice of dishonour when a cheque is dishonoured. Section 47 (2) of the Bills of Exchange Ordinance enacts:

'Subject to the provisions of the Ordinance, when a bill is dishonoured by non~payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.'

Section 48 of the Bills of Exchange Ordinance stipulates the requirement for a notice of dishonor. This provision contains not only the requirement of a notice of dishonour but also the effect of not giving such notice."

Hence, it is apparent that a Letter of Demand *per say* would not amount to a notice of dishonour unless the necessary requirements of the Bills of Exchange Ordinance are complied with by a plaintiff. However, it was contended by the Plaintiff that she met the Defendant multiple times and attempted to present the note for payment, but the Defendant refused (vide proceedings on 25.08.2006, p. 98 of the Brief). The Defendant did not deny this position nor was it controverted by any other evidence. The Plaintiff states that this amounts to a sufficient notice of dishonour communicated by personal communication. I am inclined to agree with this view.

Section 49(5) of the Bills of Exchange Ordinance states;

"*The notice may be given in writing or by* ***personal communication*** *and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment*"

In ***Metcalfe v Richardson*** **(1852) 11 CB 1011** on the day after a bill became due, the holder's clerk called upon the drawer, and told him that the bill had been duly presented, and that the acceptor "could not pay it" to which the drawer replied that "he would see the holder about it:" It was held at p. 775 by Maule J that;

"The clerk, it is true, does not say that the bill has been dishonoured, or is unpaid; but that Dalgleish, the acceptor, cannot pay it. He assumes that he has duly ascertained that: and it is plain that the sense in which the plaintiff understands the communication is, that he is called upon to pay the bill. He treats it as a notice that the acceptor has not paid the bill, and that he himself is called upon to pay. Therefore, we have the fact of the bill being dishonoured, and of the drawer's being informed of the acceptor's incapacity to pay, as being established, and that the drawer is looked to

for payment. And, when the plaintiff, in reply to the communication so made to him, says, 'I will see Mr. Richardson about it' I think no jury could come to any other conclusion than that he considered and accepted it, as it evidently was intended, as a notice of dishonour."

The Court states further that;

"It was competent to them to assume, and it was properly left to them to infer from the conversation deposed to, that the plaintiff had had notice of dishonour, and that he would be looked to for payment of the bill, which is the material part of the notice. I therefore think there should be no rule that it was proper to infer from this conversation that the drawer had due notice of dishonour."

In my opinion, similar to ***Metcalfe v Richardson*** (supra) once the Plaintiff attempted to present the note and the Defendant refused, this amounted to sufficient notice of dishonour. Hence, I am of the view it is proper to infer that sufficient notice of dishonour was given.

Conclusion

For the reasons stated above, I answer the questions of law upon which leave to appeal was granted as follows;

(1) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has satisfactorily proved that a notice of dishonour has been given in respect of an action based on a Promissory note?

No

(2) Did the High Court err in upholding the conclusion of the District Court that the Plaintiff-Respondent-Respondent has complied with the mandatory requirements of the Bills of Exchange Ordinance to succeed in enforcing a Promissory note?

No

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter for an application for Special Leave to Appeal under and in terms of Article 128 of the Constitution.

SC Appeal No. 61/2008
Special LA No. 350/2007
CA/Writ No. 164/99

Kotagala Plantations Limited of 760, Baseline S.C. Road, Colombo 09 (and presently of 53 1/1, Baron Jayathilake Mawatha, Colombo 01).

PETITIONER

Vs.

1. Ratnasiri Wickramanayake, Minister of Public Administration, Home Affairs and Plantation Industries, Ministry of Administration, Home Affairs and Plantation Industries, Colombo.

2. Land Reform Commission, 82C, Gregory's Road, Colombo 07.

3. State Plantations Corporation, 55/75, Vauxhall Lane, Colombo 02.

4. Hon. Rajitha Senaratne, Minister of Lands, Ministry of Lands, 'Govijana Kendraya', Rajamalwatte, Battaramulla. RESPONDENTS

5. Hon. Anura Priyadharshana Yapa, Minister of Plantation Industries,

Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.
ADDED RESPONDENT

6. Hon. Milroy Fernando,
Minister of Plantation Industries,
Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.

7. Hon. Chamal Rajapakse,
Minister of Agricultural
Development, Ministry of
Agricultural Development,
'Govijana Kendraya',
Rajamalwatte, Battaramulla.
ADDED 6th and 7th RESPONDENTS

AND BETWEEN

Kotagala Plantations Limited of 760, Baseline S.C. Road, Colombo 09 (and presently of 53 1/1, Baron Jayathilake Mawatha, Colombo 01).

PETITIONER-PETITIONER

Vs.

1. Land Reform Commission, 82C,
Gregory's Road, Colombo 07.

2. State Plantations Corporation,
55/75, Vauxhall Lane, Colombo
02.

3. Hon. D. M. Jayaratne,
   Minister of Plantation Industries,
   Ministry of Plantation Industries,
   55/75, Vauxhall Lane,
   Colombo 02.

4. Hon. Jeevan Kumarathunga,
   Minister of Land and Land
   Development, Ministry of Land
   and Land Development, 85/5,
   'Govijana Kendraya',
   Rajamalwatte, Battaramulla.

RESPONDENT-RESPONDENTS

AND BETWEEN

Kotagala Plantations Limited of 760, baseline Road, Colombo 09 (and presently of 53 1/1, Sir Baron Jayathilake Mawatha, Colombo 10)

PETITIONER – PETITIONER

1. Land Reform Commission, 82 C, Gregory's Road Colombo 07

2. State Plantations Corporation, 55/75 Vauxhall Lane, Colombo 02

3. Hon. D.M Jayaratne, Minister of Plantation Industries, Ministry of Plantations Industries, 55/75 Vauxhall Lane, Colombo 02

4. Hon. Kumaratunga Minister of Land and Land Development, 85/5 "Govijana Mandiraya", Rajamalwatte, Battaramulla

RESPONDENT-RESPONDENTS

5. Hon. Mahinda Samarasinghe, Minister of Plantation Industries, Ministry of Plantation Industries, 55/75, Vauxhall Lane,

   Colombo 02.

6. Hon. Janaka Bandara Tennakoon, Minister of Land and Land Development, Ministry of Land and Land Development, 85/5, 'Govijana Kendraya', Rajamalwatte, Battaramulla.

7. Hon. P. Dayaratne, Minister of State Resources and Enterprise Development, No. 561/3, Elvitigala Mawatha, Colombo 05.

ADDED RESPONDENT-RESPONDENTS

AND BETWEEN

Kotagala Plantations Limited of 760, Baseline Road, Colombo 09 (and presently of 53 1/1 Sir Baron Jayathilake Mawatha, Colombo 01)

PETITIONER-PETITIONER

Vs.

1. Land Reform Commission 82 C, Gregory's Road, Colombo 07

2. State Plantations Corporation, 55/77, Vauxhall Lane, Colombo 02

3. Hon. D.M Jayaratne, Minister of Plantation Industries, Ministry of Plantations Industries, 55/75, Vauxhall Lane, Colombo 02

4. Hon.Jeewan Kumaratunga, Minister of Land and Land Development, Ministry of Land and Land Development, 85/5 "Govijana Mandiraya", Rajamalwatte Battaramulla

RESPONDENTS-RESPONDENTS

5. Hon. Mahinda Samarasinghe, Minister of Plantation Industries, Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 02

6. Hon. Janala Bandara Tennakoon, Minister Land and Land Development, 85/5,

"Govijana Mandiraya"
Rajamalwatte, Battaramulla

7. Hon. P. Dayaratne, Minister of State Resources and Enterprise Development No.561/3, Elivitigala Mawatha, Colombo 05

ADDED RESPONDENT-RESPONDENTS

8. Hon. Anton Dayashritha Tisseraa,

   Minister State Resources and Enterprise Development, No. 561/3, Elvitigala Mawatha, Colombo 05.

ADDED RESPONDENT-RESPONDENT

AND NOW BETWEEN

Kotagala Plantations Limited of 760, Baseline Road, Colombo 09 (and presently of 53 1/1 Sir Baron Jayathilake Mawatha, Colombo 01)

PETITIONER-PETITIONER

Vs.

1. Land Reform Commission 82 C, Gregory's Road, Colombo 07

2. State Plantations Corporation, 55/77, Vauxhall Lane, Colombo 02

3. Hon. D.M Jayaratne, Minister of Plantation Industries, Ministry of Plantations Industries, 55/75, Vauxhall Lane, Colombo 02

4. Hon.Jeewan Kumaratunga, Minister of Land and Land Development, Ministry of Land and Land Development, 85/5 "Govijana Mandiraya", Rajamalwatte Battaramulla

RESPONDENTS-RESPONDENTS

5. Hon. Mahinda Samarasinghe, Minister of Plantation Industries, Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 02

6. Hon. Janala Bandara Tennakoon, Minister Land and Land Development, 85/5, "Govijana Mandiraya" Rajamalwatte, Battaramulla

7. Hon. P. Dayaratne, Minister of State Resources and Enterprise Development No.561/3,

Elivitigala Mawatha, Colombo 05

ADDED RESPONDENT-RESPONDENTS

8. Hon. Anton Dayashritha Tisseraa, Minister State Resources and Enterprise Development, No. 561/3, Elvitigala Mawatha, Colombo 05.

ADDED RESPONDENT-RESPONDENT

9. Hon. Navin Dissanayake, Minister of Plantation Industries, Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 03

10. Hon. John Amaratunga, Minister of Land and Land Development, Ministry of Land and Land Development, 85/5, 'Govijana Kendraya', Rajamalwatte, Battaramulla.

ADDED RESPONDENTS-RESPONDENTS

11. Hon. Gayantha Karunatilleka,
Minister of Lands and
Parliamentary Reforms,
Ministry of Lands and
Parliamentary Reforms,
'Mihikatha Medura',
Land Secretariat, No. 1200/6,
Rajamalwatte Avenue,
Battaramulla.

ADDED RESPONDENT-RESPONDENT

BEFORE: Buwaneka Aluwihare, PC, J.
Vijith Malalgoda PC, J.
Murdu Fernando PC, J.

COUNSEL: Manohara De Silva PC, for the Petitioner- Petitioner-Appellant.
Sanjay Rajaratnam, PC, SASG for the 1st, 9th and 10th Respondent-Respondents.

ARGUED ON: 18.02.2019.

WRITTEN SUBMISSIONS: For the Petitioner-Petitioner-Appellant on 19.03.2019.
For the 1st Respondent on 25.02.2019.

DECIDED ON: 10.11.2023

Judgement

Aluwihare PC. J.,

This is a case related to the vesting, and subsequent revocation of land taken over by the Land Reform Commission under the Land Reform Law. The Petitioner-Petitioner-Appellant [hereinafter the Appellant] seeks to impugn the decision of the Minister to revoke the vesting of the disputed land in the State Plantations Corporation, which had leased the said land to the Appellant. This court granted Special Leave to Appeal against the Order of the Court of Appeal dated 01.11.2007 on the following questions of law.

(a) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal made only an observation on the bare denial of the Respondents that the DEEGALA DIVISION is not part of the VOGAN ESTATE as against the strong documentary evidence placed by the Petitioners to the contrary?

(b) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal considered Section 27A(4) of the Land Reform Law in isolation and having no regard to the material circumstances as set out in detail by the Petitioner, which contentions were supported by documentation?

(c) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that principles of natural justice would have warranted a hearing and/or notification to the Petitioner prior to making of the Revocation Order 'P10' by Gazette Extraordinary No. 1059/16 dated 24.12.1998?

(d) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that Revocation order 'P10' itself gives no reason as to why the said Revocation Order was made?

(e) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that the Petitioner is not only the Lessee of the entirety of VOGAN ESTATE including the said extent of 94A:2R:14P for a period of 99 years as stated above, but also holds a Power of Attorney No. 345 dated 4th May 1995 from the State Plantations Corporation, 2nd Respondent- Respondent and that the Petitioner would suffer grave prejudice and loss if the said extent of

land vests in the Land Reform Commission by virtue of the said Revocation Order?

(f) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that the Revocation Order 'P10' has been made by the 1st Respondent despite being well aware that the Petitioner had sought judicial recourse against the sub lessee for non-payment of the rentals and moreover without any notice to the Petitioner of the said Revocation order? Thus had the 1st Respondent acted arbitrarily, *ultra vires*, with *mala fides*, in an unreasonable manner and had been made for an ulterior motive?

(g) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal considered the Revocation Order 'P10' having no regard to the commercial complexities applicable to the said VOGAN ESTATE and especially the DEEGALA DIVISION?

(h) Did the Court of Appeal fail to consider the letter dated 27th February 2003 ('X15') by the Land Reform Commission sent to the Petitioner marked 'P12', by which letter the Land Reform Commission clearly stated that no further steps would be taken under and in terms of the Gazette Extraordinary No. 1059/16 dated 24.12.1998 to re-vest the DEEGALA DIVISION in the Land Reform Commission as per the said Gazette notification?

(1) It would be prudent to mention the facts of the case before addressing the questions of law which warrant determination by this Court. 'DEEGALA DIVISION' is a division of the 'VOGAN ESTATE' situated in Kalutara and described in Schedule 'A' to the Petition. By and under virtue of the provisions of the Land Reform Law, No. 1 of 1972 the VOGAN ESTATE was duly vested in the Land Reform Commission. Thereafter, the Minister of Forestry, Irrigation and Mahaweli Development acting under and by virtue of the powers vested under Section 27A of the Land Reform (Special provisions) Act, No. 39 of 1981, by order published in the Gazette Extraordinary of 21st April 1994 vested the 'VOGAN ESTATE' in the Sri Lanka State Plantations Corporation. Subsequently, by and upon Indenture of Lease No. 344 dated 4th of May 1995 attested by D.C. Pieris Notary Public, the State Plantations Corporation leased the said land, estate, plantations and premises of VOGAN ESTATE for a period of 99 years commencing 22nd of June 1992 and ending 31st December 2091 to the Appellant.

(2) One Mrs. Gunawardane and family, who were the original owners of the portion of land-94A.2R.14P comprising part of DEEGALA DIVISION prior to it being vested in the Land Reform Commission, requested the Ministry of Public Administration, Home Affairs, Plantation industries and Parliamentary Affairs that an extent of 94A:2R:14P be leased to them. The Ministry directed the land Reform Commission to lease the said extent of land out of DEEGALA DIVISION to Mrs. Gunawardane and family.

(3) At this point, the Appellant [Kotagala Plantations Ltd] objected to the lease, maintaining the position that the aforementioned land, by virtue of being part of the VOGAN ESTATE was duly vested in the Sri Lanka State Plantations Corporation, which had in turn, leased the entirety to the Appellant. A letter dated 23.07.1996 sent by the Director of Land Alienation of the Land Reform Commission to the Director of the Land Reform Authority of Kalutara directed that possession be taken of the said extent of 94A:2R:14P out of DEEGALA DIVISION for the purpose of leasing it to Mrs. Gunawardane and family. The Appellant, having been compelled to seek legal recourse due to the aforementioned letter, instituted Case No. 4696/Spl in the District Court of Colombo on 6th August 1996 against the Land Reform Commission, Sri Lanka State Plantations Corporation and Mrs. Gunawardane. In that case, the Appellant claimed relief in the form of a declaration that the Appellant is the lawful lessee of VOGAN ESTATE including DEEGALA DIVISION, a permanent injunction and interim injunction restraining the Land Reform Commission from entering and/or taking possession of VOGAN ESTATE including DEEGALA DIVISION, and an interim injunction restraining Mrs. Gunawardane from entering and/or taking possession of VOGAN ESTATE including DEEGALA DIVISION.

(4) The Case was fixed for trial in the District Court. In the interim, the Land Reform Commission and the Ministry agreed that the Appellant should lease the said extent of 94A:2R:14P to Mrs. Gunawardane and family. DC Colombo Case No. 4696/Spl was settled and in or around 8th April 1997, the Appellant, by indenture of Lease No. 1594 dated 8th April 1997 attested by Gilbert Somasiri Herath Gunaratne Notary Public, in pursuance of the authority under the Indenture of Lease No. 344, sub-leased to Mrs. Gunawardane and her children the allotment of land, estate, plantations and premises in extent 94A:2R:14P of DEEGALA DIVISION of the VOGAN ESTATE with the buildings for a period of 50 years commencing 1st November 1996. The Land Reform

Commission refunded to the Appellant the sum of Rs. 400,000 paid to it by Mrs. Gunawardane for the lease rental and the amount was given as credit in favour of Mrs. Gunawardane and utilised by the Appellant as the first year's rental from Mrs. Gunawardane. A Receipt of Rs. 453,600 received by the Appellant, was provided to Mrs. Gunawardane.

(5) The terms of the said indenture of lease were such that the Gunawardanes shall pay a rental of Rs. 453,600 during the first year of the said term, that an yearly rental would be paid in the manner set out in the lease, that if the yearly rental or any part of it was unpaid for 60 days after becoming payable, or if any covenant on the part of the Gunawardanes contained in the indenture were not performed or observed, it shall be lawful for the Appellant at any time thereafter to re-enter the premises or any part of it, and that if at any time, any question, dispute or difference of opinion in relation to or in connection with the lease, or in the interpretation of any provision arises during the continuance of the lease term, which cannot be amicably settled by the Parties, it shall be referred to Arbitration.

(6) Having entered into possession of the land, the Gunawardanes failed or neglected to make payment of rental due as per the lease agreement for the period between 1st November 1997 to 30th October 1998. Due to the failure of the Arbitration proceedings which followed as a result of the dispute, the Appellant instituted an action in the District Court of Colombo bearing No. 5222/Spl against Mrs. Gunawardane and family seeking inter alia an enjoining order restraining the Gunawardanes from removing or using any produce of the land. On 27th October 1998, the Court issued the said Enjoining Order prayed for along with notice of Interim Injunction for the same purpose.

(7) Thereafter, the Minister of Plantation Industries, the relevant Minister at that time; by Gazette Extraordinary No.1059/16 dated 24.12.1998, acting under Section 27A(4) of the Land Reform Law, revoked the vesting order made by him in the Gazette Extraordinary of 21st April 1994 vesting land extent 94A:2R:14P of the DEEGALA DIVISION of the VOGAN ESTATE in the State Plantations Corporation. **It is the validity of this Revocation Order that was canvassed before the Court of Appeal by the Appellant.**

(8) It is the Appellant's position that by the vesting order published in the Gazette Extraordinary of 21st April 1994, the Sri Lanka State Plantations Corporation became vested with the title to and ownership of the said land, estate, plantations and premises of VOGAN ESTATE and that as per Section 27A(4) of the Land Reform Law as amended by Land Reform (Special Provisions) Act, No.39 of 1981, the Vestee must have failed to comply with any term or condition in relation to the vesting Order for the Minister to revoke the vesting Order. The Appellant notes that the said revocation order provides no reason as to why the revocation order was made, and by virtue of holding Power of Attorney to the State Plantations Corporation, the Appellant was entitled in law to be noticed and provided an opportunity of being heard as to why the Revocation Order was issued. Therefore, the Appellant contends that the said Revocation Order is arbitrary, *mala fide*, *ultra vires* and unreasonable. On this premise, the Appellant contended before the Court of Appeal that it was entitled in law for an Order in law in the nature of a Writ of Certiorari quashing the said Revocation Order.

(9) It must be mentioned that **no notice of revocation order** was provided to the Appellant until a copy of the said order was produced by the Attorney-at-Law for the Minister of Plantation Industries in DC Colombo Case No. 4696/Spl on 27th January 1999.

(10) Furthermore, the Appellant contends that in any event, the Revocation Order is not valid as the Land Reform Commission, in a letter dated 27th February 2003 **(X 15)**, states that no further steps would be taken under and in terms of the Gazette Extraordinary No. 1059/16 dated 24.12.1998 for the re-vesting of the DEEGALA DIVISION in the Commission. The Appellant prays that the of the Court of Appeal dated 01.11.2007 be set aside and for the issuance of a Writ of Certiorari quashing the Revocation Order.

(11) The 1st Respondent- Respondents, the Land Reform Commission [LRC] maintains that the DEEGALA DIVISION was and is not part of the VOGAN ESTATE, that it was vested separately in the Land Reform Commission, that it was not vested in the State Plantations Corporation and that the State Plantations Corporation merely managed the DEEGALA DIVISION- of which the Title Ownership was vested in the Land Reform Commission. The LRC further submits that the DEEGALA DIVISION was not included in the Indenture of Lease No. 344 dated 4th May 1995 attested by D.C. Pieris Notary Public whereby the State Plantations Corporation leased the land, estate, plantations

and premises of the VOGAN ESTATE for a period of 99 years commencing 22nd June 1992 and ending 31st December 2091 to the Appellant, and that the State Plantations Corporation has offered no explanation as to how it considered (if at all) the DEEGALA DIVISION to be part of the VOGAN ESTATE. The LRC submits that the above matters are factual disputes and would be best resolved by the District Court, and not by way of a Writ of Certiorari as prayed by the Appellant. It is of significance to note that when the Appellant, the LRC and the 2nd Respondent -Respondents, State Plantation Corporation [SPC] entered into a settlement in the District Court case referred to above, based on which the Appellant leased DEEGAL DIVISION to Gunawardenas, LRC or the SPC never took up the position that the DEEGALA DIVISION was not a part of the Vogan Estate.

(12) Moreover, the LRC submits that, in any event, the terms of condition of the vesting Order which was breached for the Minister to publish the Revocation Order by the Extraordinary Gazette is clear as the Vesting Order mentions that the State Plantations Corporation is bound to pay the Land Reform Commission the nominal value of lands referred to in the schedule – which the State Plantations Corporation failed to fulfil as it had not paid the Land Reform Commission the nominal value of the lands amounting to Rs. 14,412,000. The above explanation, the LRC contends, was also made clear in the affidavit submitted by the then Minister of Plantation Industries. Additionally, the LRC notes that the duty of diligence to seek out clarity in terms of payments and documentation on the part of the State Plantations Corporation prior to entering into a Lease agreement falls upon the Appellant.

(13) The Appellant, during the hearing, took up the position that if non-payment of consideration for the entire VOGAN ESTATE was the reason for revocation, the Minister should have revoked the entire estate, not merely the disputed land of extent 94A:2R:14P. The LRC then proceeded to take up a novel position in response. In the written submission dated 25th February 2019, the LRC argues as follows: that Section 27A(4) offers the relevant Minister the power to revoke the vesting of small portions of selected land of a vested Estate, and this form of part-vesting and part-revocation of an estate or land is permitted under Section 27A(1) read together with Section 27A(4) of the Land Reform Law, and that the above is apparent when considering how part-vesting and part-revocation conforms with the policy and scheme of the Act whereby lands vested in the Land Reform Commission may be utilised for multiple purposes and

different portions of the same land may be utilised differently.

Is the DEEGALA DIVISION including the land of extent 94A.2R.14P part and parcel of the VOGAN ESTATE?

(14) Section 27A(1) of the Land Reform (Special provisions) Act, No. 39 of 198 states: *"At the request of the Commission, the Minister may, where he considers it necessary in the interest of the Commission to do so, subject to Sections 22, 23 and 42H, by Order published in the Gazette, vest, in any State corporation specified in the Order, with effect from a date specified in that Order, any agricultural land or estate land or any portion of the land vested in the Commission under this Law, and described in the Order, subject to terms and conditions relating to consideration for the vesting of that land in such corporation as may be agreed upon between the Commission and such Corporation."*

(15) It is by virtue of the above provision that by order published in the Gazette Extraordinary of 21st April 1994 (marked **'P3')** by the Minister, the 'VOGAN ESTATE' was vested in the Sri Lanka State Plantations Corporation.

(16) The Hectarage Statement submitted by the Appellant marked **'P2'** notes the DEEGALA DIVISION comprising 81.15 hectares to be part of the total hectarage of the VOGAN ESTATE of 847.43 hectares. The Vesting Order which vests the VOGAN ESTATE in the State Plantation Corporation, marked **'P3'**, also states the total hectarage of the VOGAN ESTATE as 847 hectares. It is also conceded that the 94A:2R:14P leased to the Gunawardenas, is part of the DEEGALA DIVISION. Even the Court of Appeal had acknowledged [pages 4 and 5 of the Order] that Board of Directors of the Appellant Company on a request made by the Ministry of Plantation and Industry, leased out 94A:2R and 14 P to the Gunawardena family the original owners of Deegala Division which indicates that Deegala Division was part and parcel of the Vogan Estate.

Was the disputed land vested in the State Plantations Corporation?

(17) In addition to the conclusion determined above, I am also of the view for the purpose of this case, that the LRC cannot maintain the position that DEEGALA DIVISION was not vested in the State Plantations Corporation while also maintaining

the argument that the Revocation Order revoked the vesting of the same land 'in any event'. This, in essence, as pointed out by the learned President's Counsel for the Appellant, constitutes an admission that the disputed extent of land was in fact vested in the State Plantations Corporation since **that which has not been vested cannot be revoked.**

Is the Revocation Order bad in law?

(18) The determination of the court in this regard is whether part-vesting and part-revocation is permissible in law as per Section 27A(1) and Section 27A(4) of the Land Reform Act, and if so, whether the order for part-revocation in the present case was lawful.

(19) Section 27A(4) of the Land Reform (Special provisions) Act, No. 39 of 1981 states: *"Where any term or condition relating to consideration for the vesting of any agricultural land or estate land or portion thereof in any State Corporation by an Order under subsection (1) is not complied with, the Minister may by Order published in the Gazette, revoke the Order under subsection (1) relating to that land and thereupon that land shall revest in the Commission."*

(20) It is by virtue of the above provision that by order published in the Gazette Extraordinary No.1059/16 dated 24.12.1998 (marked '**P10**') the Minister revoked the vesting order made by the former Minister in the Gazette Extraordinary of 21st April 1994 vesting land extent 94A:2R:14P of the DEEGALA DIVISION of the VOGAN ESTATE in the State Plantations Corporation. It is to be noted that this is the exact extent of land that was leased to Gunawardenas by the Appellant.

(21) It is the LRC's contention that the '*term or condition relating to consideration'* for the vesting Order which the State Plantations Corporation has failed to comply with is the payment of a nominal value of Rs. 14,412,000 for the lands, premises and estate of the VOGAN ESTATE. This is the pith and substance on which the Court of Appeal refused to quash the vesting order. To appreciate that no material was placed before this Court supporting the failure of payment as reason for revocation besides the affidavit of the Minister himself dated 20th July 1999 which states that the State Plantations Corporation failed to pay due consideration of Rs. 14,412,000 as the

nominal value of the entire estate. This allegation was strenuously disputed by the Appellant as well as the State Plantations Corporation. The monies were due to the LRC, and consequently, it was incumbent upon the LRC and not the Minister to complain about the non-payment. The Vesting Order "P 3" does not require the payment of consideration within a stipulated time and therefore it follows that even if the State Plantations Corporation had failed to pay, the revocation could not have been done without providing an opportunity to pay. In any case, it must be borne in mind that the Minister's allegation is that that the State Plantations Corporation failed to pay due consideration of Rs. 14,412,000 as the n*ominal value of the entire estate.* **The succeeding question then, is why the specific land of extent 94A.2R.14P of the DEEGALA DIVISION *alone* was revoked and re-vested in the Land Reform Commission, and not the entire Division or Estate**. Therefore, **even if partial revocation may be permissible, for the present Revocation Order to stand it must be proven that the State Plantations Corporation failed to provide consideration of a defined amount for the specific extent of land.**

(22) There is no mention of consideration being apportioned and assigned for the specific extent of land to the State Plantations Corporation, and **the Respondents have failed to provide any reason for the partial revocation as divorced from the non-payment of nominal fees for the entire Estate.** This is a pertinent consideration since the LRC, in the written submission dated 25th February 2019 submits that the policy, and underlying reasoning behind the part-revocation was that there were various utilities in different portions of lands held for the State. Although the LRC's argument does conform to the purpose of the act spelled out in the the preamble to the Land Reform Law- which provides *inter alia "…to prescribe the purposes and the manner of disposition by the commission of agricultural lands vested in the commission so as to increase productivity and employment,…"*, **no such reasoning, as applicable for the disputed portion of land of extent 94:A:2R:14P has been offered, and no specific use or viability of purpose the land possesses that other lots of land in the VOGAN ESTATE do not hold has been noted either by the Respondents.**

(23) Therefore, even if it could be established that the Minister was entitled to revoke the vesting order due to the State Plantations Corporation's alleged failure to pay consideration for the entire state, and part-revocation is permissible under Section 27A(1) and Section 27A(4) of the Land Reform Act, it cannot be established that the

Minister was entitled to revoke the specific extent of land pertinent to the present dispute.

(24) The exact portion of land that was revoked i.e. 94A:2R:14P was the extent of the land which was sub-leased to the Gunawardenas by the Appellant. This reality, considered with the fact that no reasoning was provided for the exclusive revocation could only lead to the conclusion that the revocation was effected for the collateral purpose of benefiting the Gunawardenas alone.

(25) In ***Sugathapala Mendis Vs. Chandrika Kumaratunga*** **[2008] 2 Sri LR 339**, Her Ladyship Justice Shiranee Tilakawardane, in determining whether the acts impugned in that case constituted a "public purpose", held [at page 360] that the primary object of "public purpose" is the general interest of the community. Though in achieving the public purpose the individual or individuals may be benefited, the benefit to such individual or individuals must only be indirect.

(26) While 27A(4) of the Land Reform (Special provisions) Act, No. 39 of 1981 does not expressly restrict the Minister's power to revoke lands vested for "public purposes", I am of the view that any actions taken under the Act must conform to the policy considerations contemplated by the legislature in enacting such act. This view was also taken by five Lordships of this Court in ***Jayanetti Vs. The Land Reform Commission & Others*** **[1984] 2 SLR 172,** where the Court, referring to the preamble of the Land Reform Law stated that "*alienations should be strictly confined to purposes which would ensure productivity or utilization of manpower, and not for other reasons.* ***All activity of the Commission is subsumed under overriding policy considerations…***" [at page 189]. Revocation of the portion of land which constitutes the exact portion of land the Gunawardenas have sought does not in any way contribute to effecting the purposes of the Land Reform Law or the Land Reform (Special provisions) Act. Therefore, it is evident that the Minister published the Revocation Order for an arbitrary, collateral purpose and is therefore bad in law and liable to be quashed.

Was the Minister bound to provide the Petitioner notice in advance and/or a hearing prior to publishing the Revocation Order per Principles of Natural Justice?

(27) No administrative body or executive organ exercising an administrative function

is entitled to escape the requirements of Natural Justice. The jurisprudence of our courts has not wavered in this conviction; therefore, I do not find it necessary to reproduce dicta in this regard. The Appellant was not provided notice in advance of the revocation; neither was the Appellant granted a hearing before the revocation order was published. This is not disputed by the Respondents. Therefore, it is *ex facie* evident that the Minister, being a creature of the Constitution and exercising an administrative function bound to adhere to the immutable principle of *audi alteram partem,* had lamentably failed in such adherence.

(28) This failure is further aggravated by the manner in which the resort to judicial recourse by the Appellant for the non-payment of rentals by the sub-lessee (Gunawardenas) was neglected in publishing the revocation order particularly where letter dated 27th February 2003, states that no further steps would be taken under and in terms of the Gazette Extraordinary No. 1059/16 dated 24.12.1998 for the re-vesting of the DEEGALA DIVISION in the Commission.

<u>Conclusion</u>

For the aforementioned reasons, I answer the questions of law upon which leave was granted in the following manner.

(a) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal made only an observation on the bare denial of the Respondents that the DEEGALA DIVISION is not part of the VOGAN ESTATE as against the strong documentary evidence placed by the Petitioners to the contrary?
Yes.

(b) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal considered Section 27A(4) of the Land Reform Law in isolation and having no regard to the material circumstances as set out in detail by the Petitioner, which contentions were supported by documentation?
Yes.

(c) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that principles of natural justice would have warranted a hearing and/or notification to the Petitioner prior to making of the

Revocation Order 'P10' by Gazette Extraordinary No. 1059/16 dated 24.12.1998?
Yes.

(d) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that Revocation order 'P10' itself gives no reason as to why the said Revocation Order was made?
Yes.

(e) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that the Petitioner is not only the Lessee of the entirety of VOGAN ESTATE including the said extent of 94A:2R:14P for a period of 99 years as stated above, but also holds a Power of Attorney No. 345 dated 4th May 1995 from the State Plantations Corporation, 2nd Respondent- Respondent and that the Petitioner would suffer grave prejudice and loss if the said extent of land vests in the Land Reform Commission by virtue of the said Revocation Order?
Yes.

(f) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal failed to consider that the Revocation Order 'P10' has been made by the 1st Respondent despite being well aware that the Petitioner had sought judicial recourse against the sub lessee for non-payment of the rentals and moreover without any notice to the Petitioner of the said Revocation order? Thus had the 1st Respondent acted arbitrarily, *ultra vires*, with *mala fides*, in an unreasonable manner and had been made for an ulterior motive?
Yes.

(g) Did the Court of Appeal err in fact and in law when the Learned Justice of the Court of Appeal considered the Revocation Order 'P10' having no regard to the commercial complexities applicable to the said VOGAN ESTATE and especially the DEEGALA DIVISION?
Yes.

(h) Did the Court of Appeal fail to consider the letter dated 27th February 2003 ('X15') by the Land Reform Commission sent to the Petitioner marked 'P12', by

which letter the Land Reform Commission clearly stated that no further steps would be taken under and in terms of the Gazette Extraordinary No. 1059/16 dated 24.12.1998 to re-vest the DEEGALA DIVISION in the Land Reform Commission as per the said Gazette notification?
Yes.

In view of the conclusions reached, and considering the facts and circumstances of this case a writ in the nature of certiorari is allowed quashing the Revocation Order 'P10' published in the Gazette Extraordinary No. 1059/16 dated 24.12.1998 and I direct that no steps or measures are taken under such Order. Accordingly, the Order of the Court of Appeal dated 01.11.2007 is set-aside.

Appeal allowed.

Judge of the Supreme Court

Vijith K. Malalgoda PC, J.
I agree.

Judge of the Supreme Court

Murdu Fernando PC, J.
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

SC Appeal: 192/2017

SC SPL LA No: 123/2013

Court of Appeal Case No:180-182/2006

High Court Galle Case No: 1875

Vs.

1. Luwis Hemantha alias Mangala
2. Agampodi Jayalias alias Jayalie
3. Arumadura Sunil alias Malu Sunil
4. Wellage Nandasena alias Adul
5. Kukundura Ranjith
6. Wellage Nandasiri
7. Wellage Wipulasena
8. Wellage Padmasiri
9. Themmadura Prabhath Kumara
10. Agampodi Kapila Kumara alias Ajith
11. Themmadura Ranil Krishantha
12. Agampodi Somawathie
13. Agampodi Nalani alias Navalias Hamy

Accused

AND

1. Arumadura Sunil alias Malu Sunil
2. Kukundura Ranjith
3. Wellage Nandasiri
4. Wellage Wipulasena
5. Wellage Padmasiri

3rd, 5th, 6th, 7th, and 8th Accused -Appellants

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent

AND NOW

1. Arumadura Sunil alias Malu Sunil (now deceased)
2. Wellage Wipulasena

3rd and 7th Accused-Appellant-Petitioners

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent-Respondent

AND NOW BETWEEN

Wellage Wipulasena

7th Accused-Appellant-Petitioner-Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent-Respondent-Respondent

BEFORE: Buwaneka Aluwihare PC, J.

S. Thurairaja PC J.

E. A. G. R. Amarasekara J.

COUNSEL: Anil Silva, PC with Isuru Jayawardane for the 7th Accused-Appellant-Appellant.

Rohantha Abeysuriya, PC, ASG for the Hon. Attorney General

ARGUED ON: 22. 06. 2020

DECIDED ON: 10.11. 2023

JUDGEMENT

Aluwihare PC J,

(1) Thirteen accused were indicted before the High Court for the commission of several offences and the Accused-Appellant-Petitioner-Appellant stood as the 7th Accused before the High Court. Hereinafter, the Accused-Appellant-Petitioner-Appellant will be referred to as the '7th Accused'. The prosecution alleged that these offences were committed by the 7th Accused and the others who were indicted with him, along with one Wellage Sirisena Prabath Kumara and others unknown to the prosecution.

(2) The offences for which the 7th Accused and the others were indicted are as follows;

Count 1- Being a member of an unlawful assembly with the common object of causing injuries to Uragaha Siripala, an offence punishable under Section 140 of the Penal Code.

Count 2- Being a member of the said unlawful Assembly, caused the death of said Uragaha Siripala, an offence punishable under Section 296 of the Penal Code read with Section 146 of the Penal code.

Count 3- Being a member of the same unlawful assembly, caused the death of Uragaha Nadeeka Thushara, an offence punishable under Section 296 of the Penal Code read with Section 146 of the Penal code.

Count 4- Being a member of the same unlawful assembly caused mischief to the house of Chandrawathie, an offence punishable under

Section 410 of the Penal Code read with Section 146 of the Penal code.

Count 5-Being a member of the same unlawful assembly committed robbery of Rs.75,400/-belonging to Chandrawathie an offence punishable under Section 380 of the Penal Code read with Section 146 of the Penal code.

Counts 6,7,8 and 9 were based on the substantive counts referred to in counts 2 to 5 above, on the basis that the said offences were committed by the accused in furtherance of a common intention. [Section 32 of the Penal Code]

(3) The trial before the High Court proceeded in the absence of the 5th Accused who absconded and the 9th Accused who died during the pendency of the trial.

(4) At the conclusion of the trial, the 1st, 4th, 10th, 11th, 12th and the 13th Accused were acquitted on all counts.

(5) The 3rd ,5th, 6th, 7th and the 8th Accused were convicted by the learned trial judge on counts 1 and 2 on the indictment, namely being a member of an unlawful assembly and the murder of Uragaha Siripala.

(6) The 3rd and the 5th Accused were also convicted on count 6 of the indictment, namely, causing the death of Nadeeka Thushara on the basis that the offence was committed by the said accused in furtherance of a common intention.

(7) The 3rd, 5th, 6th, 7th and the 8th Accused appealed against the conviction and the Court of Appeal by its judgement dated 03.04.2013 affirmed the convictions of all the accused referred to, save for the 8th Accused. The appeal of the 8th Accused was abated as he passed away during the pendency of the appeal.

(8) The 3rd and the 7th Accused moved this court by way of Special leave to Appeal and leave was granted on the questions of law referred to in sub-paragraphs (b) and (c) of paragraph 15 of the petition of the Accused, which are as follows;

(b) *Did the learned judges of the Court of Appeal misdirect themselves when they held that the doctrine of divisibility of credibility does not apply to the evidence of Sewwa Handi Nanadasiri in the circumstances of this case and thereby occasioned a miscarriage of justice.*

(c) *Did the learned Judges of the Court of Appeal misdirect themselves in rejecting the evidence of the 3rd Accused-Appellant on untenable grounds.*

(9) As the 3rd Accused-Appellant- Petitioner-Appellant is since dead, what is left to be decided is the legality of the conviction of the 7th Accused. It is to be observed that the question of law referred to in sub-paragraph (c) of Paragraph 15, on which Special leave was granted relates to the legality of the conviction of the 3rd Accused-Appellant who is dead. Hence, answering the said question would not arise now. As such I shall confine to answering only the question of law referred to in sub-paragraph (b) of Paragraph 15.

(10) Upon an overall consideration of the submissions made by the learned President's Counsel on behalf of the 7th Accused, it appears that the main thrust of the argument was that the evidence implicating the 7th Accused is

unreliable and cannot be acted upon; as such the prosecution had failed to establish the offences to satisfy the degree of proof required by law, i.e beyond reasonable doubt, hence, the conviction cannot stand.

(11) It was also contended that if the evidence was evaluated in the correct perspective applying the applicable legal principles, no reasonable court could have come to the conclusion that the 7th Accused was guilty. In the circumstances, it was argued that both the learned trial judge as well as the Court of Appeal erred in that respect.

(12) In view of the nature of the legal issue raised on behalf of the 7th Accused, it would be necessary to consider the totality of the evidence led at the trial and to consider whether the courts below have properly evaluated the evidence led at the trial, in particular the material incriminating the 7th Accused. In this context, I find the background to the incident would be of utmost relevance.

The Factual Background

(13) According to the evidence led at the trial, it transpired that two incidents had taken place on the day in question. According to witness Nandasiri, the two deceased happened to be his brother-in law [Siripala] and his nephew [Thushara]. They had lived roughly about 100 meters away from his residence, but the houses are not directly visible to each other. On the morning of the incident, Nandasiri had learnt that his nephew Thushara had shot one Shantha. Around mid-day, while he was at his aunt's place which was in close proximity to his house, he had seen a crowd of people going towards the deceased's house which was followed by a sound of an explosion. Then he had returned home.

(14) Around the same time, Siripala had come running to Nandasiri's residence, accompanied by his two daughters and son. Siripala had requested Nandasiri to board the two daughters to a bus saying that a crowd came to attack them. Nandasiri had dutifully acceded to the request and had taken the two daughters and seen to it that they boarded a bus. Thereafter Nandasiri has returned home. In the course of the examination in chief, he had said that he identified the 2nd Accused, Jayalie as one of the persons who came that day armed with a knife and he saw the deceased Siripala grappling with the 2nd Accused. At one point, he says he saw Siripala falling and at that juncture he witnessed the other Accused including the 7th Accused surrounding the deceased Siripala and attacking him.

(15) Under cross examination a contradiction was marked as 'V2', where he had told the police that he did not see Siripala being attacked ["සිරිපාල අයියට කොටනවා දැක්කේ නැත."] and that due to fear he fled and returned only after the Police and the Magistrate visited the scene. Although this witness had not seen as to how Thushara came about his death, he had seen the two bodies of Siripala and Thushara with multiple injuries. It is also to be noted that the statement of this witness to the Police is somewhat belated in that, he had given the statement the day after the incident. There was no mention in the statement, of him having witnessed the attack on Siripala, which was highlighted as an omission by the defence.

(16) According to witness Chandravathi who is the wife of the deceased Siripala, while she was in the Galle town, she was informed about the shooting of Shantha and she had rushed home. On the way she had been given the news by one Lucian, that a commotion was taking place near her house. She had said that, instead of going home, she got off the three-wheeler in which she was travelling at Lucian's house. From there she had walked towards home and she says she searched for her son Thushara in the vicinity as he was not

to be found and when she was finally walking towards the house, she heard her sister Ruwani, shouting that a crowd from 'IDH Watte' is approaching.

(17) It appears that at this juncture this witness had got separated from her other family members and having realised that her house was surrounded, she had fled and had boarded a Matara bound bus. When the bus was passing in front of her house, she had identified the 7th Accused along with the several other Accused [the 1st , 3rd, 4th, 6th, and 11th] among the crowd that had surrounded her house. It was this witness who had made the initial complaint to the police and had arrived at the crime scene with the Police.

(18) Prosecution witness Rosalyn happened to be the mother-in-law and the grandmother respectively of Siripala and Thushara, the two deceased. According to the testimony of witness Rosalyn, the deceased Siripala, had come running in the direction of their house accompanied by his two daughters, saying he had heard a commotion from the direction of their house. After a while a crowd from 'IDH Watte' had come running in their direction and the 2nd Accused and Siripala had grappled with each other and others followed by attacking Siripala with knives and clubs. She had said she saw the 7th Accused attacking the deceased with an axe. She had also said that the deceased Thushara was hiding under a bed at their residence and she saw both the 3rd and 4th Accused entering the house having forced open the door. The witness having specifically referred to the 2nd, 3rd, 5th and the 6th Accused however had said; "I do not know the names of the others but all of them came."' ["ඔය කට්ටිය සේරම ආවා."] This appears to be a clear reference to the Accused that was standing in the dock. Then, the witness had been asked, of the people who came, who are in court and the response of the witness was "All of them were there" ["ඔක්කොම උන්නා."]. She had said that several Accused attacked Siripala with knives and in reference to the 7th Accused she had said that he attacked Siripala on

his legs with an axe. The Post-Mortem Report of Siripala indicates that he has sustained several injuries to his right leg. In total, the JMO had observed 30 injuries on the body of Siripala.

(19) It must be noted however, that three omissions were highlighted in the course of the cross examination of Rosalyn to the effect that she had failed to state or mention that the 7th Accused was armed with an axe. What is significant is that the omission relates to the weapon the 7th Accused alleged to have carried at the time of the attack, but not relating to his presence at the scene when the crimes were committed. Her statement to the Police does not appear to be a belated one.

(20) It is also to be noted that other than the omissions referred to above, the evidence of Rosalyn is devoid of contradiction *per se*. The learned trial judge having considered the evidence of Rosalyn had observed that there is no reason to reject the evidence of the said witness. As the witness had testified before the predecessor of the learned High Court judge who delivered the judgement, he had not commented on the demeanour or the deportment of the witness. Undoubtedly it would have been a traumatic experience for Rosalyn to witness the attack on her son-in-law and grandchild. Further, she had mentioned that a crowd of about 25 people came there on that day. Under those circumstances, it was quite possible that she would not have been in a fit mental status, not only to absorb every detail of the events that unfolded on that day but also to narrate them in detail. I am of the view that the infirmities in Rosalyn's testimony must be evaluated considering the traumatic experience she had to undergo, having witnessed the incident.

(21) It was argued on behalf of the 7th Accused that, the 'omissions' referred to in the testimony of Rosalyn create a serious doubt about the testimonial trustworthiness of the witness. Although it was contended that the learned

High Court Judge had failed to consider those omissions, in his judgement [at pg 448 of the brief] the learned High Court Judge had observed that her evidence is not tainted by 'serious contradictions' which goes to indicate that he had evaluated her evidence. Thus, the failure to state that the 7th Accused was armed with an axe, in my view is not sufficiently grave to discredit Rosalyn. Thus, I cannot find fault with the trial judge on relying on the testimony of Rosalyn.

(22) On the other hand, in evaluating Rosalyn's evidence, the learned trial judge had considered the evidence given by the police officers who visited the scene and had observed that her evidence is compatible with observations made by the police officers [pg 447 of the brief] in the circumstances aforesaid, the findings of the learned trial judge on the testimonial trustworthiness of Rosalyn cannot be faulted.

The Questions of Law

(23) The first question that this court is called upon to address is whether the Learned Judges of the Court of Appeal misdirected themselves when they held that the doctrine of indivisibility of credibility does not apply to the evidence of witness Nandasiri in the circumstances of this case and thereby occasioned a miscarriage of justice.

(24) Giving evidence before the High Court, witness Nandasiri stated that the 8th Accused hit the diseased Siripala with a pestle which made him fall to a side and that thereafter the 3rd, 5th, 6th, 7th and 8th Accused surrounded Siripala and attacked him with weapons (pg 126 of the High Court Brief), seeing which, he fled the scene. In his statement to the Police, however, he had stated that he did not see the attack on the deceased Siripala. This contradiction was marked as '3V1' and '10V3' (pgs 149 and 183 of 'P1').

(25) Addressing the contradiction referred to above, the Court of Appeal held; "*These omissions are, in my view, vital omissions although the learned trial judge, in his judgment, had concluded that they were not vital. When I consider the said omission, I feel that Nandasiri had not seen Siripala being attacked. Thus, his evidence with regard to the attack on Siripala cannot be accepted as true.*" Considering the nature of the contradiction and its impact on Nandasiri's evidence the conclusion of the Court of Appeal is correct.

(26) The Court of Appeal, however, having disbelieved Nandasiri's evidence before the High Court as to witnessing the attack on Siripala, proceeded to act on the other parts of his evidence, *inter alia*, relying on the decision in ***Samaraweera v. The Attorney General*** (1990) 1 SLR 256. In the case of ***Samaraweera*** [*supra*] the verdict of the High Court was challenged before the Court of Appeal mainly on the ground that the same two witnesses who had testified against the 2nd Accused who was acquitted had testified against the 3rd Accused who was found guilty. It was contended that if the two witnesses were disbelieved as against the 2nd Accused the jury should not have believed them regarding the 3rd Accused-Appellant, and the maxim *falsus in uno falsus in omnibus* should have been applied. Rejecting the said contention, the Court of Appeal held "*The verdict was supportable in that the acquittal of the 2nd Accused could be attributable to the fact that vicarious liability on the basis of common intention could not be imputed to him on the evidence even if the two witnesses were believed.*"

(27) The learned President's Counsel citing, E.R.S.R. Coomaraswamy's **'The Law of Evidence'** [Vol II, Book 2, page 753,] emphasized that "*a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of a non-existence of a fact.*" Relying further on Coomaraswamy, it was submitted that it is recumbent on the court to decide whether a particular omission amounts to a contradiction or not by reference to the

facts. The test applicable is whether, it being natural for the person to make the assertion in question, such person has failed to make the assertion. Such conduct is *prima facie* an inconsistency unless cleared by an explanation. It was submitted that witness Nandasiri could not offer an explanation as to why he stated that he did not see the attack on the deceased in the police statement but stated that he did in fact witness the attack when giving evidence before the High court. It was further submitted that due to Nandasiri's personal relationship to the two deceased he is an interested witness. Given these factors it was submitted that there is a reasonable doubt about the evidence of Nandasiri and it should not be acted upon.

(28) I am of the view that the contradiction referred to, as to whether Nandasiri had witnessed the incident or not, is a vital one and makes his entire testimony unreliable and infirm. Thus, I am of the view that placing reliance on such evidence is unsafe and should not have been acted upon but rejected.

(29) For the reasons set out above, I answer the question of law referred to in sub-paragraph (b) of Paragraph 15 of the Petition in the affirmative. As referred to earlier the other question of law on which special leave was granted was in respect of the 3rd Accused who is now dead; and hence a requirement of answering the said question does not arise.

(30) The question that needs to be addressed now is, even though the question of law referred to above was answered in favour of the 7th Accused whether he would be entitled to an acquittal.

(31) Although both the learned trial judge as well as the Court of Appeal had misdirected themselves by not rejecting the evidence of witness Nandasiri, the same cannot be said about witness Rosalyn. Even if the evidence of

witness Nandasiri is rejected, I see no reason to reject the evidence of Rosalyn and as such the trial judge cannot be faulted for acting on her evidence. As referred to earlier she had clearly implicated the 7th Accused as one of the persons who came with the crowd that day and attacked both Siripala and Thushara, the two deceased.

(32) In the circumstances referred to above, I am of the view that this is a fit case to apply the proviso to Article 138(1) of the Constitution which reads;

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Although this court is of the opinion that the question of law raised should be decided in favour of the 7th Accused-Appellant, I proceed to dismiss this appeal as no failure of justice has occurred.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE E.A.G.R. AMARASEKARA

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC/Appeal/78/2014
SC/SPL/LA 96/2012
CA (Revision): 385/2003
DC/Mount Lavinia
Case No: 849/P

1. Matarage Don Lorence Apppuhamy
(deceased)
No. 11, Huludagoda Lane,
Mount Lavinia.

Plaintiff

01A. Matarage Dona Sudharma
No. 142/29 Sekkuwatta,
Dalupitiya Road, Mahara,
Kadawatha.

Substituted Plaintiff

Vs.

01. Lucien Ivan Wilfred de Alwis
(deceased)
1A. John de Alwis,
No. 10, Quarry Road,
Ratmalana.

02. Gerald Clerk Wilfred de Alwis,
No. 22, Huludagoda Road,
Mount Lavinia.

03. Wilfred Letman Eustus de Alwis,

Zoological Gardens,
Dehiwela.

04. Wilfred Michael Neville de Alwis,
No. 22, Huludagoda Road,
Mount Lavinia.

05. Joyce Gladys Christobel Gunathilake
nee de Alwis, (deceased)
No. 30, Huludagoda Road,
Mount Lavinia.

05A. E.P.T. Gunathilake

05B. Sriyani Gunathilake
both of No. 30, Huludagoda Road,
Mount Lavinia.

06. Sheila Constance Milred
Gunathilake nee De Alwis,
No. 20, Huludagoda Road,
Mount Lavinia.

07. Gunawathie Liyanage nee Wijeratne,
"Manel Niwasa", Padikara, Waluwatta,
Veyangoda.

08. Kuda Liyanage Leslie
09. Kuda Liyanage Kusum kanthi
10. Kuda Liyanage Iranganie
11. Kuda Liyanage Doreen
12. Kuda Liyanage Sandhya,
All of "Manel Niwasa",
Padikara Waluwatta,
Veyangoda.

13. Matarage Don Gunadasa,
    No. 70, Huludagoda Road,
    Mount Lavinia.
14. Matarage Don Karunratna,
    No. 9A, Huludagoda Road,
    Mount Lavinia.

15. Ganthudage Peter Perera,
    No. 2/1, Menerigama Place,
    Mount Lavinia.

16. Waduthantrige Hemawathie Alwis,
    No. 19/1, Huludagoda Road,
    Mount Lavinia.

17. Mirihanage Maggie Perera,
    "Kusumgiriya",
    Mahalwarawa Junction,
    Pannipitiya.

18. Matarage Dona Kusumawathie,
    Kusum Somathilake, Sirideva Niwasa,
    Malagama, Malwana.

19. Mataragae Don Munidasa
20. Matarage Dona Gunaseeli
    Both of "Kusumgiriya",
    Mahalwarawa Junction,
    Pannipitya.

21. Kolambage Nollie Peiris
22. Matarage Don Seelet
23. Matarage Dona Sumanawathie
24. Matarage Don Anadasiri

25. Matarage Dona Thilaka
    All of No. 09, Huludagoda Road,
    Mount Lavinia.

26. Ranasinghe Arachchige Don Ariyadasa,
27. Ranasinghe Arachchige Don Edwin
28. Ranasinghe Arachchige Don Piyadasa
29. Ranasinghe Arachchige Don
    Dharmapala
30. Ranasinghe Arachchige Sisilin
    All of No. 633, Station Road,
    Kottawa, Pannipitiya.

31. Dodanwalage Chnadradasa Perera,
    Presidential Secretariat,
    Colombo.

32. Donwalage Walter Perera,
    Hulugoda Lane,
    Mount Lavinia.

33. Donwalage Piyadasa Perera,
    No. 8/2, Huludagoda Lane,
    Mount Lavinia.

34. Donwalage Rupawathie Perera
    No. 7A, Huludagoda Lane,
    Mount Lavinia.

35. N.H.T. Wilson Perera,
    No. 7A, Huludagoda Lane,
    Mount Lavinia.

36. W. Kusumwathie Sriyalatha Fonseka,
No. 8/1B, Huludagoda Lane, Mount Lavinia.

37. K. Maggie Perera (deceased)

37A. A.W.S. Fonseka

38. A.W.S. Fonseka

39. W. Somadasa Fonseka (deceased)

39A. A.W.S. Fonseka
All of No. 8/1, Huludagoda Lane, Mount Lavinia.

40. W. Arthur Fernando

41. W. Austin Fernando

42. W. Elsie Fernando

43. W. Helen Fernando
All of 14/4, Huludagoda Lane, Mount Lavinia

44. Matarage Dona Sopihamy, (deceased)
No. 12, Huludagoda Lane, Mount Lavinia

44A. Rillagoda Arachchihge Alexander
No. 12, Huludagoda Lane, Mount Lavinia.

45. Matarage Don William (deceased)
No. 36/1, Piliyandala Road, Godigamuwa, Maharagama.

45A. Henadheerage Don Asilin Nona,
No. 14/7, Pengiriwatta Lane, Gangodawila, Nugegoda.

46. Matarage Don Rosalinhamy
(deceased)
No. 12, Huludagoda Lane,
Mount Lavinia.

46A. Matarage Don Ariyadasa
No. 14/7, Pengitriwatta Lane,
Gangodawila, Nugegoda.

47. Liyanage Henry Perera (deceased)
No. 3, Huludagoda Road,
Mount Lavinia.

47A. Liyanage Rojilina Perera nee
Gunasekera

48. Liyanage Vincent Perera (deceased)
No. 442, Neelammahara Road,
Godigamuwa.

48A. Wanniarachchige Dona Miyulin,
No. 2/1, Huludagoda Road,
Mount Lavinia.

49. Kuda Liyanage Nandawathie,
No. 9, Huludagoda,
Mount Lavinia.

50. Kurukulasuriya Peter Perera,
No. 102, Modara,
Moratuwa.

51. Punchi Hewage Babynna

52. Kuda Liyanage Ebert,
Both of No. 32/2, Huludagoda Road,
Mount Lavinia.

53. Kuda Liyanage Noyal *alias* Sunney,
(deceased)
No. 23/1, Huludagoda Road,
Mount Lavinia.

53A. Hettige Dulcie Iranganie Perera,
No. 23/1, Huludagoda Road,
Mount Lavinia.

54. Kuda Liyanage Hamini alias Walter,
No. 27/2, Huludagoda Road,
Mount Lavinia.

55. Kuda Liyanage Weslin,
No. 146/A, Anderson Road,
Nedimala, Dehiwala.

56. Rilagoda Arachchige Wimalawathie,
No. 12, Huludagoda Lane,
Mount Lavinia.

57. Kudaligama Son Sugathapala,
No. 9, Huludagoda Lane,
Mount Lavinia.

58. K.D. Piyasoma,
No. 14, Huludagoda Lane,
Mount Lavinia.

59. G.M. Albert,
No. 14/3, Huludagoda Lane,
Mount Lavinia.

60. K. Dharmasena,
No. 14/6, Huludagoda Lane,
Mount Lavinia.

61. S. Rajawasam,
No. 18, Huludagoda Lane,
Mount Lavinia.

62. Dissanayake Mudiynsela Abeysekera,
No. 14, Huludagoda Lane,
Mount Lavinia.

63. K. Lurde Gunathilake,
No. 40/1, Huludagoda Lane,
Mount Lavinia.

64. G.L. Piyadana (deceased)
No. 40/1, Huludagoda Lane,
Mount Lavinia.

64A. Warna Jinadasa alias Hettiarachchi,
No. 21/1, Huludagoda Lane,
Mount Lavinia.

65. M. Paranawithana,

66. Iranganie Bopearachchi,
No. 16/1, Attidiya Road,
Ratmalana.

67. J.K. Paranawithana

68. A.M. Paranawithana
Both of No. 16/1, Huludagoda Lane,
Mount Lavinia.

69. Sarath Paranawithana,
No. 1A/1, Attidiya Road,
Ratmalana.

70. Dodangodaliyanage Albert
Jayatunga Mathugama (deceased)
70A. G.L.D.G. Jayasinghe

71. G. Henkenda,
3rd Lane,
Ratmalana.

72. W. Edwin Thisera,
No. 14/3, Huludagoda Lane,
Mount Lavinia.

73. S.A. Wilson,
No. 14/3, Huludagoda Lane,
Mount Lavinia.

74. S.A. Newton,
No. 14/3, Huludagoda Lane,
Mount Lavinia.

75. Commissioner of National Housing
Sir Chittmpalam A. Gardiner Mawatha,
Colombo 02.

76. G. Lomina de Silva,
No. 14/3, Huludagoda Lane,
Mount Lavinia.

77. Sumawathie Dabare,
No. 14/3, Huludagoda Lane,
Mount Lavinia.

78. Mudiyanselkage Darley
Dewalkawatta, Templers Road,
Mount Lavinia.

79. K.D. Hemawathie,
No. 6, Huludagoda Lane,
Mount Lavinia.

80. Mount Hatters Private Limited,
No. 447, Galle Road,
Mount Lavinia.

81. M.A. Fernando,
No. 13/11, Huludagoda Lane,
Mount Lavinia.

82. S.B. Wilson

83. Cicilin Fernando,
No. 14/6, Huludagoda Lane,
Mount Lavinia.

84. L.D. Pabilinqa Gunasekera

85. Roshilitha Gunasekera

86. Cicili Perera,
Huludagoda Lane,
Mount Lavinia.

87. B.M. Bandara,
Huludagoda Lane,
Mount Lavinia.

88. S.P. Dharmadasa,
Huludagoda Lane,
Mount Lavinia.

89. Siriyawathie
No. 14/5, Huludagoda Lane,
Mount Lavinia.

Defendants

AND

01.Gunawathie Liyanage nee Wijeratne,
02. Kuda Liyanage Leslie
03. Kuda Liyanage Kusum kanthi
04. Kuda Liyanage Iranganie
05. Kuda Liyanage Doreen
06. Kuda Liyanage Sandhya,
All of No. 6, Old Road,
Pannipitiya.

7th to 12th Defendant-Petitioners

Vs.

01. Matarage Don Lorence Apppuhamy
(deceased)
No. 11, Huludagoda Lane,
Mount Lavinia.

1A. Matarage Dona Sudharma
No. 142/29 Sekkuwatta,
Dalupitiya Road, Mahara,
Kadawatha.

Plaintiffs-Respondents

02. Lucien Ivan Wilfred de Alwis
03. John de Alwis,
Both of No. 10, Quarry Road,
Ratmalana.

04. Gerald Clerk Wilfred de Alwis,
No. 22, Huludagoda Road,
Mount Lavinia.

05. Wilfred Letman Eustace de Alwis,
Zoological Gardens,
Dehiwala.

06. W212, Hulugoda Lane,
Mount Lavinia.

07. Joyce Gladys Christobel Gunathilake
nee de Alwis, (deceased)
No. 30, Huludagoda Road,
Mount Lavinia.

08. E.P.T. Gunathilake

09. Sriyani Gunathilake
Both of No. 30, Huludagoda Road,
Mount Lavinia.

10. Sheila Constance Milred
Gunathilake nee De Alwis,

No. 20, Huludagoda Road,
Mount Lavinia.

1st, 1A, 2nd to 5th, 5A and 5B and 6th Defendants-Respondents

11. Matarage Don William (deceased)
No. 36/1, Piliyandala Road,
Godigamuwa, Maharagama.

12. Henadheerage Don Asilin Nona,
No. 14/7, Pengiriwatta Lane,
Gangodawila, Nugegoda.

13. Matarage Don Rosalinhamy
(deceased)
No. 12, Huludagoda Lane,
Mount Lavinia.

14. Matarage Don Ariyadasa
No. 14/7, Pengitriwatta Lane,
Gangodawila, Nugegoda.

45th, 45A, 46th and 46A Defendants-Respondents

AND NOW BETWEEN

01. Gunawathie Liyanage nee Wijeratne
06. Kuda Liyanage Sandhya
All of No. 6, Old Road,
Pannipitiya.

7th and 12th Defendants-Petitioners-Petitioners

Vs.

01. Matarage Don Lorence Apppuhamy
(deceased)
No. 11, Huludagoda Lane,
Mount Lavinia.

01A. Matarage Dona Sudharma
No. 142/29 Sekkuwatta,
Dalupitiya Road, Mahara,
Kadawatha.

Plaintiff-Respondents-Respondents

02. Lucien Ivan Wilfred de Alwis
(deceased)

03. John de Alwis,
No. 10, Quarry Road,
Ratmalana.

04. Gerald Clerk Wilfred de Alwis,
No. 10, Huludagoda Road,
Mount Lavinia.

05. Wilfred Ludowollyn Eustace de Alwis,
Zoological Gardens,
Dehiwala.

06. W212, Huludagoda Lane,
Mount Lavinia.

07. Joyce Gladys Christobel Gunathilake
nee de Alwis, (deceased)

08. E.P.T. Gunathilake

09. Sriyani Gunathilake

10. Sheila Constance Milred
Gunathilake nee De Alwis,
No. 20, Huludagoda Road,
Mount Lavinia.

1st, 1A, 2nd to 5th, 5A and 5B and 6th Defendants-Respondents-Respondents

11. Matarage Don William (deceased)
No. 36/1, Piliyandala Road,
Godigamuwa, Maharagama.

12. Henadheerage Don Asilin Nona,
No. 14/7, Pengiriwatta Lane,
Gangodawila, Nugegoda.

13.Matarage Don Rosalinhamy

(deceased)
No. 12, Huludagoda Lane,
Mount Lavinia.

14. Matarage Don Ariyadasa
No. 14/7, Pengitriwatta Lane,
Gangodawila, Nugegoda.

45th, 45A, 46th and 46A Defendants-Respondents-Respondents-Respondents

02. Kuda Liyanage Leslie
03. Kuda Liyanage Kusum Kanthi
04. Kuda Liyanage Iranganie

05. Kuda Liyanage Doreen
All of No. 6, Old Road,
Pannipitiya.

8th to 11th Defendants-Petitioners-Respondents

Before: Hon. Priyantha Jayawardena PC, J
Hon. A.L. Shiran Gooneratne, J
Hon. Achala Wengappuli, J

Counsel: Mangala Niyarapola with Shamika Seneviratne for the Defendant-Petitioner-Appellant-Appellant

Mokshini Jayamanne for the 1st to 6th Defendants-Respondents-Respondents

K.G. Pathiraja with J.M. Wijebandara for the 21st Defendant-Respondent-Respondent

Ranjan Siriwardena PC with Anil Rajakaruna and R.D. Perera for the 46A Defendant-Respondent-Respondent

N. Wigneshwaran Senior State Counsel for the Hon. Attorney General

Argued on: 8th October, 2021

Decided on: 10th November, 2023

Priyantha Jayawardena PC, J

This is an appeal to set aside the judgment of the Court of Appeal dated 30th of March, 2012 which dismissed the Revision Application filed by the appellants on the grounds that there was an inordinate delay in filing the Revision Application and the appellants have failed to explain the reason for the delay.

On the 22nd of April, 1974, the plaintiff-respondents-respondents (hereinafter referred to as the "respondents") instituted action in the District Court of Mount Lavinia to partition a land called Kongahawatta and Otudena Dawatagahawatta alias Gorakagahawatta, situated at Watarappola, Mount Lavinia, in extent of 7 Acres, 1 Rood and 12.53 Perches (A7: R1: P12.53).

Thereafter, the 7th and 8th defendants-petitioners-appellants (hereinafter referred to as the "appellants") filed their Statement of Claim on the 9th of March, 1993 and pleaded that they are entitled to 14254/211680 share of Lot No. 17 of the undivided land depicted in the Preliminary Plan of the case.

At the trial, the contest was between the appellants and the 49th, 66th to 69th and 79th respondents, in respect of the deed bearing No. 3494 dated 1st of December, 1958 which was produced marked as "50D1", as to whether the said deed created a constructive trust.

After the trial, the learned District Judge delivered his judgment on the 1st of October, 1990 holding that the said deed marked as "50D1" did not create a constructive trust and that the interlocutory decree was entered accordingly. Hence, the appellants were allocated 142959/211680 shares of the corpus, which is equivalent to 1/15 share of the corpus.

Being aggrieved by the said judgment of the District Court, the appellants appealed to the Court of Appeal against the same. Thereafter, the Court of Appeal, by judgment dated 20th of February, 1998 held that the only issue to be considered in the appeal is whether Deed of Transfer No. 3949 dated 1st of December, 1958 (50D1) was a nominal transfer by one Dharmadasa to his mother, Mary Perera, which gave rise to a trust in favour of Dharmadasa and, upon his death, in favour of his heirs. The Court of Appeal held that there were sufficient attended circumstances to come to the conclusion that there was a trust and set aside that part of the judgment of the learned District Judge dated 1st of October, 1990. Accordingly, it was further held that the allotment of shares in the main partition action should be amended when preparing the Interlocutory Decree. Subject to the above judgment, the District Court judgment dated 8th of March, 1990 was affirmed by the Court of Appeal.

Consequently, in compliance with the Court of Appeal judgment, the learned District Judge amended the Interlocutory Decree on the 21st of February, 2000.

The appellants stated that, when the surveyor visited the land to be partitioned, it was discovered that the shares allotted to them were much less than what they expected to be given by the judgment.

Thus, the appellants made an application to the District Court on or around the 30th of May, 2002 under section 48(4) of the Partition Act No. 21 of 1977 as amended (hereinafter referred to as the "Partition Act") and/or section 189 of the Civil Procedure Code to amend and/or modify the said Interlocutory Decree.

In the aforesaid application to the District Court, the appellants stated that when the appellants checked the allocation of shares as per the amended Interlocutory Decree, it was discovered that they had been allotted only 588/70560 shares of the corpus, which is equivalent to about 1/120 shares of the corpus, whereas they should have been allotted a share equivalent to 1/15 of the corpus as shown in the plaint and for which evidence had been led at the trial.

Further, in the said application, it was stated that the appellants discovered that the shares that should have been devolved on them by Deeds marked as "7V1", "7V3", 7V4" and "7V6" [also marked as P6 to P9], that were produced in evidence at the trial without a contest and also by inheritance under the pedigree were not been taken into consideration in preparing the scheme of shares after the judgment of the Court of Appeal was delivered.

However, the 1st to 6th respondents and the 45th and 46th respondents objected to the said application of the appellants to amend and/or modify the said Interlocutory Decree.

After an inquiry, the learned District Judge by Order dated 28th of January, 2003 dismissed the application of the appellants.

Being aggrieved by the said Order of the learned District Judge dated 28th of January, 2003 the appellants filed a Revision Application in the Court of Appeal on the 27th of April, 2003 seeking, *inter alia*, to revise and/or set aside the said Order delivered by the District Court and to amend the Interlocutory Decree dated 21st of February, 2000.

After hearing the said Revisions Application, the Court of Appeal, by judgment dated 30th of March, 2012 dismissed the said Application of the appellants on the basis that there was an inordinate delay in filing the Revision Application.

Being aggrieved by the said judgment of the Court of Appeal, the appellants sought leave to appeal from this court and prayed for:

"(a) Issue notice on the Plaintiff and the Respondents;

(b) Call for an examine the record of District Court of Mount Lavinia Case No; 849/P;
(c) Stay further proceedings in District Court of Mount Lavinia Case No; 849/P until final determination of this application;
(d) Set aside and/or revised the impugned judgment dated 30/03/2012 (marked "X13") in the Court of Appeal Case No: CA (Revision) 385/2003;
(e) Set aside the Order dated 28/01/2003 (marked "X10" above) and direct the learned District Judge to amend and/or modify the amended interlocutory Decree (marked X6) by allocating correct shares to the Petitioners; or
(f) **In the alternative, set aside the Order dated 28/01/2003 (marked "X10" above) and the amended Interlocutory Decree (marked X6) entered in this case and amend the original Interlocutory Decree dated 01/10/1990 (marked "X4") by allocating correct shares to the Petitioners**;
(g) Set aside the judgment and Interlocutory Decree dated 21/01/2000 (marked "X6" above) and the final decree that may be entered in the District Court of Mount Lavinia Case No; 849/P;
(h) Grant cost of this Application; and
(i) Grant Special Leave to Appeal
(j) Grant such other and further relief as to Your Lordships' Court shall seem fit."

[emphasis added]

Thereafter, this court granted leave to appeal on the following questions of law;

"(a) Is the said impugned judgment marked "X13" is ex facie wrong?

(b) Is the said impugned judgment marked "X13" is bad in law and against the oral evidence adduced in this case?

(c) Is the said impugned judgment marked "X13" is contrary to law and against the weight of documentary evidence adduced?

(d) Did their Lordships of the Court of Appeal err in law by misdirecting themselves in failing to appreciate the fact that:

(i) the said Order of learned District Judge dated 28/01/2003 (marked "X10") is contrary to law and against the evidence adduced in that case;

(ii) the learned District Judge has failed to carry out the mandatory provisions of the Partition Act in examining the title of all parties and satisfy himself of the rights of all parties before court;

(iii) the learned District Judge has failed in his duty in acting solely on the computation of shares prepared by the Attorney-at-Law of the Plaintiff (Plaintiff-Respondents-Respondents herein);

(iv) the learned District Judge has failed to address his mind that as per his amended Interlocutory Decree subsequent Scheme of Partition (marked as "X14(a)" and "X14(b)" below), the Petitioners were the only party to this action to be deprived of their complete dwelling house where they have been peaceful and undisturbed possession for over 44 years, whilst they have established their entitlement for a bigger share of the corpus.

(v) the learned District Judge has wrongly interpreted the provisions of section 48(4) of the Partition Act and/or section 189 of the Civil Procedure Code and failed to amend and/or modify the amended Interlocutory Decree as contemplated in the said sections;

(vi) the learned District Judge has wrongfully and illegally held that the Petitioners were attempting to introduce new Deeds and claim shares in the land, whereas, in fact they have only drawn attention to the Deeds that have been already produced and marked in evidence, namely Deeds marked 7V1, 7V3, 7V4 and 7V6 (currently) marked "X7(a)", "X7(b)", "X7(C)" and "X7(d)" respectively) and the shares inherited under the Pedigree proved in evidence;

(vii) the learned District Judge has completely misunderstood and misconstrued the Petitioners' application to amend the amended Interlocutory Decree?

(e) Did the Lordships of the Court of Appeal err in law in erroneously concluding that the finality that is given to an Interlocutory Decree and the final judgment of a partition action by the

Partition Act cannot be disturbed by Court of Appeal by invoking the revisionary jurisdiction of that court?

(f) Did their Lordships of the Court of Appeal err in law in failing to appreciate that the Petitioner have established fit and proper grounds to show their Lordships that the decision of learned District Judge was so erroneous that, with no doubt, shocks the conscience of the court which warrant the intervention of the Court of Appeal by invoking the revisionary jurisdiction?

(g) Did their Lordships of the Court of Appeal err in law in failing to appreciate that the same court on the same subject matter has taken a very pragmatic and contrary view of the Petitioners' application invoking revisionary jurisdiction of the Court of Appeal by the Order of their Lordships dated 13/05/2003 when it was supported for a stay order at the outset (marked X12)?

(h) Did their Lordships of the Court of Appeal err in law by misdirecting themselves in failing to appreciate that there was no ground for illiterate and unemployed 7th widow Petitioner and her 5 children to suspect that the learned District Judge would come to such an erroneous conclusion after proving in evidence of their entitlement in the corpus and also due mainly to their inability to determine the actual extent of land allotted in the original interlocutory decree actual extent of land allotted in the original interlocutory decree only representing by way of complicated mathematical calculations?

(i) Did their Lordships of the Court of Appeal err in law in erroneously concluding that the Petitioners were guilty of being non-vigilant right throughout the case, when the Petitioners have in fact taken some timely action to challenge what in their understanding was wrong and in the given circumstances and that is much better than doing nothing at all?

(j) Did their Lordships of the Court of Appeal err in law by misdirecting themselves in failing to appreciate that considering the circumstances prevailed in the present case there was total want of investigation of tile and that there is paramount duty cast on the court by the Partition Law itself to investigate title?

(k) Did their Lordships of the Court of Appeal err in law by misdirecting themselves in failing to appreciate that the judgment entered for the partition of the land is clearly contrary to law as there has been a total failure by the court to investigate the title of each party?

(l) Did their Lordships of the Court of Appeal err in law by misdirecting themselves in failing to appreciate that a grave miscarriage of justice had actually occurred and also failing to appreciate that there is a paramount duty imposed by the statute on the court to ensure that the rights of persons claiming title to the land are not placed in jeopardy by the decree sought from court?

(m) Did their Lordships of the Court of Appeal err in law by misdirecting themselves in failing to appreciate that the evidence adduced and grounds set out before their Lordships' have in fact established extraordinary and exceptional circumstances which warrants the intervention of the Court of Appeal by way of revision notwithstanding the purportedly unexplained delay of 13 years, in seeking revisionary jurisdiction of their Lordships' Court?

(n) Did their Lordships of the Court of Appeal err in law in erroneously concluding to dismiss the Petitioners' revision application simply on the ground of delay, without giving very extraordinary reasons to justify such dismissal, when it is well-established that the impugned Order of learned District Judge dated 28/01/2003 (marked "X10") and the amended Interlocutory Decree dated 21/02/2000 (marked "X6") are manifestly erroneous and failing to appreciate that it would be unjust to allow the mischief of the order and/or interlocutory decree to continue and reject such revision application simply on the ground of delay?"

During the hearing of the instant appeal, it appeared that most of the questions of law referred to above did not reflect the correct questions of law arising from the judgment of the Court of Appeal. Hence, with the consent of the parties, this court raised the following question of law and the parties agreed to have the hearing confined to the new question of law raised by this court.

> "Did the Court of Appeal err in law by coming to the conclusion that there is an inordinate delay in filing the Revision Application and the parties have not explained the reason for the delay in the Revision Application filed in the Court of Appeal?"

In the circumstances, the other questions of law will not be considered in this judgment.

Did the Court of Appeal err in law by coming to the conclusion that there is an inordinate delay in filing the Revision Application?

After hearing the first appeal preferred by the appellants the Court of Appeal delivered the judgment on the 20th of February, 1998 and held, *inter alia*;

> *"We are satisfied that there were enough attended circumstances to come to the conclusion that the mother Mary Perera held the shares in question in trust for the son Dharmadasa and his heirs the 7th to 12th defendant-appellants abovementioned….. We make order that shares transferred by Dharmadasa to Mary Perera on Deed 50D1 should devolve on the 7th to 12th defendant-appellants and the allotment of shares in the main petition case should be adjusted and amended accordingly when preparing the Interlocutory Decree.* ***Except for these changes the judgment dated 08.03.90 shall remain unaffected****."*
>
> [emphasis added]

Thereafter, the learned District Judge amended the said Interlocutory Decree on the 21st of February, 2000 as directed by the Court of Appeal.

Subsequently, the appellants made an application to the District Court on the 30th of May, 2002 under section 43(4) of the Partition Act No. 21 of 1977 as amended and/or under section 189 of the Civil Procedure Code to amend and/or modify the said amended Interlocutory Decree, stating that the allocation of shares in the amended Interlocutory Decree is not in conformity with the deeds produced at the trial before the District Court.

After an inquiry, the learned District Judge by Order dated 28th of January, 2003 dismissed the application of the appellants on the grounds that the District Court does not have jurisdiction to amend the judgment of the Court of Appeal and that the reliefs pleaded by the 7th to 12th appellants cannot be granted either under section 189 of the Civil Procedure Code or under section 48(4) of the Partition Act, the said provisions can only be invoked under special circumstances.

Thereafter, the appellants filed a Revision Application in the Court of Appeal, seeking, *inter alia,* to revise and/or set aside the said Order of the District Court.

After hearing the appeal, the Court of Appeal, by judgment dated 30th of March, 2012 dismissed the said Revision Application of the appellants and held, *inter alia:*

> *"In this instant application the Petitioner was a party to the partition action from early 70s until the judgment was delivered in March 1990 and thereafter he challenged the judgment and was an appellant until the judgment was finally delivered by the Court of Appeal in 1998. The appeal was not on the grounds urged in this Revision Application* ***but in fact the purported error complained of in this Revision Application was in existence at the time the final appeal was preferred. In these circumstances this Court cannot entertain a revision application to revise an order that was made 13 years ago****, in view of this inordinate delay and, as the delay is not explained, this Court dismisses this application without costs."*
>
> [emphasis added]

A careful consideration of the said judgment of the Court of Appeal shows that the appellants sought to revise the original judgment delivered by the District Court on the 1st of October, 1990 and the application to revise the same was made to the Court of Appeal on the 23rd of February, 2003. i.e., after the appeal was decided by the Court of Appeal on the 23rd of February, 2003.

Thus, it is necessary to consider the delay in filing the said Revision Application and the maintainability of the said Revision Application.

The jurisdiction to hear Revision Applications are set out in terms of Article 138 of the Constitution and section 753 of the Civil Procedure Code.

Article 138(1) of the Constitution states;

> *"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

Further, section 753 of the Civil Procedure Code states;

"The Court of Appeal may call for and examine the record of any case, whether already tried or pending trial, in any court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such court, and may upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been brought it in due course of appeal instead of by way of revision."

It is pertinent to note that though an appeal is a right conferred on the litigants a revisionary jurisdiction is a discretionary remedy and cannot be exercised as of right. Further, courts exercise revisionary jurisdiction only when the parties satisfy the courts that there is a real need to exercise the discretion of the court to entertain a Revision Application. Hence, the petitioners should aver sufficient reasons in the petition to justify when making an application to invoke the discretionary power of the court.

A similar view was expressed in ***Wijesinghe v Tharmaratnam*** **Sri Skantha's Law Reports Vol. IV 47 at 49** where it was held;

"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which 'shocks the conscience of the court'."

Further, in ***Dharmaratne and Another v Palm Paradise Cabanas Ltd. and Others*** **(2003) 3 SLR 24 at 30** it was held;

"The practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'."

As stated above, the petitioner should plead the 'exceptional circumstances' which warrant court to exercise its discretion in deciding to entertain a Revision Application. Further, the 'exceptional circumstances' will vary from one application to another, and such circumstances are unique to each and every application. Moreover, if a petitioner avers 'exceptional circumstances' in the petition, the learned judge is required to consider such matters and satisfy himself that there are 'exceptional circumstances' that warrant the exercise of discretion to entertain the application of the petitioner. A similar view was expressed in ***Rustom v Hapangama*** **(1978-79) 2 SLR 229** where it was held;

> *"It must depend entirely on the facts and circumstances of each case and one can only notice the matters which courts have held to amount to exceptional circumstances in order to find out the essential nature of these circumstances."*

However, if the court is not satisfied that the 'exceptional circumstances' that are pleaded in the petition do not warrant the invocation of the discretion of court due to the facts and circumstances of the case or due to the law applicable to the relevant Revision Application, the court shall not exercise such discretion in favour of the petitioners.

Further, if a right of appeal was available and the petitioner failed and/or neglected to use the said right, the petitioner should state in his petition the reason for failing to exercise the right of appeal. Furthermore, in order to invoke the discretionary power of court, the petitioner should disclose all relevant material facts and should not misrepresent or suppress material facts. Hence, a petitioner should come to court with clean hands (*Uberrima Fides*). Moreover, there should be no laches in making the application

Laches

As stated above, a Revision Application should be made within a reasonable time. Thus, delay in making an Application for Revision for an Order made by a lower court results in refusing the application. If there is a delay in making an Application for Revision, the petitioner should explain the reason for such delay in the petition filed in court. A similar view was expressed in ***Rajkumar and Another v Hatton National Bank*** **(2007) 2 SLR 1** where it was held;

> *"The power of revision vested in the Court of Appeal in discretionary. Vide Colombo Apothecaries Ltd. v Commissioner of Labour, Rasheed Ali v Mohamed*

Ali (supra), and Wijesinghe v Tharmarathnam. On a careful consideration of the above judicial decisions, I hold that revision being a discretionary remedy is not available to those who sleep over their rights. I further hold that it is not the function of the Court of Appeal, in the exercise of its revisionary jurisdiction, to relieve parties of the consequences of their own folly, negligence and laches."

Furthermore, a long and unexplained delay disentitles a petitioner to get any relief by way of revision. A similar view was expressed in the following cases.

In ***Gnanapandithan v Balanayagam*** **1998 (1) SLR 391,** it was held;

"The question whether delay is fatal to an application in revision depends on the particular facts and circumstances of the case."

Further, in ***Carlo Perera v Lakshman Perera*** **(1990) 2 SLR 302** it was held;

"The Defendant-Petitioners sought to explain the delay partly on the basis that they had to obtain a certified copy of the proceedings from the District Court. It is noted that the certified copy was obtained on 17.12.1984. This application was thereafter filed on 31.1.1985. Thus, it is seen that the application has been filed within a period of five months of the order that is challenged. It had been filed within six weeks of the certified copy being obtained. Counsel for the Defendant-Petitioners has not cited any precedent in which an application has been dismissed because it was filed within a period of five months of the impugned order. To my mind there has been no undue delay in filing this application. The Rules require that a certified copy of the proceedings be filed together with an application in revision. It is seen from the record that there has been some delay in obtaining the certified copy. The Defendant-Petitioners cannot be faulted for this matter. I accordingly see no merit in this ground of objection."

A careful consideration of the judgment of the Court of Appeal shows that the appellant was seeking to revise the Interlocutory Order of the District Court made on the 1st of October, 1990.

Therefore, I am of the opinion that the Court of Appeal had not erred in law by concluding that there had been an inordinate delay in filing the said Revision Application. It is pertinent to note

that even in prayer (f) to the petition filed in this court, the appellant seeks to revise the Interlocutory Order made by the District Court on the 8th of March, 1990.

In any event, as correctly stated by the learned District Judge, it is not possible to vary or set aside the judgment delivered by the Court of Appeal on the 20th of February, 1998 the District Court or by a Revision Application filed in the Court of Appeal. In fact, the said Revision Application is a collateral attack on the previous judgment of the Court of Appeal delivered on the 20th of February, 1998. A similar view was expressed in ***Cadermanpulle v Ceylon Paper Sacks Ltd*. (2001) 3 SLR 112 at 117** where it was held:

> *"When the reliefs claimed by the petitioner in this application are considered, it became apparent that the petitioner has claimed the same reliefs which he has claimed in his leave to appeal application. In other words, petitioner is trying to achieve in this application what he could not achieve in his leave to appeal application, in a devious manner, after the lapse of nearly two years from the original order delivered by the learned District Judge. This inordinate delay has not been explained away by the petitioner to the satisfaction of this court. Moreover, the petitioner has not disclosed exceptional circumstances why his application for revisionary relied should be entertained by this court after a lapse of nearly two years from the original District Court order."*

Conclusion

In light of the above, the following question of law is answered as follows;

Did the Court of Appeal err in law by coming to the conclusion that there is an inordinate delay in filing the Revision Application and the parties have not explained the delay in the Revision Application filed in the Court of Appeal?

NO

In the circumstances, I affirm the judgment of the Court of Appeal dated 30th of March, 2012. The appeal is dismissed without costs.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J

I Agree

Judge of the Supreme Court

Achala Wengappuli, J

I Agree

Judge of the Supreme Court

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

SC/SPL/LA/40/2022

High Court of the Western Province Holden at Colombo

Appeal No. MCA/24/2019

MC Colombo Case No.

50190/8/16

In the matter of an application seeking Special Leave to Appeal in terms of the provisions of Section 14(2) of the Maintenance Act No.37 of 1999.

Mallikarachchige Terashma Rashmi Perera,

No.6/4,

3rd Lane, Nawala,

Rajagiriya.

Applicant.

Vs.

Nawalage Asanka Indrajith Cooray,

No. 6/26,

3rd Lane, Nawala,

Rajagiriya.

Respondent.

AND BETWEEN

Mallikarachchige Terashma

Rashmi Perera,

No.6/4,

3rd Lane, Nawala,

Rajagiriya.

Applicant-Appellant

Vs.

Nawalage Asanka Indrajith Cooray,

No. 6/26,

3rd Lane, Nawala,

Rajagiriya.

Respondent-Respondent

AND THEREAFTER BETWEEN

Nawalage Asanka Indrajith Cooray,

No. 6/26,

3rd Lane, Nawala,

Rajagiriya.

Respondent-Respondent-Petitioner

Vs.

Mallikarachchige Terashma

Rashmi Perera,

No.6/4,

3rd Lane, Nawala,

Rajagiriya.

Applicant-Appellant-Respondent

AND NOW BETWEEN

Nawalage Asanka Indrajith Cooray,

No. 6/26,

3rd Lane, Nawala,

Rajagiriya.

Respondent-Respondent-Petitioner-Petitioner

Vs.

Mallikarachchige Terashma

Rashmi Perera,

No.6/4,

3rd Lane, Nawala,

Rajagiriya.

Applicant-Appellant-Respondent- Respondent

Before: Buwaneka Aluwihare, PC, J.

E. A. G. R Amarasekara, J.

Mahinda Samayawardhena, J.

Counsels: Aravinda Athurupana with Ms. Anurangi Singh instructed by Ms. Nadee Dayaratne for the Petitioner.

Chathura Amarathunga instructed by Legal Aid Commission for the Applicant-Appellant-Respondent- Respondent.

Argued on: 01/12/2022

Decided on:13/11/2023

E.A.G.R Amarasekara, J

When this Special Leave to Appeal application was taken up for support for the granting of special leave on 01.12.2022, learned counsel for the Applicant-Appellant-Respondent-Respondent (hereinafter referred to as the Applicant-Respondent) raised a preliminary objection that this application has been filed out of time. The said preliminary objection was based on the 'deeming provisions' found in Rule 20(2) and proviso to Rule 22(5) of the Supreme Court Rules found in part 1B of the Supreme Court Rules of 1990.

Parties made their oral submissions and this Court directed them to file their written submissions within 3 weeks thereof. However, as per the brief, it appears that only the Respondent-Respondent-Petitioner-Petitioner (hereinafter referred to as Respondent-Petitioner) has filed his written submissions within the time given for that purpose, and Applicant-Respondent who raised the preliminary objection has not filed her written submissions.

Facts behind this application can be briefly stated as follows:

1. The learned Additional Magistrate of Colombo on 16.01.2019 delivered the order dated 23.12.2018 dismissing the maintenance application of the Applicant-Respondent.
2. Being aggrieved by the said order, an appeal was made to the Colombo High Court by the Applicant-Respondent and after hearing the parties, the learned High Court Judge delivered her Judgment dated 08.10.2020 setting aside the order made by the learned Magistrate and ordered the Respondent Petitioner to pay Rs.25000/= per month as maintenance.

3. In terms of Section 14(2) of the Maintenance Act No.37 of 1997, Respondent-Petitioner filed a leave to appeal application to appeal to the Supreme Court before the High Court.
4. The learned High Court Judge of Colombo High Court No.02 refused to grant leave to appeal to this Court by his order dated 09.12.2021.
5. Being aggrieved by the said decisions of the High Court, this special leave to appeal application dated 19.01.2022 has been filed on 20.01.2022 by the Respondent-Petitioner.

Many decisions of this Court have stated that the said Supreme Court Rules have categorized appeals to the Supreme Court into 3 groups as mentioned below;

- **Part 1A**-Appeals with special leave obtained from the Supreme Court.
- **Part 1B**-Appeals with leave to appeal from the Court of Appeal.
- **Part 1C**-Other appeals from Court of Appeal, other Courts and Tribunals.

[with regard to the above, see **Samantha Kumara v Manohari (2006) 2 SLR 57, Sudath Rohana and Another v Mohammed Zeena and Another (2011) 2SLR 134, Priyanthi Chandrika Jinadasa v Pathma Hemamali and Others (2011) 1SLR 337, Asia Broadcasting Corporation (pvt) Ltd v Kaluappu Hannadi Lalith Priyantha (SC/HC/LA/50/2020 SCM of 07/07/2021)**]

In the aforesaid case of **Sudath Rohana and Another V Mohamed Zeena**, it has been held as follows;

'*Part 1 of the Supreme Court Rules 1990, refers to three types of appeals which are dealt with by the Supreme Court, viz, special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in section C of part 1 of the Supreme Court Rules are described in Rule 28(1), which is as follows:*

"Save as otherwise specifically provided by or under any law passed by parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or **any other Court or tribunal**" (emphasis added).'

Thus, as per the above quoted paragraph, what is relevant to the application for appeals from the High Court is Part 1C of the said rules which contains only Rule 28 and as per Rule 28 (7), provisions of Rule 27 shall apply *mutatis mutandis* to such appeal.

However, in the case of **Samantha Kumara V Manohari** mentioned above, which was an application of appeal against the High Court Order of Dismissal of the appeal from the Magistrate

Court in terms of section14(2) of the Maintenance Act No. 37 of 1999 read with section 9 of Act no. 19 of 1990 but with leave granted by the High Court, it was held;

"*The present Appeal is neither with special leave from the Supreme Court nor with leave of the Court of Appeal but with leave from the High Court. Therefore, the instant appeal clearly falls into the category of other appeals and hence rules in Part 1C dealing with other appeals would apply.*

The position of the Appellant that there are no rules governing appeals from the Provincial High Court to the Supreme Court is therefore incorrect.

An appeal to the Supreme Court from an order of the Provincial High Court can be either with the leave of the Provincial High Court or with special leave obtained from the Supreme Court upon a refusal of leave by the High Court.

If the appeal is with leave of the High Court, then Supreme Court rules under Part 1C (other appeals) shall apply; If the appeal is with special leave of the Supreme Court, then Supreme Court rules under Part 1A (special leave to appeal) shall apply mutatis mutandis since Rule 2 relates to every application for special leave to appeal…"

As per the afore quoted paragraph, when the High Court grants leave, rules in Part 1C apply and if the High Court refuses leave, rules in Part 1A apply. It must be noted that the 'deeming provisions' relied upon by the Applicant Respondent in raising the preliminary objection are found in Part IB of the Supreme Court Rules which applies to the appeals where leave to appeal to the Supreme Court is first sought in the Court of Appeal, and that Part has no application to the present application which emanates from the High Court. However, the said decision does not find any issue with filing an application in terms of section 14(2) in combination with the provisions in section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990. Anyway, as per the said decision, rules in Part IA apply and, as per Rule 7, the time limit to file an application is 6 weeks (42 days).

As said before, Rule 20(2) and Rule 22(5) of the Supreme Court Rules that contain 'deeming provisions' occur in Part 1B which expressly and specifically deal with appeals from the Court of Appeal where leave to appeal is first sought in the Court of Appeal.

The learned counsel for the Respondent-Petitioner in his written submissions has brought this Court's attention to the fact that even though Sections 5 and 7 of the Act No.19 of 1990 have made written laws including rules applicable to the appeals from Magistrates Court, Primary Courts and Labour Tribunals filed in the Provincial High Courts and to the writ applications filed in the Provincial High Court respectively, there are no such specific statutory provisions that make Supreme Court Rules relevant to the Appeals from Court of Appeal to the Supreme Court applicable to the Appeals from the Provincial High Court to the Supreme Court.

It is pertinent to refer the relevant section 14(2) of the Maintenance Act No.37 of 1999 which is mentioned below;

(2) "Any person dissatisfied with an Order made by a High Court in the exercise of its appellate jurisdiction under this section, may prefer an appeal there from to the Supreme Court, on a question of law with the leave of the High Court, and where such leave is refused, with the Special Leave of Supreme Court, first had an obtained."

As per the said section, to file a special leave to appeal application in this Court, there is a pre-condition. First the leave to appeal to Supreme Court has to be refused by the High Court. Till that, time cannot start to run. Thus, in my view, said deeming provisions cannot override said statutory provision, even if they are considered as applicable for the sake of argument.

In the case of **Antony Fernando v Deepthi Lakmali (2012) 2 Sri LR 81**, Suresh Chandra J, after considering Section 14(2) of the Maintenance Act along with Section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and provisions of the Industrial Dispute Act No.43 of 1950 amended by Act No. 11 of 2003 relating to appeal to the Supreme Court from the High Court held that;

No direct application can be made to the Supreme Court in respect of an application for maintenance against the judgment of the High Court. Such an application should first be made to the High Court itself seeking leave to appeal to the Supreme Court and in the event of refusal of such application by the High Court, the Petitioner could seek leave to appeal from the Supreme Court.

It was further held "*that the maxim 'Generalia Specialibus Non Derogant', when applied to the present instance would also show that the general provisions for appeals from High Court to the Supreme Court as provided by Section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 have no application when a special provision is made in a specific statute such as a provision in Section 14(2) of the Maintenance Act No.37 of 1999 which was also enacted after the introduction of the general provision in Act No. 19 of 1990.*"

Due to the reasons given above, this Court cannot hold that the said deeming provisions in Part 1B of Supreme Court Rules applies to the present application.

Since provisions in part 1C of the said Supreme Court Rules are silent with regard to the time limit within which an appeal is to be filed, a question arises as to how one decides whether the application is time barred if Supreme Court Rules in Part 1C apply.

In this regard, following passage found in **Samantha Kumara v Manohari (2006) 2 SLR 57** is relevant.

"in determining the time for an aggrieved party to lodge an application for special leave to the Supreme Court where no time is fixed either in statutes or the rules; this Court has in the case of ***Tea Small Holders Ltd v Weragoda***[1] *and in the case of* ***Mahaweli Authority of Sri Lanka v United Agency Corporation (Pvt) Ltd***[2] *held that the petitioner should make his application within a reasonable time, and relying on the time period prescribed in the rules for similar applications has held that 42 days is reasonable time."*

Thus, in the matter at hand, irrespective of whether Part 1A or 1C apply, the application should have filed within 42 days from the refusal by the High Court to grant leave to appeal which was done on 09.12.2021. This application has been filed on 20.01.2022, thus within 42 days.

Therefore, the preliminary objection raised by the Applicant-Respondent is overruled and the application is fixed for support for special leave to appeal.

Judge of the Supreme Court

Buwaneka Aluwihare PC, J.

I agree

Judge of the Supreme Court

Mahinda Samayawardhena, J

I agree

Judge of the Supreme Court

[1] (1994) 3 Sri LR 353.

[2] (2002) 1 Sri LR 8.

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

1. Madawatte Kammale Samel Sirisena, Madawatte, Malmeekanda, Opanayake.
2. Madawatte Kammale Magi Nona of Bodimalgoda, Pelmaduula.
3. Madawatte Kammale Manikhamy of Madawatte, Malmeekanda, Opanayake.
4. Madawatte Kammale Podi Nona of Madawatte, Malmeekanda, Opanayake.
5. Madawatte Kammale David Singho of Madawatte, Malmeekanda, Opanayake.
6. Madawatte Kammale Seelawathie of Midalladeniya, Opanayake.
7. Wijeratne haluge Somapala of Bandarawatte, Malmeekanda, Opanayake.

Plaintiffs

SC APPEAL NO: SC/APPEAL/82/2010

CA NO: CA/1339/2004(F)

DC RATNAPURA NO: 14016/P

Vs.

1. Madawatte Kammale Matheshamy
2. Dombagammana Badalge Randohamy
3. Medawatte Kammale Karunaratne
4. Medawatte Kammale Dayaratne
5. Medawatte Kammale Malani Chandralatha
6. Medawatte Kammale Gamini Wijeratne
7. Medawatte Kammale Gamini Jayaratne
8. Medawatte Kammale Ebert Piyasiri

all of Malmeekanda, Madawatte, Opanayake.

9. Pradeep Nilanga Dela Bandara, Basnayake Nilame, Ratnapura Maha Saman Devale.

Defendants

AND BETWEEN

1. Madawatte Kammale Samel Sirisena, Madawatte, Malmeekanda, Opanayake.
2. Madawatte Kammale Magi Nona of Bodimalgoda, Pelmaduula.
3. Madawatte Kammale Manikhamy of Madawatte, Malmeekanda, Opanayake.

4. Madawatte Kammale Podi Nona of Madawatte, Malmeekanda, Opanayake.
5. Madawatte Kammale David Singho of Madawatte, Malmeekanda, Opanayake.
6. Madawatte Kammale Seelawathie of Midalladeniya, Opanayake.
7. Wijeratne haluge Somapala of Bandarawatte, Malmeekanda, Opanayake.

Plaintiffs-Appellants

Vs.

1. Madawatte Kammale Matheshamy
2. Dombagammana Badalge Randohamy
3. Medawatte Kammale Karunaratne
4. Medawatte Kammale Dayaratne
5. Medawatte Kammale Malani Chandralatha
6. Medawatte Kammale Gamini Wijeratne
7. Medawatte Kammale Gamini Jayaratne
8. Medawatte Kammale Ebert Piyasiri

all of Malmeekanda, Madawatte, Opanayake.

9. Pradeep Nilanga Dela Bandara,
   Basnayake Nilame, Ratnapura
   Maha Saman Devale.
   Defendants-Respondents

NOW BETWEEN

1. Madawatte Kammale Samel
   Sirisena, Madawatte,
   Malmeekanda, Opanayake.
2. Madawatte Kammale Magi Nona of
   Bodimalgoda, Pelmaduula.
3. Madawatte Kammale Manikhamy
   of Madawatte, Malmeekanda,
   Opanayake.
4. Madawatte Kammale Podi Nona of
   Madawatte, Malmeekanda,
   Opanayake.
5. Madawatte Kammale David Singho
   of Madawatte, Malmeekanda,
   Opanayake.
6. Madawatte Kammale Seelawathie
   of Midalladeniya, Opanayake.
7. Wijeratne haluge Somapala of
   Bandarawatte, Malmeekanda,
   Opanayake.
   Plaintiffs-Appellants-Appellants

Vs.

1. Madawatte Kammale Matheshamy

2. Dombagammana Badalge Randohamy
   Both of Medawatte, Malmeekanda.
3. Medawatte Kammale Karunaratne
4. Medawatte Kammale Dayaratne
5. Medawatte Kammale Malani Chandralatha
6. Medawatte Kammale Gamini Wijeratne
   all of Malmeekanda, Madawatte, Opanayake.
7. Hunuwala Malawarage Nilupa Subhaseeli of Madawatte, Malmeekanda, Hunuwala, Opanayake.
8. Medawatte Kammale Ebert Piyasiri of Malmeekanda, Madawatte, Opanayake.
9. Pradeep Nilanga Dela Bandara, Basnayake Nilame, Ratnapura Maha Saman Devale.

   Defendants-Respondents-Respondents

Before: Buwaneka Aluwihare, P.C., J.
Mahinda Samayawardhena, J.
Arjuna Obeysekere, J.

Counsel: Gamini Marapana, P.C., with Navin Marapana, P.C., Thanuja Meegahawatta and Uchitha Wickremesinghe for the 1st, 2nd and 4th to 6th Plaintiffs-Appellants-Appellants.

H. Withanachchi with Shantha Karunadhara for the 1st to 8th Defendants-Respondents-Respondents.

Argued on: 28.03. 2022

Written Submissions:

By the 1st, 2nd and 4th to 6th Plaintiffs-Appellants-Appellants on 03.05.2011 and 15.09.2023
By the 1st to 8th Defendants-Respondents-Respondents on 26.07.2011 and 05.05.2022

Decided on: 13.11.2023

Samayawardhena, J.

Introduction

This partition case has a checkered history. The plaintiffs filed this action in the District Court of Ratnapura to partition the land known as Madawatta described in the schedule to the plaint in accordance with the Partition Law No. 21 of 1977 among the plaintiffs and the 1st-8th defendants. The 1st-8th defendants in their joint statement of claim *inter alia* took up the position that since this land is subject to service (rajakariya) to the Sabaragamu Maha Saman Devalaya, the plaintiffs cannot maintain this action as partition cannot be sought for land subject to such service.

Subsequently, upon the application of the 1st-8th defendants, the Basnayake Nilame of Sabaragamu Maha Saman Devalaya was added as the 9th defendant. He submitted that partition is possible subject to service. At the trial, all parties agreed that this land is subject to service to the Sabaragamu Maha Saman Devalaya and recorded it as a formal admission.

The 1st-8th defendants raised issue Nos. 14-26 and the 17th issue was on this question as to whether this land which is subject to service (rajakariya) to the Sabaragamu Maha Saman Devalaya can be partitioned according to the Partition Law. The trial proceeded and the plaintiffs closed their case. Thereafter, the Attorney-at-Law for the 1st-8th defendants made a belated application to try issue No. 17 as a preliminary question of law.

The learned District Judge by order dated 01.11.2004 answered this issue in the negative and dismissed the plaintiffs' action on the basis that the District Court has no jurisdiction to partition a land subject to rajakariya notwithstanding that the ninda lord consents to partition. On appeal, the Court of Appeal by judgment dated 12.01.2010 affirmed the order of the District Court. Thereafter, on 06.08.2010, the Court of Appeal granted leave to appeal against its own judgment to the Supreme Court.

The feudal land tenure system

The feudal land tenure system in Sri Lanka, commonly referred to as the "rajakariya" system, is a historical one that started well before the colonial periods.

The Sinhala king was the lord paramount of all the land in the country. On this basis king granted away whole villages to temples or individual persons on sannasa (සන්නස), royal grant etc., though much of the land was already held by private parties. A village (ගම) so granted to a temple is viharagama (විහාරගම) or dewalagama (දේවාලගම), and a village granted to an individual is nindagama (නින්දගම). The proprietor of a viharagama, dewalagama or nindagama was known as ninda proprietor or ninda lord. Each such village consisted of a number of holdings or allotments and each such holding was known as panguwa (පංගුව). The ninda lord could

assign such holdings to people subject to service (rajakariya). Such people are known as nilakarayas (නිලකාරයා). Nilakarayas were of two kinds, namely paraveni nilakaraya (පරවේනි නිලකාරයා) and maruwena nilakaraya (මාරුවෙන නිලකාරයා). Paraveni nilakaraya's panguwa is known as paraveni panguwa (පරවේනි පංගුව) whereas maruwena nilakaraya's panguwa is known as maruvena panguwa (මාරුවෙන පංගුව). Paraveni nilakarayas are those who held their lands before the nindagama or viharagama or dewalagama was granted to the ninda lord, and maruvena nilakarayas are those who received their lands from the ninda lord subsequent to the royal grant. Paraveni nilakarayas are hereditary holders in perpetuity of the pangu subject to the performance of different services to the ninda lord who could be the chief of the temple or dewalaya. In practical terms, maruwena nilakarayas also fall into the same category. However, paraveni nilakaraya is now statutorily recognised as a holder of a paraveni pangu in perpetuity by section 2 of the Service Tenures Ordinance No. 4 of 1870.

The excerpts, observations and dicta found in the Full Bench decision in *Appuhamy v. Menike* (1917) 19 NLR 361 throw some light to better understand this ancient system. In this judgment, Ennis J. states at 362-363:

> *Burge (vol. IV, p. 68), speaking of the hereditary tenure under the Sinhalese kings, says: "The king was the lord paramount of the soil, which was possessed by hereditary holders on the condition of doing service according to their **caste**. The liability to perform service was not a personal obligation, but attached to the land…Besides the land thus held by the ordinary peasant proprietors, there were the estates of the crown, of the church, and the chiefs. These are known as gabadagam, royal villages; viharagam and dewalagam, villages belonging to Buddhist*

monasteries and temples (dewala); and nindagam, villages of large proprietors. These last were ancestral property of the chiefs, or were originally royal villages bestowed from time to time on favourites of the court. In these estates certain portions…were retained for the use of the palace…while the rest was given out in parcels to cultivators, followers, and dependents, on condition…performing various services…These followers or dependents had at first no hereditary title to the parcels of land thus allotted to them. These allotments, however, generally passed from father to son, and in course of time hereditary title was in fact acquired. The real status of these followers was thus well described in 1824 by Mr. Wright, the Revenue Commissioner. Writing of the followers of the chief, he says: 'They are in fact servants by inheritance, whose wages are paid in lieu of money, and though he has the power of dismissing them and transferring their land to others if he pleases, this is seldom or rarely ever excised; they leaving in most instances a kind of birthright, by long residence and possession, living happily and contented in performing all the customary services which by the tenure of these lands they are bound to perform to their chief.' "

Pereira in his Collection (Pereira 303) says: "The only paraveni tenants were those who were on the land prior to the grant of the village to the ninda lord".

The word "paraveni" imports a right in perpetuity (Weerasinghe v. De Silva 6 S.C.C.17). It would seem then that historically paraveni nilakarayas were originally hereditary holders under the king before the grant of the royal village to the ninda lord. Thereafter certain followers were given allotments (panguwa) by the lord, and in the course of years the holders of these allotments assimilated their tenure to that of the original paraveni tenants, i.e., the holding

became heritable and alienable, and the holders acquired by prescription all the rights the original paraveni tenants under the king.

In the same judgment, De Sampayo J. states at 367-368:

The theory of the old Sinhalese constitution, as much as that of the English constitution, was that the king was the lord paramount of all the land, and on this basis the Sinhalese king granted away whole villages to temples or individual persons, though much of the land was already held by private parties. A village so granted to a temple is a viharagama or dewalagama, and a village granted to an individual is a nindagama. The proprietor of a temple village or a nindagama would also, after the grant, assign portions to tenants subject to service. Sir John D'Oyley's Notes quoted by Marshall state (see Marshall's Judgments 300) that paraveni tenants are those who held their lands before the nindagama or the temple village was granted to the proprietor, and maruvena tenants are those who receive their panguwas from the proprietor subsequent to the grant. This is confirmed by the Service Tenures Commissioners, who in their report (see Pereira's Collection 303) say that the only paraveni tenants were those who were on the land prior to the grant of the village to the ninda lord or vihare or dewale. With regard to the nature of tile paraveni tenant's right, Sawers (see Marshall's Judgments 307), after stating that a person having "the absolute possession of (and right to) real or personal property has the power to dispose of such property unlimitedly," adds "but to the unlimited power of disposing of landed property there was this exception, that lands liable to rajakariya, or any public service to the Crown, or to a superior, could not be disposed of either by gift, sale, or request to a

vihare or dewale without the sanction of the king, or the superior to whom the service was due."

Basnayake C.J. in *Herath v. Attorney General* (1958) 60 NLR 193 at 205-206 traced the history of this ancient system in the following terms:

A village or gama in respect of which services (rajakariya) were performed are of four kinds, viz., gabadagama, nindagama, viharagama, and dewalagama. A gabadagama is a royal village which was the exclusive property of the Sovereign. The Royal Store or Treasury was supplied from the gabadagama, which the tenants had to cultivate gratuitously in consideration of being holders of praveni panguwas. A nindagama is a village granted by the Sovereign to a chief or noble or other person on a sannasa or grant. Similarly, a village granted by the Sovereign to a vihare is a viharagama and to a dewale is a dewalagama. Each gama or village consisted of a number of holdings or minor villages. Each such holding or minor village was known as a panguwa. Each panguwa consisted of a number of fields and gardens. Panguwas were of two kinds, viz., praveni or paraveni panguwa and maruwena panguwa. A praveni panguwa is a hereditary holding and a maruwena panguwa is a holding given out to a tenant for each cultivation year or for a period of years. The holder of a panguwa was known as a nilakaraya. They were of two kinds: Praveni or paraveni nilakarayas and maruwena nilakarayas. The praveni nilakarayas are generally those who were holders of panguwas prior to the Royal Grant and the ninda lord is not free to change them. They were free to transmit their lands to their male heirs, but were not free to sell or mortgage their rights. They were obliged to perform services in respect of their panguwas. The services varied according as the ninda lord was an individual, a vihare or a dewale. In the case of

vihares or dewales personal services were such as keeping the buildings in repair, cultivating the fields of the temple, preparing the daily dana, participating in the annual procession, and performing services at the daily pooja of the vihare or dewale. In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to render services or pay dues. Though the panguwa was indivisible, especially after a praveni nilakaraya's right to sell, gift, devise, and mortgage his panguwa came to be recognised, the practice came into existence of different persons who obtained rights from a nilakaraya occupying separate allotments of land for convenience of possession. The maruwena nilakaraya though known as a tenant-at-will held on a tenancy which lasted at least for one cultivation year at a time. Unlike the praveni nilakaraya he could be changed by the ninda lord; but it was seldom done. He went on year after year, but was not entitled to transmit his rights to his heirs. On the death of a maruwena tenant his heirs are entitled to continue only if they receive the tenancy. Though in theory maruwena tenure was precarious, in fact it was not so. So long as he paid his dues the ninda lord rarely disturbed him. Besides the praveni and maruwena panguwas in a nindagama, viharagama or dewalagama, there were also lands owned absolutely by the ninda lord both ownership and possession being in him.

In addition, the king preserved some lands for himself that were known as gabadagam (ගබඩාගම්) for the works of the royal palace. With the disappearance of kings as rulers, gabadagam also disappeared.

The abolition of the feudal land tenure system in Sri Lanka occurred in stages over time. The British colonial administration introduced certain land reforms during their rule, which began in the early 19th century. In

1832, the Colebrooke-Cameron Commission implemented land reforms with the objective of abolishing the feudal land tenure system. The shift from the old system to the new one was a gradual and complex process.

The Service Tenures Ordinance No. 4 of 1870 came into being in order "*to define the services due by the paraveni tenant of wiharagama, dewalagama and nindagama lands and to provide for the commutation of those services*." The following definitions were given by section 2 of the Ordinance.

> *"maruwena nilakaraya" shall mean the tenant at will of a maruwena pangu.*
>
> *"maruwena pangu" shall mean an allotment or share of land in a temple or nindagama village held by one or more tenants at will.*
>
> *"nindagama proprietor" shall mean any proprietor of nindagama entitled to demand services from any praveni nilakaraya or maruwena nilakaraya, for and in respect of a praveni pangu or maruwena pangu held by him.*
>
> *"praveni nilakaraya" shall mean the holder of a praveni pangu in perpetuity, subject to the performance of certain services to the temple or nindagama proprietor.*
>
> *"praveni pangu" shall mean an allotment or share of land in a temple or nindagama village held in perpetuity by one or more holders, subject to the performance of certain services to the temple or nindagama proprietor.*
>
> *"temple" shall include wihara and dewala.*
>
> *"wiharagama proprietor" or "dewalagama proprietor" shall include the officer of any wihara or dewala respectively entitled to demand*

services from any praveni nilakaraya or maruwena nilakaraya, for and in respect of a praveni pangu or maruwena pangu held by him.

After the enactment of the Service Tenures Ordinance, the performance of services is not compulsory. Instead, sections 9, 10 and 14 provided for the commutation of nilakaraya's services by payment of money and section 24 imposed a period of limitation of one year in the case of the recovery of arrears of personal services and two years in the case of commuted dues. The right to recovery of services or dues if not enforced for ten years was to result in the loss forever of the ninda lord's rights in respect of the pangu. Section 25 also deprived the ninda lord of the right to proceed to ejectment against the nilakaraya on his failure to render personal services or to pay commutation.

Sections 9, 10, 14, 24 and 25 of the Service Tenure Ordinance read as follows:

9. On the day appointed in such notice the commissioners shall enter into their inquiries, and shall then, or on such other early day as they shall then and there from time to time publicly appoint, hear, try, and determine as follows:-

(a) the tenure of each pangu subject to service in the village, whether it be praveni or maruwena;

(b) the names, so far as the same can be ascertained, of the proprietors and holders of each praveni pangu;

(c) the nature and extent of the services due for each praveni pangu;

(d) the annual amount of money payment for which such services may be fairly commuted at the time the registries are made.

And their determination shall be final and conclusive in that or any future proceeding, whether before the said commissioners or any other judicial tribunal, as to the tenure of the pangus in such village, whether it be praveni or maruwena, the nature of the service due for and in respect of each praveni pangu, and the annual amount of money payment for which the services due for each praveni pangu may be fairly commuted at the time those registries are made.

10. So soon as the commissioners shall complete their inquiry into the claims in any village, they shall cause to be numbered and entered in a book of registry a list of praveni pangus in such village, and shall further cause to be entered the names, so far as the same can be ascertained, of the proprietors and tenants of each pangu, the nature and extent of the services due for such pangu, and the annual amount of money payment for which such services may be fairly commuted at the time the registry is made, and shall duly sign such registry and transmit the same to the kachcheri of the district.

14. If any praveni nilakaraya shall be desirous of commuting any service as aforesaid for a money payment, he shall, during the pendency of the commission (and the commission shall be held to be pending until the Governor-General[3] shall declare it to be at an end by notice in the Gazette), transmit to the commissioners, and, after the close of the commission, to the Government Agent of the district in which the praveni pangu is situated, an application in writing to that effect, which application shall set forth the name of the party making it, the name and number of the pangu in respect of which such service may be due, and the name of the village in which the same is situated. If there be more than one praveni nilakaraya in any praveni pangu, the application to commute must be made or acquiesced in by a majority of the entire number of nilakarayas who

shall have attained the age of sixteen years. The commissioners or the Government Agent to whom such application shall be made shall issue a notice to the proprietor of the pangu, informing him that, on a day to be named in such notice, the application will be considered and determined upon. A copy of the application must be served with the notice.

24. Arrears of personal services in cases where the praveni nilakaraya shall not have commuted shall not be recoverable for any period beyond a year; arrears of commuted dues, where the praveni nilakaraya shall have commuted, shall not be recoverable for any period beyond two years. If no services shall have been rendered, and no commuted dues be paid for ten years, and no action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost forever, and the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues therefor:

Provided, however, that if at the time of such right of action accruing the proprietor shall not be resident within Ceylon, or if by reason of his minority or insanity he shall be disabled from instituting such action, the period of prescription of such action shall begin to run, in every such case, from the time when such absence or disability shall have ceased.

25. It shall be lawful for any proprietor to recover damages in any competent court against the holder or holders of any praveni pangu who shall not have commuted, and who shall have failed to render the services defined in the registry herein before referred to. In assessing such damages, it shall be competent for the court to award not only the sum for which the services shall have been assessed by the commissioners for the purpose of perpetual commutation, but

such further sum as it shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the default of the nilakaraya or nilakarayas to render such personal services at the time when they were due; but it shall not be lawful for any proprietor to proceed to ejectment against his praveni nilakaraya for default of performing services or paying commuted dues; the value of those services or dues shall be recoverable against such nilakaraya by seizure and sale of the crop of fruits on the pangu, or failing these, by the personal property of such nilakaraya, or failing both, by a sale of the pangu, subject to the personal services, or commuted dues in lieu thereof, due thereon to the proprietor. The proceeds of such sale are to be applied in payment of the amount due to the proprietor, and the balance, if any, shall be paid to the evicted nilakarayas, unless there should be any puisne incumbrance upon the holding, in which case such balance shall be applied to satisfy such incumbrance.

Nearly after a century from this Ordinance, Nindagama Lands Act No. 30 of 1968 became part of our law. In terms of section 29 of the Act, the Service Tenures Ordinance ceased to apply to any nindagama land. The Nindagama Lands Act was passed for the abolition of services due in respect of nindagama lands and for the declaration of tenants or holders as owners of such lands.

Sections 2-5 of the Nindagama Lands Act read as follows:

2. The services due from any tenant or holder of any nindagama land to any proprietor thereof are hereby abolished, and accordingly-

(a) no such proprietor shall be entitled to demand the performance of such services or to demand or receive any sum of money (due or

which may fall due) in commutation of such services, from any tenant or holder thereof; and

(b) no such tenant or holder shall be liable to perform such services, or ten to pay such sum of money.

3. Every tenant or holder of any nindagama land is hereby declared to be the owner thereof.

4. No tenant or holder of any nindagama land shall be liable to pay compensation to the proprietor thereof or to any other person for any loss or damage incurred or suffered by such proprietor or other person, whether directly or indirectly, by reason of the abolition of the services due by such tenant or holder in respect of that land.

5. No tenant or holder of any nindagama land shall be liable to pay compensation to the proprietor thereof or to any other person for any loss or damage incurred or suffered by such proprietor or other person, whether directly or indirectly, by reason of his becoming an owner thereof.

However, according to the definition given to the term "nindagama land" in section 31 of the Nindagama Lands Act, viharagam and devalagam are unaffected by the Act.

"nindagama land" means any land in respect of which a proprietor thereof was, prior to the date of the commencement of this Act, entitled to demand services from any praveni nilakaraya or maruwena nilakaraya for and in respect of a praveni pangu or maruwena pangu held by any such nilakaraya, or to demand or receive from any such nilakaraya any sum of money in commutation of any such services, <u>but does not include viharagama or devalagama land</u>.

The Land Reform Law No. 1 of 1972 represented a significant step towards the further abolition of feudal land tenure.

Partition Law and the position of paraveni nilakaraya

The oldest Ordinance which governed partition proceedings was Ordinance No. 21 of 1844.

This Ordinance was replaced by the Partition Ordinance No. 10 of 1863.

These two Ordinances did not contain any special provision regarding the competency of a paraveni nilakaraya to partition a pangu land.

In *Jotihamy v. Dingirihamy* (1906) 3 Balasingham's Reports 67, the question whether a paraveni nilakaraya can file a partition action to partition a paraveni pangu was considered. The Court answered the question in the negative on two grounds: firstly, the paraveni nilakaraya lacks full dominium in the property, and secondly, the service required from them is indivisible. It is worth quoting the full judgment delivered by Wendt J. with the agreement of Middleton J. as some of the later cases followed this judgment without any hesitation.

> *This is an action of the most novel kind, and in all my experience I have never known another like it. Shortly, this is an application by a man, who has purchased an undivided share of a Panguwa in a Nindagama that is to say, the interest of one of the Nilakarayo. The first question that suggests itself to me is whether the lands can be said to "belong" to the parties within the meaning of the Partition Ordinance. The Ordinance has hitherto been regarded as requiring nothing short of the full dominium. Now the dominium in Service Tenures land is generally regarded as vested in the person usually described as proprietor of the Nindagama, or the over lord, while the Nilakarayo are similarly spoken of as tenants. I do not of course*

forget that the interests of a Paraveny Nilakaraya cannot be determined against his will by a proprietor although upon the non-performance of services judgment can be recovered for damages and the interest of the tenant sold up and so brought to an end. But I do not see that this makes a tenant an owner; he cannot therefore claim partition of the land. Another objection is based upon the indivisibility of the services. Counsel on both sides were allowed the opportunity of looking into the authorities on this point but have not been able to produce anything which recognises the right of a tenant to maintain a partition action. We are therefore invited to decide the appeal upon general principles. Applying these to the best of our ability we think that the provisions of the Partition Ordinance do not apply to lands of the character of those in question. We therefore reverse the decree appealed from and dismiss the action with costs.

The question whether a paraveni nilakaraya can file a partition action to partition a paraveni pangu was addressed in the Partition Act No. 16 of 1951. Section 54 of the Act expressly recognised the right of the paraveni nilakaraya to institute a partition action:

54(1). Every praveni nilakaraya shall, for the purposes of this Act, be deemed to be a co-owner of the praveni panguwa of which he is a shareholder and shall be entitled to institute a partition action to obtain a decree for the partition or sale of that panguwa or of any of the lands in that panguwa.

(2). The rights of the proprietor of a nindagama shall in no way be affected by the partition or sale under this Act of a panguwa or of any of the lands in a panguwa, and that proprietor shall be entitled to exercise those rights as though that partition or sale had not occurred.

(3). In this section, the expressions "praveni nilakaraya" and "praveni panguwa" have the meanings respectively assigned to them in section 2 of the Service Tenures Ordinance.

Section 48(1) of the Partition Act No. 16 of 1951 which recognised finality of interlocutory and final decrees of partition "*free from all encumbrances whatsoever other than those specified in that decree*", further acknowledged that "*the rights of a proprietor of a nindagama*" was unaffected whether or not it is specified in the decree.

Section 48(1) read as follows:

48(1). Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection "encumbrance" means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama.

The Partition Act No. 16 of 1951 was replaced by the Partition Law No. 21 of 1977, which represents the current law governing partition actions. However, the Partition Law No. 21 of 1977, does not contain a provision similar to that of section 54 of the Partition Act No. 16 of 1951. I am aware that as a general principal the Court cannot assume a mistake in an Act of Parliament. Nevertheless, several reasons can be attributed to this omission.

One is, on 25.07.1960, the Privy Council, which was the highest Court at that time, in the case of *The Attorney General v. Herath* (1960) 62 NLR 145 decided that paraveni nilakarayas are the owners of the land.

The other is, the services due in respect of nindagama lands were abolished and all nilakarayas were declared as owners by the Nindagama Lands Act No. 30 of 1968.

These developments took place after the enactment of the Partition Act No. 16 of 1951 but before the enactment of the Partition Law No. 21 of 1977. I doubt whether this would have led the drafter of the Partition Law No. 21 of 1977 to choose not to include a provision similar to section 54 of the Partition Act No. 16 of 1951.

This omission can also be deliberate on the part of the legislature.

It is noteworthy that despite this omission, paraveni nilakarayas continued to file partition actions in the District Courts without any objection from the ninda lords. The District Courts entertained these cases without hesitation until the learned District Judge in the present case held that, following the enactment of Partition Law No. 21 of 1977, no partition action can be filed for land subject to rajakariya. This is stated by none other than the ninda lord in the instant action (Basnayake Nilame of Sabaragamu Maha Saman Devalaya) in his written submissions tendered to the District Court

dated 29.06.2004 and 02.09.2004 who says a paraveni pangu can be partitioned subject to rajakariya.

However, as I pointed out earlier, in the interpretation section of the Nindagama Lands Act, there was a reference excluding viharagam and devalagam from the operation of the Act. Therefore, whether paraveni nilakarayas in viharagam and devalagam can institute a partition action remains unresolved.

With this in view, a Bill was presented to Parliament in this year (which was gazetted on 23.02.2023) to amend the Partition Law introducing provisions similar to section 54 of the Partition Act No. 16 of 1951 expressly stating that paraveni nilakaraya can file a partition action to partition a paraveni pangu in a temple land according to the Partition Law. Following are the proposed amendments to the principal statute.

> *2A(1) Every praveni nilakaraya or any person who derives title from a praveni nilakaraya in a praveni pangu of a temple land shall be entitled to institute a partition action for the partition or sale of such praveni pangu in accordance with the provisions of this Law.*
>
> *(2) Where there are more than one praveni nilakarayas or persons having an interest in a praveni pangu, such praveni nilakarayas or such persons may be made parties to any action instituted under subsection (1).*
>
> *(3)(a) For the avoidance of doubt, it is hereby stated that the partition or sale of a praveni pangu shall not affect any rights of a temple enforceable under the provisions of the Service Tenures Ordinance (Chapter 467) and the temple shall be entitled to exercise rights under such Ordinance through its trustee or Viharadhipathi as the case may be, as though no partition or sale had occurred in respect*

of the entirety of the praveni pangu or any portion thereof as the case may be.

(b) Any right of a temple enforceable under the Service Tenures Ordinance (Chapter 467) shall remain unaffected irrespective of the fact that a trustee or a Viharadhipathi of such temple has been or has not been made a party to a partition action instituted under the provisions of this section.

(4)(a) A trustee appointed with reference to a temple referred to in subsection (1) under the provisions of the Buddhist Temporalities Ordinance (Chapter 318) or a Viharadipathi of a temple which is exempted under the provisions of section 4(1) of the Buddhist Temporalities Ordinance (Chapter 318), as the case may be, may make an application to be a party to the partition action instituted under subsection (1).

(b) Where such trustee or Viharadhipathi, as the case may be, makes an application under paragraph (a) of this subsection, the court shall make such trustee or Viharadhipathi a party to such action.

48(1) Substitution for the words "a lease at will or for a period not exceeding one month" of the words "a lease at will or for a period not exceeding one month or the rights of a temple enforceable under the Service Tenures Ordinance (Chapter 467)."

83. By the insertion of the following new definitions:

"praveni nilakaraya" shall have the same meaning assigned to it under section 2 of the Service Tenures Ordinance (Chapter 467) to the extent it relates to a temple;

"praveni pangu" shall include any land or a part of any land held by one or more persons subject to the performance of any service or

rendering of any duties to the temple as defined in section 2 of the Buddhist Temporalities Ordinance (Chapter 318) in respect of which an order for commuted dues in lieu of services under section 15 of the Service Tenures Ordinance (Chapter 467) has been made and shall include the same meaning assigned to it in section 2 of the Service Tenures Ordinance (Chapter 467) to the extent it relates to a temple;"

"temple" shall have the same meaning assigned to it in section 2 of the Buddhist Temporalities Ordinance (Chapter 318) in so far as such temple is possessed of rights as specified under the Service Tenures Ordinance (Chapter 467);

"Trustee" shall have the same meaning assigned to it in section 2 of the Buddhist Temporalities Ordinance (Chapter 318).

The order of the District Court affirmed by the Court of Appeal

The District Court decided to dismiss the partition action on four grounds:

(a) Lack of absolute ownership to the land to be partitioned by the plaintiffs;
(b) The indivisibility of service to be performed to the ninda lord;
(c) Partition Law No. 21 of 1977 does not provide for partition of lands subject to rajakariya;
(d) Land subject to rajakariya cannot be partitioned even with the consent of the ninda lord.

Who can institute a partition action?

The question as to who can institute a partition action relates to (a), (c) and (d) above. The short answer to the question of who can institute a

partition action is that any co-owner to the land can institute a partition action.

Section 10 of the Ordinance No. 21 of 1844 enacted that "*when any landed property shall belong in common to two or more owners, it is and shall be competent to any one or more such owners to compel a partition of the said property*". Section 15 provided for any such owner to seek sale of the land instead of partition when "*on account of the number or poverty of the parties, the nature or value of the property, or from other causes, a partition would be injurious or impossible*".

Section 2 of both the Partition Ordinance No. 10 of 1863 and the Partition Act No. 16 of 1951 contained similar provisions, addressing both partition and sale within the same section.

Section 2 of the Partition Law No. 21 of 1977 enacts the same:

> *2. Where any land belongs in common to two or more owners, any one or more of them, whether or not his or their ownership is subject to any life interest in any other person, may institute an action for the partition or sale of the land in accordance with the provisions of this Law.*

The term "owner" was not defined in the previous Partition Ordinances or the Partition Act. Nor is it defined in the present Partition Law. In the absence of a specific definition of the term "owner" in the Act, it should be construed to refer to a person possessing the attributes of ownership as recognised by the general law at the time of the enactment of the Partition Law. Any modification to this interpretation should be made in consideration of the context in which the term is used. This was what was stated by the Privy Council in *The Attorney General v. Herath* at page 147 when it was called upon to define the term "owner" in the context of a different statute.

What are the rights sufficient to constitute a person an "owner" under our law? The short answer is, the right to possession, the right to recover possession, and the right to disposition. I need only to quote pages 147-148 of the same Privy Council decision for a complete answer:

> *Lee (Introduction to Roman Dutch Law 5th edition p. 121) in a chapter headed "The Meaning of ownership" reflecting the views of Van der Linden says:-*
>
> *"Dominion or Ownership is the relation protected by law in which a man stands to a thing, which he may: (a) possess, (b) use and enjoy, (c) alienate. The right to possess implies the right to vindicate, that is, to recover possession from a person who possesses without title to possess derived from the owner."*
>
> *Grotius in Book 2 chapter 3 of his Introduction to the Jurisprudence of Holland says:-*
>
> *"Ownership is the property in a thing whereby a person who has not the possession may acquire the same by legal process."*
>
> *Commenting on this Lee says (p. 121) "Grotius selects this right as the most signal quality of ownership".*
>
> *Maasdorp (Volume 2 p. 27) says the rights of an owner are "comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition". He goes on to say "these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time".*

The next question is whether a modification of the general meaning of the term "owner" is required in the context of the Partition Law.

Full ownership

Should the plaintiff have "full ownership" or "full dominium" or "absolute ownership" in the property to institute a partition action?

As previously quoted, in the early case of *Jotihamy v. Dingirihamy*, Wendt J. thought that "full dominium" was necessary and that in service tenure lands it vested in the ninda lord and not in paraveni nilakarayas. Paraveni nilakarayas were recognised as tenants. This judgment was followed by Hutchinson C.J. in *Kaluwa v. Rankira* (1907) 3 Balasingham's Reports 264.

However, in the discussion of parties entitled to institute partition actions, K.D.P. Wickremesinghe in *The Law of Partition in Ceylon* (1969) at page 46 under the subheading "Trustee and Beneficiary" states:

> *To be entitled to institute a partition action it is not necessary that the co-owner should have absolute ownership in the property.*

Citing several judgments in support, the learned author states at page 48:

> *[T]he principle in all these cases is that a co-owner who institutes a partition action should have the legal estate of the property vested in him so that he can rightly be considered the owner. He need not be one who is entitled to the absolute dominium or who is beneficially interested.*

In *Daniel v. Saranelis Appu* (1903) 7 NLR 163 the plaintiff who was a trustee of a temple filed a partition action claiming an undivided two-fifths share of the land. It was argued for the respondent that a trustee is not an owner such as is contemplated by the Partition Ordinance No. 10 of 1863. Rejecting this argument, Layard C.J. with the agreement of Wendt J. held at 165-166:

It appears to me that Ordinance No. 10 of 1863 was not intended to be limited to persons who have an absolute ownership in the property, but that it also includes one who has an undivided share vested in him as trustee. The English Courts have allowed a partition suit to be brought by freehold tenants in possession, whether they are entitled in fee simple, or in fee tail or for life, and there have been cases in which they have allowed a partition action where an estate was vested in a person for a term of years only. The trustee under the Buddhist Temporalities Ordinance appears to me to be the owner of the temple property subject to the terms of the trust on which the property is vested in him, and I see no reason why he should not be allowed to bring an action for partition under Ordinance No. 10 of 1863. No authority has been cited to us in which it has been held that such a trustee cannot bring a partition suit under that Ordinance. This Court has recognized the rights of executors and administrators as parties to a partition suit under Ordinance No. 10 of 1863, and having allowed trustees to be parties in such suits I see no reason why a trustee created by statute should be excluded from the right of bringing a partition suit, unless there is anything in the statute which limits the power of the trustee and prohibits him from bringing such an action.

In *Babey Nona v. Silva* (1906) 9 NLR 251 it was argued on behalf of the appellant that the Partition Ordinance was inapplicable to lands which are subject to fidei commissum because fiduciaries do not have absolute ownership in the property. This was rejected by Lascelles A.C.J. with the agreement of Middleton J. at pages 255-256 in the following terms:

It is true that the language of the Partition Ordinance appears at first sight to limit the scope of the Ordinance to land which is held in common by two or more persons as absolute owners. Section 2, for

example, deals with the case of landed property belonging in common to two or more owners, and authorizes one or more of such owners to compel partition.

This difficulty is largely reduced, if it is not altogether removed, when it is remembered that by the Roman-Dutch Law the fiduciarius was a true owner; he had a real though a burdened right of ownership. It is also material that in David v. Sarnelis Appu 7 N.L.R. 163 this Court held that a trustee under the Buddhist Temporalities Ordinance was an owner for the purposes of the Partition Ordinance. In my opinion the balance of reason and authority is in favour of the view that property subject to fidei commissum may be the subject of partition, and I hold, in the case under consideration, that the property in dispute, though subject to fidei commissum, was lawfully partitioned.

But the partition decree in no way extinguishes the reversionary interest of the fidei commissarius. It merely sets apart a specific portion of the common estate to which the rights of the fidei commissarius attach in severalty.

By no reasonable construction of the Ordinance can it be held that the effect of a partition decree is to enlarge the life interest of the fiduciarius into absolute ownership. In the words of Lord Watson in Tillekeratne v. Abeysekere (2 N.L.R. 313): "…the partition…would not necessarily destroy a fidei commissum attaching to one or more of the shares before partition."

As mentioned previously, two of the essential attributes of ownership are the right to possession and the right to recover possession. However, in cases where a property is held by one person subject to the life interest of another, the former cannot be technically regarded as an owner

because he is unable to exercise the right to possession. He has only the bare dominium of the property. It may be on that basis in cases such as *Charles Appu v. Dias Abeysinghe* (1933) 35 NLR 323 the Court held that a person who is entitled to the dominium only of an undivided share of land, the usufruct being vested in another, is not entitled to bring a partition action. Nevertheless, section 2 of the present Partition Law No. 21 of 1977 allows a co-owner, whose rights in the land are subject to the life interest held by another, to institute a partition action.

For the aforesaid reasons, I take the view that the plaintiff does not necessarily require absolute ownership of the land to institute a partition action.

Can paraveni nilakaraya be regarded as an owner for the purpose of partition law?

In the early cases of *Marikar v. Assanpillai* (1916) 4 Court of Appeal Cases 85 and *Kiriduraya v. Kudaduraya* (1916) 3 Ceylon Weekly Reporter 188, De Sampayo J. expressed the opinion that paraveni nilakarayas are the owners of their holdings subject only to the performance of service to their ninda lords.

In *Marikar v. Assanpillai* at page 86-87 it was held:

> *The case for the plaintiff was put as high as this, that he was the owner of the tenants' holding and had in substance leased them to the tenants for a consideration which must be paid in some shape or another. This involves an entire misconception of the relation between the nindagama proprietor and the nilakarayas. The holding in fact belongs to the tenants themselves subject only to the performance of service, and they become free even of this burden if the right to service is lost, as, for instance, by non-performance of service for 10 years. The nature of the service is definite and*

determined, and the tenant is bound to do that [service] and none other. If he has elected to commute the service by a money payment, the proprietor can of course claim the money irrespective of any change in the circumstances. But if there has been no such election the proprietor must be content with exacting the service, and if that becomes impossible, he must suffer the loss.

In *Kiriduraya v. Kudaduraya* at page 189-190 it was stated:

The word paraveni does not mean "inalienable", it only implies permanency and descent to heirs. The paraveni tenant holds the land in fee simple subject only to the performance of service, and his title is liable to be affected by the ordinary incidents of adverse possession by a third party. The fact that the party who so possesses adversely is the overlord himself makes no difference.

However, in later decisions such as *Jotihamy v. Dingirihamy* and *Kaluwa v. Rankira* the contrary view was taken.

In the Full Bench decision in *Appuhamy v. Menike* (1917) 19 NLR 361, De Sampayo J. disagrees with the view expressed by Wendt J. in Jotihamy's case that a paraveni nilakaraya is not an owner but merely a tenant of paraveni pangu when he states at page 366:

I may say, with great respect to Wendt J., who delivered the judgment, that I am not convinced that his conclusion as to the nature of the title of a paraveni nilakaraya was right. He did not profess to discuss the origin of this species of feudal tenure, nor refer to any authorities. All that is said in the judgment is that "the dominium in service tenure land is generally regarded as vested in the person usually described as proprietor of the nindagama or the overlord, while the nilakarayas are similarly spoken of as tenants." There are no grounds stated for the opinion that the dominium is

generally regarded as vested in the overlord. That is the very problem requiring solution.

Ennis J. in *Appuhamy v. Menike* states at pages 361-362:

It is clear that the relations of the ninda proprietor and the nilakaraya as of a paraveni panguwa are not the ordinary relations of a landlord and tenant. A nilakaraya of a paraveni panguwa holds the land in perpetuity subject to the service (Ordinance No. 4 of 1870, section 3); and since 1870 the ninda proprietor has no right to eject a paraveni nilakaraya for non-performance of the service, he can recover only the value of the services in an action for damages (Ordinance No. 4 of 1870, section 25). It is to be observed that a panguwa is only a portion (allotment or share) of the holding of a ninda lord as the "proprietor" of the whole nindagama of which any part is held by a nilakaraya. A "paraveni nilakaraya" is defined as a "holder" of a paraveni panguwa, while the term "tenant" is used to describe a maruvena nilakaraya, who is a tenant at will, as distinct from a paraveni nilakaraya, a holder in perpetuity.

This question of whether a paraveni nilakaraya can be regarded as the owner of paraveni pangu was extensively dealt with in the aforementioned Privy Council decision in *The Attorney General v. Herath*, which was an appeal from the judgment of the Supreme Court in *Herath v. The Attorney General* where the principal judgment was delivered by Chief Justice Basnayake.

First, the Privy Council unhesitatingly agrees with the majority view of the Full Bench decision in *Appuhamy v. Menike* that a paraveni nilakaraya is the owner of paraveni pangu and states at pages 150-151:

The case of Appuhamy v. Menike needs further comment. The question which arose in that case was whether a paraveni

nilakaraya could bring an action under the Partition Ordinance 10 of 1863 to partition a holding which he held with others. Two points had to be decided. The first whether a paraveni nilakaraya was an owner, the second was whether the nature of the services to be rendered made the ordinance inapplicable. There had previously been a conflict of authority and the case on appeal was referred for an authoritative decision to a bench of three judges of the Supreme Court, Ennis, J., de Sampayo, J. and Shaw, J. (normally two judges would have decided the appeal). On the question of ownership Ennis, J. came to the conclusion set out above [i.e. "In my opinion a paraveni nilakaraya holds all the rights which, under Maasdorp's definition, constitute ownership but he nevertheless does not possess full ownership in that the ninda lord holds a perpetual right to service, the obligation to perform which attaches to the land"]. De Sampayo, J. said "I am of opinion that paraveni nilakarayas are the owners of the land". Shaw, J. dissented. It will be seen that the majority of the court were of opinion that a paraveni nilakaraya is an owner. With this view their Lordships are in entire agreement.

Thereafter, the Privy Council at pages 148-150 provides its own explanation as to why a paraveni nilakaraya is entitled to be regarded as an owner in the following manner:

The next question is whether a paraveni nilakaraya can properly be regarded as an owner. It is common ground that a "nilakaraya" holds an allotment of land (known as a "pangu") subject to the performance of services for, or payment of dues to (where the performance of services had been commuted for the payment of dues) an "overlord" (referred to very appropriately by the learned Chief Justice in his judgment and hereafter by their Lordships as the "ninda lord"). Sometimes (as in the present case) a temple was the

ninda lord. It is also common ground that the type of nilakaraya known as a "maruwena nilakaraya" holds the land as a tenant at will and the type known as a "paraveni nilakaraya" (second respondent belonged to this type) holds the land in perpetuity. It was, as stated by the learned Chief Justice, a "hereditary holding". The learned Chief Justice makes a forceful point in support of the view that a "paraveni nilakaraya" must be regarded as a tenant and not as an owner when he points out that in certain legislation language is used which seems to imply that a "paraveni nilakaraya" must be regarded as a tenant and not as an owner. For instance, in Section 27 of the Buddhist Temporalities Ordinance (Volume V Ceylon Legislative Enactments p. 655) the words "a paraveni pangu tenant's interest" are used. The Service Tenures Ordinance 4 of 1870 (Volume VI Ceylon Legislative Enactments p. 657) uses the words "nindagama proprietor" to designate a ninda lord:-

"nindagama proprietor" shall mean any proprietor of nindagama entitled to demand services from any paraveni nilakaraya or maruwena nilakaraya, for and in respect of a praveni pangu or maruwena pangu held by him;".

This language normally, in the absence of other relevant material, would afford strong reason for the conclusion that a paraveni nilakaraya does not occupy the status of an owner. But ultimately the question whether a person is an owner or not must be determined by the rights and attributes he possesses in law. If those attributes clearly establish his position as owner the considerations which arise from the language referred to above must give way.

The "rights of a paraveni nilakaraya in respect of his holding became enlarged in the course of time" as stated by the learned Chief Justice and this fact with its accompanying uncertainty as to what those

rights were at any particular time probably led to some confusion particularly in the language by which they were sometimes described.

Following on a report by a commission called the Service Tenures Commission an ordinance, The Service Tenures Ordinance 4 of 1870 was passed. It was, as stated by de Sampayo, J. in the case of Appuhamy v. Menike (1917) 19 N.L.R. 361 at p. 367, on most points declaratory. Whatever the position was before the ordinance was passed, after its passage its provisions must be accepted to the exclusion of all contending views that may previously have existed. And, though historical research into those contending views may be interesting, it cannot modify the clear provisions of the ordinance. In Section 2 a paraveni nilakaraya is said to be "the holder of a praveni pangu in perpetuity, subject to the performance of certain services to the temple or nindagama proprietor"; a "paraveni pangu" is said to be "an allotment or share of land in a temple or nindagama village held in perpetuity by one or more holders, subject to the performance of certain services to the temple or nindagama proprietor". Section 24 is to the following effect:-

"24. Arrears of personal services in cases where the praveni nilakaraya shall not have commuted shall not be recoverable for any period beyond a year; arrears of commuted dues, where the praveni niIakaraya shall have commuted, shall not be recoverable for any period beyond two years. If no services shall have been rendered, and no commuted dues be paid for ten years, and no action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost for ever and the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues therefor:".

A proviso to the section has no bearing on this case.

It is common ground that the services to be rendered were personal. Section 25 is to the following effect:-

"25. It shall be lawful for any proprietor to recover damages in any competent court against the holder or holders of any praveni pangu who shall not have commuted, and who shall have failed to render the services defined in the registry hereinbefore referred to. In assessing such damages, it shall be competent for the court to award not only the sum for which the services shall have been assessed by the Commissioners for the purpose of perpetual commutation, but such further sum as it shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the default of the nilakaraya or nilakarayas to render such personal services at the time when they were due; but it shall not be lawful for any proprietor to proceed to ejectment against his praveni nilakaraya for default of performing services or paying commuted dues; the value of those services or dues shall be recoverable against such nilakaraya by seizure and sale of the crop or fruits on the pangu, or failing these, by the personal property of such nilakaraya, or failing both, by a sale of the pangu, subject to the personal services, or commuted dues in lieu thereof, due thereon to the proprietor. The proceeds of such sale are to be applied in payment of the amount due to the proprietor, and the balance, if any, shall be paid to the evicted nilakarayas, unless there should be any puisne encumbrance upon the holding, in which case such balance shall be applied to satisfy such encumbrance."

This is what the ordinance declared the law to be and was the law after the ordinance came into force.

> *It will be seen that a paraveni nilakaraya cannot be ejected for non-performance of service or non-payment of dues. This means that he is subject to no liability similar to that of forfeiture.* ***Moreover he is accorded a right of possession in respect of his holding superior to the general rights of an owner****. The latter in respect of a judgment debt is liable to have any part of his property proceeded against in execution. But a paraveni nilakaraya's holding may be proceeded against on a judgment for damages for non-performance of services or for non-payment of dues only after certain property belonging to him has been exhausted.* ***It was not disputed that he had the right to the use and enjoyment of the land, the right to dispose of it, and the right to sue for and recover possession if he was disturbed. He has therefore all the rights which entitle him to be regarded as an owner****.*

The Privy Council then explains why the ninda lord cannot be regarded as an owner at page 151 in the following terms:

> *As already stated a paraveni nilakaraya possesses all the essential attributes which a person must possess before he can be regarded as an owner.* ***As for the "ninda lord" he has not the right of possession. He cannot even enter into possession for non-fulfillment of services or non-payment of dues. Further the right to possession of the paraveni nilakaraya has the special protection of the law already indicated. The "ninda lord" cannot sell or otherwise dispose of the holding of the paraveni nilakaraya. He has no right of use and enjoyment. He has a bare right to services. Their Lordships do not think he can possibly be regarded as the owner****.*

In the Full Bench decision of *Appuhamy v. Menike*, De Sampayo J. states at pages 368:

The state of the law to be gathered from the above references is made clearer by the Service Tenures Ordinance, No. 4 of 1870. It is remarkable that nowhere in the Ordinance is the lord of a nindagama referred to directly or indirectly as the owner of the lands held by the paraveni nilakarayas. On the other hand, section 24 declares that if services are not rendered or commuted dues paid by the paraveni nilakarayas for a period of ten years, the panguwa shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues. It seems to me clear that in such a case the Ordinance intends that what was previously qualified ownership shall become absolute ownership. Section 25 lays down the order in which the property of the nilakaraya may be sold in execution for default of payment of damages for non-performance of services, and provides that the value of services shall be recovered in the last resort "by a sale of the pangu." Here the pangu does not mean the possessory interest, because the same section enacts that the tenant shall not be ejected for non-performance of service. The pangu is defined in the Ordinance itself as the "allotment or share of land"; there is, to my mind, no meaning in providing for the sale of the pangu, unless the tenant is the owner of the allotment.

I hold that a paraveni nilakaraya is the "owner" of paraveni panguwa and therefore falls within the meaning of the term "owner" imposed upon it by the context of the Partition Law. The Partition Law does not restrict institution of partition actions by persons who have full ownership in the land to be partitioned.

Buddhist Temporalities Ordinance and Paraveni Nilakaraya

Buddhist Temporalities Ordinance No. 19 of 1931 contains several references to paraveni nilakaraya in its text although there are no express

provisions on the partition of a paraveni panguwa. Nonetheless, those references are helpful to understand the status of a paraveni nilakaraya in respect of a paraveni panguwa belonging to a temple within the meaning of the Ordinance. A closer look at the provisions referring to paraveni nilakaraya in the Ordinance shows that throughout the Ordinance, he has been treated as a tenant rather than an owner. For instance, the very definition of a paraveni panguwa under section 2 is as follows:

> "*paraveni panguwa" means an allotment of land held by one or more hereditary tenants subject to the performance of service or rendering of dues to a temple*.

It can be implied from the terminology used in the said definition that while the paraveni nilakaraya is a tenant, his interest in the land is hereditary. The term "paraveni nilakaraya" has not been defined in the Buddhist Temporalities Ordinance. This definition to the term "paraveni panguwa" found in the Buddhist Temporalities Ordinance is different from the definition given to "paraveni panguwa" in the Service Tenures Ordinance which is the principal statute governing the matters in relation to service tenures. According to section 2 of the Service Tenures Ordinance, "paraveni panguwa" means an allotment or share of land in a temple held in perpetuity by one or more holders subject to the performance of certain services to the temple. Temple includes vihara and dewala. In the Service Tenures Ordinance, the paraveni nilakaraya has been defined as the holder of a paraveni pangu in perpetuity (not as the tenant of the paraveni pangu) subject to the performance of services to the temple. The maruwena nilakaraya has been defined as the tenant at will in respect of the maruwena pangu. There is a conflict between the two parallel statutes on this point.

The idea that a paraveni nilakaraya is a tenant is in contradistinction with some of the provisions of the Buddhist Temporalities Ordinance itself.

When section 26 of the Buddhist Temporalities Ordinance is read with section 27, it can be inferred that while the immovable property of a temple cannot be alienated, that does not apply to a paraveni panguwa. However, under section 27, when a paraveni pangu tenant's interest in any land held of a temple is transferred, it shall be the duty of the transferee within one month of such transfer to send a written notice thereof in duplicate to the Commissioner of Buddhist Affairs. Thereafter, the Commissioner of Buddhist Affairs shall send one copy of every such notice to the trustee of the temple concerned. It necessarily follows that, a paraveni nilakaraya can transfer his interest without the permission of the temple which is not in line with his status as a tenant.

Furthermore, under section 28 of the Buddhist Temporalities Ordinance, whenever the Commissioner of Buddhist Affairs is satisfied that any immovable property belonging to any temple has been before the commencement of the Ordinance mortgaged, sold, or otherwise alienated to the detriment of such temple, it is the duty of the Commissioner of Buddhist Affairs to direct the trustee, or the controlling viharadhipati, to institute legal proceedings to set aside such mortgage, sale, or alienation, and to recover possession of such property. But this provision does not apply to a paraveni panguwa with the implication that it does not fall within the ownership of the temple like any other immovable property.

Appuhamy v. Menike and *Attorney General v. Herath* held that a paraveni nilakaraya is an owner of the paraveni panguwa subject to the performance of service to the temple. In *The Attorney General v. Herath*, the Privy Council, referring to the term "*paraveni pangu tenant's interest*"

found in section 27 of Buddhist Temporalities Ordinance states at page 148:

> *This language normally, in the absence of other relevant material, would afford strong reason for the conclusion that a paraveni nilakaraya does not occupy the status of an owner. But ultimately the question whether a person is an owner or not must be determined by the rights and attributes he possesses in law. If those attributes clearly establish his position as owner, the considerations which arise from the language referred to above must give way*.

Similarly, in *Appuhamy v. Menike*, De Sampayo J. while ruling that a paraveni nilakaraya is an owner states at page 366:

> *The terms "overlord" and "tenant" are natural to any system of tenure, such as the fee simple tenure in the English system of real property, but they do not necessarily describe the nature of the rights*.

Therefore, despite the references of Buddhist Temporalities Ordinance to a paraveni nilakaraya as a tenant, it is settled law that he is the owner of the paraveni panguwa subject to the performance of service to the temple.

Acquisition of full ownership

Under section 24 of the Service Tenures Ordinance quoted above, the ninda lord loses his rights to the services or commuted dues, if they have not been rendered or paid for ten years and no action has been brought for them within those ten years. This results in the paraveni nilakaraya acquiring full ownership to the land.

There are several nilakarayas in a panguwa and such panguwa can comprise several allotments. According to the ruling in *Asmadale v. Weerasuria* [1905] 3 Balasingham's Reports 51, for the application of

section 24 of the Service Tenures Ordinance, it must be demonstrated that neither services have been performed nor dues paid by any one of the nilakarayas in respect of all the allotments included in the panguwa, and not solely in relation to the allotment that is the subject matter of the action. This ruling can be revisited in an appropriate future case.

If this is established, it was held in *Bandara v. Dingiri Menika* (1943) 44 NLR 393 that the paraveni nilakaraya acquires full ownership.

In this regard, the initial burden that no services were performed and/or no payments were made in respect of the allotment or allotments in suit lies with the paraveni nilakaraya. Once that burden is discharged, the burden shifts to the ninda lord to prove that services were rendered and/or payments were made in respect of other allotments of paraveni panguwa by some other nilakarayas.

In *Bandara v. Dingiri Menika*, Howard C.J. with the agreement of Keuneman J. stated at 395-396:

> *[D]ue regard must be paid to the decision in Asmadale v. Weerasuriya (supra), which was followed in Martin v. Hatana [16 NLR 92], that the obligation of the tenants of a panguwa of a nindagama to render services is in the nature of an indivisible obligation, and therefore the liability to pay commuted dues is also indivisible. The whole amount may be recovered from one tenant. The payment, therefore of the dues by one tenant in respect of the whole panguwa prevents forfeiture of the ninda proprietors' rights against the other tenants under section 24 of the Service Tenures Ordinance, and it is also a bar to the other tenants gaining prescriptive rights under section 3 of the Prescription Ordinance. So far as the evidence in this case goes, I agree with the learned Judge that the plaintiffs have established that neither services were*

performed nor dues paid in respect of the land, the subject of this action for a period of ten years. No evidence has been tendered by the appellants that such services were performed or dues paid in respect of other lands of the panguwa. In view of the fact that the plaintiffs had proved that no services were performed nor dues paid in respect of the land sought to be partitioned, I am of opinion that the burden of proof rested on the defendants to show that such performances were made or dues paid in respect of other lands of the panguwa.

The dicta of Howard C.J. at page 396 "*The only clog on the full ownership of the nilakaraya is the obligation to perform services. Relief from such obligation would therefore confer full ownership*" was approved by the Privy Council in *The Attorney General v. Herath* at page 151.

Howard C.J. ultimately held at page 397 "*Inasmuch as the land is no longer subject to a liability to perform indivisible services I am of opinion that the learned Judge was right in coming to the conclusion that it could be the subject of a partition action under the Ordinance*."

However, as I have already stated, full ownership in a paraveni pangu is not necessary for a paraveni nilakaraya to institute a partition action.

Partition with the consent of the ninda lord

In the instant case, the ninda load, consented to partition the land but the learned District Judge stated that even with the consent of the ninda lord, partition is not possible.

In *Dias v. Carlinahamy* (1919) 21 NLR 112, Scheider A.J. held at page 114 "*lands subject to service tenures cannot be sold or partitioned under the provisions of the Partition Ordinance, unless it may be in cases where*

the proprietor of the nindagama and the paraveni nilakaraya are all consenting parties to the proceedings."

However, in *Kasturiaracci v. Pini* (1958) 61 NLR 167 it was held "*The partition under the repealed Partition Ordinance of a paraveni panguwa is not valid even where the ninda proprietor is a consenting party to the proceedings*." Basnayake C.J. at page 168 took the view that "*where a Court has no jurisdiction to entertain an action parties cannot by consent confer jurisdiction on it. The learned District Judge is therefore right in holding that the partition decree is a nullity*."

Parties cannot confer jurisdiction where there is none. In other words, when there is patent or total lack of jurisdiction (as opposed to latent lack of jurisdiction), parties cannot confer jurisdiction. The District Court has jurisdiction to hear partition cases and the question here is whether the jurisdiction has been invoked in the right way. It is not a question of patent or total lack of jurisdiction. In my view, in any event, a paraveni nilakaraya can file a partition action with the consent of the ninda lord.

Indivisibility of service

The Full Bench in *Appuhamy v. Menike* had to address two issues: whether paraveni nilakarayas are considered owners and whether the nature of services to be rendered made the Partition Ordinance inapplicable to pangu land.

In *The Attorney General v. Herath*, the Privy Council states at page 151 that the Full Bench in *Appuhamy v. Menike* decided that paraveni nilakarayas are disqualified from instituting a partition action because the services that have to be performed by nilakarayas in a pangu land are incapable of division. But the Privy Council did not express its opinion on that issue, although it expressed its opinion in favour of paraveni

nilakaraya on the other issue, namely whether paraveni nilakaraya is considered an owner.

In the early case (C.R. Ratnapura, No. 284) decided on 31.05.1877 and reported in (1877) Ramanathan's Reports 131, the Basnayake Nilame of Maha Saman Devalaya of Sabaragamuwa sued 12 defendants to recover Rs. 18.50 as commuted dues for failure as tenants of a pangu belonging to the said devalaya to render certain services. The Supreme Court held that each of the nilakarayas of a panguwa was liable only for the share of the service which is proportionate to his share in the panguwa.

> *The Commissioner has decided, as this Court thinks erroneously, that each is liable for the whole. We are not aware of any law or custom by which one of such nilakaraya's of a panguwa is liable to render services for the whole panguwa, that is to say, for himself as well as his co-tenants. The mere fact of the Commissioner having valued the services of the whole panguwa, instead of valuing the services of each nilakaraya, cannot create a liability which did not exist before.*

In *Ratwatte v. Polambegoda* (1901) 5 NLR 143, the question whether liability of the nilakarayas was or was not joint and several was in issue. The trial Court held that it was joint and several. On appeal, although this matter was not specifically dealt with, it is clear from the judgment of Lawrie A.C.J. that His Lordship concurred in that proposition of law laid down by the trial Court. This was so stated by Lascelles C.J. in *Martin v. Hatana* (1913) 16 NLR 92 at 93.

In *Herath v. Attorney General* Basnayake C.J. at page 205 states "*In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to render services or pay dues.*"

In *Asmadale v. Weerasuria* it was held that the liability of nilakarayas is a joint liability. Pereira A.P.J. states at pages 52-53 that the whole service may be rendered or the whole commuted amount may be recovered from one nilakaraya and such nilakaraya is entitled to contribution from other nilakarayas of the panguwa.

> *The liability of the tenants of a panguwa is a joint liability. At the same time the services in their nature were indivisible, and, therefore, the obligation to pay the commuted dues must be regarded as an indivisible obligation. Whether the service was to cultivate the muttettu field, or to accompany the ninda proprietor on a journey, or carry his talipot or watch his field or keep watch at his house, it was indivisible. Each tenant could not claim to be liable to cultivate a portion only of the field, or to accompany the chief on only a part of the journey, or to keep watch at a part only of his house, etc. The nature of the service was such that the liability to perform it was indivisible, and, therefore, as observed already, the liability to the commuted dues must also be regarded as an indivisible liability. This indivisible obligation must I take it, be given the same effect as it would have under our Common Law. The consequence to the debtors, where there are more than one, of an indivisible obligation, is practically the same as that of an obligation contracted in solido (see Pothier 2.4.31). Each obligator is obliged for the whole of the thing or act that forms the subject of the obligation. On his giving or performing such thing or act he is entitled to contribution from his co-obligors. The payment of the whole amount of the dues in the present case by one or more of the Nilakarayas, was a payment properly made in respect of the whole panguwa, and it cannot be said that there has been a forfeiture of the ninda proprietor's rights in respect of any part or portion of the panguwa under section 24 of the Service Tenures Ordinance; and for the same reason I think that the 3rd*

defendant cannot claim any prescriptive right under section 3 of Ordinance No. 22 of 1871.

The dicta of Pereira A.P.J. in *Asmadale v. Weerasuria* that "*the services in their nature were indivisible, and, therefore, the obligation to pay the commuted dues must be regarded as an indivisible obligation*" was not considered to be correct by Soertsz J. in *Jayaratne v. Gunaratna Thero* (1944) 45 NLR 97 at 99 when His Lordship stated "*If I may say so with respect this view, that the obligation to pay the commuted dues is an indivisible obligation, appears to me to be the correct view in the light of the provision of the Service Tenures Ordinance itself, and not for the reason given by Pereira J. that the services being indivisible, it necessarily followed that the alternative or secondary obligation was indivisible.*"

According to Soertsz J. at pages 99-100

Service Tenures Ordinance makes it sufficiently clear that the services as well as the dues attached to the panguwa and are indivisible and owed jointly and severally by the nilakarayas and are exigible from any of them subject to his or their right to claim contribution. Sections 9 and 10 of the Ordinance provide for the ascertainment and registration of the nature and extent of the services in relation to each pangu. Sections 14 and 15 make it clearer still that the unit is the pangu and not the Nilakaraya for section 14 requires the application for commutation in the case of a pangu with several or many Nilakarayas to be made or acquiesced in by a majority of those above sixteen years of age, and section 15 requires the Commissioner to ascertain as far as practicable whether all the Nilakarayas above 16 years of age desire the commutation. Both these requirements would surely be out of place, if it were intended to leave it open to one or more of the Nilakarayas to commute his or their services for a pro rata payment of dues. Section 15 goes on to

> *say that once commutation has been determined and fixed "the Nilakarayas shall be liable to pay the proprietors…the annual amount of money payment due for and in respect of…the services; and such commuted dues shall thenceforth be decided to be a head rent due for and in respect of the pangu". That, as I understand it, makes the pangu "the head" or the unit. This view is supported by the terms of section 25 which provides the remedy of a proprietor when there is default of payment of the commuted dues. It enacts that if the dues be not paid, they shall be recovered by "seizure and sale of the crop or fruits on the pangu or failing these by the personal property of the Nilakaraya or failing both by a sale of the pangu". The crop and fruits on the whole pangu, and ultimately the whole pangu itself being made liable it follows the proprietors may seize and sell any part of the crop and fruits or any part of the pangu.*

The opinion expressed by Wendt J. in the old case of *Jotihamy v. Dingirihamy* decided in 1906 was not a considered opinion on that matter. If I may repeat, this is all what Wendt J. stated at page 68:

> *Another objection is based upon the indivisibility of the services. Counsel on both sides were allowed the opportunity of looking into the authorities on this point but have not been able to produce anything which recognises the right of a tenant to maintain a partition action. We are therefore invited to decide the appeal upon general principles. Applying these to the best of our ability we think that the provisions of the Partition Ordinance do not apply to lands of the character of those in question.*

In my view, *Martin v. Hatana* (1913) 16 NLR 92 is an eye-opener and provides insights into solving the issue of indivisibility. In this case the plaintiff ninda lord filed action against several nilakarayas in terms of section 25 of the Service Tenures Ordinance to recover damages in a sum

of Rs. 25.40 for the value of services due by them. The position of the 14th defendant was that if the defendants are liable, his company is not liable to pay more than what is proportionate to the share of land owned by his company. Lascelles C.J. did not in my view reject this position on the sole basis that payment of commuted dues is indivisible on principle. His Lordship at page 93 also took into consideration that dividing the commuted dues among several nilakarayas would create practical difficulties for the ninda lord, including the need for surveys and share valuation, the cost of which would outweigh the damages to be recovered:

> *In view of these authorities, which represent the view commonly held as to the obligation of the tenants of a panguwa, and on account of the practical difficulty of distributing the liability, I think that the decision in C.R. Ratnapura, No. 284, is one which might properly be reconsidered by a Collective Court when the question comes up in a suitable form. But in the present case it is not necessary to take this course. The action is one for damages under section 25 of Ordinance No. 4 of 1870, a section which clearly enables the proprietor to sue the holders of the panguwa collectively. I fail to see that under this section it is open for one of the tenants to claim that his liability should be restricted to an amount of damages which is proportionate to his holding in the panguwa. To allow this claim would be inequitable to the proprietor, for the proportionate share of each tenant could not be ascertained without a survey and probably a valuation, the costs of which, in cases like the present, would far exceed the whole amount of damages. Whatever may be the law as to the divisibility of the liability to render services, or to pay the commutation for services, I think that when it comes to recovering damages, in a case where the liability has not been apportioned, the damages are recoverable from the tenants jointly.*

I think the concept of indivisibility of service and commuted dues should not be promoted or retained on the basis of convenience to the ninda lord or on the basis of potential litigation costs to the ninda lord. Such considerations are typical in any litigation, and there is no need for preferential treatment for the ninda lord.

In *Appuhamy v. Menike* the unanimous view of the Court was that the service of a paraveni nilakaraya is indivisible and on that ground paraveni nilakarayas cannot institute a partition action in respect of a paraveni panguwa. Ennis J. at page 363 states "*In my opinion a paraveni nilakaraya holds all the rights which, under Maarsdorp's definition, constitute ownership, but he, nevertheless, does not possess the full ownership, in that the ninda lord holds a perpetual right to service, the obligation to perform which attaches to the land*."

If the obligation to perform service is tied to the land, it is questionable as to how it would pose a difficulty for the partition of the land as the obligation can naturally transfer with the land and attach to the separate lots upon partition. This is how constructive or charitable trusts, leases at will, or those for periods not exceeding one month continue to exist after the partition decree, even if they are not specifically included in the decree.

The feudal system has long gone. The ninda lord, if interested, should work towards finding a mechanism to obtain services from nilakarayas after partition rather than merely echoing what was said centuries ago that service is inherently indivisible.

Even assuming that the services to be rendered in their nature are indivisible, after the enactment of the Service Tenures Ordinance, such services can be commuted to a quantifiable monetary payment recoverable in accordance with the procedure laid down in sections 24

and 25 of the Ordinance. Hence there is no justifiable reason to deny partition in respect of pangu land on the basis that service is indivisible.

It must be noted that under section 48(1) of the Partition Law No. 21 of 1977, the partition decree "*shall be free from all encumbrances whatsoever other than those specified in that decree*." Thus, the Court can specify in the partition decree the encumbrances attached to the allotments.

Section 48(1) of the Partition Law No. 21 of 1977 further states that the term "encumbrance" means "*any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for period not exceeding one month*." Constructive or charitable trusts, leases at will or for period not exceeding one month will continue to remain as encumbrances whether or not specified in the decree.

In the repealed Partition Ordinance, No. 10 of 1863, section 9 dealt with the conclusive effect of a partition decree, and sections 12 and 13 explicitly preserved the status of mortgages and leases, indicating that they would not be affected by the partition decree, regardless of whether they were included in it. However, unlike mortgages and leases, there was no express provision protecting constructive trusts or fidei commissa after a decree for partition was entered.

Nevertheless, the Full Bench of the Supreme Court in *Marikar v. Marikar* (1920) 22 NLR 137, having reviewed the conflicting previous decisions authoritatively held:

> *A trust, express or constructive, is not extinguished by a decree for partition, and attaches to the divided portion, which on the partition is assigned to the trustee.*

In the Privy Council decision of *Nadesan v. Ramasamy* (1961) 63 NLR 49 it was held:

> *Where property burdened with a fidei commissum under a deed of gift has been partitioned under the Partition Ordinance No. 10 of 1863, such partition has not the effect of destroying the fidei commissum which thereafter attaches to the land allotted in severalty to the fiduciaries or his successor in title, even though no mention has been made of his capacity in the partition decree. Section 9 of the Ordinance has no bearing upon the rights of fidei commissaries who have no present right or interest in the land which is being partitioned. They are not owners or co-owners to whom Section 2 can apply.*

These decisions illustrate that, in suitable cases, the Court is not precluded from introducing encumbrances that are not explicitly specified by the statute.

Therefore, once a paraveni pangu is partitioned, the District Court can specify in the decree that partition is subject to service. However, the failure to mention it should not prevent the ninda lord from exercising his rights under the Service Tenures Ordinance and Buddhist Temporalities Ordinance. The perpetual rights of the ninda lord in respect of paraveni pangu shall in no way extinguish or affect, regardless of whether they are explicitly mentioned in the partition decree since his rights are attached to the land (as opposed to a personal service) and carry with it even after the partition.

Human dignity

Both ancient and contemporary historical authorities unequivocally support the view that the rajakariya system was fundamentally rooted in the caste system. (Robert Knox, *An Historical Relation of the Island Ceylon*

(2nd ed, Tisara prakashakayo, 1989) 139-140; John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom* (2nd ed, Tisara prakashakayo, 1975) 67-68; M.U. De Silva, *Land tenure, Caste System and the Rājakāriya, under Foreign Rule: A Review of Change in Sri Lanka under Western Powers*, 1597-1832, (1992) Journal of the Royal Asiatic Society of Sri Lanka 5)

Sri Lankan society has undergone significant transformations since the era of monarchy, and the preservation of vestiges of the feudal system, particularly regarding the role of paraveni nilakarayas, practically based on **caste**, may no longer be necessary. The question of the ninda lord's rights now warrants the exploration of novel approaches.

Caste-based discrimination is an outright violation of human rights. Human rights are the rights we have simply because we exist as human beings. They are inherent to all of us, regardless of caste, class, colour, race, gender, religion or any other status. Human rights spring from human dignity. In all the religious doctrines, such as Buddhism, Hinduism, Christianity, Islam, human dignity is revered as a fundamental and sacred principle.

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, stands as the first legal document to delineate the fundamental human rights to be universally protected. This is the foundation of international human rights law including human rights conventions, treaties and other legal instruments. Article 1 thereof states "*All human beings are born free and equal in dignity and rights*." Article 2(1) states "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*." Article 7 states "*All are equal before the law and are entitled without any discrimination to equal protection of*

the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The Universal Declaration of Human Rights, along with the two covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, adopted by the United Nations in 1966, collectively form a comprehensive body of human rights.

While international law instruments may not be directly used to modify the domestic law, the importance of interpreting the law in light of the international standards has been stressed in several cases. I am reminded of the dictum of Amarasinghe J. in the landmark judgment of *Bulankuluma and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 274-275, where His Lordship, in reference to the U.N. Stockholm Declaration (1972) and the U.N. Rio De Janeiro Declaration (1992), stated:

> *Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions.*

Although this is not a fundamental right application, Article 4(d) of the Constitution states "*The fundamental rights which are by the Constitution declared and recognized* ***shall be respected***, ***secured*** *and* ***advanced*** *by*

all the organs of government *and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided.*" One of the three organs of the government is the judiciary, the other two being the legislature and the executive.

The *Svasti* of our Constitution *inter alia* assures "equality" and "fundamental human rights" that guarantees "the dignity" of the People of Sri Lanka. Fundamental rights spring from human rights. Article 3 of our Constitution states that sovereignty includes fundamental rights. Fundamental rights include equality and non-discrimination. Article 12(1) of the Constitution states "*All persons are equal before the law and are entitled to the equal protection of the law.*" Article 12(2) states "*No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds*".

Under directive principles of state policy, Article 27(2)(a) states that the State is devoted to establishing a democratic socialist society with one of its objectives being "*the full realization of the fundamental rights and freedoms of all persons*". Article 27(6) states "*The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.*" Article 27(7) states "*The State shall eliminate economic and social privilege and disparity and the exploitation of man by man or by the State.*"

In this backdrop, where both the international and domestic law strongly condemn and discourage the discriminatory practices in society, it is timely to reconsider whether remnants of the rajakariya system constitutes an infringement upon human dignity. If a partition action can be instituted by an owner of a land and a paraveni nilakaraya is

considered an owner of the land, why he should be prevented from instituting a partition action on the notion that rajakariya is indivisible?

Conclusion

The questions of law upon which leave has been granted and the answers are as follows:

(a) Was section 54(1) of the Partition Act No. 16 of 1951 necessitated due to judicial opinions expressed in judgments that paraveni nilakaraya is not the owner of the lands appurtenant to his paraveni panguwa?
That may have been one of the reasons.

(b) Was this judicial opinion reversed by the Privy Council in Attorney General v. Herath reported in 62 NLR 145?
Yes.

(c) In view of that, was there any need for section 54(1) to continue in the statute book?
Whether or not there is express provision, the Court can interpret the law.

(d) If (a) and (b) above are answered in the affirmative and (c) is answered in the negative, has the Court of Appeal erred in dismissing the appeal?
The Court of Appeal erred in dismissing the appeal.

(e) If so, are the appellants entitled to the reliefs prayed for in the Petition of Appeal to the Court of Appeal?
The appellants are entitled to continue with the action in the District Court.

The Partition Law does not restrict institution of partition actions by persons who have full ownership in the land. The paraveni nilakaraya is an “owner” within the meaning of the term imposed upon it by the context

of the Partition Law. A partition action can be instituted by a nilakaraya in respect of a land subject to rajakariya.

The obligation to perform services attaches to the land. Therefore, such obligation, upon partition, shall attach to the separate lots in severalty.

The perpetual rights of the ninda lord in respect of paraveni pangu will in no way extinguish or affect whether or not specified in the partition decree.

The impugned order of the District Court and the judgment of the Court of Appeal are set aside and the appeal is allowed with costs in all three Courts.

The learned District Judge is directed to procced with the trial and deliver the judgment according to the law.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court

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

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

SC Appeal No. 107/2015
SC/HCCA/LA No. 165/2014
SP/HCCA/GA/12/2006 (F)
DC Galle Case No. 10650/L

Susangatha De Fonseka,
No. 9, Gravets Road,
Panadura.

Plaintiff

vs

Pussewalage Ashokalatha,
Urala, Doowahena.

Defendant

And between

Susangatha De Fonseka,
No. 9, Gravets Road,
Panadura.

Plaintiff – Appellant

vs

Pussewalage Ashokalatha,
Urala, Doowahena.

Defendant – Respondent

And now between

Susangatha De Fonseka,
No. 9, Gravets Road,
Panadura.

Plaintiff – Appellant – Appellant

vs

Pussewalage Ashokalatha,
Urala, Doowahena.

Defendant – Respondent – Respondent

Before: **Buwaneka Aluwihare, PC, J**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Manohara De Silva, PC with Nadeeshani Lankatilleke and Dilmini De Silva for the Plaintiff – Appellant – Appellant

A S M Perera, PC with Uvindu Jayasiri and Chathurika Witharana for the Defendant – Respondent – Respondent

Argued on: 10th January 2023

Written Submissions: Tendered by the Plaintiff – Appellant – Appellant on 26th March 2015 and 27th April 2023

Tendered by the Defendant – Respondent – Respondent on 5th January 2023

Decided on: 13th November 2023

Obeyesekere, J

This appeal arises from a judgment delivered by the Provincial High Court of the Southern Province holden in Galle [the High Court] on 17th March 2014, by which the High Court upheld the judgment of the District Court of Galle [the District Court] dated 22nd February 2006 dismissing the plaint. Aggrieved by the said judgment, the Plaintiff – Appellant – Appellant [the Plaintiff] filed a petition of appeal before this Court on 4th April 2014 seeking leave to appeal from the said judgment. On 28th January 2015, leave to appeal was granted on the questions of law set out in paragraph 14(b) – (m) of the said petition and one question of law raised on behalf of the Defendant – Respondent – Respondent [the Defendant].

Facts in brief

The Plaintiff's father, the late Justin De Silva Warnakulasuriya Goonewardena was the owner of two agricultural lands in Galle. One was Manomani Estate in extent of 145 acres and part of which is the subject matter of this appeal. The other was Upper Langsland Estate in extent of 317 acres.

The following matters were recorded as admissions at the commencement of the District Court trial on 24th January 1992:

a) The Plaintiff's father had mortgaged Manomani Estate by way of Mortgage Bond No. 3514 executed on 1st February 1948 to Sumanawathie Weerapperuma and Don Frederick Subasinghe [the mortgagees] as a security for a loan given by the mortgagees;

b) Upon the Plaintiff's father defaulting on the payment of the moneys borrowed, the mortgagees had filed Case No. MB 1218 in the District Court of Galle against the Plaintiff's father [the MB action]. After trial, judgment had been entered in favour of the mortgagees on 25th October 1963 and decree had accordingly been entered on 18th December 1963;

c) The appeal preferred against the said judgment of the District Court by the Plaintiff's father had been dismissed by this Court on 5th July 1974;

d) The Plaintiff's father [mortgagor] had objected to the mortgagees' application for the enforcement of the decree but the said objection had been overruled by the District Court by its Order delivered on 22nd November 1983;

e) On 24th November 1983, the said decree had been executed and Manomani Estate which was the subject matter of the MB action, had been sold by public auction, with it being purchased by the mortgagees. Manomani Estate had accordingly been transferred to the mortgagees by a Fiscal conveyance on 27th June 1984 by Deed of Transfer No. 1339 and on the same day, the mortgagees had transferred the same to the Defendant by Deed of Transfer No. 1341.

Although it had been admitted that Manomani Estate had been transferred in its entirety to the Defendant, the evidence led at the trial was that pursuant to the sale, the mortgagees had sub-divided the land into several lots and what had been transferred to the Defendant was only a part thereof, as described in the schedule to Deed No. 1341. Be that as it may, *on the face of it*, with the execution of the decree and the Fiscal's conveyance as aforesaid, neither the Plaintiff nor her father could have claimed any ownership to Manomani Estate or any part thereof.

The Land Reform Law

I say *on the face of it* for the reason that the primary issue that needs to be determined in this appeal is whether the Plaintiff has title to that part of Manomani Estate referred to in the schedule to the plaint, in spite of the execution of the decree in the MB action and the Fiscal's conveyance. This issue arose due to the fact that while the appeal from the District Court in the MB action was pending, the Land Reform Law No. 1 of 1972 was introduced, and as a result of the application of certain provisions of the said Law and steps taken in terms of the said Law, an extent of 25 acres from Manomani Estate was gifted to the Plaintiff by her father in 1980, thus conferring the Plaintiff title in respect of such portion of Manomani Estate.

The Land Reform Law [the Law] is the first law enacted under the First Republican Constitution of 1972 by the National State Assembly, and came into operation on 26th August 1972. In its long title, the said Law was stated to be, "*A Law to establish a Land Reform Commission, to fix a ceiling on the extent of agricultural land that may be owned by persons, to provide for the vesting of lands owned in excess of such ceiling in the Land Reform Commission, and for such land to be held by the former owners on a statutory lease from the Commission, to prescribe the purposes and the manner of disposition by the Commission of agricultural lands vested in the Commission so as to increase productivity and employment, to provide for the payment of compensation to persons deprived of their lands under this Law and for matters connected therewith or incidental thereto*."

Section 2 of the said Law provides that the objects of the Land Reform Commission [the Commission] was *inter alia* to ensure that no person shall own agricultural land in excess of the ceiling set out in Section 3(1), which Section reads as follows:

> "*On and after the date of commencement of this Law* ***the maximum extent of agricultural land which may be owned by any person****, in this Law referred to as the "ceiling", shall:*
>
> *(a) if such land consists exclusively of paddy land, be twenty-five acres; or*
>
> *(b) if such land does not consist exclusively of paddy land, be fifty acres, so however that the total extent of any paddy land, if any, comprised in such fifty acres shall not exceed the ceiling on paddy land specified in paragraph (a)*." [emphasis added]

Section 3(2) provides further as follows:

> "*Any agricultural land owned by any person* ***in excess of the ceiling*** *on the date of commencement of this Law shall as from that date –*
>
> *(a)* ***be deemed to vest*** *in the Commission; and*

(b) *be* ***deemed to be held by such person under a statutory lease*** *from the Commission*." [emphasis added]

In terms of Section 6 of the Law, "*Where any agricultural land is vested in the Commission under this Law, such vesting shall have the effect of* ***giving the Commission*** *absolute* ***title*** *to such land as* ***from the date of such vesting****, and* ***free from all encumbrances***." [emphasis added]

Determination of the land that is to vest in the Commission

The cumulative effect of Sections 3 and 6 is that from the date of commencement of the Law, the maximum extent of agricultural land that could be owned by an individual is 50 acres with any land in excess of this ceiling being deemed vested in the Commission. The exact land area amounting to 50 acres of agricultural land that a person is permitted to own and in turn, the exact metes and bounds of the remaining agricultural land that was deemed to vest in the Commission was **to be** determined in terms of the Law. In other words, although in terms of Section 3(2), all agricultural lands owned by an individual over and above the ceiling were *deemed to vest* in the Commission, until the procedure stipulated in the Law for determining the exact land area forming the 50 acres that a person was entitled to elect to keep for himself was completed, it was not possible to determine exactly which land portion overshot the 50 acre ceiling and had therefore vested in the Commission.

The legal fiction of introducing a deemed concept in Section 3 was to ensure that (a) any person who owned more land than the 50 acre ceiling could not alienate such agricultural land pending a determination in terms of the Law of the precise land that was to be retained by such person, and (b) until such time, the entire land was *deemed to vest* in the Commission.

The concept of 'deemed vested' was considered by a bench of five Judges of this Court in **Jinawathie and Others v Emalin Perera** [(1986) 2 Sri LR 121] where Parinda Ranasinghe, J [as he then was] stated as follows:

"*A careful consideration of the provisions of the Land Reform Law … , in their proper sequence shows that, with the coming into operation of the said provisions, on 26.8.1972, the entirety of the agricultural land owned by a person, who is entitled to more than fifty acres, has to be deemed to vest immediately in the Commission; that what is so deemed to vest, vests absolutely free from all encumbrances; that thenceforth the person who owned such land is deemed to be a statutory lessee of the Commission upon the terms and conditions set out*; … " [page 126]

"*As has been set out above, where an agricultural land becomes subject to the provisions of this Law in consequence of its owner being one who is entitled to land over and above the ceiling, such agricultural land is "deemed" to vest in the Commission, and its owner is "deemed" to be a statutory lessee of such land. It is, therefore, necessary to examine the nature and scope, in law, of such a deeming provision as section 3(2) of this Law. In statutes the expression "deemed" is commonly used for the purpose of creating a statutory function so that the meaning of a term is extended to a subject matter which it properly does not designate. Thus where a person is "deemed to be something" it only means that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. When a thing is deemed to be something, it does not mean that it is that which it is deemed to be, but it is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing it is nevertheless deemed to be that thing. Where a statute declares that a person or thing shall be deemed to be or shall be treated as something which in reality it is not, it shall have to be treated as so during the entire course of the proceeding-vide Bindra: Interpretation of Statutes (6th Ed.) pp. 912-914*." [page 130]

Keeping in mind one of the questions of law that needs to be determined in this appeal, I should perhaps mention at this stage that the Law further provided for any person who became a statutory lessee to make an application in terms of Section 14 seeking the return to such statutory lessee [i.e., to the owner], agricultural land that was over and above the ceiling stipulated in Section 3(1) in order that the said land be transferred to such persons children who were over eighteen years of age or such persons parents.

Therefore, (a) until the exact 50 acre parcel of agricultural land that a person could retain was determined in terms of the Law, and (b) where an application had been made in terms of Section 14, until the process stipulated thereunder was completed, it was not possible to say which exact portion of the excess agricultural land held by an individual would in fact vest in the Commission, despite the law providing that all lands in excess of the ceiling were *deemed* to vest in the Commission from the date of commencement of the said Law.

The role of the statutory lessee

In terms of Sections 15 of the Law, while the land remained *vested* with the Commission pending the above, the owner of the land, who in terms of the Law had transformed into the role of a statutory lessee, was responsible for the management of the agricultural land once owned by him. The so created statutory lease was to continue for one year from the date of vesting, with provision for the extension of such period for a further one year at the discretion of the Commission. However, no such statutory lease could be continued for any further period by the Commission, except with the express approval of the Minister.

Thus, in terms of the Law, until such time a determination was made with regard to the 50 acres of agricultural land that a person could retain and the exclusion of any land that an owner would be allowed to transfer to children or parents pursuant to an application under Section 14, the agricultural land belonging to an individual to whom Section 3 applied, was *deemed vested* with the Commission. Furthermore, until such time a suitable entity was identified to manage the said lands, which period was limited to two years, the management was to remain with the individual or company that owned such land, on the basis of a statutory lease. The role of the Commission was that of a **repository of lands** that were deemed vested in the Commission in terms of the Law from the date of commencement of the Law until *inter alia* the land was returned to the owner or suitable persons were identified to manage the said lands or the lands were alienated or otherwise allocated in accordance with the Law.

I shall now consider three important provisions of the Law which are directly referable to the questions of law to be determined in this appeal, namely (a) the requirement for an owner of agricultural land above the ceiling to submit a "statutory declaration", (b) the option available to such an owner to seek land over and above the ceiling for children over the age of eighteen, and (c) the "statutory determination" that is made by the Commission pursuant to the submission of the said statutory declaration.

The statutory declaration

The mechanism to decide which 50 acres of agricultural land a person who owned more than the ceiling was entitled to retain, has been set out in Section 18(1), which reads as follows:

> "*The Commission may, by Order published in the Gazette and in such other form as it may deem desirable to give publicity to such Order, direct that every person who becomes the statutory lessee of any agricultural land shall,* ***within a month*** *from the date of the publication of the Order,* ***or of becoming a statutory lessee under this Law make a declaration****, in this Law referred to as a " statutory declaration ", in the prescribed form of the total extent of the agricultural land so held by him on such lease*."

While Section 18(2) stipulates the matters that a declaration under Section 18(1) shall contain, in terms of paragraph (f) thereof, the statutory lessee was required to "*specify the preference or preferences, if any, of the declarant as to the particular portion or portions of each such land which he should be allowed to retain*." Thus began the process of identifying the land that was to ultimately vest in the Commission, once all exemptions and permitted transfers under the Law had been entertained.

It is admitted that the Plaintiff's father made two statutory declarations on 20th November 1972 in which he declared Manomani Estate and Upper Langsland Estate as being agricultural lands owned by him. In the said declarations, the Plaintiff's father had declared that, (a) he wishes to retain as his entitlement in terms of the Law, land from the Upper Langsland Estate, and (b) there existed a mortgage in respect of Manomani Estate

which was subject to the MB action. He had however failed to mention that decree had already been entered in the MB action.

Section 14 of the Law

It is admitted that the Plaintiff was one of several children of Justin De Silva Warnakulasuriya Goonewardena.

Section 14(1) provides that, "*Any person who becomes a statutory lessee of any agricultural land under this Law may* ***within three months*** *from such date* ***make an application to the Commission*** *in the prescribed form* ***for the transfer*** *by way of sale, gift, exchange or otherwise* ***of the entirety or portion of such agricultural land to any child who is eighteen years of age*** *or over or to a parent of such person*." [emphasis added]

Acting in terms of the above Section, the Plaintiff's father had made an application that he be permitted to transfer out of the two Estates, 50 acres per child to each of his children who by then were all between the ages of 19 and 32.

In terms of Section 14(2), "***The Commission may*** *by order made under its hand* ***grant*** *or refuse to grant* ***approval for such transfer****. Such order shall be made within one year of the date of application under subsection (1). Every such order shall be sent by registered post to the applicant under subsection (1). Any such applicant aggrieved by the order may appeal to the Minister within three weeks of the receipt of such order. The receipt of the order shall be deemed to be effected at the time at which letters would be delivered in the ordinary course of post*." [emphasis added]

Although the said application had initially been rejected, pursuant to an appeal to the Minister, the Commission, by its letter dated 31st December 1973 had informed the Plaintiff's father that approval had been granted to transfer 25 acres each, to each of his children. This included two 25 acre lots from Manomani Estate, which by then formed part of the subject matter of the decree issued in the MB action, but which fact (i.e., of the decree) had not been disclosed to the Commission. It must perhaps be noted that in terms of Section 18(5), making a declaration knowing such declaration to be false is an

offence and the Commission was empowered to forfeit the compensation payable under the Law.

The formal Order of the Commission granting its approval was conveyed to the Plaintiff's father by letter dated 10th June 1974. The said Order contained the steps to be followed by the Plaintiff's father in transferring the land to the Plaintiff and her sister, including the requirement to have a survey plan prepared and to submit to the Commission a copy of the deed of transfer upon its execution.

In terms of Section 14(3), "***Any transfer*** *effected in accordance with the provisions of an order made under subsection (2) or such order as amended, varied or modified on appeal* ***shall have the effect of transferring*** *right,* ***title*** *or interest* ***in property so transferred*** *free of the statutory lease*." [emphasis added]

Thus, once the approval of the Commission was received, the transfer was to be effected by the applicant in favour of his or her child, and not by the Commission. In the process, the applicant ceased to be a statutory lessee of such land that was to be transferred. Accordingly, by Deed of Transfer No. 2085 dated 16th August 1980 executed by the Plaintiff's father, 25 acres each from Manomani Estate were transferred to the Plaintiff and her sister. This is borne out by the contents of the said Deed which clearly state that the Plaintiff is receiving the title of her father.

While I shall elaborate later on in this judgment, I must state at this point that:

(a) it is not the Commission that transferred the impugned land to the Plaintiff but her own father; and

(b) what was transferred to the Plaintiff was the title that the Plaintiff's father had in the said land at the time the Law came into force, and therefore free of the statutory lease to which the Plaintiff's father's rights over the land had been reduced to in terms of Section 3 of the Law.

Thus, although the Plaintiff's father was only entitled to 50 acres in terms of the Law, the Commission had granted him approval to transfer a further 175 acres to his children,

obviously not as a statutory lessee but as the owner who was capable of such dispositions. The Plaintiff thus acquired title over that part of Manomani Estate referred to in Deed No. 2085, and morefully set out in the schedule to the plaint, subject to the encumbrances that existed over her father's title to the said land.

Statutory Determination

It is only thereafter that the Commission, acting in terms of Section 19 of the Law, published its Statutory Determination in Extraordinary Gazette No. 196/2 dated 29th December 1975 declaring that the Plaintiff's father is allowed to retain 50 acres of land from Upper Langsland Estate.

The effect of a statutory determination is set out in Section 20 in the following manner:

> "*Every statutory determination published in the Gazette under section 19 shall come into operation on the date of such publication and the* ***Commission shall have no*** *right,* ***title*** *or interest in the agricultural land specified in the statutory determination from the date of such publication*." [emphasis added]

In **Jinawathie and Others v Emalin Perera** [supra; at page 139] this Court had held that:

> *"P6 the statutory determination in this case states, as set out earlier, that the plaintiff-respondent "shall be allowed to retain" the said extent of land referred to in the schedule to P6, and also fully described in the schedule to the plaint in this case. The effect of such a statutory determination, upon its publication in the Gazette, is set out in this Law itself, in Section 20. All that is stated therein is that "the Commission shall have no right, title or interest in the agricultural land specified in the statutory determination from the date of such publication".* ***It is merely a renunciation of all interests on the part of the Commission.*** *There is,* ***in P6, no express vesting or conferment of title in the plaintiff****-respondent, who is referred to in P6 as the statutory lessee, in respect of the Land referred to in P6 and described in P6 as "the portion of agricultural land owned" by the statutory lessee and which she shall be allowed to retain.*

What then is the effect, in law, of the plaintiff-respondent being "allowed to retain" the land described in the schedule to P6-which is also, as set out already, the land more fully described in the schedule to the plaint-and further referred to as a portion of agricultural land "owned" by the statutory lessee? The order embodied in P6 is made as the final act in the process of "ensuring that no person (plaintiff-respondent) shall own agricultural land in excess of the ceiling (50 acres)" – vide Section 2(a)." [emphasis added]

It was further stated [at page 141] that:

"… the person, in whose favour a statutory determination … is made, would, upon the making of such a determination, become possessed of those attributes – viz: the right to possess, to take the income, and to deal with it in any way, including alienation and even destruction, so long as it is not illegal, which are, in law, the essence of ownership."

It must be emphasised that by the time the aforesaid Deed No. 2085 was executed, the appeal in the MB action had been dismissed by this Court, but this fact had not been disclosed to the Commission. Accordingly, the said inter-family transfer pertained to a portion of a land which, in terms of Section 2 of the Mortgage Act No. 6 of 1949, was bound by an order of Court and liable to judicial sale to enforce payment due upon the mortgage. Be that as it may, the decree in the MB action was executed and Manomani Estate was sold at a public auction in November 1983, with it being purchased by the mortgagees themselves, who in turn sold part of the said land to the Defendant, with Deed of Transfer No. 1341 being executed in June 1984.

Action in the District Court

Thus, by June 1984, the Plaintiff had a deed in her favour in respect of 25 acres of Manomani Estate, namely Deed No. 2085 executed in 1980 in terms of the Law, while the Defendant too held Deed No. 1341 in respect of a part of Manomani Estate pursuant to a Fiscal's conveyance executed in 1984. Having purchased part of Manomani Estate, the Defendant had soon thereafter taken possession of the land she had purchased.

It is in this background that by plaint dated 13th June 1985, the Plaintiff instituted a *rei vindicatio* action against the Defendant in respect of the 25 acres transferred to her by her father, relying on Deed No. 2085 to establish her title. The Plaintiff had pleaded in the alternative that she has acquired prescriptive title to the said land. In terms of the amended plaint filed on 5th May 1991, the Plaintiff had sought a declaration of title to Lot 'R' in Plan No. 148 which is the portion of land purchased by the Defendant and for an order ejecting the Defendant from the said land.

Answer having been filed, the matter proceeded to trial on 24th January 1992. While I have already referred to the admissions, the issues raised by the parties are set out below.

Issues proposed by the Plaintiff:

(1) පැමිණිලි පතුයේ සඳහන් පරිදි ඩී.ජේ.එස්. වර්ණකුලසුරිය ගුණවර්ධනට හිමිව තිබූ මනෝමනී වත්ත නැමැති අක්කර 145 කින් යුත් මෙම නඩුවට අදාල වන 1 වෙනි සහ 2 වෙනි උපලේඛනයෙහි සඳහන් ඉඩම් ඇතුලුව එම අක්කර 145 මගින් 1972 අංක 1 දරණ ඉඩම් ප්‍රතිසංස්කරණ පනත යටතේ ඉඩම් ප්‍රතිසංස්කරණ සභාවට සියළුම බැදීම් වලින් තොරව හිමිවිද?

(2) 1972 අංක 1 දරණ ඉඩම් ප්‍රතිසංස්කරණ පනතෙහි ප්‍රතිපාදනයන් අනුව ඉහත සඳහන් කළ ඉඩම් වල ව්‍යවස්ථාපිත බදුකරු එම වර්ණකුලසුරිය ගුණවර්ධන නැමැත්තාද?

(3) ඉහත පණතෙහි ප්‍රතිපාදනයන් අනුව එම ගුණවර්ධන විසින් කරන ලද ඉල්ලීමක් මත මෙම නඩුවට අදාල ඉඩම පැමිණිලිකරුගේ නමට පැවරීමට බලය දුන්නාද?

(4) **ඒ අනුව ඉහත සඳහන් ගුණවර්ධන විසින් 1980.08.16 වෙනි දින අංක 2085 දරණ තැගි කරයෙන් එම ඉඩම් මෙම පැමිණිලිකාරියට තැගි දී ඇද්ද?**

(5) පැමිණිල්ලේ සඳහන් පරිදි අංක 148 දරණ නඩුවට ගොනු කොට ඇති පිඹුරේ 'ආර්' අක්ෂරය දරණ කැබැල්ලට මෙම නඩුවහි විත්තිකාරිය ආරවුල් කරයිද?

(6) එසේ නම් පැමැණිලිකාරියට පැමිණිල්ලේ ඉල්ලා ඇති සහනයක් ලබා ගත හැකිද?

Issues proposed by the Defendant:

(7) මෙම අධිකරණයේ එම්.බී. 1218 දරණ නඩුවේ තීන්දුව ප්‍රකාර ඉඩම් විකිණීම වලංගු විකිණීමක්ද?

(8) එම විකිණීම මත මිලදිගත් විත්තිකාරියගේ අයිතිය ඒ අනුව වලංගු වූ අයිතියක්ද?

(9) එම වෙන්දේසියේ ඉදිරිපත් කරන අවස්ථාවේ ඊට විරුද්ධව කිසිම විරුද්ධතාවයක් ඉදිරිපත් කරන ලද්දේද?

(10) ඒ නිසා එම විකිණීම අධිකරණය විසින් ස්ථිර කරන ලද්දේද?

(11) කෙසේ වෙතත් නීතිමය කරුණක් වශයෙන් ඉඩම් ප්‍රතිසංස්කරණ පනතේ සඳහන් වන බැඳීම (encumbrances) යන වචනයේ අර්ථ නිරූපනයට අධිකරණය විසින් දෙන ලද තීන්දු, ප්‍රකාෂයක් ඇතුලත් විද?

(12) කෙසේ වෙතත් 1981 අංක 39 පනතේ 27බී වගන්තිය යටතේ එවැනි බැඳීමක් අහෝසි වී තිබුනේ වී නමුත් යලිත් ප්‍රකෘත්තිමත් වේද?

(13) එසේ නම් විත්තිකරුවන්ට මෙම ඉඩමේ අයිතිය නීත්‍යානුකූලව ලැබේද?

Consequential issues proposed by the Plaintiff:

(14) 1972 අංක 1 දරණ ඉඩම් ප්‍රතිසංස්කරණ පනත හා 1981 අංක 39 දරණ සංශෝධිත පනතේ අර්ථ නිරූපනය කිරීමේ දී සංශෝධන පනත අතීතයට බලපාන පරිදි ක්‍රියාත්මක වේද?

(15) එසේ නැතහොත් එම වගන්තිය ප්‍රකාර බැඳීම් ප්‍රකෘතිමත් විය හැකිද?

Order on Issue Nos. 11–15

The parties had thereafter moved that Issue Nos. 11–15 be determined as preliminary issues of law. The order on the said issues had been delivered on 15th December 1992, with the District Court answering the said issues in the affirmative. In essence, the District Court had held that, (a) the mortgage subsists until the decree is executed; (b) a decree is an encumbrance for the purposes of the Law; and (c) Section 27B of the Law applies with retrospective effect.

Aggrieved by the said judgment, the Plaintiff had filed an appeal in the Court of Appeal [CA Case No. 57/1993], By its judgment delivered on 16th July 1993, the Court of Appeal had held as follows:

> "*This is an application for leave to appeal notwithstanding lapse of time from the order dated 15.12.92. By that order learned District Judge answered preliminary legal issues 11, 12, 13, 14 and 15 in favour of the Defendant. These issues relate to the vesting of the land in the Land Reform Commission and the operation of the amendment to the Land Reform Commission Law done by Act No. 39 of 1981. The trial has to now proceed in the District Court with regard to the issues of fact on the competing claims based upon prescription. We are of the view that the order of the*

learned District Judge on the preliminary issues may be canvassed in the final appeal in the event of a final appeal being filed by the Plaintiff. The application is dismissed subject to the foregoing reservation."

Further trial

Further trial before the District Court proceeded on Issue Nos. 1 – 10, with an officer from the Tea Control Department, an officer from the Commission and the Plaintiff's brother giving evidence on behalf of the Plaintiff while the Defendant gave evidence on her own behalf. During the trial, each party had raised a further issue on prescription. By its judgment delivered on 22nd February 2006, the District Court answered Issue Nos. 1-10 against the Plaintiff and dismissed the action. The appeal that was filed by the Plaintiff against the said judgment of the District Court too had been dismissed by the High Court, resulting in this appeal.

I must perhaps mention that the sister of the Plaintiff who received 25 acres of land from Manomani Estate under the same circumstances as the Plaintiff instituted Case No. 10911/L in the District Court of Galle against another person who had purchased land from the mortgagees following the Fiscal's conveyance. That case was decided in favour of the sister of the Plaintiff. The appeal preferred to the High Court had been dismissed and this Court had refused leave to appeal against the said judgment of the High Court.

Questions of Law

This Court has granted leave to appeal on thirteen questions of law, with the first twelve being raised by the Plaintiff, and the thirteenth by the Defendant. The said questions of law are reproduced below:

(1) The learned Judges of the High Court erred by not taking into consideration the decisions of the High Court made in SP/HCCA/GA/09/2001 marked A1 and the Supreme Court made in SC/HCCA/LA 546/2011 marked A2;

(2) The learned Judges of the High Court erred by holding that the Defendant obtained title to the property in suit (by Deed 1341 dated 27th June 1984) prior to the Plaintiff whose deed No. 2085 is dated 16th August 1980;

(3) The learned Judges of the High Court erred by holding that the Defendant's title based on Deed 1341 dated 27th June 1984 is valid;

(4) The learned High Court Judges failed to consider that the decree dated 18th December 1963, being only a decree entered in a hypothecary action "for the payment of money due upon the mortgage and to enforce such payment by a judicial sale of the mortgage property," did not pass title to the judgment creditor upon such decree being entered and therefore the Defendant did not derive title prior to the Plaintiff;

(5) The learned High Court Judges failed to consider that when the property was vested in the Land Reform Commission in 1972 i.e., prior to the Fiscal sale in MB/1218, the same vested in the Land Reform Commission free from all encumbrances in terms of Section 6 of the Land Reform Law;

(6) The learned High Court Judges failed to consider that with the enactment of the Land Reform Law in 1972, absolute title to the property vested in the Land Reform Commission free from all encumbrances and accordingly by operation of law, right title and interest of the property got transferred to the Land Reform Commission;

(7) The learned High Court Judges failed to consider the provisions of Section 3, 6 and 14 of the Land Reform Law which grants absolute title in the Plaintiff from the Land Reform Commission free from all encumbrances;

(8) The learned High Court Judges failed to consider the provisions of Section 12 of the Land Reform Law;

(9) The learned High Court Judges failed to consider that it is only upon the sale of the property at the auction that the purchaser will acquire title to the property, until then the mortgagor continues to hold title to the property;

(10) The learned High Court Judges failed to consider that the Fiscal sale was in 1984, that is, much after absolute title free from all encumbrances vested in the Land Reform Commission 1973 which transferred title to the Plaintiff on 16th August 1980 by Deed No. 2085;

(11) In the circumstances the learned High Court Judges erred in not considering the correct legal effect of Fiscal sale effected under the Mortgage decree in Case No. MB/1218 in 1984 vis-a-vis the Plaintiff's title derived from Deed No. 2085 of 16th August 1980 executed under the provisions of Section 14(2) of the Land Reform Law No. 1 of 1972;

(12) The learned High Court Judges have erred by holding that the Plaintiff has failed to prove that she has prescribed to the land;

(13) Is the mortgage decree entered into in District Court of Galle Case No. 1218/MB on 25th October 1963 an encumbrance under Section 6 of the Land Reform Law?

I must state that the High Court has failed to consider the matters set out in questions of law Nos. 5 – 11, thus necessitating this Court to consider such matters in detail.

I shall commence by considering questions of law Nos. 1 and 12.

Issue Nos. 1 and 12

Although a copy of the plaint in Case No. 10911/L filed by the Plaintiff's sister has not been produced, there is agreement among the parties that the principal legal issue raised in this appeal is identical to that raised in the aforementioned case. Be that as it may, the fact that the High Court in HC Case No. SP/HCCA/GA/09/2001(F) upheld the judgment of the District Court in Case No. 10911/L is irrelevant when one considers the fact that the said judgment of the High Court is not binding on the High Court that heard the appeal from the judgment of the District Court in this case.

This Court refused to grant leave to appeal from the said judgment by its Order dated 10th September 2012 made in SC/HC/CALA No. 546/2011. In **The Commissioner General of Inland Revenue v. Janashakthi General Insurance** [CA (TAX) No. 14/2013; CA Minutes of 20th May 2020] my brother, Justice Janak De Silva responding to an argument that refusal by the Supreme Court to grant special leave to appeal is binding in other cases, cited with approval the finding in **B.M. Karunadasa, Assistant Commissioner of Labour vs W. Balasuriya, Sports of Kings** [CA (PHC) APN No. 97/2010; CA minutes of 17th July 2013] that it is a misconception to come to the conclusion that the refusal of leave by the Supreme Court constitutes the affirmation of the judgment of the lower court, and held that such an order cannot be considered as creating a precedent. I am of the view that the refusal on the part of this Court to grant leave to appeal would only be binding between the same parties, and therefore is not a consideration that weighs in the mind of this Court today.

In these circumstances, it cannot be said that the learned Judges of the High Court erred in law when they proceeded to hear the appeal before them [i.e., the appeal that has given rise to this appeal] on its merits and made an independent determination. Question of law No.1 is therefore answered in the negative.

With regard to question of law No. 12, it was in evidence that Manomani Estate was a neglected and abandoned property, that the Plaintiff went into possession of the impugned 25 acres of Manomani Estate only after Deed No. 2085 was executed in her favour in 1980, and that she was dispossessed by the Defendant after she purchased the land in 1984 resulting in action being filed in the District Court in 1985. Thus, the question of prescription does not arise and the said question of law is answered in the negative.

Title to the land

One of the primary issues that needs to be decided in a *rei vindicatio* action is whether the plaintiff has established that he or she has title to the land from which the ejection of the defendant is sought. If I were to very briefly summarise the contentions of the parties, then they would be as follows. The position of the Plaintiff was that, (a) the mortgage executed by her father was **wiped out** as a result of Manomani Estate being vested in the Commission free of encumbrances, and (b) she derived her title from the Commission,

and therefore free of any encumbrance. The position of the Defendant was four-fold. The first was that with the decree in the MB action being entered in 1963, the Plaintiff's father did not have title to the land thereafter. The second was that a decree is not an encumbrance for the purposes of the Law. The third was that the land is free of encumbrances only while it remains vested in the Commission. The fourth was that Section 27B of the Law applies with retrospective effect and therefore the mortgage has been revived, with the result that the Plaintiff derives her title subject to the mortgage.

The above arguments presented by the learned Presidents Counsel in order to support their respective position that title to the land referred to in the schedule to the plaint is with the party they represent, are reflective of the issues that were raised before the District Court. I shall therefore consider these arguments under six heads in addressing questions of law Nos. 2 – 11 and 13.

Does a mortgagor lose title to the land once the decree is entered?

The learned President's Counsel for the Defendant submitted that the Plaintiff's father lost his title to Manomani Estate upon the decree in the MB action being entered in 1963. If this Court were to agree with the said submission, it would mean that the Plaintiff's father did not have title to the land at the time the Law was enacted and hence, Manomani Estate could not be deemed to have vested with the Commission.

There is no dispute that the MB action filed in 1956 by the mortgagees was only a hypothecary action in which title to Manomani Estate was not in issue. A hypothecary action has been defined in Section 2 of the Mortgage Act to mean, "*an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the money due upon the mortgage and to enforce such payment by a judicial sale of the mortgaged property*;".

It was the position of the learned President's Counsel for the Plaintiff that the decree entered in the MB action on 18th December 1963 was only for the payment of money due upon the mortgage, and that, while no title passed to the judgment creditor upon such decree being entered, it is only when the property is sold in a public auction that the

purchaser acquires title to the land purchased and the mortgagor simultaneously loses title to the same.

This position is reflected in Section 289 of the Civil Procedure Code, in terms of which, "*The right and title of the judgment- debtor or of any person holding under him or deriving title through him to immovable property sold by virtue of an execution is not divested by the sale until the confirmation of the sale by the Court and the execution of the Fiscal's conveyance. But if the sale is confirmed by the Court and the conveyance is executed in pursuance of the sale, the grantee in the conveyance is deemed to have been vested with the legal estate from the time of the sale*." This provision is made applicable to mortgaged land directed to be sold in execution of a decree by Section 61(1)(a) of the Mortgage Act.

The learned President's Counsel for the Plaintiff buttressed his argument by stating further that an argument to the contrary, namely that title passes upon the decree being entered, is not tenable for the reason that the mortgagee may not be the person who purchases the property at the public auction.

A similar question arose for consideration in **M S Perera (Assistant Government Agent, Kandy) v Unantenna and Others** [54 NLR 457] where Chief Justice Alan Rose while observing [at pages 459 and 460], that R W Lee in **An Introduction to Roman Dutch Law** [(1953) 5th ed. Oxford University Press] makes no mention of a transformation or change of nature on the part of a mortgage after decree, stated as follows:

> "*Wille in Principles of South African Law (1937 edition, page 192) does not support the contention that a decree entered in a mortgage action has the effect of extinguishing the mortgage. According to him a sale in execution must follow the decree in order that the mortgage may be extinguished. In dealing with the law as to how by a decree of court a mortgage may be extinguished the learned author does not even suggest that the bare entering up of a decree in an action to enforce the mortgage has the effect of terminating it.*"

Accordingly, the Plaintiff's father was free to dispose of Manomani Estate subject to the mortgage and the decree until such time as the decree was executed, at which point the

purchaser at the public auction acquired title to the land upon the Fiscal's conveyance. I am therefore in agreement with the learned President's Counsel for the Plaintiff, and take the view that the entering of the decree in 1963 in the MB action did not take away the title that the Plaintiff's father had to Manomani Estate. Thus, when the Law came into force, title to Manomani Estate remained with the Plaintiff's father, subject to the mortgage and the decree.

Is a decree entered in a hypothecary action an encumbrance for the purposes of the Law?

Even though the issue whether a decree entered in a mortgage action is an encumbrance for the purposes of the Law was raised by the Defendant as Issue No. 11 and has been answered by the District Court in favour of the Plaintiff, the said issue has not been addressed by the High Court.

I have already referred to Section 3(2) of the Law in terms of which all agricultural land in excess of the ceiling was deemed to vest in the Commission. The effect of such vesting is reflected in Section 6 which provides that, "*Where any agricultural land is vested in the Commission under this Law, such vesting shall have the effect of* ***giving the Commission absolute title*** *to such land as* ***from the date of such vesting****, and* ***free from all encumbrances***." [emphasis added]

What existed at the time the Law came into force was the mortgage, and the decree in the MB action filed to enforce the mortgage, but with an appeal made in respect of the judgment from which the decree arose.

The learned President's Counsel for the Plaintiff submitted that, (a) on the date that the Law came into operation [26th August 1972], the legal owner of Manomani Estate was the Plaintiff's father, although encumbered by the mortgage which was the subject matter of the hypothecary action, (b) the Plaintiff's father was therefore required by the Law to declare his ownership in Manomani Estate, and (c) in view of Section 6, Manomani Estate vested in the Commission **free of all encumbrances**, including the mortgage and the decree entered in the MB action. It was therefore his position that although decree had been entered, given the fact that the MB action was only a hypothecary action, the mortgage was *very much alive* at the time the Law came into force, and that the mortgage and the decree are encumbrances for the purposes of Section 6.

The view that the mortgage as well as the decree are encumbrances over the land is supported by the meaning attached to "*incumbrance*" in **Misso v Hadjear** [19 NLR 277 at page 278] where De Sampayo, J stated that, "*In the largest sense it means any kind of burden on or diminution of the title, and in a narrower sense it is generally employed to indicate a mortgage or charge upon the property*."

In **Sarvanamuttu v Solamuttu** [26 NLR 385; at page 389] Bertram, CJ stated that a mortgage decree does 'affect the land' in the sense of it investing a person with an interest in the land or imposing or creating some charge, interest, or liability which would operate prejudicially to the title of any subsequent purchaser.

I am in agreement with the learned President's Counsel for the Plaintiff that as the MB action was only a hypothecary action, the mortgage retained its character without any transformation, even though decree had been entered, and that as at the date of the Law coming into force, the mortgage was very much in existence, although subject to the decree. I am therefore of the view that the aforementioned mortgage and decree are encumbrances on Manomani Estate and were subject to the provisions of the Law.

Does Section 6 of the Law apply only while land is deemed vested in the Commission?

Referring to Section 6, the learned President's Counsel for the Plaintiff submitted that the title to Manomani Estate vested in the Commission free of encumbrances and that Section 6 had the effect of completely **wiping out the mortgage and the decree**. He therefore submitted that with the mortgage and decree having been wiped out, Manomani Estate could not have been sold at a public auction in satisfaction of a decree which no longer had any legal validity and therefore no title could have passed to the person who bought Manomani Estate at the auction [in this case the mortgagees] and consequently no title passed to the Defendant.

I agree that with the application of Section 6, title to Manomani Estate vested in the Commission free of the mortgage suit and the decree, but subject to the caveat that it would continue to be so only so far as the land remained vested in the Commission or where the Commission alienated the land to a third party in terms of the Law. In other words, if Manomani Estate which was deemed vested in the Commission was to revert

back to the owner, either in its entirety or in part, such as for example upon the making of the statutory determination in terms of Section 19 or an Order in terms of Section 14(2), it would revert back to the owner with the mortgage and the decree that Manomani Estate was encumbered with on the day the Law came into operation. Thus, in such circumstances there is no wiping out of the mortgage. What takes place is that in terms of Section 6, Manomani Estate was deemed vested in the Commission free of all encumbrances and would continue to be so, with the encumbrance floating over Manomani Estate, only for it to be attached to the land once again in the event of Manomani Estate or part thereof being returned to the Plaintiff's father. This is clearly further borne out by the provisions of Section 27B introduced by the Land Reform (Special Provisions) Act, No. 39 of 1981, to which I will advert to later in this judgment.

Did the Plaintiff derive the title of her father or that of the Commission?

The learned President's Counsel for the Plaintiff submitted that with the coming into operation of the Law and with land over and above the ceiling deemed to have been vested in the Commission free of any encumbrance, the Plaintiff's father *lost his title* to the mortgaged property and was transformed into a statutory lessee. He therefore submitted that when the Plaintiff's father executed Deed No. 2085, he did so not as the owner of Manomani Estate which was subject to a mortgage but as the statutory lessee of a land that was no longer encumbered. He submitted further that with Manomani Estate being deemed vested in the Commission in 1972, the Plaintiff derived her title to 25 acres of Manomani Estate not from her father but from the Commission, and most importantly, free of any encumbrance.

I am unable to agree with this argument of the learned President's Counsel for the Plaintiff. Although in terms of Section 3(2), all agricultural lands in excess of the ceiling are deemed to have vested in the Commission on the day the Law came into operation by way of a legal fiction, as I have already stated, for the purposes of this case, that vesting is subject to:

(a) a statutory determination of the land area amounting to 50 acres that an owner would be allowed to retain as his entitlement in terms of the Law; and

(b) the release to the owner of land in excess of the ceiling in order that the said land be gifted to his children who are over the age of eighteen.

What the Commission did in terms of the Order made under Section 14(2) was grant approval to the owner to transfer land to his children, which is a further manifestation of the concept of the land being merely deemed vested in the Commission. In doing so, the Commission revived the title of the owner to that portion of land for which approval was being granted, while simultaneously removing his status as statutory lessee, thereby enabling the land be transferred to his children. This is reflected in the wording of Section 14(3), as well as by the fact that the Deed of Gift was executed by the Plaintiff's father and not by the Commission. Thus, I am of the view that the Plaintiff in this case derived her title from her father and not from the Commission.

Having said so, I must reiterate that the benefit of title vesting free of any encumbrances, as provided by Section 6, has only been conferred upon the Commission, and that when the Commission grants approval in terms of Section 14(2) for an inter-family transfer, the title that the beneficiaries of such transfer receive is not the unencumbered title of the Commission but the title of the person who owned the land at the time the Law came into force, including any encumbrance that may have existed at the time in respect of such land. Indeed, this is the process of 're-attachment' of an encumbrance that I have discussed earlier.

In other words, the Plaintiff derived her title to 25 acres of Manomani Estate from her father subject to the mortgage executed by her father and the decree in the MB action. To hold otherwise would mean that an encumbered title can be cleared of such encumbrances via the Law for the benefit of its owner, who could thereby evade his or her obligations and liabilities under a mortgage or any other encumbrance. This certainly would not have been the intention of the legislature when the Law was enacted, in spite of the apparent consensus that landowners losing vast tracts of land overnight be given certain concessions such as inter-family transfers of land over the stipulated ceiling.

The above position is confirmed by:

(a) the latter part of Section 12 of the Law, to which I shall advert; and

(b) Section 21(c) of the Law, in terms of which, "*Every statutory determination published in the Gazette under Section 19 shall inter alia specify any servitude or* ***encumbrance attaching to such agricultural land***." [emphasis added], which means that when the Commission makes a statutory determination, any encumbrance that existed over such land referred to in the statutory determination at the time the said land vested in the Commission, continues to hang over the owner.

Section 12(1)

The learned President's Counsel for the Plaintiff, whilst conceding that an injustice would be caused to mortgagees from the blanket suppression of all encumbrances on land vested in the Commission through the operation of Section 6, submitted that a mortgagee has been provided a solution by way of Section 12(1) of the Law and that the mortgagees ought to have pursued relief under this section.

Section 12(1) reads as follows:

> "*Where any agricultural land subject to a mortgage, … vests in the Commission under the provisions of this Law the mortgagee, … shall have a lien to the extent of his interest in such agricultural land on the compensation payable to the owner thereof and where such compensation is not sufficient to meet his claim, such mortgagee, … shall be entitled to enforce his rights against any land subject to such mortgage, … in the hands of the owner of the agricultural land vested in the Commission after the ceiling of agricultural land is applied to him*."

It is clear that in terms of Section 12(1), a mortgagee has a claim on the compensation that is payable to the mortgagor. However, this was not in issue before the District Court and therefore there is no evidence before this Court indicating whether compensation was in fact paid to the Plaintiff's father for the balance part of Manomani Estate that vested with the Commission. Although the said Section further provides that where such amount of compensation is not sufficient to meet the mortgagee's claim, the mortgagee can enforce his or her rights over the 50 acres of land that is released to the owner from the mortgaged land, this will not apply in the present case as no part of Manomani Estate remained with the Plaintiff's father.

I am in agreement with the learned President's Counsel for the Plaintiff that the mortgagees could have made a claim on the compensation paid to the Plaintiff's father but differ in holding that they were not obliged to do so, especially in view of the subsequent Order made in terms of Section 14(2) which had the effect of restoring the mortgage and the decree, and thereby the rights of the mortgagees over Manomani Estate.

Did Section 27B(1) apply with retrospective effect?

The necessity to consider the application of Section 27B, introduced by Section 8 of Act No. 39 of 1981, and forming the basis of the question of law raised by the learned President's Counsel for the Defendant, does not arise in view of the above conclusion that the title of the Plaintiff is subject to the mortgage and the decree. I shall nonetheless refer to the arguments of the parties not only for the sake of completeness but also because it reflects the intention of the legislature with regard to encumbrances where an Order is made under Section 14.

Section 27B(1) reads as follows:

> "***Where any agricultural land is transferred to any person in consequence of an order under section 14*** *or is alienated, or vested in, any person under paragraph (f) of section 22 or where any person is allowed to retain any agricultural land in consequence of a determination made under section 19,* ***such order****, alienation, vesting or determination, as the case may be,* ***shall have the effect of reviving, with effect from the date of such order****, alienation, vesting or determination, as the case may be,* ***any encumbrance which subsisted over that land on the day immediately preceding the date on which that land was vested in the Commission***." [emphasis added]

Section 27B(1) thus makes it clear that all encumbrances that existed on the day immediately preceding the day the Law came into operation, shall be revived in respect of lands to which an Order under Section 14 would apply, with effect from the date of such Order. Section 27B(1) supports my previous finding that any agricultural land over which there exists an encumbrance continues to be so encumbered when returned to the

hands of the owner to be retained or transferred to a child or parent, and is free of the encumbrance only when such land is in the hands of the Commission or is alienated by the Commission to a third party in terms of the Law.

It was the position of the learned President's Counsel for the Defendant that in terms of Section 27B(1) the mortgage that was executed over Manomani Estate on 1st February 1948 by Mortgage Bond No. 3514, and which mortgage stood suppressed while the land was deemed vested in the Commission, was revived when the Commission made its Order under Section 14(2) on 10th June 1974, with effect from such date. The learned President's Counsel for the Plaintiff however submitted that Section 27B(1) applies only in respect of an order made after Act No. 39 of 1981 was enacted into law and that Section 27B(1) does not apply with retrospective effect. He accordingly submitted that as the Order under Section 14(2) was made in June 1974 and Deed No. 2085, by which the Plaintiff derived her title, was executed in 1980, prior to Act No. 39 of 1981, the provisions of Section 27B has no application in this case.

I am attracted by the submission of the learned President's Counsel for the Plaintiff for two reasons. The first is that Act No. 39 of 1981 introduced detailed provisions that permitted land owners to make applications seeking approval to effect further inter-family transfers, in spite of the 3 month time limit imposed by the principal enactment for such applications. The second is that while Section 27B has been introduced by Section 8 of Act No. 39 of 1981, Section 16 of that Act only provides that, "*The amendments made to the principal enactment by section 2 (a), 12 and 15 of this Act shall be deemed for all purposes to have come into operation on the date of commencement of the principal enactment*."

I am however mindful that in **Jinawathie** [supra; at page 139] it was held that, "… *an encumbrance which subsisted over and in respect of the plaintiff-respondent's undivided shares in the larger land would, from and after the date on which P6 came into operation, be revived and attach to the land described in P6.*"

P6 is the statutory determination in **Jinawathie** and was dated 25th September 1974, and so it seems that the five Judge Bench of this Court in **Jinawathie** has considered, despite not explicitly spelling it out, that Section 27B does have retrospective operation. However,

this is not a matter that I wish to pronounce on today, as, for the purposes of the present case, I have already arrived at the conclusion that, independent of Section 27B, the Plaintiff derived her title from her father subject to the encumbrances attaching thereto.

Conclusion

Thus, the mortgage over Manomani Estate, effected in 1948, which was sought to be enforced through the MB action from 1956, which continued following the entering of the decree in 1963 until the introduction of the Law in 1972, and which stood suppressed while Manomani Estate was vested in the Commission, completed its full circle when the Order under Section 14(2) was made in 1974 in favour of the Plaintiff's father, thereby reviving the mortgage and the decree.

I am of the view that the title the Plaintiff acquired in terms of Deed No. 2085 was that of her father's and was therefore subject to the mortgage and the decree. With this Court having dismissed the appeal against the MB action in July 1974, and part of the land having been returned to the Plaintiff's father to be transferred to the Plaintiff and her sister, the mortgagees had every right to enforce the decree in respect of that part of the land, which was duly done in November 1983. Upon such execution of the decree, the Plaintiff lost her title to the 25 acres of land in Manomani Estate referred to in Deed No. 2085 and the Defendant simultaneously acquired title to a part of Manomani Estate, through Deed No. 1341.

I am therefore of the view that the Plaintiff had no title to the land referred to in the plaint when she instituted District Court Case No. 10650/L, while the Defendant had title to such land by virtue of Deed No. 1341. The Plaintiff is therefore not entitled to the relief prayed for in the plaint.

The questions of law are answered as follows:

(1) No.

(2) Even though the finding of the High Court that the Defendant acquired title prior to the Plaintiff is erroneous, the said finding has no bearing on the principal issues in this case.

(3) No.

(4) Even though the High Court has failed to consider this issue, the finding of the District Court on this question of law was in favour of the Plaintiff and regardless, such finding has no bearing on the principal issues to be decided.

(5) – (11) Even though the High Court has failed to examine the provisions of the Law, it has no bearing on the final outcome of this case for the reasons set out in this judgment.

(12) No.

(13) Yes.

The judgment of the District Court and the High Court are affirmed. This appeal is dismissed, without costs.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT

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

1. Sunpac Engineers (Private) Limited,
   Temple Burge Step 11,
   Industrial Zone, Panagoda,
   Homagama.
2. Ranath Jayaweera alias Sanath Jayaweera,
   No. 379/B, Temple Road,
   Thalawathugoda.

   Plaintiffs

SC APPEAL NO: SC/APPEAL/11/2021
SC LA NO: SC/HC/LA/08/2021
CHC CASE NO: CH/CIVIL/514/2018 (MR)

Vs.

1. DFCC Bank PLC,
   No. 73/5, Galle Road,
   Colombo 03.
2. Schokman and Samerawickreme Auctioneers,
   No. 6A, Fair field Garden,
   Colombo 08.

   Defendants

AND NOW BETWEEN

1. Sunpac Engineers (Private) Limited,
   Temple Burge Step 11,
   Industrial Zone, Panagoda,
   Homagama.

2. Ranath Jayaweera alias Sanath Jayaweera,
No. 379/B, Temple Road,
Thalawathugoda.
Plaintiff-Appellants

Vs.

1. DFCC Bank PLC,
No. 73/5, Galle Road,
Colombo 03.

2. Schokman and Samerawickreme Auctioneers,
No. 6A, Fair field Garden,
Colombo 08.
Defendant-Respondents

1. Hatton National Bank PLC,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

2. Seylan Bank PLC,
Seylan Towers, No. 90,
Galle Road, Colombo 03.

3. People's Bank,
No. 75, Sir Chittampalam A. Gardiner
Mawatha, Colombo 02.

4. Cargills Bank Limited,
No. 696, Galle Road,
Colombo 03.

5. National Development Bank PLC,
P.O. Box 1825,
No. 40, Nawam Mawatha.

6. Union Bank of Colombo PLC,
   No. 64, Galle Road,
   Colombo 03.

7. Nations Trust Bank PLC,
   No. 242, Union Place,
   Colombo 02.

8. Commercial Bank of Ceylon PLC,
   Commercial House,
   No. 21, Sir Razik Fareed Mawatha,
   Colombo 01.

9. Pan Asia Banking Corporation,
   No. 6A, Fair field Gardens,
   Colombo 8.

10. Bank of Ceylon,
    'BOC Square',
    Bank of Ceylon Mawatha,
    Colombo 01.

    1st-10th Intervenient Respondents

Before: Buwaneka Aluwihare, P.C., J.
Murdu N.B. Fernando, P.C., J.
S. Thurairaja, P.C., J.
E.A.G.R. Amarasekara, J.
A.H.M.D. Nawaz, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu, P.C., with Chathurika Elvitigala, Sachini Senanayake and Nathasha Fernando for the 1st and 2nd Plaintiff-Appellants.

N.R. Sivendran, with Kaushalya Nawaratne, Renuka Udumulla, Dushyanthi Jayasooriya, Hansika Iddamalgoda and Manodha Mohotti for the Defendant-Respondents (DFCC Bank PLC).

Dr. Romesh de Silva, P.C., with S.V. Niles and Niran Anketell for the 1st Intervenient Respondent (Hatton National Bank PLC).

Palitha Kumarasinghe, P.C., with Gimeshika De Silva for the 2nd Intervenient Respondent (Seylan Bank PLC).

Kushan D'Alwis, P.C., with Jayaruwan Wijayalath Arachchi for the 3rd Intervenient Respondent (People's Bank).

Kushan D'Alwis, P.C., with Jayaruwan Wijayalath Arachchi for the 4th Intervenient Respondent (Cargills Bank Limited).

Geethaka Goonewardene, P.C., with Chanaka Weerasekara for the 5th Intervenient Respondent (National Development Bank PLC).

Geethaka Goonewardene, P.C., with Rishan Vidanagamage for the 6th Intervenient Respondent (Union Bank of Colombo PLC).

Palitha Kumarasinghe, P.C., with Viraj Bandaranayake for the 7th Intervenient Respondent (Nations Trust Bank PLC).

Dr. Harsha Cabral, P.C., with Nishan Premathiratne and Shenali Dias for the 8th Intervenient Respondent (Commercial Bank of Ceylon PLC).

Harsha Amarasekera, P.C., with Kanchana Peiris and Sachindra Sanders for the 9th Intervenient Respondent (Pan Asia Banking Corporation).

Susantha Balapatabendi, P.C., ASG, with Rajitha Perera, D.S.G., and Mihiri De Alwis, S.C., for the 10th Intervenient Respondent (Bank of Ceylon).

Argued on: 02.03.2023, 03.03.2023, 03.04.2023 and 04.04.2023.

Written submissions:

by the 1st and 2nd Plaintiff-Appellants on 18.05.2021, 02.02.2022, 10.08.2022, 27.02.2023 and 11.05.2023.

by the Defendant-Respondents on 20.07.2021, 18.08.2021 and 17.05.2023.

by the 1st Intervenient Respondent on 21.02.2023 and 15.05.2023.

by the 2nd Intervenient Respondent on 15.05.2023.

by the 3rd Intervenient Respondent on 22.11.2022.

by the 4th Intervenient Respondent on 22.11.2022.

by the 5th Intervenient Respondent on 27.10.2022.

by the 6th Intervenient Respondent on 30.11.2022.

by the 7th Intervenient Respondent on 15.05.2023.

by the 8th Intervenient Respondent on 12.05.2023.

by the 9th Intervenient Respondent on 07.06.2023.

by the 10th Intervenient Respondent on 24.02.2023.

Decided on: 13.11.2023

Samayawardhena, J.

Introduction

The 2nd plaintiff is one of the two directors of the 1st plaintiff company. The other director of the company is the wife of the 2nd plaintiff. Upon the request of the directors of the company, the defendant bank granted a loan to the 1st plaintiff company. The 2nd plaintiff mortgaged his land as security for the loan. The company defaulted on payment as agreed, and the bank took steps in terms of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended (hereinafter sometimes "the Act"), to recover the dues by selling the mortgaged property by

public auction (*parate* execution). Very close to the date of the auction, the 1st and 2nd plaintiffs rushed to the Commercial High Court and obtained an enjoining order preventing the bank from holding the auction on the ground that this Act is inapplicable to mortgages executed by persons who are not borrowers. The plaintiffs' position was that the loan was obtained by the 1st plaintiff company and the 2nd plaintiff who mortgaged the property as security to obtain the loan is a third party. The plaintiffs relied on the majority judgment of the Five Judge Bench of this Court (with one Judge dissenting) in *Ramachandran v. Hatton National Bank* [2006] 1 Sri LR 393 (hereinafter sometimes "*Ramachandran*") which held that the right of *parate* execution in terms of Act No. 4 of 1990 is not available to banks when the mortgagor is not the borrower. In short, the Act is inapplicable to what is conveniently called "third-party mortgages". However, the Commercial High Court subsequently refused to issue an interim injunction preventing future auctions. This appeal by the 1st and 2nd plaintiffs (hereinafter "the appellant") with leave obtained is from the refusal of the interim injunction.

Two years after the judgment in *Ramachandran*, in *Hatton National Bank v. Jayawardane* [2007] 1 Sri LR 181 (hereinafter sometimes "*Jayawardane*"), a Three Judge Bench of this Court restricted the applicability of the majority decision in *Ramachandran*. In *Jayawardane*, it was held *inter alia* that when the directors of the company are the mortgagors, they cannot be treated as third-party mortgagors since they have directly benefited from the financial facility made available to the company.

Thereafter, later decisions such as *Nelka Rupasinghe v. National Development Bank* [2014] 1 Sri LR 68 and *DFCC Bank v. Mudith Perera* [2014] 1 Sri LR 128 favoured the majority judgment of *Ramachandran* (without reservation); and decisions such as *Yasodha Holdings (Pvt) Ltd v. People's Bank* (CA/WRIT/1268/1998, CA Minutes of 29.02.2008-Divisional Bench), *Seylan Bank Limited v. Padmanathan* (CA/REV/702/2006, CA Minutes of 16.02.2010), *Yasasiri Kasthuriarachchi v. People's Bank* (SC/APPEAL/127/2014, SC Minutes of 02.06.2021) and *Commercial*

Bank of Ceylon PLC v. Nawa Rajarata Appliances (Pvt) Ltd (SC APPEAL/44/2016, SC Minutes of 05.10.2022) favoured the view taken in *Jayawardane*.

I might add that in view of the doctrine of *stare decisis* there was no occasion for a Three Judge Bench to overrule the majority decision in *Ramachandran*, and the only option available to a Three Judge Bench was to concur with *Jayawardane* as a measure to mitigate the full effect of *Ramachandran*.

It is common ground that the law is unsettled on this important question of law. It is to answer this question, i.e. whether the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 is applicable not only to mortgages executed by borrowers but also to mortgages executed by third parties who are not borrowers, that this Bench of Seven Judges was constituted by His Lordship the Chief Justice.

The original case was filed in the Commercial High Court against DFCC Bank PLC. After leave was granted to the appellant on two questions of law, eight licensed commercial banks and two state banks intervened: the licensed commercial banks are Hatton National Bank PLC, Seylan Bank PLC, Cargills Bank Limited, National Development Bank PLC, Union Bank of Colombo PLC, Nations Trust Bank PLC, Commercial Bank of Ceylon PLC and Pan Asia Banking Corporation; the two state banks are People's Bank and Bank of Ceylon.

The two questions of law raised on behalf of the appellant are as follows:

(1) Did the Commercial High Court err in law by determining that the 2nd plaintiff is a borrower within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990?

(2) Is the ratio in the case of Hatton National Bank v. Jayawardane [2007] 1 Sri LR 181 that the director of a corporate entity who mortgages his property for a loan obtained by the corporate entity is a borrower, correct within the meaning of the aforesaid Act?

The question of law raised on behalf of the licensed commercial banks reads as follows:

> *(3) Has the Board of Directors (within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990) the power to, by resolution to be recorded in writing, authorize a person specified in the resolution to sell by public auction any property mortgaged to the Bank (whether by the borrower or any other person) as security for any loan in respect of which default has been made in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under section 13 of the said Act?*

The two state banks raised the following question of law:

> *(4) Is any property (movable or immovable) mortgaged to the Bank of Ceylon or People's Bank as security for any loan as the case may be, in respect of which default has been made within the meaning of the Bank of Ceylon Ordinance, No. 53 of 1938, as amended, and the People's Bank Act, No. 29 of 1961, liable to be auctioned in terms of the respective Acts?*

The appeal was strenuously fought on both sides with weighty grounds. Mr. Rohan Sahabandu, P.C. for the appellant vehemently argued that the majority judgment in *Ramachandran* is correct and the judgment in *Jayawardane* is wrong. Conversely, Dr. Romesh De Silva, P.C. who is the lead counsel for the banks vigorously contended that the majority judgment in *Ramachandran* is wrong and hence the consideration of *Jayawardane* does not arise as it only introduced an exception to the rule laid down in *Ramachandran* that third-party mortgages are not subject to *parate* execution. I accept that if this Court answers the question of law formulated on behalf of the licensed commercial banks in the affirmative, the appeal virtually comes to an end and the consideration of *Jayawardane* will not arise.

The purpose of the Act

The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is not an Act passed by Parliament in isolation. It is one of a series of Acts passed by Parliament in 1990 aimed at revitalising the country's economy by facilitating speedy recovery of debts. The package of Acts passed by Parliament in 1990 is:

(1) Debt Recovery (Special Provisions) Act, No. 2 of 1990
(2) Mortgage (Amendment) Act, No. 3 of 1990
(3) Registration of Documents (Amendment) Act, No. 5 of 1990
(4) Civil Procedure (Amendment) Act, No. 6 of 1990
(5) Motor Traffic (Amendment) Act, No. 8 of 1990
(6) Agrarian Services (Amendment) Act, No. 9 of 1990
(7) Consumer Credit (Amendment) Act, No. 7 of 1990
(8) National Development Bank of Sri Lanka (Amendment) Act, No. 10 of 1990
(9) Public Servants (Liabilities) (Amendment) Act, No. 11 of 1990
(10) Code of Criminal Procedure (Amendment) Act, No. 12 of 1990
(11) Trust Receipts (Amendment) Act, No. 13 of 1990
(12) Inland Trust Receipts Act, No. 14 of 1990
(13) Credit Information Bureau of Sri Lanka Act, No. 18 of 1990
(14) Inland Revenue (Amendment) Act, No. 22 of 1990
(15) Excise (Amendment) Act, No. 37 of 1990
(16) Banking (Amendment) Act, No. 39 of 1990
(17) Excise (Special Provisions) (Amendment) Act, No. 40 of 1990
(18) Inland Revenue (Amendment) Act, No. 42 of 1990
(19) Turnover Tax (Amendment) Act, No. 43 of 1990
(20) Specified Certificate of Deposits (Tax and Other Concessions) Act, No. 45 of 1990 and
(21) Industrial Promotion Act, No. 46 of 1990.

Thirteen Bills were presented to Parliament on 23.01.1990. This included the Debt Recovery (Special Provisions) Bill, the Mortgage (Amendment) Bill and the Recovery

of Loans by Banks (Special Provisions) Bill. Acts from No. 2 of 1990 to No. 14 of 1990 were all certified on 06.03.1990. Although at first glance, the Acts listed under (3)-(6), (9), and (10) above may seem out of place, a contextual reading reveals that the intention of the legislature was to include them as part of a comprehensive package aimed at fostering the economic development of the country.

A stable financial system is crucial for ensuring robust economic development in any country. A stable financial system helps facilitate efficient allocation of resources, access to credit, management of risks, and overall economic growth. It provides the necessary foundation for businesses and individuals to access funding for investments and economic activities. Within the framework of the Sri Lankan financial system, banks, as guardians of public funds, assume a pivotal function. Ensuring stability in the financial system necessitates the establishment of a secure and strong payment and repayment system.

J.C. Sutherland, *Statutes and Statutory Construction*, Vol. 2, 3rd edition (1943), states at page 502: *"Relevant conditions existing when the statute was adopted must be given due regard in the construction of statutes."*

The legislative intent behind the introduction of Act No. 4 of 1990 to rejuvenate the country's economy through the facilitation of expeditious debt recovery is clearly evident from the Hansards. Parliamentary debates are intricately linked to the mischief rule of interpretation (which I will address briefly later), as these official parliamentary proceedings assist in identifying the underlying mischief Parliament aimed to remedy through the statute.

Can Hansards be used to interpret statutes? There was reluctance on the part of English judges to consider proceedings in Parliament for the purpose of interpretation of statutes, but the seminal decision of the House of Lords in *Pepper v. Hart* [1993] 1 All ER 42 changed the thinking of English judges. *Pepper* lays down three conditions for inclusion of Hansard: (a) that the legislative provision must be ambiguous, obscure or lead to absurdity; (b) that the relevant statement is of a

Minister or other promoter of the Bill; and (c) that the statement made in Parliament is clear and unequivocal. Similar reluctance was shown by judges in Sri Lanka until the decision of Chief Justice Samarakoon in *J.B. Textiles Industries Ltd. v. Minister of Finance and Planning* [1981] 1 Sri LR 156. In *Shiyam v. OIC Narcotics Bureau* [2006] 2 Sri LR 156, a Full Bench of the Supreme Court held that Hansards could be made use of to ascertain the intention of the legislature and to interpret a statute which is ambiguous, obscure or leading to an absurdity. The question before the Full Bench in *Shiyam's* case required the interpretation of section 3(1) of the Bail Act and for this purpose the Court used the Hansards. Justice Bandaranayake (as Her Ladyship then was) stated at pages 164-165:

> *Learned Deputy Solicitor General for the respondents contended that the parliamentary proceedings could be used by the Court to ascertain the intention of the legislature.*
>
> *Until the landmark decision in Pepper v. Hart [1993] 1 All ER 42 the rule followed by the English judges had been that parliamentary debates reported in Hansard could not be referred to in order to facilitate the interpretation of a statute. However, by the decision in Pepper v. Hart (supra), a new practice came into being relaxing the exclusionary rule and permitting reference to parliamentary material. Referring to this new approach, Lord Griffiths in Pepper v. Hart (supra) stated that, "The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*
>
> *In Sri Lanka, the Courts were reluctant to consider the proceedings in the Parliament for the purpose of interpretation. However, the attitude of our Courts took a new turn tilting towards a purposive approach in J.B. Textiles Industries Ltd. v. Minister of Finance and Planning [1981] 1 Sri LR 156 where Samarakoon, C.J., expressed the view that, "Hansards are admissible to prove the course of proceedings in the legislature."*

Since the decision in J.B. Textile Industries Ltd., (supra), our Courts had acted with approval the acceptability in perusing the Hansard for the purpose of ascertaining the intention of the Parliament. Manawadu v. Attorney General [1987] 2 Sri LR 30. In fact in De Silva and Others v. Jeyaraj Fernandopulle and Others [1996] 1 Sri LR 22 Mark Fernando, J. adopted the observations of Samarakoon, C.J. in J.B. Textiles Industries Ltd., case (supra) which stated as follows: "The Hansard is the official publication of Parliament. It is published to keep the public informed of what takes place in Parliament. It is neither sacrosanct nor untouchable."

It is therefore apparent that the Court which now adopts a purposive approach, could refer to the Hansard for the purpose of ascertaining the intention and the true purpose of the legislature in order to interpret the legislation which is ambiguous, obscure or leading to an absurdity.

The speech made by the then Hon. Minister of Justice, Prof. G.L. Peiris at the introduction of the Bail Act, would thus be important in the interpretation of section 3(1) of the Bail Act.

It is now settled law that Parliamentary debates reported in Hansard can be made use of to interpret statutes.

Whilst presenting this package of bills to Parliament, the then Prime Minister *inter alia* explained the history and the purpose of those Bills (Parliamentary Debates (Hansard) Official Report, dated 23.01.1996, Vol. 62, columns 864-867):

Mr. Speaker, I have great pleasure in presenting to the House a set of Bills designed to improve the debt recovery environment in the country. These Bills will result in substantial changes in the laws and procedures governing the recovery of debts by banks and other financial institutions.

Banking institutions in Sri Lanka have for many years been making representations to the Ministry of Finance regarding the long delays which are

experienced in the recovery of bank debts which are in default. In many cases the legal proceedings for debt recovery drag on for periods of six to eight years. The banks state that the long delays and the high cost of recovery of bank debts is one of the causes for the high interest rates which are being charged by banks from borrowers. It is very desirable that interest rates should be reduced to the lowest possible level in order to encourage investment and development in the country. I hope that the implementation of the new legislation will help in achieving these objectives.

Equally important is the need to maintain the financial viability of banks and other lending institutions. The high level of defaults by persons who have borrowed from the banking system, particularly by those who have borrowed large sums of money from the State banks, threatens the financial stability of the banks. If this situation is allowed to continue there is a danger that some of our banks may eventually collapse, with disastrous consequences for the hundreds of thousands of small depositors who have placed their money in these banks. The experience we have had recently with a number of finance companies is a grim warning of what could happen. I am not suggesting that these finance companies collapsed solely because of the difficulties which they encountered in recovering their overdue loans. There were many other causes such as mismanagement, and in some cases fraud. But the difficulty and delay encountered in attempting to recover loans in default was certainly one of the contributory factors for the collapse of these finance companies. We do not want the same fate to overtake our banks.

The laws which I am presenting today have been drafted after careful and detailed study and consideration extending over a period of five years. In 1985 the then Minister of Justice appointed a high level committee to examine and report on matters relating to debt recovery in Sri Lanka. The committee was headed by a former Supreme Court Judge, Mr. D. Wimalaratne, while Mr. H.L. de Silva, a former Chairman of the Bar Association, and Mr. N.U. Jayawardene,

a former Governor of the Central Bank, were members of the committee. The committee submitted a valuable report in October 1985 with detailed recommendations and draft legislation for the improvement of the laws and procedures relating to debt recovery.

The Wimalaratne Report ran into considerable opposition from some sections of the legal profession. As a result, its recommendations, which would have greatly improved the debt recovery environment in the country, were not implemented at that time.

A committee was appointed in March 1988 jointly by the then Minister of Finance and the then Minister of Justice to examine the matter further and propose amendments which would assist in expediting debt recovery. The committee was chaired by Dr. A.R.B. Amarasinghe, at that time Secretary to the Ministry of Justice and now a Judge of the Supreme Court, and it included representatives of the Central Bank, the Sri Lanka Banks Association and the Bar Association of Sri Lanka. The committee made recommendations for some changes in the law relating to debt recovery. The laws proposed by the Amarasinghe Committee were more restricted in scope and effect than those which had been previously proposed by the Wimalaratne Committee.

The subject was also examined by Prof. Ross Cranston, Professor of Banking Law in the University of London, who was engaged as a consultant by the Ministry of Finance to report on the improvement of Sri Lanka's debt recovery laws and procedures. Prof. Cranston submitted a valuable report on this subject. Like the Wimalaratne Committee, Prof. Cranston recommended changes in the law which were more far reaching than those which had been proposed by the Amarasinghe Committee.

All these reports were carefully considered by the Ministry of Finance and the Central Bank. Based on the recommendations of the Ministry and the Central Bank, the Cabinet agreed on a large number of changes in the laws and

procedures relating to debt recovery. The changes in the laws are embodied in a package of 13 Bills, namely:

1. *the Debt Recovery (Special Provisions) Bill;*
2. *the Recovery of Loans by Banks (Special Provisions) Bill;*
3. *the Mortgage (Amendment) Bill;*
4. *the Registration of Documents (Amendment) Bill;*
5. *the Civil Procedure Code (Amendment) Bill;*
6. *the Consumer Credit (Amendment) Bill;*
7. *the Motor Traffic (Amendment) Bill;*
8. *the Agrarian Services (Amendment) Bill;*
9. *the National Development Bank of Sri Lanka (Amendment) Bill;*
10. *the Public Servants (Liabilities) (Amendment) Bill;*
11. *the Code of Criminal Procedure (Amendment) Bill;*
12. *the Trust Receipts (Amendment) Bill; and*
13. *the Inland Trust Receipts Bill.*

The majority of these Bills are based on the recommendations of the Wimalaratne Committee, though these recommendations have in some cases been modified by the Cabinet. The last two Bills relating to Trust Receipts are based on the recommendations of the Amarasinghe Committee.

All these Bills have been discussed in detail by a five-man Bench of the Supreme Court to ensure that they do not violate any of the provisions of the Constitution. The Supreme Court has suggested a few amendments to the Bills. These amendments will all be incorporated in the Bills in the form of Committee Stage amendments. These amendments are being tabled now in this House.

Since the 13 Bills contain a large number of detailed provisions, I felt it would be best if I tabled a statement explaining the provisions of each Bill. This has already been done. I will not therefore take up the time of the House in

explaining all the provisions contained in these Bills. I would like, however, to refer to the provisions of two of the most important Bills.

The Debt Recovery (Special Provisions) Bill provides a special procedure for the recovery of loans by lending institutions. In terms of this Bill, a lending institution can file a plaint in court setting out particulars of the loan in default. The court will then enter a decree nisi against the debtor. The decree nisi will be sent by registered post to the debtor or, where the debtor is an employee, it will be served through the employer. The debtor can then file an affidavit in court stating that there is an issue or a question which has to be tried by the court. If the defendant fails to show sufficient cause, the court will convert the decree nisi into a decree absolute. Thereafter it is not necessary for the lending institution to go to court again for a writ of execution. The decree absolute itself will be deemed to be a writ of execution issued to the Fiscal. The new procedure will be available to all banks and finance companies in the country.

Another important change is introduced in the Recovery of Loans by Banks (Special Provisions) Bill. Under this Bill the right of parate execution which has already been granted to the State banks will be extended to all banks in the country, but not to the finance companies. The right of parate execution enables a lending institution to sell the property mortgaged to it by a debtor who is in default without seeking the intervention of a court of law. Modern banking laws in other countries, in developed countries like the United Kingdom as well as developing countries like Singapore, allow the right of parate execution to banking institutions. <u>The right of parate execution will cover all property mortgaged to a bank whether movable or immovable...</u>

Joining the debate, the then Minister of Industry and the Leader of the House (who is the incumbent President of the Republic) quoted verbatim the following part of the Supreme Court Special Determination No. 1 of 1990 on the Debt Recovery (Special Provisions) Bill (Parliamentary Debates (Hansard) Official Report, dated 26.01.1996, Vol. 62, columns 1354-1355):

It needs to be emphasised that legal provisions for the expeditious recovery of debts-not before they fall due, but after default by the borrowers-by banking and financial institutions are not burdens or punitive measures imposed on borrowers. Expeditious debt recovery is, in the long-term, beneficial to borrowers in general for at least two reasons. Firstly, expeditious repayment or recovery of debts enhances the ability of lending institutions to lend to other borrowers. Secondly, the Law's delays in respect of debt recovery, howsoever and by whomsoever caused, tend to make lending institutions much more cautious and slower in lending: by refusing some applications, by requiring higher security from some borrowers, and by insisting on more stringent terms as to interest from other borrowers. Expeditious debt recovery will thus tend to make credit available more readily and on easier terms, and will maximise the flow of money into the economy. Undoubtedly, there is a legitimate national interest in expediting the recovery of debts by lending institutions engaged in the business of providing credit, and thereby stimulating the national economy and national development. The objections to the constitutionality of the Bill must be considered in that context.

The same Minister explained the objectives of these debt recovery laws in this manner (columns 1355-1356):

The prevailing situation in the country necessarily warrants the state to provide the required legal provision for banks to lend more finance for production ventures without limiting their efforts to much safer areas of trade and business. They stick to trade and business because recovery is easier and would not go into other areas because recovery is more difficult. Their investment in productive ventures creates more employment opportunities. That is what we are trying to aim at. If we expect the banks to invest borrower' funds on high-risk bearing new ventures the legal framework should be such that with the least financial expense and without long delays funds advanced could be recovered. We are talking of money not being given. If it is a high risk

> *they should be able to recover the money. And from whom? From those who default not from a person who has been running a business for a long time as default. Banks always try to put a business on its feet first. One policy today is not to go in for liquidation of every venture. What can be put back on its feet is restructured. But they have to go against those habitual defaulters who think it is much easier today to default and go to court and hang on to the money. This is how other countries developed in Asia. Let us not be blind to reality. If there are more safeguards needed let the law operate for some time and we will think of it. But by opposing it you are not helping the country. You are not speaking on behalf of the persons who have deposited money. The middle class of the country are the ones who have deposited the money.*

The legislative history is a relevant factor to interpret provisions of a statute. In the case of *SZTAL v. Minister for Immigration and Border Protection* [2017] HCA 34 at para 14, Kiefel C.J. states:

> *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

Let me also add that the new trend in the UK on how best to interpret a statute seems to be a shift from 'the intention of the legislature' to 'the purpose of the legislation'.

In the House of Lords case of *R v. Secretary of State for Health ex parte Quintavalle (on behalf of Pro-Life Alliance)* [2003] UKHL 138, Lord Bingham states:

> *The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*

According to the Parliamentary debates quoted above, it is evident that Parliament fervently desired to assist the banking sector by facilitating speedy recovery of loans, and it did not intend to limit the expedited process only to cases where the debtor had mortgaged the property.

The character of the mortgagor was not a concern. If the payment is defaulted, the mortgaged property could be sold to recover the money.

In addition to the Parliamentary proceedings, the short and long titles of Act No. 4 of 1990 itself make it clear that this is a special Act enacted for the recovery of loans granted by banks to promote the economic development of Sri Lanka. With the risk of repetition, the title of the Act is "*Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990*", and the long title is "*An Act to provide for the recovery of loans granted by Banks for the economic development of Sri Lanka; and for matters connected therewith or incidental thereto*." Long title is an important part of the Act

and can be used as an aid to the construction of the Act. (*Maxwell on the Interpretation of Statutes*, 12th edition, page 4)

Apart from the long title, the Act does not contain any reference to support the argument that only loans granted by banks for economic development can be recovered under the provisions of this Act. The recovery of loans granted by banks will contribute to the economic development of Sri Lanka; when money circulates, the economy will prosper.

The question arises as to why this special Act was introduced when the Mortgage Act, No. 6 of 1949, as amended, was already there (and still is) for the purpose of recovering loans granted by banks. The legislature recognised that while the ultimate outcome remained consistent (the sale of the mortgaged property for the recovery of loans), the duration required to conclude a hypothecary action filed under the Mortgage Act was unreasonably protracted. As a result, the lending portfolios of banks, their solvency, financial performance and other factors were significantly compromised, directly impacting the country's economic development. The classic example would be that after the Supreme Court decision in *Ramachandran* on 15.04.2005, the bank filed a hypothecary action in the Commercial High Court on 22.06.2006 to recover the money by judicial sale of the mortgaged property and this case still remains pending in Courts even after a span of more than 17 years.

Scheme of the Act: operative sections

Understanding the scheme of the Act is important in interpreting its various provisions and discerning the legislative intent behind its enactment.

The operative provisions of a statute are of great significance; they constitute the enacting part of a statute. *Halsbury's Laws of England: Statutes and Legislative Process*, Vol. 96 (5th edition, 2012), para 664 states:

The operative components of an Act are obviously by far most important, for they carry the legislative message directly. All other elements serve as commentaries on the operative components, of greater or less utility depending on their precise function.

The operative sections of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 are sections 3, 4 and 5. In other words, they are the principal or substantive sections of the Act. These substantive sections do not make a distinction between a borrower and a mortgagor; both the borrower who mortgages his property as security for the loan and a third party who mortgages his property as security for the loan obtained by the borrower are subject to the same treatment. In either situation, should the loan be defaulted, the mortgaged property is liable to be sold by public auction to recover the dues to the bank.

Let me quote the operative sections of the Act:

3. ***Whenever default is made in the payment of any sum due on any loan****, whether on account of principal or of interest or of both, default shall be deemed to have been made in respect of the whole of the unpaid portion of the loan and the interest due thereon up to date; and the Board may in its discretion, take action as specified either in section 5 or in section 4;*

Provided, however, that where the Board has ***in any case*** *taken action, or commenced to take action, in accordance with section 5, nothing shall be deemed to prevent the Board at any time from subsequently taking action in that case by resolution under section 4 if the Board deems it advisable or necessary to do so.*

4. Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorize any person specified in the resolution ***to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made*** *in order to recover the whole*

of the unpaid portion of such loan, and the interest due thereon up to the date of the sale, together with the moneys and costs recoverable under section 13.

5(1). Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorize ***any person*** *specified in the resolution* ***to enter upon any immovable property mortgaged to the bank as security for any loan in respect of which default has been made*** *or where the terms of* ***any loan agreement are contravened in respect of such property*** *to take possession of, and to manage and maintain such property, and to exercise the same powers in the control and management of such property as might have been exercised by* ***the mortgagor*** *if he had not made default, or contravened the terms of such agreement.*

5(2). Whenever ***any sum of money*** *due on* ***any loan*** *granted for any agricultural or industrial undertaking* ***on the security of any plant, machinery or other movable property to the bank*** *is in default or where the terms of any loan agreement are contravened in respect of such property, the Board may authorize any person specified in writing to enter and take possession of such agricultural or industrial undertaking in which such plant, machinery or other movable property is situate, and exercise the same power in the control and management of such undertaking as might have been exercised if such property had been pledged or mortgaged.*

It is clear that section 4 of the Act, which serves as the central provision, empowers the board of directors of the bank to pass a resolution authorising any person "***to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made***" irrespective of whether the property was mortgaged by the borrower or a third party. The focus in sections 3-5 is on the mortgaged property and the mortgagor; who mortgages the property is immaterial.

The argument of learned President's Counsel for the appellant relying on the Divisional Bench decision of the Court of Appeal in *Yasodha Holdings (Pvt) Ltd v. People's Bank (supra)* that "any property mortgaged to the bank" in section 4 of the Act would mean "any one of the properties mortgaged to the bank by the borrower" is in my view unacceptable as a general rule. That interpretation is correct on the unique facts of that case. In the *Yasodha* case, the petitioner obtained several loans by mortgaging several properties. One of his arguments was that the Nuwara Eliya property could not be subjected to *parate* execution because it was not included in the offer letter for that specific loan that was defaulted. It is in that context the Court held that "*the bank is empowered to sell any immovable or movable property mortgaged to the bank as security for any loan in respect of which default has been made. The security need not be in relation to a particular loan in respect of which default has been made*." The facts of that case are totally different from the instant case. A principle laid down in a judgment shall be understood in the context of the peculiar facts and circumstances of that particular case.

I accept that in sections 7 and 13-17, the term used is "borrower", not "mortgagor". I also accept that a statute must be understood holistically, not piecemeal. But the important point to bear in mind is that sections 7 and 13-17 are procedural sections. In other words, they are subsidiary or subordinate sections of the Act. These procedural sections are there to facilitate the operative sections, which are sections 3-5 of the Act.

In the case of *Institute of Patent Agents v. Lockwood* [1894] AC 347, Lord Herschell L.C. observes at 360:

> *Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best as you may. If you cannot, you have to determine which is <u>the leading provision</u> and which <u>the subordinate provision</u>, and which must give way to the other.*

In the case of *Project Blue Sky Inc. v. Australian Broadcasting Authority* [1998] HCA 28, McHugh, Gummow, Kirby and Hayne JJ (Chief Justice Brennan wrote a separate judgment) state at para 70:

> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*

As seen from the recent decisions such as *Monash University v. EBT* [2022] VSC 651 at para 84 and *ENT19 v. Minister for Home Affairs* [2023] HCA 18 at para 87, the above dicta of Lord Herschell L.C. in *Institute of Patent Agents v. Lockwood* are consistently followed as good law.

In *Saiyad Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab and Others* 1998 4 SCC 343, on comparison between two Acts, one dealing with substantive law and the other with procedural law, Justice Misra states:

> *A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law.*

Substantive sections of a statute aim at the ends which the legislature seeks to achieve while procedural sections aim at the means by which those ends can be

achieved. Procedural sections should not diminish what substantive sections provide, nor should they grant what substantive sections do not provide. They should align or harmonise with substantive sections. In order to achieve this, procedural sections should be interpreted liberally to facilitate the enforcement of the substantive sections. I must say with the utmost respect to Their Lordships that the majority decision in *Ramachandran* does not appear to have appreciated this important point.

The canons of statutory interpretation

When the wording of a statute is clear, there is no need for interpretation; the words speak for themselves. The Court cannot introduce new words or disregard existing words to give a different interpretation to the statute which the Court would think meets the ends of justice. The words, phrases and sentences must be construed in their ordinary, natural and grammatical meaning. This is known as the literal rule. The literal rule serves to prevent not only the undue expansion of narrow language but also the undue limitation of wide language. (Maxwell, pages 28-32; *N.S. Bindra Interpretation of Statutes*, 13th edition, pages 328-336)

In *Miller v. Salomons* (1853) 7 Ex. 475, Pollock C.B., states at 560:

> *If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it–to administer it as we find it, and I think, to take a different course is to abandon the office of Judge, and to assume the province of legislation.*

Learned President's Counsel for the appellant contends that "*Ramachandran case did not add words to the statute or read words into it, which are not there*". The ordinary interpretation of "*any property mortgaged to the bank as security for any loan*" found in the principal section of the Act (section 4) inherently encompasses property mortgaged to the bank by anybody – either the borrower or a third party. However, in *Ramachandran* this was restricted to the *property mortgaged to the bank only by the borrower*.

A literal and mechanical interpretation is not the sole interpretation that Courts are bound to give to the words of a statute. The golden rule permits the Court to depart from the plain and ordinary meaning of the words, if the Court thinks with good reasons that such meaning is inconsistent with the clear intention of the legislature or leads to absurdity or repugnancy. This rule respects the purposive interpretation of statutes: that sections of a statute shall be read contextually, not superficially or mechanically, keeping in mind the purpose, object, tenor or policy of the enactment. (Maxwell, pages 43-46, Bindra, pages 337-346)

In *Becke v. Smith* (1836) 2 M & W 191, Parke B., states at 195:

> *It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.*

In *Warburton v. Loveland* (1929) 1 H & BIR 623, Justice Burton observes at 648:

> *I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further.*

In *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1022, Viscount Simon L.C. states:

> *Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for*

> *doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.*

When the words in a statute are capable of having two or more constructions, the well-established rule laid down in the *Heydon's* case (1584) 3 Co. Rep. 7a, also known as the mischief rule, has been applied by Courts. This rule, which promotes purposive interpretation, requires the Court to ascertain what the law was before the making of the Act, what the mischief or defect in the previous law was, and how Parliament intended to address it. The Court must then determine how to rectify the mischief and further the remedy by imbuing the provisions with greater strength and vitality, all in order to give effect to the true intent of the makers of the Act.

In *Heydon's* case it was resolved by the Barons of the Exchequer at p.7b:

> *[T]he sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:- (1st). What was the common law before the making of the Act. (2nd). What was the mischief and defect for which the common law did not provide. (3rd). what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, (4th). The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.*

When the literal rule is applied to Act No. 4 of 1990, the operative sections favour the bank whilst the procedural sections favour the third-party mortgagor; it is evident that these two cannot coexist. Then the Court can legitimately look beyond the literal rule to discern the true legislative intent and seek reconciliation.

Harmonious construction is employed to resolve apparent inconsistencies or contradictions within the same law. Harmonious construction in law rests on the principle that every statute is enacted with a distinct purpose and intention, and therefore, it should be interpreted as a cohesive whole.

In *Sultana Begum v. Prem Chand Jain* AIR 1997 SC 1006, it was held:

> *[T]he rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.*

In *ENT19 v. Minister for Home Affairs (supra)*, Gordon, Edelman, Steward and Gleeson JJ. state at para 87:

> *The context of the words, consideration of the consequences of adopting a provision's literal meaning, the purpose of the statute and principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision. One such principle is that legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. As expressed by Gageler J in SAS Trustee Corporation v Miles (2018) 265 CLR 137 at 157, "statutory text must be considered from the outset in context and attribution of meaning to the text in context must be guided so far as possible by statutory purpose on the understanding that a legislature ordinarily intends to pursue its purposes by coherent means". Where conflict appears to arise in construing an Act, "the conflict must be alleviated, so far as possible, by adjusting the meaning of the*

> *competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions", and this "will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other". [Project Blue Sky (1998) 194 CLR 355 at 382, quoting Institute of Patent Agents v. Lockwood [1894] AC 347 at 360.] Ultimately, the task in applying the accepted principles of statutory construction is to discern what Parliament is to be taken to have intended.*

In *Rajavarothiam Sampanthan and Others v. The Attorney General and Others* (SC/FR/351-356, 358-361/2018, SC Minutes of 13.12.2018) at 61 it was held:

> *The next principle of interpretation which should be mentioned is that, where there is more than one provision in a statute which deal with the same subject and differing constructions of the provisions are advanced, the Court must seek to interpret and apply the several provisions harmoniously and read the statute as a whole. That rule of harmonious interpretation crystallises the good sense that all the provisions of a statute must be taken into account and be made to work together and cohesively enable the statute to achieve its purpose.*

In the application of harmonious construction, both the golden rule and the mischief rule serve as valuable tools.

According to the golden rule, if the application of the literal rule leads to inconsistency within the statute, the Court can give an interpretation to achieve the manifest intention of the legislature. I have already stated that the manifest intention of the legislature is to facilitate the speedy recovery of loans granted by banks for the economic development of the country by *parate* execution.

In accordance with the mischief (*Heydon*) rule, the legislature had identified the shortcomings of the conventional legal recovery procedure and its adverse effect on the economic development of the country. An assortment of legislation was introduced to remedy this situation and Act No. 4 of 1990 is part of it. How can the

Court assist in suppressing the mischief and advancing the remedy to achieve the legislative intent?

Although the substantive sections 3-5 do not make a distinction between the borrower and mortgagor, the procedural or subordinate sections 7 and 13-17 use the term "borrower". On this basis, learned President's Counsel for the appellant argues that the Act is applicable only to the borrower who is also the mortgagor but not to a mortgagor who is not the borrower. I must reiterate that the subordinate sections cannot override the substantive sections although the contrary might be possible.

Maxwell at page 199, citing Lord Reid's statement in the House of Lords case of *Luke v. Inland Revenue Commissioners* [1963] AC 557 at 577 states:

> *Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction.*

Subordinate sections of the Act

Let me now examine the procedural or subordinate sections of the Act individually to assess the validity of the argument of learned President's Counsel for the appellant.

Section 7 reads as follows:

> *7(1). Save as otherwise provided in subsection (2) the provisions of section 4 shall apply in the case of any default notwithstanding that the borrower may have died or that any right, title or interest whatsoever in the property mortgaged to the bank as security for the loan may have passed by the voluntary conveyance or operation of law to any other person.*

> *(2) Where a borrower is dead and probate of his will or letters of administration to his estate have not been issued to any person, the District Court of Colombo or the District Court of the district in which the property mortgaged to the bank by the borrower is situate, may upon application made in that behalf by a bank and after service of notice of the application on such persons, if any, as the court may order, and if satisfied that the grant of probate or the issue of letters of administration is likely to be unduly delayed, appoint a person to represent the estate of the borrower for the purposes of this section; and the provisions of section 4 shall not apply in the case of any default made by such borrower unless and until a person is appointed under this subsection to represent the estate of such borrower.*

According to section 7, the provisions of section 4 (whereby the bank can pass a resolution to sell the mortgaged property) shall not apply in the case of default made by a borrower who is dead, until a person is appointed to represent the estate of such borrower.

If the Court is to give literal interpretation to this section, only the mortgagor who is also the borrower is governed by this section but not the mortgagor who is not the borrower. In that eventuality, the property of the deceased mortgagor who is not the borrower can be sold by *parate* execution notwithstanding that a person has not been appointed to represent the estate of such mortgagor.

Such a literal construction causes injustice to a mortgagor who is not the borrower. Will the legislature enact statutes to oppress a group of people similarly circumstanced in that manner?

Should the Court in such circumstances, as argued by learned President's Counsel for the appellant, interpret that section to mean that the property of a mortgagor who is not the borrower cannot be sold by *parate* execution? Or should the Court find a solution that aligns with the intention of the legislature and the purpose of the

legislation? Canons of construction of statutes suggest that the Court must adopt the latter, not the former.

The argument of the learned President's Counsel for the appellant that the use of the term "borrower" instead of "mortgagor" suggests that only the property mortgaged by the borrower is liable to *parate* execution is unacceptable as such construction restricts the ambit of the substantive sections of the Act. Such an interpretation will do violence to the symmetry of this special law.

An intention to produce an unreasonable result should not be attributed to a statute when an alternative interpretation is possible. The Court can give a liberal construction to a section to avert injustice. In this instance, the Court can extend the meaning of the term "borrower" not only to the borrower who is also the mortgagor but also to the mortgagor who is not the borrower. To put it differently, the term "borrower" must be interpreted to include the mortgagor who has provided security for the loan obtained by the borrower. This construction can be adopted in respect of all other sections (i.e. sections 13-17) where the term "borrower" appears. Such interpretation is in consonance with the policy, object and spirit of the Act.

Section 13 reads as follows:

> *13. In addition to the amount due on any loan, the Board may recover from the borrower, or any person acting on his behalf –*
>
> *(a) all moneys expended by a bank, in accordance with the covenants contained in the mortgage bond executed by the person to whom the loan was granted, in the payment of premia and other charges in respect of any policy of insurance effected on the property mortgaged to such bank, and in the payment of all other costs and charges authorized to be incurred by the bank, under the covenants contained in such mortgage bond and executed by the borrower;*
>
> *(b) the costs of advertising the sale and of selling of the mortgaged property:*

> *Provided that the costs incurred under paragraph (b) shall not exceed such percentage of the loan as may be prescribed.*

Section 13 empowers the bank to recover the expenses and costs incurred by the bank in conducting the sale from the borrower in accordance with the covenants contained in the mortgage bond executed by the borrower. The literal interpretation of this section suggests that the bank can recover expenses as contained in the mortgage bond if the mortgage bond was executed by the borrower, not by a third party.

When the operative section of the Act empowers the bank to sell any property mortgaged to the bank (regardless of who mortgages the property), can this subordinate provision of the Act nullify the full effect of the operative section of the Act? The purposive interpretation of this section is when the mortgage is executed by a third party, the term "borrower" should mean both the individual who borrows money by mortgaging the property and the third party who mortgages the property on behalf of that individual. That is the way to suppress the mischief and advance the remedy. A construction that is excessively literal should be avoided when it results in an absurdity, especially if a more flexible interpretation would better serve the practical implementation of the Act.

Bindra, states at page 354:

> *The court can look behind the letter of the law in order to determine the true purpose and effect of an enactment when the language of the statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or some inconvenience, or absurdity, hardship or injustice, presumably not intended. In such cases, a construction modifying the meaning of the words and even the structure of a sentence is permissible, and in order to avoid absurdity or incongruity, even grammatical and ordinary sense of the words can in certain circumstances be avoided.*

Section 14 reads as follows:

> *If the mortgaged property is sold, the bank shall, after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13, pay the balance remaining, if any, either to the borrower or any person legally entitled to accept the payment due to the borrower or where the Board is in doubt as to whom the money should be paid into the District Court of the district in which the mortgage property is situate.*

I do not think that even the literal interpretation of section 14 presents an anomaly. There is no compulsion in section 14 for the bank to give excess money to the borrower and not to any other person. If the borrower is not the mortgagor, the excess money can be deposited with the Court for the Court to release it to the correct person. Section 14 will not "*bring about a preposterous result*" as remarked at page 405 in the *Ramachandran* case.

However, once the aforementioned liberal interpretation of the term "borrower" is adopted, the question of depositing such excess money in Court does not arise.

As Maxwell points out at page 47, citing *Canada Sugar Refining Co. Ltd. v. R* [1898] AC 735, a statute shall be read as a whole and "*every clause of a statute is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute*."

Lord Hodge, in the UK Supreme Court's recent case, namely *R (on the application of O) v. Secretary of State for the Home Department* [2022] UKSC 3, declares:

> *The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:*
>
> *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."*

> *(R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, 397:*
>
> *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*

Section 15(1) reads as follows:

> *If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right, title or interest to, or in, the property as against the purchaser.*

Learned President's Counsel for the appellant states that this is an important section that cuts across the banks' argument because when the property is sold (whether or not the mortgagor is the borrower), it is the right, title and interest of the borrower in the property that is transferred to the purchaser. He argues that the only inference

that can be drawn from this is that *parate* execution applies exclusively to the property of the borrower. I regret my inability to agree.

What this section says is that "*if the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser*". What is sold is "the mortgaged property", not "the borrower's property". If the borrower is the owner of the mortgaged property, the purchaser will acquire the borrower's right, title, and interest in the property. However, if the borrower is not the owner of the mortgaged property, the purchaser does not and cannot acquire the right, title, and interest of the borrower in the property since the borrower has no such right, title and interest in the property. Upon the issuance of the certificate of sale, the right, title and interest of the owner of the mortgaged property will pass to the purchaser. This section does not say that upon the mortgaged property being sold and the certificate of sale being issued, only the right, title and interest of the borrower are transferred to the purchaser.

Sometimes the letter of the law needs to yield to the spirit of the law. If the term "borrower" in this section is given a strict literal interpretation, it leads to a preposterous outcome. If I may repeat what Viscount Simon L.C. stated in *Nokes v. Doncaster Amalgamated Collieries Ltd (supra)* at 1022, "*if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we would avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result*."

Chief Justice Goddard in *Barns v. Jarvis* [1953] 1 All ER 1061 at 1063 states "*One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act*".

If the extended meaning to the term "borrower" is given (encompassing both the borrower who mortgaged the property and the third party who mortgaged the property), this anomaly can be averted.

Section 16(3)-(5) is to the following effect:

> *16(3). Where any immovable property sold in pursuance of the preceding provisions of this Act in the occupancy of the borrower or some person on his behalf or of some person claiming under a title created by the borrower subsequently to the mortgage of the property to the bank the District Court shall order delivery to be made by putting the purchaser or any person whom he may appoint to receive possession on his behalf, in possession of the property.*
>
> *(4). Where any immovable property sold in pursuance of the preceding provisions of this Act is in the occupancy of a tenant or other person entitled to occupy the same, the District Court shall order delivery to be made by affixing a notice that the sale has taken place, in the Sinhala, Tamil and English languages, in some conspicuous place on the property, and proclaiming to the occupant by beat of tom-tom or any other customary mode or in such manner as the court may direct, at some convenient place, that the interest of the borrower has been transferred to the purchaser. The cost of such proclamation shall be fixed by the court and shall in every case be prepaid by the purchaser.*
>
> *(5). Every order under subsection (3) or subsection (4) shall be deemed, as the case may be, to be an order for delivery of possession made under section 287 or section 288 of the Civil procedure Code, and may be enforced in like manner as an order so made, the borrower and the purchaser being deemed, for the purpose of the application of any provisions of that Code, to be the judgment-debtor and judgment-creditor, respectively.*

If the term "borrower" is given a narrow meaning, although any immovable property mortgaged to the bank can be sold under the principal sections of the Act, delivery of possession can be given to the purchaser only if the borrower is the mortgagor

but not when the mortgagor is not the borrower. That interpretation will result in absurdity and will allow the mischief to perpetuate.

Chief Justice Beaumont, in *Emperor v. Somadhai Govindbhai* (1938) 40 BOMLR 1082 remarked:

> *I protest against the suggestion that a Judge, construing an Act of Parliament, is a mere automaton whose only duty is to give out what he considers to be the primary meaning of the language used. A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair, he is entitled, and indeed bound, to assume that the Legislature did not intend such a construction to be adopted, and to try to find some more rational meaning to which the words are sensible.*

Maxwell states at page 201:

> *Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act, which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results*.

To avert the anomaly, the term "borrower" shall include the mortgagor who is not the borrower. Such a liberal interpretation can easily be accommodated within the scope and purpose of the Act.

Bindra states at page 351:

> *In a liberal construction of the statute, its meaning can be extended to matters which come within the spirit or reason of the law or within the evil which the law seeks to suppress or correct, although, of course, the statute can under no circumstances be given a meaning inconsistent with, or contrary to the language used by the legislators. Consequently, any matter reasonably within*

> *the statute's meaning, may be included within the statute's scope, unless the language necessarily excludes it.*

Section 17 reads as follows:

> *Where the property sold has been purchased on behalf of the bank, the Board may at any time before it resells that property, cancel the sale by an endorsement to that effect on a certified copy of the certificate of sale, upon the borrower or any person on his behalf paying the amount due in respect of the loan for which the property was sold (including the cost of seizure and sale) and interest on the aggregate sum at a rate not exceeding the prescribed rate per annum. Such an endorsement shall, upon registration in the office of the Registrar of Lands, revest the said property in the borrower as though the sale under this Act has never been made.*

According to the literal construction of this section, the endorsement of cancellation on the certificate of sale shall revest the mortgaged property in the borrower as if the sale had never taken place. For the property to be revested, the borrower must have been the owner in the first place. Any argument that such an endorsement shall vest the property in the borrower whether or not he was the owner is untenable. If the sale is deemed not to have taken place, the property will revert to the original owner, who could be either the borrower or a third party. If the term "borrower" is given a liberal meaning to include the mortgagor who is not the borrower, no other explanation is necessary.

Bindra states at page 351:

> *Where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the provision and to make the whole of it effective and operative.*

In sections 2, 8 and 9, the use of the term "borrower" shall be understood as the borrower who is also the mortgagor and the mortgagor who is not the borrower. Both of them should register their addresses with the bank for receiving notices, including but not limited to notices of resolution and sale. I must state that although a mortgagor who is not the borrower may not be required to register his address according to the literal meaning of the section, the experience demonstrates that the bank sends all notices to both the borrower and the mortgagor and if the borrower is an incorporated body, to all the directors because what the bank wants is to recover the money, not the mortgaged property. This is what has happened in the instant case as well.

In terms of section 19, if the bank purchases the property at the sale, the bank shall not hold the property for a longer period than it is necessary to enable the bank to resell the property to recover its dues. In terms of section 14, the excess money shall be returned.

Bindra states at page 368:

> *Every statute must be construed ex visceribus actus, that is, within the four corners of the Act. When the court is called upon to construe the term of any provision found in a statute, the court should not confine its attention only to the particular provision which falls for consideration. The court should also consider other parts of the statute which throw light on the intention of the legislature and serve to show that the particular provision ought not to be construed as if it stood alone and part from the rest of the statute.*

Dictionary meanings of "borrower" and "mortgagor"

Dictionaries cannot be taken as authoritative pronouncements of the meanings of words used in statutes. However, the Courts, in the interpretation of statutes, may consult standard authors and make reference to dictionaries, including law dictionaries. (*R v. Peters* [1886] 16 QBD 636) The dictionary meanings of "borrower"

and "mortgagor" suggest that there might be instances where these terms could be used interchangeably, particularly in contexts related to loans and mortgages.

Black's Law Dictionary (11th edition), page 1214 defines "mortgagor" as "*Someone who mortgages property; the mortgage-debtor, or borrower*".

Law Dictionary, P.H. Collin (Universal Book Stall, New Delhi), page 178 "mortgagor" is defined as "*person who borrows money, giving a property as security*".

A Dictionary of Law (5th edition, edited by Elizabeth A. Martin, Oxford University Press), page 320 states: "*Mortgage – an interest in property created as a form of security for a loan or payment of a debt and terminated on payment of the loan or debt. The borrower, who offers the security, is the mortgagor; the lender, who provides the money, is the mortgagee*."

In *K.J. Aiyar's Judicial Dictionary* (11th edition, The Law Book Co (P) Ltd, Allahabad), page 773, the term "mortgage" is defined as follows:

> *A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee, a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage money; and the instrument, if any, by which the transfer is effected is called a mortgage deed. Simple mortgage – Where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly and impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgage property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and mortgagee a simple mortgagee*.

Judicial remedy for imprecise legislative language

The purpose of the Act and the mischief the legislature intended to remedy are clear. Having regard to the intent, scope and object of the Act, it is quite apparent that the draftsman failed to use precise language in the Act. Had the attention of Parliament been drawn to this inadvertent oversight before the Bill was passed into law, I am certain that the term "borrower" in the Act would have been substituted with the term "mortgagor" to prevent any ambiguity. This simple change could have averted any confusion.

As a general principle the Court cannot assume a mistake in an Act of Parliament; the legislature is presumed not to have made mistakes. Changing the language of a statute is a serious step, but there is no blanket prohibition. Canons of statutory interpretation allow such action when there are compelling reasons to do so.

In the House of Lords case of *Vickers, Sons & Maxim Ltd v. Evans* [1910] AC 444 at 445, Lord Loreburn L.C. states that Court cannot "*read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself*."

In regard to substitution of words in a statute, Maxwell states at page 231:

> *Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act.*

If the draftsman or the legislature has failed to use apt words, the Court can intervene. Inadvertent mistakes on the part of the draftsman should not defeat the purpose of the Act. Maxwell further explains at page 228:

> *Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the*

> *words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Lord Reid [in Cramas Properties Ltd v. Connaught Fur Trimmings Ltd [1965] 1 WLR 892 at 899] has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: "the canons of construction are not so rigid as to prevent a realistic solution."*

Quoting a part of this excerpt from Maxwell, in *The King v. Vasey* [1905] 2 KB 748, Lord Alverstone C.J. substituted new words into the statute to fulfil the manifest object of the legislature. Said His Lordship at page 751:

> *Applying those principles to the present case, we have to see whether the amending section requires modification, on the ground that if it is to be taken literally it will be reduced to a nullity. It seems to me that the object of the section is perfectly plain, and no one can doubt that the intention of the Legislature was to prevent the destruction of fish in salmon rivers by putting lime or other noxious substances into the water. The draftsman must, however, have forgotten exactly how the section of the Malicious Injuries to Property Act, 1861, which deals with the matter runs. I have no doubt that he meant to provide that for the purpose of this Act the expression "salmon river" should be substituted for the description of waters enumerated in the earlier Act. If, therefore, the exact phraseology of the section of the amending Act is disregarded, and the words "or in any salmon river" are inserted in the earlier section after the words "in any*

> *such pond or water", that makes sense, and carries out the manifest object of the amendment.*

Similar sentiments were echoed in *The King v. Ettridge* [1909] 2 KB 24.

Bindra states at page 365-366:

> *When a language of the statute is plain and unambiguous it would not be open to the courts to adopt a hypothetical construction on the ground that such a construction is more consistent with the alleged object and policy of the Act. But where such a plain reading leads to anomalies, injustices and absurdities, the court may look into the purpose for which the statute was enacted and try to interpret it so as to adhere to the purpose of the statute. If words are to be added by the court in order to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into law.*

Lord Denning in *Seaford Court Estates Ltd v. Asher* (1949) 2 All ER 155 at page 164 observes as follows:

> *Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to*

> *work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b) by the resolution of the judges [Sir Roger Manwood, C.B., and the other barons of the Exchequer] in Heydon's case (1584) 3 Co. Rep. 7a), and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his note (2 Plowd. 465) to Eyston v. Studd (1574) 2 Plowd. 463. Put into homely metaphor it is this: A Judge should ask himself the question how if the makers of the Act had themselves come across this ruck in the texture of it, they would have strengthened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.*

In the Supreme Court case of *Balasunderam v. The Chairman, Janatha Estate Development Board* [1997] 1 Sri LR 83, while interpreting sections of the Government Quarters (Recovery of Possession) Act, No. 8 of 1981, as amended, Justice Kulatunga stated at page 88:

> *In interpreting the Act, I have adopted the principle that words are to be construed in accordance with the intention as expressed, having regard to the object or policy of the legislation, which in the instant case is to facilitate the speedy recovery of Government quarters*.

I need only to repeat the same, with the substitution of the words "loans by banks" for the words "Government quarters".

Ramachandran v. Hatton National Bank

The central focus of this appeal hinged on the majority decision in *Ramachandran v. Hatton National Bank*.

The *ratio decidendi* of the majority decision in *Ramachandran* (at page 405) is that "*the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank for the economic development of Sri Lanka*."

The gravamen of submissions made on behalf of the banks led by Dr. Romesh De Silva, P.C. is that the majority in *Ramachandran* took extraneous matters into consideration before they addressed the core issue. As a result, it was strenuously submitted that the majority considered the core issue with "*prejudice and bias against parate execution*". He strongly argued that *Ramachandran* has been wrongly decided and should be overruled by this Fuller Bench. Learned President's Counsel for the other intervenient banks associated themselves with the submissions of Dr. De Silva, P.C.

Ramachandran was decided on 15.04.2005. It is the submission of learned President's Counsel that, as seen from the judgment, the majority in *Ramachandran* did not give due consideration to any of the previous decisions on the matter before they arrived at the aforementioned conclusion. He highlights that in *Nalin Enterprises (Pvt) Limited v. Sampath Bank Limited* (HC (Civil) 199/2000(1) decided on 27.04.2001) the Commercial High Court held that under the Act No. 4 of 1990 *parate* execution is permissible in respect of any property mortgaged to the bank whether it be of the borrower or any other party, and the term "borrower" in the Act must be interpreted to include the mortgagor who had provided security for the loan obtained by the borrower. The Supreme Court in *Nalin Enterprises (Pvt) Limited v. Sampath Bank Limited* (SC/LA/14/2001, SC Minutes dated 23.07.2001) refused leave to appeal against this order by a bench presided over by His Lordship the Chief Justice who presided over the Bench in *Ramachandran*. The same conclusion was arrived at in the Commercial High Court case of *Sathasivam v. Hatton National Bank* (HC(Civil)174/2000(1) decided on 04.12.2002) and the Supreme Court in *Sathasivam v. Hatton National Bank* (SC/CHC/44/2002, SC Minutes of 30.01.2003)

refused leave to appeal against this order by a Bench presided over by Justice M.D.H. Fernando. In *Bank of Ceylon v. Dharmasena* (CALA/329/2000, CA Minutes of 07.10.2002) and in *Weerakoon v. Bank of Ceylon* (CA/970/2002, CA Minutes of 31.05.2002) by Benches presided over by Justice Amaratunga and Justice Thilakawardane, respectively, the Court took the same view. In *Ukwatte v. D.F.C.C. Bank* [2004] 1 Sri LR 164, Justice Sripavan (as His Lordship then was) also held that the terms "*any property*" and "*for any loan*" in section 4 of the Act, No. 4 of 1990 are not limited to the property of the borrower.

Although Mr. Rohan Sahabandu, P.C. for the appellant states that *Ukwatte's* case was considered in *Ramachandran*, there is no such indication in the majority judgment. It was the submission of Dr. De Silva, P.C. that until the majority decision in *Ramachandran*, all Courts that considered the matter did not confine *parate* execution solely to property mortgaged by the borrower. In reply, Mr. Sahabandu, P.C. did not draw the attention of this Court to any case decided prior to *Ramachandran* where the Court has given a restrictive interpretation to section 4 of the Act.

Dr. De Silva, P.C. stresses that the extensive discussion in the majority judgment on the historical and conceptual aspects of *parate* execution, including its origins in Roman Law, Roman-Dutch Law, and English Law, tends to portray *parate* execution as a negative concept. He contends that the discussion is purely academic and was not relevant to the matter at hand. The Supreme Court was tasked with deciding the statutory law introduced by Act No. 4 of 1990, rather than determining which law is applicable to the recovery of debts by banks. He further submits that the majority's view that common law, not English law, applies in *parate* execution proceedings is incorrect.

The cause of action allegedly accrued to the plaintiff in *parate* execution cases arises out of a banking transaction and not of a mortgage transaction. The mortgage is part of the banking transaction. In the instance case, the 1st plaintiff is the borrower and the 2nd plaintiff is the mortgagor. The bank resorts to *parate* execution of the

mortgaged property to recover the loan. In terms of section 3 of the Civil Law Ordinance, No. 5 of 1854, as amended, the law applicable in respect to banks and banking is the English law unless other provision is made applicable *by statute law*. (*De Costa v. Bank of Ceylon* (1969) 72 NLR 457) Roman-Dutch law is considered as the common law of Sri Lanka because it is the residuary law filling in the gaps only when the statute laws and special laws are silent. The transaction in question is governed by the English law, not by the Roman Dutch law.

Let me explain this in lucid language. When a person goes to a bank to obtain a loan, the bank asks for security. That security can be provided by the borrower himself or he can plead with another to give security on his behalf. The main transaction is the loan transaction between the bank and the borrower, not the security, which is incidental. The incidental transaction cannot be brought to the fore to thwart or undermine the main transaction. It is beside the point who provides the security. The covenants of the Mortgage Bonds remain the same for both the borrower and the third party. If another individual obliges the borrower's request and mortgages his property as security for the loan, and hands over his original title deeds to the bank, and if the borrower defaults on the loan payment, the bank should be able to recover the money by selling the mortgaged property. In practical terms, the guarantor or the mortgagor would be the debtor to the bank where the loan is in default. That is the purpose of providing security. If the mortgaged property is sold to recover the dues to the bank, the mortgagor must deal with the borrower, not with the bank. This is what happens in modern day banking, involving performance guarantees, advance payment bonds, letters of credit, credit card transactions etc. Once the demand is made, money is paid without informing the guarantor.

More specifically, learned President's Counsel for the banks, in unison, strenuously submitted that the *dicta* made on the constitutionality of the provisions of the Recovery of Loans by Banks (Special Provisions) Act are clearly unwarranted when a Divisional Bench of the same Supreme Court in Special Determination No. 3 of 1990 (which was taken up with No. 2 of 1990) had unanimously decided that none

of the provisions of the Recovery of Loans by Banks (Special Provisions) Bill were inconsistent with the Constitution. They particularly point out that the gravamen of the majority reasoning that the Recovery of Loans by Banks (Special Provisions) Act transfers judicial powers from Courts to the board of directors of the bank was fully considered and rejected by the Five Judge Bench of the Supreme Court in the said Special Determination. There is great force in this argument.

The majority in *Ramachandran* started interpretation of the provisions of the Act at page 401 in the following manner:

> *The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, the ambit of the provisions of which, is the substantial question on which leave has been granted, is undoubtedly a special provision, as its very title indicates and is a departure from the established law and procedure. The nature and extent of such departure will be examined in respect of each of its applicable provisions in the light of the preceding analysis of the established law and procedure.*

In *Ramachandran*, the Supreme Court started investigation into the constitutionality of the Act at page 396 in the following manner:

> *In a system based on the Rule of Law, these salutary requirements [the provisions of the Civil Procedure Code in regard to the execution of a money decree] cannot be considered as being time consuming, frivolous or unnecessary. The process of execution and sale is thus firmly within the ambit of judicial power, to ensure the orderly transfer of the right to property recognized and safeguarded by law and for the adjudication of all claims and interests that arise therefrom. One could imagine the mayhem that would ensue, if a landlord, creditor or owner is empowered to secure his rights by way of execution without recourse to a Court. Whatever be the economic benefit that may derive from it, such a process would be unthinkable. I have to make this observation, as the perspective from which any departure from or erosion of, the carefully established procedures that constitute the bedrock of the Rule*

> *of Law and the exercise of judicial power, should be examined, considered and decided upon.*

After referring *inter alia* to Articles 3, 4, 12(1), 105(1) of the Constitution, rules of natural justice etc. the Court repeated this at page 401:

> *These are basic concepts but they have to be restated as the perspective from which any departure from the established law and procedure should be examined and decided upon.*

I cannot but agree with Dr. De Silva, P.C. when he emphasises that there was no need to reexamine, reconsider and decide on, what had already been decided by a Five Judge Bench of the Supreme Court. The underlying reasoning of the majority view was based on Their Lordships' belief that Act No. 4 of 1990 ought not to have been made into law in the first place as it had been enacted in breach of the rights enshrined under Articles 3, 4, 12(1) and 105(1) of the Constitution. As seen from pages 401-404 of the *Ramachandran* judgment, it is on this basis Their Lordships were disinclined to consider the principal sections of the Act (sections 3-5) in line with the intended meaning of the legislature.

According to the analysis found on those pages, even if the borrower is the mortgagor, the bank cannot subject the mortgaged property to *parate* execution without judicial process. However, later in the judgment at page 405 Their Lordships take the view that there "may be some justification" for *parate* execution against the borrower "*on the basis that the person to whom the loan is granted being the borrower, has a continuing transaction with the Bank and should know the amounts paid by him or are in default*."

This approach, Dr. De Silva, P.C. submits, goes against the constitutional framework of our Constitution. In our Constitution, there is no provision for reviewing a decision made (under Article 123) in a Special Determination regarding the constitutionality of a Bill by a subsequent Bench. Nor does the Constitution provide for the review of the constitutionality of an Act. In terms of Article 80(3) of the

Constitution, "*Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever*." Article 16(1) which falls under Chapter III on fundamental rights of the Constitution further states "*All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter*." This has in fact been acknowledged by Their Lordships at page 404 of the *Ramachandran* judgment.

There is no need to highlight that this is a special Act and is a departure from the established law and procedure because it is expressly stated in the Act itself. Where there are provisions in a special Act which are inconsistent with the general law and procedure, the general law and procedure must yield to the provisions of the special Act. Non-judicial sales do not take place for the first time after the enactment of this Act. As the Supreme Court in the first Special Determination No. 3 of 1990 states the right of *parate* execution has been exercising by the state banks and some state institutions for a very long time. The Divisional Bench in their first Special Determination lists out names of those banks and institutions:

(a) The State Mortgage Bank established by the Ceylon State Mortgage Bank Ordinance, No. 16 of 1931
(b) The Agricultural and Industrial Credit Corporation established by Ordinance No. 19 of 1943
(c) The State Mortgage and Investment Bank established by State Mortgage and Investment Bank Law, No. 13 of 1975 (which repealed the Ceylon State Mortgage Bank Ordinance and the Agricultural and the Industrial Credit Corporation Ordinance)
(d) The Ceylon Savings Bank established by Ordinance No. 12 of 1959
(e) The National Savings Bank established by Act No. 30 of 1971 (which repealed the Ceylon Savings Bank)
(f) The People's Bank established by the People's Bank Act, No. 29 of 1961

(g) The Bank of Ceylon established by the Bank of Ceylon Ordinance, No. 53 of 1938

(h) The National Development Bank established by Act No. 2 of 1979

(i) The Regional Rural Development Bank established by Act No. 15 of 1985

(j) The Commissioner of National Housing appointed under the National Housing Act, No. 37 of 1954

(k) The National Housing Development Authority established by Act No. 17 of 1979

(l) The Tourist Development Act, No. 14 of 1968 extended the right of *parate* execution to all "approved credit agencies" in respect of loans granted by them on the security of land alienated by the Ceylon Tourist Board

Second Special Determination in 2003

Learned President's Counsel for the appellant submits that the proposed amendment to the principal Act No. 4 of 1990 in the year 2003 was to include the property mortgaged by a person other than the borrower within the ambit of the Act, but the Supreme Court by Special Determination No. 22 of 2003 dated 26.08.2003 struck this down as unconstitutional and the banks are now trying to achieve indirectly what they could not achieve directly. Learned President's Counsel for the appellant indirectly invites this Court to consider this second Special Determination in 2003 to address the current issue before this Bench. Can this be done?

As seen from the dissenting judgment of Her Ladyship in *Ramachandran*, the 1st question of law on which leave to appeal was granted in *Ramachandran* was:

> *Has the Court of Appeal erred in law in holding that the determination made by the Supreme Court in the S.C. (SD) No. 22/2003 on the constitutionality of the Recovery of Loans by Banks (Special Provisions) (Amendment) Bill that a Bank is not entitled to sell by way of parate execution a property mortgaged to the Bank by a person other than the borrower, is not binding on the Court of*

Appeal in interpreting the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990?

This appears to be on a finding made in the *Ukwatte's* case *(supra)*. However, the majority judgment in *Ramachandran* did not address this issue but this was addressed in the dissenting judgment. In point of fact, the majority judgment does not make any reference to either the first Special Determination in 1990 or the second Special Determination in 2003. The second Special Determination was in respect of a Bill to amend the principal Act No. 4 of 1990 and not the principal Act itself. The second Special Determination cannot be considered as an interpretation of the principal Act No. 4 of 1990. What this Court in the instant appeal has been called upon to decide is the principal Act. Hence, the second Special Determination cannot be taken into consideration for the purpose of deciding this appeal.

Conclusion

The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, applies to any property mortgaged to the bank as security for any loan in respect of which default has been made irrespective of whether the mortgagor is the borrower or a third party.

The Bank of Ceylon Ordinance, No. 53 of 1938, as amended, and the People's Bank Act, No. 29 of 1961, as amended, apply to any property mortgaged to the said banks as security for any loan in respect of which default has been made regardless of whether the mortgagor is the borrower or a third party.

Accordingly, the majority judgment of *Ramachandran v. Hatton National Bank* [2006] 1 Sri LR 393 is overruled.

The 1st question of law raised by the appellant is answered in the negative and the 2nd question of law raised by the appellant is answered as "Does not arise".

The 3rd question of law raised on behalf of the licensed commercial banks and the 4th question of law raised on behalf of the two state banks are answered in the affirmative.

The order of the Commercial High Court refusing the application for interim injunction is affirmed and the appeal is dismissed.

In view of the importance of the question of law raised in this appeal, let the parties bear their own costs.

As agreed, the parties in the connected case No. SC/APPEAL/30/2021 will abide by this judgment.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I am in agreement with the judgment of Justice Samayawardhena.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I am in agreement with the judgment of Samayawardhena J.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

A banking institution lends money to **A (the borrower of a loan)** but takes as security for the loan an immoveable property belonging to **B (a third-party mortgagor).** The long vexed question of whether the bank (the lender) can put up for auction the third-party mortgagor B's property without the intervention of Courts (*parate execution*) was settled in the seminal case of ***Chelliah Ramachandran and Manohary Ramachandran v. Hatton National Bank; V. Anandasiva and 12 Others v. Hatton National Bank; C. Ukwatte and Another v. DFCC Bank and Another; M.D.Karunawathie and 5 Others v. DFCC Bank and Another*** *(sub nom Ramachandran and Another (SC Appeal No 5/2004) and Anandasiva and Another (SC Appeal No 9/2004) v. Hatton National Bank[1])* - a judicial precedent of 4 judges that is being impugned by several banks before this 7 judge bench as having been wrongly decided, whereas the Petitioners assert that this case has correctly laid down the legal position as to *parate execution* of immovable property in the country. In other words, as held by *Ramachandran and Another (SC Appeal No 5/2004) and Anandasiva and Another (SC Appeal No 9/2004) v. Hatton National Bank[2]* (henceforth sometimes referred to as the *Chelliah Ramachandran* case), both Petitioners in this case (SC Appeal 11/2021) as well as those in SC Appeal 30/2021 contend that no property mortgaged to the bank by a person who is not the borrower of the loan, can be sold at an auction.

In the same breath the Petitioners argue that the exception created to the *Chelliah Ramachandran* case in the decision of ***Hatton National Bank Ltd v. Samathapala Jayawardane, Ariyawathie Jayawardane and Rienzi Nalin Jayawardane*** *(*hereinafter sometimes referred to as *Jayawardane* case*)* (*sub nom Hatton National Bank Ltd v. Jayawardane and Others)[3]* is incorrect in fact and law, whilst the banks

[1] (2006) (1) Sri. LR 393.
[2] Ibid.
[3] (2007) 1 Sri.LR 181.

before us contend that *Jayawardane* case represents the correct view of the law concerning mortgages executed by a director of a corporate borrower.

In a nutshell, as the law stands today in the wake of these two decisions, two propositions of law stand out as plain as a pikestaff.

1) In terms of the majority decision of *Chelliah Ramachandran,* a lending institution cannot sell by auction the mortgaged property of a person unless he is also the borrower of the loan.

2) But in the case of a corporate borrower, *HNB v. Jayawardane and Others* establishes that *parate execution* of third-party mortgages is permitted, where the so-called third-party mortgagor is a director of the borrower company, who fully owned and controlled the corporate borrower to the extent of being its alter ego.

Both these propositions come up for a re-appraisal before this bench of 7 judges and If I may paraphrase the words of the English Court of Appeal in ***R (Association of British Civilian Internees (Far East Region) v Secretary of State for Defence***[4] to describe the pith and substance of the arguments of all leading President's Counsel for the banks, the time has come to perform the burial rites of *Chelliah Ramachandran*, whilst the President's Counsel, who in a lone battle against the array of President's Counsel espoused the cause of the Petitioners, has strenuously contended that it is *HNB Ltd v. Jayawardane and Others* (the *Jayawardane* case) which must suffer extinction.

It cannot be gainsaid that when the majority of 4 judges (S.N.Silva, C.J, Jayasinghe, J, Udalagama, J and Dissanayake, J with Shirani Bandaranayake, J dissenting), out of the 5 judges who heard the eponymous case of *Ramachandran and Another and Anandasiva and Another v. Hatton National Bank,* decided on 15 April 2005 that it

[4] (2003) EWCA Civ 473.

is the borrower's property that could be auctioned and not the property of the so-called third-party mortgagor, their pronouncement wrought a paradigmatic shift in the contours of mortgage financing by licensed banking institutions.

The correctness or otherwise of the decision of the 4 judges is the quintessential issue before this bench of 7 judges and whilst the banks challenge the correctness of the majority decision, it goes without saying that the banks have asserted impliedly, if not so in so many words, that the dissentient judgment of Shirani Bandaranayake, J (as Her Ladyship then was) must be preferred in that the mortgagee banks can exercise *parate executie* not only in respect of the immovable property of the borrower but also that of a third-party mortgagor. Allied to the argument of the Respondent banks and Intervenient banks in the two cases before us, is the correctness or otherwise of the decision of Jayasinghe J in *Hatton National Bank Ltd v. Jayawardane and Others* **-** namely when it comes to the borrowing of a corporate customer, the corporate veil must be lifted and the property of the mortgagor-director could be sold. Whilst the banks contended that directors who constitute shareholders in a company cannot hide behind the corporate entity as was correctly articulated in the case *of Hatton National Bank Ltd v. Jayawardane and Others*, the Petitioners have questioned the very basis of the reasoning of Jayasinghe, J in the above case. The veil lifting that the Supreme Court embarked upon in the case of *Hatton National Bank Ltd v. Jayawardane and Others* cannot be supported having regard to the legal indicia that authorize veil piercing in corporate law - an argument that the learned President's Counsel for the Petitioners Mr. Rohan Sahabandu vigorously put forward. In a nutshell it is the contention of the learned President's Counsel that veil lifting was not warranted at all on the facts and circumstances of the case of *Hatton National Bank Ltd v. Jayawardane and Others.*

Thus, the instant case engages before us a statutory interpretation of *parate* law or a re-appraisal of these two seminal cases as far as the provisions of Recovery of Loans (Special Provisions) Act, No.4 of 1990 (hereinafter sometimes referred to as

the Act, No.4 of 1990) are concerned. In this process a scrutiny of case law that have dealt with *parate execution* so far would also be made.

All that I have adumbrated by way of the above introduction flows from the facts immanent in the two cases before us and questions of law that have been formulated thereon.

As such it is apposite to look at the questions of law that come up for consideration. Initially on 8 February 2022, leave was granted by this Court on the following questions of law

i. "Did the High Court - (Commercial) err in Law by determining that the 2nd Plaintiff is a borrower within the meaning of the Recovery of Loans (Special Provisions) Act, No.04 of 1990?
ii. Is the ratio in the case of *HNB Ltd v. Jayawardane and Others* ([2007] 1 Sri.LR 181), that the director of a corporate entity who mortgages his property for a loan obtained by that corporate entity is a borrower, correct within the meaning of the Act, No.04 of 1990?"

Subsequently, this Court, by its order dated 14th September 2022, added two other questions of law which go as follows.

1) "Does the Board of Directors within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990 as amended, have the power, by resolution to be recorded in writing, to authorize a person specified in the resolution to sell by public auction any property mortgaged to the Bank [whether by the Borrower or any other person] as security for any loan in respect of which default has been made, in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under Section 13 of the said Act?
2) Is any property [immovable or movable] mortgaged to the Bank of Ceylon or the People's Bank as security for any loan as the case may be, in respect of which default has been made within the meaning of the Bank of Ceylon

Ordinance, No.53 of 1938 as amended and the People's Bank Act, No.29 of 1961, liable to be auctioned in terms of the respective Acts referred to?".

Thus, all these four questions constitute the parameters within which the arguments on behalf of the Petitioners and the banks, both Respondent and Intervenient, took place. Whichever way one looks at it, the sum and substance of the questions of law before us would boil down to two quintessential issues.

1) Whether *parate execution* of 3rd party mortgages are permitted under Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990 as amended.

If this Court arrives at the view that it is permissible, then the corollary would follow that the legal precedent *Ramachandran and Another (SC Appeal No 5/2004) and Anandasiva and Another (SC Appeal No 9/2004) v. Hatton National Bank*[5] (the *Chelliah Ramachandran* case) has been wrongly decided.

2) The 2nd question that repays attention is whether veil lifting was properly and legally resorted to in *HNB Ltd v. Jayawardane and Others* (the *Jayawardane* case), given the tenor of that decision that when a director of a corporate entity has mortgaged his immovable property as security for the loan of the company, the mortgaged property remains open to *parate execution*.

Before one proceeds to assay and appraise the above two kernel issues in the cases before us, a succinct reference to the factual template in the two cases before us becomes necessary.

Factual Matrix.

In both the appeals before us (SC Appeal 11/2021 and SC Appeal 30/2021), the loans had been advanced to the Petitioner Companies by their respective creditor

[5] Ibid.

banks. In the case of SC Appeal 11/2021, the bank that seeks the aid of the provisions of the Act, No.4 of 1990 for *parate execution* is DFCC Bank, whereas in SC Appeal 30/2021, the mortgagee banking institution is Sampath Bank PLC. Though only SC Appeal No. 11/2021 was taken up for argument, there was agreement that one judgment will apply to both cases since the questions of law arising on the material facts in each case are identical. Thus, there is commonality on the material facts in the cases. The mortgagee banks seek to sell by *parate execution* the immovable properties mortgaged to them by the directors of the Petitioner Companies to whom the dispersal of loans took place. Hence the argument on behalf of the Petitioners placed heavy reliance on the majority judgment of *Chelliah Ramachandran* which entails that the immovable properties mortgaged to the lending institutions by persons other than borrowers constitute third-party mortgages and thus are outside the reach of *parate executie* powers of the banks.

According to the Petitioners, as the *Jayawardane* case was wrongly decided, a veil piercing of the corporate borrower in the cases before us cannot take place so as to reach the properties of the directors. So much for the commonality on the material facts.

It must be stated at the outset that as acknowledged by all Counsel across the divide, a revisitation of *Chelliah Ramachandran* and *Jayawardane* cases certainly calls for a holistic and harmonious interpretation of the salient provisions of the *Recovery of Loans (Special Provisions) Act, No.4 of 1990* to which I will repair, but not before I have looked at the pros and cons of the arguments regarding the aforesaid decisions and how Roman Dutch Law position on *parate execution* was eroded and repudiated by later legislative changes in this country.

Such a foray into the common law on *parate executie* which existed before legislative changes in 1990 would become necessary as the all-important provisions of the Act, No.4 of 1990 namely sections 2, 3, 4, 5 and 15 containing expressions such as *any property mortgaged*, *borrower* and *mortgagor* give rise to a decision on their

interpretation in view of the rival arguments that have been made before us for such an interpretive process.

The Petitioners have advanced the argument that the above operative sections read together or separately impose restrictions on the banks to sell the property of a third-party mortgagor, whereas the banks have contended that for the purpose of recovery of the unpaid portion of loan facilities given to borrowers, the provisions of the Act, No.4 of 1990 do not distinguish between mortgages given by the actual borrower and a mortgage given by a third-party. If one looks at the operative sections of the Act, No.4 of 1990, one is struck by the profuse use of the word *borrower* in the sections and it is undeniably one of the reasons that led to the majority judges in *Chelliah Ramachandran* narrowing the scope of the expression "*any property mortgaged*" to mean only the property of the actual borrower.

Section 15 (1) - a narrow or broad interpretation?

I must also place in context one of the crucial sections of the Act, No.4 of 1990 namely Section 15, which the banks contended as requiring a broad interpretation. Section 15 (1) of the Act, No.4 of 1990, which refers to a post *parate* situation after the sale of the mortgaged property has taken place, is as follows:

> *If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon* ***all the right, title, and interest of the borrower to****, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right,* ***title or interest of the borrower*** *to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any Court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser.*

Whilst Dr. Romesh de Silva, President's Counsel for Hatton National Bank -the 1st intervenient Respondent in SC/Appeal/11/2021 contended that the word *borrower*

in Section 15 (1) must necessarily include a third-party mortgagor and, other learned Counsel for the banks chorused in unison with him for such an interpretation, Mr. Rohan Sahabandu, President's Counsel for the Petitioners invited this Court to accept as correct the interpretation placed by the majority in *Chelliah Ramachandran* that it is the actual borrower's property that could be sold by auction at a *parate* execution. The use of the word *borrower* in sections 7 (1), (2), 8, 9 (a), 13, 14, 15 (1), 16 (3), 16 (4) and 16 (6) connotes uniformity in that it refers only to the actual borrower and cannot embed within it a third-party mortgagor- so argued Mr. Rohan Sahabandu PC. The word *borrower* must be given its literal meaning and not any extended meaning - so ran the argument of the learned President's Counsel in the case.

Same word, same statute, different meanings?

These contrary arguments also raise the all too important question - should a particular word, when used in a statute, must have the same meaning or given the context in which the legislation was enacted, can it bear a different meaning?

Whilst Mr. Rohan Sahabandu argued that the word *borrower* in the Act, No.4 of 1990 has one and the same meaning throughout the *parate executie* statute, Dr. Romesh de Silva invited the attention of the Court to the rule of statutory interpretation which looks back to the mischief that the Act, No.4 of 1990 sought to cure and in light of that curative exercise by the legislature to facilitate easy and speedy recovery of bank loans obviating the clogs and backlogs on recovery in Courts, the sum and substance of the argument for the banks therefore was that the word *borrower* should be given the extended meaning to include a third-party mortgagor.

Any property mortgaged to the bank

It was the contention of Mr. Sahabandu**,** PC that the phrase "…. *any loan on the mortgage of property….*" in section 2 (1) (a) of the Act, No.4 of 1990 must necessarily connote the property of the person to whom the loan is given, because the use of the expression "*the right, title or interest of the borrower to, and in, the property shall vest*

in the purchaser" in section 15 (1) makes it patently clear that it is the property of the actual borrower that could be sold.

A harmonious construction, according to Mr. Sahabandu PC, of the sections in the Act must necessarily lead to this interpretation. On the other hand, Dr. Romesh de Silva, PC argued otherwise. He strenuously contended that a literal construction of the word *borrower* and its linkage to any property of the actual borrower will result in absurdity and lead to the frustration of the purpose which the Act, No.4 of 1990 sought to achieve and in order to advance the remedy of speedy and effective recovery of non-performing loans, the word borrower must be given an expansive meaning to include a *third-party mortgagor*. So, the crux of the argument of the learned President's Counsel insisted on a repudiation of the *literal rule* of construction in respect of the word *borrower,* which profusely pervades the provisions of the Act, No 4 of 1990.

Thus, the cardinal issue in the case before us boils down to this nitty-gritty. How should the harmonization of the provisions in the Act, No. 4 of 1990 be achieved? Is it by placing a restrictive interpretation on the word *borrower* as was done in *Chelliah Ramachandran* or expanding it to include a third-party mortgagor who is another person other than the actual borrower? After all, one of the elementary rules of statutory interpretation is that, when there is a doubt about their meaning, the words of statutes are to be understood in the sense in which they best harmonize with the object of the enactment.

In light of all these arguments it falls to this Court to ascertain the meaning of the relevant words bearing in mind the fact that "*some general words are capable of more than one meaning depending on whether the word is interpreted narrowly or broadly*"[6]. Let me state at the very outset that whether one interprets a word narrowly or broadly depends **on context**. I will return to this after having discussed

[6] See Hall, Kathleen, Clare Macken, *Legislation and Statutory Interpretation*, LEXIS-NEXIS, Butterworths, 2020 at p 59.

the two rules of statutory interpretation that prominently figured in the submissions of the learned President's Counsel.

Common Law approaches to statutory interpretation.

It cannot be denied that the approach adopted by the Sri Lankan Courts to statutory interpretation is based on the common law approaches to interpreting legislation. The so-called rules of statutory interpretation aim at ascertaining the intention of Parliament because oftentimes the framers do not set forth the precise methodology of how judges could fill the interpretive void. While the ordinary meaning of the word is a matter of *fact*, its legal meaning is, self-evidently, a matter of *law*.

When Courts are interpreting legislation, it is necessary to attribute a legal meaning to the words as used in the particular legislation under consideration. In doing so, Courts often profess to be giving effect to the intention of Parliament. As Donaldson J. remarked in ***Corocraft Ltd v. Pan American Airways Inc*** [7]

> *The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.*

Thus, the process of interpretation is not a mechanical one and there will inevitably be uncertainty as to the way in which a Court in any given case will attribute a meaning to the words used in the legislation. In this instance, a definition of the word *borrower* is not provided in the Act, to which this Court will have had regard,

[7] (1969) 1 Q.B 622, 638.

but even where that is the case it will still be necessary for this Court to give a meaning to the words used in the definition.

As I pointed out elsewhere, the words used in legislation may have one or more meanings. If the Court is of the view that the words, in **the context of the Act,** can have only one meaning, then it will give effect to that meaning and this will become the legal meaning of those words for the purposes of the particular statutory provision in question. This is unless the Court feels that this is clearly contrary to what the Court perceives to be the intention of Parliament in enacting those words. However, it is more likely that, because language is inherently imprecise and equivocal, even words which might be thought to have an obvious meaning can in fact have a number of different meanings. In such circumstances, in order to give a legal meaning to the words, the Court will be obliged to decide which meaning to adopt.

The Court may seek to resolve the ambiguity of meaning in a number of ways. How it is resolved depends to a large extent on, to use the words of Donaldson J above, which "tools of the trade" judges opt to select and apply. It is generally accepted that these "tools" include, *inter alia*, a number of so-called "rules," although these are not rules in the strict sense, as indicated by Lord Reid, in ***Maunsell v. Olins*** [8]

> *…….rules of construction…. are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction……. Not infrequently, one "rule" points in one direction, and another in a different direction. In each case they must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular "rule."*

The "rules" of interpretation.

[8] (1975) A.C. 373, 382.

I hasten to reiterate that, whichever rule(s) may be applied, the basic task will always be to give a meaning to the particular words used in the statute in question. Each rule is simply a means by which that may be achieved. They may be used singly or in combination. I will add further that judges are not bound to follow one (or indeed any) of them and do not have to announce in any way which "rule" they have used. It is perhaps better, then, to think of them as *approaches* to interpretation or as a framework for discussion, rather than as traditional rules or canons. Let me briefly refer to them and thereafter invoke other aids to construction which I think should be called in in order to resolve the issue before us namely should the word *borrower* in the Act, No.4 of 1990 bring within its scope the Petitioners who have provided the mortgage securities to the banks in question?

It has to be recalled that whilst Mr. Rohan Sahabandu relied on the literal rule on behalf of the Petitioners, Dr. Romesh de Silva for the intervenient bank advanced the mischief rule as the approach that should help ascertain the meaning of the word *borrower* and consequently the phrase *any property mortgaged to the banks*.

Suffice it to set out in brief the bare essentials of the rules that surfaced in the arguments of the learned Counsel before us, though it would appear academic. All such attempts prove to be nothing but the goal of ascribing the suggested meanings to the words *borrower* and the *property mortgaged*.

The Literal rule.

The literal rule provides that words must be given their plain, ordinary and literal meaning. The crux of the argument of Mr. Rohan Sahabandu PC was an invocation of the literal rule to the effect that the plain, ordinary and literal meaning of the word *borrower* would mean no one other than the actual borrower.

The rationale behind the use of the literal rule is that if the words of the statute are clear they must be applied as they represent the intention of Parliament as expressed in the words used. This is so even if the outcome is harsh or undesirable.

This was made clear in the ***Sussex Peerage Case***[9] **;** ***Cutter v. Eagle Star Insurance Co Ltd***[10]*[1997] 1 WLR 1082, CA;* ***Whiteley v. Chappell***[11]*.* For Sri Lankan cases which have alluded to literal rule - see ***J. A. P. Zebedee Fernando & Co. v. The Commissioner of Inland Revenue***[12] ***; Cinemas Ltd v. Ceylon Theatres Ltd***[13]***; S. Gunasekera v. A. Ratnavale***[14]***; Ladamuttu Pillai v. The Attorney-General***[15]***; Nadarajan Chettiar v. Tennekoon***[16]***; R. A. De Mel et al. v. Haniffa***[17]***; The Queen v. Mahatun***[18]***; Tissera v. Tissera***[19]***; Babappu v. Don Andris***[20] ***; Pathumma v. Sinna Lebbe***[21]***; Hameed v. Anamalay***[22]***; Kiri Banda v. Booth***[23] ***; Pieris v. Pieris***[24]***; The Attorney-General v. Perera***[25]***; Hamid v. Special Officer*** [26]***.***

The Golden rule.

The golden rule provides that words must be given their plain, ordinary and literal meaning as far as possible but only to the extent that they do not produce absurdity (narrow approach) or an affront to public policy (wide approach). For Sri Lankan cases which make reference to the golden rule see ***Sriyani v. Iddamalgoda, Officer in charge, Police Station, Payagala and Others***[27]***; Forbes & Walker Tea Brokers v. Maligaspe and Others***[28] ***; Tennekoon v. Somawathie Perera alias Tennekoon***[29]***;***

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9 (1884) 1 CI & Fin 85.
10 (1997) 1 WLR 1082, CA.
11 (1898) LR 4 QB 147, DC.
12 66 NLR 256
13 67 NLR 97
14 76 NLR 316
15 59 NLR 313
16 51 NLR 491
17 53 NLR 433
18 61 NLR 540
19 2 NLR 238
20 13 NLR 273
21 18 NLR 330
22 47 NLR 558
23 5 NLR 284
24 9 NLR 14
25 12 NLR 161
26 21 NLR 353
27 (2003) 1 Sri.LR 14
28 (1998) 2 Sri.LR 378
29 (1986) 2 Sri.LR 90

Nanayakkara v. Kiriella (deceased) and Others[30]; United Motors Ltd. v. De Mel[31]; West v. Abeyawardena[32]; Nadar v. Leon[33] ; Pakiadasan v. Marshall Appu[34]; Badurdeen v. Commissioner for the registration of Indian and Pakistani residents.[35]

The rationale behind the golden rule is that it mitigates some of the potential harshness arising from use of the literal rule. This was referred to in ***Grey v. Pearson[36]***.

The Mischief rule

The mischief rule (or the rule in ***Heydon's Case[37]***) involves an examination of the *former* law in an attempt to deduce Parliament's intention (‘mischief’ here means 'wrong' or 'harm'). There are four points to consider:

1. What was the common law before the making of the Act?

2. What was the mischief and defect for which the common law did not provide?

3. What was the remedy proposed by Parliament to rectify the situation?

4. What was the true reason for that remedy?

The rule was restated in ***Jones v. Wrotham Park Settled Estates [38]*** in terms of three conditions:

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[30] (1985) 2 Sri.LR 391
[31] (1982) 2 Sri.LR 549
[32] 53 NLR 217
[33] 30 NLR 123
[34] 52 NLR 335
[35] 52 NLR 354
[36] (1857) 6 HL Cas 61, HL.
[37] (1584) 3 C0 Rep 7
[38] (1980) AC 74, HL.

1. It must be possible to determine precisely the mischief that the Act was intended to remedy.

2. It must be apparent that Parliament had failed to deal with the mischief.

3. It must be possible to state the additional words that would have been inserted had the omission been drawn to Parliament's attention.

Mischief Rule[39] and Purposive Approach[40]

It is pertinent to point out that the mischief rule that dates back to the 16th century has since given rise to a modern development namely *the purposive approach* which requires the Court to interpret any statute or part of it in light of the purpose for which it was enacted. Here it behooves the judge to decide what the purpose of the Act was, and then ensure that its provisions are construed in a way which gives effect to that construction.

Lord Griffiths described this approach quite vividly in the leading English case of ***Pepper v. Hart[41]*** where the learned Justice stated thus:

> "*The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to give effect to the true purpose of legislation."*

[39] For cases on mischief rule see *Silva v. Cooray* 33 NLR 25; *V. T. Ramalingam v. S. Sinnadurai* 67 NLR 45; *Mohamed Auf v. The Queen* 69 NLR 337; See *the Mischief Rule and The Brothels Ordinance* by H.M.Zafrullah in *The Colombo Law Review* (1978) Vol 4 at p. 119.

[40] For cases on purposive interpretation see; *Multi-Purpose Co-operative Society, Madawachchiya v. Kirimudiyanse and Others (2011) 1 Sri.LR 135; Malraj Piyasena v. Attorney-General and Others (2007) 2 Sri.LR 117; Shiyam v. Officer in Charge, Narcotics Bureau and Others (2006) 2 Sri.LR 156; Piyasena v Associated Newspapers of Ceylon Ltd and Others (2006) 3 Sri.LR 113); Thilanga Sumathipala v Inspector-General of Police and Others (2004) 1 Sri.LR 210; Madduma Banda v Assistant Commissioner of Agrarian Services and Another (2003) 2 Sri.LR 80; Somawathie v. Weerasinghe and Others (1990) 2 Sri.LR 121; Namasivayam v. Gunawardena (1989) 1 Sri.LR 394); Science House (Ceylon) Ltd. v. IPCA Laboratories Private Ltd. (1987) 1 Sri.LR 185.*

[41] (1993) AC 593 at 617; (1993) 1 All ER 42, HL

Thus, it is clear that, in Lord Griffiths' view it is necessary to give effect to the true purpose of legislation. Referring to the purposive approach and its applicability, Professor Crabbe has stressed on the fact that it is important to consider **the context of the section** that is to be interpreted without limiting it to its ordinary meaning.[42] In Professor Crabbe's words:

> "*The Purposive Approach thus takes account not only of the words of the Act according to their ordinary meaning, but also the context. 'Context' here does not mean simply linguistic context;* ***the subject matter, scope, purpose and (to some extent) background of the Act are also taken into consideration....***
>
> *The language used by Lord Griffiths in Pepper v. Hart is clear and cogent: to give effect to the true purpose of the legislation.* ***He did not say to give effect to the intention of Parliament*** (emphasis added)."

The Importance of Context

This approach, requiring regard to be had to the context, finds acceptance in other jurisdictions. As noted in the Australian High Court case of ***CIC Insurance Ltd v. Bankstown Football Club Ltd***[43], by Brennan CJ, Dawson, Toohey and Gummow JJ at 408:

> "*The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses* ***"context" in its widest sense***".

A throwback at ***context in its widest sense*** throws open before a judge a plethora of intrinsic and extrinsic aids to unravel the meanings that have to be attributed to

[42] *Understanding Statutes*, p 97.
[43] (1997) 187 CLR 384

words and these aids emerge from several sources such as pre-parliamentary materials, Reports of Commissions and Hansards or even from other indications of purpose afforded by information relating to legal, social, economic and other aspects of society of which a judge is able to take judicial notice. In consequence, Courts, in considering the legislative purpose as a means of establishing what meaning Parliament intended words to have, have not restricted themselves to a consideration of mischiefs to be remedied but have looked to the general legislative purpose. In looking to general legislative purpose as well as mischiefs, Courts would be adopting a "*purposive approach*" when determining what meaning Parliament intended the words to have. In this interpretive process, context assumes importance and this bids us to look at the common law (i.e the legal position) before the Act, No.4 of 1990, and the mischief that the statute was intended to remedy.

Let me in those circumstances hark back to a historical excursus - the common law position on *parate execution* and how impediments that contributed to long and protracted proceedings in recovering back non-performing loans were sought to be overcome by a gradual attenuation of *parate* laws finally resulting in the Act, No.4 of 1990.

The Common Law on *Parate Execution* prior to 1990.

Immovables can be mortgaged under Roman-Dutch law, but the mortgagee does not obtain a right of ownership, only the right to recover payment of the debt secured by the mortgage through legal action.[44] Extra-judicial sale - known as parate execution - was forbidden in Roman-Dutch law. After 1871 it was possible to mortgage movables in Sri Lanka in only two ways - by delivery (pledge) or by registered bill of sale (which, however, did not validate the mortgage or give priority to the registrant).[45] As with the mortgage of

[44] Robert Warden (R.W.) Lee, *An Introduction to Roman-Dutch Law,* 5th ed. (Oxford, Clarendon, 1953), p. 200.
[45] See A.B. Colin de Soysa, *The Laws of Ceylon* (Colombo, Dharmasamaya Press, 1963), Vol. II, The *Law of Things*. p. 307.

immovables, the mortgagee of movables does not have a right of sale under Roman-Dutch law but has to obtain a judgment of the Court upon the mortgage-debt and then take out a writ of execution against the property. Walter Pereira, K.C states the matter of parate execution authoritatively in relation to both movables and immovables:[46]

> The effect of a mortgage is not that the creditor may retain the mortgaged property for himself or sell it on his own authority. It may not even stipulate by contract for the right of forfeiture of the ownership in default of payment, but he must after obtaining judgment allow the sale to take place according to legal process, and thus recover what is due to himself [Grot. 2.48.41). The position is stated by Van der Linden thus -where the debt secured by pledge or mortgage becomes due, the creditor is not at liberty to sell the pledge or thing mortgaged without a decree of the Court or a judgment to this effect…{V.d.L.1.12.5[47]}

However, in Roman law a first mortgagee ultimately acquired a power of sale which could not be excluded by express agreement.[48] Moreover, the tendency of judicial decisions in South Africa has been able to recognize the validity of an agreement for the extra-judicial sale of movables. In **Osry v. Hirsch, Loubser & Co. Ltd**[49] an agreement for the sale of movables by means of parate execution was held to be valid. It was a case of pledge. The Court also held that it was open to the debtor in such a case to seek the protection of the Court if he could show that, in carrying out the agreement and effecting the sale, the creditor had acted

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[46] *The Laws of Ceylon* (Colombo, Government Printer, 1904), Vol. II., pp. 442-444.
[47] The references are to Grotius' *Introduction to Dutch Jurisprudence* and Van der Linden's *Institutes of the Laws of Holland*.
[48] E.R.S.R. Coomaraswamy, *The Conveyancer and Property Lawyer* (Colombo, 1949), p. 209; R.W. Lee, *op. cit., supra, footnote* 44, at p. 200.
[49] 1922 C.P.D. 531.

in a manner which prejudiced his rights. The case has been followed in other South African cases.[50]

The result of these decisions is that parate execution whereby a mortgagee can sell the security without the prior intervention of a Court is looked upon with disfavour by the Roman-Dutch law of Sri Lanka. Professor Robert Warden (R.W) Lee in his locus classicus An Introduction to Roman-Dutch Law cites the case of **Hong Kong and Shanghai Bank v. Krishnapillai[51]** to drive home the position that "parate executie is not allowed by the law of Ceylon"[52].

In that case, a businessman had pledged his shares in a Company as security for an overdraft. As was customary he had also given the bank a blank transfer of the shares together with a written authorization for the bank, if required, to sell the shares. Subsequently, the borrower became bankrupt without settling the overdraft and the bank moved to sell the shares (given as security) without a Court order.

The Supreme Court held that the bank was not entitled to do so. The Court took the view that the law relating to property (shares) and the mortgage of property was governed in Sri Lanka by its common law, namely, the Roman-Dutch law and not by English law. Although English law applied to "banks and banking", the loaning of money was "not an ordinary business of banking" and therefore merely because the mortgagee-creditor in this case was a bank, it did not automatically mean that Roman-Dutch law was displaced by English law. Under Roman-Dutch law, a creditor could not sell any security pledged to it without permission of a Court of law and if the bank in this case wished to sell the shares it must get the Court's approval. According to the judgment, the right of a pledgee to sell his security without recourse to a Court of law was a

[50] *E.g., Aitken v. Miller* (1951), 1 S.A. 153 (S.R.). See generally T. J. Scott and Susan Scott, *Wille's Law of Mortgage and Pledge in South Africa,* 3rd ed. (Cape Town, Juta & Co. Ltd., 1987), pp. 120-4.
[51] (1932) 33 N.L.R. 249
[52] See R.W. Lee, op. cit., *supra, footnote* 44, at p. 201.

matter of Roman-Dutch law. Further **Mitchell v. Fernando**[53] held that the Roman-Dutch law of mortgage applied to a mortgage of shares in a company. This was despite the fact that (i) the Civil Law Ordinance required that matters relating to joint stock companies be decided according to English, not Roman-Dutch, law; and (ii) shares were things unknown to the Roman-Dutch law. The Court categorized the issue as one of mortgage, not one with respect to joint stock companies, and applied the Roman-Dutch law.

By the time the **Hong Kong and Shanghai Bank** case was decided, the South African Roman-Dutch law had moved to a legal position where parate execution would only be available in the case of movables and, on one reading of the authorities, only in the case of pledge.[54] The above decision in **the Hongkong & Shanghai Banking Corporation** case rang alarm bells to the banking community at that time. The Sub-Committee on Commercial Legislation in Sri Lanka (Sessional Paper No.10 of 1939 paragraph 18) referred to this case and recommended legislation to protect banks from this Roman-Dutch law rule. Accordingly, the Mortgage Act was amended in 1949 whereby **'approved credit agencies'** were permitted by statute to realize movable property (for example, shares, life insurance policies and book debts) without getting a Court order.[55]

Legal Changes in 1990.

It is pertinent to observe at this stage that from 1990 onward licensed commercial banks in Sri Lanka were vested with parate powers over both immovable and movable securities as the special legislation, the Act No. 4 of 1990 that enables them to recover such securities speedily and without litigation was enacted. Along with it was enacted a slew of statutes among which the Debt Recovery (Special Provisions) Act, No.2 of 1990 is also pivotal in debt recovery. The two statutes, Act No.2 of 1990 and Act No.4 of 1990 which are categorized as special debt recovery legislation were

[53] (1945) 46 N.L.R 265.
[54] See the case of *Osry v Hirsch, Loubser & Co.Ltd., supra, footnote 48.*
[55] See part 2 of Mortgage Act (*Sections* 73-88).

the end products of a report issued in 1985 by a Debt Recovery Committee (DRC)[56], chaired by Justice D. Wimalaratne. The legislation was not enacted until 1990 because of very strong opposition from the Sri Lanka Bar Association which argued that the proposed legislation was "discriminatory, draconian in their nature and harsh and superfluous". All opposition notwithstanding, both statutes became law in 1990.[57]

On the other hand it must be mentioned that the Mortgage Act[58] "continues to give full effect to the conception of a mortgage as understood in Roman-Dutch law".[59] Thus, the Mortgage Act assumes that parate execution is not possible in the case of a mortgage of land, and so provides in detail for how hypothecary actions are to be conducted and their effect.[60] As I said before, the Act does permit an **approved credit agency**, which is a mortgagee of shares, debentures, stock, life insurance policies and corporeal movables deposited with the agency, to realize them without resort to the Courts.[61] A mortgagor can sue for any loss or damage suffered as a result of an agency not duly exercising its powers or not following the correct procedures.[62] Section 85, which deals with corporeal movables, requires that the corporeal movable be "actually in the possession and custody of the agency".

How the Roman-Dutch law against parate execution was departed from.

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[56] *Report of the Committee Appointed by the Honourable the Minister of Justice Dr. Nissanka Wijeyeratne to Examine and Report on the Law and Practice Relating to Debt Recovery* (Colombo, **A** Ministry of Justice Project, 1985) (hereafter "Debt Recovery Committee Report"). The Committee was chaired by the late Justice D. Wimalaratne, a retired judge of the Supreme Court, and had as members **Mr. H. L.** de Silva, PC., later President of the Bar Association of Sri Lanka, and Mr. N. U. Jayawardena, a former Governor of the Central Bank.

[57] See an excellent account of the history behind the extraordinary legislation in the report of the Presidential Commission on Finance and Banking, Sessional Paper No 3 of 1992.

[58] Act No. 6 of 1949, as amended.

[59] A. B. Colin de Soysa, *op cit., supra,* footnote 45 pp. 336-7.

[60] See especially Sections 7 to 9, 16, 25, 33, 48, 52.

[61] Sections 73, 81, 85. To acquire the status of an approved credit agency, an institution or individual applies to the Director of Commerce, who refers the matter to a board (s. 114). Banks, finance houses and co-operative societies making loans have been approved under this provision.

[62] Sections 78, 84, 88.

Generally, as we have seen, the law in Sri Lanka had set itself against parate execution until the Roman-Dutch Law rule against parate execution was mitigated by the Mortgage (Amendment) Act in 1949 and the enactment of the Act No.4 of 1990. Over the years, however, a number of state or state related institutions have been given the right of parate execution by specific enactments. Until the introduction of the debt recovery package in 1990, the right of parate execution (i.e. the right of a creditor to sell the mortgaged property without recourse to Court) had been restricted to the two state commercial banks, i.e., the Bank of Ceylon and the People's Bank, and the other state lending institutions such as the State Mortgage and Investment Bank, the National Development Bank, the National Savings Bank and also the Development Finance Corporation of Ceylon. However, with the enactment of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, all licensed commercial banks were given the power of parate execution.

The Bank of Ceylon Ordinance as amended.

The power in the Bank of Ceylon Ordinance is illustrative. The bank is empowered to grant loans, advances or other accommodation on the security of a mortgage of any movable or immovable property. When default occurs, the board of directors of the bank may authorize a person to take possession of any immovable property or seize any movable property mortgaged to the bank and to manage and maintain such property as might have been done by the mortgagor if he had not made default.[63] Moreover, S. 19 provides that the Board of Directors may resolve to authorize a specified person to sell by public auction any movable or immovable property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due up to the date of the sale, together with the monies and costs recoverable under S. 18. If the mortgaged

[63] Bank of Ceylon Ordinance, as amended by Act No. 34 of 1968 and Law No. 10 of 1974, s. 17. See also s. 18 on the manager's powers.

property is sold, all right, title and interest of the borrower vests in the purchaser.[64]

I am making this allusion to the Bank of Ceylon Ordinance as its aforementioned provisions are identically mirrored in the Act, No.4 of 1990.

Before I move on to the 1990 constitutional challenge to the Recovery of Loans by Banks (Special Provisions) Bill in the Supreme Court, this account of the historical survey leading up to the 1990 legal changes, will not be complete without recalling some other Committees that followed the Debt Recovery Committee (DRC) headed by Justice D. Wimalaratne. All this exercise, I repeat, is for the purpose of situating the Act, No 4. of 1990 in its context, because as I pointed out before, the context of the text in its widest sense becomes imperative in the interpretation of the words in the aforesaid parate legislation.[65]

Between 1986 - 1990 the government appointed the following other Committees to consider the recommendations of the DRC namely,

(a) A Committee of officials of the Central Bank and legal officers of the state banks.

(b) A Committee of officials of the Ministry of Justice and Ministry of Finance.

(c) A Committee of officials of the Ministries of Justice and Finance, the Bar Association and the Sri Lanka Banks' Association.

The World Bank and the Asian Development Bank also submitted their views supporting the recommendations of the Debt Recovery Committee. At their request Mr. Ross Cranston the then Professor of Banking Law of the University of London who later ended up as a Solicitor General of England and an MP also reviewed the

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[64] *ibid.,* s. 28. See also s. 29 on the purchaser's right to obtain a Court order for delivery of possession of the property.

[65] See the Australian precedent *CIC Insurance Ltd v Bankstown Football Club Ltd,* footnote 43 supra and the discussion titled ***the importance of context*** at pp 24-25 of this judgment.

DRC recommendations and substantially agreed with them. Finally, in early 1990, despite the continued objections of the Sri Lanka Bar Association, the recommendations of the Debt Recovery Committee (subject to some minor amendments) were accepted and enacted as one package in the following legislation.

It is not irrelevant to point out that the so-called disfavour that Roman-Dutch law showed *parate execution* of immovables was fast sliding into oblivion and the Supreme Court put a nail into the coffin when it proceeded to endorse the constitutional validity of debt recovery legislation package.[66]

S.C. Special Determination No 3/90.

In the hearing into the validity of the Bill which finally became Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990, it was strenuously argued by H.W. Jayewardene Q.C on behalf of the Bar Association that an exercise of *parate* powers on the part of Board of Directors of a bank amounted to a dilution of judicial power and a transfer of a part thereof to a non-judicial body of individuals. But the Court pointed out that if there was such a dilution, it had already taken place so many years ago when State Institutions had been bestowed with powers of *parate execution* in several statutes.

The Court pointed out that the Bank of Ceylon Ordinance No. 53 of 1938, as amended by Act No.10 of 1974, Peoples Bank (Amendment) Act No. 32 of 1986, National Savings Bank Act No.30 of 1971 and a host of other statutes have conferred *parate* powers on their respective Boards of Directors and in the end the determination concluded that there was no dilution or interference with judicial power. The Court observed as follows-

> "*Had there been provision in the bills, the necessary effect of which was to exclude recourse to the Courts, notwithstanding the history of parate execution,*

[66] See Decisions of the Supreme Court on Parliamentary Bills (1990) Volume VI p 13.

> *both legislative and as constrained in judicial decisions, we would have entertained no doubt as to whether the Bills were inconsistent with Article 4(c) so as to be deemed to have been determined to be inconsistent with that Article, in terms of Article 123(3), in which event they could only have been passed by the special majority required under para (2) of Article 84.*

The Supreme Court further determined-

> *"We hold that the Bills, properly interpreted, do not exclude the right of recourse to the Courts, and there is therefore no ousting of or interference with judicial power."*

Thus, the tenor of this passage is to the effect that conferment of *parate execution* powers on a bank is not a dilution of judicial power, in infringement of Article 4 (c) of the Constitution. That the bank does not exercise judicial power is put beyond doubt by the next pronouncement in the determination.

> *"In 72 NLR 25, a provision that every person concerned in exporting goods (contrary to restriction) shall, at the election of the Collector of Customs, forfeit either treble the value of the goods or a penalty of Rs. 1,000/- was held not to be an adjudication, and the only determination having the legal effect of an adjudication was that which a Court would later make, in an action brought by the collector for recovery. Even certiorari was refused, for the reason (as stated by the Privy Council in 73 NLR 289 affirming that decision) that this was a preliminary decision which did not bind the party. In the present case, the bank's action affects rights (although not binding) and certiorari lies."*

Though the two well-known tests, *Holmes test* and the historical test of *Roscoe Pound* were urged before the Supreme Court for the proposition that banks sought to be vested with *parate execution* powers could be in effect exercising judicial power, this contention did not weigh in with the final determination of Court. In fact, the determination of the Supreme Court on this issue comports with the definition of

judicial power articulated by Griffith CJ in the Australian case of ***Huddart Parker v. Moorehead***:[67]

> "*The words "judicial power" as used in S.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.*"[68]

Three elements are present in the definition of judicial power given by Griffith CJ; (i) a controversy; (ii) the controversy is about rights; (iii) a binding and authoritative determination. The **SC determination 03/90** speaks of a non-binding decision by banks which is susceptible to judicial review and the learned Deputy Solicitor General who assisted Court at the time of hearing had argued that there could be interposition of Courts in case of a board resolution. No doubt banks conferred with *parate* powers take action on the basis of a unilateral decision that there has been a default but the banks concerned do not conclusively determine legal rights and liabilities. According to the SC determination, the decision of the board of directors is not made final or conclusive and there is no attempt to exclude recourse to Courts.

Whilst the determination of H.A.G. de Silva J, G.R.T.D. Bandaranayake J, M.D.H. Fernando J, R.N.M. Dheeraratne J, and S.B. Goonewardena J, concluded in the pre-enactment review to the effect that *parate executie* does not allow the creditor to be the judge in his own cause, Sarath N. Silva CJ (with Jayasinghe J, Udalagama J, and Dissanayake J agreeing) chose to hold in the later *Chelliah Ramachandran* case that the provisions in the *Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990* contravene the basic safeguards of natural justice "*nemo judex in causa sua*".[69] It is problematic that the very argument of "*nemo judex in causa sua*" that was disposed

[67] (1909) 8 C.L.R 330.
[68] Ibid, 357.
[69] See the *Chelliah Ramachandran* case *footnote* 1 supra at p 404.

of by a 5 bench Special Determination in 1990 should again be revisited by a numerically lower composition of judges in *Chelliah Ramachandran* case.

Having regard to the fact that the Supreme Court held in the Special Determination No.3 of 90 that none of the provisions of the Recovery of Loans by Banks (Special Provisions) Bill was inconsistent with the Constitution or any provisions thereof, His Lordship S.N. Silva CJ, was quick to point out in the *Chelliah Ramachandran* case "*Be that as it may, under our Constitution the law is valid and we could only interpret its provisions.*" Thus, the majority of judges in the *Chelliah Ramachandran* case must be taken to have been mindful that the pre-enactment determination of five judges in SC Determination No 3/90 was binding on the question of whether there was *in esse* an exercise of judicial power or erosion thereof as Article 80(3) of the Constitution effectively prohibits post-enactment review in its peremptory declaration. As such the invocation of erosion of judicial power argument has no place in the overall consideration of the question whether the extrajudicial sale of properties mortgaged by third-parties could amount to an interference with judicial power.

It is worth recalling what the Supreme Court said in upholding, in the main, the constitutionality of one of a number of bills introduced to facilitate debt recovery:[70]

> *Expeditious debt recovery is, in the long term, beneficial to borrowers in general for at least two reasons. Firstly, expeditious repayment or recovery of debts enhances the ability of lending institutions to lend to other borrowers. Secondly, the Law's delays in respect of debt recovery, howsoever and by whomsoever caused, tend to make lending institutions much more cautious and slower in lending; by refusing some applications, by requiring higher security from some borrowers, and by insisting on more stringent terms as to interest from other borrowers. Expeditious debt recovery will thus tend to make credit available more readily and on easier terms, and will maximise the flow of money into the economy. Undoubtedly, there is a*

[70] The Debt Recovery (Special Provisions) Bill -S.C. Determination No 1/90 Decisions of the Supreme Court on Parliamentary Bills 1990 Volume VI p 3 at p 5.

> *legitimate national interest in expediting the recovery of debts by lending institutions engaged in the business of providing credit, and thereby stimulating the national economy and national development*.

The aim of the legislation, as the Supreme Court noted, is to facilitate economic development, although it is fair to add that lenders both from within and outside the country had been pressing for legal changes for some time.

This is what the Debt Recovery Committee (DRC) had also recommended as far back as 1985 to the effect that *parate execution* in relation to corporeal movables be extended to other institutions.[71]

Despite opposition from the Bar Association[72] and the Central Bank committee[73], the Debt Recovery Committee (DRC) adhered to its views in a supplementary report, "*because movables in the custody of a borrower, secured by a mortgage, provides in the main the basic security for working capital of a trade or business. The right of parate execution in this instance will contribute to easy and enlarged availability, and reduced cost, of credit against such security.*"[74] It was the strong objections by the Bar Association to the suggested changes that put on hold the implementation of Justice Wimalaratne Committee recommendations of 1985.

The struggle for parate execution of immovables was a long time coming even before 1985. A recall of this long history is illustrative of how law can be thought to lag behind what is thought to be economically desirable. In

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[71] Debt Recovery Committee Report, at p. 8.
[72] Bar Association of Sri Lanka, *Report of the Bar Association of Sri Lanka, Seminar on Report to ... Examine and Report on the Law and Practice Relating to Debt Recovery* (Colombo, 1987).
[73] Central Bank Committee, *Report of the Committee Constituted to Examine and Consider Certain Aspects of Law Relating to Recovery of Debt* (Colombo, 1987).
[74] *Summary of Comments on the Debt Recovery Committee (D.R.C.) Report and the Responses to these Comments* (Colombo, 1987). The Supplementary Report was prepared by two members of the Debt Recovery Committee, **Mr. H.** L. de Silva P.C. and **Mr. N.** U. **J**ayawardena (the chairman having passed away after the original report).

1934, the Ceylon Banking Commission reported its recommendations.[75] It had been established to report on existing conditions of banking and credit, and to consider feasible steps in respect of the provision of banking and credit facilities for agriculture, industry and trade. In the course of its Report, it made several suggestions as to reform of the law to increase the availability of credit by removing what were perceived to be legal handicaps.[76]..

> *Banks and commercial bodies have emphatically complained to us that the commercial laws of Ceylon do not help the creditor ... [The banks) rightly urged that, if the law helped the debtors against the legitimate rights of the creditor, no one should blame the latter if he became too cautious. We come to the conclusion that the legal machinery of the Island is very defective from the point of view of credit and lending, and that it should be overhauled if banking is to do its legitimate business.*

Specifically, the Banking Commission recommended changes in the law of security. The Commission suggested that the law relating to the mortgage of immovable property should be made to conform to Indian law.[77] Consequently, a mortgagee would in some cases have been able to realize his security by sale, enter into possession or appoint a receiver, all without recourse to a Court.[78] Generally, in relation to the mortgage of movables, it recommended a simpler scheme, together "with power to the lender to sell off the security in the event of the borrower failing to repay, after giving him due

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[75] *Ceylon Sessional Papers,* No. XXII of 1934. The Commission comprised mainly bankers, Sir Sorabji N. Pochkhanawala, Managing Director of the Central Bank of India Ltd., and two Sri Lankans, Sir Marcus Fernando, Chairman of the State Mortgage Bank and Dr. Samuel Chelliah Paul F.R.C.S. Dr. (Professor) B. B. Das Gupta and **Mr. N.** U. Jayawardena, both later associated with the Central Bank of Sri Lanka, were secretary and assistant secretary respectively of the Commission.

[76] *Ibid.,* at p. 106. On Indian law: R. Ghose, *Law of Mortgage,* 6th ed. (Calcutta, Kamel Law House, 1988).

[77] *Ibid.*

[78] For a modern version of Indian Law on realizing security see *The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002. (The SARFAESI Act).

notice.''[79] Significantly, the Commission concluded its discussion of legal reforms by identifying the unsuitability of the Roman-Dutch law to modern commercial and credit activities. "This is the main reason why the mercantile legislation in Ceylon is in its infancy and out of date …… Modernization of the legal system of Ceylon is a necessity for the smooth running of its commercial and banking machineries."[80] The recommendations of the Banking Commission were endorsed in part by the Sub-Committee on Commercial Legislation.[81]

Thus, the Banking Commission and the Sub-Committee on Commercial Legislation were trend setting and despite the correctional course that the Banking Commission and the Sub Committee on Commercial Legislation suggested, there were snags and snarls on the way.

It is fair to interpose here once again that I am indulging in this survey of the long history of suggested reforms as they provide the context in the **widest sense** for the final interpretation of the words borrower and any property mortgaged in the Act, No.4 of 1990. I entertain little doubt that having regard to the progressive rejection in this country of the so called dislike shown by Roman-Dutch law towards parate execution, there has to be a liberal interpretation of the word borrower in the Act, No.4 of 1990 and not a stultification of its purpose and history by strict, literal interpretations of statutes. I will expand on this presently but not before alluding to a restrictive view that the Mortgage Commission took of parate execution.

Mortgage Commission rejecting parate execution

The Banking Commission had recommended that the defects in the law which it had identified should be examined in depth by a special Commission. This

[79] *Ibid.*
[80] *Ibid.*
[81] See *Sessional Paper,* No. X of 1939. The Committee comprised government officials and a representative of the law firm F. J. & G. de Saram.

was the origin of the Mortgage Commission, appointed in November 1943. The Second Interim Report of the Commission[82] led to the Mortgage Act. In essence the Report and the Act rejected the approach of the Banking Commission: Instead, both cling to the Roman-Dutch principles of mortgage. The Report begins by rejecting the recommendations of the Banking Commission in relation to the mortgage of land. The reasons given can be gathered under four broad heads:

It would be a "perilous adventure" to superimpose one part of a foreign system of law (i.e., the English law of mortgage) upon the different system of land law in Sri Lanka; the evidence about delay in enforcing mortgages, and its adverse effects on the confidence of investors, was thin; the English rule, that a mortgagee should be able to sell the property on default without intervention of the Court, would lead to breaches of the peace:[83] and there was a need to protect borrowers. None of these reasons is overwhelmingly persuasive, except possibly the last Although it hardly featured in the Report, the nature of lending in Sri Lanka, and its consequences, in the first part of the 20th century had burnt itself into the collective consciousness of many and clearly influenced the Commission. The story, in brief, is that in colonial times the British banks would not lend to Sri Lankans, except the very wealthy or very influential. To borrow money, Sri Lankan businessmen and agriculturalists had to turn to foreign money-lenders - Afghans and the South Indian Nattukottai Chettiars. This meant that in the economic

[82] *Ceylon Sessional Papers,* No. V of 1945. The Commission comprised L. M. D. de Silva K.C. as Chairman (a prominent lawyer, who later sat on the Supreme Court and Privy Council); G. Crossette Thambyah as the other Commissioner (later Solicitor- General); and H. N. G. Fernando as secretary (later Chief Justice). The Commission was to report generally on the law of mortgage; to make recommendations for law reform "with a view to removing defects and supplying deficiencies in the laws which limit the availability in Ceylon of adequate facilities for agricultural, industrial and commercial purposes"; and, significantly, to report on the nature of protection for "the ancestral and other lands of agriculturalists, and to preserve a sufficient portion thereof for the maintenance of themselves and their families."

[83] "We are aware that in this country attachment to land and the desire at all costs to retain possession are one of the primary causes of crime": *ibid.* at p. 29.

depression of the 1930s, many Sri Lankan landowners were thus in the hands of foreign money-lenders to whom they had mortgaged their lands.[84]

> *The world-wide depression hit Ceylon as well . . . The banks having suspended all credit to the Chettiars after [abuses and collapses in the nineteen twenties] further tightened their lending policies. The Chettiars on their part, unable to obtain facilities from the banks, demanded the repayment of their loans from their Ceylonese borrowers. When they found that the Ceylonese were unable to pay, the Chettiars put their promissory notes in suit and foreclosed on their mortgages. The period between 1930- 1936 saw a spate of litigation initiated by the Chettiars against their Ceylonese borrowers who had defaulted in payment. One has only to scan the pages of the Ceylon Law Reports of that period to see the number of law- suits filed by the Chettiars against their debtors. Many a Ceylonese landowner lent his property to the Chettiars and many a Ceylonese debtor ended up in the Insolvency Court at the instance of his Chettiar creditor.*[85]

The Land Redemption Ordinance[86] resulted from the political pressure exerted by dispossessed landowners. It was to enable the Government to acquire land sold during the depression to pay off debts. The land was then to be restored to its original owners on the payment of its value in installments. For our purposes, however, the most important result was that, as previously mentioned, the Mortgage Act 1949 did not change fundamentally the Roman-Dutch law on parate execution.

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[84] **H.W.** Tambiah, *Principles of Ceylon Law* (Colombo, **H. W.** Cave & Co., 1972), p. 485.
[85] W. Weerasooria, The Nattukottai Chettiar Merchant Bankers in Ceylon (Tisara Prakasakayo, 1973), p. xvi. It is only fair to add in defence of the Chettiars that they made credit fully available to Sri Lankans, were not careful about the security they took, and were very reluctant to have to realize their security.
[86] No. 61 of 1942.

It was so many years thereafter, as I pointed out earlier, that the DRC headed by Justice D. Wimalaratne recommended in 1985 that what was hitherto enjoyed by approved credit agencies in relation to movables must be extended to other institutions.[87] I have already traced the trajectory of the DRC recommendations to its final culmination in the 1990 Debt Recovery Legislation package. Though there was opposition, by the late 1980s, the view that the law of credit and security needed reform was shared widely by Government officials, bankers and also by some members of the legal fraternity.[88] In fact it was in December 1989 that the reform proposals carried the day when the Sri Lankan cabinet approved a series of bills to be introduced to the Parliament. In announcing the legislation, the Ministry of Finance noted that the present laws were "outdated and not in line with legislation governing bank loans in force in other progressive countries.[89]

Fourteen Bills were enacted by the Sri Lankan Parliament in early 1990. The Prime Minister noted the economic rationale behind the legislation.

> The banks state that the long delays and the high cost of recovery of bank debts are one of the causes for the high interest rates which are being charged by banks from borrowers. It is very desirable that interest rates should be reduced to the lowest possible level in order to encourage investment and development in the country[90].

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[87] See *footnote* 71 supra.

[88] *E.g.,* Minister of Finance in *Hansard,* November 25, 1987, p. 898. See also, "If the right of the *parate execution* had been granted to the Finance Companies most of them would not have collapsed and the poor depositors would have been saved from being deprived of their life savings": *Legal Aid Newsletter,* Vol. 4, no. 5, May 1989, p. 1 (Comment).

[89] Ministry of Finance - Press Communique. Debt Recovery Legislation, December 21, 1989. In Parliament, the Prime Minister said: "Modern banking laws in other countries, in developed countries like the United Kingdom as well as developing countries like Singapore, allow the right of *parate execution* to banking institutions."

[90] *Hansard*, January 23, 1990, p. 864.

1. Debt Recovery (Special Provisions)	8. Agrarian Services (Amendment)
2. Mortgage (Amendment)	9. National Development Bank of Sri Lanka (Amendment)
3. Recovery of Loans by Banks (Special Provisions)	10. Public Servants (Liabilities) (Amendments)
4. Registration of Documents (Amendment)	11. Code of Criminal Procedure (Amendment)
5. Civil Procedure Code (Amendment)	12. Trust Receipts (Amendments)
6. Consumer Credit (Amendment)	13. Inland Trust Receipts
7. Motor Traffic (Amendment)	14. Credit Information Bureau of Sri Lanka

So in a nutshell whilst the Banking Commission (1934), Debt Recovery Committee (1985) and the Sub Committee on Commercial Legislation all recommended parate powers to banking institutions, the Mortgage Commission (1943) and the Mortgage Act (1949) was disinclined to countenance parate execution. But the enactment of the Recovery of Loans (Special Provisions) Act, No.4 of 1990 brought about the displacement of Roman-Dutch law on parate execution. It heralded a paradigmatic shift in the law of credit and security of this country. With the introduction of the Recovery of Loans (Special Provisions) Act, No.4 of 1990 parate executie powers were extended to other licensed commercial banks (LCBs) within the meaning of the Banking Act, No. 30 of 1988 and the banks established for special purposes under an Act of Parliament such as National Savings Bank (NSB), Development of Finance Corporation of Ceylon (DFCC) and Housing Development and Finance Corporation (HDFC).

Divergent Views on parate execution between 1990 and 2003

What followed the legislative reforms in 1990 is worth recounting. The prodigious litigation that was brought about due to extra judicial sales by banks

after the enactment of the Act, No. 4 of 1990 surfaced to the fore the issue of third-party mortgages. It was not infrequent that the mortgagee banks proceeded to pass resolutions to sell by auction properties mortgaged to them by third-parties who were not the actual borrowers of the non-performing loans. It became par for the course that whilst some of such auction sales passed muster, others did not qualify under the Act on the ground that it was only the property of the actual borrower that could be auctioned.[91]

As could be seen, the majority of the differing views came from the original Courts and it has to be noted that the Commercial High Court refused to accept the plaintiff's argument in **Jewarlarts Garments Ltd and Another v. The Hatton National Bank[92]** that the bank had no right to auction the property of a third-party. The same Court articulated a similar view in **Nalin Enterprises Private Limited v. Sampath Bank.[93]** In this case the Plaintiff-the corporate borrower argued that the Act No.4 of 1990 envisaged that the property mortgaged should necessarily be the property belonging to the borrower. Therefore, the defendant bank is not entitled to resolve to sell the property of the 2nd Plaintiff (the third-party mortgagor who was a director of the company) in terms of the Act, No.4 of 1990. The Commercial High Court Judge Mr. Wimalachandra HCJ (as he then was) refused to accept the argument of the corporate borrower Nalin Enterprises Pvt. Ltd. and decided that the word borrower must be interpreted so as to include a third-party mortgagor.

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[91] See decisions to the effect that only properties of actual borrowers could be auctioned in *Link Acqua Farms (Pvt) Ltd and Others v. National development Bank Development Bank* (CHC (Civil) No 110/2000/1-order dated 17th August 2000); *Y.A.G. Dharmasena v Bank of Ceylon and Another* (DC Colombo 5351/Special- order dated 17th October 2000).

[92] CHC (Civil) 77/2000/1 Order dated 26th April 2001. The Commercial High Court held that since section 4 of the Act No. 4 of 1990 does not differentiate mortgages of a third-party from a mortgage by an actual borrower, there is no prohibition to adopt a resolution to auction the property of a third-party. But there is no attempt in the judgment as to how the sections in the Act could be harmonized.

[93] CHC (Civil) 1999/2000/1 Order 27th April 2001.

Even Gamini Amaratunga J in **Bank of Ceylon v. Yasapala Arambegedera and Others**[94] took the view that third-party mortgages remain liable for recovery of unpaid loans through parate execution.

In this tangle of decisions proliferating in the wilderness of single instances, as Tennyson called them in his Aylmer's Field, the law was left in a state of ambiguity and uncertainty.

The 2003 Amendment Bill to the Act, No.4 of 1990 was an attempt to clear all snags in interpretation but it failed to pass muster in its constitutional validity. But the manifestation of Parliamentary intention in the 2003 Amendment Bill to permit parate execution of third-party mortgages cannot be lost sight of.

2003 Amendment Bill

It was in the context of all ambiguity surrounding the position of third-party mortgages that the Parliament attempted to put at rest the controversy by coming forth in 2003 with an amending Bill entitled Recovery of Loans by Banks (Special Provisions) (Amendment) to amend the parent Act, No.4 of 1990.

The objective of the Amendment was basically as follows:

(i) To prevent the borrower, mortgagor or any claimant from making an application to Court to invalidate a resolution of the Bank's Board authorizing the sale of the property. This clause will also enable banks to exercise parate execution rights in respect of syndicated loans.

(ii) To identify the borrower more clearly in order to avoid any doubt.

(iii) To extend the scope given to banks to exercise the right of parate execution in respect of a mortgage of property, to include a third-

[94] CALA 329/2000 decided on 7.10.2002.

party mortgage.

(iv) To enable all "licensed specialized banks" and finance companies supervised by the Central Bank to exercise "parate execution" similar to licensed commercial banks.

SC Determination (SD) No. 22/2003[95]

The constitutionality of the Amendment Bill to Recovery of Loans by Banks (Special Provisions) Act was considered by Sarath N. Silva CJ, P.Edussuriya J, Hector Yapa J, J.A.N.de.Silva J and T.B.Weerasuriya J, on 26.08.2003 and the Court determined that the Bill could only be passed by the special majority required under the provisions of Article 84 (2) of the Constitution. It has to be noted that it was almost three years later when the Supreme Court next considered the question of *parate execution* of third-party mortgages in *Chelliah Ramachandran* case. One can certainly find the echoes of reasoning in the 2003 determination resonating in the *Chelliah Ramachandran* decision. In **S.C (SD) No. 22/2003** which considered the constitutionality of the Amendment Bill, the argument premised on the Rule of Law was once again raised and the Court held that it would be inconsistent with the Rule of Law and the requirements of our constitution as to administration of justice to invest in any person the power to decide in respect of his rights as against another, and further to empower that person who so decides to enforce his unilateral decision by the sale of property of such other person. It has to be observed that this very argument had been rejected outright by the previous S.C Determination 03 of 1990 and if it was not against the Rule of Law to vest in the board of directors a power to exercise *parate execution* in respect of direct mortgages, one fails to understand why it would be against the Rule of Law to invest the self-same board of directors with identical powers in respect of third-party mortgages.

[95] *Kusumin Kirthy Kumari v The Attorney General* - Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Volume VII 425.

Another reason that the 2003 determination gives for declaring the bill inconsistent with the Constitution is that the Roman-Dutch law being our common law, has looked upon the process of *parate execution* with extreme disfavor. In fact, this reasoning pervades the spirit of the majority judgment in *Chelliah Ramachandran* of 15 April 2005.

The long peddling of this so-called opprobrium of Roman-Dutch law for *parate execution ad nauseum* all the way through 2003 to 2005 reduces it to absurdity-*reductio ad absurdum*, as there has been a gradual attenuation or whittling down of the Roman-Dutch law rule on mortgage of immovables but this inarticulate major premise of glaring repudiation of the Roman-Dutch law position reduces the effect of the 2003 Statutory Determination and the *Chelliah Ramachandran* decision that followed it.

As we saw in its historical conspectus, there was a statutory departure from Roman-Dutch law in 1990 and our legislature had moved away from the common law position many moons ago when it enacted an ubiquity of statutes vesting *parate* powers with several state institutions. Therefore, the precedential value of the *Chelliah Ramachandran* case is greatly reduced in light of the fact it uses the same argument that had been rejected in **Special Determination 03 of 1990** to bolster its own articulation. In the process both the 2003 determination and the *Chelliah Ramachandran* decision of 2005 which builds on it blissfully ignore the effect of statutory departures from the Roman-Dutch position. This would in turn reduce the soundness and logic of their *ratios.*

Undoubtedly our common law roots are Roman-Dutch, and splendid they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law such as the law on Banks and Banking. The original sources of Roman-Dutch Law are important, but extensive preoccupation with them is like trying to return an oak tree to its acorn. It is looking ever backwards. One is reminded of the biblical episode of Lot's wife. Lot's wife looked back and turned into

a pillar of salt. Our national jurisprudence must move forward, casting away its swaddling clothes.

Parate execution has come to stay in this country and the question is whether there has to be a distinction between mortgages provided by actual borrowers and those by third-party mortgagors.

A fact that the 2003 Amendment Bill brings out, though it did not enter the statute book, is worthy of recognition for purposes of statutory interpretation. The fact that the 2003 Amendment Bill sought to declare *parate execution* of third-party mortgages legal and valid unmistakably manifests the intention of Parliament that its inelegant drafting in 1990 that resulted in the word *borrower* being read literally was not its intended purpose. The fact that the Parliament always had both actual borrowers and third-party mortgagors in one class was as clear as clear can be, when it sought to clarify its intention in the Amendment Bill of 2003. The Parliament was seeking to unravel the ambiguity and it clearly spoke its mind in the Amendment Bill but the Amendment proved abortive in the end as a result of a declaration of constitutional invalidity.

Having pinpointed that the weight of the 2003 determination rests on slender threads, let me examine whether the 2005 *Chelliah Ramachandran* case can hold water on its own merit.

Chelliah Ramachandran Case[96]

Factual Template.

The Supreme Court heard two amalgamated appeals which raised identical issues. The appellants Chelliah Ramachandran and Manohary Ramachandran (husband and wife) had executed a mortgage of their immoveable property at 49, Collingwood Place, Colombo in favour of Hatton National Bank (HNB) at the request of the 4th

[96] See *Footnote* 1 supra

Respondent to the appeal, one Nadarajah Ganarajah. The reason for such an execution of the mortgage was a prior transaction in which the said Nadarajah Ganarajah had advanced money to Chelliah Ramachandran. Though the loan from HNB was for Nadarajah Ganarajah, the mortgage bond which secured the loan was from the husband and wife who had covenanted along with the debtor Ganarajah to repay the loan on demand and thus there was a joint and several obligation owed to the bank in the mortgage bond. When the repayment of the loan was in default, the bank noticed both the husband and wife- Chelliah Ramachandran and Manohary Ramachandran. In his response to the bank, Chelliah Ramachandran admitted that he had been paying the monthly dues regularly to the bank though Nadarajah Ganarajah defaulted.

The appellants sought writs of certiorari from the Court of Appeal to quash the resolutions of the Respondent Bank, HNB to sell by *parate execution* the property of the appellants (the third-parties) which was mortgaged to secure the loans as securities. The Court of Appeal refused interim relief sought by the appellants. It is in this backdrop that the all-important question of law surfaced in the Supreme Court-namely Can Hatton National Bank Ltd proceed to sell by *parate execution* the immovable property of a mortgagor who had not himself borrowed money from the bank?

Whilst the majority of 4 judges gave a restrictive interpretation of the term *borrower* and declared invalid *parate execution* of third-party mortgages, the minority judgement adopted a liberal and broad interpretation of the word *borrower* to encompass within it a third-party mortgagor as well. Both judgements teem with their own reasoning the pros and cons of which could now be assayed.

Majority Judgment

It is important to distill the legal reasoning on which the majority in the Supreme Court arrived at its decision. S.N. Silva CJ in *Chelliah Ramachandran* sought to

identify the category of persons against whom *parate execution* was intended to be made available by the Act as follows at page 404 of his judgment: -

> "*The submissions of Counsel for the Petitioner [in Ramachandran's case], is that the class of persons is clearly identified in the provisions of the Act commencing from Section 2 itself. Section 2(1)(a) requires 'every person to whom any loan is granted by a Bank on the mortgage of property' to register with the Bank the address to which a notice to him may be sent. I am inclined to agree with this submission since a Resolution of the Board to sell by Public Auction, as empowered by Section 4, has to be dispatched to this address in terms of Section 8. Similarly, the notice of sale in terms of Section 9 should be dispatched to that address.*
>
> *There is a clear link in the provisions between the taking of a loan and the mortgage. The law will apply where a mortgage is given by the person to whom the loan is granted. In Sections 7, 14, 15, 16 and 17 this person is identified as the 'borrower'. The borrower is none other than the person to whom a loan is granted and who is required in terms of Section 2 to register his address with the Bank. In terms of Section 14 where the mortgaged property is sold and an amount in excess of what is due to the Bank is recovered, such amount has to be paid by the Bank to the borrower. This clearly established that it is only the property mortgaged by a borrower that could be sold by a Bank to recover a loan granted to him. If the provisions are extended by a process of interpretation to cover a mortgage given by a guarantor, Section 14 will bring about a preposterous result in which the guarantor's property is sold and the excess recovered is paid by the Bank to the borrower. It is when confronted with their unanswerable contention that the Counsel for the Banks submitted that the term borrower should be interpreted to include any debtor and that where a loan is in default the guarantor would be a debtor*. ***The words 'borrower', 'guarantor' and 'debtor' have specific significance attaching to them in legal proceedings. These distinctions cannot be removed and the***

application of the special provisions law extended to encompass guarantors in view of the serious implications of its provisions as revealed in the preceding analysis." (*Emphasis added*).

Comments on the Majority Judgment

One can see that the majority judgment in *Chelliah Ramachandran* is dismissive of the argument that where a loan is in default the guarantor would be a *debtor*. The majority in *Chelliah Ramachandran* also states that the words "*borrower*", "*guarantor"* and "*debtor"* have specific meanings implying that they are distinct and separate and these distinctions can never be removed. It would appear that the legal position is to the contrary. Let me first set forth the argument based on joint and several liability of security providers along with principal borrowers, which the majority view in *Chelliah Ramachandran* case made short shrift of.

Joint and Several Liability of Principal Borrowers and Mortgagors

As in *Chelliah Ramchandran*, the mortgage bonds in the two cases before us impose joint and several liabilities on the directors for the borrowing of the respective Companies. In other words, both the principal debtors-the Companies in question and Director mortgagors have undertaken joint and several liability for the loans.

Black's Law Dictionary defines a joint and several bond as a bond in which the principal and interest are guaranteed by two or more obligors.[97] In a joint and several mortgage bond, two or more persons declare themselves jointly and severally liable for the debt of the principal borrower. A guarantor or a mortgagor, who has mortgaged his property to secure the repayment of the loan, stands on the same footing as a borrower. In such a situation the mortgagor has accepted the same liability as the borrower and when the default occurs, the mortgagor stands on the same footing as the borrower *vis a vis* the obligee (the bank).

[97] 11th Edition edited by Bryan Garner at pp 222; 1002.

When one examines the mortgage bond bearing No 6291 in SC/Appeal/11/2021, the phraseology is symptomatic of the joint and several covenant undertaken by both the Company (Sunpac Engineers Pvt Ltd) and the mortgagor, Ranath Jayaweera alias Sanath Jayaweera. The joint and several liability of the company and the mortgagor is expressed in no uncertain terms in the following tenor.

> *NOW KNOW YE AND THESE PRESENTS WITNESS that the Company and the Mortgagor do hereby covenant and agree with and bind and oblige themselves jointly and severally to the Bank that the Company and/or the Mortgagor shall and will on demand well and truly pay or cause to be paid at Colombo aforesaid to the Bank in lawful currency of Sri Lanka…*

This shows that the mortgagor Ranath Jayaweera incurs the same obligations as Sunpac Engineers (Pvt Ltd)-the principal borrower. Clause 10 of the mortgage bond makes it patently clear about the rights of the bank when it stipulates:

> *The Company and the mortgagor empower and require the bank in the event of exercising the parate execution rights conferred on it under the recovery of loans by banks (special provisions Act, No.4 of 1990) to appropriate the proceeds in such a way as to recognize the claim of the bank and effect payment giving effect to the provisions of these presents and the Company shall not interpose any objections thereto.*

The mortgage bond in question thus imputes obligations to both the borrower Sunpac Engineers (Pvt Ltd) and the mortgagor Ranath Jayaweera *qua* borrowers, as they have clearly covenanted and obliged themselves to the bank that they would be jointly and severally liable to repay the loan on demand. There is no necessity for the principal borrower Sunpac Engineers (Pvt Ltd) to be proceeded against first, before DFCC bank PLC could turn to Ranath Jayaweera alias Sanath Jayaweera – the mortgagor. But the majority judgment in *Chelliah Ramachandran* is quite oblivious to this aspect of coalescence of the borrower and mortgagor when default of payment has occurred and the majority in *Chelliah Ramachandran* clearly

misdirected themselves when they proceeded to hold that the words *debtor, guarantor and mortgagor* have fixed and distinct meanings which cannot be removed.

As the mortgage bond stands, it is a solidary obligation with both parties covenanting to repay the bank on demand. Both also covenant that the DFCC bank PLC could have recourse to the provisions of Act, No.4 of 1990 to sell by auction the mortgaged property belonging to the mortgagor Ranath Jayaweera. The mortgage bond is identical in terms and conditions to the mortgage bond as was confronted with by Court in *Chelliah Ramachandran*. In such circumstances, it is open to the mortgagee bank to proceed against the property of the third-party mortgagor first, as there is a joint and several liability.

This makes it clear that Ranath Jayaweera and Sunpac Engineers (Pvt Ltd) stand in the character of *borrowers* in the same breath; so one cannot ascribe distinct and different meanings to the words *borrower* and *mortgagor* as both tend to coalesce into one category as far as the liability to the bank is concerned. As the borrower defaults in the payment due to the bank, the liability of the mortgagor kicks in and is co-extensive with that of the principal borrower. Therefore, the majority in *Chelliah Ramachandran* fell into an error when they pronounced that the words such as *debtor* and *guarantor* bore distinct and fixed meanings. *En passant*, the definition of a mortgagor in Black's Law Dictionary as a mortgage-debtor or borrower has to be understood as a reference to a mortgage provider as a borrower in its extended meaning.[98]

I am also fortified in my reasoning by some comparative legislative developments across the Palk Strait. The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 (the SARFAESI Act) defines the term borrower to mean a person who fulfills two criteria viz (1) who has been granted financial assistance by any bank or financial institution, (2) who has given any guarantee or created any mortgage or pledge as a security for financial assistance

[98] See Black's Law Dictionary, 11th Edition. p 1214

granted by any bank or financial institution…[99]. The Indian Supreme Court has affirmed this position in ***Union Bank of India v. Rajat Infrastructure Pvt. Ltd. & ORS.***[100]

I hasten to point out that the liability for the third-party's property to be sold extra judicially arises by the third-party himself being considered as a *borrower* under the Act and it must be kept in mind that this statutory liability is independent of the contractual liability arising under the joint and several covenant in mortgage bond. Joint and several liability only supplements the statutory liability arising under the Act by virtue of the interpretation of the word to include a third party.

The word *borrower* includes a *mortgagor.*

From the foregoing it is indisputable without a scintilla of doubt that the word *borrower* takes in its sweep even a person who has given guarantee or created any mortgage or pledge as a security for the financial assistance granted by any bank or financial institution. The security interest means right, title or interest of any kind whatsoever upon property, created in favor of any secured creditor and includes any mortgage, charge and hypothecation. Therefore, a person who has created any mortgage or pledge as security for financial accommodation granted by any lending institution as defined or empowered in *parate execution* statutes is a *borrower* within the meaning of the word *borrower* in provisions such as section 15 (1) of the Act, No.4 of 1990 and this conclusion is inescapable having regard to the text, context and the resultant interpretation.

Text, Context and Interpretation.

All that I have undertaken above is to examine the text of the Act, No.4 of 1990 in relation to its context in its widest sense and utilize it to interpret the text.

[99] Section 2(f) of the SARFAESI Act; also see *footnote* 78 supra.
[100] (2020) 3 SCC 770 ; AIR 2020 SC 1172

As I said before, context in the 'widest sense' includes the legislative history of an Act, extrinsic materials, and 'any other circumstance that could rationally assist understanding of meaning': ***Commissioner of State Revenue EHL Burgess Properties Pty Ltd***[101]

In ***Reg. v. Schildkamp***[102] Lord Upjohn said at p.22G

> "*But, my Lords, this, in my opinion, is the wrong approach to the construction of an Act of Parliament. The task of the Court is to ascertain the intention of Parliament; you cannot look at a section, still less a subsection, in isolation, to ascertain that intention; you must look at all the admissible surrounding circumstances before starting to construe the Act. The principle was stated by Lord Simonds in* ***Attorney-General v. Prince Ernest Augustus of Hanover*** *[1957] A.C. 436, 461:*
>
> ***'For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those other legitimate means, discern the statute was intended to remedy.'***

Viscount Simonds does not specifically mention Law Commission Reports (the Law Commissions had not then been established). Nor does he mention white papers or other documents, but the material to which he referred included external material. So, what Viscount Simonds says about obtaining 'the colour and content' of a statute

[101] (2015) VSCA 269 at {52}.
[102] (1971) AC p 1

from its context must apply to pre-legislative material and other external aids that are available before us.

Based on the above, it is realistic to conclude that the word *borrower* in the Act bears different meanings in that it includes not only the person to whom the financial accommodation was granted but also the person who provides security for such financial accommodation. It makes no difference whether the person who provides the security is the actual borrower or a third-party.

The word *borrower,* having regard to legislative history behind *parate executie* in this country, statutory departures from Roman-Dutch law, purpose of the special law and even joint and several liability covenant in the mortgage instruments, has to be interpreted to extend to a mortgagor, inclusive of a third-party mortgagor. The context in the widest sense would also include the fact that the Parliament did not choose to leave the law as it stood, since the abortive Amendment Act of 2003 was sought to be enacted on the assumption that the impugned decision of *Chelliah Ramachandran* did not represent the law or parliamentary intention.

It is therefore irreconcilable to logic and common sense to contend that the Act, No.4 of 1990 makes a distinction between an actual borrower who provides a mortgage and a third-party who provides security on behalf of the actual borrower. Many a judicial decision have extended the meaning of words, from its normal and literal sense to their legal meaning or else the provisions in the Act would become useless and infructuous if a different treatment has to be given when the actual borrowers and mortgagors are different persons.

As rightly pointed by Lord Scarman, it would be perilous to assume that an English word of ordinary usage is to express only one particular meaning – see ***Infabrics Ltd v. Jaytex Ltd.***[103] Therefore it cannot be argued that the particular word *borrower*

[103] (1984) R.P.C 405

has been used uniformly in different parts of the statute and when Section 2 (1) of the Act, No.4 of 1990 uses the words ''*the mortgage of* property'', it would connote not only the property of the person to whom the loan is granted but also the property of a third-party who volunteers to provide security for the loan.

Furthermore, when Section15 (1) of the Act, No.4 of 1990 states that *"all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser…''*, the word *borrower* in the subsection would include the third-party who has provided the security for the financial assistance.

Before I part with this judgement, two questions repay consideration. What does one make of the cases such as Jayawardane[104] and DFCC v. Muditha Perera and Others?[105] How does this Court deal with the precedent of Chelliah Ramachandran, now that it has been held to be incorrectly decided?

Since I have concluded that the property of a third-party mortgagor becomes liable for parate execution, it follows that the legal precedent of Chelliah Ramachandran has been wrongly decided. In the same breath a re-appraisal of the Jayawardane case would be otiose as the property mortgaged by a director for the loan of the company would anyway be available for parate execution because of its character as a third-party mortgage. Laconically, on the strength of the repudiation of Chelliah Ramachandran by this Court, lending institutions would no longer require the aid of the Jayawardane case. An immovable property mortgaged by a director would now become available for parate execution merely on the basis that it is a third-party mortgage that qualifies for exposure to parate execution. However, it has to be recalled that there were arguments for and against the correctness or otherwise of the Jayawardane decision and whilst the Petitioners contended that the Jayawardane case was wrongly decided, the Respondent banks invited this Court to hold the

[104] (2007) 1 Sri.LR 181
[105] SC Appeal 15/10 decided on 25th March 2014

Jayawardane case as having laid down the law correctly, in the event this Court proceeded to depart from the Chelliah Ramachandran case.

Indeed there has been a question of law No (ii) that was raised on 8th February 2022 on the ratio of the Jayawardane case and in the circumstances, in order to complete the narrative, it behoves the Court to proceed to consider both HNB v Jayawardane and DFCC v Muditha Perera (supra).

HNB v. Jayawardane and DFCC v. Muditha Perera and Others (SC).

Hard on the heels of *Chelliah Ramachandran* followed the case of *Hatton National Bank Ltd., v. Jayawardane and Others*.[106] In this case the HNB granted a loan to a company (Nalin Enterprises Pvt) of which Jayawardane and others were directors. The directors hypothecated properties belonging to them to secure the loan. As the company defaulted in the payment of the loan the bank adopted a resolution in terms of Act No. 4 of 1990 to sell the property of Jayawardane and others. After some abortive litigation, the property was indeed sold at an auction and purchased by the bank. Jayawardane and Others instituted an action in the Commercial High Court and sought an order that the resolution was a nullity and the auction should be declared null and void on the ground of *laesio enormis.*

When the mater went up in appeal to the Supreme Court, the question of applicability of *Chelliah Ramachandran*'s case came up. Jayawardane and Others argued that they were third-parties whose properties could not have been sold. In other words, applying the ratio in *Chelliah Ramachandran's* case the directors argued that it was only the property of the company that could have been sold and not theirs. In effect the argument of the directors was that their hypothecation would not authorize HNB to have exercised *parate executie*, because the mortgage came from third-parties (the Directors of the Company).

[106] See *footnote* 3 supra

Jayasinghe J, (with Thilakawardane J, and Marsoof J, agreeing) lifted the corporate veil and held that the directors cannot hide behind the veil of incorporation of the company. The reasoning given by Jayasinghe J, for lifting the corporate veil was:

> *"It is quite obvious that the 1st and 2nd Respondents being Directors of the Company benefited from the facilities made available to the said Company by the Petitioner Bank and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third-party mortgages" as contemplated in the majority judgments of the Court in Ramachandran v. Hatton National Bank."*

This reasoning is indefensible in corporate law and logic. In company law corporate veil can be lifted only on some limited grounds namely (a) if the directors were utilizing the company as a vehicle of fraud or (b) it was necessary to interpret a document or statute or (c) the directors be construed to be agents in regard to the lending transaction. In this case no such exception existed. The judgment does not refer to the recognized grounds of lifting the corporate veil *in extenso*. How the directors benefited from the loan given to the company is not discernible as there is no evidence of fraudulent benefit to the directors though Nalin Enterprises Ltd was a closely knit, private company. What evidence was there before Court to conclude that the directors directly benefited from the loan facilities is not readily available upon a perusal of the judgment. What if the money lent to the company was used to purchase property for the company itself? Could it be concluded that the loan was exhausted and busted up by the directors, without that money having been used for the benefit of the company? Merely because the company is unable to pay the debt, can it be concluded that that failure to pay a debt would amount to fraud on the part of the directors? What if the company did not make enough profits to satisfy its liability?

There are no answers to these questions. Except for the bare assertion that the directors benefitted out of the loan, the *Jayawardane* case does not proffer proof of such a benefit. There must be irrefragable evidence to prove fraud and the

Jayawardane judgment does not substantiate any allegations of fraud against the directors. Therefore, there was no warrant for lifting the corporate veil on the facts of the case and the ratio in *Jayawardane* case cannot be taken to mean that if a loan is granted by a bank to a company and the directors mortgage their property to secure that loan, the mortgaged property could be reached for *parate execution*, but without any grounds for lifting the corporate veil.

The fact that the directors mortgaged their property for the loan of the company does not *ipso facto* give the bank a carte blanche to sell by an auction the properties of directors. In order to lift the corporate veil, there must be grounds for that exercise and the English cases have trawled out only a limited number of such grounds such as fraud.[107]

It cannot be denied that the *Jayawardane* case became an emollient and a panacea for the banks as it created an apparent exception to the ratio in *Chelliah Ramachandran* case. But its ratio cannot be applied uniformly to all directors who mortgage their properties for the loans of their companies. Moreover, the precedential value of the *Jayawardane* case is weakened by its inherent absence of logic and scant attention paid to recognized grounds of exception to the doctrine of separate corporate personality which was encapsulated in the seminal case of *Saloman v. A. Saloman and Co. Ltd.*[108]

In my judgment there was no warrant for lifting the corporate veil on the facts and the correctness of this decision is open to serious objection.

Let me now turn to the case of *DFCC v. Muditha Perera.*[109]

DFCC v. Muditha Perera and Others.

[107] See *Adams v. Cape Industries Plc* (1990) Ch 433 and a subsequent discussion of the principles in *Prest v. Petrodel Resources Ltd* (2013) AC 415.
[108] (1897) AC 22.
[109] See *footnote* 104 supra.

Saleem Marsoof J, who was a member of the Divisional Bench in *HNB v. Jayawardane* chose correctly in the later case of *DFCC v. Muditha Perera and Others* not to follow the case of *HNB v. Jayawardane.* As Baron Bramwell said about a point of law in 1872 **"[t]he matter does not appear to me now as it appears to have appeared to me then.",**[110] Saleem Marsoof J had just such a damascene conversion in *Muditha Perera's* case. Saleem Marsoof J chose to follow *Chelliah Ramachandran* in *Muditha Perera* and as a result, the property mortgaged by Muditha Perera to DFCC bank escaped foreclosure on the ground that it was a third- party mortgage.

Now that *Chelliah Ramachandran* has been held by this Court to have perpetuated an incorrect view of *parate execution* as regards third-party mortgages, this Court proceeds to hold that *Chelliah Ramachandran* would no longer be followed. I would not saddle this judgment with a slew of cases that have focused on *parate execution* since the decisions of *Chelliah Ramachandran, Jayawardane* and *Muditha Perera*.

Whichever way they were decided, they all constitute *res judicata* between the parties in those cases and the holding of this case before us would not bind the parties on the rights and liabilities had they been already determined in those cases.[111]

Answering the Questions of Law.

Having dwelt at length on an issue which required a comprehensive treatment, I now proceed to answer the questions of law in the following tenor.

Question No (i)- No

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[110] Baron George W. W. Bramwell, Justice on the Court of the Exchequer, *Andrews* v. *Styrap,* 26 L. T. 706 (1872).

[111] See the CA decision of Wimalachandra J on the effect of *Chelliah Ramachandran* in a case which had proceeded beyond auction sale *Jayawardane v. Sampath Bank* (2005) 2 Sri.LR 34; see also` Chitrasiri J in *Seylan Bank Limited v. Sivanu Padmandan and 3 Others* (CA Revision Application) No 702/2006 (CA minutes of 16.02.2010.

Question No (ii)- To the extent that veil lifting in *HNB Ltd v. Jayawardane and Others* was not warranted on the facts and circumstances in the case, the ratio in the case is incorrect and in view of the holding in this case now, any director who mortgages his property would be a borrower within the meaning of Act, No.4 of 1990.

Question No (1) -Yes

Question No (2) -Yes

Should Chelliah Ramachandran be overruled?

In view of the answers to the questions of law, another question arises before one would part with this judgment. As I said before, the Divisional Court of this 7-judge bench finds that the 4 judge-bench decision of *Chelliah Ramachandran is* irreconcilable and it is undoubtedly within the competence of a numerically superior Supreme Court to overrule a decision of any Court containing a fewer number of judges-see ***Bandahamy v. Senanayake***.[112]

The doctrine of judicial precedent or binding precedent is one of the most fundamental aspects of any legal system. Precedent is based on the maxim, ***stare decisis et non quieta movere*****,** literally to stand by previous decisions and not to disturb settled matters; to adhere to precedents and not to depart from established principles. In common law systems a large part of the law is made of decided cases, i.e. judge made law or case law. These decisions carry the authority of law upon pronouncement and must necessarily bind later judges to ensure certainty, uniformity and *finis litium* (an end to litigation). The doctrine is important to give the system a sense of certainty and balance and to make it acceptable to the public.

But there are circumstances that destroy the binding force of a precedent and one such factor which is often cited as an exception to *stare decisis* is when it can be inferred that the deciding Court merely assumed the correctness of the propositions

[112] (1960) 62 N.L.R 313;

of law it was laying down. For instance, the assertion that the Roman-Dutch law in this country had viewed *parate execution* with abomination had merely been assumed to be correct with nary any attention being paid to the long line of statutory departures from this so-called loathing. The underlying covenant of joint and several liability inherent in the mortgage instrument of *Chelliah Ramachandran* just passed muster without its significance being brought to bear upon the right of a lending institution to proceed to *parate execution* when the third-party knowingly and without any trace of undue influence or duress had assumed the consequences of an extra judicial sale. A decision is said to be *sub silentio* when a particular point of law involved in the decision is not perceived by the Court or present to its mind. So *Chelliah Ramachandran* is one such precedent *sub silentio* and in such a backdrop the case cannot be an authority on the unperceived rules of law that have been allowed to pass *sub silentio*.

I am fortified in expressing the opinion that it is not desirable that the most authoritative Court in a country be bound by its own decisions. A comparative look across passport control discloses the practice of overruling discordant dissents in several jurisdictions.

Practice Statement of the House of Lords in 1966.

The House of Lords in a dramatic fashion recognized this. The Lord Chancellor, Lord Gardiner, on July 26th, 1966 announced in the House of Lords that in future the House of Lords would not regard itself as absolutely bound by its own decisions. This was quite contrary to an antiquated rule that the House had set down for itself that the House of Lords was bound by its past decisions-see ***London Tramways v. London County Council.***[113]

However, in the period that followed the *London Tramway*s decision it was felt that the effect of the decision was to constrain the development of the common law and

[113] (1898) AC 375.

that rather than ensuring predictability and certainty in the law, the effect was rather the opposite.

As a result, in 1966, all of the judges in the House of Lords joined together to issue a **Practice Statement** (a statement by the Court of a procedure that it intends to introduce) providing that in future the House would no longer regard itself as bound by its own earlier decisions. The statement was carefully worded to communicate that this new power to depart from decisions would be used sparingly to avoid creating uncertainty in the law.

The Practice Statement (Judicial Precedent) [1966] 3 All ER 77

The Practice Statement set out why the House of Lords was going to change its practice and how it thought it would exercise the new freedom to depart from earlier decisions of its own. It said:

> *Their Lordships recognise... that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions ... as normally binding, to depart from a previous decision when it appears right to do so.*

Together with the Practice Statement, the House of Lords published a press release which gave more explanation about the new practice. The key points that emerged from the Practice Statement and press release were that:

- The Court would only rarely depart from an earlier decision
- The Court would be most likely to use the new freedom in situations where there had been significant social change so that a precedent was outdated or inappropriate to modern social conditions, values and practices
- The Court would be likely to depart from an earlier decision if there was a need to keep English common law in step with law of other jurisdictions

- There was a special need for certainty in criminal law and as a result the Court would be very reluctant to depart from an earlier decision in a criminal case.

Horizontal precedent in the UK Supreme Court

Soon after the UK Supreme Court was established in 2009, Lord Hope gave a judgment in ***Austin v. Southwark London Borough Council***[114] in which he made it clear that the prior jurisprudence of the House of Lords had been transferred to the UK Supreme Court and that the UKSC would therefore not regard itself as bound by earlier decisions.

> *The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the Court's own name. This is because it has as much effect in this Court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by section 40 of the Constitutional Reform Act 2005. So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so.*

R v. Shivpuri[115] was a criminal appeal in which the House of Lords overturned one of its own decisions - ***Anderton v. Ryan***[116] that had only been decided one year earlier. This was the first time that the House of Lords overturned its own decision in a criminal case and it was regarded as a spectacular decision when Lord Bridge (a member of the erroneous majority in *Anderton*) acknowledged the error and said:

[114] (2010) UKSC 28; (2010) 4 All ER 16
[115] (1986) 2 All ER 334.
[116] (1985) 2 All ER 355.

> "***the Practice Statement is an effective abandonment of our pretension to infallibility****. If a serious error, embodied in a decision of this House has distorted the law, the sooner it is corrected the better*".

There are a host of civil cases where one finds the House of Lords overrule previous decisions-see ***British Railways Board v. Herrington***[117]: ***Murphy v. Brentwood District Council***[118]; ***Austin v. Mayor and Burgesses of the London Borough of Southwark***[119]; ***Knouer v. Ministry of Justice.***[120]

Across the Palk Strait, one is reminded of Justice Khanna who was given the respect accorded to a hero everywhere he went because of his dissent in the famous ***Additional District Magistrate (ADM) Jabalpur v. Shivkant Shukla***[121]. The majority judgment in this case was expressly overruled by a nine-judge bench of the Supreme Court of India in ***Justice K.S.Puttaswamy (retd) v. Union of India***[122] and the minority judgment of Justice Khanna was restored.

Stare decisis is neither an "inexorable command"[123] nor "a mechanical formula of adherence to the latest decision",[124] it is a "principle of policy",[125] especially in constitutional cases. If it were an inflexible command, old cases would have continued and would never have been overruled. When considering whether to re-examine a prior decision which seems incorrect, the court must balance the importance of having legal issues decided against the importance of having them decided right. As Jackson, J, explained, this requires a "sober appraisal of the

[117] (1972) AC 877
[118] (1990) 2 All ER 908
[119] (2010) UKSC 28
[120] (2016) UKSC 9.
[121] (1976) 2 SCC 521 (the ADM Jabalpur case).
[122] (2017) 10 SCC 1.
[123] Lawrence v Texas, 539 US 558, 557, (2003).
[124] Helvering v Hallock, 309 US 109, 119 (1940).
[125] Ibid

disadvantages of the innovation as well as those of the questioned case, a weighing of the practical effects of one against the other".[126]

The great purpose of all this is a constitutional ideal-the rule of law and thus, ***Ramachandran and another (SC Appeal No 5/2004) and Anandasiva and another (SC Appeal No 9 of 2004) v. Hatton National Bank***[127] is accordingly overruled and the appeal is dismissed.

Judge of the Supreme Court

S. THURAIRAJA, PC, J.

I have had the advantage of reading the judgements of my learned brothers Nawaz, J. and Samayawardhena, J. in draft. I am in respectful agreement with both the said judgements, as I see no contradiction in principle between the opinions expressed therein. However, my conscience compels me to make some observations of my own, without prejudice to the opinions so propounded by my learned brothers.

Suppose an old man or woman who mortgages the roof over their head and the only property in their names so that a grandchild may have higher education, only to be neglected later on. Suppose an illiterate or a nescient who signs a mortgage bond—some of which are incomprehensible to even the learned men—as a third-party mortgagor, with the most benevolent of intentions, only to be defrauded. What comes of such classes of third-party mortgagors, if *parate execution* were to be effected against them. To this extent, this Court's historical reluctance to vest in the

[126] See Jackson, Robert H. (1944), "Decisional Law & Stare Decisis", American Bar Association Journal, 30 (6), pp 334-335.
[127] (2006) (1) Sri. LR 393.

board of directors such power to exercise *parate execution* in respect of third-party mortgages resonates with me.

Despite the shortcomings of the judgements in ***Ramachandran v. Hatton National Bank***[128] ***and Hatton National Bank v. Jayawardena,***[129] which Nawaz, J. has appraised in great detail, it cannot be gainsaid that said dicta have made a clear delineation and afforded protection to the aforesaid classes of third-party mortgagors who could otherwise be greatly prejudiced. Though common law, too, seeks to protect such persons, I cannot help but see such protection as inadequate.

Be that as it may, I cannot close my mind to sound legal reasoning, like which my learned brothers have set out, merely based on moral sentiment. The foregoing discussion has established, with irrefutably sound logic, why third-party mortgagors must be read within the meaning of *borrower* and I am therefore inclined to agree with the same.

Nonetheless, I invite the relevant authorities to take due cognizance of the concerns I have raised in formulating their policies, so that this decision, which to me appears utilitarian, may not perpetrate undesirable results.

JUDGE OF THE SUPREME COURT

E.A.G.R Amarasekara, J.

I had the opportunity of reading the judgments written by learned brothers Honourable Justice Nawaz and Honourable Justice Samayawardhena in its draft form. I am in respectful agreement with the final conclusion they have reached that, when a loan is granted by a bank on a mortgaged property, irrespective of the fact

[128] [2006] 1 Sri LR 393

[129] [2007] 1 Sri LR 181

whether the loan was released in the name of the mortgagor or not, mortgage property is subject to parate execution in terms of the Act No 4 of 1990 and other similar provision found in other relevant Acts, on which the State Banks which were represented before us rely.

I observe that my brother Judge Honorable Samayawardhena J. and Honourable Nawaz J. have answered the questions of Law No. 1, 3, and 4 in the same manner, namely question No. 1 in the Negative and No. 3 and 4 in the affirmative, for which I also agree. Honourable Samayawardhena J. has considered the 2nd question of law as one that does not arise. Honourable Nawaz J. has answered the 2nd question of law with certain comments. In my view, irrespective of reasons given by the Honourable judges who decided the **Hatton National Bank V Jayawardane (2007) 1 Sri L R 181,** due to the conclusions reached in this case, any property mortgaged to a bank to obtain a loan subject to the provisions of the relevant act is subject to parate execution. Thus, the 2nd question of law has to be answered stating that any director of a corporate entity who mortgage his property for a loan obtained by the corporate entity is a borrower within the meaning of Act No.4 of 1990.

I prefer to add few observations in the matter at hand with regard to the nature of obligations created by a Mortgage. Philip S James in his book '**Introduction to English Law', 12th Edition, by Butterworths,** at page 464 explains the origin of Mortgage as follows;

"*There are two principal forms of security, 'personal' security and 'real' security. Personal security usually requires a person who will stand surety for the debt. Real security requires some form of property; the borrower may, for instances, secure the loan by giving the lender a possession of his watch. If he is lucky, however, the borrower may own land; in this case he will be able to secure the debt upon the land. The best way of securing a debt upon land is by way of mortgage. 'Mortgage' is a strange word. It is said to derive from the ancient practice by which the borrower conveyed the land to the lender with a proviso for reconveyance should the loan be paid by a certain date; if the loan is not paid on that date the land become dead pledge ('mortgage') forever*

to the borrower, for it became the property of the lender. The word survives, although mortgages are no longer created in that way."

Even though the mortgages are created in many ways, it appears that in conventional mortgages, original flavour of lending and borrowing still remains with most of the transactions, especially that are found in transactions similar to matter at hand. Wille in his work "**Mortgage and Pledge in South Affrica"** at page 1 states that "*In its comprehensive sense, mortgage is defined as a right over the property of another which serves to secure an obligation*". At page 8, in describing the nature of the obligation he states as follows;

"*The principal obligation may be of any kind of nature, whether civil, pretorian, natural, or honorary (Marcianus, Dig, 20, 1, 5: Pothierad Pand, 20, 1 note 7). Thus, the obligation may arise from such causes as the lending of money, a dowry, a purchase, a sale, a letting, a hiring, a mandate (ibid, ibid) a suretyship (Ulpian, Dig., 13,7,9, 1), an eviction from sold property (Voet 20, 1, 20), or a judgment (Kadrinka V Lorentz 1914 T P D 32). Maasdorp (Vol. II, p 234) sums up the matter by saying that the original obligation may be any obligation whatsoever, which, in case of non-fulfilment, is capable of being converted into money value by claim of a compensation but as a general rule it is a money debt*"

Halsbury's Laws of England, 5th Edition, Vol. 77 at para 101, page 63 gives the meaning of a mortgage.

"*A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub demise of land, by a transfer of a chattel, by an assignment of a chose or thing in action, by a charge on any interest in real or personal property or by an agreement to create a charge for securing money or money's worth, the security being redeemable on repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself or form any other instrument or from oral evidence, it is considered as mortgage and redeemable*."

If above definitions and descriptions are taken together, it appears mortgagor is bound to pay the money value as a debtor at the end to get his interest in the property. His standing is similar to that of a borrower. This may be the reason for many dictionary meanings identify the mortgagor as a borrower. Counsel for the 1st Intervenient Petitioner has quoted some of them as follows;

Black's Law Dictionary 10th edition

Mortgagor- Someone to whom mortgages property; the mortgage-debtor.

Collins Law Dictionary

Mortgagor- person who borrows money, giving a property as security.

A Dictionary of Law Edited by Jonathan Law, 8th Edition

Mortgage- An interest in property created as a form of security for a loan or payment of debt and terminated on payment of the loan or debt. The borrower, who offers the security, is the mortgagor, the lender, who provides the money, is the mortgagee.

In a banking transaction providing financial facilities such as loans, the bank lends while the other side borrows. If there is a mortgage bond involved, in essence, mortgagor is also a borrower. He may borrow for himself or someone else. If he borrows for someone else, it does not make his standing different. In modern transaction, main credit card holder may get a supplementary card for one of his family members. Merely because he does not get the financial benefits of the supplementary card, he cannot say that he is not the borrower.

In my view, it is inherent in a mortgage bond that the mortgagor stands akin to a borrower even though the financial facility is taken in the name of someone else and in such a situation, he is not a mere guarantor.

In the above backdrop, I wish to look at the some of the provisions of Act No. 4 of 1990. When section 3,4 and 5 of the said Act are read together, the Act authorizes

either sale by public auction and or taking of possession of any property mortgaged in the manner prescribed by the Act whenever any sum is due on the relevant mortgage after passing a resolution and taking steps in accordance with the Act. These sections do not limit the auction or possession to the property mortgaged by the person in whose name the money is lent. To give such meaning a court has to add words to qualify the meaning of the word 'any property' found in said operative sections of the Act.

Section 14 provides for the payment of any excess money after the sale. The section starts with the words "If the mortgaged property is sold". The mortgaged property referred to there cannot be anything other than what is referred to in the aforesaid operative provisions, namely section 3, 4 and 5. This section is there to direct the distribution of the balance money after the sale and it is not meant to decide what should be sold in action or taken in to possession. The main focus in that section is the distribution of excess money. It relates only to what should be done after the sale. Thus, the words in it cannot be used to decide what should be sold and taken into possession under a resolution passed by the board. Since, the said section directs to give the excess money to the borrower or to persons who can claim under the borrower, in **Ramachandran V H. N. B. (2006) 1 Sri L R 393**, the majority of the bench considered it as an absurdity when the borrower is not the mortgagor. It must be noted that to mortgage one must have title, right or some interest in the property that can be mortgaged to secure the loan or money value of the transaction. As I explained in conventional mortgages the mortgagor stands similar to a debtor or borrower. In my view, the borrower in the said section means none other than the mortgagor who defaulted irrespective of the fact whether he receives the loan in his name or not.

In the **Ramachandran case**, it appears that it was the view of the majority that allowing parate execution of the property would deprive the mortgagor access to our courts to get his matter adjudicated through courts. It is true in a normal mortgage action the Bank should have commenced litigation by filing the action. It

must be noted that the default is generally proved using records of the banks which are considered as prima facie proof which may be hardly challenged only by cross examination. Now the position has changed and the Banks have given the authority to pass a resolution using such prima facie evidence but still I do not see any hindrance to access to justice and challenge such resolution prior to the entering of certificate of sale. The difference would be that it is now the alleged defaulter or the mortgagor who has to initiate proceedings.

The learned judges who heard the said **Ramachandran case** and the said **Jayawardena case** mentioned above would have contributed their best to solve the issues presented before them as per the submissions available before them. They may not have foreseen the other issues that may arise with such interpretations in future. Present interpretation, that exist after the said **Ramachandran case** has given an opportunity to many defaulters to annul the intention of the legislature expressed by bringing these legislations. For example, a defaulter who may get his name registered in CRIB, and unable to get further loans, may transfer his property to one of his family members name and get further loans through one of his colleagues while getting his family member to sign the mortgage. The said colleague does not take interest in paying as it is not his property at stake and the family member can take up the position that it is third party mortgage. The original defaulter may further file an action stating that he did not mean to transfer the title but it was a trust.

The number of cases on similar issues that have been filed in our courts to annul the resolutions on similar grounds may give an indication that the interpretation given in the **Ramachandran case** now serves the defaulters defeating the intention of the legislature expressed through passing the the Act No.4 of 1990 and similar laws, which may not have been foreseen by the learned Judges who decided **Ramachandran case**. This seems to be one of the reasons that the House of Lords, to some extent deviate from applying horizontal application of the Stare Decisis principle as there should be a balance between the need to develop law with the

passage of time and its consistency. Thus, with all due respect to the judges who decided **Ramachandran case** and **Jayawardena case**, I approve the departure from those decisions.

Judge of the Supreme Court

K. Kumudini Wickremasinghe, J

I have perused the draft judgments of both my learned brothers Hon. Justice A.H.M.D. Nawaz and Hon. Justice Mahinda Samayawardhena. Although different approaches have been used in the analysis, I am agreeable to the final outcome of both draft judgements.

The questions of law on which leave has been granted in this case are as follows:

1. Did the CHC err in law in determining that the 2nd Plaintiff is a borrower within the meaning of the Recovery of Loans by Bank Special Provisions Act.

2. Is the Ratio in the case HNB v Jayawardhena [2007] 1 S L R that the director of a corporate entity who mortgages his property for a loan obtained by that corporate entity is a borrower within the meaning of the Act.

3. Has the Board of Directors have the power to by resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under Section 13 of the said Act.

4. Does any property mortgaged to the bank of Ceylon or the Peoples bank as security for any loan as the case may be, in respect of which default has been made within the meaning of Bank of Ceylon Ordinance No. 53 of 1938 as amended and the

Peoples bank Act no 29 of 1961 liable to be auctioned in terms of the respective acts referred to

When considering the analysis of both draft judgments, I believe that Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393 is considered as an important jurisprudence in our country and that the salient principles set out by such a case must be given its due recognition in law and this court must take cognisance of the importance of this judgment in order to avert injustice in the future by overruling the same and the matter must be addressed in a diplomatic manner.

The highlight of the decision of Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393 is that "*the provision of the Recovery of Loans (Special Provisions) Act No 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank or the economic development of Sri Lanka*"

Considering the facts of this appeal I am in full agreement with my Learned brothers that the interpretation that needs to be given Recovery of Loans (Special Provisions) Act No 4 of 1990 by this court is that the Act applies to any property mortgaged to the bank as security for any loan in respect of which default has been made irrespective of whether the mortgagor is the borrower or a third party and not the ratio as of the above mentioned case.

However, we must keep in mind that prior to the decision of Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393, where the majority decision gave a restrictive interpretation of the term borrower and declared invalid *parate* execution of the third party mortgages, innocent third party borrowers had no protection against *parate* executions under the Recovery of Loans (Special Provisions) Act No 4 of 1990 and we must ensure that innocent third party borrowers can still avail this avenue of justice in future.

In order to ensure that justice is done by this court I believe that we only need to analyse the relevant legal provisions, address the essential points, the lacunas and shortcomings of the abovementioned judgement, as it is better to articulate our arguments legally and limit it to so.

I have had the advantage of reading the observations made by Hon. Justice E.A.G.R. Amarasekara and I agree with his observation that "**the 2nd question of law has to be answered stating that any director of a corporate entity who mortgaged his property for a loan obtained by the corporate entity is a borrower within the meaning of Act No.4 of 1990**." Since the 1st question of law is answered in the positive it is only logical that the 2nd question of law, namely that the director of a corporate entity who mortgages his property for a loan obtained by that corporate entity is a borrower within the meaning of the Act is also answered in the positive. The Ratio in the case of HNB v Jayawardhena [2007] 1 S L R is that the veil of incorporation can be lifted in certain instances, excerpts of the case are set out below;

"*To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.*

As far as this case is concerned, it is quite obvious that the 1st and 2nd respondents, being directors of Nalin Enterprises Pvt. Ltd. benefited from the facilities made available to the said company by the petitioner bank, and to that extent they cannot claim the mortgages which secured the said facilities fall within the category of " third party mortgages" as contemplated in the majority judgments of this court in Ramachandra v. Hatton National Bank. The 1st and 2nd Plaintiffs are integrated to Nalin Enterprises Ltd. and when Nalin Enterprises sought to obtain facilities from the petitioner bank, the borrowers are in fact the said Nalin Enterprises and 1st and 2nd Plaintiffs. It would be an exercise totally illogical to seek to differentiate the 1st and

2nd Plaintiffs as 3rd party mortgages within the meaning of Ramachandra v. Hatton National Bank.."

Considering the analysis by Hon. Justice A.H.M.D. Nawaz and the observations by Hon. Justice E.A.G.R. Amarasekara, our conclusion should be that even in instances where the directors of a company are the third party mortgagors they will not be able to seek redress under the case of Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393 as the impact of our judgement is that any third party borrower is liable for *parate* execution under the provisions of the Act, regardless of him being a director of the company or not and as such the veil of incorporation is automatically lifted.

Based on both draft judgements, I am of the view that Hon. Justice A.H.M.D. Nawaz has made a rather thorough analysis of the law and addressed all 4 questions of law on which leave has been granted comprehensively, whilst Hon. Justice Samayawardhena has considered that the 2nd question of law and concluded that it does not arise. I believe that the 2nd question of law should be addressed in order avoid confusion, owing to which I am more inclined to agree with the draft of Hon. Justice A.H.M.D. Nawaz, subject to the above mentioned observations.

Judge of the Supreme Court

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

S.C. Appeal 113/2019

S.C./ HCCA/ LA/ 302/2018

SP/HCCA/RAT/FA/58/2017

D.C. Rathnapura Case No. 18509/P

In the matter of an Application for Leave to Appeal in terms of Section 5(C)1 of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006.

Liyana Kankamalage Munasinghe.

Panukerapitiya, Hidellana.

Plaintiff

Vs.

1.Kandegedara Ralalage Podimanike.

2.Tepulangoda Mudiyanselage Sudesh Prasanna.

3.Tepulangoda Mudiyanselage Sujith Prasanna

All of Nugagahadeniya, Godella, Panukerapitiya, Hidelllana.

4.A. G. Kusumawathie.

Tepulangoda, Hidellana.

5.Sujith Lakshman Muthumala.

6.Indrani Muthumla.

7.Nilani Muthumala.

8.Pradeepa Muthumala.

All of Tepulangoda, Hidellana.

Defendants

And Between

1.Kandegedara Ralalage Podimanike.

2.Tepulangoda Mudiyanselage Sudesh Prasanna.

3.Tepulangoda Mudiyanselage Sujith Prasanna

All of Nugagahadeniya, Godella, Panukerapitiya, Hidelllana.

Defendant-Appellant

Vs.

Liyana Kankamalage Munasinghe.

Panukerapitiya, Hidellana.

Plaintiff-Respondent

1.A. G. Kusumawathie.

Tepulangoda, Hidellana.

2.Sujith Lakshman Muthumala.

3.Indrani Muthumla.

4.Nilani Muthumala.

5.Pradeepa Muthumala.

All of Tepulangoda, Hidellana.

Defendant- Respondents

And now between

Liyana Mudiyanselage Munasinghe.

Panukerapitiya, Hidellana.

Mistakenly referred to as

Liyana Kankamalage Munasinghe.

Plaintiff-Respondent-Appellant

Vs.

1.Kandegedara Ralalage Podimanike.

2.Tepulangoda Mudiyanselage Sudesh Prasanna.

3.Tepulangoda Mudiyanselage Sujith Prasanna

All of Nugagahadeniya, Godella, Panukerapitiya, Hidelllana.

1st to 3rd Defendant-Appellant-Respondents

1.A. G. Kusumawathie.

Tepulangoda, Hidellana.

2.Sujith Lakshman Muthumala.

3.Indrani Muthumla.

4.Nilani Muthumala.

5.Pradeepa Muthumala.

All of Tepulangoda, Hidellana.

Defendant- Respondents- Respondents

Before : Buwaneka Aluwihare PC, J.

E. A. G. R. Amarasekara J and

Janak De Silva J.

Counsel : R.M.D Bandara with Ms. Lilanthi De Silva for the Plaintiff- Respondent-Appellant.

Ms. Sudharshani Cooray for 1-3rd Defendant-Appellant- Respondent.

Parakrama Agalawatta with Manodya Gopayage for the 4th to 6th Defendant- Respondent- Respondent.

Argued on : 01.11.2021

Decided on : 13.11.2023

E.A.G.R. Amarasekara J

The Plaintiff – Respondent – Petitioner (hereinafter referred to as Plaintiff) instituted the partition action No. 18509/P in the District Court of Ratnapura on 13/01/2003 to partition a land called "Nugagahadeniya Godella" in extent of 120 perches, which is described in the schedule to the plaint.

As averred in the plaint, the Plaintiff's position is that;

i. The original owner of the undivided 1/3rd of the corpus was Nalla Gamage Albert. The said Nalla Gamage Albert purchased said undivided 1/3rd share upon deed No. 5903 dated

25/8/1924. Thereafter, through deeds No. 17634, dated 26/09/1929, 15362 dated 26/2/1931 and 2342 dated 15/5/1974 executed by predecessors in title referred to in the pedigree of the Plaintiff, the Plaintiff became entitled to the said 1/3rd share. As per the said deeds said Albert had conveyed his rights to M.A. Richard Senaviratne and M.M. Don Andiris and said Senaviratne had conveyed his rights to said Andiris and at the end said Andrias has conveyed his rights to the Plaintiff.

ii. Plaintiff is not aware of the original owners of the remaining 2/3rd share or how that share devolved upon other co-owners.

iii. 1st, 2nd and 3rd Defendants were made parties as they are in occupation of the land claiming that they have rights to it, but the Plaintiff is unaware as to how they gained such rights.

iv. Though it was revealed through a search in the land registry that certain deeds have been executed in relation to the corpus, he could not ascertain how the rights in the corpus devolved on the executants of those deeds or their heirs.

Thus, the Plaintiff prayed for a partition decree to get his 1/3rd share partitioned.

1st, 2nd and 3rd Defendant Appellant Respondents (hereinafter referred to as the 1st,2nd and 3rd Defendants) filed their statement of claim and stated inter alia that;

I. Tepulangoda Mudiyanselage Oushadahamy was the original owner of the land by virtue of his possession for a long period.

II. As aforesaid Tepulangoda Mudiyanselage Oushadahamy died intestate leaving his estate requiring no administration, his son Tepulangoda Mudiyanselage Ratranhamy became the sole owner.

III. As said Tepulangoda Mudiyanselage Ratranhamy died leaving his estate requiring no administration, his son T.M. Kirimudiyanse became the owner of the entire corpus.

IV. As aforesaid T.M. Kirimudiyanse died intestate leaving his estate requiring no administration, his children Tepulangoda Mudiyanselage Ariyapala, Sumanawathie, Dayawathie, Karunadasa, Sumanapala, Leelawathie, Karunawathie, Seelawathie and Dharmadasa became the heirs but by a settlement among the family members, siblings of aforesaid Ariyapala renounced their rights for the benefit of said Ariyapala. Thus, said Ariyapala became the sole owner.

V. Aforesaid Tepulangoda Mudiyanselage Ariyapala died intestate leaving his estate requiring no administration and his wife 1st defendant Kandegedara Ralalage Podimenike and children Sudesh Prasanna (2nd Defendant) and Sujith Prasanna (3rd Defendant) became his heirs.

Thereby 2nd and 3rd Defendants became entitled to undivided ½ share of the corpus subject to the life interest of the 1st Defendant.

VI. Aforesaid Defendants and their predecessors have possessed the corpus undisturbed and uninterrupted for more than 10 years and they have got prescriptive rights in terms of Prescription Ordinance and they own the structure and plantation depicted in the plan No. 437.

1st, 2nd and 3rd Defendants prayed for the dismissal of the action or to partition the land between 2nd and 3rd Defendants subject to the life interest of the 1st Defendant.

A.G Kusumawathie, 1st Defendant Respondent Respondent who was the 4th Defendant before the District Court (hereinafter referred to as the 4th Defendant) filed her amended statement of claim on 29/10/2015 and stated inter alia that;

I. Tepulangoda Mudiyanselage Punchirala was the original owner of the land and he died intestate leaving his estate requiring no administration. Thus, his son Tepulangoda Mudiyanselage Mudalihamy alias Mudiyanse became the owner.

II. Aforesaid Mudalihamy alias Mudiyanse died intestate leaving his estate requiring no administration and his children Tepulangoda Mudiyanselage Punchimahaththaya, Mohottihamy, Appuhamy, Dingiri Menike and Podimenike each became entitled to undivided 1/5th share.

III. Aforesaid Appuhamy, out of his 1/5th conveyed 1/20th of the corpus to T.A. Haramanis Appu, W.A. Luis Appuhamy and to aforesaid Podimenike by deed No.11642 dated 22.06.1927.

Thereafter, the 4th Defendant in her amended statement of claim proceeded to describe her pedigree while referring to some family arrangements to indicate that she is entitled 23/30 of the corpus. This Court observes that the 4th Defendant originally filled her statement of claim along with 5th to 8th Defendants in the original Court who are the 2nd to 5th Defendant Respondent before this Court. In the said original statement of claim, there was no reference to the aforesaid Deed No.11642.

Action proceeded to trial on one admission and 13 points of contest recorded on 02.06.2009. The only admission so recorded clearly indicates that there was no dispute as to the identity of the corpus and the corpus is depicted in plan no.437 made by S.N. Senaratne L.S.

The Plaintiff gave evidence and marked all the deeds referred to in his pedigree in evidence as P1, P2, P3 and P4. Those deeds were marked without any objection. As per section 68 of the Partition Law, formal proof of the execution of any deed is not necessary where the genuineness of such deed is not impeached.

As per the decision in **Sri Lanka Ports Authority and Another V Jugolinija Boal East (1981) 1 Sri L R 18,** the documents for which the objections were not reiterated at the close of the opponent's case become evidence for all the purposes of the case. Moreover, section 3 of the Civil Procedure Code (Amendment) Act No.17 of 2022 confirms that such deeds not objected by the opposite party shall be admitted as evidence without further proof. The oldest deed P4 was executed in 1924. As per the evidence given by the Plaintiff, it appears his position is that even though he does not occupy the corpus he has enjoyed his rights by getting his share through produce of the corpus as well as when trees were sold taking the money according to his share. The Plaintiff has further stated that Ariyapala, father of the 1st, 2nd and 3rd Defendants, when putting up his house, cut Jak trees and due to his close friendship, he gave permission to cut those trees. The four boundaries found in the Schedules of the said deeds tally with the Corpus of this case. Thus, it is clear that the Plaintiff had placed sufficient evidence to show his paper title to 1/3rd of the Corpus through the evidence given before the District Judge.

The Position of the 1st, 2nd and 3rd Defendants as per their statement of claim seems to be that one Oushadahamy, the person they claimed as the original owner acquired title by long possession, in other words by prescription, and thereafter, others in their pedigree got title through succession. Section 3 of the Prescription Ordinance is the section that enables a party to an action get a decree on his prescriptive rights. Thus, a Plaintiff, a Defendant or an Intervenient may get a decree on his or her prescriptive title but it is questionable whether a Court can decree that a person who was not a party acquired prescriptive title somewhere in the past. [**see Punchi Rala V Andris Appuhami 3 SCR 149, K.D. Edwin Peeris V Kirilamaya 71 N L R 52, Terunnanse V Menike 1 N L R 200, Timothy David V Ibrahim 13 N L R 318, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197, Raman Chetty et al V Mohideen 18 N L R 478**]. However, I do not intend to say that a party cannot tag on to the possession of his predecessors to claim prescriptive title. In fact, a party can. [see **Terunnanse v Menike 1 N L R 200, Wijesundara and others V Constantine Dasa and Another (1987) 2 Sri L R 66, Kirihamy Muhandirama V Dingiri Appu 6 N L R 197**]. What I wish to say is that it is doubtful, whether in terms of section 3 of the Prescription Ordinance, a Court can decree that the so-called original owner, Oushadahamy acquired title by prescription as part of its decree. Anyway, this Court need not go deep into this issue as there was no evidence acceptable before the learned District Judge to say that Oushadahamy was the sole original owner and his grandson Kirimudiyanse became the sole owner through inheritance after Rathranhamy, the son of Oushadahamy, as per the pedigree stated by the 1st to 3rd Defendants.

As per the statement of claim of the 1st to 3rd Defendants, Kirimudiyanse was the grandfather of 2nd and 3rd Defendants and father-in-law of the 1st Defendant. Dangaswela Pathirannehalage Piyasena and Nissanka Arachchilage Dhanapala, (the sons – in – law of aforesaid Kirimudiyanse) and 2nd Defendant, Sudesh Prasanne had given evidence on behalf of 1st, 2nd and 3rd Defendants. Dangaswela Pathirannehalage Piyasena in his evidence has clearly stated that aforesaid Kirimudiyanse was entitled only to 1/5th share of the corpus and that he does not know who is entitled to the balance 4/5th share. He was 80 years old when giving evidence and was the eldest among the witnesses for the 1st to 3rd Defendants. The 2nd Defendant was only 37 years when he was giving evidence. Though he has stated that said Piyasena, his own witness, had given false evidence (at page 143 of the brief), he admits that Piyasena had a better knowledge than him regarding the entitlements to the Corpus and what Piyasena had stated may be correct as he is elder than him- vide page 149 of the brief. The 2nd Defendant further states in his evidence that the Plaintiff and his father, Ariyapala had a relationship and he does not have knowledge regarding any arrangements with regard to property and transactions between them- vide pages 151 - 153 of the brief. Aforesaid Dhanapala while giving evidence admits that he knows only about the possession and not about the pedigree- vide page 164 of the brief, and he does not know regarding the rights of Kirimudiyanse. None of these witnesses of the 1st to 3rd Defendant has placed any acceptable evidence regarding the sole original ownership of Oushadahamy or thereafter of his son Ratharanhamy. In fact, due to the evidence of aforesaid Piyasena with regard to the ownership of 1/5th share of Kirimudiyanse, which is contrary to sole ownership of Kirimudiyanse at one time, it is difficult to accept the purported pedigree starting from original sole ownership of Oushadahamy as presented by the 1st to 3rd Defendants in their statement of claim as true. Even though, there is evidence to show that 1st to 3rd Defendants have occupied the corpus, due to the evidence relating to 1/5th share of Kirimudiyanse and lack of knowledge with regard to the relationship between Plaintiff and the father of the 2nd and 3rd Defendants regarding the property, it is difficult establish adverse possession to prove prescriptive title as claimed by the 1st to 3rd Defendants, where there is no evidence to show that there is something similar to ouster in relation to the other co-owners. The 1st to 3rd Defendants cannot claim prescriptive title in the abstract, it must be by possession adverse to the true ownership [see **Fernando V Wijesooriya et al. 48 N L R 320** and **I. De Silva V Commissioner General of Inland Revenue 80 N L R 292**]. True ownership revealed through evidence is the paper title of the Plaintiff and the co-ownership claimed by the 4th Defendant through a deed and inheritance which will be referred to later in this judgment. Now it seems that the 1st -3rd Defendants attempt to argue before this court that there was no proof of co-ownership by the Plaintiff. If they challenge the Co-ownership established through paper title, it is questionable

against whose true ownership they claimed prescriptive title. As per section 3 of the Prescription Ordinance it has to be through adverse possession to the title claimed by the opposite party. It must be further observed that the 2nd Defendant while giving evidence before the District Court, first had tried to avoid admitting that 4th Defendant Kusumawathie is a relative but later has admitted that 4th Defendant Kusumawathie belongs to the same Family indicating close relationship – vide page 141 of the brief. Perhaps, his attempt to hide the relationship may be an attempt to hide coownership. The learned District Judge has given the 1st to 3rd Defendants shares from the 1/5 share which was once belonged to Kirimudiyanse as revealed by their own witness Piyasena. As they are physically occupying the corpus, their possession must relate to a lawful right. Only lawful right that is seen from the evidence is the inheritance to the rights of said Kirimudiyanse.

The 4th Defendant giving evidence, has stated that the Plaintiff and she are co-owners and she has no objection for allotting 1/3rd share to the Plaintiff. She has also stated that the predecessors in title of the Plaintiff had rights in the corpus – vide pages 241 and 242 of the brief. She in her evidence refers to occasions where parts of produce were given to her and also to a dispute arose between 1st,2nd and 3rd Defendants and her regarding cutting of coconut trees- vide page 194 of the brief. The 4th Defendant has attempted in his evidence to establish a pedigree commencing from one Thepulangoda Mudiyanselage Punchirala and has marked a deed no.11642 dated 22.06.1927 relating to a share of 1/20th of the corpus. While giving evidence 4th Defendant has stated that Podimenike and Appuhamy in her pedigree had 1/5th each at one time.

The learned District Judge after the conclusion of the trial has delivered the judgment on 29/03/2017, allotting shares to the Plaintiff, 1st,2nd ,3rd and 4th Defendants as follows;

The Plaintiff -	1/3	=	60/180
1st Defendant -	1/90	=	2/180
2nd Defendant-	1/180	=	1/180
3rd Defendant-	1/180	=	1/180
4th Defendant-	13/60	=	39/180
Unallotted Shares;			
For Kirimudiyanse's children except Ariyapala	8/45	=	32/180

For two vendees in deed No.11642, namely Dingiri Menike(Sic) and Louis Appuhamy 2/60 = 6/180

Not proved for anyone 39/180

In her judgment, the learned District judge has found that;

- There is no dispute with regard to the identification of the corpus among the parties and it is depicted as Lot 1 in plan No.437 made by S.N. Senaratne, marked X.
- As per the contents of P4 which is a very old deed, at one time 1/3rd of the Corpus belonged to one Kukule Kankamalage Arnold Hamine and the said 1/3rd share devolved on the original owner mentioned in the pedigree of the Plaintiff, namely Nallagamage Albert due to the execution of deed marked P4. Thereafter, due to the execution of deeds marked P1, P2 and P3 said 1/3rd share now belongs to the Plaintiff.
- There is no evidence to establish that the original owner as described in the plaint, namely Oushadahamy had sole ownership to the corpus.
- Although 1st, 2nd and 3rd Defendants claimed that they have prescriptive rights to the entire corpus, witness Piyasena who gave evidence on behalf of them has stated that Kirimudiyanse who was the grandfather of 2nd and 3rd Defendants was entitled only to 1/5th share and the evidence clearly establishes that 4/5th share of the corpus belongs to others. They have not established that they have prescriptive rights to the corpus in entirety since there is no evidence of 10 years possession in terms of section 3 of the Prescription Ordinance after something similar to ouster regarding the other co-owners. Deeds No. 39617 and deed no. 31 establishes that Kirimudiyanse the predecessor of 1st to 3rd Defendants had a title to the corpus. Hence 1st, 2nd and 3rd Defendants are co-owners of the corpus and they get the 1/9th from the 1/5th share of Kirimudiyanse which was devolved on Ariyapala who was one of the 9 children Kirimudiyanse had. The balance 8/9th of the 1/5th of Kirimudiyanse's entitlement has to be kept unallotted for the other siblings of Ariyapala.
- There is a lack of acceptable evidence to come to a decision that at one time, Punchirala who has been described as the original owner by the statement of claim of the 4th Defendant was the sole owner of the corpus. However, Podimenike and Appuhamy in the said pedigree of the 4th Defendant had 1/5th each and Said Appuhamy had transferred 1/20th of the corpus to said Podimenike by deed No. 11642 marked 4V2. Hence, said Podimenike is entitled to 13/60th share

of the corpus which at the end has devolved on the 4th Defendant. The 2/60th conveyed to other two donees of 4V2, namely, Haramanis and Louis Appuhamy has to be unallotted for them or people who claims under them. (It appears that the name of Haramanis has been incorrectly mentioned in the share list contained in the Judgment as "Dingiri Menike")

- The balance 39/180th share has to be kept unallotted as entitlement of that share was not proved in favour of anyone.

Being aggrieved by the said Judgment, the 1st, 2nd, 3rd Defendants appealed to the Civil Appellate High Court of Rathnapura stating inter alia that:

- The learned District Judge has not investigated the title properly,
- Learned District Judge has not considered the evidence which established that 1st to 3rd Defendants have prescribe to the entire land.
- Learned District Judge has not evaluated the evidence properly,
- Learned District Judge has not considered the fact that when the pedigrees are different and when the parties claim on different original owners, possession by one owner cannot be considered as the possession by the other owners.

The 1st to 3rd Defendants prayed for to set aside the judgment dated 29/3/2017 and to grant the relief prayed for by them in their statement of claim or alternatively to order trial de novo.

The Civil Appellate High Court of Rathnapura delivered its judgment on 25/07/2018 setting aside the judgment of the learned District Judge dated 29/03/2018 and dismissed the partition action. Honourable High Court Judges have stated in his judgement inter alia that;

- It is clear that the Plaintiff, 1st to 3rd Defendants and 4th Defendant have claimed title to the Corpus in three separate pedigrees.
- The plaintiff has not disclosed who the original owner of the corpus was and a devolution of title from the Original Owner. He has shown a pedigree only for 1/3rd share of the Corpus. He has failed to show the common ownership among the Plaintiff and the Defendants.
- The Plaint has not complied with the sections 2,4, and 5 of the Partition Act and therefore, plaint should be rejected *in limine* in terms of section 7 of the Partition Act.
- Acceptance of 3 different pedigrees by the learned District Judge to order partitioning of the corpus is erroneous.

Further, the High Court held as follows;

"*The 1st, 2nd, 3rd Defendants and 4th Defendant have shown a relationship up to the Defendants but they were unable to establish their relationship and its connection to the land in partition by evidence. Although they stated that they were in possession it is uncertain whether it is permissive or prescriptive*".

As a result, the High Court decided that this land cannot be partitioned in accordance to the partition law and set aside the District Court judgment dated 29/03/2017 and dismissed the partition action but refused to grant reliefs "b" and "c" of the petition of appeal of the 1st to 3rd Defendants which prayed for a re-trial and relief as prayed for in their statement of claim.

Being aggrieved by the judgment of the Civil Appellate High Court, the Plaintiff sought leave to appeal from the Supreme Court and, on 25.06.2019 leave was granted on the four questions of law. The said questions of law will be mentioned in the latter part of this Judgment.

Even the learned High Court Judges have come to the conclusion that it is uncertain whether the possession of 1st to 3rd Defendants is permissive or prescriptive. In other words, they also have come to the conclusion that 1st to 3rd Defendants failed in proving prescriptive possession. 1st to 3rd Defendants have not appealed against this finding. On the other hand, as mentioned before, evidence given by their own witness has shown that Kirimudiyanse, the grandfather of the 2nd and 3rd Defendants, under whom they claim title to the whole land, had only 1/5th share in the corpus. No acceptable evidence has been placed to show that there was ouster or something similar to ouster in relation to the other co-owners who held the other 4/5th of the Corpus or in relation to the Plaintiff and the 4th Defendant who had shown common ownership through deeds, and thereafter, 1st to 3rd Defendants or their predecessors had commenced adverse possession and continued it for ten years. Neither have they shown that they or their predecessors came to the land in a subordinate character and through an overt act change the nature of their possession and commenced adverse possession and continued it for ten years. Thus, it is clear that the claim of title to the corpus through prescription by the 1st to 3rd Defendants cannot hold water.

Among the grounds given by the learned High Court Judges to set aside the Judgment of the District Court and dismiss the partition action, it is stated that the Plaint has not complied with the section 2,4 and 5 of the Partition Act and the Plaintiff has failed to reveal an original owner and devolution of title that flows from the original owner. Even the counsel for the 1st to 3rd Defendants in his written submissions has stated that it seems that the Plaintiff has complied with the said sections- vide paragraph 8 of the written submissions dated 14.12.202021. Thus, I need not elaborate much on those grounds. However, it is

worthwhile to make few observations on those grounds. It appears that no challenge has been made before the District Court on the ground that the Plaint was defective -vide points of contests raised on 02.06.2009. In K. **Vethavanam and Two Others V J Retnam 60 N L R 20**, which refers to a similar provision in a previous Partition Act, it was held that once a plaint is accepted and it is not exfacie defective, the Court has no power to reject it subsequently under section 7, read with section 4 of the Partition Act No.16 of 1951. It must be observed that in the present Partition Act, even when the Plaintiff does not show due diligence to prosecute the action, the Court may endeavour to compel the parties to bring the action to a termination and even permit a Defendant to prosecute the action as the Plaintiff- vide section 70(1). It shows that the scheme contemplated in the Act is to reach a finality whenever possible once an action is filed without dismissing based on the failures of the Plaintiff. As admitted by the Counsel for the 1st to 3rd Defendants' Counsel in his written submissions, there does not seem to be any exfacie defects in the plaint.

Section 2 of the Partition Act states that where any land belongs in common to two or more owners, any one or more of them, may institute an action for partition or sale of the land in accordance with the provisions of Law. Thus, any co-owner of a land can institute a partition action. The Plaintiff in his plaint has referred to the chain of deeds by which he claims 1/3rd of the land showing that he has only a share in the land and he has not revealed the entitlement to the balance 2/3rd of the land. He has made the Defendants who are there in the land parties to the action. The contents of the plaint clearly indicate that the Plaintiff claims him to be a co-owner but he does not know how the balance 2/3rd devolve on the other co-owners. I do not see any defect as far as section 2 is concerned.

Section 4(1)(c) of the Partition Act requires the Plaintiff to include in the plaint the names and addresses of all persons who are entitled to or claim to be entitled to any right, share, or interest to, of, or in that land or to any improvements made or effected on or to that land and the nature and extent of any such right, share or improvements, **so far as such particulars are known to the plaintiff or can be ascertained by him.** Section 4(1)(d) requires the Plaintiff to include in the plaint a statement setting out the devolution of title of the Plaintiff, and, **where possible**, the devolution of title of every other person disclosed in the plaint as a person entitled or claiming to be entitled to the land, or to any right, share or interest to, of, or in that land. Section 5 requires the Plaintiff to include in his plaint as parties to the action **all persons who to his knowledge** are entitled or claim to be entitled to any right, share, or interest to, of or in the land or to any improvement. The phrases that I have highlighted above indicate that what is expected from the Plaintiff is to reveal what he knows or what he can ascertain. The sections referred to above do not require

the Plaintiff to include in the plaint a devolution of title that commences from an original owner who had the sole ownership to the corpus or from original owners who had ownership to the entire corpus. It must be mentioned here that it is impractical and impossible to mention an original owner/ original owners who held the property in its entirety many generations ago unless such facts can be found on documents such as deeds or land registry entries because any other reference to such an original owner or original owners has to be depend on hearsay evidence and not on personal knowledge of the fact, and as such, on such occasions the Plaintiff may face difficulties in proving his pedigree. With regard to what is discussed above it is pertinent to note that Law does not compel one to do impossible things (Lex *non cogit ad impossiblia*). If one applies the said principle to the case at hand, law does not expect the Plaintiff to reveal what the Plaintiff does not know or cannot ascertain. Now I would prefer to refer to some case laws that has some relevancy to what was discussed above even though some of them were decided in terms of the Partition Ordinance which had similar provisions.

In **Sinchi Appu V Wijegunasekara 6 N L R 1,** it was held that a person claiming to be the owner of an undivided share of a land and to be therefore entitled to possession of it, is competent to maintain an action to have that partitioned. **Gunawardene V Baby Nona 47 N L R 31** also have expressed the same view. In **Appuhamy V Samaranayaka 19 N L R 403 at 405**, Sampayo J has expressed that section 2 of the Ordinance which requires the Plaintiff or Plaintiffs to state certain particulars in the plaint, including the names and residences of all the co-owners and mortgagees, expressly provides that this shall be done so far as the said matters or things or any of them shall be known to him or them.

It is important to state what was expressed in **Magilin Perera V Abraham Perera (1986) 2 Sri L R 208 at 210**.

"*When a partition action is instituted, the plaintiff must perforce indicate an original owner or owners of the land. A Plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and, even if it be so claimed, such claim need not necessarily and in every instance be correct because when such an original owner is shown it could theoretically and actually be possible to go back to still and earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the plaintiff if it be so established need not necessarily result in the case of the plaintiff failing. In like manner if it be seen that original owner is in point of fact someone lower down in the chain of title than the one shown by the plaintiff that again by itself need not ordinarily defeat the*

plaintiff's action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on question such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership."

The above show that with regard to matters relating to original ownership, Courts have to take a sensible and realistic approach. In the matter at hand, the Plaintiff has shown an original ownership for the 1/3rd he claims. It is not realistic to expect him to reveal what he does not know. He has made the 1st to 3rd Defendants who occupy the corpus as they may have a claim. The claim presented by the said 1st to 3rd Defendants is based on inheritance and prescription. Reasonable Court cannot expect that the Plaintiff could have ascertained the pedigree that gives them rights as it is not recorded anywhere. It must be noted that the partition Act provides for registration of *lis pendens*, public notice of institution of the action and notices for the claimants before the surveyor etc. to give notice of the action for anyone who has an interest in the corpus to come and present his claim.

In that backdrop, I do not find that said grounds that the plaint is not in accordance with the section 2,4 and 5 of the Partition Act and the Plaintiff has failed to disclose an original owner and devolution of title from the said original owner cannot be considered as viable grounds to hold that the decision of the High Court is correct. Partition action is intended to terminate the co-ownership. If the Plaintiff can prove that he is a co-owner and his share in the corpus through a pedigree presented to court, it is sufficient to get his share partitioned. It is not necessary to prove that co-ownership exist among Plaintiff and all the Defendants.

It is true that as learned High Court Judges have stated in their judgment that the Plaintiff,1st to 3rd Defendants and the 4th Defendants have claimed title to the corpus through three separate pedigrees but the finding of the learned High Court Judges that the learned District Judge accepted three different pedigrees cannot be considered as correct because the learned District judge has not accepted a pedigree commencing from the Oushadahamy or Punchirala who are the original owners in 1st to 3rd Defendants' pedigree and 4th Defendant's pedigree respectively. If the pedigree as presented by the 1st to 3rd Defendant and 4th Defendant were accepted then there could have been a conflict between pedigrees. Learned District Judge has accepted the pedigree of the Plaintiff for 1/3rd share which is based on title passed through deeds marked P1 to P4, which deeds were not challenged when tendered in evidence.

Thus, the learned District Judge has accepted the complete pedigree of the Plaintiff for the 1/3rd share he claims and found that Plaintiff is a co-owner in the corpus. Thus, there is a balance of another 2/3rd share in the corpus. Moreover, the learned District Judge, while denying the pedigree commencing from Oushadahamy to the whole land and prescriptive rights claimed by the 1st to 3rd Defendants, on the evidence before the court, has found that at one time, Kirimudiyanse was an owner for 1/5th share of the corpus as a co-owner. Aforesaid 1/5th share belongs to Kirimudiyanse could be accommodated within the aforesaid balance 2/3rd share. Considering the evidence placed before the District Court, similarly learned District Judge has not accepted the original ownership of Punchirala as per the pedigree of the 4th Defendant. Instead, the learned District Judge has come to the conclusion that at one time, Appuhamy and Podimenike mentioned in the pedigree of the 4th Defendant were entitled to 1/5th share each and at one time, they were co-owners. Aforesaid 2/5th share belonged to Appuhamy and Podimenike could be accommodated within the aforesaid balance 2/3rd share along with the 1/5th share belonged to Kirimudiyanse as a co-owner at one time. After considering the evidence placed before the District Court learned District Judge has decided that 1st to 3rd Defendants have inherited certain shares as mentioned in the District Court judgment. Thus, Part of the entitlement of Kirimudiyanse have devolved on the 1st to 3rd Defendants through Ariyapala, one of the children of Kirimudiyanse and rest of the share of Kirimudiyanse has been kept unallotted for the other children of Kirimudiyanse to be claimed by them or people who gain rights through them. Similarly, while taking into considering of the execution of deed marked 4V2 by Appuhamy, the learned District Judge has decided that 1/60 from the Corpus has been devolved on aforesaid Podimenike making her share entitlement 1/5+1/60= 13/60. The learned District Judge has decided that said 3/60th has devolved on the 4th Defendant through inheritance. The learned District Judge has kept the shares that should go to the other vendees in 4V2 unallotted in their name to be claimed later by them or people who gain rights through them. The learned District Judge has kept 39/180 share unallotted which includes the balance belonged to aforesaid Appuhamy after executing 4V2 and the share for which no original co-owner was proved. Thus, in my view, it is incorrect to say that the Learned District Judge has accepted three separate Pedigrees. What the learned District Judge has done was to allot shares as per the proved co-ownership and proved entitlements. In other words, the learned District Judge has accepted the original ownership for 1/3rd of one Arnoldhamine who was the predecessor in title to the original owner mentioned in the plaint and also accepted the Plaintiff's pedigree through which co-ownership for that 1/3rd share devolve on the Plaintiff. Further, it appears that the learned District Judge has considered on evidence before him that, at one time, Kirimudiyanse, Appuhamy and Podimenike had 1/5th each as original co-owners. Thus, the learned District Judge has decided to

allocate shares in the manner described in the Judgment of the District Court based on the proved co-ownership and share entitlements. This cannot be interpreted as acceptance of three different pedigrees as stated in the Judgment of the High Court.

The 1st to 3rd Respondents in their written submissions taken up the position that the Plaintiff failed to prove common ownership of the land. As mentioned before in this judgment, the Plaintiff has proved his pedigree and paper title to the corpus. The deeds (P1 to P4) he marked in that regard were not objected. As explained before in this judgment these deeds become evidence for all the purposes of this case and the said deeds establish that the Plaintiff has paper title to the corpus. As explained above, the prescriptive claim of the 1st to 3rd Defendants should fail. Thus, the Plaintiff's entitlement to the undivided 1/3rd has been established and hence his right to possess is also established – see **Leisha and another V Simon and another (2002) 1 Sri L R 148.** This evidence is sufficient to prove that the Plaintiff is a co-owner. It is not the task of the Plaintiff to prove who are the other co-owners, because by proving his entitlement is only to an undivided 1/3rd , the facts itself indicates that he is a co-owner with owners of other undivided 2/3rd of the corpus. However, the learned District Judge based on evidence has found that 1st to 3rd and 4th Defendants are co-owners to the Corpus.

For the reasons given above, the questions of law allowed by this Court on 25.06.2019, namely questions of law as mentioned in paragraph 16 (a)(e)(f) and (g) of the Petition dated 30.08.2018 can be answered as follows.

a) Is the determination of the High Court that the plaint should have been rejected *in limina* as Plaintiff has not complied with sections 2,4,5 and 7 of the Partition Act, is perverse and erroneous in law?

A. Answered in the affirmative.

e) Have the High Court Judges erred in law and in facts when the court decided that "the land cannot be partitioned as the Plaintiff has not disclosed the original owner of the land sought to be partitioned and devolution of title from the original owner?

A. Answered in the affirmative.

f) Have the High Court Judges erred in law and facts when they decided that learned District Judge erroneously accepted all three different devolutions of title to partition the land?

A. Answered in the Affirmative.

g) Has the High Court erred in law and facts when they decided that Plaintiff cannot maintain this action, in spite of the fact that Plaintiff has established that he has dominium to undivided 1/3rd share?

A. Answered in the Affirmative.

Hence, this Court decides to set aside the Judgment dated 25.07.2018 of the Civil Appellate High Court of Ratnapura while restoring the Judgment of the District Court.

This appeal is allowed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare PC, J.

I agree.

Judge of the Supreme Court

Janak de Silva, J.

I agree.

Judge of the Supreme Court

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

1. Centre for Policy Alternatives,
   No. 6/5, Layards Road,
   Colombo 05.
2. Dr. Paikiasoothy Saravanamuttu,
   No. 3, Ascot Avenue,
   Colombo 05.
   Petitioners in SC/FR/91/2021

Sithara Shreen Abdul Saroor,
No. 202, W.A. Silva Mawatha,
Colombo 06.
Petitioner in SC/FR/106/2021

Ambika Satkunanathan,
No. 27, Rudra Mawatha,
Colombo 06.
Petitioner in SC/FR/107/2021

SC/FR/91/2021
SC/FR/106/2021
SC/FR/107/2021

Vs.

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

2. Major General (retd) G.D.H. Kamal Gunaratne,
   Secretary, Ministry of Defence,
   No. 15/5, Baladaksha Mawatha,
   Colombo 03.
3. C.D. Wickramaratne,
   Inspector General of Police,
   Police Headquarters, Colombo 1.
4. Major General Dharshana Hettiarachchi,
   Commissioner General of Rehabilitation,
   Bureau of Commissioner General of Rehabilitation,
   No. 462/2, Kaduwela Road,
   Ganahena, Battaramulla.
   Respondents

1. Dr. Malkanthi Hettiarachchi,
   7A, De Soyza Mawatha,
   Mt. Lavania.
2. Al Haj Abdul Jawad Alim
   Ualiyallah Trust & Maulavee
   K.R.M. Sahlan Rabbane,
   B.J.M. Road, Kattankudy 05.
   Intervenient-Respondents

Before: Buwaneka Aluwihare, P.C., J.
Murdu N.B. Fernando P.C., J.
Mahinda Samayawardhena, J.

Counsel: Viran Corea with Luwie Ganeshathasan, Khyati Wikramanayake and Thilini Vidanagamage for the Petitioners in SC/FR/91/2021.

Suren Fernando with Khyati Wikramanayake for the Petitioners in SC/FR/106/2021.

Pulasthi Hewamanna with Harini Jayawardhana, Fadhila Fairoze and Githmi Wijenarayana for the Petitioners in SC/FR/107/2021.

Nerin Pulle, P.C., Additional Solicitor General, with Dr. Avanti Perera, Deputy Solicitor General for the Respondents.

Suren Gnanaraj with Rashmi Dias Goonewardena for the 1st Intervenient-Respondent.

Shehan De Silva with Naveen Maha Arachchige for the 2nd Intervenient-Respondent.

Argued on: 21.03.2022, 13.05.2022, 18.05.2023, 05.06.2023, 28.06.2023

Written Submissions:

By the Petitioners in SC/FR/91/2021 on 09.08.2022 and 03.08.2023

By the Petitioners in SC/FR/106/2021 on 15.03.2022 and 26.07.2023

By the Petitioners in SC/FR/107/2021 on 15.03.2022 and 31.07.2023

By the Respondents on 19.07.2023

By the 2nd Intervenient-Respondent on 14.03.2022 and 15.08.2023

By the 1st Intervenient-Respondent on 15.03.2022 and 23.10.2023

Decided on: 13.11.2023

Samayawardhena, J.

Introduction

The petitioners filed these fundamental rights applications (SC/FR/91/2021, SC/FR/106/2021 and SC/FR/107/2021) in their own right and in the public interest on the basis that several fundamental rights guaranteed under Chapter 3 of the Constitution are violated by the Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 1 of 2021 published in the Extraordinary Gazette No. 2218/68 dated 12.03.2021.

All three applications were supported together and the Court granted leave to proceed to the petitioners on the alleged violation of Articles 10, 12(1) and 13 of the Constitution. The Court also made an interim order suspending the operation of the said Regulations until the final determination of these applications.

Two petitioners were allowed to intervene. They are opposing the applications of the petitioners.

Arguments were taken up together and parties agreed to abide by a single judgment.

As stated in the Gazette, these Regulations were made by the President under section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 read with paragraph (b) of Article 4 of the Constitution.

The learned Additional Solicitor General appearing for the respondents submitted to Court that the primary purpose of promulgating these Regulations was the de-radicalization and rehabilitation of the misguided youth who either surrendered or were arrested following the horrific Easter Sunday attacks on 21.04.2019, driven by a violent extremist religious ideology.

While these fundamental rights applications were pending, the Bureau of Rehabilitation Bill was placed on the Order Paper of Parliament on 23.09.2022. This Bill was subsequently challenged in this Court for its constitutionality. On 04.10.2022, in SC/SD/54-61/2022, this Court ruled that the Bill as a whole was inconsistent with Article 12(1) of the Constitution and suggested ways to address the inconsistencies. Following this determination, the Bureau of Rehabilitation Act No. 2 of 2023 was enacted.

As section 3 of the Bureau of Rehabilitation Act states "*The objective of the Bureau shall be to rehabilitate drug dependent persons or <u>any other person as may be identified by law as a person who requires rehabilitation</u> and which may include treatment and adoption of various therapies in order to ensure effective reintegration and reconciliation, through developing socio-economic standards*." This Act contains extensive provisions related to rehabilitation. I find that several Regulations overlap or conflict with the provisions of the Bureau of Rehabilitation Act because the Bureau of Rehabilitation Act was non-existent when these impugned Regulations were promulgated. If these impugned Regulations had been promulgated after the determination of the Bureau of Rehabilitation Bill and the enactment of the Bureau of Rehabilitation Act, it would have saved more judicial time.

The learned Additional Solicitor General submits that the Act provides for the rehabilitation framework, while these Regulations provide for the procedure for sending individuals for rehabilitation.

All parties unequivocally endorse the idea of rehabilitation and acknowledge that restorative justice is better than retributive justice. Retributive justice is based on the punishment of offenders whereas restorative justice is based on repairing harm and reconciling parties. Nevertheless, the petitioners assert that the impugned Regulations will not achieve this goal. They contend that the rehabilitation contemplated in the impugned Regulations is tantamount to pre-trial punishment.

Locus standi

The learned Additional Solicitor General raised a preliminary objection regarding the *locus standi* of the petitioners to file these applications. He reiterates this objection in his post-argument written submissions as well. His argument is that although the petitioners state that they invoke the fundamental rights jurisdiction in public interest, they have failed to present at least a single affidavit of an arrestee or surrendee who has expressed a view that he or she does not wish to take part in the process of rehabilitation in lieu of prosecution as envisaged by the impugned Regulations. I do not think that the Court should adopt such a strict attitude in the invocation and exercise of the fundamental rights jurisdiction.

All the petitioners (except the 1st petitioner in SC/FR/91/2021 which is a company) are citizens of Sri Lanka.

In SC/FR/91/2021 there are two petitioners. The 1st petitioner is a company incorporated under the Laws in Sri Lanka whose one of the primary objectives is to contribute to public accountability in governance through the strengthening of awareness in society of all aspects of public

and policy implementation. The 2nd petitioner is the executive director of the 1st petitioner company.

The petitioner in SC/FR/106/2021 is reportedly a human rights activist working as a member of the *Mannar Women's Development Federation and Women's Action Network* that work with women directly affected by armed conflict in Sri Lanka.

The petitioner in SC/FR/107/2021 was a member of the Human Rights Commission in Sri Lanka and is involved in rehabilitation processes in different capacities.

The literal reading of Article 126(2) of the Constitution indicates that the fundamental rights jurisdiction of this Court can be invoked by a person whose rights have been infringed or are about to be infringed by executive or administrative action. However, the contextual reading of the Constitution as a cohesive whole and the jurisprudential dimension reveal that the invocation of fundamental rights jurisdiction is not circumscribed by rigid boundaries or limited by isolated provisions. Instead, it is intended to be a flexible and dynamic instrument for safeguarding the rights and liberties of the People.

The Preamble of the Constitution itself recognises the fundamental human rights, amongst others, as an intangible heritage that guarantees the dignity and well-being of the people of Sri Lanka.

According to Article 3 of the Constitution, sovereignty is in the People and sovereignty includes the fundamental rights. Article 4(d) states that the fundamental rights shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, except in the manner and to the extent provided for in the Constitution.

According to Article 17, every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of Chapter 3 of the Constitution.

In accordance with Article 27(2)(a), the State is committed to establishing a democratic socialist society with one of its objectives being "the full realization of the fundamental rights and freedoms of all persons".

Article 28(a) states that the exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka to uphold and defend the Constitution and the law.

The contours of fundamental rights jurisdiction have expanded over the years, and public interest litigation in response to violations and imminent violations of fundamental rights is no longer a new phenomenon in the global arena.

In the seminal case of *Bulankulama and Others v. Secretary of Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 258, Justice Amerasinghe observed:

> *[T]he Supreme Court has "sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right…" The Court is neither assuming a role as "trustee" nor usurping the powers of any other organ of Government. It is discharging a duty which has in the clearest terms been entrusted to this Court, and this Court alone, by Article 126(1) of the Constitution.*

> *Learned counsel for the 5th and 7th respondents submitted that, being an alleged "public interest litigation" matter, it should not be entertained under provisions of the Constitution and should be rejected. I must confess surprise, for the question of 'public interest litigation' really involves questions of standing and not whether there is a certain kind of recognized cause of action. The Court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka – rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant.*

In *Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others* [2008] 2 Sri LR 339 at 356, Justice Thillakawardane endorsed this view in the following manner:

> *With respect to the submission of standing, or locus standi, we concur with the opinion of the learned Judge in Bulankulama (supra), namely that petitioner in such public interest litigation have a constitutional right, given by Article 17, read with Articles 12 and 126, to bring forward their claims. Petitioners to such litigation cannot be disqualified on the basis that their rights happen to be*

> *ones that extend to the collective citizenry of Sri Lanka. The very notion that the organs of government are expected to act in accordance with the best interests of the People of Sri Lanka, necessitates a determination that any one of the People of Sri Lanka may seek redress in instances where a violation is believed to have occurred. To hold otherwise would deprive the citizenry from seeking accountability of the institutions to which it has conferred great power and to allow injustice to be left unchecked solely because of technical shortcomings. This position is consistent with several instances where this Court has held standing to be adequate.*

The petitioners in the instant applications have the *locus standi* to file these applications.

I will now consider the impugned Regulations separately to determine whether they violate Articles 10, 12(1), and 13 of the Constitution, as alleged by the petitioners.

The purpose of the Regulations

Regulation 1 provides the title of the Regulations. It captures the purpose of the Regulations and sets the tone for the rest.

> *These Regulations may be cited as the Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021.*

Article 10 of the Constitution reads as follows:

> *Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.*

Article 10 is a non-derogable and an entrenched provision. No restrictions can be placed on this Article. To amend Article 10, Article 83 requires a 2/3 majority in Parliament and approval through a referendum.

The freedom of thought, as enshrined in our fundamental rights, stands out as a cornerstone of democracy. The freedom of thought ensures that a person's mind remains beyond scrutiny. To infringe upon the freedom of thought is to undermine the very essence of a democratic society, for it is within the realm of individual thought that the roots of self-expression, personal liberty, human dignity and the flourishing of all other fundamental rights are nurtured.

The definition of "extremist religious ideology" presents inherent difficulties as religious beliefs may vary widely among individuals, with one person's religious ideology potentially appearing extreme to another. In the absence of clarity, there is a risk of arbitrary decisions being made where certain attitudes, behaviors, attire etc. can also be deemed as signs of extremist religious ideologies.

According to Article 10, the State cannot prevent a person from thinking or believing in some religious ideology on the basis that such thinking or belief is irrational or extreme. As I have already stated, Article 10 sets an absolute bar against such infringements. Nevertheless, if such person manifests his thinking or belief, freedom of thought can be restricted as permitted by Article 15 of the Constitution.

Whilst Article 10 guarantees freedom of thought to every person, Article 14(1)(a) guarantees freedom of expression of his thinking to every citizen. Article 14(1)(a) states "*Every citizen is entitled to the freedom of speech and expression including publication*". In *Fernando v. The Sri Lanka Broadcasting Corporation* [1996] 1 Sri LR 157 at 179, Justice Mark Fernando stated that "*Article 10 denies government the power to control*

men's minds, while Article 14(1)(a) excludes the power to curb their tongues."

Unlike freedom of thought, the freedom of speech and expression is not absolute. The full enjoyment of freedom of speech and expression is circumscribed by Article 15(2):

> *The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.*

According to Article 170, "law" means "*any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council*". This means the freedom of speech and expression can be limited by an Act of Parliament.

The manifestation of one's religion or belief is a fundamental right. Article 14(e) states:

> *Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.*

Freedom to manifest one's religion or belief is also subject to restrictions. Article 15(7) imposes restrictions on the manifestation of religion or belief.

> *The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just*

requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

For the purpose of Article 15(7), "law" includes not only Acts of parliament but also regulations made under the law for the time being relating to public security.

While Article 10 is theoretically absolute and untouchable, practically, it may not be so. It seems that learned counsel for the petitioners accept this.

Learned counsel for the petitioner in SC/FR/106/2021 says "*The role of the State, to be exercised in terms of the Constitution and the law, is limited to stepping in, in the event that imminent harm is to be caused to another. Even in the event that a person is prone to violence, the powers given to the State to prevent such harm do not extend to the power to brainwash, or to change the thoughts, conscience or religion of a person.*"

Learned counsel in SC/FR/91/2021 states "*the petitioners are not against the notion of de-radicalization and rehabilitation of persons holding violent extremist views. To the contrary, the petitioners strongly believe that rehabilitation is an essential pre-requisite of any progressive criminal justice system and when done properly and with due regard to the rights of persons, is the most appropriate way to deal with many persons who have violent extremist views.*"

In *Premalal Perera v. Weerasuriya* [1985] 2 Sri LR 177 at 192 Justice Ranasinghe (as His Lordship then was) stated that "*a religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected that unless where the claim is so bizarre, so clearly non-religious in motivation, it is not within the judicial function and judicial competence to inquire whether the person seeking protection has correctly perceived*

the commands of his particular faith". That means, if the religious belief is "*so bizarre, so clearly non-religious in motivation*", the protection under Article 10 is not available.

But the question is how to draw the line between "*a religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected*" and "*the claim is so bizarre, so clearly non-religious in motivation*"? What is the yardstick to decide that the religious belief is "*so bizarre, so clearly non-religious in motivation*"? People cannot be prosecuted, nay persecuted, for merely "holding religious ideology" which the State thinks to be "violent and extremist".

All seem to be in agreement that when there is an imminent threat in pursuit of "violent extremist religious ideology", the State can step in to prevent the harm for the greater benefit of all others. However, prevention of harm cannot be the pretext for arbitrary use of power to curb the rights of the People.

Although no issue of a legal nature arises from the title of a statute, the unqualified concept contained in the title of the impugned Regulations is inconsistent with Article 10 of the Constitution. This has been exacerbated by the fact that no definition has been provided for the term "violent extremist religious ideology" in the Regulations.

I must also note that in the Sinhala version of these Regulations, the word "violent" is not included in the title of the Regulations.

The objective of the Regulations

Regulation 2 deals with the objectives of the Regulations. However, a contextual reading of these objectives reveals that there is no nexus between the theme of the Regulations as manifested in the title and the

objectives of the Regulations. Regulation 2 is inherently illogical and irrational. It reads thus:

> *The objective of these regulations shall be to ensure, that any person who surrenders or is taken into custody on suspicion of being a person who by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups after the coming into operation of these regulations is dealt with in accordance with the provisions of the Act, and that persons who have surrendered or have been taken into custody in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.*

According to Regulation 2, the objective of these Regulations is not de-radicalization and rehabilitation of individuals holding violent extremist religious ideology. Regulation 2 does not expressly state such an objective.

Regulation 2 outlines two-fold objectives:

The first objective is "*to ensure that any person who surrenders or is taken into custody on suspicion of being a person who by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups <u>after the coming into operation of these regulations is dealt with in accordance with the provisions of the **Act**</u>*" (and not in accordance with the provisions of the impugned Regulations).

According to Regulation 9, "Act" means the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

I find it hard to understand this objective. Let me explain.

According to section 2(1)(h) of the Prevention of Terrorism (Temporary Provisions) Act, a person who "*by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups*" shall be guilty of an offence under that Act. These are the very same words used in Regulation 2 quoted above. The Act also includes provisions for individuals who are arrested on suspicion of engaging in the aforementioned acts. In this backdrop, it appears incongruous when Regulation 2 says after the coming into operation of the Regulations such persons are dealt with in accordance with the provisions of "the Act". The Act does not provide for rehabilitation.

The second objective is "*that persons who have surrendered or have been taken into custody in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.*" If the care and protection provided to those individuals remain the same even after these Regulations, I fail to see any significance in this objective.

Alternative interpretations of these objectives may be possible but this shows the inherent vagueness, ambiguity, and obscurity in Regulation 2. If the stated objective of the Regulations is not clear, how can their impact and applicability be properly assessed or understood? The existence of such real uncertainties within legal provisions may give rise to subjective

interpretation and arbitrary enforcement of the law, which may undermine the rule of law and legal predictability. This violates Article 12(1) of the Constitution which states "*All persons are equal before the law and are entitled to the equal protection of the law.*"

Who can be referred to rehabilitation?

Who can be referred to rehabilitation is set out in Regulations 3 and 5. Regulation 3 reads as follows:

> *Any person who, in connection with any offence under the provisions of,*
>
> *(a) the Act, or the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 published in the Gazette Extraordinary No. 2123/3 of May 13, 2019, surrenders or has surrendered to, or is taken or has been taken into custody by; or*
>
> *(b) the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2019 published in the Gazette Extraordinary No. 2120/5 of April 22, 2019, has surrendered to or has been taken into custody by,*
>
> *any police officer, or any member of the armed forces, or to any public officer or any other person or body of persons authorized by the President by Order, may be referred to a rehabilitation programme in terms of the provisions of these regulations.*

Regulation 3 delineates three distinct categories of individuals who may be directed to rehabilitation. They are:

A person who is in connection with any offence under the provisions of:

(1) the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979
(2) the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019
(3) the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2019

The term "connected with any offence" has not been defined in the impugned Regulations. Such a broad term permits the inclusion of virtually anyone under its scope, based on the subjective criteria of those authorised to arrest individuals under the impugned Regulations.

The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2019, which were made under section 5 of the Public Security Ordinance No. 25 of 1947 as amended, have since lapsed. Consequently, persons cannot now be taken into custody under the aforesaid third category.

The Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 were made under section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

People can still be taken into custody under the first and second categories because the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Regulations made thereunder are still in force.

Who can arrest individuals?

According to Regulation 3 of the impugned Regulations, persons in connection with any offence under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 can be taken into custody by

(1) any police officer,
(2) any member of the armed forces,
(3) any public officer,
(4) any other person or
(5) body of persons authorized by the President by Order.

There is no provision in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 which confers the President or the Minister to exercise such power.

The words used in Regulation 3(a) are "Any person who…surrenders or has surrendered to, or is taken or has been taken into custody" thereby covering not only past acts but also future acts. The plain reading of Regulation 3 confirms that this is applicable to the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 and the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2019. Regulation 3, when read in conjunction with Regulation 9, confers a *sui generis* power of arrest.

The argument of the learned Additional Solicitor General that "*Regulation 3 does not in any way confer power on any authority to arrest a person under these Regulations, but makes reference to persons whose surrender or custody is in terms of other laws/Regulations*" is unacceptable.

Similarly, the argument of learned counsel for the intervenient respondents that "*Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021) does not envisage nor empower the arrest or taking into custody of persons thereunder and only applies to those who are arrested or taken into custody under the Prevention of Terrorism (Temporary Provisions) Act No.*

48 of 1979 as amended, Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 and the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2019 and refers to categories of persons entitled to arrest thereunder" is also unacceptable.

Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 do not provide for arrest. Hence, before the impugned Regulations were made, arrest had to be done under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 identifies categories of persons who can arrest individuals. According to this Act, far from 'any person', even 'any police officer' cannot arrest individuals under the said Act. In terms of section 6(1) of the Act, "*any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary arrest any person".*

Can Regulations override the principal Act?

Regulations made under the principal Act cannot override the principal Act unless it is expressly provided. The Regulations are expected to be consistent with and subordinate to the enabling Act. What cannot be done through an amendment to the principal Act cannot be done through Regulations made under the same Act. The principal Act passed by the legislature cannot be changed by the executive by Regulations.

According to section 17(1)(c) of the Interpretation Ordinance No. 21 of 1901 as amended, where any enactment confers power on any authority to make rules, "*no rule shall be inconsistent with the provisions of any*

enactment". Section 17(2) enacts that "*In this section the expression "rules" includes rules and regulations, regulations, and by-laws.*"

Section 27(1) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, which invests the Minister with his rule-making power enacts "*The Minister may make regulations under this Act for the purpose of carrying out or giving effect to the principles and provisions of this Act.*" This does not permit the Minister to unilaterally extend or modify the enabling Act passed by Parliament. Such actions would constitute an encroachment on legislative power by the executive, which is contrary to the fundamental principles of democratic governance.

According to section 28 of the of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, "*The provisions of this Act shall have effect notwithstanding anything contained in any other written law and accordingly in the event of any conflict or inconsistency between the provisions of this Act and such other written law, the provisions of this Act shall prevail.*" Article 170 of the Constitution includes "Regulations" into the definition of "written law". This itself indicates that Regulations made under the Prevention of Terrorism (Temporary Provisions) Act cannot take precedence over the Act.

In the case of *The Attorney General of Ceylon v. W.M. Fernando, Honorary Secretary, Galle Gymkhana Club* (1977) 79(1) NLR 39 at 42-43, Justice Sharvananda (as His Lordship then was) stated:

> *A clear distinction has to be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in a resolution passed by the House of Representatives, a limb of the Legislature. A Court has no jurisdiction to declare invalid an Act of Parliament, but has jurisdiction to declare subordinate legislation to be invalid if it is satisfied that in making the subordinate legislation,*

> *the rule-making authority has acted outside the legislative powers conferred on it by the Act of Parliament under which such legislation is purported to be made. (…) The doctrine that subordinate legislation is invalid if it is ultra vires, is based on the principle that a subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivatory nature and must be exercised within the periphery of the power conferred by the enabling Act. If a subordinate law-making authority goes outside the powers conferred on it by the enabling statute, such legislation will ipso facto be ultra vires.*

In *Ram Banda v. The River Valleys Development Board* (1968) 71 NLR 25, the Minister, purporting to act under the rule-making powers conferred on him by certain sections of the Industrial Disputes Act, made Regulation 16 of the Industrial Disputes Regulations, 1958. Regulation 16 provided that "*every application under paragraph (a) or (b) of section 31B(1) of the Industrial Disputes Act in respect of any workman shall be made within three months of the date of termination of the services of that workman*". The appellant workman's application was rejected by the Labour Tribunal on the ground that the date of dismissal was more than three months anterior to the application. On appeal, the Supreme Court held:

> *Regulation 16 is ultra vires the rule-making powers conferred on the Minister by sections 31A(2), 39(1)(a), 39(1)(b), 39(1)(ff) and 39(1)(h) of the Industrial Disputes Act inasmuch as it in effect takes away from the workman, on the expiry of the stated period of three months, the right given to him by the legislature to apply to a Labour Tribunal for relief, and to that extent nullifies or repeals the principal enactment.*

Section 39(2) of the Industrial Disputes Act provides that every Regulation made by the Minister should be placed before Parliament for approval and that on such approval and publication in the Gazette, it shall be "as valid and effectual as though it were herein enacted". Justice Weeramantry took the view that such approval does not confer validity on a Regulation which is outside the scope of the enabling powers. His Lordship stated at page 38:

> *The mere passage of such regulation through Parliament does not give it the imprimatur in such a way as to remove it, through the operation of section 39(2), from the purview of the courts. The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter devolves on the courts alone.*
>
> *Against such a background, to view section 39(2) as a clock of validity which may be thrown around rules which in fact are ultra vires would be to erode rather than protect the supreme authority of Parliament. Regulations clearly outside the scope of the enabling powers and passing unnoticed in the heat and pressure of parliamentary business may then survive unquestioned and unquestionable; and functionaries manifestly exceeding their powers would thereby be able to arrogate to themselves a de facto legislative authority which de jure belongs to parliament alone.*
>
> *For the foregoing reasons I cannot subscribe to the view that the mere passage of a regulation through Parliament gives it the imprimatur of the legislature in such a way as to remove it from the purview of the courts through the operation of section 39(2).*
>
> *The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter*

devolves on the courts alone. It is a principle that has often been asserted, and bears reassertion, that just as the making of the laws is exclusively the province and function of Parliament, so is their interpretation the province and function exclusively of the courts. In the total and exclusive commitment of this function to the care of the courts, tradition, law and reason all combine; nor is any organ of the State so-well equipped in fact or so amply authorised by law to discharge this function. It is self-evident that Parliament is not nor ever can be the authority for the interpretation of the laws which it enacts.

In the view stated above, the courts as the sole interpreters of the law are committed to the duty, despite section 39(2), to consider whether a regulation travels beyond the powers conferred on its maker. Any other view of the law seems fraught with danger to the subject for it would free the acts of creatures of the legislature from the checks and scrutinies which alone are effective in ensuring that the delegated authority while operating to the uttermost limits of its powers does not travel beyond.

I thus reach the conclusion that it is within the competence of this court to subject such regulations to the ultra vires test despite section 39(2) and for the reasons earlier set out, I hold the rule in question to be ultra vires.

In *River Valleys Development Board v. Sheriff* (1971) 74 NLR 505 the majority did not agree with the above judgment. However, *River Valleys Development Board v. Sheriff* was overruled in *The Ceylon Workers' Congress v. The Superintendent, Beragala Estate* (1973) 76 NLR 1, which held that *Ram Banda v. The River Valleys Development Board* had been correctly decided. The dicta of Justice Weeramantry in *Ram Banda v. The River Valleys Development Board* was followed by a series of subsequent

decisions. Those decisions include *Wickremasekera v. Ganegoda* (1973) 76 NLR 452, *Rahuman v. Trustees of the Mohideen Jumma Mosque* [2004] 2 Sri LR 250 and *Rathnakumara and Others v. The Postgraduate Institute of Medicine* (SC/APPEAL/16/2014, SC Minutes of 30.03.2016).

In the instant case, only the making of the Regulations and their publication in the Gazette in terms of section 27(1) and (2) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 have taken place, and not the approval by Parliament.

Regulation 3 is *ultra vires* the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It also constitutes an affront to Article 12(1) of the Constitution.

This also violates Article 13(1) of the Constitution which states "*No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*"

Who determines rehabilitation under regulation 3?

Regulation 3 provides for the arrest. Then the next question is who decides to send such persons having some "connection with any offence" under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 or the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 or the Emergency (Miscellaneous Provisions and Powers) Regulations No.1 of 2019 to rehabilitation. The impugned Regulations do not provide for it. It is important to bear in mind that this category of persons is different from those who fall into the category described in Regulation 5. Regulation 3 is clearly vague.

According to Regulation 3, such arrestees "*may be referred to a rehabilitation programme in terms of the provisions of these regulations*",

not in terms of the provisions of the Bureau of Rehabilitation Act No. 2 of 2023, which became law after these Regulations. This leads to a further confusion whether there are two regimes governing rehabilitation.

Article 13(5) declares "*Every person shall be presumed innocent until he is proved guilty*".

Regulation 3 violates Articles 12(1), 13(1) and 13(5) of the Constitution.

Reintegration Centres

Regulation 4 provides for setting up of Reintegration Centres:

> *The Secretary to the Ministry of the Minister shall, from time to time approve Centres to be known as "Reintegration Centres" (hereinafter referred to as the "Centre") for the purpose of rehabilitating the surrendees and detainees. Upon such approval the Commissioner General of Rehabilitation shall by order published in the Gazette specify the category and the place of the Centres approved by the Secretary.*

According to Regulation 9, "Minister" means the Minister of Defence.

This Regulation is in direct contradiction to the framework established by the Bureau of Rehabilitation Act No. 2 of 2023.

In brief, under the Bureau of Rehabilitation Act, there are no Reintegration Centres but Rehabilitation Centers established by the Minister in charge of the subject of rehabilitation, not by the Minister of Defence or Secretary to the Ministry of Defence or Commissioner General of Rehabilitation. The administration, management and control of the affairs of the Bureau of Rehabilitation is vested in the Governing Council.

After the enactment of the Bureau of Rehabilitation Act, impugned Regulation 4 is no longer valid or sustainable. Regulation 4 cannot be given effect to over the provisions of the Bureau of Rehabilitation Act. The overlap between the provisions of the Bureau of Rehabilitation Act and Regulation 4 leads to ambiguity.

Regulation 4 violates Article 12(1).

Detention orders

Regulation 5 has four sub sections: 5(1) and 5(2) are standalone sections. They deal with distinct matters. 5(3) and 5(4) together deal with a separate matter.

Several questions arise out of this Regulation.

Regulation 5(1) reads as follows:

> *Any person other than a police officer to whom a person surrenders or who takes a person into custody in terms of regulation 3 shall hand over such surrendee or person taken into custody, to the Officer in Charge of the nearest police station within twenty four hours of such surrender or taking into custody.*

There is no ambiguity that Regulation 5(1) refers to first two categories of Regulation 3 mentioned above because this Regulation does not refer to past acts. It says any person other than a police officer to whom a person "surrenders or who takes a person into custody" shall hand over such person to the officer in charge of the nearest police station within twenty four hours. As I mentioned previously, individuals cannot be arrested in such a manner by "any person other than a police officer". Regulation 5(1) violates Articles 12(1) and 13(1).

Regulation 5(2) reads as follows:

> *Notwithstanding the provisions of regulation 3, where there is reasonable cause to suspect that a surrendee or detainee has committed an offence specified in regulation 3, the Officer in Charge of the police station in which such surrendee or detainee is held in custody shall submit a report to the Minister for consideration whether such surrendee or detainee shall be detained in terms of section 9 of the Act, for the purpose of conducting an investigation.*

This Regulation clears the doubt that a reference to rehabilitation in terms of Regulation 3 is done where there is not even a reasonable cause to suspect that the arrestee has committed an offence specified in Regulation 3. Reference to rehabilitation under Regulation 3 is not voluntary. This shows the illegality of rehabilitation under Regulation 3.

According to Regulation 5(2), where there is reasonable cause to suspect that a detainee has committed an offence specified in Regulation 3, the officer in charge of the police station shall submit a report to the Minister of Defence for consideration whether such person shall be detained in terms of section 9 of the Prevention of Terrorism (Temporary Provisions) Act for further investigation. This goes to show that the procedure in the impugned Regulations is *sui generis*. Otherwise, there is no reason to reiterate this within this Regulation.

Role of the Attorney General

Regulation 5(3) reads as follows:

> *Where in the course of such investigation it is disclosed that such surrendee or detainee has committed an offence specified in regulation 3 the matter shall be referred to the Attorney-General for appropriate action in terms of the law.*

According to this Regulation, during the course of an investigation (prior to its conclusion), if the police decide that the detainee has committed an offence specified in Regulation 3, the matter shall be referred to the Attorney General. It is important to note that this decision is made unilaterally by the police.

Regulation 5(4) states:

> *Where the Attorney-General is of the opinion that according to the nature of the offence committed a surrendee or detainee shall be rehabilitated at a Centre in lieu of instituting criminal proceedings against him, such surrendee or detainee shall be produced before a Magistrate with the written approval of the Attorney-General. The Magistrate may make order, having taking into consideration whether such surrendee or detainee has committed any other offence other than offences specified in regulation 3, referring him for rehabilitation for a period not exceeding one year at a Centre.*

This marks the second occasion where a unilateral decision is taken against the detainee that he committed the offence. The Attorney General can unilaterally decide that the detainee shall be rehabilitated at a Centre in lieu of instituting criminal proceedings. With the written approval of the Attorney General, the detainee is then produced before a Magistrate.

Under the Prevention of Terrorism (Temporary Provisions) Act, the Magistrate has no authority to release individuals on bail without the sanction of the Attorney General. In practical terms, with the written approval of the Attorney General for rehabilitation, the Magistrate has to make a perfunctory order for rehabilitation. That is the reality. This the Magistrate does, without a charge sheet, without trial, without conviction and without passing a sentence. The sentence for committing an unknown and undisclosed offence is rehabilitation. Notably, there is no

provision for a hearing to be given to the detainee before sending him for rehabilitation. The detainee can even be produced to the Magistrate at his residence with the written approval of the Attorney General for rehabilitation to get the formal order.

A careful reading of Regulation 5(4) confirms that the only matter the Magistrate can take into account is whether the detainee has committed any offence other than those specified in Regulation 3. If I may repeat, what it says is "*The Magistrate may make order, having taking into consideration whether such surrendee or detainee has committed any other offence other than offences specified in regulation 3, referring him for rehabilitation for a period not exceeding one year at a Centre.*" It does not say that the Magistrate may, having taken into consideration *inter alia* whether such surrendee or detainee has committed any offence other than the offences specified in regulation 3, refer such person to a Centre for rehabilitation for a period not exceeding one year. Here an individual is sent for rehabilitation without his informed consent. It remains unclear whether the alleged commission of other offences is considered in favor of rehabilitation or against it. The absence of proper judicial oversight throughout this entire process renders it inherently arbitrary.

Article 13(3) enacts that "*Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.*" Article 13(3) does not fall under any of the restrictions recognised under Article 15. This Article is interrelated with Article 13(5), which upholds the presumption of innocence until proven guilty as a fundamental right. Article 13(3) cannot be rendered nugatory by denying a trial, as these Regulations do. The principle of fairness is not limited to the trial proper. It begins before the trial and continues after the trial in the event of a conviction.

Regulation 5 violates the fundamental rights guaranteed under Article 12(1) and 13(5).

The argument that all these decisions are reviewable and therefore no prejudice is caused to the rehabilitant is unacceptable. Litigation is time-consuming and costly. It is the duty of the State to take all precautionary steps to safeguard the fundamental rights of the subjects.

Revocation of the rehabilitation order

Regulation 6 deals with the subject of revocation of the rehabilitation order.

> *6(1) Where any surrendee or detainee who is referred to for rehabilitation by an order of a Magistrate under sub regulation (4) of regulation 5 acts in a manner that is disruptive to the rehabilitation programme or detrimental to the interests of the other surrendees or detainees who are under rehabilitation at the Centre, the Commissioner-General of Rehabilitation shall inform in that regard in writing to the Officer in Charge of the police station who applied to the Magistrate for rehabilitation of such surrendee or detainee.*
>
> *(2) Upon receipt of information from the Commissioner-General of Rehabilitation under sub regulation (1) of this regulation, the Officer in Charge of the police station who applied to the Magistrate for rehabilitation of such surrendee or detainee shall apply to the Magistrate to revoke the order for rehabilitation and refer the matter to the Attorney-General to consider whether such person shall be indicted in lieu of rehabilitation.*

The term “disruptive” can be interpreted in many ways; for instance, complaints against the condition of the Center can be considered as disruptive. According to this Regulation, the revocation of a rehabilitation

order is effected without any inquiry or hearing being afforded to the rehabilitant. Absence of due process infringes upon the principles of natural justice and fairness, thereby constituting a violation of Article 12(1).

It seems to me that this is a matter that should be addressed through the Bureau of Rehabilitation Act and not by way of Regulations made under the Prevention of Terrorism (Temporary Provisions) Act.

Section 26 of the Bureau of Rehabilitation Act provides for obstructions of the rehabilitation programme.

> *Any person who unlawfully obstructs or attempts to unlawfully obstruct any person employed in any Centre for Rehabilitation in the performance of his lawful duties under this Act, commits an offence under this Act and shall be liable on conviction after summary trial by a Magistrate to a fine not exceeding fifty thousand rupees or to imprisonment of either description for a period not exceeding six months or to both such fine and imprisonment.*

As previously mentioned, this is a consequence of these Regulations having been promulgated before the Bureau of Rehabilitation Act came into existence.

Extension of rehabilitation period

Regulation 7 deals with the extension of the rehabilitation period.

> *7(1) At the end of the period of rehabilitation specified in respect of a surrendee or detainee in the order made by the Magistrate under sub Regulation (4) of regulation 5, the Commissioner-General of Rehabilitation shall, having regard to the nature and progress of the rehabilitation of such surrendee or detainee, consider whether it is appropriate for the surrendee or detainee to be released or be subject*

to a further the period of rehabilitation, shall forthwith submit his recommendation to the Secretary to the Ministry of the Minister. The Secretary shall forthwith forward such report to the Minister.

(2) The Minister may, after perusal of the report submitted to him under sub regulation (1) of this regulation,

(a) order the release of such surrendee or detainee; or

(b) extend the period of rehabilitation for a period of six months at a time, so however that the aggregate period of such extensions shall not exceed a further twelve months. Each such extension shall be made on the recommendation of the Commissioner-General of Rehabilitation.

(3) The surrendee or detainee shall, at the end of the extended period of rehabilitation, be released.

This Regulation is *ultra vires* in several respects.

After obtaining an order for rehabilitation from a Magistrate for a maximum period of one year and after the completion of that one-year of rehabilitation, it is not within the purview of a Regulation to grant the Minister of Defence the authority to unilaterally extend the rehabilitation period for an additional year without the intervention of the Magistrate. This amounts to a usurpation of judicial power by the executive in violation of Article 3 read with Article 4(c) of the Constitution.

This is also done unilaterally without giving a hearing to the detainee.

This Regulation also violates Articles 12(1), 13(2) and 13(4).

Extension of the period of rehabilitation also seems to be a matter to be dealt with through the Bureau of Rehabilitation Act and not by way of

Regulations made under the Prevention of Terrorism (Temporary Provisions) Act.

According to the impugned Regulations, the Minister acts according to the recommendations of the Commissioner General of Rehabilitation. However, under the Bureau of Rehabilitation Act, the Commissioner General of Rehabilitation is the Chief Administrative Officer and the substantive decisions are taken by the Council which consists of eminent professionals in the relevant fields including rehabilitation and social integration.

The rehabilitation programme

Regulation 8 addresses the content of the program, the progress of the individuals undergoing rehabilitation, and some aspect of their welfare.

> *8(1) The Commissioner-General of Rehabilitation shall provide a surrendee or detainee with psycho social assistance and vocational and other training during the period of his rehabilitation to ensure that such person is integrated back to the community and to the society.*
>
> *(2) The Commissioner-General of Rehabilitation shall every three months from the date of handing over a surrendee or detainee for rehabilitation, forward to the Secretary to the Ministry of the Minister, a report on the nature and the progress of the rehabilitation programme carried out in respect of such person. The Secretary shall submit such report to the Minister.*
>
> *(3) A surrendee or a detainee referred for rehabilitation to a Centre may with the permission of the officer in charge of the Centre be entitled to meet his parents, relations or guardian as the case may be, once in every two weeks.*

These provisions are completely redundant. I reiterate that these issues must be addressed through the Bureau of Rehabilitation Act, not through the Prevention of Terrorism (Temporary Provisions) Act. It seems that these issues have already been addressed in the Bureau of Rehabilitation Act.

Lawful restriction of fundamental rights

Notwithstanding that the fundamental rights have been given the utmost recognition in our Constitution making it part of sovereignty which is inalienable, as I have already stated, Article 15 recognises permissible restrictions to fundamental rights. However, proportionality is inherent in Article 15. The restriction must be rational and commensurate with the objective to be achieved.

I must state at the outset that the learned Additional Solicitor General did not take up the position that the restrictions are within the constitutionally permissible limits. The State took up an unusual position that no restrictions were placed by the impugned Regulations.

For the purpose of the present applications, the relevant Articles are Articles 10, 12(1) and 13 because the Court granted leave to proceed only on alleged violations of these Articles.

I have already dealt with Article 10, which cannot be subject to any such restrictions.

Article 15(1) stipulates that the fundamental rights guaranteed by Articles 13(5) and 13(6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security.

According to Article 15(7), the fundamental rights recognised by Articles 12, 13(1) and 13(2) shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and

the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

Article 170 defines "law" to encompass any Act of Parliament, laws enacted by any legislature before the commencement of the Constitution, and also includes an Order in Council.

Both 15(1) and 15(7) state that for the purposes of those two paragraphs, "law" includes regulations made under the law for the time being relating to public security.

Learned counsel for the petitioners especially relying on *Thavaneethan v. Attorney General* [2003] 1 Sri LR 74 argue that "regulations made under the law for the time being relating to public security" means "Regulations made under the law for the time being relating to the Public Security Ordinance" and therefore the restrictions placed on the fundamental rights by the Regulations made under the Prevention of Terrorism (Temporary Provisions) Act are against the Constitution and the rule of law.

The learned Additional Solicitor General, for reasons best known to him, avoided addressing this argument by asserting that "*the impugned Regulations do not restrict any fundamental rights of the petitioner or any other persons. As such, the respondents do not seek to engage in the redundant exercise of relying on the applicability of Article 15(7) of the Constitution and thereby attempt to interpret the said Regulations as "law" within the meaning of that provision.*" It is rather naive to submit that the impugned regulations do not restrict any fundamental rights when they obviously do.

Nonetheless, as the Court did not have the full benefit of the argument of the State on that important point of law (namely, whether the term "the law for the time being relating to public security" should be construed as "the law for the time being relating to Public Security Ordinance") and also in view of the conclusion I have already reached, there is no necessity to make a ruling on this point in the instant application. This matter can be fully considered in a suitable future case.

Learned counsel for the petitioners further argue that, as the impugned Regulations have been promulgated not by the Minister of Defence but by the President, as evident from the Gazette, they should be deemed null and void. In terms of section 27 of the Prevention of Terrorism (Temporary Provisions) Act, it is the Minister of Defence, not the President, who can make Regulations under the Act. Although the impugned Regulations have been signed by the President, it seems that, at the relevant time, the President had been functioning as the Defence Minister as well. In light of the conclusion I have already arrived at on the merits of this application, there is no need to make a ruling on this important point as well.

Conclusion

The Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 1 of 2021 are in violation of the fundamental rights of the petitioners guaranteed under Articles 10, 12(1) and 13 of the Constitution. It is not practically possible for this Court to suggest amendments to rectify the Regulations to align with all fundamental rights due to their inherent flaws. The Court also makes the declaration that the impugned Regulations are null and void. The State shall pay a sum of Rs. 25,000 to each petitioner as costs of the application.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

Murdu N.B. Fernando P.C., J.
I agree.

Judge of the Supreme Court

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

In the matter of an Application in terms of Article 126 of the Constitution.

Waduthanthrige Leo Merril De Alwis,
01, Owittiyawatta,
Kochchikade,
Negombo .

SC (FR) Application No. 710/2012

PETITIONER

Vs.

1) K. G. Dharmathilake,
Divisional Secretary,
Divisional Secretariat Office,
Colombo.

1 (a). Divisional Secretary,
Divisional Secretariat Office,
Colombo.

2) H.D. Anuruddhika,
Accountant,
Divisional Secretariat Office,
Colombo.

2 (a). Accountant,
Divisional Secretariat Office,
Colombo.

3) Pushpakumara De Silva,
Assistant Commissioner of Excise,
(Western Province)
Excise Commissioner's Office,
D.R.Wijewardena MW,
Colombo 02.

3 (a). Assistant Commissioner of Excise,
(Western Province)
Excise Commissioner's Office,
D.R.Wijewardena MW,
Colombo 02.

4) Prabhakaran Sandrew,
47 Lakshmi House,
Chaply Colony,
Wadigapitiya,
(via Gampola).

5) D.G.M.V Hapuarachchi,
Commissioner General of Excise,
Excise Department,
34, W.A.D. Ramanayake Mw,
Colombo 02.

5 (a). Commissioner General of Excise,
Excise Department,
34, W.A.D. Ramanayake Mw,
Colombo 02.

6) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : BUWANEKA ALUWIHARE, PC, J.
E.A.G.R. AMARASEKARA, J. &
K.KUMUDINI WICKREMASINGHE, J.

COUNSEL : R. Arsecularatne PC with Udara Muhandiramge, Punsiri Gamage and Eranga Yakandawala for the Petitioner.

Viveka Siriwardena PC, ASG for the 1st to 3rd, 5th and 6th Respondents.

Anura Meddegoda PC with Nadeesha Kannangara and Isuru Deshapriya for the 4th Respondent.

WRITTEN SUBMISSIONS : By the Petitioners on 09.10.2014
By the 1st, 2nd, 3rd, 5th and 6th Respondents on 11.09.2014 and 17.02.2022
By the 4th Respondent on 22.08.2014

ARGUED ON : 13.02.2023

DECIDED ON : 13.11.2023

K. KUMUDINI WICKREMASINGHE, J

This is an Application filed under Article 126(1) of the Constitution by the Petitioner seeking, *inter alia*, for a declaration that their fundamental rights to equality before the law and equal protection of the law as guaranteed by Article 12(1) of the Constitution has been violated as a result of the arbitrary, capricious and/or irrational action of the Respondents.

On 12th December 2012, having heard the President's Counsel for the Petitioner in support of this Application and the Learned ASG and the President's Counsel who appeared for the Respondents, this court granted leave to proceed under Article 12(1) of the Constitution for the alleged violation of the said fundamental right by the 1st and 2nd Respondents.

The Petitioner carried on the business of running a toddy tavern at Madampitiya, Colombo 15 and he was awarded the tender to sell toddy at the Madampitiya toddy tavern, Colombo 15 for the period of 01.01.2012 to 31.12.2012. The 1st Respondent who is the Divisional Secretary of Colombo published the Gazette bearing No.1773 on 24.08.2012 (P1) for the sale of the right to sell toddy at the aforesaid toddy tavern for the period starting from 1st January 2013 to 31st of December of 2013 and annually tenders are invited from the prospective bidders in terms of the Gazette No.207 dated 20.08.1982 (P2). The Petitioner in accordance with the aforesaid Gazette submitted a tender for a sum of Rs. 1, 500, 000.00 on 11.09.2012.

The tenders for the sale of the right to sell toddy at the aforesaid toddy tavern was opened on 11.09.2012 and apart from this tender there had been another tender for a sum of Rs. 2, 500, 000.00 submitted by the 4th Respondent. At the opening of the tender, 1st, 2nd and 3rd Respondents, the Clerk of the Colombo Divisional Secretariat, one R.P.G Piyatissa and the Petitioner were present while the 4th Respondent failed to be present.

According to the Petitioner, the 1st Respondent has telephoned the 4th Respondent during the tender board meeting and informed him that the tender will be granted to him. Aggrieved by this the Petitioner has sent a letter (P3) to the 5th Respondent complaining to him about the aforesaid incident and requested that the tender be awarded to him. The 5th Respondent responded by a letter dated 16.11.2012 (P4A) stating that since the 1st Respondent is the Chairman of the Tender Board the 5th Respondent is unable to take any actions against him and advising him to take legal action if any injustice has been caused. Upon receiving this letter the Petitioner has inquired about the same from the Colombo Divisional Secretariat and from the office of the 5th Respondent and he was informed that the tender had been granted to the 4th Respondents.

The Petitioner's position is that the Gazette marked P1 requires the presence of the tenderer at the time of opening the tender and the award of the tender to the 4th Respondent is illegal and unlawful as the 4th Respondent was absent at that specific time.

According to the 4th Respondent he and his father were forcibly taken by some unknown persons to a vehicle (Nissan Vanette Van, White in Colour) parked outside the Divisional Secretariat Office when they were waiting outside the office to be invited to attend the opening of the tender on 11.09.2012 at about 10.00am. The 4th Respondents states that the Petitioner who was not known to him at that time was also inside the said vehicle and they threatened the 4th Respondent and his father to withdraw the tender. Upon the Respondent's refusal to do so, the Petitioner had left the vehicle presumably to attend the tender opening at the Divisional Secretariat Office while the 4th Respondent and his father were detained forcibly to prevent them from attending the same. The 4th Respondent states that those unknown persons threatened to cause

harm if they attempted to leave the vehicle and they were driven away in that vehicle and dropped off in Kiribathgoda.

The 1st Respondent states that he was informed that the handing of the tender closed on the same day which was 11.09.2012 and that the 4th Respondent had been present at that time. Nevertheless, the Petitioner has informed him that the 4th Respondent was not present and that he left the premises since he was not pursuing his tender. The Petitioner has told that the 1st Respondent can talk to the 4th Respondent to confirm the same. Having dialed a number, the Petitioner has given his mobile phone to the 1st Respondent. The 4th Respondent who was at the other end has told the 1st Respondent that the Petitioner had intimidated him and chased him away and yet, he was pursuing his claim for the award of the tender. The 1st Respondent has then announced that the tender will be granted to the 4th Respondent.

According to both the 1st and 4th Respondents, the Gazette marked P1 does not require the presence of the tenderer at the time of opening the tender. The relevant conditions of the Gazette marked P1 in this regard are as follows.

“03. සිල් තබන ලද කවරයක බහාලූ එක එක ටෙන්ඩර්පත ඇතුලත් කවරයේ උඩ වම පස කලෙවරේ අංක ..... දරන රා තැබෑරුම් සඳහා ටෙන්ඩර් පත්‍රය - කොළඹ " යනුවෙන් සඳහන් කර - (අ) කොළඹ ප්‍රාදේශීය ලේකම් කාර්යාලයේ ටෙන්ඩර් පෙට්ටියේ තැන්පත් කිරීමෙන්, හෝ (ආ) ලියාපදිංචි තැපෑලෙන් කොළඹ ප්‍රාදේශීය ලේකම් වෙත එවීමෙන් හෝ මෙහි පහත සඳහන් උපලකෙනයේ ඒ ඒ තැබෑරුමට කලෙින් දක්වා ඇති වේලාවන් සහ දිනයන්හි දී හෝ ඊට පරෙ හෝ ලැබෙනෙතට සැලැස්විය යුතුය. ටෙන්ඩර් කරුවන් ටෙන්ඩර් හාර ගන්නා අවසාන **වේලාවේ** දී කාර් යාලයට පැමිණ සිටිය යුතු ය.

04. තෝරාගත් ටෙන්ඩර් කරු ඒ මොහොතේම ගැනුම්කරු වශයෙන් දැනුම් දෙනු ලබන අතර, ඉහත පල කරන ලද රා රේන්ද විකිණීමේ කොන්දේසි ප්‍රකාර, වරප්‍රසාද විකිණීමේ කොන්දේසි අත්සන් කිරීම සඳහා නියම කරනු ලබන මුදලක් තැන්පත් ඇප මුදල වශයෙන් ප්‍රාදේශීය ලේකම් වෙත ගවෙය යුතු ය.”

According to the above, the presence of the tenderers are required only when they are closing the acceptance of tenders and not at the time of the opening of the tenders.

Further, the condition 07 of the said Gazette marked P1 states that,

"කිසි කරුණක් නොදක්වාම එකක් හෝ සියලුම ටෙන්ඩර් ප්‍රතික්ෂේප කිරීමේ බලය ප්‍රාදේශීය ලේකම්ට තිබේ."

The condition 9 of the Gazette marked P2 also states that,

"The Powers of Acceptance or Rejection of Tenders-

(1) The Government Agent may, in his discretion, accept any tender received.

(2) The Government Agent may,in his discretion, reject any or all of the tenders received…"

It is evident from the above that the complete discretion over the tender lies with the Divisional Secretary. In the present case, the 1st Respondent who is the Divisional Secretary has awarded the tender to the 4th Respondent by considering the fact that the tender submitted by him was Rs. 300, 000.00 in excess of the threshold price fixed by the Excise Department (Rs. 2, 200, 000.00) while the tender of the Petitioner fell short of the threshold price by Rs. 700, 000.00.

Therefore, the actions of the 1st Respondent cannot be considered as arbitrary and unlawful as he has acted according to the Gazette in the best interest of the State.

Furthermore, the Respondents of the present action have contended that the Petitioner's application has been filed out of time. Although this court has

decided on 21.12.2012 that the application was filed within the mandatory time limit of one month, this cannot be taken as conclusive as the case was supported *ex parte* on that day without notice to any of the Respondents. By the journal entry dated 01.07.2014, this court has granted permission to the Respondents to file preliminary objections on time bar before 08.08.2014 and on 19.08.2014, this court has granted further two weeks time to the 4th Respondent to file written submission on the preliminary objections. The 4th Respondent has filed his written submission on 22.08.2014 and 1st, 2nd, 3rd, 5th and 6th Respondents have filed their written submissions on 11.09.2014. In all of those submissions, the Respondents have raised the preliminary objection that the Petitioner's application has been filed out of time under Article 126 (2) of the Constitution and therefore, the matter must be dismissed *in limine*. According to Article 126 (2) of the Constitution,

"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney-at-Law on his behalf, ***within one month thereof****, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges."*

In the case of **Ilangaratne vs. Kandy Municipal Council [1995] BALJ Vol.VI Part 1** at p.10, his Lordship Justice Kulatunga observed that,

"the result of the express stipulation of a one month time limit in Article 126(2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of,. ……. if it is clear

that an application is out of time, the Court has no jurisdiction to entertain such application."

In **Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake, SC 206/2008 (F/R), SC Minutes of 09.12.2016**, Justice Prasanna Jayawardena PC held at page 8 that,

"Article 126 (2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may "….. within one month thereof ….. " apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126 (2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution."

In the present case, the 1st Respondent has announced his decision to award the tender to the 4th Respondent on the day the Tenders were open, which was on 11.09.2012 in the presence of everyone, including the Petitioner. Subsequently, the Petitioner on 13.09.2012 has written a letter (marked P3) to the 5th Respondent complaining about the incident and requesting to grant the tender to him.

The Petitioner's position is that he became aware of the granting of the tender to 4th Respondent only when he received the letter marked P4 on 20.11.2012

in reply to his letter marked P3. However, in the said letter marked P3 supports the position of the Respondent that the Petitioner was aware of the said decision.

Moreover, clause 10 of the Gazette marked P1 states that if the toddy tender in question was not awarded on 11.09.2012, the tender will be resold on 06.11.2012 at 10.30 am. Nevertheless, there were no steps taken for resale of the impugned toddy tender on the said date. This further affirms that the tender was already awarded to the 4th Respondent on 11.09.2012 and even if the Petitioner was not aware of that on 11.09.2012, he should have been aware by 06.11.2012 as there was no resale as stipulated by the said Gazette.

However, the Petitioner has filed this application on 20.12.2012 after the expiry of one month (which is more than three months after the alleged violation).

Furthermore, in **Siriwardena and Others v. Brigadier J. Rodrigo and Others (1986) 1 Sri.L.R. 384**, Justice Ranasinghe held at page 385 that,

"An application must be filed within one month from the date of the commission of the administrative or executive act which is alleged constitutes the infringement or imminent infringement of the fundamental right relied on. Where, however, a petitioner establishes he became aware of such infringement or imminent infringement only on a later date, the one month will run from that date. The petitioners had filed their application long after the expiry of one month from the date they became aware of the infringement. Hence the application was out of time."

Similarly, in **Gamaethige v. Siriwardena and Others (1988) 1 Sri.L.R. 384**, where the Petitioner has sent letters to the Director of Establishments and the Secretary of the Ministry of Public Administration complaining about the violation of his fundamental rights, it was held at page 402 that,

"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126 (2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both in infringement and knowledge exist (Siriwardena v. Rodrigo (2). ***The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit****." [emphasis added]*

According to afore-cited cases, the Petitioner seeking an administrative remedy by writing to the 5th Respondent does not stop the running of time as stipulated in Article 126 (2) of the Constitution. Therefore, I am of the opinion that the application of the Petitioner is time barred as it was filed on 20.12.2012 which is more than three months after the alleged violation.

For the reasons set out above, I conclude that the Petitioners application is time barred under Article 126 (2) of the Constitution thus, the same is misconceived in law

On the basis of the aforesaid findings, the Application is hereby dismissed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of Sri Lanka.

Ranjith Udaya Kumara Rajapakse,
No.43, Amunugama,
Gunnapana.

Petitioner

S.C.(F.R.) Application No. 374/2017.

Vs.

1. G.K.G.A.R.P.K. Nandana,
Secretary,
Chief Ministry and
Ministry of Education,
Central Provincial Council,
Provincial Council Complex,
Pallakele, Kundasale.

1A. K.G.Upali Ranawaka,
Secretary,
Chief Ministry and
Ministry of Education,
Central Provincial Council,
Provincial Council Complex,
Pallakele, Kundasale.

2. Sarath Ekanayake
Chief Minister and
Minister of Education,
Central Provincial Council,
Provincial Council Complex,
Pallakele, Kundasale.

2A. Gamini Rajaratne,

Chief Minister and
Minister of Education,
Central Provincial Council,
Provincial Council Complex,
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3. Lalith U. Gamage,
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04. P.D. Amarakoon,
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05. W.M.S.D. Weerakoon,
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06. A.M. Wais,
Member,
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07. Rohitha Tennakoon,
Member,
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08. N.D.K. Piumsiri,
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08.A. W.M.K.K. Karunarathne,
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09. T.A. Don Wilson Dayananda,
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09A. N.M.D.R. Herath,
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09B. Keerthi Wickramaratne,
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10. Gamini Rajarathna,
Chief Secretary of the Central
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Chief Secretary's office,
Kandy.

11. E.P.T.K. Ekanayake,
Provincial Director of Education,
Provincial Department of
Education,
Kandy.

12. M.W. Wijeratne,
Zonal Director of Education,
Zonal Education Office,
Kandy.

13. Prof. K.K.C.K. Perera,
Secretary,
Ministry of Education,
"Isurupaya", Pelawatte,
Battaramulla.

14. M.R.P. Mayadunne,
Principal,
Vidyartha College,
Kandy.

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

Respondents

BEFORE : **BUWANEKA ALUWIHARE, PC., J.**
JANAK DE SILVA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Sanjeewa Jayawardene, P.C. for the Petitioner.
Viveka Siriwardene, (P.C.), ASG for the 1st to 13th and 15th Respondents.

ARGUED ON : 18th January, 2023

DECIDED ON : 13th November, 2023

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ACHALA WENGAPPULI, J.

The Petitioner, a Grade 3 Sri Lanka Education Administrative Service officer, was transferred on the basis of 'exigencies of service' from *Vidyartha* College, Kandy where he functioned as its principal. In invoking the jurisdiction conferred on this Court, under Articles 17 and 126 of the Constitution, the Petitioner alleges that the decisions of the 1st and 12th Respondent to transfer him are violative of his fundamental rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution.

It was strongly asserted by the Petitioner that the impugned transfer was made illegally, unlawfully, arbitrarily, unreasonably, unfairly, irrationally and was prompted by *mala fides,* ulterior motives and extraneous considerations.

On 09.02.2018, this Court granted leave to proceed as prayed for.

At the hearing, learned President's Counsel submitted on behalf of the Petitioner that since assuming office as the principal of *Vidyartha* College in March 2015, the Petitioner had effectively rectified and resolved many a problem that affected proper administration of the school. It was further submitted that the Petitioner had eradicated the drug abuse among student population that prevailed when he assumed office and instilled discipline in them and, as a result, was able to restore the status of *Vidyartha* College as a leading and respectable boys' school in Kandy.

The Petitioner averred in his petition that, commencing from or about November 2016, there were several anonymous letters addressed to Central and Provincial Authorities, containing a series of false, frivolous and defamatory allegations against him. The Petitioner further added that, however, none of the several investigations carried out by the provincial authorities on these anonymous complaints revealed any misconduct, irregularity, fault or wrongdoing on his part.

The Petitioner asserts that he was "*surprised*", when he received a letter, signed by the Zonal Director of Education (the 12th Respondent), on 25.09.2017 (P18), which enclosed another letter dated 22.09.2017 (P17) signed by the Secretary to the Provincial Ministry of Education (the 1st Respondent), conveying of his transfer on 'exigencies of service' with immediate effect. He was further directed to report to the Provincial Department of Education. The Petitioner, therefore, seeks a declaration of this Court that the said decisions are illegal, *null* and *void*. He further sought to nullify the appointment of the 14th Respondent, who succeeded him as the principal, *Vidyartha* College, and in addition,

prays for a declaration that the Respondents have violated his fundamental rights guaranteed under Articles 12(1) and 14(1)(g).

The Petitioner contended that the decisions made by the 1st and 12th Respondent to transfer him on 'exigencies of service', were violative of his fundamental rights. He relied on the following grounds, in order to substantiate his contention;

a. the decision to transfer was made *mala fide,* and with ulterior motives and on extraneous considerations
b. letters P17 and P18 were issued in blatant violation of the Rules of the Public Service Commission, since no reasons were provided for the decision to transfer the Petitioner on 'exigencies of service',
c. the transfer of the Petitioner, not being a disciplinary transfer but on exigencies of service, was made without satisfying the ingredients that constitute conditions precedent to the lawful exercise of power,
d. the transfer was not made in respect of any particular post or position at the Department of Education and there was no mention that the Petitioner's services are needed at that institution,
e. the normative period of 5 years to serve in one station was summarily denied.

The 1st Respondent, through his Statement of Objections, denied the allegation of infringement of fundamental rights of the Petitioner and resisted his entitlement to the reliefs sought. The 1st Respondent averred that an exigency of service arose to have the Petitioner transferred to the Central Provincial Department of Education, in order

to facilitate the conduct of several preliminary inquiries. The 1st Respondent also seeks to counter the Petitioner's claim that none of the inquiries conducted by the Respondents revealed any misconduct, irregularity, a fault or wrong doing on his part by stating that the latter was well aware of the fact that there were several preliminary inquiries being conducted out regarding multiple allegations of misconduct, which included admission of students contrary to the applicable circulars, accepting donations for admission of students, printing and selling of diaries to students, renting out school premises to park private vehicles for a fee and permitting a private educational institution to erect a hoarding within school premises for a payment.

Whilst denying the impugned transfer was made arbitrarily, unreasonably, *mala fide* and for collateral purposes the 1st Respondent avers that the reasons for the impugned decision to transfer the Petitioner on exigency of service arose due to following factors;

i. his failure to co-operate with the inquiring officers and causing obstruction to the unimpeded conduct of preliminary investigations;
ii. his conduct of repeatedly making frivolous excuses in order to avoid making a statement to the inquiring officers, despite the many opportunities that were afforded to him;
iii. his presence as the principal of the school which became a hindrance to record statements of the members of staff who came under his direct supervision and control.

It is the position of the 1st Respondent that the 14th Respondent's appointment was intended to fill the vacancy created by the impugned

transfer and made only as a measure to avert the situation that had arisen due to the conduct of the Petitioner.

In support of the contention of the Petitioner that he was transferred out illegally by the 1st and 12th Respondents, alleging that they acted *mala fide,* with ulterior motives and on extraneous considerations due to 'political' pressure, learned President's Counsel relied on the fact that the Respondents, in spite of an already concluded preliminary inquiry on the allegation of irregular admissions of students, had more initiated a second preliminary inquiry on the same unfounded allegation, in order to somehow rope in him. Learned Counsel further contended that the said second inquiry was initiated due to political interference and that too only after the Presidential Secretariat had directed the Respondents to conduct a '*comprehensive*' investigation by "*an experienced officer*" (R12).

This contention shall be considered at the outset of this judgment for its merits.

The 12th Respondent, by letter dated 10.03.2017 (R1) directed a Deputy Director of Education to conduct a preliminary inquiry into the allegations of admission of students to *Vidyartha* College irregularly and submit a report along with his recommendations. The said Deputy Director of Education had conducted an inquiry on the same day and submitted his report (R2). In that report, the inquirer had identified of 39 specific instances of irregular admission of students, contrary to applicable circulars. The inquirer also made an entry, in the logbook of the school, directing that no student shall be admitted to any of the grades until further notice.

In spite of the said *prima facie* finding that there were instances of irregular student admissions, the inquirer however did not make any recommendations in R2, nor did he ensure compliance of the provisions contained in Clause 13.12 of Chapter XLVII of the Establishment Code, which states " *[T]he officer conducting the preliminary investigation should also prepare a draft charge sheet as per Appendix 5 of this Code and forward it to the relevant authority in the event that sufficient material is disclosed that call for disciplinary action against the suspect officer …".*

The Petitioner, along with his counter affidavit, had tendered a letter containing his observations (CA-1), that had been submitted to the 1st Respondent on 26.04.2017. This was in response to the allegation of irregular admission of students. However, the 1st Respondent, in his Statement of Objections, failed to disclose of any decision taken either on P2 or CA-1 and of any follow up action taken thereafter. Interestingly, the counter affidavit of the Petitioner, also annexed documents CA-2(a) to (e), by which the 1st Respondent had directed him to admit students on several occasions outside the regular admission process.

On 08.08.2017, after almost five months since P2 was tendered, the Director (investigation) of the Presidential Secretariat, called a report from the Director of Education of Kandy on several allegations that were received against the Petitioner (R6). This report was to be submitted to the President of the Republic. The allegations referred to in R6 were in relation to several other matters and did not include the allegation of irregular admission of students. However, upon this direction from the Presidential Secretariat, the 12th Respondent appointed a three-member team of inquirers on 15.08.2017 (R7) and

directed them to conduct a preliminary investigation into the allegations referred to in R6. The report of this inquiry was submitted to the 12th Respondent by the panel of inquirers on 24.09.2017 (R10).

The 1st Respondent, however, failed to explain the reason to appoint another two-member panel of inquirers in respect of the allegation of irregular admission of students, in spite of an already concluded inquiry. The report of the said panel of inquirers, who were appointed to inquire into the allegation of irregular admission of students, issued their report on 17.08.2018 (R10A). The introduction of the said report indicates that the inquiry panel was constituted and directed by the 12th Respondent to conduct a preliminary inquiry on 15.08.2017 and also made reference to a letter dated 03.07.2017, issued by the Secretary to the Governor of the Central Province in that regard.

It is not clear that the report of the 1st inquirer (R2) was forwarded to the Presidential Secretariat at any point of time. However, it is to be noted that the report R10A, prepared by the said two-member panel of inquirers on irregular admission of students, consists of a total of 32 pages whereas the 1st report (R2), which also refers to inquiry into the same allegation, confines to a mere one side of a single A4 sheet of paper. Considered in this context, the directions issued by the Presidential Secretariat on the 1st Respondent to conduct a '*comprehensive*' investigation by "*an experienced officer*" would have been resulted after perusal of P2.

Similarly, the enquiries made by the Presidential Secretariat regarding the conduct of inquiries was necessitated due to a petition addressed to that establishment by a group of 'concerned parents' of certain students of *Vidyartha* College. In this context, it is relevant to

note here, that another group, claiming themselves to be committee members of the School Development Society, also made an allegation in their letter to the Presidential Secretariat that, despite that fact of making several complaints against the Petitioner, the Respondents have thus far failed to initiate a single inquiry (P12(c)). They attributed the close relationship the Respondents had with the Petitioner as the reason for the said inaction.

If these two factors, the obvious failure to take any meaningful action on R2 and the decision to appoint a two-member inquiry panel to conduct a second preliminary inquiry, are considered together, it appears that the 2nd inquiry was prompted only when the Presidential Secretariat had indicated its concerns on R2. This comparison indicates that the allegation, that there were *mala fides,* ulterior motives and extraneous considerations on the part of the Respondents in making the transfer, is not supported by the available material. It appears that, the actions of the Respondent indicate contrary position to the one presented by the Petitioner as clearly a very conciliatory approach had been adopted, in dealing with the allegations of irregular admission of students. This inference finds further support when considered in the light of another factor, which will be dealt during the latter part of this judgment.

Learned President's Counsel's other contention was founded on the failure of the Respondents to provide reasons for their decision, as set out in the applicable Sections of the Rules of Procedure of the Public Service Commission, which they were bound to comply with.

In this regard, learned President's Counsel contended that the decision to transfer the Petitioner was said to have been taken on the

premise that his retention in his post was inappropriate due to the possibility of obstructions and interference to the conducting of an inquiry. If that being the real reason, learned Counsel argued that, in fact the transfer was made on disciplinary grounds and not on an exigency of service.

Learned President's Counsel also contended that, if indeed the purported allegations against the Petitioner were genuine and legitimate as the Respondents claim, they had recourse to Section 222 of the said Rules, under which a transfer order could validly be made, but only after giving reasons. Thus, he submitted that the illegality which taints the decision to transfer is the failure of the Respondents to comply with the provisions of Section 222, where a mandatory requirement to give reasons for the transfer of a public officer was imposed.

It appears from the above, that the contention advanced by the Petitioner before this Court on this point is that he was transferred in fact on 'disciplinary grounds' and not on exigencies of service is in turn based on the 1st Respondent's explanation that the transfer was made in order to conduct the several investigations initiated by them unimpeded by actions of the Petitioner. The letters of transfer P17 and P18 indicate that the Petitioner was transferred on exigencies of services and not on disciplinary grounds.

In view of these divergent positions of the contesting parties, it is relevant to have a cursory glance over the scheme of transfer that had been laid down in the Procedural Rules of the Public Service Commission, published in the Government Gazette (Extraordinary) No.

1589/30, dated 20.04.2009 (hereinafter referred to as the "Rules"), which deals with different types of transfers that could be made.

Section 195 of the said Rules stipulates all or several or any one of the following objectives are sought to be achieved by transferring a public officer;

i. fill a vacancy in an institution;
ii. meet the administrative needs of an institution;
iii. promote the efficiency and productivity of an institution;
iv. meet the needs of a disciplinary process;
v. implement a disciplinary order;
vi. provide the officer with an opportunity to gain experience in a wider field;
vii. provide the officer with an opportunity for professional development and improve of his skills
viii. provide relief from personal difficulties experienced by the officer.

Thus, in terms of Article 55 of the Constitution and Section 194, a public officer can be transferred only by the Public Service Commission or by an Authority with Delegated Power of the Commission to achieve any one or more of these objectives.

Section 196 states as follows;

"Transfers are fourfold as indicated below:

(i) Transfers done annually;
(ii) Transfers done exigencies of service;
(iii) Transfers done on disciplinary grounds;

(iv) Mutual transfers on requests made by officers."

Of these fourfold categories of transfers, the ones that would be examined in relation to the instant matter are the transfers on exigencies of service and transfers on disciplinary grounds. Sections 218 to 221 governs the transfer procedure applicable to service exigencies while Section 222 governs the transfer procedure applicable to transfers made on disciplinary grounds.

The contention of the Petitioner in this respect is twofold. First, he contends that the Respondents have blatantly violated the said procedural rules, in their failure to discharge the obligation to convey reasons that formed the basis of the transfer to the Petitioner and cited *dicta* of *Sripavan* CJ in ***Sumedha Jayaweera v Dharmasena Dissanayake, Chairman of the Public Service Commission*** (SC(FR) Application No. 484/2011 – decided on 16.01.2017).

Secondly, he contended that the Respondent's claim of obstructing or refusing to co-operate with the inquiries that were being conducted against him is a belated concoction by the 1st Respondent to deceptively justify the impugned transfer. In this regard, the Petitioner stressed that the 1st Respondent must present credible material before this Court in order to establish the said allegation that he refused to cooperate with the inquiring officers. He further contended that the inquiry reports reveal that even though the Petitioner was unable to present himself for investigations on two occasions, he had subsequently cooperated with the inquirers by making statements within a reasonable time.

In support of the contention that the Respondent failed to adduce reasons for the transfer, the Petitioner relied heavily on the provisions of the Section 222 (iii) which states " *[W]here it is found on matters revealed either before the beginning, or in the course of an investigation or on existing circumstances that the retention of a Public Officer in his post or station may obstruct the conduct of a preliminary investigation*" such an officer could be transferred out even without prior notice. It was his position that the transfer order was made under this Section. Section 222 of the Rules further imposes a duty on the appointing authority that it "*shall convey the reasons in writing to the officer concerned.*" Thus, the Petitioner contends that the impugned transfer is illegal, as it was made in violation of the provisions contained in these Sections.

In presenting a counter argument, learned Addl. S.G submitted that in fact an exigency arose to have the Petitioner transferred out with immediate effect, in order to conclude the investigations against him as his presence in the school as its principal had become a hindrance to record statements of those who came under his direct control and supervision. She submitted therefore he was rightly transferred out on exigencies of services to assume duties as Assistant Director of Education at the Provincial Department of Education. She further submitted that since the completion of the preliminary inquiries, the Petitioner was served with a charge sheet containing a total 13 charges, which in itself is an indication as to the seriousness of the allegations and the nature of the inquiries that had been conducted by the Respondents. Learned Addl. S.G. also contended that the Petitioner had made blatantly a false statement in his petition by stating that "… *no disciplinary action whatsoever had been initiated or taken against the Petitioner*".

It appears from the contention that had been advanced by the Petitioner, that he presupposes the fact that an Appointing Authority could transfer a public officer, who is facing a preliminary inquiry from station he currently serves, only under Section 222(iii) as that is the sub Section, which provide for situations where it found that the retention of that officer may obstruct the conduct of a preliminary inquiry. This Section deals with transfers made on disciplinary grounds.

However, the Petitioner was transferred not on disciplinary grounds but on exigencies of service, as the said letters P17 and P18 clearly indicate. In view of the contention of the Petitioner, a question arises whether there is a similar provision in the Rules of Procedure that govern transfers on exigencies of service, which also permits the Appointing Authority to transfer an officer due his failure to cooperate with the conduct of a preliminary inquiry. Section 218, which generally deals with transfers made on exigencies of service, in sub section (iii) provides an answer to that question in the affirmative. Section 218(iii) states " *[W]here it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable."*

Thus, in both these instances, Rules of Procedure indeed provide for transfer of a Public Officer from his current station, but such a transfer could validly be made only when the conditions that are stipulated in the said Sections are satisfied and fully complied with. However, it must be noted here that the considerations that apply in these two specific instances are slightly different to each other in certain aspects.

In view of the Respondent's justification of the transfer and the Petitioner's contention that it was a concocted position, taken up

belatedly as an attempt to justify otherwise an illegal transfer, it becomes necessary at this stage to consider whether there were factors which could reasonably be taken as "*administrative reasons*" which in turn would render "*the retention of an officer in his present station is not suitable*", and those factors did exist before the issuance of P17 (on 22.09.2017).

It has been stated earlier on in this judgment that there was a preliminary inquiry that had already been conducted against the Petitioner on irregular admission of students and its report R2 was tendered. During this inquiry, as R2 indicate, the Petitioner had provided necessary information to the inquirer facilitating the conduct of the said inquiry. The Deputy Director made a log entry of the school on 10.03.2017 (R3), expressing his appreciation of the assistance rendered by the Petitioner and his staff during the course of his inquiry. The Respondents have not decided that at that point of time that it was expedient to transfer the Petitioner, notwithstanding the serious allegation that had been inquired into i.e., irregular admission of students.

In addition to the said allegation, there were other anonymous complaints alleging several other acts of wrongdoing on the part of the Petitioner. One such allegation was that the Petitioner had misused the school grounds by allowing it to be used as a parking area and collected a substantial amount of funds. The Petitioner himself was aware of these allegations as some of the anonymous petitions were in fact copied to him (P12(a)-(e)) by the Respondents themselves.

The inquirer, who was appointed to inquire into the said allegation of misuse of school grounds, reported back to 12th

Respondent that the Petitioner declined to make a statement, when requested to do so on 13.09.2017 and continued to avoid making one, despite several opportunities being afforded for that purpose (R5). The said report highlighted the fact that the Petitioner also failed to handover the receipt books used to issue parking tickets and owing to those reasons the inquirer was unable to complete her report.

It was during this time that the Presidential Secretariat, directed the 1st Respondent to submit a report on or before 22.08.2017 for the consideration of the President of the Republic (R6).

The conduct attributed to the Petitioner, as indicative in the report R5, signifies a clear change of his behaviour towards the pending inquiries. Having rendered his assistance to conduct the first inquiry (P2), after a mere lapse of six months and whilst serving in the same school, the Petitioner had adopted a contrasting approach with a view to delay the conclusion of several inquiries that were pending against him. This was noted by the 11th Respondent who conveyed same to the 1st Respondent, by a letter dated 18.09.2017 (R8).

The 1st instance of the Petitioner's evasive approach was noted by the Respondents on 13.09.2017(R5). In R5 a specific reference was made that the Petitioner refused to make a statement citing different reasons. The 2nd instance of not cooperating with the inquirers was noted in R8, a letter issued on 18.09.2017.

Paragraph 13.11 of Chapter XLVIII of the Establishment Code, under the heading "Rules of Disciplinary Procedure" it is stated that *"[I]t would be an act of grave misconduct for an officer to refuse to make a statement with regard to an investigation when he is required to do so by an*

officer duly appointed to conduct a preliminary investigation. When such an incident is reported by an officer conducting a preliminary investigation, it will be the responsibility of the relevant Head of Institution to report such fact to the relevant Disciplinary Authority to enable him to take disciplinary action against the officer concerned."

Contrary to the claim of the Petitioner that he was illegally transferred out for extraneous reasons, it is thus evident that the Respondents have taken the decision to transfer him only after they were made aware of his conduct, which was clearly indicative of his reluctance to voluntarily participate in the inquiries pending against him. In addition, the Petitioner was reported by the inquirer, due to the failure of the former to submit relevant documentation that were in his possession, when demanded.

In view of the foregoing, I am of the considered view that there were factors that were presented before for the Respondents for them to reasonably entertain "*administrative reasons*" that "*the retention of an officer in his present station is not suitable*". In the judgment of ***Waidyaratne v Provincial Commissioner- Local Government and Others*** (SCFR Application No. 137/2011 – decided on 25.10.2019) *Amarasekara, J.* was of the view when there are grounds to satisfy that there was a situation that demanded the transfer was necessary for the proper administration of the service and the workplace, a need of a disciplinary inquiry does not arise.

The other premise on which the Petitioner sought to impugn the decision to transfer (P17) was the failure of the Respondents to provide reasons for the said decision other than merely stating "*exigencies of service*". He relied on the Section 221 where it states that the Appointing

Authority "*… shall convey reasons to the officer concerned*". Section 221 not only imposes a duty on the Appointing Authority to convey reasons for the decision to transfer but also impose a similar duty that it "*… shall record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service*."

It is to be noted that the 1st Respondent, failed to tender a copy of the minute/entry made in the relevant file, in which the several factors that contributed to the decision to transfer, should have been clearly set out. The letter of transfer P17 merely conveyed that the Petitioner was transferred due to exigencies of service. It cannot be emphasised enough that the necessity to comply with the Rules of Procedure, as set out by the Public Service Commission, by the Appointing Authorities and thereby ensuring transparency in the decision-making process regarding transfer of public officers on exigencies of service. The strict compliance of the Rules is therefore fundamental to the proper administration of the Public Service.

The question, whether the Petitioner was conveyed of the reasons of his transfer, shall be considered next. In this particular instant, it must be noted that the Petitioner was possessed of the fact of his impending transfer well in advance, even prior to the issuance of P17 on 22.09.2017. This was evident from the contents of the letter P12(f) annexed to the petition. The Petitioner tendered copies of several anonymous letters and petitions were sent to him by the 11th and 12th Respondents, annexed to his petition. Letter P12(f) to be a one such petition, appears to have been sent by a group of parents who attended a meeting convened by the Petitioner. What is important is that the said meeting was convened on 20.09.2017, two days prior to the issuance of

P17, and the Petitioner had publicly declared in that gathering of his transfer. He described his imminent transfer as a 'promotional' transfer. There is no denial by the Petitioner in his petition as to the truth of the contents of this particular letter or to the specific event it speaks of. Prior to this meeting, a petition was signed by 132 members of the staff of *Vidyartha* College, addressed the Chief Minister informing him of certain moves to have the Petitioner transferred out (P15).

The Petitioner claims there were strong rumours indicating that he would be transferred out soon. But it is evident from this letter, despite the rumours, the Petitioner himself was aware of the fact that he would be transferred out of the school. He also knew that transfer in effect offered him a 'promotion'. Coupled with this fact, the Petitioner's presence in the Provincial Department of Education on 22.09.2017 for the purpose of making a statement (R10), being the day on which P17 was issued, makes it more probable that he was informed of the reasons for the issuance of letter P17 as well.

Letter of transfer P17 was signed by the 1st Respondent whereas letter of transfer P18 was signed by the 12th Respondent on the 25.09.2017. The fact that Petitioner was in contact with the 12th Respondent in the previous day, before P18 was signed, is evident from his own statement to police on 24.09.2017 (P10(e)). In his statement, the Petitioner mentions that he sought advice on that very morning from the 12th Respondent before making the statement, meant for future reference. In these circumstances, it is highly unlikely that the Petitioner was not informed of the reasons for his transfer, given the apparent close relationship he had with the 12th Respondent.

The Petitioner, however, averred in paragraph 31 of his petition that "*to my shock and surprise, I received a letter on 25.09.2017 from/through the 12th Respondent, which enclosed a further letter sent to me by the 1st Respondent's predecessor in office (dated 22.09.2017) informing that I had been transferred with immediate effect …*". In view of the several factors considered in the preceding paragraph, this particular averment of the Petitioner, claiming that he was '*surprised*' to receive the transfer order, could not be accepted as an accurate description of the events that had taken place. Thus, the fact that Petitioner had prior knowledge of his impending transfer and the type of transfer is undoubtedly evident from his own actions.

Section 221 as well as Section 222 (iii) imposes a duty on the Appointing Authority to convey reasons for transfer to the officer concerned. Section 221 lay down the procedure and the manner in which a decision should be made to transfer a public officer on exigencies of service, when it specified a requirement of making an entry in the relevant file of all the factors that caused the transfer. It also imposes a similar duty that it shall be conveyed to the officer under transfer.

However, a significant difference exists in relation to the manner of conveying the reasons. Section 222 (iii) speaks of conveying the reasons to transfer "*in writing*" to the transferred officer whereas Section 221, speaks of mere conveying the reasons, allowing the Appointing Authority to convey reasons for transfer to the concerned officer in any other form as well.

Returning to the question, whether the 1st Respondent "conveyed" the reasons to the Petitioner in this particular instance, in

my view, it could be answered in the affirmative since he was most probably was verbally conveyed of the reasons for his transfer.

Although this form of informal conveyance cannot be considered as the best method that should be adopted and followed by the Appointing Authority in making orders for transfer, nor it could be taken as an acceptable manner of formally conveying the reasons for transfer. In ***Range Bandara v Gen. Anuruddha Ratwatte and Another*** (1997) 3 Sri L.R. 360 *Mark Fernando* J held (at p. 372);

> *"… the summary transfer of the petitioner to a distant place was unreasonable, on the material available to the 2nd respondent, and it was also a misuse of discretion to withhold from him the true reason for the transfer, because it deprived him of the opportunity to rebut it."*

A similar approach was taken in ***Chandrasena v Kulatunga and Others*** (1996) 2 Sri L.R. 327. Connected to the issue of giving reasons for the transfer, learned Presidents Counsel for the Petitioner relied on the judgment of *Sripavan* CJ in ***Sumedha Jayaweera v Prof. Dayasiri Fernando*** (supra) where his Lordship states thus;

> "*Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of a sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the administrative body itself. Conveying reasons is calculated to prevent unconscious, unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimize the chances of unconscious infiltration of bias or unfairness in the conclusion. The duty to*

adduce reasons will be regarded as fair and legitimate by a reasonable man and will discard irrelevant and extraneous considerations. Therefore, conveying reasons is one of the essentials of justice (Vide ***S. N. Mukherjee Vs. Union of India*** *(1990) 4 S.CC.C. 594; A.I.R. 1990 S.C. 1984."*

But, since the circumstances referred to in the preceding paragraphs are strongly supportive of the conclusion that the Petitioner had been adequately forewarned of the impending transfer and therefore the reasons for his transfer were "*conveyed*" to the Petitioner even before P17 was issued, it could be taken as sufficient compliance of the procedural requirements imposed by Section 221, in relation to this particular instance.

In a recent pronouncement of this Court, the judgment of ***Bandulani Basnayake v Sunil Hettiarachchi and Others*** (SC(FR) Application No. 311/2016 – decided on 16.10.2023) *De Silva* J, in reference to the Rules made by Public Service Commission stated "*[I]t is important to follow them in all matters pertaining to public officers. Failure to do so will result in a violation of Article 12(1) of the Constitution."* This was an instance where this Court found an infringement of fundamental rights of the petitioner, when she was transferred on exigencies of service, after an audit inquiry which conducted and concluded without recording a statement from her and thereby denying her an opportunity to respond to any of the allegations that had been inquired into. Strangely, the said audit report did not even recommend her transfer.

However, the factual position revealed from the pleadings in the instant matter is totally different to the position revealed in the said application.

Thus, after a careful consideration of all the circumstances, I am of the view that the decision to transfer the Petitioner was made on account of his conduct which provided justification for entertaining an "*administrative reason*" that a preliminary inquiry could not be conducted unimpeded with the presence of the Petitioner. The said decision thus cannot be termed as an unreasonable decision. Moreover, the Respondents have sufficiently "conveyed" reasons for the transfer order, well in advance to the issuance of P17.

In these circumstances, I hold that the Petitioner failed to establish that the executive and administrative action of the Respondents in transferring him, infringed his fundamental rights guaranteed to under Articles 12(1) and 14(1)(g) of the Constitution.

Accordingly, the petition of the Petitioner is dismissed without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal Under the Provisions of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C Appeal No.158/2018

S.C S.P.L L.A. No. 125/2017

CA/Tax Appeal No.07/15

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Inland Revenue Building,
Sir Chittampalam A.Gardiner Mawatha
Colombo – 02

Petitioner

-Vs-

Classic Travels (Pvt) Limited
379/4, Galle Road,
Colombo – 03

Respondent

-Vs-

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Inland Revenue Building,
Sir Chittampalam A. Gardiner Mawatha,
Colombo – 02

Petitioner – Petitioner – Appellant

Classic Travels (Pvt) Limited,
379/4, Galle Road,
Colombo 03.

Respondent – Respondent – Respondent

BEFORE: B.P Aluwihare, P.C, J.
Vijith K. Malalgoda, P.C, J.
Arjuna Obeyesekere, J.

COUNSEL: Chaya Sri Nammuni, SSC for the Petitioner – Petitioner – Appellant
F.N Goonewardena for the Respondent – Respondent – Respondent

ARGUED ON: 03.11.2021.

WRITTEN SUBMISSIONS: Appellant on 12.06.2019 and 16.10.2023.
Respondent on 28.08.2019 and 25.11.2021.

DECIDED ON: 14.11.2023.

Judgement

Aluwihare, PC, J

The Petitioner – Petitioner – Appellant to this application (hereinafter referred to as the Appellant) is the Commissioner General of Inland Revenue. The Respondent – Respondent – Respondent (hereinafter referred to as the Respondent) is a limited liability company

incorporated under the laws of Sri Lanka and has been engaged in the business of a Travel Agent for airlines. The Respondent pursuant to Gazette Extraordinary No. 127/5 dated 17th December 2002 operated on the assumption that its service income was zero rated for the purpose of Value Added Tax (VAT) imposed in terms of the Value Added Tax Act No. 14 of 2002. Therefore, the Respondent did not pay any VAT on its service income.

The Respondent states that the above position was confirmed by a document issued by M.G Somachandra, Deputy Commissioner of the Inland Revenue Department (ACT17/9) dated 25.02.2008 (vide. P. 49 of the Brief). However, when the VAT returns were submitted by the Respondent for certain taxable periods, on the basis that their supplies were zero rated, the returns were rejected by the assessor stating that Commission Income of the Respondent could not be considered as a zero-rated supply and new VAT assessment had been issued in terms of Section 28 of the Value Added Tax Act of 2002.

The Respondent appealed against the said decision of the assessor to the Commissioner-General of Inland Revenue (hereinafter referred to as Commissioner-General) against the assessment. The Appeal was heard by Commissioner K. Dharmasena in the period of December 2012 to March 2013 and the said Commissioner reserved the determination. But the determination was issued by another Commissioner, namely D.M Somadasa Dissanayake by way of letter dated 02.08.2013 (vide p. 31 of the Brief). Thereafter, the reasons for the determination were issued on 05.08.2013, however, it was Commissioner D.M Somadasa Dissanayake who had signed the said reasons for the determination, but that document contained the name of Commissioner K. Dharmasena in its first page. Therefore, the Commissioner-General sought to replace page 1 of the reasons for the determination by letters dated 09.10.2013 and 14.10.2013. As per the reasons for the determination issued by Commissioner D.M Somadasa Dissanayake, dated 05.08.2013 as amended on 09.10.2013 (P 1 vide p. 4 of the brief), a note was inscribed as follows;

"The above appeals heard before K. Dharmasena (Commissioner (Zone III) and the dates of hearing mentioned above are dates of hearing made by him. Further, the names mentioned under the appearance are the persons appeared for the case.

I (Commissioner D.M Somadasa Dissanayake) have determined the above appeals upon letter dated 04.07.2013(CGIR/APP/H/2013) Commissioner General of Inland Revenue"

Hence, it is apparent that two separate Commissioners had heard and issued the determination. Aggrieved by the aforesaid determination the Respondent appealed to Tax Appeals Commission (hereinafter referred to as the TAC). At the TAC the Respondent raised a preliminary objection that there had been a violation of the principles of natural justice. The Appellant's response to the said preliminary objection was that the TAC has no jurisdiction to entertain preliminary objections and has been constituted only to consider the merits of the assessment. The TAC made its determination **(P8)** on 13.11.2014, whereby the TAC upheld that there was a violation of the principles of natural justice and the assessment was accordingly annulled.

The Appellant, aggrieved by the said determination made by the TAC, stated a case to the Court of Appeal on the following questions of law;

1. Whether the Tax Appeals Commission acted in excess of its limited jurisdiction as it cannot assume jurisdiction it does not possess to decide on questions of law?

2. Whether the Tax Appeals Commission has erred in law to determine the appeal on matters raised as preliminary objections by the Appellant's counsel?

3.Whether the Tax Appeals Commission was empowered by the Hon. Minister of Finance who appointed it to hear and determine appeals preferred by the Appellant to give its determination without hearing the matters raised in the appeal?

4.Whether the Tax Appeals Commission has erred in law in determining a question of law and failed to give due consideration to the judgement of the case *A.M Ismail v CIR* (SLTC Vol. VI p. 156) that question of law have to be decided by courts and Tax Appeals Commission can decide on questions of fact?

5.Whether the Tax Appeals Commission had erred in law, that coming into conclusion that it is a violation of principles of natural justice where hearing of the appeal by one commissioner and concluded hearing the other commissioner notice of determination based on the record maintained by the first commissioner?

The Court of Appeal delivered its Judgement on 06.04.2017 in favour of the Respondent dismissing the appeal (vide p. 85 of the Brief). The Appellant being aggrieved with the

Judgement of the Court of Appeal, sought special leave to appeal from this court and Special Leave to Appeal was granted on the following questions of law;

1. Did the Court of Appeal err in law when holding that a Tax Appeal Commission could dispose its mandate on preliminary objections?

2.Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?

3. Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?

Before considering the questions of law, the Court observes that the Appellant had submitted the final written submissions on 16.10.2023, despite arguments were heard on 03.11.2021 and parties, if wished, were required to file written submission within three weeks from the said date. Needless to say, the Rules of this Court are not mere procedural niceties but ensure that no prejudice is caused to the litigants. Therefore, the parties should adhere to the time limits provided by this Court. However, the Court considered the written submissions although belatedly filed by the Appellant.

<u>Question of Law 01: Can the Tax Appeal Commission Dispose its Mandate on Preliminary Objections?</u>

The Appellant argued that as per Section 9(10) of the Tax Appeals Commission Act No.23 of 2011 (as amended) a final determination cannot be given, which results in the assessment being annulled if the substantive tax issue is not considered by the TAC. On this basis the Appellant argues that the TAC erroneously disposed of its mandate by way of a preliminary objection. The contention simply stated was that the, the TAC is only mandated to consider appeals, on merit.

Section 9(10) of the Tax Appeals Commission Act provides that;

"After hearing the evidence, the Commission shall on appeal either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner- General ***or may remit the case to the Commissioner-General with the decision of the Commission on such appeal.*** *Where a case is so remitted by the Commission, the Commissioner- General shall revise the assessment in order that it is in conformity with such amount as stated in the decision of the Commission."* [Emphasis added]

I do not find merit in the contention of the Appellant referred to above, regarding the 1st question of law. The advantage of a preliminary objection is to prevent unnecessary litigation. Hence, the purpose of preliminary objections is not to stifle legitimate adjudication but to dispose a matter expeditiously when it is apparent that the action cannot be maintained. His Ladyship Justice Thilakawardena in ***Jathika Sevaka Sangamaya vs. Sri Lanka Ports Authority and Another*** **[2003] 3 Sri.L.R. 146 at 149** held that;

"*Preliminary objections are also particularly useful for actions which have no substance and where it is clear that such action could not possibly succeed. The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts and/or law is in dispute. It is also important to distinguish a preliminary objection from an objection on any point of law, which can be raised at any part of the trial unlike the preliminary objections, which by its nature is expected to be raised at the beginning of the proceedings prior to the beginning of the arguments in the case.*"

The Appellant also argued that in any event the preliminary objection raised by the Respondent does not go to the root of the issue, as the failure to abide by rules of natural justice is merely a "defect in the procedure" adopted by the Commissioner – General. Further, it was argued that no prejudice is caused by the lack of oral hearing as the documentary evidence including expert evidence was considered by the Commissioner-General. Moreover, the Appellant argued that the TAC cannot refuse to exercise jurisdiction on a tax matter in the guise of annulling the determination on a preliminary objection when the TAC is the arbiter of questions of fact. This argument presupposes that the jurisdiction of the TAC is limited to substantive matters of the assessment.

It is certainly true that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested but the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are at stake as identified by Lord Reed in ***Booth v Parole Board*** **[2013] UKSC 61**.

The first is the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. Justice entails that a person whose rights are significantly affected by a decision of an administrative or judicial body, should be allowed to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. This aspect of fairness avoids resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him or her to influence the result. As observed by Lord Reed in *Booth v Parole Board* [supra] at [66];

"I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions per *Booth v Parole Board* [supra] at [71]. Hence, even if the documentary evidence was considered by the Commissioner- General as argued by the Appellant, there is a breach of the principles of natural justice.

In this backdrop it would be pertinent to consider the document marked and produced by the Appellant as 'P3', the letter [dated 02.08.2013] by which the Department of Inland Revenue communicated the determination of the Commissioner General, regarding the Respondent's appeal to the Commissioner General which had been signed by

Commissioner D.M.S Dissanayake. In communicating the decision, the writer states that *"…having considered the written and **oral submissions** made by authorized representatives and a few officials on behalf of the appellant company and the views, explanations ruling submissions made by the Department officials on behalf of the revenue, I determine the above appeal by confirming the assessment…"*

The Determination, however, gives three dates of hearing, namely 13.12.2012, 21.01.2013 and 07.03.2013 and the notation added by Commissioner DMS Dissanayake states that *"The above appeals heard before K. Dharmadasa (Commissioner Zon III) and the dates of hearing mentioned above are dates of hearing made by him."*

The above, clearly demonstrates that no hearings had taken place before Commissioner D.M.S Dissanayake and for him to say that he considered '***oral submissions** made by authorized representatives and a few officials on behalf of the appellant company.*' is patently incorrect and demands inquiry, not only from the perspective whether the Respondent was accorded a fair hearing but also whether the submissions made on behalf of them received due consideration. Therefore, it is incorrect to state that no prejudice is allegedly caused to the Respondent as submitted by the Appellant.

Further, if the Respondent was not provided with a fair hearing, then the assessment made by the Commissioner-General is defective and the fact that the assessment was made by another assessor is quite apparent. Then the TAC is not required to further consider the defective assessment of the Commissioner – General, since the objection of the Respondent goes to the root of the cause.

The Court of Appeal held in this regard at p. 18 that;

"If a question of law or fact or a question mixed with both law and fact is raised as a preliminary issue which goes to the root of the case, determining that issue first, would undoubtedly save time and resources of all stakeholders. Besides this, it is an accepted norm that a party agitating a question of fact or law must first have it raised before the original institution tasked to resolve that dispute. This is underpinned by the fact that such original institution may well uphold such argument saving time and resources of the appellate forum. Thus, there is also no merit in the statement that the Tax Appeals

Commission has erred in law when it determined the appeal on the matters raised as preliminary objections by the learned counsel for the Appellant."

Whilst agreeing with the views expressed above, I am of the opinion that the legislature never intended to oust and limit the jurisdiction of the TAC to the substantive matters of the assessment. If the legislature intended to limit the jurisdiction of the TAC to substantive matters of the assessment, then such intention would be expressly provided. The only requirement of Section 9(10) is for the TAC to hear the evidence in appeal and either confirm, reduce, increase or annual the assessment determined by the Commissioner – General or remit the case to the Commissioner-General with the decision of the TAC. It is a recognized rule of interpretation that the duty of the Court is to construe Acts of Parliament according to the intent or will of the legislature and to give the words their meaning, even if that intention appears to the Court just or unjust or inconvenient or whatever may be the ulterior consequences of so interpreting them, as dislike of the effect of a statute is of no consequence.

I am also persuaded by the reasoning of His Lordship Justice Ruwan Fernando in the case of ***The Commissioner of General of Inland Revenue v. Cargills Food Service (Pvt) Ltd*** **Case No. CA/TAX/0013/2016 (C.A. Minutes 25.05.2023) at p. 37** regarding the interpretation of Section 11A of the Tax Appeals Commission Act. His Lordship stated that;

"*At this stage, it is relevant to note that the right of appeal by way of a case stated is a substantive right given to any person aggrieved by the decision of the TAC in terms of section 11A(1) of the TAC Act. When that right has already vested with the parties on the date the lis (proceedings) commenced in the TAC, that right cannot be denied to such party who seeks remedies to violated rights, unless that right has been taken away by a subsequent enactment, if it so provided expressly and not otherwise*"

Further at p. 39 the Court held that;

"*This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise*"

In my opinion if the interpretation advanced by the Appellant is accepted, the Court will inadvertently usurp legislative functions by limiting the scope of the appeal, when an express limitation is not provided by the Legislature. I find support for this view in terms of Section 8(1)(a) of the Tax Appeals Commission Act which provides that;

"*8(1) Any person aggrieved by the determination of-*

(a) the Commissioner-General, in respect of ***any matter*** *relating to the imposition of any tax, levy, charge, duty or penalty; or*

(b) the Director-General under subsection (1B) of section 10 of the Customs Ordinance (Chapter 235),

may if he is dissatisfied with the reasons stated by the Commissioner-General or the Director- General, as the case may be, prefer the appeal therefrom to the Commission within thirty days from the date of receipt of such reasons; or"

If the Legislature intended the jurisdiction of the TAC to be limited to only review of the substantive matter of the assessment, why would the Legislature in Section 8(1)(a) allow an appeal to the TAC in respect of *'any matter'* relating to the imposition of any tax, levy charge, duty, or penalty of the Commissioner - General? The rational conclusion that could be drawn is that the Legislature never intended to limit the jurisdiction of the TAC only to substantive issues.

It is a settled principle that a statute must be interpreted harmoniously. When two interpretations are available, the Court interprets the provision harmoniously so as to ensure the consistent operation of the Act. An interpretation that results in a clash of provision or reduces a provision to an inutility should be avoided. As held by Pasayat J, in ***Commissioner of Income Tax Vs Hindustan Bulk Carriers,*** **(2003) 3 SCC 57, P. 74**

"*The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare clause with other parts of the law and the setting in which the clause to be interpreted occurs. [See R.S. Raghunath v. State of Karnataka and Anr. (AIR 1992 SC 81)]. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty*

of the Court to avoid a head on clash between two sections of the same Act. [See Sultana Begum v. Prem Chand Jain (AIR 1997 SC 1006)] Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.

The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a 'useless lumber' or 'dead letter' is not a harmonised construction. To harmonise is not to destroy."

The principles enunciated above can be summarized as follows;

1. The Courts must avoid a head-on clash of seemingly contradicting provisions and must construe the contradictory provisions so as to harmonize them.
2. The provision of one section cannot be used to defeat the provision contained in another, unless the Court, despite all its effort, is unable to reconcile their differences.
3. When it is impossible to completely reconcile the differences in contradictory provisions, the Courts must interpret them in a manner so that effect is given to both the provisions as much as possible.
4. Courts must also keep in mind that interpretation that reduces one provision to an inutility is contrary to a harmonious construction.

Applying the principles above, the interpretation advanced by the Appellant is evidently contrary to a harmonious interpretation, since that interpretation ignores Section 8(1)(a) of the Act, thereby resulting in a conflict of the two provisions, as Section 8(1)(a) explicitly provides an appellant the ability to canvass '*any matter*' relating to the imposition of any tax, levy, charge, duty or penalty by the Commissioner – General before the TAC. In my view an interpretation stating that the TAC's jurisdiction is limited to substantive tax matters results in an inconsistency between the provisions. A 'matter' is "something to be tried or proved; an allegation forming the basis of a claim or defence" (Black's Law Dictionary 10th Edition). The use of the determinant word 'any' implies that the scope of questions of law that can be heard by the TAC was not limited to substantive

tax questions but is wide, subject to the jurisdictional requirements of the Act. Therefore, an interpretation that does not limit the TAC's jurisdiction to the substantive tax assessment is preferred as that construction avoids any clash between the provisions. In those circumstances, I see no merit in the Appellant's contention.

Question of Law 02: Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?

The Appellant contends that as per Section 9(10) of the Tax Appeals Commission Act the word "confirm and annul" has to be in connection with the power to increase or reduce the assessment of the Commissioner-General. On that basis the Appellant argued that the decision of the TAC declaring the assessment of the Commissioner – General as void, was erroneous. This Court finds it difficult to appreciate the said contention of the Appellant. The word "annul" is defined in Black's Law Dictionary [11th Edition] as "the act of nullifying or making void". It is therefore apparent that the TAC had the power to declare the decision of the Commissioner-General as void.

The Appellant also sought to argue that the proper remedy for the Respondent was to challenge the assessment of the Commissioner – General by way of a writ as the forum of the TAC is exclusive to determining the validity of the assessment. The Appellant relied on ***A.M Ismail v Commissioner of Inland Revenue*** **SLTC Vol. IV at p. 156** as authority for the proposition that the Respondent should have sought review from the determination of the Commissioner-General by way of a writ and that a statutory appeal does not lie to annual the determination. In ***A.M Ismail v Commissioner of Inland Revenue*** **[Supra]** it was held that;

"An appeal from a determination of a Commissioner to the Board of Review is also very narrow in its scope. Further the Board of Review does not exercise judicial functions, but is merely an instrument created for the administration of the Revenue Law and its work is really administrative though judicial authorities are called for in the performance of its duties. It is a body created as an administrative check to see that a tax payer's liability is correctly ascertained. The fact that it could state a case in regard to a question of law

to the Supreme Court to determine the liability in regard to taxes does not give a Board of Review the authority to declare notices sent by, or proceedings before an Assessor void or to quash them. It has power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged."

His Lordship Justice Abdul Cader made these observations in relation to the question whether it was mandatory to communicate to the taxpayer the reasons for rejecting a return on income tax under the Inland Revenue Act of 1968 (as amended). The instant appeal relates to the assessment made by the Commissioner-General and its validity. The facts can be distinguished since Section 9(10) of the Tax Appeals Commission Act expressly provides the power on the TAC to annul an assessment. Further, the Court also expressly recognized in ***A.M Ismail v Commissioner of Inland Revenue*** **[supra]** that the Board of Review has the power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged. A taxpayer is entitled to a fair hearing to ensure that a proper assessment is recorded upon considering all relevant matters and the applicable provisions . If a taxpayer is not provided with a fair hearing, then the assessment is defective. Therefore, the TAC was correct in annulling the determination of the Commissioner-General and on that basis also, there is no conflict with the decision of ***A.M Ismail v Commissioner of Inland Revenue*** **[supra]**.

It is also relevant that writ remedies are not granted by the Court as of right but are discretionary. The granting of a writ remedy depends on various other circumstances, such as laches, or misconduct, misrepresentation or non- disclosure of facts and acquiescence, unlike a right of appeal under Section 9(10) of the Tax Appeals Commission Act.

A similar argument was canvassed before the Court of Appeal in relation to Section 11A(6) of the Tax Appeals Commission Act in ***The Commissioner General of Inland Revenue, v Janashakthi General Insurance Col. Ltd*** **Case No. CA (TAX) 14/2013 (C.A Minutes 20.05.2020)** and His Lordship Justice Janak De Silva rejected this argument and held that (at p. 08);

"Let me start the analysis by restating two established principles. Firstly, judicial review being a discretionary remedy may be refused where there is an adequate and effective

remedy such as a statutory appeal. Secondly, judicial review is concerned with the legality of a decision whereas an appeal inquires whether the decision is right or wrong.

There may be situations where an Appellant in a statutory appeal proceeding wishes to raise questions relating to legality such as the breach of the rules of natural justice or an issue on the jurisdiction of the decision maker. A multitude of judicial authority supports the proposition that jurisdictional questions can be raised by way of appeal……..

Breach of the common law principles of natural justice can be dealt with by the appellate system in the tax field [R. v. Brentford General Commissioners Ex. p. Chan (1986) S.T.C. 65; R. v. Commissioner for the Special Purposes of the Income Tax Acts Ex. p. Napier (1988) 3 All E.R. 166; Banin v. Mackinlay (Inspector of Taxes) (1985) 1 All E.R. 842].”

His Lordship Justice Ruwan Fernando also held in ***The Commissioner of General of Inland Revenue v. Cargills Food Service (Pvt) Ltd*** [supra] at p. 57 in relation to Section 11A of the Tax Appeals Commission Act that;

“*It is relevant to note that a party has no absolute right in a judicial remedy where an inferior tribunal exceeds its jurisdiction, and where the absence or excess of jurisdiction is not apparent on the face of the proceedings. It is only discretionary, and depends on various other circumstances, such as laches, or misconduct, misrepresentation or non-disclosure of facts and acquiescence etc. The grant of a writ is always discretionary and is never demandable of right like in a case stated in terms of section 11A(1)*”

I am in agreement with the views expressed above and, in my opinion, they apply with equal force to Section 9(10) of the Tax Appeals Commission. If the Respondent is required to resort to judicial review to challenge a decision of the Commissioner-General, then such an interpretation would cause undue hardship and burden to the taxpayer, when an explicit right of appeal is provided[to the TAC].

Another reason why I reject the interpretation of the Appellant is that the Courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted in exceptional circumstances such as where the alternative statutory remedy is nowhere

near so convenient, beneficial and effectual or where there is no other equally effective and convenient remedy. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law. This principle is discussed in "**Judicial Remedies in Public Law, Sir Clive Lewis, 5th edtn. at p. 75**;

"Judicial review is, in principle, available in relation to the acts and omissions of inferior courts such as the county court or magistrates' courts. In practice, the availability of judicial review is likely to be limited by the availability of other methods of challenge such as appeals. Judicial review will not normally be permitted if there are adequate alternative remedies available. There are rights of appeal against decisions of district judges and county courts, for example. Where the possibility of an appeal to a higher court exists, that route is the appropriate method of challenging the original decision rather than a claim for judicial review unless there are exceptional circumstances justifying bring a claim for judicial review."

Of course, the crux of the argument advanced by the Appellant was that judicial review is the *only* remedy in the instant appeal, and that the Respondent ought to have moved to have the assessment of the Commissioner – General quashed, by way of a writ, however, I am of the view that the interpretation advanced by the Appellant would deprive a party the most convenient, effectual and beneficial remedy.

In ***R v Brentford General Commissioners, ex parte Chan and others*** **[1986] STC 65** the taxpayers applied for an order to quash the decision of the General Commissioners of Income Tax for denial of natural justice. The court held that Section 56(6) of the Taxes Management Act 1970 of United Kingdom, gave the court the widest possible powers to remit cases to the commissioners for amendment or rehearing, including the power to deal with procedural irregularities and that judicial review would not be an appropriate remedy in a tax case unless there were exceptional circumstances. In determining whether judicial review was the appropriate remedy, the court by citing ***Ex p Waldron*** **[1985] 3 WLR 1090 at p. 1108** mentioned certain guidelines as follows;

"***Whether the alternative statutory remedy will resolve questions at issue fully and directly; whether the statutory procedure would be quicker or slower than procedure by***

way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a court should take into account when deciding whether to grant relief by judicial review where an alternative remedy is available"

Certainly, these guidelines are not exhaustive in determining whether judicial review is the appropriate remedy but applying them to the present case, in my opinion an appeal to the TAC can resolve an issue fully but judicial review may not, as the focus on the latter is the legality of the issue. Moreover, the members of the TAC would be more aware, perhaps, of the practice and the exigencies relating to fiscal law and practice, therefore can resolve the issues fully. On that basis judicial review would not be the proper remedy in this instance. I am also persuaded by the dicta of Lord Templeman in ***Preston v IRC*** **[1985] AC 835 at p. 362**

"*Judicial review should not be granted where an alternative remedy is available. In most cases in which the commissioners are said to have fallen into error, the remedy of the taxpayer lies in the appeal procedures provided by the tax statutes to the General Commissioners or Special Commissioners. This appeal structure provides an independent and informed tribunal which meets in private so that the taxpayer is not embarrassed in disclosing his affairs and the commissioners are not inhibited by their duty of confidentiality. The commissioners and the tribunals established to hear appeals from the commissioners have wide knowledge and experience of fiscal law and practice. Appeals from the General Commissioners or the Special Commissioners lie, but only on questions of law, to the High Court by means of a case stated and the High Court can then correct all kinds of errors of law including errors which might otherwise be the subject of judicial review proceedings*"

As judicial review is a collateral challenge and not an appeal, it will only be in exceptional circumstances that the courts will allow the collateral process of judicial review to be used to attack an appealable decision, when Parliament has expressly provided by statute an appellate procedure. But exceptional circumstances may arise when it would be unjust for the taxpayer to appeal a decision of the Commissioner – General. For example, if the Commissioner – General during the hearing acted illegally or *ultra vires*, then

exceptional circumstances may arise where judicial review is appropriate to challenge the alleged abuse at its inception. Otherwise, the taxpayer would be expected to proceed with the allegedly illegal hearing until the determination is issued by the Commissioner-General to appeal the Commissioner-General's assessment to the TAC.

Accordingly, in my opinion judicial review is not the proper remedy unless exceptional circumstances justify a claim for judicial review. If judicial review is eliminated as a remedy unless exceptional circumstances justify a claim, then the proper remedy would be an appeal to the TAC, therefore, I find no merit in the contention of the Appellant.

Question of Law 03: Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?

The Appellant argued that the Court of Appeal erred by holding that TAC and the Commissioner-General are time barred from hearing a fresh appeal of the instant case by virtue of Section 34 of the Value Added Tax Act. The gravamen of the Appellant's argument is that the Court of Appeal has the power to remit a case to the TAC for rehearing with any guidelines set by the Court as per Section11A(6) of the Tax Appeals Commission Act. It was also argued that the Section 34 of the Value Added Tax Act only imposes a time bar on the Commissioner - General in hearing a matter when an appeal is made from the assessment [of an assessor or an assistant commissioner] and has no application to the Court of Appeal since a case remitted will be a fresh inquiry. It was argued by the Appellant that a contrary interpretation would deprive much needed revenue to the State since an assessment would be annulled, and time barred for extraneous issues unrelated to the substantive tax assessment. The same argument was canvassed by the Appellant at the Court of Appeal, and the Court held [at p. 13] that;

"The Commissioner General in this instance has failed to accomplish any lawful hearing of the appeal up to now. Thus, he has failed to comply with the time frame prescribed in the above section. The invalidation of his previous determination amounts, in the eyes of law, to the said appeal being not heard.

Therefore, it is clear when this Court holds that the determination by the Commissioner General is not valid, what remains valid is the determination by the Assessor. [Emphasis added]

Section 34 of the VAT Act has specified in no uncertain terms, the effect of such appeal is not agreed or determined within the specified period. Thus, in such a situation the appeal shall be deemed to have been allowed.

The above position appears to be in line with the fact that neither section 9(10) nor 11 A (6) of the Tax Appeals Commission Act provide that a case could be sent back for 're-inquiry'."

It was further held by the Court that;

"*It is to be observed that both the aforementioned sections, [Sections 9(10) and 11A(6) of the Tax Appeals Commission Act] the action to be taken either by the Commission or by the Commissioner-General when a case is so remitted have been restricted to the revision of the assessment in order that it is in conformity with such amount as stated in the said decision. It is to be observed that these sections do not provide for the conduct of re-inquiries as has been provided for in the case of regular appeal proceedings. This could be to avoid any conflict with the operation of the time bar placed on the Commissioner-General regarding the disposal of appeals made to him*"

Sections 9(10) and 11A (6) of the Tax Appeals Commission Act provides as follows;

Section9(10*)*; *"After hearing the evidence, the Commission shall on appeal either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner- General or may remit the case to the Commissioner-General with the decision of the Commission on such appeal. Where a case is so remitted by the Commission, the Commissioner- General shall revise the assessment in order that it is in conformity with such amount as stated in the decision of the Commission"*

Section 11A(6); *Any two or more Judges of the Court of Appeal may hear and determine any question of law arising on the stated case and may in accordance with the decision of Court upon such question, confirm, reduce, increase or annul the assessment determined by the Commission, or may remit the case to the Commission with the*

opinion of the Court, thereon. Where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the Court"

The interpretation given to Section 11A(6) by His Lordship Justice Samarakoon in the case of ***Cargills Agrifood Ltd v The Commissioner General of Inland Revenue*** **C.A Tax 36/2014 (C.A Minutes 28.02.2023)** merits consideration. The Court held that;

"Hence, any two or more Judges of the Court of Appeal may,

(i) determine any question of law arising on the stated case,

It does not say may determine the 'determination' of the Commission.

(ii) confirm, reduce, increase or annul the assessment determined by the Commission,

(iii) or may remit the case to the Commission with the opinion of the Court, thereon.

This may or may not be on the 'determination' of the Commission, because the term 'thereon' refers to 'any question of law arising on the stated case'.

What does the next sentence mean?

'Where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the Court'.

If the question of law arose was not with regard to the 'assessment determined by the Commission', how shall the Commission 'revise the assessment'?

The answer is, that, the 'assessment', referred to in the last sentence is, the 'assessment' made by the assessor.

This is why, the previous sentence refers to the 'assessment determined by the Commission' but the last sentence just say 'assessment'.

The legislature will not waste words as well as it will not use words without a meaning.

Hence it is clear that,

(a) there can be a case stated on a question of law other than the determination of the Commission on tax,

(b) the Court has power to remit the case to the Commission, with its opinion on the question of law so arose and

(c) the Commission shall, on receiving such an opinion of the Court, revise the assessment of the assessor."

I am in agreement with the above views expressed by His Lordship Justice Samarakoon. In my opinion similar to above, Section 9(10) of the Tax Appeals Commission Act provides that;

The Commission shall on appeal;

1. either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner- General **or;**
2. remit the case to the Commissioner-General with the decision of the Commission on such appeal.
3. When a case is remitted by the Commission, the Commissioner-General is required to revise the assessment in order that it is in conformity with such amount as stated in the decision of the Commission.

On that basis the TAC can dispose of its mandate by a preliminary issue and remit the case to the Commissioner – General. The Commissioner – General thereafter, is required to revise the assessment of the assessor. But how can the Commissioner – General revise the assessment in conformity with 'such amount as stated in the decision of the Commission' if the TAC disposes of its mandate by way of a preliminary objection without considering the substantive tax issues?

The first possible interpretation that can reconcile the above position is the one adopted by the Court of Appeal. According to this interpretation, when the Commissioner-General's assessment is invalidated by the TAC, what remains is the assessment made by the assessor. The TAC cannot remit the case for a fresh inquiry, possibly due to the time-bar set forth in Section 34 of the Value Added Tax Act. However, I unable to agree with this interpretation for two reasons

First, if a taxpayer appeals the assessor's assessment to the Commissioner-General, and the Commissioner-General's assessment is later annulled due to reasons such as a breach

of natural justice or by way of any other preliminary objections, the taxpayer is left with what he believes to be an erroneous assessment of the assessor. In my opinion, this interpretation defeats the purpose of the appeal process. The second reason, as advanced by the Appellant, is that the correct tax liability of a taxpayer will be unascertained for extraneous reasons unrelated to the substantive tax issue, and I am in agreement with this view.

The second possible interpretation is to construe Section 9(10) narrowly as advanced by the Appellant, by limiting the jurisdiction of the TAC and holding that the TAC can only determine issues related to the substantive tax issues. This interpretation would limit the TAC's jurisdiction to an arithmetic revision and for the reasons explained above cannot be accepted, as the remedy for a taxpayer then would be limited to judicial review and is contrary to a harmonious interpretation of the Tax Appeals Act.

Of course, it can be argued that although the TAC correctly annulled the determination of the Commissioner – General, the TAC should have considered the substantive tax issue. Even the Appellant advanced a similar view in the alternative and stated that the TAC should have provided a decision separately on the preliminary question of law and the substantive matters. This view was also expressed in ***The Commissioner of General of Inland Revenue v. Cargills Food Service (Pvt) Ltd*** **[supra] at p. 60** which was also concerned with remitting a case, albeit from the Court of Appeal to the TAC, when the TAC annulled the assessment of the Commissioner – General, by upholding a preliminary objection. By virtue of Section 9(10), it appears to me, that the jurisdiction of the TAC is limited to the revision of the assessment of the Commissioner General, therefore, once the assessment of the Commissioner – General is annulled the TAC cannot reassess the assessor's assessment or in other words consider the substantive tax assessment, thereby exceeding its jurisdiction.

I am of the opinion that Section 9(10) of the Tax Appeals Commission Act provides two courses of action;

1. on appeal either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner- General (first limb); **or**

2. remit the case to the Commissioner-General with the decision of the Commission on such appeal (second limb)

It appears that the first limb may generally apply when determining the substantive matters of the assessment of the Commissioner – General, whereby the TAC can either confirm, annul, reduce or increase the assessment. In my view, the second limb includes the four powers provided under the first limb (i.e the power of the TAC to confirm, reduce, increase, or annul the assessment of the Commissioner-General) and the power to direct the Commissioner-General to revise the assessment in accordance with the 'decision' of the TAC. To put this in another way, the second limb apply;

(i) If the TAC is of the view that the amount of the assessment determined by the Commissioner- General must be either increased or reduced, the case may be remitted back to the Commissioner-General. The Commissioner - General is required to revise the assessment in accordance with such amount as stated in the decision of the TAC;

(ii) If the TAC annulled the assessment made by the Commissioner- General on questions other than substantive matters of the assessment, the case may be remitted back to the Commissioner-Geneal with its decision. The decision can include any guidelines or directions for the Commissioner-General to follow in revising the substantive matters of the assessor's assessment. Thereafter, the Commissioner-General is required, if so directed, to revise the assessor's assessment in accordance with such decision of the TAC. In such instances, the TAC is not required to provide an amount in its decision.

I support the above view, (in para (ii) above) with two propositions. First, the following view is apparent as per the Sinhala text of Section 9(10) of the Tax Appeals Commission Act, which provides as follows;

කොමිෂන් සභාව විසින් සාක්ෂි විභාග කිරීමෙන් පසුව, කොමසාරිස්-ජනරාල්වරයා විසින් තීරණය කරන ලද තක්සේරුව අභියාචනයේ දී, අවස්ථාවෝචිත පරිදි ස්ථිර කිරීම, අඩුකිරීම, වැඩි කිරීම හෝ අවලංගු කිරීම සිදු කළ යුතු ය ; ඒ පිළිබඳ කොමිෂන් සභාවේ තීරණය සමග කොමසාරිස්-ජනරාල්වරයා වෙත අදාළ කාරණය යොමු කළ හැකි ය. කොමිෂන් සභාව විසින් එසේ යම් කාරණයක් යොමු කල අවස්ථාවක, කොමසාරිස්-ජනරාල්වරයා විසින් කොමිෂන් සභාවේ තීරණයේ සඳහන් මුදල් ප්‍රමාණයට අනුකූල වන පරිදි තක්සේරුව ප්‍රතිශෝධනය කළ යුතු ය.

In my opinion, it is apparent that the first limb of the Sinhala text similar to the English text, contemplates the ability of the TAC to either confirm, reduce, increase, or annul the assessment of the Commissioner-General. However, the four powers are included in the second sentence of the Sinhala text because the use of the words "ඒ සම්බන්ධ" provides that when the four powers are exercised the case may be remitted back to the Commissioner-General in appropriate instances as stated by the words, "අදාළ කාරණය යොමු කළ හැකි ය". If the TAC can refer a **decision even in instances** where the power of annulment is exercised, then it follows that directions or guidelines can be provided in that decision of the TAC. Otherwise, the assessment being a nullity, there is no need for the TAC to refer a decision back to the Commissioner-General.

The second proposition is that it is a commonly accepted rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction of a statute. However, if the literal construction is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further. The following view is stated by **N.S Bindra, 'Interpretation of Statutes' [9th Edition] at p. 439**, citing ***Rex v Vasey*** **[1905] 2 KB 748**, as follows;

"*Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably, not intended, a construction may be put upon it which modifies the meaning of the words, and the structure of the sentence*"

However, such an inference should not be made lightly. Bindra on the 'Interpretation of Statutes' at p. 439 [supra] states as follows;
"*In interpreting a statute, an intention contrary to the literal meaning of words of the statute should not be inferred unless the context or consequences which would ensure from a literal interpretation, justify the inference that the legislature has not expressed something which it intended to express, or unless such interpretation leads to any manifest absurdity or repugnance with this superadded qualification that the absurdity*

or repugnance must be such as manifested itself in the mind of the law-maker, and not such as may appear to be so to the Tribunal interpreting the statute."

Bindra on the 'Interpretation of Statutes' at p. 440 [supra] states further citing ***North v Templin*** 8 QBD 247 that;
"*Anyone who contends that a section of an Act of Parliament is not to be read literally must be able to show one of the two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act*"

In my opinion, the departure from the literal construction of Section 9(10) is justified in this instance as Section 8(1)(a) of the Tax Appeals Commission Act does not limit the jurisdiction of the TAC to substantive matters of the assessment for the reasons stated above. Further, if the Court of Appeals' interpretation is accepted then that interpretation would defeat the purpose of the appeal procedure and result in manifest absurdity. If a taxpayer appeals against the assessor's assessment to the Commissioner-General, and the TAC annuls the Commissioner-General's assessment through no fault of the taxpayer, leaving the taxpayer with the same assessor's assessment taxpayer initially contested, to say the least would be an absurd outcome.

Further, it appears that the intention of the legislature by establishing the TAC was to resolve tax disputes expeditiously, effectively, and efficiently by the establishment of an informed tribunal. This view is supported by the fact that Section 2(2) of the Tax Appeals Commission Act recognizes that the members appointed to the TAC comprise of persons that gained eminence in the field of taxation, finance and law. Therefore, an interpretation in furtherance of this object should be preferred. None of the interpretations provided by the Appellant advances this objective. The Appellant's interpretation unduly restricts the scope of the TAC. Hence, I am of the opinion that it is justified for the Court to depart from the literal construction of the section as stated above, which advances the object of the Act. In consideration of the interpretation above, it appears that the first error of the TAC and the Court of Appeal is the holding that the case cannot be remitted, when the provision provides otherwise. Both the TAC and the Court

of Appeal also fell into error in justifying the first error by resorting to Section 34 of the Value Added Tax Act.

Section 34(8) of the Value Added Tax Act provides that;

"*Every appellant shall attend before the Commissioner-General at time and place fixed for the hearing of the appeal. ……*

Provided further that every petition of appeal under this Chapter shall be agreed to or determined by ***the Commissioner General within two years*** *from the date on which such petition of appeal is received by the Commissioner-General unless the agreement or determination of such appeal depends on the furnishing of any document or the taking of any action by any person other than the appellant or the Commissioner General or an Assessor or Assistant Commissioner where such appeal is not agreed to or determined within such period the appeal shall be deemed to have been allowed and the tax charged accordingly*

Section 34(1) relates to appeals from the assessor or assistant commissioner to the Commissioner – General in regard to any assessment of penalty. Therefore, the time bar in Section 34(8) relates to the appeal from the assessor or assistant commissioner. If the time bar is not complied with, then the appeal is deemed to be allowed. In my view once the TAC remits a case to the Commissioner – General then it is heard as a fresh inquiry and the time bar in Section 34(8) of the Value Added Tax Act has no application.

Once a case is remitted from the TAC it is not an appeal from the assessor or assistant commissioner but a fresh hearing. Black's Law Dictionary 10th ed., defines remit as "to refer (a matter for decision) to some authority, esp. to send back (a case) to a lower court". Accordingly, once the TAC remits a case to the Commissioner – General, it is a fresh hearing on this basis, and I am of the view that Section 34(8) of the Value Added Tax Act will not be a fetter for the Commissioner General to revisit the Appeal made to him by the Respondent.

Conclusion

In these circumstances, I answer the Questions of Law arising in the instant Appeal as follows:

1.Did the Court of Appeal err in law when holding that a Tax Appeal Commission could dispose its mandate on preliminary objections?
No.

2.Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?
No.

3. Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?
Yes.

In view of the answer given in question of law No. 3 the appeal is partially allowed and the Commissioner General is directed to re-hear the case.

Parties may bear the cost of this appeal.

Appeal is partially allowed.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C, J,

I agree.

JUDGE OF THE SUPREME COURT

Obeyesekere, J

I have read in draft the judgment of my brother Justice Buwaneka Aluwihare, PC and while his approach does appear to cut the Gordian Knot in the administration of tax law, I am unable to fully agree with it as it appears that we may be encroaching upon the legislative sphere.

The issue in this case relates to the determination of the Tax Appeals Commission (TAC) to annul an assessment issued under the Value Added Services Act No. 14 of 2002, as amended, which determination was upheld by the Court of Appeal. The TAC annulled the assessment on the basis that while one Commissioner had heard the appeal to the Commissioner General, another had issued the determination.

Leave to appeal was granted on the following three questions of law.

1. Did the Court of Appeal err in law when holding that a Tax Appeal Commission could dispose its mandate on preliminary objections?

2. Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?

3. Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?

At the outset, I am constrained to note that the reference to a "preliminary objection" is not appropriate, since the so called objection was raised by the party who filed the appeal to the TAC. In essence, what was being sought was a summary determination of the issue.

In my respectful view this case ought to be approached from a different perspective. Tax administration has been plagued with unnecessary delays. In as much as State revenue remains uncollected for several years, taxpayers too have the burden of uncertainty with regard to their liability. It is noted that more than 10 years have lapsed since the decision of the Commissioner on behalf of the Commissioner General. It is not reasonable by the Respondent or the Revenue for the entire matter to be referred back to the Commissioner General at this stage. The TAC is an appellate body. If there are matters that have been urged by the Respondent at the oral hearing that have not been considered by the Commissioner in preparing his report, then those deficiencies can easily be supplied by the TAC. In this regard, it is important to bear in mind the scheme of the TAC Act. Sections 9(7), (8) and (9) are of particular importance, and are re-produced below:

"(7) *The Commission shall have power to summon to a hearing, the attendance of any person whom it considers capable of giving evidence respecting the appeal and may examine him as a witness, either on oath or otherwise. Any person so attending may be allowed by the Commission to be paid any reasonable expenses necessarily incurred by him in so attending.*

(8) *Except with the consent of the Commission and on such terms as the Commission may determine, the appellant shall not at the hearing, be allowed to produce any document which was not produced before the Commissioner-General, or to adduce the evidence of any witness whose evidence was not led before the Commissioner-General, or adduce evidence of a witness whose evidence has already been recorded at the hearing before the Commissioner-General.*

(9) *At the hearing of the appeal the Commission may, admit or reject any evidence adduced whether oral or documentary, and the provisions of the Evidence Ordinance relating to the admissibility of evidence shall not apply in respect of such evidence.*"

These provisions demonstrate the ample powers vested in the Commission to supplement any hearing deficiencies in the appeal before the Commissioner General. If the TAC had

felt that there was a deficiency in the hearing, it should have identified the relevant aspects that had not been considered (if any) and then evaluated whether such failures have resulted in a wrong decision. That would be consonant with its powers in appeal.

There are two conflicting interpretations with regard to the scope of the power of the TAC which have been highlighted by my brother. The first is that the restriction on the powers of the TAC in terms of Section 9(10) of the TAC Act be ignored and its powers be defined with reference to Section 8(1)(a). In other words, the limitation on the TAC's power implied in Section 9(10) which requires the Commissioner having to "*revise the assessment in order that it is in* ***conformity with such amount*** *as stated in the decision of the Commission"* should be expanded with reference to Section 8(1)(a) which refers to the right to appeal to the TAC in respect of ***any matter*** *relating to the imposition of any tax, levy, charge, duty or penalty".* My brother favours this interpretation.

The second interpretation is to limit the scope of the reference in Section 8(1)(a) in line with Section 9(10). This was the position articulated by the learned Deputy Solicitor General. The said argument is one which has the support of several previous decisions. The Supreme Court in the 5 judge bench decision in **D M S Fernando v Ismail** [(1982) IV SLTC 184], held as follows:

"*It was contended by the Deputy Solicitor General that the Respondent was not entitled to maintain this application for Writ because an alternative remedy by way of appeal was available to him under the Inland Revenue Act.* ***Those provisions confine him to an appeal against the quantum of assessment****. The Commissioner has not been given power to order the Assessor to communicate reasons. He may, or may not, do so as an administrative act. The Assessor may, or may not, obey. The Assessee is powerless to enforce the execution of such administrative acts. The present objection goes to the very root of the matter and is independent of quantum. It concerns the very exercise of power and is a fit matter for Writ jurisdiction. An application for Writ of Certiorari is the proper remedy." (Emphasis added)*

The Court of Appeal decision in the above case is also illuminating. Victor Perera, J held as follows:

"The petitioner cannot canvass the validity or legality of these acts of the Assessor by way of an appeal to the Commissioner of Inland Revenue. The scope of an appeal to the Commissioner has been clearly laid down in the sections dealing with appeals. An appeal from a determination of a Commissioner to the Board of Review is also very narrow in its scope. Further the Board of Review does not exercise judicial functions, but is merely an instrument created for the administration of the Revenue Law and its work is really administrative though judicial attributes are called for in the performance of its duties. It is a body created as an administrative check to see that a tax payer's liability is correctly ascertained. The fact that it could state a case in regard to a question of law to the Supreme Court to determine the liability in regard to taxes does not give a Board of Review the authority to declare notices sent by, or proceedings before an Assessor void or to quash them. It has power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged. The power to quash a notice or proceeding before an Assessor is vested in the courts and therefore this Court must be satisfied that the circumstances justify the exercise of such a jurisdiction."

In Commissioner General of Inland Revenue v First Media Solutions (Pvt) Ltd (CA/TAX/6/2016; CA minutes of 5th December 2019), Samayawardene, J in the Court of Appeal observed as follows;

"The very argument of the respondent tax payer is counterproductive. It opens the door for a constructive dialogue about whether the Tax Appeals Commission has the authority to declare Notices sent by the Commissioner General of Inland Revenue void purely on technical grounds, or whether it can only annul an assessment determined by the Commissioner General of Inland Revenue on merits. The dicta in Ismail v Commissioner General of Inland Revenue, Ranaweera v Ramachandran seem to me to be lending support for the latter view."

In **Ranaweera v. Ramachandran** [(Sri Lanka Tax Cases (Vol 2) 395], the Privy Council held that members of the Board of Review were not judicial officers. The Privy Council there cited the following passage from **Inland Revenue Commissioners V Sneath** [(1932) 2 KB 362]:

"I think the estimating authorities, even where an appeal is made to them, are not acting as judges deciding litigation between the subject and the crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the tax payer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax, and though the figure determined is final for that year, it is not final for any other purpose. It is final not as a judgment inter partes but as the final estimate of the statutory estimating body. No lis comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no lis until the rights and duties are settled and thereafter questioned by litigation.

Romer LJ added (p 390)

"……But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the tax payer's income for the year in question…

….On the whole of the material put before them on this part of the case their lordships' conclusion is that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance and that as such its work is administrative, though judicial qualities are called for in its performance."

In order to arrive at a decision in this regard, consideration must be given to several matters including the following:

(a) The historical role of the Board of Review and the Tax Appeals Commission

(b) Whether the TAC was created with the intention of exercising powers akin to the Court of Appeal in the exercise of its writ jurisdiction under Article 140 of the Constitution?

(c) Whether the TAC has the capacity to exercise such powers?

(d) Whether the exercise of such powers constitute the exercise of "judicial powers"?

(e) Which interpretation will provide for a harmonious, efficient and effective functioning of the revenue collection statutes, whilst ensuring fairness to the tax payer?

(f) Which interpretation will minimize delay and litigation?

(g) Would the TAC be entitled to use the entire gamut of administrative law principles in determining issues before it, including principles of proportionality, reasonableness etc.?

While the above matters and more particularly whether the TAC has the authority to deal with matters not concerning the merits of the appeal will have to be considered and answered by this Court in a suitable case, there is no necessity to consider such issues in this appeal if it is approached in the following manner.

It is clear that if the TAC only has the power to decide on the merits of the appeal, then the question of remitting a matter that deals with an issue other than the merits to the Commissioner General does not arise. The TAC would be wrong in entertaining such a matter. If that is the case, then this Court should remit the matter to the TAC to hear the dispute on its merits.

If the TAC can examine matters other than the merits, then does the TAC have the power to remit such other matter [i.e. a matter not relating to the substantive tax issue] to the Commissioner General? In my view, if the TAC has the power to examine matters other than the merits, then the power of remission too should include the power to remit the case on matters other than on merit. If it is assumed that the TAC does have the power to examine matters other than the substantive tax matter, then my brother's analysis explaining why the TAC should have the power to remit this matter to the Commissioner General is persuasive. I would only add that if the matter is so remitted, it does not mean that the Commissioner General has unlimited time to make such determination. He would need to do so within a reasonable time, which in the circumstances of the scheme of the Act cannot exceed the time set out in Section 34(8) from the date of reference.

However, I am of the view that even if the TAC could have remitted the matter to the Commissioner General it would not be reasonable to do so at this juncture after the lapse of more than 10 years. Given the extensive powers vested in the TAC in hearing an appeal and set out at the outset of this judgment, I am of the opinion that even if the TAC could remit the matter to the Commissioner General it should not do so, and that it should proceed to hear the matter on the merits.

In the above circumstances, the TAC and the Court of Appeal were in error in failing to ensure that the matter is not disposed of on the merits by the TAC.

In view of the above finding, the questions of law raised need not be answered. The decision of the Court of Appeal and the TAC are set aside and the matter is remitted to the TAC for a hearing on the merits. In view of the long delay the TAC is directed to conclude the hearing expeditiously.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Leave to Appeal against the Judgement of the Provincial High Court of the Central Province holden in Kandy dated 22.07.2016. in case No. CP/HCCA/KA/N/02/2015.

Colombo Buddhist Theosophical Society,
No. 203, Olcott Mawatha,
Colombo 11.

Plaintiff

SC Appeal No. 92/2018
HCCA Case No. CP/HCCA/Kandy/02/15(RA)
DC Gampola Case No. 51/2006 Land

-Vs-

Meringahage Mangala Pushpakumara Fernando,
No. 113, Kandy Road,
Gampola.

Defendant

AND THEN BETWEEN

Meringahage Mangala Pushpakumara Fernando,
No. 113, Kandy Road,
Gampola.

Defendant-Petitioner

-Vs-

Colombo Buddhist Theosophical Society,
No. 203, Olcott Mawatha,
Colombo 11.

Plaintiff-Respondent

AND NOW BETWEEN

Meringahage Mangala Pushpakumara Fernando,
No. 113, Kandy Road,
Gampola.

Defendant-Petitioner-Appellant

-Vs-

Colombo Buddhist Theosophical Society,
No. 203, Olcott Mawatha,
Colombo 11.

Plaintiff-Respondent-Respondent

BEFORE: Buwaneka Aluwihare, P.C, J.
Kumudini Wickremasinghe, J.
Janak De Silva, J.

COUNSEL: Petitioner appeared in person.
Dr. Sunil Abeyratne with Sheron Wanigasooriya for Respondent instructed by Ms. Buddhika Alagiyawanna.

ARGUED ON: 23.02.2023

WRITTEN SUBMISSIONS: On 24.01.2019 for the Plaintiff-Respondent-Respondent.
On 20.07.2018 & 24.04.2023 by the Defendant-

Petitioner-Appellant

DECIDED ON: 14.11.2023

Judgement

Aluwihare, P.C., J,

This is an appeal against the Judgement of the Civil Appellate High Court of the Kandy dated 22.07.2022. The Defendant-Petitioner-Appellant (hereinafter referred to as the 'Defendant') failed to file an Answer before the District Court of Gampola in an action filed against him for declaration of title by the Plaintiff-Respondent-Respondent (hereinafter referred to as the 'Plaintiff'). An exposition of the factual narrative relating to this case is necessary to comprehend the questions of law upon which leave to appeal was granted.

Factual Background

The Plaintiff instituted a land case in the District Court bearing case No. L51/2006 against the Defendant for declaration of title. The subject matter is the property originally owned by 'Parama Vingartha Buddhist Society' [Buddhist Theosophical Society] started by Col. Henry Olcott. The building was used to run the Olcott Buddhist School in Gampola which was vested by the government in 1961. In the year 2005, however, after the school was shifted to a new building, the property was re-vested with the Society by virtue of a Gazette notice and the President of the Society had taken over possession of the building in 2006. Subsequently a dispute had arisen between the Society officials and the Defendant which had been settled with the intervention of the Police. Both parties had agreed to keep the premises under lock and key. Subsequently, however, the Plaintiff alleges that the Defendant had forcibly entered into the premises and had taken over possession of the building. The Action before the District Court was filed by the Society to recover possession of the property in addition to a declaration of title.

Summons were served and the case was fixed for filing of an Answer of the Defendant

for 23.04.2007. On the said date, the Defendant failed to appear, no Proxy or Answer was filed either. The learned District Judge therefore fixed the case for ex- parte hearing on the same day and the Plaintiff was heard. At the conclusion of the ex-parte trial, on 15.05.2007 the learned District Judge delivered the ex parte judgement (marked 'A4') in favour of the Plaintiff. It must be noted that the Defendant had made no appearance in, or representation on his behalf before the District Court.

Thereafter, subsequent to being served notice of the ex parte judgement, the Defendant had filed papers to purge the ex parte judgement, and an inquiry was held on the same. The learned District Judge who conducted the inquiry affirmed the ex parte judgement referred to above by his Order dated 13.01.2015.

Aggrieved by the said Order, the Defendant moved by way of revision to the High Court of Civil Appeal pleading *inter alia* for the vacation of the said Order. The learned Judges of the High Court of Civil Appeal dismissed the revision application by its order dated 22.07.2016 (marked 'A2').
Aggrieved by the said order of the High Court of Civil Appeal, the Defendant moved this court by way of an application for leave to appeal and this Court granted leave on the following questions.

i) Had the learned District Court Judge erred in fixing the case instituted by the Plaintiff for an ex parte hearing?
ii) Is the Judgement of the Civil Appellate High Court of Kandy dated 22.07.2016 bad in law?

Having heard the Defendant -Appellant (who appeared in person), and the learned Counsel for the Plaintiff- Respondent, this Court directed both parties to file further written submissions on the following issues.

1. Whether the High Court of Civil Appeal, having requested the parties to file written submissions in relation to the preliminary objections raised by the Respondent, without considering the preliminary objection, delivered the order with regard to the substantive relief prayed in the revision application.
2. Whether the Appellant could have moved the High Court of Civil Appeal by way of revision to set aside the judgement of the District Court without first having canvassed the adverse order made against the Appellant in refusing the

application to purge default.

Having possessed the set of facts and circumstances, as well as the legal issues relating to this appeal in greater detail, I am of the opinion that the aforementioned questions could be answered once the following questions are addressed.

1. On what basis may a case be fixed for ex-parte hearing and an ex-parte judgement be delivered when a Defendant fails to file Answer?
2. What are the steps to be taken in order to purge default? Has the Appellant taken such steps and been successful in that endeavour?
3. Where a person fails to purge default and set aside an adverse ex-parte judgement, does an appeal or application for revision lie from any Order affirming an adverse ex-parte judgement?
4. Does any Court exercising Revisionary jurisdiction possess the competence to determine the process of adjudication of the matter?

1. **On what basis may a case be fixed for ex-parte hearing and an ex-parte judgement be delivered?**

Section 84 of the Civil Procedure Code states as follows.

"**If the defendant fails to file his answer on or before the day fixed for the filing of the answer**, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, **if he fails to appear on the day fixed (or the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons**, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, **and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex-parte forthwith, or on such other day as the court may fix.**" [emphasis added].

That the Defendant failed to file his Answer on the day fixed for filing of Answer is admitted. The Defendant and the Plaintiff are in agreement that filing of the Answer was fixed for 23.04.2007 and that the Defendant failed to file his Answer, appear or make any representation to Court on the said date. Regarding the serving of summons, the Defendant claimed that he was served summons in open Court

on 29.01.2007 by the learned District Judge when he was in court in connection with some other case [*vide* evidence of the Defendant on 20.03.2012 before the DC]. The Defendant further claimed that the District Judge did so upon being notified by Counsel for the Plaintiff (now Respondent) that the Defendant was present in Court. Therefore, there can be no doubt that the present case falls within the ambit of Section 84.

Nothing prevents the Court from fixing a date for trial on the day of default itself and the in the present instance, the learned District Judge considered it expeditious to do so as the Defendant was neither present nor had there been any representation on his behalf indicating his intention to contest the Plaint. By his judgement dated 15.05.2007 (at p. 165 of the Original Court Record marked 'A4'), the learned District Judge entered judgement in favour of the Plaintiff and stated that such judgment is entered upon the merit of evidence led by the Plaintiff, and that the Defendant may vacate the ex-parte judgment within 14 days. Therefore, although the learned District Judge makes no reference to Section 84 in his judgement, there can be no question of illegality regarding the conduct of an ex-parte trial or the delivery of ex-parte judgement where the Defendant fails to file Answer and/or appear.

2. **What are the steps to be taken in order to purge default? Has the Defendant taken such steps and been successful in that endeavour?**

Section 86 of the Civil Procedure Code details how default may be purged or how a judgement entered in default may be set aside. I have reproduced the Section below for convenience.

"(2) Where, **within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff** makes application to and thereafter **satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default** upon such terms as to costs or otherwise as to the court shall appear proper.

(2A) **At any time prior to the entering of judgment against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant** and permit him to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear fit." [emphasis added].

The Defendant had made an application under Section 86(2) to have the ex-parte judgement vacated. The Order of the learned District Judge dated 13.01.2015 (at pg. 225 of the Original Court Record marked 'A4') states that an inquiry into the matter was conducted and written submissions were submitted by both parties. This Order too observes that the Defendant had been served summons in open court, that 23.04.2007 had been fixed for filing of answer and that on the said date, he had failed to file such answer. The Order also states that the Defendant contended that the reason he could not file Answer on the said date is due sustained illness, resulting in his hospitalization from 02.04.2007 to 10.04.2007 and subsequent time to recuperate till 02.05.2007. Having noted that per the Defendant's submissions, the he was ill from 28.03.2007, that the medical report obtained on 10.04.2007 recommends a period of rest till 24.04.2007, and that consequently, the Appellant would have been cognizant of the impending difficulty to appear in Court or file his Answer by 23.04.2007, the learned District Court Judge concluded that the Appellant could have made the Court aware of this difficulty by way of Counsel, agent or relation. Based on the aforementioned reasoning, the learned District Court Judge concluded that the Defendant had not satisfied Court that he had "reasonable grounds for such default" per Section 86(2) to vacate the ex-parte judgement. The Appellant's application under Section 86(2) was refused and affirmed the ex-parte judgement dated 15.05.2007. It would be pertinent to note that 'Dr Doluweera' who issued the medical certificate to the Defendant, had noted under 'Medical Officer's opinion' that the Defendant was 'moderately ill', and the Defendants' ailment was a backpain.

Accordingly, it is evident that although the Appellant had sought the vacation of the ex-parte judgement via the appropriate statutory remedy, he had not been successful and therefore, the ex-parte judgement was affirmed at the end of the inquiry.

3. **Where a person fails to purge default and set aside an adverse ex-parte judgement, does an appeal or an application for revision lie from any Order affirming an adverse ex-parte judgement?**

This question relates to the second question upon which parties were directed to tender written submissions. In my opinion, Section 88 of the Civil Procedure Code read in conjunction with the scope and extent of the Revisionary Jurisdiction exercised by the High Court of Civil Appeals comprehensively addresses this question.

Sections 88(1) and 88(2) are as follows:

"(1) **No appeal shall lie against any judgment entered upon default**.

(2) **The order** setting aside or **refusing to set aside the judgment entered upon default** shall accompany the facts upon which it is adjudicated and specify the grounds upon which it is made, and **shall be liable to an appeal to the relevant High Court established by Article 154P of the Constitution, with leave first had and obtained from such High Court**." [emphasis added]

Accordingly, per Section 88(2), the Defendant could have sought to leave to appeal from the High Court Civil Appeal against the Order of the learned District Court Judge dated 13.01.2015 (at pg. 225 of the Original Court Record marked 'A4'). The Defendant avers, in his Petition to this Court that he filed an application seeking leave to appeal in terms of Section 88(2), as well as an application seeking revision of the Order of the learned District Court Judge dated 13.01.2015 in the High Court of Civil Appeal. However, no mention is made of any progress or result of the application which sought leave to appeal. Nevertheless, the High Court of Civil Appeal entertained the Appellant's Revision application, and it is the resultant order of the High Court of Civil Appeal on the Revision application that is being canvassed against before this Court.

In any case, the application which sought leave to appeal could have had no effect

on the maintainability of the Revision application as it is well settled that the powers of revision bestowed on Appellate Courts are discretionary, and very wide in that they may be exercised regardless of whether an appeal has been taken against the impugned Order of the Original Court [*vide* ***Rustom Vs. Hapangama & Co.*** **[1978/79] 2 SLR 225;** ***Attorney General v. Podisingho*** **[1950] 51 NLR 385; Wijesiri Gunawardene & Others Vs. Chandrasena Muthukumarana & Others, SC Appeal No. 111/2015 with SC Appeal No. 113/2015 and SC Appeal No. 114/2015, S.C Minutes 27.05.2020**]. For these reasons, I am of the opinion that the Appellant could have moved the High Court of Civil Appeal by way of revision to set aside the order of the District Court even if he had not first sought to appeal against the adverse order made against the Defendant when the District Court, by Order dated13.01.2015 refused to vacate the ex-parte judgement.

4. Does any Court exercising Revisionary jurisdiction possess the competence to determine the procedure of adjudication?

This question relates to the first question upon which parties were directed to tender written submissions. I must begin addressing this question by setting out the parameters, scope and appropriate fora in which the Revisionary jurisdiction may be invoked in this Island.

Article 138 of the Constitution bestows the Court of Appeal the power to revise any judgement, decree or order of any Original Court where any error, defect or irregularity in such judgement, decree or order of any Original Court has prejudiced the substantial rights of parties or has occasioned a failure of justice. Article 154P(3)(b) of the Constitution read with Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 0f 1990 provide that any High Court established by Article 154P of the Constitution for a Province, shall have and exercise revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court within such Province, where any error, defect or irregularity in such judgement, decree or order of any Original Court has prejudiced the substantial rights of parties or has occasioned a failure of justice. Accordingly, the High Court of Civil Appeal of Kandy was well-possessed of the jurisdiction to hear and determine the Defendant's Revision Application.

The Defendant's central grievance over the order of the High Court of Civil Appeal dated 22.07.2016 is that the order is conclusive of the merits of the Defendant's revision application and dismisses the application despite the Defendant not being granted a hearing for substantive submissions on the merits of the application. The Defendant contended that at the point at which the order was given, both parties had only addressed a preliminary objection regarding the application. Explaining his argument, the Defendant contended that consideration of the preliminary objection alone cannot be grounds for adjudication of the merits of his application, and that a final order cannot be given when the parties had only argued on a preliminary objection.

At this point, I find it prudent to advert to the Judgement and Proceedings of the High Court of Civil Appeal dated 22.07.2016 (marked 'A1'). I observe the following:

- Having supported his application for revision, the Defendant raised a preliminary objection regarding the standing of the Plaintiff before the High Court. Court allowed parties to tender written submissions on the objection [vide proceedings dated 07.09.2015].
- The aforesaid Preliminary Objection was that the Proxy tendered on behalf of the Plaintiff was defective in that it did not bear the signature of the Secretary of the Respondent Society and that it did not bear the Common Seal [vide p. 4 of the A1].
- On 17.11.2015 the Defendant filed written submissions [vide proceedings dated 17.11.2015].
- On 10.12.2015 the Plaintiff filed written submissions [vide proceedings dated 14.12.2015].
- On 22.07.2016. the Order was delivered in open courts, the Preliminary Objection was overruled, and the Revision application was dismissed without costs." [vide proceedings dated 22.07.2016].

Therefore, it is evident that no dedicated submissions on the merits of the revision application were made. The question which warrants determination is therefore whether the learned Judges of the High Court erred in only permitting

submissions to be made on the preliminary objection before delivering its order on the entire application.

The Revisionary Jurisdiction is fundamentally a discretionary one. The essence of this statement is that it is exercised purely at the discretion of the learned Appellate Judges while paying due regard to immutable principles of natural justice and legislation. This court has, on several occasions, deemed it fit to lay out the scope of the revisionary power of our appellate courts and note how it may be exercised.

To reach the crucial element of this question in this appeal, I will refer to the judgement in ***Rasheed Ali Vs. Mohamed Ali and Others*** **[1981] 1 SLR 262** where His Lordship Justice R.S. Wanasundera (with Justice Weeraratne agreeing) held that the powers of revision vested in the Court of Appeal, flowing from Article 138 of the Constitution, are very wide and the Court can in a fit case, exercise that power whether or not an appeal lies, **but it should do so only in exceptional circumstances**. The learned Counsel for the Plaintiff as well as the Defendant himself referred to this judgement to substantiate their arguments. Relying on the aforementioned judgement, the Defendant contended that his case was one that warranted revision due to a set of circumstances which he believed to be exceptional, due to alleged errors in fact and law in the Order of the learned District Court Judge. Learned Counsel for the Plaintiff contended that the learned Judges of the High Court rightly concluded that the revision application presented no exceptional circumstances, or any errors, omissions or irregularities which occasioned a failure of justice.

Regarding the manner in which the revisionary jurisdiction may be exercised, five Justices of this Court observed in ***Attorney General Vs. Gunawardena*** **[1996] 2 SLR 149** that "*in exercising the powers of Revision this Court is not trammelled by technical rules of pleading and procedure*" [at p. 150]. Although the jurisprudence of this Court has now advanced to the point where it is settled that this Court does not have an inherent power of revision, it is my view that the above holding would apply without derogation to the revisionary jurisdiction exercised by the Court of Appeal, or a High Court established by Article 154P of the Constitution. From the aforementioned observation, it could also be

established that the High Court of Civil Appeal would not have been bound to entertain the revision application any further than the learned Judges felt it necessary.

Regarding the preliminary objection raised by the Defendant, the Order of the High Court notes [at pages 4 and 5] that the alleged defect is a mere technical objection which could be readily remedied and that such objection cannot in any circumstances be grounds for quashing an Order of the District Court or setting aside the ex-parte judgement. The Appellant contended before this Court that the learned Judges of the High Court have not paid consideration to material facts and circumstances relating to the Revision application before dismissing it. However, in my opinion, the Petition and affidavit of the Defendant presented to the High Court provide a comprehensive narration of the facts and circumstances of his application. It is evident in the order of the High Court that the learned Judges were well-possessed of the facts and circumstances of the application as correct references are made to the documents tendered, as well as the original case record of the District Court.

Upon further observation, I note that the learned Judges of the High Court have paid ample consideration to the grievance averred to by the Defendant. Having done so, the learned Judges have found no credible elements constituting 'exceptional circumstances' to exist in the Defendant's application for the court to exercise its revisionary powers. The order of the High Court states [at pages 6 and 7] that it is evident that the Defendant was in derogation of Section 86(2) and Section 753 of the Civil Procedure Code in seeking revision of the Order of the learned District Court Judge as the Defendant had failed to provide any grounds which justified his default or served to indicate an error of law or fact committed by the learned District Court Judge, and that the lack of such elements constitute sufficient reason for the dismissal of the Appellant's Application for Revision. Having considered the facts and circumstances of this case and the matters urged before the High Court of Civil Appeal, I am of the view that the learned judges of the High Court of Civil Appeal could not have arrived at any other conclusion and as such I hold that the decision of the learned Hogh Court Judges cannot be faulted.

For the reasons mentioned above, I answer the questions of law upon which leave to appeal was granted as follows.

i) Had the learned District Court Judge erred in fixing the case instituted by the Plaintiff for an ex parte hearing?
Answer: No.

ii) Is the Judgement of the Civil Appellate High Court of Kandy dated 22.07.2016 bad in law?
Answer: No.

The parties may bear the respective costs of this case.
Appeal dismissed.

Judge of the Supreme Court

Kumudini Wickremasinghe, J
I agree.

Judge of the Supreme Court

Janak De Silva, J
I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application for Leave to Appeal under and in terms of article 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5c of the High Court of Provinces (Special Provisions) Act No 54 of 2006.

SC/Appeal/35/2018

S.C.(HCCA) LA Case No. 579/2016

Case No: SP/HCCA/GA/42/2009 (F)

DC Galle Case No : 10993/P

Serasinghe Vidanage Somalatha,

Elabada, Ginthota.

Plaintiff

Vs

1. Aluthgamage Albert,

2. Aluthgamage Chitralatha,

   Both of:

   Sri Pagngnaloka Mawatha,

   Welipitimodara, Ginthota.

3. Serasinghe Widanage Somawathi,

   Mahaneliya Road,

   Walliwala, Weligama.

   (Deceased)

4. Serasinghe Widanage Karunadasa,

Mahaneliya Road,
Walliwala,Weligama.

5. Serasinghe Widanage Pagngnadasa,
Elabada, Ginthota.

6. Kathaluwa Gamage Seetin,
Neelagewaththa,
Kathaluwa, Ahangama.

7. Pansina,
Welipitimodara, Ginthota.
(Deceased)

8. Aluthgamage Bantis,
Sri Pagngnaloka Mawatha,
Welipitimodara,
Ginthota.
(Deceased)

8A. Lankapurage Rosinahami,
Sri Pagngnaloka Mawatha,
Welipitimodara,
Ginthota.
(Deceased)

7A. B.V. Vineris,
Welipitimodara,
Ginthota.

4A. Serasinghe Vidanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

Defendants

And

1/8A. Aluthgamage Albert,

2. Aluthgamage Chitralatha,
Both of:
Sri Pagngnaloka Mawatha,
Welipitimodara,
Ginthota.

1/8A and 2nd Defendant-Appellants

Vs

Serasinghe Vidanage Somalatha,
Elabada, Ginthota.

Plaintiff-Respondent

3. Serasinghe Widanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

4. Serasinghe Widanage Karunadasa,
Mahaneliya Road,
Walliwala,Weligama.

(Deceased)

5. Serasinghe Widanage Pagngnadasa,
Elabada, Ginthota.

6. Kathaluwa Gamage Seetin,
Neelagewaththa,
Kathaluwa, Ahangama.

7. Pansina,
Welipitimodara, Ginthota.

7A. B.V. Vineris,
Welipitimodara,
Ginthota.

4A. Serasinghe Vidanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

Defendant- Respondents

And

Serasinghe Vidanage Somalatha
(Deceased)
Kodikarage Murin,
Withanagiri, Pokunugamuwa,
Weligama.

Substituted-Plaintiff-Respondent-Petitioner

Vs

1/8A. Aluthgamage Albert,

2. Aluthgamage Chitralatha

Both of:

Sri Pangnyaloka Mawatha,

Welipitimodara, Ginthota.

<u>1/8A and 2nd Defendant- Appellant- Respondents</u>

3. Serasinghe Widanage Somawathi,

Mahaneliya Road,

Walliwela, Weligama.

4. Serasinghe Widanage Karunadasa,

Mahaneliya Road,

Walliwala,Weligama.

5. Serasinghe Widanage Pagngnyadasa,

Elabada, Ginthota.

6. Kathaluwa Gamage Seetin,

Neelagewaththa,

Kathaluwa, Ahangama.

7. Pansina,

Welipitimodara, Ginthota.

(Deceased)

7A. B.V. Vineris,
Welipitimodara,
Ginthota.

4A. Serasinghe Vidanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

Defendant- Respondent- Respondents

AND NOW

In the matter of an application for substitution

Serasinghe Vidanage Somalatha
(Deceased)
Kodikarage Murin,
Withanagiri, Pokunugamuwa,
Weligama.

Substituted-Plaintiff-Respondent-Petitioner-Appellant

Vs

1/8A. Aluthgamage Albert,
2. Aluthgamage Chitralatha
Both of:
Sri Pangnyaloka Mawatha,
Welipitimodara, Ginthota.

1/8A and 2nd Defendant-Appellant-Respondent-Respondents

3. Serasinghe Widanage Somawathi,

Mahaneliya Road,
Walliwala, Weligama.
(Deceased)

3A. Serasinghe Widanage Pagngnyadasa,
Mahaneliya Road,
Walliwala,
Weligama.

4. Serasinghe Widanage Karunadasa,
Mahaneliya Road,
Walliwala, Weligama.

4A. Serasinghe Widanage Somawathi,
Mahaneliya Road,
Walliwala, Weligama.

4B. Serasinghe Widanage Pagngnyadasa,
Mahaneliya Road, Walliwala,
Weligama.

5. Serasinghe Widanage Pagngnyadasa,
Elabada, Ginthota.

<u>New Address:</u>

Mahaneliya Road,
Walliwala, Weligama.

6. Kathaluwa Gamage Seetin,
Neelagewaththa,
Kathaluwa, Ahangama.
(Deceased)

6A. Serasinghe Widanage Somawathi
Mahaneliya Road,
Walliwala, Weligama.
(Deceased)

6B. Serasinghe Widanage Pagngnyadasa,
Mahaneliya Road, Walliwala,
Weligama.

7. Pansina,
Welipitimodara, Ginthota.
(Deceased)

7A. B.V. Vineris,
Weliptimodara, Ginthota.
(Deceased)

7B. Nevil Thushara,
Welipitimodara, Ginthota.

Defendant-Respondent-Respondent- Respondents

Before: B.P. Aluwihare, PC., J
Vijith K. Malalgoda, PC., J
Murdu N.B. Fernando, PC., J

Counsel: Sanjeewa Dasanayake with Ms. Dilni Premarathne instructed by M.S. Paul Ratnayake Associates for the Substituted-Plaintiff-Respondent-Appellant.
Suren Fernando with Ms. Khyati Wickramanayake for the 1/8A and 2nd Defendant- Appellant-Respondents.

Argued on: 23.06. 2020

Decided On: 14.11.2023

Judgement

Aluwihare PC J.,

This is an appeal against the judgment of the Civil Appellate High Court of Galle. The original action filed by the original Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) in the District Court of Galle for the partition of a land called '*Hamade Delgahawatta*". By the Plaint, 8 Defendants were made parties to the action and the Plaintiff sought to partition the aforesaid land according to the share allocation described in paragraph 10 of the Plaint.

By preliminary plan No.198 dated 31st March 1991 made by Bandula Silva Licensed Surveyor **(marked as 'X')** a land of 2 Acres, 1 Rood and 26.25 Perches was identified as the corpus which consists of two lots **namely Lot A and Lot B**.

The 1st/8A and 2nd Defendant-Appellant-Respondents (hereinafter referred to as the relevant Defendants) by their statement of objections disputed the corpus identified in the preliminary plan. They took up the position that a land called *Delgahawatta*

Addara Owita was included in the corpus identified by the aforementioned preliminary plan and sought the exclusion of that purported land from the corpus.

The surveyor, by having plan No.1490 [referred to in the statement of claim of the relevant Defendants], superimposed on the preliminary plan No.198, which was marked and produced as 'Y 1'. In the superimposed plan he had identified 3 lots namely A1, A2 and B. Of those lots, the relevant Defendants claimed A1 was the corpus, and prayed that the land sought to be partitioned by this action be identified as Lot A1 of the superimposed plan 'Y1', and for a declaration that they were the owners of the said Lor A1.

The Plaintiff's position was that none of the Surveyors had used earlier plans to demarcate boundaries but surveyed the land according to the metes and bounds as shown by the respective parties.

Thereafter the trial proceeded on 2 main contesting points,

1. the corpus and its extent and

2. the pedigree of title

The Plaintiff giving evidence claimed title as described in the schedule to the plaint and sought to partition the land among the co-owners as described therein.

The relevant Defendants while disputing the identification of the corpus took up the position that out of the entirety of Lot A1 in the plan marked 'Y1' their predecessor in title namely Bantis (the original 8th Defendant) has acquired prescriptive title to a 42/48th share which was almost the entirety of the corpus.

The District Court by its judgment dated 2nd April 2009, admitted the title and pedigree disclosed by the Plaintiff and further identified the corpus to be partitioned as Lot A1 in the Plan marked 'Y1' which is 1 Acre, 2 Roods and 13.75 Perches in extent. Upon analysing the evidence placed, the learned District Judge held the entitlement of parties as follows;

Plaintiff- 24/360, the 1st Defendant-55/360, the 2nd Defendant 55/360, the 3rd to the 6th Defendant 24/360 each, the 7th and 8th Defendants 65/360 each. All parties were allotted shares and it appears that the share allotted to the Plaintiff was the smallest, in terms of extent.

Aggrieved by the aforesaid judgment, the relevant Defendants preferred an appeal to the Civil Appellate High Court of the Southern Province Holden in Galle.

The relevant Defendants did not dispute the findings of the District Court with respect to the identification of the corpus, however they challenged the findings relating to the pedigree and in particular the findings with regard to prescriptive title.

The Civil Appellate High Court delivered its judgment *inter alia* granting prescriptive title of the entirety of the corpus (Lot A1 in Plan marked Y1) to the relevant Defendants. It is of relevance to note that the learned High Court Judges have reproduced the entirety of the written submission filled on behalf of the relevant Defendants in their judgement and had overturned the findings of the learned District Court Judge. The judgement of the High Court commences on page 04 and runs into page 22. The entire judgement is nothing but a reproduction of the written submission of the Defendants, save for the last paragraph which says, "for the foregoing reasons we set aside the answers by the learned District Judge to issues 24 to 29 by holding that 8A/1 and 2nd Defendant-Appellants have in fact prescribed to Lot A1 in Y1." This Court takes serious note of this conduct, which cannot be condoned under any circumstances and this Court is strongly of the view that judges should not resort to such conduct.

It appears to me that the learned High Court Judges have failed in their duty to consider the respective cases of both the Plaintiff and the relevant Defendants. However, the only issue that this Court has to consider is whether the said Defendants have prescribed to the corpus of A1.

Aggrieved by the said judgment of the Civil Appellate High Court the Plaintiff appealed to this Court seeking relief. The Plaintiff however did not wish to challenge the decisions of the District Court and High Court with regard to the identification of the corpus.

On 09.03.2018 Leave to Appeal was granted on questions of law referred to in sub paragraphs (iii), (iv) and (v) in paragraph 17 of the petition dated 23.11.2016, which are as follows;

(iii) Whether their Lordship the High Court Judges of Civil Appeal had misdirected themselves by deciding the said Bantis acquired prescriptive title to the subject matter as against the rest of the co-owners?

(iv) Whether their Lordship the High Court Judges of Civil Appeal had erred in law by failing to appreciate the fact that the 1,2, and 8A respondents have not placed any cogent evidence to establish act of ouster which enables the said Bantis to claim prescriptive title against the fellow co-owners?

(v) Whether their Lordship the High Court Judges of Civil Appeal had failed to appreciate the fact that in the absence of evidence to establish act of ouster the co-owner cannot seek prescriptive title against the other co-owners merely relying on exclusive possession?

At the outset the Counsel for the relevant Defendants submitted that the High Court had correctly found that the Plaintiff had not proved title to the corpus and as such no question of co-ownership arises. The observation made by the High Court was that based on the evidence before it, the relevant Defendants have proved title independent of the Plaintiff. It is argued that since there is no question of law raised with regard to the finding that the Plaintiff was not a co-owner, the other questions of law cannot arise.

However, on the perusal of the questions of law for which leave had been granted, it cannot be denied that the appeal is based on the assumption that the parties are co-owners and that the Plaintiff has impliedly contested the finding that the relevant Defendants have proved title independent to the Plaintiff.

In fact, the parties have based their submissions on the issue of whether they, co-owners of the land sought to be partitioned and whether the 8th Respondent, Bantis, acquired prescriptive title to the subject matter as against the rest of the co-owners. Therefore, the contesting point made on behalf of the relevant Defendants regarding the futility of the questions of law raised in this appeal cannot stand.

Co-ownership

The relevant Defendants submit that in order for a question of prescription against co-owners to arise, it must be established that the Plaintiff is a co-owner. It is argued that the Counsel for the Plaintiff did not point to any evidence that the Plaintiff is a

co-owner of the corpus while the relevant Defendants have proved title independently of the Plaintiff on the basis of a deed from the year 1894 which is the oldest source deed provided in evidence.

The relevant Defendants have based their title to the corpus on Deed No. 12571 dated 13th March 1894 (marked 1V1) and seven other deeds (1V2-1V8) which convey the rights acquired by '1V1'.

The 1st /8A Defendant stated in evidence that the original owner of the corpus one Mathes alias Jando transferred **an undivided 1/8th share** of the corpus to one Sinnachcho. On Sinnachcho's death her rights devolved on her five children, Juanis, Carolina, Jamis, Ranso and Babunhamy. All five children by individual deeds sold their shares to Lankapurage Rosinahami, the 8A Defendant who was added as a party on the death of her spouse the 8th Defendant and is the mother of the present appeal's 1st /8A and 2nd Defendants [present Appellants].

Accordingly, Juanis and Carolina by Deed No. 13114 dated 2nd July 1974 (marked 1V2), Jamis by Deed No. 3053 dated 13th November 1974 (1V3) and Ranso by Deed No. 3004 dated 19th July 1974 (1V4), transferred their shares to the 8A Defendant. Babunhamy transferred her share to her sibling Jamis by Deed No. 6528 dated 31st May 1952 (1V5) which the said Jamis transferred to the 8A Defendant [Rosinahamy] by Deed No. 8780 dated 19th August 1958 (1V6).

In the statement of claim, it is mentioned that Rosinahamy, the 8A Defendant gifted her rights to the corpus to her two children the 1st/8A Defendant Albert by Deed No. 22170 dated 4th May 1985 (1V8), and the 2nd Defendant Chitralatha by Deed No. 22171 dated 4th May 1985 (2V1). It is submitted that they have accordingly proved title under Deed No. 12571 independently from the Plaintiff.

The primary deed on which the Plaintiff has based her claim to the corpus is deed No. 12572. According to the pedigree disclosed by the Plantiff **an undivided 1/3** share of the corpus was transferred by the said original owner Mathes by Deed No. 12572 dated 13th March 1894 to one Saudiris who had conveyed the same share by Deed No. 15144 dated 22nd January 1940 (marked as P2) to one Ransohamy, the Plaintiff's mother. The rights of Ransohamy had on her death devolved on her six children, namely, the Plaintiff, the 3rd to 5th Defendants, Karunawathie and Sisilawathie. The

rights of Karunawathie devolved on her siblings, while the rights of Sisilawathie had on her death passed onto her husband the 6th Defendant.

The Plaintiff in lieu of deed No. 12572 produced 'P1', a Letter issued by the Land Registry stating that the deed has perished. The document marked 'P1' does not contain any description of what the deed contained and all evidence led as to its contents were from the Plaintiff herself.

Thus, the relevant Defendants assert that there is no valid primary or secondary evidence led with regard to this deed and the extent transferred to the Plaintiff's predecessors. In order to substantiate this argument, the relevant Defendants have highlighted the admission made by the Plaintiff when being cross-examined that she did not know the contents of the deed nor the extent of rights transferred from the original owner Mathes to her predecessor Saudiris (vide page 160-161 of the Brief) as well as the Plaintiff's observation that the size of the land in deed No. 12752 was larger than the size of the land in deed No. 15144 and deed No. 12751.

On this basis the relevant Defendants take up the position that the Plaintiff has not sufficiently proved that she has title over the corpus and therefore has no basis to claim co-ownership.

The Plaintiff asserts the fact that the parties to the action are co-owners of the property sought to be partitioned by indicating that during cross-examination the 1st/8A Defendant specifically admitted the title of the Plaintiff to the corpus as set out in the pedigree (vide page 261 of the Brief). Furthermore, the Plaintiff notes that in the relevant Defendants statement of claim dated 31st January 1997, they claim rights under another individual, one Theberis and admit the fact that Theberis too had undivided rights to the corpus, which indicates that even the portion of land to which they claim prescriptive title is undivided. Therefore, on behalf of the Plaintiff it is argued that the relevant Defendants have conceded the co-owned rights of the parties to the land sought to be partitioned.

In this instance it is noteworthy that when being cross-examined, 1st/ 8A Defendants did admit to the fact that he is a co-owner to the corpus (vide page 255 of the Brief). The 1st/8A Defendants also admitted that Saudiris received rights under deed No. 12571 and that the Plaintiff received rights devolving from the original owner Mathes (at page 262 of the Brief).

The 1st /8A Defendants also accepted that by deed No. 15144 Saudiris transferred rights to Ransohamy which then devolved on her six children including the Plaintiff. The argument made in that instance was that the Plaintiff was not entitled to the land as those rights were never exercised by the Plaintiff nor her predecessor Ransohamy (at page 264 of the Brief). Furthermore the 1st /8A and 2nd Defendants had in their statement of claim dated 31st January 1997 in paragraph 23 stated that the two deeds Nos. 12572 and 15144 referred to above on which the Plaintiff's mother had acquired rights had never been acted upon. As such the relevant Defendants have not denied the two deeds and only state that they had not been acted upon.

Despite the fact that deed No. 12571 was not produced as evidence due to its unavailability, deed No. 15144 (marked 'P2') by which Saudiris conveys his rights to the corpus, to the Plaintiff's mother Rensohamy, describes deed No. 12571. The validity of deed No. 15144 which is a legally executed document cannot be denied. Therefore, the devolution of title as set out by the Plaintiff cannot be disregarded and the inference that can be drawn is that Saudiris had gifted the undivided rights he received with respect to the corpus, under deed No. 12751 to Rensohamy by way of deed No. 15144.

Prescriptive title

The Plaintiff's pedigree is based on three deeds, deeds No. 12571, 12572, 12573 all dated 13th March 1894.

According to the Plaintiff, the original owner also conveyed an undivided 13/24 share of the corpus to one Theberis by Deed No. 12573 dated 13th March 1894. This deed has not been produced and instead a letter issued by the Land Registry indicating that it has been decayed was submitted as evidence (marked 7V1).

As per the Plaintiff's pedigree, Theberis had then by Deed No. 13705 dated 24th February 1919 (7V2) sold a 15/48 share to Lankapurage Juanis who then conveyed this share to Hikkaduwage Ijo under Deed No. 10328 dated 4th July 1919 (7V3). The said Ijo was married to Theberis and together they had an undivided 13/24 share. They had 6 children, the 7th Defendant Francina, the 8th Defendant Bantis, Siyadoris, Sampy, Aminona, and Danister and on their deaths their rights devolved on their six heirs. The shares of Sampy, Aminona, and Danister who died unmarried and issueless devolved on Siyadoris and the 7th and 8th Defendants. Siyadoris by Deed No. 12881

dated 13th November 1972 (1V7) conveyed his share to the 8A Defendant Lankapurage Rosinahami.

The relevant Defendants in their statement of claim assert that although Theberis and Ijo had a 26/48 share (13/24 in the Plaint), they possessed a 42/48 share of the corpus and acquired prescriptive title to it. They further assert that on the death of Theberis and Ijo their rights were only enjoyed by one of their children, the 8th Defendant Bantis and that Bantis had prior to the institution of this action enjoyed undisturbed, uninterrupted and adverse possession of that undivided 42/48 share for more than 10 years thus acquiring prescriptive title. Accordingly on the death of the 8th Defendant it is argued that this share should devolve on his heirs, his widow Rosinahami (8A Defendant), and his children the 1st/ 8A Defendant and 2nd Defendant.

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Based on the rights acquired under Sinnachcho and Theberis the relevant Defendants have claimed that the 1st/8A Defendant and 2nd Defendant are each entitled to a 3/48 share of the corpus while the 8A Defendant (now deceased) is entitled to a 42/48 share of the corpus (vide paragraph 21 of the statement of claim marked 'P5').

In light of this claim, the three questions of law above, namely (1) whether the Judges of the High Court of Civil Appeal had misdirected themselves by deciding the said Bantis acquired prescriptive title to the subject matter, (2) had failed to appreciate that in the absence of evidence to establish act of ouster the co-owner cannot seek prescriptive title against the other co-owners merely relying on exclusive possession, and (3) that the 1, 2, and 8A Defendants have not placed any cogent evidence to

establish act of ouster which enables the said Bantis to claim prescriptive title against the fellow co-owners, can be addressed in toto.

It is the Plaintiff's contention that the relevant Defendants have only established possession of the property and have failed to establish any overt act of ouster and have therefore failed to prove that Bantis (8th Defendant) acquired prescriptive title to a 42/48 share of the corpus. It is further submitted that the High Court has failed to establish an act of ouster and has solely decided the matter based on the purported exclusive possession claimed by the relevant Defendants.

The relevant Defendants' position is that this is clearly a case in which the counter-presumption of ouster applies and that based on the evidence placed before court they have sufficiently proved that they have prescriptive rights over the corpus.

The fundamental principle recognized by our law is that the possession of one co-owner is the possession of the other co-owners as well. In light of this principle, it is pertinent to touch upon the law of prescription in relation to co-owners.

Our Prescription Ordinance is said to constitute a complete code on the subject of prescription. As per Section 3 of the Prescription Ordinance, No. 22 of 1871 as amended, in order to establish prescriptive title, there must be, "Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action…"

According to the leading case of ***Corea v. Appuhamy*** **(1911) 15 NLR 65**, in which Their Lordships of the Privy Council discussed the principles relating to prescription among co-owners;

"*It is settled law that a co-owner's possession is in law the possession of all other co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of an ouster or something equivalent to ouster could bring about that result.*"

This means that a co-owner cannot prescribe against other co-owners unless he has actually ousted them or has by some overt act intimated to them that he is no longer possessing on their behalf but is possessing adversely to them. Thus, the co-owner

claiming prescriptive possession ***must prove that there has been an act of ouster prior to the running of prescription***.

In light of this section, the question that arises with respect to exclusive possession of the common property by one co-owner for a long period of time is whether such possession was 'adverse' and if so at what point it became so.

In ***Tillekeratne v. Bastian*** **(1918) 21 NLR 12** at p. 18, Bertram C.J. examining the real effect of the decision in ***Corea v. Appuhamy*** (supra) upon the interpretation of the word "adverse" in Section 3 of the Prescription Ordinance with reference to cases of co-ownership, observed that the word must be interpreted in light of 3 principles of law;

"(*i) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.*

(ii) Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.

(iii) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity."

In the context of co-owners, this means that generally a co-owner cannot establish prescriptive title against other co-owners. Thus, whenever a co-owner whose possession of the common property was not at its inception adverse, later claims that it has become adverse, the onus is on him to prove it. He must not only prove an intention on his part to possess adversely, but a manifestation of that intention to the other co-owners against whom he sets up his possession. Therefore, he must prove an "overt unequivocal act" of ouster.

However, in ***Tillekeratne v. Bastian*** (supra) at p. 20 it was also observed that if these presumptions of law are accepted without qualification it could lead to a conclusion that is artificial and contrary to common sense;

"*If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period* ***as far back as reasonable memory reaches;*** *that he and they have done* ***nothing to recognize the claims of the other co-***

owners; that he and they **have taken the whole produce of the property for themselves;** *and that these co-owners* **have never done anything to assert a claim to any share of the produce,** *it is artificial in the highest degree to say that person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession.*" (Emphasis added)

In cases where principles of law would lead to such an artificial result the law has developed a counter- presumption, that is to say a "presumption of ouster". In ***Tillekeratne v. Bastian*** (supra) Bertram C.J. succinctly stated the principle as follows;

"it is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

Further the Court held at p. 23

"*it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.*"

In ***Angela Fernando v. Devadeepthi Fernando and Others***, **(2006) 2 Sri L.R 188** Weerasuriya J., observed that;

"*Ouster does not necessarily involve the actual application of force. The presumption of ouster is drawn in certain circumstances when exclusive possession has been so long continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time in the distant past there was in fact a denial of the rights of the other co-owners.*"

Thus, the presumption of ouster is an exception to the general rule which can be invoked when there are special circumstances in addition to the fact of undisturbed and uninterrupted possession for the requisite period of 10 years.

In support of the contention that the presumption of ouster would apply to present case, the following reasons were expounded on behalf of the relevant Defendants;

1) Long and continuous possession;

The relevant Defendants submit that the 8th Defendant, his parents and his family, have been in possession of the land for a long period of time and that there is no evidence of anyone else having ever possessed the land (vide page 212 of the Brief).

The 1st / 8A Defendant giving evidence stated that his family took up residence on the land sought to be partitioned in 1947. However, he stated that he was residing in Ja-ela during the time of the trial and that his daughter was residing on the land. He further stated that his mother Rosinahami, the 8A Defendant had resided on the land from 1947 until her death in 2002.

The Plaintiff giving evidence on 25th March 2002 admitted that she moved to the area in which the land is situated 40 years ago but gave no evidence of having made any claims to the land at that time. The Plaintiff also admitted that the corpus was the ancestral property of the 8th Defendant and that apart the family of the 8th Defendant no one else resided on the land (at page 154 of the Brief). In fact, the Plaintiff led no evidence to show that her ancestors possessed the land.

The Plaintiff denying the exclusive possession of the corpus by the 1st /8A and 2nd Defendants and their predecessors, claimed that her predecessors in title namely Rensohami and Saudiris exercised their rights to the land and that Rensohami had plucked fruits from the land. She further claimed that they were not allowed to enter the land after the action was filed.

Furthermore, the relevant Defendants state that the paddy field and owita portion depicted as Lot A2 and B in Plan Y1 were excluded from the corpus by both the District Court and High Court on the ground that they had been exclusively possessed by the 1st/8A and 2nd Defendant and their predecessors in title, consequently acquiring prescriptive title thereto. It is argued that from a logical perspective those who cultivated the paddy and owita portion would have naturally first resided on the highland and then begun such cultivation.

With respect to Lots A2 and B in Plan Y1 called "Rathmehera Delgahawatte Owita saha Kumbura" the 1st/8A Defendant claimed that his father the 8th Defendant cultivated the land with paddy and vegetables and was in possession of it till his death at the age of 90 in 1992. The 1st /8A Defendant also claimed that on his father's death,

he came into possession of that portion of land and after having left the area to take up residence in Katunayake, he came to inspect that portion at least once a month. It is argued that the paddy and owita portion was a necessary adjunct of the highland portion and the fact that they were excluded from the corpus further established the fact that unless the 1st/8A and 2nd Defendants and their predecessors exclusively possessed the highland as their ancestral property they could not have acquired prescriptive title to the paddy and owita portion (Lots A2 and B of Plan Y1). Thus, the relevant Defendants argue that their long, continuous possession of the corpus has been established.

2) No claim to the improvements and plantations;

Apart from the relevant Defendants, neither the Plaintiff nor the other Defendants had any claim to the improvements and plantations on the corpus.

According to the Surveyor's Reports marked X1 and Y3, Lot A1 consists of a house marked No.01, a kitchen marked No. 02, a latrine marked No.3, and two wells marked No. 4 and No. 5 which were all exclusively claimed by the 1st/8A Defendant without any dispute.

The Plaintiff had only claimed that the plantations which are older the 75 years and that too was not for herself but as belonging the soil. The relevant Defendants argue that the inference that can be drawn from the fact that the Plaintiff makes no claim with respect to the plantations which are less than 75 years is that neither she nor her predecessors in title have been in possession of the corpus for that long.

The District Court categorically rejected the Plaintiff's claim to the plantations and held that all the improvements and plantations on the corpus A1 belonged to the 1st/8A and 8th Defendants based on the evidence that they were located on the land (A1) which the 8th Defendant and his family possessed, resided on and cultivated for an extended duration of time. It is also noteworthy that this finding was not appealed against by the Plaintiff or the other Defendants to the High Court. Thus, having made no claims to any cultivation on the land for least 75 years, it is argued that it is hugely artificial for the Plaintiff to claim that the relevant Defendants had been in possession of the land in the capacity of co-owners.

3) Payment of assessment rates

The relevant Defendants have proved with documentary evidence that the 1st/8A and 8th Defendants have paid assessment rates over the property since 1961 (at page 217-220 of Brief) (1v9-1v41 at pages 411-447). The Galle Municipal Council has charged municipal council rates in respect of the premises of No. 65 (old)/No. 63 (new) Pagngnaloka Mawatha, Welipitmodara, Ginthota. Thus, the relevant Defendants argue that the Municipal council had recognized that the 1st /8A Defendant and his father the 8th Defendant were in exclusive occupation of the highland portion on which their ancestral house stood and the entire premises was assigned a number with reference to the road that ran on the South-Eastern boundary of the corpus. It is submitted that it would be highly artificial to hold that these relevant Defendants alone have paid assessment rates to the Municipal Council for such a long period of time while possessing the land in the capacity of co-owners.

As was reiterated earlier, the settled law is that the possession of one co-owner is in law the possession of the other co-owners. Therefore, the question that arises in this case is whether from the uninterrupted sole possession of the 8th Defendant and his predecessors in title, extending over a number of years and the conduct of the other co-owners in not asserting any right to possess, a presumption of ouster by the 8th Defendant and his predecessors can be invoked and the commencement of adverse possession by them can be presumed.

Whether the presumption of ouster is to be drawn or not would depend on the circumstances of the case. It was held in ***Abdul Majeed v. Ummu Zaneera*** **61 NLR 361 at page 381,**

"that proof of such additional circumstances has been regarded in our courts as a sine qua non where a co-owner sought to invoke the presumption of ouster."

On the perusal of the evidence submitted on behalf of the relevant Defendants it appears that their claim is fundamentally based on the assertion that they as well as their predecessors in title were the only individuals who had undisturbed, uninterrupted possession of the property and that too since the execution of the source deeds by the original owner Mathes alias Jando in 1894.

The High Court based its finding that the relevant Defendants had acquired prescriptive title to the corpus on the same arguments made on behalf of the relevant Defendants in this appeal. While holding that the Plaintiff had failed to establish title to the corpus and was therefore not a co-owner, the Court observed that in any event the 1st/8A, 2nd and 8th Defendants had acquired prescriptive title to the corpus on the basis that they had sole, exclusive possession of the corpus, they owned all the plantations and improvements on the corpus, they had paid the assessment rates and also due to the inference that they could only have acquired prescriptive title to Lots A2 and B if and only if their forefathers had exclusively possessed Lot A1 prior to that.

Whether these circumstances are of a compelling character to support a finding as to ouster must be weighed against the arguments made on behalf of the Plaintiff.

It is the contention of the Plaintiff that the relevant Defendants conceded the co-ownership of the property. It is argued that the rights of Theberis and Ijo, the parents of the 8th Defendant did not devolve on the 8th Defendant alone but also on his 5 siblings namely, Francina the 7th Defendant, Siyadoris, Sampy, Aminona and Danister. According to the Appellant, Sampy, Aminona and Danister's rights devolved on their deaths to Siyadoris, Francina (7th Defendant) and Bantis (8th Defendant).

In order to bring into question, the claim that the rights of Theberis and Ijo devolved only on the 8th Defendant, the Plaintiff makes reference to Deed No. 12881 (1V7) and Deed No. 22170 dated 4th May 1985 (1V8). In the deed marked 1V8, a deed of gift Rosinahamy executed in favour 1st Defendant Aluthgamage Albert, it is stated that she was transferring rights she had received from Siyadoris under deed No. 12881 (1V7) which the 1st/8A Defendant admitted to during cross-examination (at page 249).

Furthermore the 1st /8A Defendant admitted that his mother Rosinahami received rights under the deed marked '1V7' from a child of Theberis (pages 252-253 of the Brief) and when asked whether that meant Theberis' rights went to his children the 1st /8A Defendant stated that these children never possessed the land, that they had a claim but asked for money and that those rights were purchased by Rosinahami.

The Plaintiff has made reference to this chain of devolution in order to claim that the 7th Defendant thus had rights to the corpus and to prove that the 8th Defendant was not the sole recipient of the share of Theberis and Ijo. However, the relevant

Defendants argue that this submission holds no weight as the 7th Defendant has not disputed against the Judgment of the High Court and had not made any claim to any of the improvements or plantations on the corpus.

The Plaintiff also argue that as evidenced by Deeds marked '1V2' dated 2nd July 1974 and '1V8' dated 4th May 1984, which is a century after 1894, the relevant Defendants have acted conceding the co-ownership of the parties.

Based on the evidence submitted to court, there can be no doubt that the 8th Defendant and his family had been in exclusive possession of Lot A1 in Plan Y1. As stated by the Plaintiff, she had never resided on the land but had resided in an area close to the land. The inference that can be drawn from this admission is that she must have been aware of the fact that the relevant Defendants were residing on the corpus, had constructed buildings and cultivated the land. It was even claimed by the Plaintiff that the highland was the ancestral land of the 8th Defendant. Such an admission would weigh heavily in favour of the assertion that the relevant Defendants were possessing the land as if they were the sole owners of it. Furthermore, on perusal of the caption to the plaint it appears that the Sri Pagngnaloka Mawatha Welipitmodara, Ginthota address has only been assigned to the 1st, 2nd and 8 and 8A Defendants and every other Defendant and the Plaintiff have not used this address.

In ***Mailvaganam v. Kandaiya*** **(1915) 1 C.W.R. 175** de Samapayo J stated;

"*There is no physical disturbance of possession necessary. It is sufficient if one co-owner has, to the knowledge of the others, taken the land for himself and begun to possess it as his own exclusively. This sole possession is often attributable to an express or tacit division of family property among co-owners, and the adverse character of exclusive possession may be inferred from circumstances.*"

The claim made by the relevant Defendants is that their predecessor the 8th Defendant had acquired prescriptive title to an undivided 42/48 share of the corpus. Theberis and Ijo had been entitled to a 26/48 undivided share of the property but according to the relevant Defendants they had been in possession of a 42/48 share of it which the 1st /8A Defendant failed to provide a proper explanation for.

Although long continued possession can be established it is necessary to take into consideration the circumstances that are quite distinct from the mere duration of

possession which would warrant the application of the presumption of ouster. Evidence indicates that Lot A1 with its improvements and plantations was maintained as the place of residence of the 8th Defendant and his family. However, it is difficult to identify specific facts from which one could legitimately infer a change in the nature of the possessor's intention with regard to the holding of the land as in order to establish prescriptive title, the circumstances must indicate that separate and exclusive possession had become adverse at some date more than ten years before the bringing of the action.

The fact that the plantations on the corpus were held to be exclusively owned by the relevant Defendants does not substantiate the assertion that they were not in possession of the corpus as co-owners. Our authorities show that where a plantation has been made by a co-owner on the common land with the express or implied consent of the other co-owners, the co-owner making the plantation is entitled to possess the whole of the plantation until the rights of the parties are finally determined in a partition action (***Arnolis Singho v. Mary Nona*** **(1946) 47 NLR 564,** ***Peeris v. Appuhamy*** **(1947) 48 NLR 344**). There is no evidence indicating an objection on the part of the other co-owners to the cultivation of the common property and in fact during the survey of the land it was noted that the Plaintiff's claim that several plantations belonged to the soil was not on the basis that they were made without their consent but on the ground that they were made by their predecessors. Furthermore, it is settled law that a co-owner who makes a plantation is entitled exclusively to the fruits of it. This was observed in the case of ***Podi Sinno v. Alwis*** **(1926) 28 NLR 401** where it was held that,

"*It is the invariable custom of the country for every co-owner who effects improvements in the way of permanent plantations on a common land alone to possess such plantation and the fruits of such plantations.*"

Therefore, taking into consideration the general rights of co-owners to cultivate a co-owned land it is difficult to draw an inference that the relevant Defendants' ownership of the plantations is necessarily an attribute of the sole ownership of the corpus. Furthermore, the payment of assessment rates by a co-owner in possession is not an act unexpected of a co-owner and cannot be considered as a factor that would prove adverse possession.

Therefore, based on the evidence adduced by the relevant Defendants it cannot be said that there is proof of circumstances from which a reasonable inference could be drawn that such possession had become adverse at some date ten years before the action was brought and would justify the Court in presuming an ouster. Thus, the questions of law can be answered in the affirmative.

Conclusion

In view of the aforementioned reasons, I answer the questions of law as follows;

(iii) Whether their Lordship the High Court Judges of Civil Appeal had misdirected themselves by deciding the said Bantis acquired prescriptive title to the subject matter as against the rest of the co-owners?

Yes

(iv) Whether their Lordship the High Court Judges of Civil Appeal had erred in law by failing to appreciate the fact that the 1,2, and 8A respondents have not placed any cogent evidence to establish act of ouster which enables the said Bantis to claim prescriptive title against the fellow co-owners?

Yes

(v) Whether their Lordship the High Court Judges of Civil Appeal had failed to appreciate the fact that in the absence of evidence to establish act of ouster the co-owner cannot seek prescriptive title against the other co-owners merely relying on exclusive possession?

Yes

Accordingly, the judgement of the High Court of Civil Appeals dated 13.10.2016 is hereby set-aside and the judgement of the District Court dated 2nd April 2009 is affirmed

The appellant is entitled for costs of this appeal

Appeal allowed

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR No. 195/2022

1. Dr. Athulasiri Kumara Samarakoon.
   The Open University of Sri Lanka
   P.O.Box 21 Nawala, Nugegoda.

2. Soosaiappu Neavis Morais.
   49/7, Cyril Peiris Mawatha
   Palliyawatte, Wattala

3. Dr. Mahim Mendis.
   301/1A, Kotte Road
   Mirihana, Nugegoda.

Petitioners

Vs.

1. Hon. Ranil Wickremesinghe
   Minister of Finance 2022-Present.

2. Mahinda Rajapakse
   Former Cabinet Minister of Finance
   2019 – 2020.

2A. Basil Rajapakse

   Former Cabinet Minister of Finance
   2020 – 2022.

2B. M.U.M.Ali Sabri, PC
   Former Cabinet Minister of Finance
   2022.

3. Prof. G.L. Peiris.

4. Dinesh Gunawardena.

5. Douglas Devenanada.

6. Dr. Ramesh Pathirana.

7. Prasanna Ranathunga.

8. Rohitha Abeygunawardhana.

9. Dullas Alahapperuma.

10. Janaka Wakkumbura.

11. Mahindananda Aluthgamage.

12. Mahinda Amaraweera.

13. S.M. Chandrasena.

14. Nimal Siripala de Silva.

15. Johnston Fernando.

16. Udaya Gammanpila

17. Bandula Gunawardana.

18. Gamini Lokuge.

19. Vasudeva Nanayakkara.

20. Chamal Rajapakse.

21. Namal Rajapakse

22. Keheliya Rambukwella.

23. C.B. Ratnayake.

24. Pavithradevi Wanniarachchi.

25. Sarath Weerasekera.

26. Wimal Weerawansa.

27. Janaka Bandara Tennakoon.

The 1st to 27th Respondents are all former Members of the Cabinet of

Ministers of the Republic and presently sit as Members of Parliament of the Republic.

Parliament of Sri Lanka
Sri Jayawardenapura Kotte.

28. The Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01

29. Ajith Nivad Cabral
Former Governor of the Central Bank of Sri Lanka.
32/7, School Lane, Nawala.

30. Deshamanya Professor W.D. Lakshman
Former Governor of the Central Bank of Sri Lanka.
No. 224, Ihalayagoda, Imbulgoda.

31. S.R. Attygalle
Former Secretary to the Treasury
No. 23, Madapatha, Piliyandala.

32. S.S.W. Kumarasinghe
Former Member of the Central Bank of Sri Lanka.
No. 62/4, 11th Lane,
Wickramasinghepura Road,
Battaramulla.

32A. Gotabaya Rajapakse
Pangiriwatte Road, Mirihana.

32B. Mr. Sanjeeva Jayawardena, PC.
Member of the Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01.

32C. Dr. Ranee Jayamaha
Member of the Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01.

33. Hon. Attorney General.
Attorney General's Department
Colombo 12.

34. Chulantha Wickramaratne
Auditor General.
306,72 Polduwa Road,
Battaramulla.

35. Hon. Justice Eva Wanasundara.

36. Hon. Justice Deepali Wijesundara.

37. Mr. Chandra Nimal Wakishta.

Members of the Commission To Investigate Allegations of Bribery or Corruption.
36, Malalasekera Mawatha
Colombo 07, Sri Lanka.

38. Mr. P.B. Jayasundera.
Pelawatte, Battaramulla.

39. Mr. Dhammika Dasanayake.
Parliament of Sri Lanka
Sri Jayawardenapura Kotte.

Respondents

SC FR No. 212/2022

1. Chandra Jayaratne
No.2 Greenland Avenue
Colombo 05.

2. Julian Bolling
No. 72, 5th Lane, Colombo 05.

3. Jehan CanagaRetna,
No. 05, Bullers Lane,
Apartment 3B, Colombo 05.

4. Transparency International Sri Lanka

No. 366, Nawala Road, Nawala,
Rajagiriya

Petitioners

Vs

1(a)Hon. Attorney General.
Attorney General's Department
Colombo 12.

1(b) Hon. Gotabaya Rajapakse
Former President of Sri Lanka.
Pangiriwatte Road, Mirihana.

2. Hon. Mahinda Rajapakse
Former Prime Minister, Former Minister of Buddhasasana, Religious & Cultural Affairs Former Minister of Urban Development & Housing, Former Minister of Economic Policies and Plan Implementation and Former Minister of Finance.
No. 117, Wijerama Mawatha,
Colombo 07.

3. Hon. Basil Rajapakse
Former Minister of Finance.
No.1315, Jayanthipura, Nelum Mawatha, Battaramulla.
No.1316, Jayanthipura, Nelum Mawatha, Battaramulla.

4. Hon. M.U.M. Ali Sabry, PC
Former Minister of Finance.
No. 5, 27th Lane, Colombo 03.

5. Hon. Ranil Wickremesinghe
Prime Minister.
Minister of Finance, Economic Stability and National Policies,
No.117, 5th Lane, Colombo 03.

6. Deshamanya Professor W.D. Lakshman
Former Governor of the Central Bank of Sri Lanka.
No. 224, Ihalayagoda, Imbulgoda.

7. Mr. Ajith Nivad Cabral
Former Governor of the Central Bank.
32/7, School Lane, Nawala.

8. Dr. P. Nandalal Weerasinghe
Governor of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01, Sri Lanka.

9. The Monetary Board of the Central Bank of Sri Lanka.
Central Bank of Sri Lanka
P.O.Box 590, Colombo 01, Sri Lanka.

10. S.R. Attygalle
Former Secretary to the Treasury/
Ministry of Finance
No. 23, Madapatha, Piliyandala.

11. Mr. K.M. Mahinda Siriwardana
Secretary to the Treasury/
Ministry of Finance
The Secretariat, Colombo 01.

12. Mr. Saliya Kithsiri Mark Pieris, PC.
President of the Bar Association of Sri Lanka.
No. 153, Mihindu Mawatha,
Colombo 12.

12(a) Kaushalya Navaratne
Attorney-at-Law
President of the Bar Association of Sri Lanka
No. 153, Mihindu Mawatha,
Colombo 12.

13. Mr. Isuru Balapatabendi, AAL
Secretary of the Bar Association of Sri Lanka
No. 153, Mihindu Mawatha,
Colombo 12.

Respondents

Before	:	Jayantha Jayasuriya, PC, CJ Buwaneka Aluwihare, PC, J Priyantha Jayawardana, PC, J Vijith K. Malalgoda, PC,J Murdu N.B. Fernando, PC, J
Counsel	:	Upul Jayasooriya, PC with Vishwaka Peiris, Sampath Wijewardene, and Hasith Samayawardana for the Petitioners in SCFR 195/22. Chandaka Jayasundera, PC with S.A. Beiling, Chinthaka Fernando, Manisha Dissanayalke, Sayuri Liyanarachchi and Imaz Imthiyas for the Petitioners in SCFR 212/22. Romesh de Silva, PC with Uditha Egalahewa, PC and Niran Anketell for the 28th , 32B and 32C Respondents in SCFR 195/22 and 9th Respondent in SCFR 212/22. Shavendra Fernando PC with Mrs. Anika Arawwala, Jeewantha Jayathilaka, Ralitha Amarasekera and Sapumal Tennakoon for the 29th Respondent in SCFR 195/22 and 7th Respondent in SCFR 212/22. Manohara de Silva, PC with Boopathy Kahathuduwa for 32nd Respondent in SCFR 195/22. Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremesinghe for the 2nd &2A respondents in 195/22 and 2nd & 3rd respondents in SCFR 212/22. Nihal Jayawardena, PC with R. Herath for the 31st Respondent in SCFR 195/22 and 10th Respondent in SCFR 212/22. Nerin Pulle,PC, ASG, with Madhushika Kannangara, SC., Shiloma David SC, Indumini Randeny SC and Vishni Ganepola, SC for the

33rd, 34th and 39th Respondents in SCFR 195/22 and 1A &11th Respondents in SCFR 212/22.

Anura Meddegoda, PC with Ms. Yasa Jayasekera, Ms. Nadeesha Kannangara, Chathura Galhena, Isuru Deshapriya and Ms. Ashani Kankanange for the 38th Respondent in SCFR 195/22.

Gamini Marapana, PC with Navin Marapana, PC and Uchitha Wickremesinghe for the 2nd &2A respondents in 195/22 and 2nd & 3rd respondents in SCFR 212/22.

K. Kanag-Isvaran, PC with Shivaan Kanag-Isvaran & Lakshmanan Jayakumar for the 12th & 13th Respondents in SCFR 212/22.

Suren Gnanaraj with Rashmi Dias, Wathsala Kekulawala and Sakuni Weeraratne for the 30th Respondent in SCFR 195/22 and 6th Respondent in SCFR 212/22.

Written Submissions filed by : Petitioners in SCFR 195/22 on 03.10.23.

2nd and 2A Respondents on 04.07.23 and 02.10.23
2B Respondent on 02.10.23
28th Respondent on 04.07.23 and 02.10.23
29th Respondent on 23.06.23 and 02.10.23
30th Respondent on 30.06.23, 27.09.23 and 02.10.23
31st Respondent on 28.06.23 and 02.10.23
32nd Respondent on 02.10.23
32B Respondent on 06.10.23
32C Respondent on 02.10.23
33rd Respondent on 02.10.23 and
38th Respondent on 02.10.23 in SCFR 195/22.

Petitioners in SCFR 212/22 on 30.06.2023 and 02.10.2023

1A Respondent on 04.10.23
2nd and 3rd Respondents on 04.07.23 and 02.10.23
4th Respondent on 02.10.23
6th Respondent on 30.06.23 and 02.10.23
7th Respondent on 23.06.23 and 02.10.23
9th Respondent on 04.07.23 and 02.10.23 in SCFR 212/22.

Argued on : 06.07.2023, 07.07.2023, 13.07.2023, 25.07.2023, 27.07.2023, 28.07.2023, 08.08.2023, 19.09.2023, 20.09.2023 and 22.09.2023.

Decided on : 14.11.2023

Petitioners in these two applications invoked the jurisdiction of this Court vested under Article 126 of the Constitution. Both these matters are public interest litigations. In both these matters petitioners are claiming violations of their rights too. This Court, having considered the material placed by all parties, granted leave to proceed in both matters. In SC FR 195/2022 leave to proceed was granted against 2nd, 2A, 2B, 3rd to 27th, 28th to 32nd, 32A and 38th respondents. Furthermore, petitioners were directed to add two members of the 28th respondent as 32B and 32C respondents. In SC FR 212/2022, the Court granted leave to proceed against 1(b), 2nd, 3rd, 6th, 7th, 9th, and 10th respondents.

The learned President's Counsel for the petitioners in both these applications drew the attention of the Court to the fact that Gotabaya Rajapaksa – the former President who is cited as 1(b) respondent in SC FR 212/2022 and who is cited as 32A respondent in SC FR 195/2022 (hereinafter referred to as "32A respondent") had neither filed objections nor has made arrangements for legal representation in Court even though notices were issued on him through Court. The learned President's Counsel further contended that the allegations made against the 32A respondent therefore remain uncontroverted.

The learned President's Counsel Chandaka Jayasundera in presenting his case in SC FR 212/2022 submitted that the petitioners do not challenge the policy of the government in these proceedings. In further elaborating this submission he contended that the conduct impugned in these proceedings include illegal, arbitrary, unreasonable or capricious executive and or administrative actions and or inactions. It is claimed that such actions and/or inactions arise from the implementation of arbitrary and/or capricious decisions, by the executive and/or administrative branches of the Government. It is his contention that the impugned conduct of the respondents breached the 'public trust' reposed in them. It is his position that the conduct impugned in these proceedings led to the economic collapse of an unprecedented magnitude. Acute shortages in essentials such as fuel and gas, food and medicine and prolonged power cuts became the regular pattern of life. Long queues for fuel and gas brought in severe hardships to the entire society and led to many deaths. This situation brought in a total breakdown of economic and social life of the entire society. Such breakdown ultimately led to the collapse of the public order and the complete undermining of the rule of law.

Petitioners contend that it is a series of decisions taken during the relevant period, including the decisions to revise taxes, artificial control of the exchange rate, failure to maintain official reserves leading to serious depletion of reserves, failure to seek assistance from the International Monetary Fund (IMF) in a timely manner and the failure to make necessary adjustments to the interest rates which were the main causes for this economic collapse.

It is further contended that the decision to reduce various taxes was taken without proper analysis and study of its possible repercussions to the government revenue. Furthermore, it was contended that no remedial measures were adopted even after the adverse repercussions were apparent. It was the "inaction to remedy" even after warnings by the officials brought in irreversible consequences. Mr Jayasundera PC further submitted that the respondent's claim, that the failure to honour the foreign debt repayment instalments in May 2022 is the cause for the economic debacle, is nothing but a futile attempt to absolve themselves from the responsibility arising from their own conduct. It is his contention that the impugned conduct of the respondents is the cause for the failure to honour the debt obligations of the State. It was further contended that the default of foreign debt repayment by the Government in May 2022 is nothing but an inevitable result of the conduct of the respondents that is impugned in these proceedings. The learned President's Counsel's position was that, if remedial measures were taken such as seeking assistance from the IMF in a timely manner, a crisis of this nature could have been averted.

The learned President's Counsel for the petitioners in SC FR 195/2022 Mr Upul Jayasuriya, fully associated himself with the aforementioned submissions of the learned President's Counsel for the petitioners in SC FR 212/2022. He further contended, that the failure to introduce tax revisions without a proper consideration of its impact to the government revenue triggered off a series of events that had a domino effect that caused the economic crisis. He further contended that introduction of tax revisions without setting up necessary effective mechanisms to ensure that the extra earnings accrued by persons due to tax revisions are invested to the benefit of the overall economic growth of the country demonstrate that such revisions were implemented to the benefit of a selected group of persons and not to the benefit of the society and hence amounts to corruption. It is his contention, that a proper investigation under the relevant laws relating to Bribery and Corruption will ensure due respect to accountability. The learned President's Counsel further contended that the downgrading of credit rating by international rating agencies

that brought in severe impact on foreign investment and borrowings is a direct result of arbitrary tax revisions. Furthermore, direct consequences of the artificial pegging of foreign exchange rates further aggravated the depletion of foreign reserves. Under these circumstances, the failure to honour foreign debt obligations in the absence of any support mechanism such as an assistance scheme from the IMF was inevitable. Explaining the consequences of such a non-negotiated disorderly default – a hard default – the learned President's Counsel submitted that would have been disastrous and would have led to total collapse of the social life.

Learned President's Counsel for the petitioners further submitted that the failure to take remedial measures when the adverse consequences of the tax revisions were felt and the persistent reluctance to take remedial measures further aggravated the situation and brought in the most damaging result to the economy as well as social lives of the entire population. In his submissions averting to several remedial measures, the learned President's Counsel submitted that such measures ought to have been taken on a priority basis to avoid the crisis.

According to the Petitioners, the adverse impact on the economy was primarily due to the tax revisions. It further aggravated due to a few other measures including artificial fixing of the exchange rate and the interest rate, maintaining an open account for foreign exchange transactions and the failure to introduce proper mechanisms to ensure that the profits and/or revenue earned due to tax revisions are properly invested to bolster the economy. The learned Counsel submitted that the failures identified above made an environment for any person to convert the extra earnings due to tax revisions to foreign exchange at an artificial rate and engage in imports or any other overseas transactions to the detriment of official reserves. It was further submitted that the artificial exchange rate discouraged receipt of foreign exchange remittances through official financial institutions and thereby led to further depletion of official reserves.

It was further contended that the above situation fell well within a renowned concept in international economics – the "impossible trinity"-. It is an accepted theory that three main factors namely a fixed exchange rate, free capital flow across borders and an independent monetary policy should not co-exist. If such a situation is created, dire consequences to the economy are inevitable. The learned President's Counsel contended that the conduct of the respondents during the relevant period created such an environment in Sri Lanka, which brought in disastrous consequences. It was his contention that this situation was created due to the

arbitrary, capricious and unreasonable conduct of the respondents. He contended that the impugned conduct of the respondents was not based on any scientific analysis or reasoning.

The learned President's Counsel submitted that constant and repeated concerns raised by the officials of the Central Bank on the overall situation and the need to seek assistance and initiate a programme with the International Monetary Fund (IMF) were ignored by the Government. It was further contended that the failure to take timely action on seeking IMF assistance heavily contributed to the downfall of the economy. It was their contention that the arbitrary, unreasonable, irrational and capricious conduct of the respondents led not only to the denial of the last tranche of the IMF programme commenced in 2016 but also refusal to grant a relief facility – Rapid Financing Instrument (RFI) - to overcome ill-effects of the pandemic. A facility that was made available to many other countries that helped them overcome difficulties caused due to the pandemic. It was further contended that the presence of an IMF assisted programme would not only have brought much needed foreign exchange but also credibility and confidence, enabling the government to attract foreign investment and assistance.

Both Mr Jayasundera and Mr Jayasuriya contended that the conduct of the respondents impugned in these proceedings amounts to a breach of the public trust and also had a direct impact on Rule of Law. They contended that the impugned conduct of the respondents resulted in the violation of the Fundamental Rights guaranteed under the Constitution. Both President's Counsel did concede that the pandemic had an adverse impact on the economy, but they claimed that the failure on the part of the respondents to take remedial measures, led to this crisis.

Mr Suren Gnanaraj, who represented W.D.Lakshman, the 6th respondent in SC FR 212/2022 and the 30th respondent in SC FR 195/2022 (hereinafter referred to as the "30th respondent") submitted that Professor Lakshman functioned as the Governor of the Central Bank for a period of less than two years namely from 24th December 2019 to 14th September 2021. The learned Counsel further contended that the conduct assailed in these proceedings relate to the performance of his duties as the Chairman of the Monetary Board. In this context it is his submission that none of the decisions of the Monetary Board can be attributed to any particular individual member of the Board but they are decisions of the Board. Therefore, it was his contention that no individual responsibility can be attached to a particular member or members in relation to any decision of the Board. In this context, he drew the attention of the Court to

sections 8 and 9 of the Monetary Law, that stipulates that the Governor of the Central Bank be the Chairman of the Monetary Board and the Board is a body corporate with perpetual succession. It was his contention that none of the decisions of the Board is a decision of any particular individual member including the Chairman but remains a decision of the Board. However, the composition of the Board and the practice has made way for divergent views of the members to be considered and a final decision of the Board to be reached on consensus. Section 47 (1) of the Monetary Law Act grants protection to each member of the Board for acts done in good faith. It is his contention that none of the petitioners were able to establish that the 30th respondent acted in bad faith or his impugned conduct amounts to a misconduct or a wilful default. It was further contended that the said respondent cannot therefore be held liable to any breach of a Fundamental Right.

He also emphasized that the impugned conduct of the 30th respondent should be viewed in the proper context of the legal framework relating to the scope, functions and the relationship between the Central Bank and the Government. Legislative framework as recognized by the jurisprudence of this Court envisages "a continuous and constructive cooperation between the Central Bank and the Government " and the Central Bank is only an "agent of the Government".

The learned Counsel submitted that the petitioners have invoked the jurisdiction of this Court on an incorrect premise. Attributing to the three factors referred to by the petitioners namely the tax revisions introduced in 2019, pegging of the US Dollar and the delay to seek assistance from the IMF, as the only causes for the economic collapse, is a misconception. Mr Gnanaraj submitted that there were numerous other factors for the economic crisis other than the three factors referred to by the petitioners. On this basis Mr Gnanaraj submitted that the contention that downgrading by the international rating agencies for the reason of unsustainable debt is a result of the aforesaid factors is incorrect.

He contended that the unsustainability of debt was envisaged even in the year 2016 and the downgrading commenced in that year itself and therefore, the petitioners have failed to act *bona fide* by fixing the downgrading to the year 2019.

It was his contention that even though an IMF facility was obtained in 2016 there was no proper investment of such funds to uplift the economy but such funds were utilized for non-income generation projects. Furthermore, he contended that there was a failure to fulfil conditions on

which such facility was granted and thereby failed to draw the last tranche of the said facility. He conceded that in the year 2019, diametrically opposed policy in the context of taxation was adopted. He emphasized that low level of reserves was observed even by October 2019.

It was his contention that the continued adverse conditions in the economy were further aggravated due to the onset of the pandemic in early 2020. The adverse impact on the economic activities and growth caused due to various steps taken by the Government to arrest the spread of the disease including lock downs and robust vaccination drives, further depleted reserves of an economy which was already ailing. He further submitted that the adverse conditions existed in the year 2020 due to the pandemic, impacted on the income and profits earned by most of the legal and natural persons other than public servants whose full salaries were continued to be paid by the Government. This situation was further compounded by the non-availability of the IMF assisted RFI.

Mr Gnanaraj further contended that at no instance fixing of the exchange rates as provided under sections 74 and 76 of the Monetary Law took place, during the relevant time. However, moral suasion is a legitimate tool available to the Central Bank and use of such tool is neither unlawful nor arbitrary. In this process the Central Bank uses influence by way of advice, suggestions, requests and persuasion extended to the commercial banks. It was his submission that the decision to seek IMF assistance is solely a prerogative of the Government and it is reflected through the statutory reports submitted as provided under the Monetary Law. The 30th respondent had briefed the Minister of Finance the benefit of reaching out to the IMF.

Mr Gnanaraj reiterated that no individual responsibility can be attributed to the 30th respondent as he had always acted in accordance with the law.

Mr Shavendra Fernando PC, representing Nivard Cabraal - the 29th respondent in SC FR 195/2022 who is also the 7th respondent in SC FR 212/2022 - (hereinafter referred to as the "29th respondent") who served as the Governor of the Central Bank from 15th September 2021 to 4th April 2022, associated himself with the submissions of Mr Gnanaraj in particular, the duties and responsibilities of the Chairman of the Monetary Board and the legal framework within which the Chairman and the other members of the Monetary Board discharge their duties and responsibilities. Furthermore, he contended that the petitioners are impugning the conduct of the 29th respondent qua Chairman of the Monetary Board. In this regard he emphasised that all the

decisions of the Monetary Board are collective decisions of the Board and none of them could be classified as decisions of the individual members. On this basis, it was argued that as far as the decisions of the Board are concerned, no responsibility could be attached to any individual member by excluding one or several of other members, as all the members are bound by the principle of collective responsibility.

Mr Fernando PC also reiterated that the petitioners in both these applications are challenging the policy decisions of the Government and hence this Court lacks jurisdiction to entertain both these applications. Furthermore, he submitted that in SC FR 212/2022 necessary parties are not before Court and in SC FR 195/2022 the petitioners are attempting to attribute responsibility on a few public servants selectively, even though the entire Cabinet of Ministers are cited as respondents. He therefore contends that both these applications are politically motivated. He further contended that the responsibility of formulating the policies of the Government lies with the Executive.

It was Mr Fernando's submission that the 29th respondent had no role to play in relation to the impugned decisions on tax revisions. He contended that the responsibility on the decision whether to seek assistance from the IMF or not cannot be attributed to the Monetary Board or any of its members. It was his submission, that the said responsibility lies with the President. Even prior to the 29th respondent assuming office as Governor of the Central Bank, the Monetary Board in this regard [seeking IMF assistance] had expressed views on two options, namely; seeking IMF assistance or to rely on alternative "structural reforms".

Although the learned President's Counsel submitted that the Cabinet of Ministers had decided to adopt the option to work on a homegrown solution instead of seeking the assistance from the IMF, we observe that there is no such material before this Court of a Cabinet Decision on the said option up until 3rd January 2022.

Mr Fernando PC submitted that the Central Bank adopted a six-month road map as part of the home grown solution. It is to be noted that, at a point closer to the date the country declaring bankrupt, however, during the 29th respondent's tenure as Governor of the Central Bank / Chairman of the Monetary Board, the President did take a decision to seek the assistance of the IMF.

The Learned President's Counsel further submitted that the pegging of the US Dollar or fixing the exchange rate, were not based on a decision of the Central Bank but was a policy decision [of the Government]. The parity of the US Dollar was initially fixed at Rupees 203 on a directive of the Minister [of Finance] but thereafter the exchange rate was partially floated subject to a cap of Rupees 230 as the rate of exchange. This was achieved using a legitimate tool, "moral suasion".

It was further contended that honouring the ISB in January 2022 was nothing but discharging an obligation of the country and a failure of which could have brought in dire consequences. Any default could have triggered cross-default clauses and a demand on other commitments would have created an unmanageable situation. He submitted that the funds necessary for the repayment was already allocated by the Parliament by the annual budget.

Mr Fernando PC submitted that no responsibility can be attributed to the 29th respondent as at no stage the respondent had acted outside the legal framework but always had lawfully discharged duties as the Chairman of the Monetary Board as provided by law.

Mr Manohara de Silva PC, representing Samantha Kumarasinghe, an appointed member of the Monetary Board, the 32nd respondent in SC FR 195/2022, (hereinafter referred to as the "32nd respondent"), at the outset submitted that this application (SC FR 195/2022) should be dismissed as the petitioners have failed to cite all necessary parties as respondents. It was his contention, as far as the allegations, made against the 32nd respondent is concerned, they arise from and out of his conduct as a member of the Monetary Board and the petitioners have selectively made him and two others as respondents whereas two other members of the Monetary Board had been conveniently left out for inexplicable reasons. He further contended that the petitioners have abused the process by selectively targeting the 32nd respondent causing great inconvenience to him. The learned President's Counsel argued that there is no merit in the case against the 32nd respondent and the petitioners have clearly acted *mala fide* in citing him as a respondent in these proceedings. Mr de Silva PC further argued that the petitioners' attribution of the responsibility regarding the mismanagement of the economy is selective in that only selected persons such as the Prime Minister, Minister of Finance, and four others have been cited as respondents. He further contended that the petitioners are impugning the decisions of various persons that fall within the ambit of economic and political decisions. It is his contention that the Court is not

equipped to examine merits or demerits of such decisions and therefore Court should refrain from making any attempt to tread into areas beyond its competency.

According to his submission the decision to honour the ISBs was a decision of the Government and the petitioners are acting maliciously by making an attempt to attribute responsibility on a few selected individuals, including the 32nd respondent.

Mr De Silva PC, further contended that the petitioners are maliciously claiming that the 32nd respondent was in control of the Monetary Board. Whilst pointing out that the previous sixteen programmes with the IMF has resulted in failures, the learned President's Counsel contended that the 32nd respondent always took up the stand that seeking IMF assistance, is not the best solution for the country and wanted to stop the leakage of foreign exchange and thereafter pursue other avenues.

Mr de Silva PC further submitted that in ascertaining the reasons for economic debacle, it is neither possible nor reasonable to confine to a few years, as to how the economy was managed (ie 2019-2022). The management of the economy during this period should not be considered in isolation for the reason that the sharp increase in the borrowings from 2017 to 2019 had placed an unbearable burden on the economy and the debt management.

He pointed out that the decisions of the sub-committee of the Monetary Board cannot be regarded as the decisions of the Board. The Monetary Board at no stage had delegated its authority to the sub-committee. Mr de Silva PC also submits that this application (SC FR 195/2022) is time barred.

On behalf of the 38th respondent in SC FR 195/2022 (P.B.Jayasundera) (hereinafter referred to as the "38th respondent") President's Counsel Mr. Anura Meddegoda, while associating himself fully with the submissions of Mr Gnanaraj in relation to the operation and applicability of the Monetary Law Act and the submissions of Mr de Silva PC on the jurisprudence relating to the extent to which the policy decisions should be examined by courts, submitted that the petitioners have not only failed to plead any specific allegation against Dr Jayasundera in the petition but also had failed to produce any material to establish a violation of any fundamental rights resulting from the conduct of this respondent. He submitted that the application is misconceived in law. The learned President's Counsel further contended that the petitioner's allegations are

palpably untenable and the application should be dismissed. He further claimed that the 38th respondent had been added as a respondent maliciously and the application is devoid of any merit.

According to Mr Meddegoda PC, the 38th respondent at no stage acted arbitrarily, unreasonably or capriciously but performed the responsibilities and duties attached to the post of Secretary to the President lawfully. The 38th respondent accepted the post of Secretary to the President on 19th November 2019 and relinquished all duties on 14th January 2022. It was further submitted that the 38th respondent always acted according to the instructions, guidance and advise of the President (32A respondent). He facilitated national and international initiatives to give effect to the policies of the Government. It was also contended that allocation of funds through a proper annual budget took place only in 2020 and allocation of funds in the preceding two years was effected by votes on account. By the time the budget was presented in 2020 the adverse conditions due to the onset of pandemic had already made an impact on the economy and the Government adopted a policy prioritising solutions to public health issues. Implementation of such policy required a collective effort at national and international levels. Further, explaining the circumstances under which the 38th respondent sent the letter dated 21st June 2021 to the Governor of the Central Bank (the 30th respondent) the learned President's Counsel submitted that he conveyed to the Governor the policy of the Government while drawing his attention to the role and the scope of functions of the Monetary Board. He contended that a closer examination of this letter in its proper context clearly shows that the Governor was appraised with the suggestions and options enabling him to take decisions exercising his discretion as opposed to any directions compelling a particular course of action. In his submission the response of the Governor dated 13th July 2021 clarifies this position.

Mr Meddegoda PC drew the attention of this Court to paragraph 3(i) of the petition and submitted that the petition fails to substantiate the basis of the assertion that the 38th respondent is responsible for the decisions of the Monetary Board. He further submitted that the absence of a specific reference to the 38th respondent in the prayers (b), (c) and (d) reflects that the petitioners themselves accept that no responsibility could be attributed to the 38th respondent for infringement of any fundamental right. It is a futile attempt to argue that the Court could grant

relief against the 38th respondent on the strength of the omnibus clause in the prayer of the petition.

Mr Nihal Jayawardena PC on behalf of S.R.Attygalle Secretary to the Treasury, the 31st respondent in SC FR 195/2022 - who is also cited as 10th respondent in SC FR 212/2022 – (hereinafter referred to as the "31st respondent") submitted that the 31st respondent functioned as Secretary to the Treasury from 13th November 2019 to end of March 2022. He submitted that the 31st respondent was the chief financial officer of the Ministry and an ex officio member of the Monetary Board. Therefore, this respondent had the duty to implement the government policy as well as appraise the Monetary Board on details of such policy. It was his submission that no responsibility could be attributed to the 31st respondent based on the change of tax policies introduced in 2019. He contended that such change did take place as a pledge to the people by the President (32A respondent) during his election campaign and subsequently adopted as the policy of the Government. In his capacity as the Secretary to the Treasury and the Ministry of Finance he was acting on the instructions and guidance of the Minister and taking necessary measures to implement policy decisions of the Government. Furthermore, the decision to seek assistance from the IMF or not was a decision that should have been taken by the Government and his function is only to make necessary administrative arrangements to implement the decision. Therefore, it was argued that the 31st respondent cannot be faulted on the basis of any delay in making the decision to seek assistance from the IMF.

It was the submission of the learned President's Counsel that the payments made to the investors on ISBs in early 2022 was nothing but honouring the commitment following the maturity of such ISBs. Any default could have brought about serious repercussions. Not only such a default would have created a deep dent on the reputation of the Country preserved over several decades since independence but also would have dried off all current and future avenues for foreign investments and borrowings. Furthermore, it was contended that the Parliament through the budget had already allocated funds necessary for the payment in issue and as such there was no reason for this respondent not to have made arrangements necessary to honour the pledge utilising available funds.

He further submitted that the adverse conditions to the economy is not due to the conduct of any of the respondents but due to the irresponsible borrowings and the depletion of reserves that took

place prior to this respondent assuming duties as Secretary to the Treasury. He submitted that the reserves of USD 8.6 billion that existed in the year 2014, sharply declined to USD 6.3 billion within a period of five years due to mismanagement and irresponsible policies. It was further contended that the increase in the volume of borrowings during the same period also caused a serious impact on debt sustainability.

The learned President's Counsel submitted that the petitioners have failed to establish a case against this respondent and therefore urged the Court to dismiss both applications.

Sanjeeva Jayawardena, President's Counsel who was added as 32B respondent (hereinafter referred to as the "32B respondent") at the hearing appeared in person. Sanjeeva Jayawardena was added as a respondent pursuant to the Order of this Court at the point this Court granted leave to proceed. He was made a respondent in his capacity as a Member of the Monetary Board along with Ranee Jayamaha (who was also a member of the Monetary Board) who was added as 32C respondent. Both these said respondents filed affidavits jointly before this Court. It is to be noted however, that leave to proceed was not granted against either of them.

32B respondent at the outset submitted that the impact of the tax revisions introduced in the year 2019 removed 600 billion rupees from state coffers as taxes and fiscal revenue. Such depletion in Government revenue adversely impacted on the service of recurring domestic debt liabilities and the day to day running and management of the affairs of the State. It is his submission that the downgrading by the rating agencies on the basis of unsustainability of debts caused immense hardships to the economy. The failure to attract foreign direct investments due to downgrading and loss of confidence among the investors aggravated the balance of payment crisis. The inability to maintain the level of foreign reserves needed for three months of imports had a serious impact on the Government's capacity to import essential items such as fuel, gas, medicinal drugs and food. It was his submission, that the government failed to take necessary effective remedial measures even after realising the serious repercussions of the tax revision. The situation was further aggravated due to continued refusal and/or the resistance to seek an unqualified assistance programme from the IMF, in a timely manner. He contended that he along with the 32C responded repeatedly urged the importance of obtaining an IMF assisted programme at the meetings of the Monetary Board. Furthermore, he contended that upon his suggestion, a board level committee namely "Monetary Board External Debt Management

Committee" – MBEDMC - was established within the Central Bank. The first meeting of the said Committee was held on 12th January 2021. Mr Jayawardena and the 32C respondent had functioned as the Chairman and Vice-Chairman of the committee which comprised of Deputy Governors, Assistant Governors, Heads of Departments as well as a senior officer from the Treasury as an ex officio member. However, the ex officio member – the officer from the treasury - had abstained from participating at these meetings other than on the very first day where he was requested to provide details of sources of inflow of foreign currency, claimed by the said official as "firmly expected sources of inflows of foreign currency", for reasons unknown. 32B respondent further submitted that the critical importance of the presence of an IMF programme was apparent; even friendly countries were reluctant to provide SWAP facilities or any other financial assistance in the absence of an IMF programme.

It is Mr Jayawardena's contention that no positive steps were taken due to the policy of the government, as made known to them, despite several discussions emphasising the need to seek IMF assistance. According to the minutes of the Monetary Board meeting held on 3rd February 2021 the 31st respondent had said *"since the Government policy is not to go to the IMF, as officials we have to abide by it. Therefore (he stated) that other means of inflows need to be considered".* Under these circumstances time passed by without any real solution to the crisis that was gradually reaching alarming levels. Repercussions were aggravated in the absence of any effective remedial measures in place.

On 6th April 2022, both the 32B & 32C respondents had presented themselves before the Parliamentary Committee on Public Finance. 32B respondent contended that following the revelations made before the said Parliamentary Committee at the request of one of the members of the said Committee, a one-on-one meeting took place between him and the President (32A respondent). In preparation of this meeting Mr Jayawardena had obtained statistics with regard to foreign reserves and the inflows expected and the outflows that would be imminent due to the upcoming debt service deadlines and the expected further decline of the reserves. Furthermore, he had been informed that a letter the President had sent to the IMF on 18th March 2022 was ambiguous and no request was made for a full programme but referred only to an engagement. Therefore, the IMF was not prepared to extend any meaningful assistance. At the meeting this respondent had briefed the President on all aspects and had stated to him that there is no other

option but to reach out to the IMF for a fully pledged programme. At this discussion the President had revealed that he in fact had inquired as to how the country could recover without an IMF programme and whether promised influx of monies from foreign countries would actually materialise. The President himself has expressed serious scepticism on such assured inflows. Furthermore, the President had said that the impression given to him was that the Central Bank was against seeking assistance from the IMF. After this meeting on the suggestion of Mr Jayawardena, the President had communicated with the IMF with a request for a full IMF programme. Accordingly, on the 7th April 2022 a letter signed by the President (32A respondent) seeking a full IMF programme was prepared and on the following day a further communication to the IMF by the new Governor (who had assumed duties on 08th April 2022) was made, resulting a positive response from the IMF which facilitated the GOSL to formally announce on the debt standstill on 12th April 2022. He submitted that debt restructuring with the backing of a fully blown IMF programme has made a significant impact on the recovery process. He further submitted that the hardships the country was experiencing in the year 2021 could have been averted if the intervention of the IMF was sought in a timely manner.

In relation to the maintenance of the exchange rate, Mr Jayawaradena submitted, that the policy of the Government had been to maintain a fixed exchange rate. However, the dire situation did not permit the Central Bank to use reserves to defend the exchange rate but moral suasion was used to maintain the exchange rate without allowing a sudden spike, which could have serious repercussions. He pointed out, however, that the failure to impose effective restrictions on imports had a direct impact on the exchange rate. The Minister of Finance by his letter dated 12th August 2021 had called upon the Central Bank and the Monetary Board to initiate ten specific measures on an expeditious basis. One such measure was to release a total of USD 250 million to all commercial banks with the instructions not to exceed the parity of the exchange rate beyond Rs. 202 per 1 USD. The Monetary Board and the MBEDMC closely monitored the exchange rate continuously. The Monetary Board at the meeting of 7th March 2022 decided to allow the market to have a greater flexibility in the exchange rate with immediate effect. The Board further decided to communicate that decision by way of a notice informing that the Central Bank is of the view that forex transactions would take place at levels which are not more than Rs. 230 per US Dollar. However, the 29th respondent (Nivard Cabraal) at a meeting with the chief executive officers of the commercial banks and licenced specialised banks held on 09th March 2022 had

informed that *"certain trades may take place beyond the exchange rate stated by the Central Bank considering the greater flexibility that has been permitted".* According to Mr Jayawardena, the abovementioned statement of the 29th respondent did completely subvert and over-ride the carefully considered decision of the Monetary Board and the banks felt free to take an exponential increase of the forex rate. This situation escalated the forex rate and resulted in the USD appreciating to Rs.365 (interbank) and in the informal banking (hawala) to around Rs. 420. He contended that the impact of this overshoot of the exchange rate, on inflation and the cost of essential imports like fuel, gas, coal, medicines and food, were unbearable. The Rupee cost of purchasing such items from international markets, was not something that the liquidity levels of the treasury could bear under any circumstances. He further contended that this had a deep impact on the cost of living and also created shortages of essential items needed as there was insufficient currency in Sri Lanka rupees to meet the costs of these purchases and no purchase of US dollars from the Central Bank was possible. This issue had been raised at the meeting of the Parliamentary Committee on Public Finance. He contended that the Monetary Board had to take various steps thereafter in order to resuscitate the situation. In his submission the conduct of the 29th respondent was not only a clear deviation from the well-considered decision of the Monetary Board but aggravated the economic crisis, further deepening the enormous hardships caused to the general public.

Mr Navin Marapana PC represented both, Mahinda Rajapaksa and Basil Rajapaksa who are cited as the 2nd and 2A respondents in SC FR 195/2022 and 2nd and 3rd respondents in SC FR 212/2022 (hereinafter referred to as "2nd respondent" and "2A respondent" respectively). Mr Marapana PC at the outset submitted that both these applications should be dismissed. He contended that the impugned conduct of the two respondents in these applications are arising from policy decisions of the Government. He contends that the case of the petitioners is based on the premise that the decisions of the respondents are not the best decisions and in hindsight, different decisions could have averted the economic crisis. It is his contention that the petitioners have failed to establish as to which fundamental right was infringed due to the conduct of the respondents. He further contended that if the Court grants relief in these applications, the Court will be recognising a right to have infallible decisions from the executive or administrative authorities. He submitted that no such right is recognised by the Constitution. He further contended that at no stage, the petitioners claim that the respondents could not have taken the

impugned decisions nor they allege that the decisions they took are tainted with *mala fide*. Learned President's Counsel further submitted that the Court should desist from hearing these applications as a Parliamentary Select Committee is examining the same issues that the Court is invited to examine in these proceedings. In his submissions these decisions fall in the realm of public finance and it is the Parliament which has the sole jurisdiction to consider such matters.

In response to the contention of the petitioners that the tax revision was the root cause for the economic collapse, Mr Marapana PC submitted that the claim of the petitioners is misconceived. In his submission, attributing the sole responsibility to the tax revision not only is artificial but would be a complete disregard to many other factors that contributed to the economic collapse. It is his submission that the tax revisions were introduced with the expectation to revive the economic growth that was badly affected due to the easter attack in April 2019. It is common ground that one of the main avenues for foreign exchange earnings, tourism, was badly affected due to the unfortunate events that took place in April 2019. However, tax revisions that were introduced in late 2019 were with the expectation to help revive the economic growth. Unexpectedly however, within a very short period the global health crisis – Covid 19 pandemic – caused serious disruption to the day-to-day life of the entire society and continued to adversely impact on the economic growth. During the period of the pandemic, the main priority of the government was the safety of the people. This policy caused unexpected loss of revenue as well as the need to divert funds to protect peoples' lives. When tax revisions were introduced, several parties including Colombo Chamber of Commerce commended the move and expressed optimism. Furthermore, the decision to revise taxes was a lawful decision giving effect to the policy adopted by the Government in keeping with the promise in the election manifesto. He further contended that it is unrealistic to have reversed the tax revisions in the year 2020 as all the people were badly affected by the pandemic. However, in the first given opportunity, at the budget in 2021, steps were taken to bring in certain changes to the tax regime with the view to enhance government revenue. Furthermore, Mr Marapana PC contended that the claim the tax revisions caused a loss of Rs. 600 billion is a myth. He claims that the impact of the pandemic itself would have lowered the earnings of people and thereby reduced the tax income of the Government. Furthermore, Government earnings from excise duty and custom duties on imported vehicles dropped as the sales of excise items dropped and importation of vehicles was suspended by the Government. The learned President's Counsel contended that the petitioners

have failed to demonstrate that these factors were taken into account in quantifying the loss of revenue due to tax revisions. It is only in hindsight that the tax revisions are criticised. He contends that the attempt to attribute sole responsibility on the decision for tax revisions as the cause for the economic collapse has no merit.

On behalf of the 2nd and 2A respondents, Mr Marapana PC conceded that the decision to seek or not to seek assistance from the IMF lies with the Government. In his submission, the decision on this matter at no stage ignored the advise and/or the recommendations of the Monetary Board. He submitted that all the cabinet papers submitted by the respondents in this regard were in line with the expert opinion of the Monetary Board as provided by its statutory reports in compliance with section 68 of the Monetary Law. He drew the attention of this Court to the fact that in none of the statutory reports the Monetary Board identifies seeking IMF assistance as the only available path to economic recovery. The Monetary Board in the statutory reports identified seeking assistance from the IMF as an option vis a vis the "home grown" solution that was also identified as an alternative option. He contended that all the cabinet memorandums submitted in this regard are based on the statutory reports provided by the Monetary Board. Therefore, no responsibility could be attributed to any particular individual or individuals in this regard. He drew the attention of this Court to nine such reports submitted by the Monetary Board to the Minister of Finance. He contends that in none of the reports, seeking assistance from the IMF is recognised as the only way forward to recover from the crisis. To the contrary, the Monetary Board had commended various steps taken by the Government, including the adoption of the "home grown solution" as opposed to seeking assistance from the IMF.

Dr Romesh de Silva PC representing the Monetary Board, cited as 28th respondent in SC FR 195/2022 and as 9th respondent in SC FR 212/2022 (hereinafter referred to as the "28th respondent") at the outset submitted that even if the Court accepts the submissions of the petitioners, no responsibility can be attributed to the Monetary Board. The 28th respondent had discharged all duties in accordance with the law and had taken all possible measures to avert the crisis, acting within the statutory powers vested on it. It was his submission that the impugned conduct and the decisions which the petitioners claim that their rights were breached, have been taken by the Government and not by the Monetary Board. Furthermore, he submitted that the Monetary Board by its statutory reports had informed the Minister of Finance the dire situation

in the economy and the need to seek assistance from the IMF due to the situation that prevailed at the relevant period. It was his submission that these reports even though did not specifically mention that seeking assistance from the IMF as the only viable option available, provided a clear picture of the situation leaving for the Minister to take an informed decision in this regard. Furthermore, these reports themselves reflect that the Government was averse to seeking assistance from the IMF despite the critical condition in the economy. Therefore, as an agency of the Government the Monetary Board had to continue with the discharge of its duties while respecting the policy decisions of the Government. It was the responsibility of the Monetary Board to engage and discharge its duties at the best possible levels within the policy framework of the Government. Even under these constraints, the Monetary Board made all attempts to convey the importance of seeking an IMF programme to avert the crisis and overcome the difficulties.

In his submission Dr de Silva contended that the 28th respondent is vested with the powers, duties and functions of the Central Bank and be generally responsible for the management, operations and administration of the Central Bank. The Central Bank and the Monetary Board are created by the Monetary Law, Act No 58 of 1949 as amended from time to time. He submitted that within the statutory framework of the Monetary Law, the Central Bank is an agency of the Government and not an entirely independent entity. In this regard he drew the attention of this Court to the "Report on the Establishment of a Central Bank for Ceylon", Sessional Paper XIV-1949 (commonly known as Exter Report) and the determination of this Court in SC SD 6-12/2023 (determination on the Bill titled "Central Bank of Sri Lanka").

The learned President's Counsel further contended that the 28th respondent which operated under the Monetary Law Act has now ceased to operate. By virtue of section 125 of the Central Bank of Sri Lanka, Act No 16 of 2023, which came into operation on 15th September 2023, the Monetary Law Act has been repealed and the "Central Bank" and a "Governing Board of the Central Bank" are established under sections 2 and 8 respectively of the said Act. Governor and the Members of the Monetary Board who were holding office on the day immediately prior to the appointed date have now become the Governor of the Central Bank and members of the Governing Body, by the operation of a deeming provision in sections 126(1) and 126(2) of the Act No 16 of 2023. Furthermore, under section 134(h) of the Act, all applications instituted

against the Central Bank, the Monetary Board, its members under the repealed Act, is deemed to be an application instituted against the Central Bank under the new Act.

Therefore, the learned President's Counsel submits that any finding by this Court against the 28th respondent will have serious repercussions on the Central Bank functioning under the new law. He submitted that it is just and equitable for this Court not to make any adverse finding on the agency which has ceased to exist, the Monetary Board. However, in the event the Court reaches the conclusion that the conduct of some of the members of the Monetary Board have resulted in the violation of any rights, such members cannot hide behind the corporate veil and the Court could find them individually responsible for such conduct.

Dr de Silva contended that the Monetary Board has discharged all its duties as required by law and hence no responsibility can be attributed for any violation of a Fundamental Right.

Additional Solicitor General Mr Nerin Pulle PC, represented the Attorney-General. At the outset Mr Pulle PC submitted that the Court should accord great weight to the two reports of the Auditor-General in considering economic, public finance auditing and related aspects raised in the two instant applications.

The learned Additional Solicitor General drew our attention to the observations and conclusions of the Auditor-General in these reports and submitted that the Auditor General has the legal competency to make such observations and express opinions having reviewed and examined all necessary material available at the Central Bank. He further contended that even though the Auditor-General has refrained from expressing an opinion as to whether or not any loss had been caused to the Central Bank, the report does show the background in which various issues occurred as well as the direct or indirect impact of each factor on the other.

In relation to the complaint of the petitioners that the revision of taxes had a direct impact on the subsequent events which led to the economic collapse, Mr Pulle PC submitted that there are several legal principles and legislative provisions that need to be considered when examining this issue. According to him the imposition of taxes is within the full control of Parliament and enactment of tax legislation with retrospective effect is a lawful exercise of such powers. The Constitution does not provide for post enactment judicial review of legislation. In this context the

learned ASG posed the question, "would the exercise of wide sweeping powers of Parliament to impose taxes precludes the Court examining the merits or demerits of such legislation?"

The learned Additional Solicitor General contended that the formulation of national policy is a matter that is solely vested with the Central Government and the economic policy does form part and parcel of the national policy. He drew the attention of this Court to a series of judgements of this Court as well as judgments from foreign jurisdictions including the judgments of the Indian Supreme Court that recognises limitations on the power of judicial review on economic policy. It was his submission that the mere disagreement with a policy is not a ground on which courts could review economic policy and therefore, when there are various theories and hypotheses regarding the correct course of action it would not be possible to evaluate the correctness or otherwise of the policy. He contended that the Court should refrain from acting as a "super auditor". Mr Pulle PC further drew the attention of this Court to the scope of the "doctrine of political question" and submitted that courts have declined judicial review in instances where a political judgement has been made based on the assessment of diverse factors and varied factors, and there are no judicially discoverable and manageable standards other than in instances where the policy is *mala fide* and/or manifestly unreasonable and/or the policy is based on wholly extraneous and irrelevant grounds. Furthermore, he submitted that the Court should be mindful of the issue of whether the Court has the institutional capacity to examine the matters raised in the two instant applications. The doctrine of separation of powers is another matter he said that the Court needs to be mindful of when considering these two applications as matters of economic policy which are within the exclusive power of the Executive and taxation which is within the exclusive purview of the legislature.

The learned Additional Solicitor General having drawn our attention to the jurisprudence of this Court finally submitted that the Court has the power to make directions as it seems fit even if the Court decides that no violation of Fundamental Rights had been established.

REPORTS OF THE AUDITOR GENERAL

This Court when granting leave to proceed, directed the Auditor General to conduct an audit upon examining all relevant material and submit a report on (a) the decision made by the 28th respondent (Monetary Board) to set the value of the Sri Lanka Rupees at or around 203 as against the US Dollar and all matters connected to the said decision; (b) the delay in seeking

facilities from the IMF by the Republic and (c) all matters relating to the settlement of International Sovereign Bond/s to the value of USD 500 million on 18.01.2022 utilising foreign reserves. In addition, the Auditor General was further directed that the said report should comprise observations, including whether any loss had been caused to the Central Bank due to one or more of the three matters referred to above.

The Auditor General in compliance with the said direction, submitted to this Court the report titled "Audit Report Including Observations of the Auditor-General pertaining to the Fundamental Rights Case No 195/2022", on 08th March 2023. Furthermore, a copy of the report titled "Special Audit Report on Financial Management and Public Debt Control in Sri Lanka 2018-2022" dated 04th July 2022 was also tendered along with the said report, as per the direction of this Court.

We accept the submission of the learned Additional Solicitor General that the two reports of the Auditor General provide material including views, observations and opinions that could be taken into account by this Court in examining the instant applications.

In this regard we note that the Auditor General has refrained from making any observations on the issue whether any loss has been caused to the Central Bank. The Auditor General has refrained from making any observations on this issue for the reasons, (a) examination on the positive or negative aspects of matters that are prima facie policies of the Government is open for challenge; (b) the inability to identify the loss caused that resulted from the specific issues referred to by this Court as the pandemic also could have had an adverse impact on the economy and (c) the difficulty of ascertaining what ought to have been the best decision the Government could have taken in the face of limited foreign resources available at the relevant time.

Nonetheless, the Auditor General states that the report sets out the background in which the matters under consideration had taken place and further goes on to state that the interconnection of such matters as well as the impact those factors had on each other can be observed by the examination of this report.

This Court had the benefit of both these reports in considering the material tendered by all parties and the submissions of Counsel.

NON-COMPLIANCE WITH ARTICLE 126(2)

The petition in SC FR 195/2022 is dated 3rd June 2022. The petition in SC FR 212/2022 is dated 16th June 2022. In both these applications, several respondents took up the preliminary objection that both applications were time-barred in that the applications were not in compliance with Article 126(2) of the Constitution, and they are therefore liable to be dismissed *in limine*. The learned President's Counsel for the 2nd and 2A respondents argued that in both applications, no act or omission on the part of the 2nd and 2A respondents are alleged to have been committed or occurred within one month of the date of the petitions, and that the said respondents, namely Mahinda Rajapaksa and Basil Rajapaksa had ceased to be the Ministers of Finance prior to one month of the dates of each petition. That is, the 2nd and 2A respondents had ceased to be the Ministers of Finance prior to 3rd May 2022 and 16th May 2022 respectively.

The learned President's Counsel for the 29th respondent argued that the applications were time-barred in respect of the 29th respondent too, as the 29th respondent had been named respondent *qua* Chairman of the Monetary Board and the Governor of the Central Bank, positions he had only held till 4th April 2022. Similarly, Counsel for several other respondents took up the objections on the basis that the applications were time-barred in respect of their clients, citing their final date in office as being beyond the reach of one month prior to the dates of the petitions. These objections will be addressed as a composite argument.

Each respondent claimed to have held office during a period of time beyond the reach of one month prior to the dates of the petitions. Essentially, Counsel for the respondents argued that by failing to name any act or omission committed or alleged to have occurred at the hands of the said respondents after either 3rd May 2022 or 16th May 2022, both sets of petitioners before this Court were not in compliance with Article 126(2) of the Constitution.

This Court cannot ex facie dismiss, nor has it considered it prudent to dismiss fundamental rights applications for their failure to conform to an arithmetic stricture of 30 days without first examining the context of such applications. The petitioners in both applications placed their grievances before this Court while stating that the matters impugned in both applications relate directly and greatly to the entire citizenry, and the consequences of decisions, actions, omissions or irregularities committed by the respondents have transpired over a period of time and at the time of filing their applications, appeared to be deep-set in a manner which may affect successive

generations of Sri Lankans. The petitioners claimed to have filed their applications in the public interest. It would be correct to state that this Court has not previously been called upon to take cognizance of such a predicament.

It was submitted on behalf of the petitioners that the public was unaware of the contributory elements for the critical condition of the economy until the 4th Respondent in SC FR 212/2022 – the then Minister of Finance - conceded in parliament on 4th May 2022 that,

a) The reduction in income taxes reduced government revenue and resulted in grievous ramifications to the economy;
b) The rupee should have been 'floated' earlier and its depreciation should have been managed;
c) The assistance of the IMF should have been sought with greater promptitude;
d) The delay in rescheduling foreign loans resulted in severe ramifications to the economy;
e) There was a significant and rapid decrease in foreign reserves.

The Judgement in the case of ***Nanayakkara v Choksy*** (**SLIC case**) [2009] BLR 1 at 28-29 is particularly relevant here. The preliminary objection that the application (in that case) was time barred was overruled for the reason that the impugned transaction was an ongoing one and also since, "*in applications which have been filed in the public interest*", the Court can take cognizance of the time required to obtain relevant documents, study the subject matter of the impugned transaction and formulate the application to be submitted to this Court. Succinctly, his Lordship Justice Amaratunga held that the time period of one month should be deemed to commence only after the petitioners had a reasonable opportunity to complete the preparatory work which was essential to formulate and file their application.

> "…….*when the Court has to deal with any objection to such application the Court has to consider Articles 12 (1), 17, 126 and 28 (d) in combination*."
>
> *"It must be remembered that these two applications have been filed in the public interest to make the fundamental right enshrined in article meaningful- that is to make it "tangible" and "palpable", and also to ensure that all officers of the State and its agencies entrusted with the duty to discharge their functions and obligations, do so in*

accordance with the law, bearing in mind the concept of equality enshrined in the Constitution and the basic tenet of the Rule of Law."

"The Petitioners have stated that they learnt about the alleged irregularities relating to the sale of SLIC after they read the COPE report tabled in Parliament. Thereafter, they had to obtain the relevant documents, which as revealed by this judgment itself, were in various government bodies not readily accessible to the public. Even after they managed to get the necessary documents, they have to study those documents to have a proper insight into the transaction to prepare their affidavits to be presented to this Court along with their applications."

As already observed, the petitioners in the present applications are public spirited persons and both these applications have been filed in the public interest. The alleged events, decisions, actions, omissions and irregularities complained of by the petitioners are matters connected with the mismanagement of the economy of the country. The events, decisions, actions, omissions and irregularities and the complaints which have flown from them are elaborate and complex in nature. The learned President's Counsel for the petitioners stated that relevant documents and material essential to obtain even a preliminary understanding of what had occurred and *how* the petitioners' fundamental rights were violated were difficult to discover, acquire and analyse. The voluminous court briefs and records which this Court scrutinised and examined over nearly a fortnight of hearings evidences the complexity of their claims. Therefore, considering the aforesaid circumstances and the inherent nature of the events, decisions, actions, omissions and irregularities impugned, it would be correct to state that the petitioners required additional time to reasonably complete the preparatory work which was essential to formulate and file their applications.

Furthermore, in the case of ***Sugathapala Mendis and Another v Chandrika Kunarathunga and Others*** **(Waters Edge Case)** [2008] 2 SLR 339,at pages 354, 355, in determining whether the application was time-barred (as this application too was filed in respect of a series of acts which ka Kunarathunga and Othershad occurred several years ago), Tilakawardane, J. considered the series of acts in totality, and in respect of the "particulars" which had changed over time which were "*central to the case*". Her Ladyship further held that "*...For this Court to ignore the continuing*

nature of a large-scale development project would be to ignore it the continuing nature of any violations that stem out of such a project…".

Similarly, for this Court to ignore the long and sustained nature of the matters impugned in these present cases, would be to ignore any possible violations which may stem from these actions.

For the aforementioned reasons, the preliminary objection concerning the time-bar is overruled in respect of all respondents.

POLICY OF THE GOVERNMENT, ECONOMIC POLICY AND DOCTRINE OF "POLITICAL QUESTION"

One of the main contentions of the respondents, particularly the 29th,30th,31st,32nd,38th,2nd and 2A respondents was that this Court lacks jurisdiction to entertain, hear and determine these applications as the impugned mattes, cumulatively challenged by the petitioners before this Court are of fiscal, economic and political in nature and also are 'policy decisions of the Government'.

To substantiate the above argument, the respondents heavily relied upon the dicta of Sripavan, J. (as he then was) in the case of ***Sujeewa Senasinghe v. Ajith Nivard Cabraal*** (**the Greek Bond Case**) SC.FR 457/2012 S.C. Minutes 18-09-2014, wherein His Lordship observed;

> *"We must not forget that in complex economic policy matters every decision is necessarily empiric and therefore its validity cannot be tested on any rigid formula or strict consideration. The Court while adjudicating the constitutional validity of the decision of the Governor or Members of the Monetary Board must grant a certain measure of freedom considering the complexity of the economic activities. The Court cannot strike down a decision merely because it feels another policy decision would have been fairer or wiser or more scientific or logical. The Court is not expected to express its opinion as to whether at a particular point of time or in a particular situation any such decision should have been adopted or not. It is best left to the discretion of the authority concerned."*

Further, it was the contention of the respondents, that issues relating to policy or its appropriateness are not matters for consideration by the judicial branch of the Government. The

respondents drew the attention of Court to the Statutory Determinations of this Court in the ***Nation Building Tax (Amendment) Bill*** SC.SD. 34/2016, [Decisions of the Supreme Court on Parliamentary Bills 2016-2017 Vol XIII 65], the ***Fiscal Management (Responsibility) (Amendment) Bill*** SC.SD. 28- 29/2016 [Decisions of the Supreme Court on Parliamentary Bills 2016-2017 Vol XIII 53] and ***The Inland Revenue (Amendment) Bill*** SC.SD. 17/1997 [Decisions of the Supreme Court on Parliamentary Bills 1991-2003 Vol VII 103] to bolster its argument.

The respondents also relied on the pronouncements made in the ***Special Goods and Services Tax Bill*** [SC.SD. 1-9/2022, Hansard of 22.02.2022] to propound that, formulation of policy is very much the prerogative of the Executive and the Legislature and converting the policies into legislation is within the exclusive domain of the legislative power of the Parliament and, that it is not prudent for the judiciary to comment upon policy formulation by the Executive.

Another judgement the learned Counsel for the respondents relied upon was ***Jathika Sevaka Sangamaya v. Sri Lanka Hadabima Authority*** SC/App 15/2013- S.C. Minutes 16.12.2015, a judgement of this Court, wherein it was observed;

> *"The doctrine of separation of powers is based on the concept that concentration of the powers of Government in one body will lead to erosion of political freedom and liberty and abuse of power. Therefore, powers of Government are kept separated to prevent the erosion of political freedom and liberty and abuse of power. This will lead to controlling of one another.*
>
> *There are three distinct functions involved in a Government of a State, namely legislative, the executive and the judicial functions. Those three branches of Government are composed of different powers and functions as three separate organs of Government. Those three organs are constitutionally of equal status and also independent from one another. One organ should not control or interfere with the powers and functions of another branch of Government and should not be in a position to dominate the others and each branch operates as a check on the others. This is accomplished through a system of 'checks and balances', where each branch is given certain powers so as to check and balance the other branches"*

Thus, the submission of the respondents was, since this Court has consistently recognized that the formulation of Government policy is very much the prerogative of the Executive and the Legislature elected by the People, that this Court should neither approve, critique or quash policies adopted by the Executive and the Legislature, or comment regarding its appropriateness in comparison with what the Court believes to be in national and public interests.

Additional Solicitor General Nerin Pulle PC in his submissions, responding to the petitioners contention that three main reasons contributed to the economic crisis, and one of which was arbitrary tax reductions, strenuously argued that the reduction and /or increase of taxes is a matter which is entirely within the purview of Parliament under Article 148 of the Constitution and this Court lacks jurisdiction to determine such matters and drew the attention of this Court to a number of tax revisions passed by Parliament in line with Article 148 of the Constitution.

The attention of the Court was also drawn to Article 80 (3) of the Constitution that prohibits post review of enactments and a plethora of Statutory Determinations of this Court, pertaining to fiscal statutes, to put forward the argument, that in tax matters, the legislator is the best judge and must benefit from greater freedom of classification and is at liberty to make reasonable classification and the Court lacks institutional capacity to assess or appraise such policy decisions and therefore, should not intervene in matters of policy unless such policy is found to be 'manifestly unreasonable.'[Vide ***Inland Revenue (Amendment) Bill*** SC.SD. 64-71/2022 Hansard of 17.11.2022]

Further, it was the contention of the learned ASG that the challenge by the petitioners to certain actions of the Executive which amounts to matters of economic policy, falls within the ambit of national policy and since national policy on all subjects and functions is listed under the 'reserved list' (List II of the 9th Schedule to the Constitution under Article 154 G (7) of the Constitution), the Central Government has sole control over such matters and thus the scope of judicial review of economic policy is limited and the Court cannot strike down a policy decision taken by the Government unless it is manifestly unreasonable and relied upon judicial dicta of the Indian Supreme Court to justify the said contention. [Vide - ***M/S Prag Ice and Oil Mills and another v. Union of India*** (1978) 3 SCC 459 and ***Balco Employees Union (Regd) v. Union of India and others*** [2002] AIR 350]

Another argument forcefully presented by the learned ASG is that certain narratives of the petitioners in these applications leading up to actions / inactions and the policies adopted by the Government would attract the application of the doctrine of political question- questions said to be 'non-justiciable' and as observed by the Supreme Court of the United States, the law is that the judiciary has no right to entertain the claim for unlawfulness, because such question is entrusted to one of the political branches and in view of a lack of judicially discoverable and manageable standards for resolving it and it involves no judicially enforceable rights.[Vide ***Baker v. Carr*** 369 US 186 (1962), ***Vieth and Furey v Jubelirer et al*** 541 US 267 (2004)] **.**

He further submitted, that although the 'doctrine of political question' was considered and rejected in the case of ***Premachandra v Major Montegue Jayawickrema and another*** [1994] 2 SLR 90, the said judgement can be distinguished and the doctrine of political question could be applied in the matter under consideration. The argument presented by the learned ASG was that in **Premachandra** (supra) the doctrine was rejected, since the impugned decision was made by a Provincial Governor and the Provincial Councils which are a subordinate arm of the Government viś-â-vis the Superior Courts. The learned ASG further submitted that even if the Court decides to examine decisions of the Executive disregarding the doctrine of political question the Court should be cautious and should be mindful, whether the Court has the institutional capacity to review matters of economic policy and formulate standards for the management of economic policy. Hence, it was submitted that the case of the petitioners is 'non-justiciable' and should be dismissed.

The attention of this Court was drawn by the learned Counsel for the Respondents to the judicial pronouncements of the Indian Supreme Court, to contend that this Court lacks jurisdiction to review taxation policies unless it is in violation of a law or is done ultra vires; and also drew our attention to specific passages of the said judgements: -

Prag Ice & Oil Mills & another v. Union of India (1978) 3 SCC 459

> ***"We do not think that it is the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide.*** *Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtless differ. Courts can certainly not be expected to decide them without even the aid of experts."*

Bharat Aluminium Company, Ltd. Employees Union v Union of India (2002) 2 SCC 333 *(The BALCO case)*

> *"In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court. […] Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution."*

Sidheswar Sahakari Sakhar Karkhana Ltd. v Union of India (2005) 3 SCC 369

> *"Normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution."*

Ugar Sugar Works Ltd. v Delhi Administration and others (2001) 3 SCC 635

> *"In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference to the Executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State."*

However, we are of the view that these passages cannot be taken in isolation. It must be considered and understood holistically. It must be examined with the narration of its facts.

In the **Ugar Sugar case** (supra) the Indian Supreme Court categorically observed:

> ***"It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily inter fere with the policy decisions of the Executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc, Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional***. *However, if the policy cannot be faulted on any of these grounds, the mere fact that it would*

hurt business interests of a party, does not justify invalidating the policy." (emphasis added).

Furthermore, this Court is conscious that the Indian Supreme Court in ***Delhi Development Authority v Joint Action Committee, Allottee of SFS Flats*** **(2008) 2 SCC** 672 t*he Court held as follows-*

> ***"****An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the* ***other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision.*** *Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review."* (emphasis added)

Similarly in the case***, Centre for Public Interest Litigation v Union of India*** **(2012) 3 SCC 1** ***(The 2G case)*** the Court observed as follows-

> *"...The power of judicial review should be exercised with great care and circumspection and the Court should not ordinarily interfere with the policy decisions of the Government in financial matters. There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. We are also conscious of the fact that the Court should not interfere with the fiscal policies of the State.* ***However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest*** *and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters."*
>
> *"...When matters like these are brought before the judicial constituent of the State by public-spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and* ***ensure that the institutional integrity is not compromised by those in whom the people have reposed trust*** *and who have taken an oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill-will and who, as any*

other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51-A." (emphasis added)

In contradistinction, to the contention of the respondents the main thrust of the case presented by the petitioners was the conduct of the 2nd,2A,29th,30th,31st,32nd, 32A and 38th respondents demonstrate a 'patent breach of public trust' and thereby a complete disregard of the 'rule of law'. The petitioners contend that in considering these applications the Court need not examine the policies adopted by the Government but focus on the failure to take necessary steps to remedy the situation which amounted to irrational and arbitrary conduct of the respondents. It was the position of the petitioners that even if this Court is to go into the policies of the State in determining whether any one or more of the Fundamental Rights of the petitioners had been violated as the law stands today, this Court is both empowered and has the jurisdiction to go into the policies adopted by the State in determining as to whether the Fundamental Rights of the petitioners have been violated by any of the respondents.

In the determination of the ***Appropriation Bill of 2012*** [Decisions of the Supreme Court on Parliamentary Bills 2010-2012 Vol X] it was observed that *'due and proper fiscal accountability must be viewed as the bedrock of good governance by any Government and must at all times be balanced and viewed through the lens of intra and intergenerational responsibility and equity.'*

This Court in its determination on the ***Inland Revenue (Amendment Bill)*** [SC SD 63-64/2023, Hansrad of 05.09.2023] in dealing with the issue of classifications in revenue matters recognized that *"such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable".* Hence the Court in Statutory Determinations too recognized its jurisdiction even to examine matters relating to revenue, when such matters are ***manifestly unreasonable***.

Indian authorities also provide that economic decisions are reviewable. Although an extent of judicial deference should be exercised in such review.

In ***Shri Sitaram Sugar Company v Union of India and Others*** (1990) AIR 1277 the price of levy on sugar was questioned. The Indian Supreme Court held that the doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated, and he does not abuse his power. He must act reasonably and in good faith. It is not sufficient that the

instrument is intra vires the parent Act but must also be consistent with the constitutional principles**.** It was held that**;**

> *"The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated, and he does not abuse his power. He must act reasonably and in good faith. It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principles: Maneka Gandhi v. Union of India, [1978] 1 SCC 248, 314-315."*
>
> *"The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or* ***it is so arbitrary or unreasonable that no fair-minded authority could ever have made it"***
>
> *"Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land."*

Similarly, in ***Small Scale Industrial Manufactures Association (Registered) v Union of India and Others*** (2021) 8 SCC 511 the Indian Supreme Court observed that**;**

> *"What is best in the national economy and in what manner and to what extent the financial reliefs/packages be formulated, offered and implemented is ultimately to be decided by the Government and RBI on the aid and advise of the experts. The same is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review. Merely because some class/sector may not be agreeable and/or satisfied with such packages/policy decisions, the courts,* ***in exercise of the power of judicial review, do not ordinarily interfere with***

the policy decisions, unless such policy could be faulted on the ground of mala fides, arbitrariness, unfairness, etc."

In the recent judgement of ***Vivek Narayan Sharma v Union of India*** *Writ petition* (Civil) No. 906 of 2016 the Indian Supreme Court observed that the Court would not interfere with any opinion formed by the government if it is based on relevant factors. The judgement was concerned with the decision of the Central Government of India to demonetise certain legal tenders**.** In para 224 the Indian Supreme Court observed that;

> *"This Court observed that the Court would not interfere with any opinion formed by the government if it is based on the relevant facts and circumstances or based on expert's advice. The Court would be entitled to interfere only when it is found that the action of the executive is arbitrary and violative of any constitutional, statutory or other provisions of law. It has been held that when the government forms its policy, it is based on a number of circumstances and it is also based on expert's opinion, which must not be interfered with, except on the ground of palpable arbitrariness. It is more than settled that the Court gives a large leeway to the executive and the legislature in matters of economic policy."*

These series of Indian judgements demonstrate that the role of Courts is to expand and not to attenuate fundamental rights. This view is stated by Justice Y.V Chandrachud et.al in 'Commentary on the Constitution of India' 8th edn Vol. 1 at page 227 as follows;

> "*Until recently, the Indian Supreme Court judges eschewed the policy approach as they treated the Indian Constitution as a statute and construed it according to the ordinary canon of statutory construction, except in one area, viz. The amenability of the Constitution and they usually stated that 'This Court is not concerned with policy or economic considerations' (vide State of Bombay v Bombay Education Society, AIR 1954 SC 561, 567).*
>
> *In Cooper's case the attitude was displayed, and it seems to continue. However, in recent times a 'policy' approach in interpreting constitutional interpretation is seen and emphasis is placed on a more creative law-making judicial role as regards to constitutional interpretation. In Maneka Gandhi it was openly declared that the role of*

the Courts is to expand not to attenuate the Fundamental Rights. This judicial policy has been translated into practical terms through a series of post-Maneka cases. Particularly in the order of personal liberty and freedom of speech."

Similar to Indian authorities, when we consider the jurisprudence of this Court it is clear that the scope and content of the Right to Equality guaranteed by Article 12 of the Constitution has evolved with the passage of time. Such evolution is in accord with the progressive changes that have taken place in other jurisdictions as well. To quote Justice Y.V Chandrachud (supra) at page 228:

"Judicial interpretation is a process of slow and gradual metamorphosis of Constitutional principles. Change caused thereby has to be deciphered by an analysis of a body of judicial precedents. This process is slow because it develops from case to case over a length of time and may take a long period for a view to crystalize. As per Dr Jain it is also somewhat haphazard because the Courts do not take initiative; they interpret the Constitution only when the question is raised before them, and the course of interpretation depends on the nature of cases and constitutional controversies which are presented to the Courts for adjudication."

In its current form the Right to Equality guarantees protection from arbitrary exercise of power and discretion by State functionaries and enhances the Rule of Law. It further requires State authorities to ensure that their conduct will not breach the trust placed on them and ensure that public resources placed in their custody are protected and preserved for the benefit of the people and not to exhaust for political or personal benefit. Exercise of discretionary powers in the decision-making process should be guided by the Directive Principles as recognized by the Constitution and callous disregard of such principles will pollute decisions with arbitrariness. Thus, the Rule of Law is not only rights and equality. The Rule of Law is also about functionality and efficiency for sustainable economic development of the nation and all of its People. **Hence, the respondents will not be absolved of liability merely because the decision and/or decisions are concerned with economic policies. This is not to state that the Court will not provide a margin of deference to the relevant decision makers in implementing national economic policies. However, such decisions should be considered decisions, for the long-term sustainable development and for the public benefit.**

This Court has considered the submissions made in respect of the "economic policy" and the "doctrine of political question", the judicial dicta of our Courts and other jurisdictions and we are convinced that this Court has jurisdiction to look into the grievances of the petitioners in these applications.

We are also of the view as laid down in the case of ***Jathika Sewaka Sangamaya v Sri Lanka Hadabima Authority*** (supra) one organ of a State should not dominate, control or interfere with the powers and functions of another branch of a government but operate as a check on the other through the mechanism of "checks and balances".

In coming to this conclusion, we are mindful that in the case of ***Sujeewa Senasinghe v Ajith Nivard Cabraal*** (supra) though leave to proceed was not granted the Court pronounced that it has to focus on the applicable law and ascertain whether the impugned decision to invest in Greek bonds was an arbitrary exercise of power serving a collateral purpose. The Court considered the totality of the circumstances, the risk management strategy in particular and the decisions complaint of in the said case viz. that the Central Bank investing in the bonds issued by the Hellanic Republic Ministry of Economy and Finance Public Debt Management Agency was based on the trade-off between the different risks faced and the Central Bank's tolerance for higher risks on a very small part of its portfolio (only 0.6 of its portfolio); and investing in high yielding Sovereign paper is an integral part of fund management of many funds in the world over and the Central Bank too had followed a similar practice in investing a tolerable proportion of its resources (0.6 percent) in Greek Bonds, The Court went on to observe when the euro zone took a turn for the worst several weeks later after the investment was made, the Central Bank sold a part of the Greek bonds at a loss of USD 6.6 million and this measure was taken to mitigate the risk of the Greek investment losing further value due to subsequent development in the euro zone and came to the conclusion, that it is neither possible nor desirable to hold that the Monetary Board in taking a decision to invest in Greek bonds have acted arbitrarily, unreasonably or in a fraudulent manner.

In view of the factors discussed above we see no merit in the submission of the learned Counsel for the respondents that the applications of the petitioners are non-justiciable or that this Court lacks jurisdiction to determine the impugned decisions of the Government.

RIGHT TO EQUALITY, RULE OF LAW AND 'PUBLIC TRUST'

Under Article 3 of the Constitution, the inalienable Sovereignty that is vested in the People includes powers of Government and Fundamental Rights. The Executive power of the People is exercised by the President who is the Head of the State, Head of the Government and the Head of the Executive. Within this Constitutional framework, The Cabinet of Ministers is charged with the direction and control of the Government and the President is the Head of the Cabinet of Ministers. The Constitution which is the Supreme Law recognises that FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL RIGHTS and the INDEPENDENCE OF THE JUDICIARY as intangible heritage of succeeding generations of the People of Sri Lanka.

Article 3 of the Constitution reads as follows;

> *"In the Republic of Sri Lanka sovereignly is in the People and is inalienable. Sovereignty includes the powers of Government, fundamental rights and the franchise."*

Article 4 of the Constitution speaks of exercise of such power in the People and **Article 4(d)** of the Constitution declares;

> *"the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and extent hereinafter provided."*

In ***Rajavarothiam Sampanthan v Attorney General*** **(Dissolution Case)** SC/FR/351 to 356 of 2018 and SC/FR/358 to 367 of 2018, SC minutes of 13-12-2018 at page 31, a Seven Judge Bench of this Court observed as follows;

> *"It has been emphasised time and again by this Court that it is a foremost duty of the Supreme Court to protect, give full meaning to and enforce the fundamental rights which are listed in Chapter III of the Constitution. Thus, Sharvananda, CJ observed in* ***Mutuweeran v The State*** *- 5 Srikantha's Law Reports 126 at page 130, 'Because the remedy under Article 126 is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental*

rights and ensure their vindication'. In the same vein, Ranasinghe, J stated in ***Edirisuriya v Navaratnam*** *[1985 1 SLR 100 at page 106], that "A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured to the citizens of the Republic as part of their intangible heritage. It therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations.""*

"In honouring this duty, the Supreme Court is giving tangible and effective life and meaning to the sovereignty of the people. The single and only instance specified in the Constitution where the exercise of these fundamental rights may be restricted is in circumstances falling within the ambit of Article 15 of the Constitution and the present application do not fall with the ambit of Article 15 in the absence of any laws which have been passed prescribing restricting the operation of Article 12(1) in the interests of national security, public order or any other of the specified grounds referred to in Article 15(7) of the Constitution [……] In the absence of a specific and express provision in the Constitution which strips the Supreme Court of jurisdiction under Article 118(b) read with Article 126 and Article 17 for the protection of fundamental rights, the provisions of Article 118(b) read with Article 126 and Article 17 will prevail. Therefore, this Court has the jurisdiction and, in fact a solemn duty to hear and determine these applications according to the law."

Thus, this Court is not fettered or precluded from exercising the fundamental rights jurisdiction and has a solemn and a bounden duty to uphold the rule of law and to safeguard the sovereignty of each and every citizen of this country.

Over the last period of forty-five years since the adoption of the Constitution in the year 1978, Right to Equality remains one of the mostly invoked rights by the People before the Supreme Court through the process provided under Article 126 of the Constitution.

The Right to Equality is guaranteed under **Article 12(1)** of the Constitution and it reads as follows:

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

The expression 'equality before the law' which is found in written Constitutions, originated from the English Law and the expression 'equal protection of the law' first appeared in the American jurisprudence. The Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights use the said expressions which exemplify that the object of these phrases is equal justice to mankind.

Sharvananda, J. (as he then was) in the case of ***Palihawadana v. Attorney General*** [1978]1 SLR 65, postulates that the Preamble to our Constitution recognizes that the People of Sri Lanka have ranked equality with justice and freedom and the notion of equality underlies all religious and political philosophies.

The Supreme Court which has the sole and exclusive jurisdiction to hear and determine any question relating to the infringement of fundamental rights in exercising this jurisdiction had examined and interpreted the scope and content of the right to equality as guaranteed by Article 12. The right to equality as guaranteed under Article 12 had evolved to its present form over a period of four decades. In this process the co-relationship between the Democracy, Rule of Law and the doctrine of Public Trust has been clearly recognised in the context of arbitrary and / or irrational exercise of power by Executive and / or Administrative authorities as well on violation of right to equality due to inaction of the Executive and / or Administrative authorities.

Equality is the corollary of the 'Rule of Law' and Sharvananda, J. in ***Sirisena & others v Kobbekaduwa, Minister of Agriculture and Lands*** 80 NLR 1 at 169-170 observed:

"Rule of law is the very foundation of our Constitution and the right of access to the Courts has always been jealously guarded. Rule of Law depends on the provision of adequate safeguards against abuse of power by the executive. Our Constitution promises to usher in a welfare state for our country. In such a state, the Legislature has necessarily to create innumerable administrative bodies and entrust them with multifarious functions. They will have power to interfere with every aspect of human activity. If their existence is necessary for the progress and development of the country the abuse of power by them, ***if unchecked, may defeat***

the legislative scheme and bring about an authoritarian or totalitarian state. The existence of the power of judicial review and the exercise of same effectively is a necessary safeguard against such abuse of power." (emphasis added)

In ***Visualingam and others v Liyanage and others*** [1983] 2 SLR 311 at page 380 it was observed that

"...there is a firm judicial policy against allowing the 'Rule of Law' to be undermined by weakening of the power of the Courts".

In the year 1984, in ***Jayanetti v The Land Reform Commission and others*** [1984] 2 SLR 172, Wanasundera J with other four judges agreeing with him observed that:

"Article 12 of our Constitution is similar in content to Article 14 of the Indian Constitution. The Indian Supreme Court has held that Article 14 "combines the English doctrine of the rule of law with the equal protection clause of the 14th amendment to (the U.S.) Constitution". We all know that the rule of law was a fundamental principle of English Constitutional Law and it was a right of the subject to challenge any act of the State from whichever organ it emanated and compel it to justify its legality. It was not confined only to legislation, but extended to every class and category of acts done by or at the instance of the State. That concept is included and embodied in Article 12." (at 184-185).

In ***De Silva v Atukorale*** [1993] 1 SLR 283, Mark Fernando, J. in interpreting the term public purpose relied on the following opinion of H. W. Wade –

"... Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended."(at 296)

Based on the said observation, the Court held that discretion of a public authority is not absolute, and that such discretion must be used exclusively for the public good, and went onto observe;

"It was a power conferred solely to be used for the public good, and not for his personal benefit; it ***was held in trust for the public****; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest."* (emphasis added)(at 297)

The principle that there is no absolute or unfettered power is also recognized in ***Marie Indira Fernandopulle and Another v E.L Senanayake, Minister of Lands and Agriculture*** 79 2 N.L.R 115 at page 120 wherein the Court held that;

"...Are the Courts obliged to turn a deaf ear merely because some statutory officer is able to proclaim, "I alone decide". "When I open my mouth let no dog bark"? If that be the position when the rights of the subject are involved, then the Court would have abdicated its powers necessary to safeguard the rights of the individual."

Another case wherein the public interest was considered is ***Bandara v Premachandra*** [1994] 1 SLR 301. In this case Fernando, J. at page 318 reasoned that;

"The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of Constitutional and statuary powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is realised."

In ***Heather Mundy v Central Environmental Authority and Others*** SC Appeal 58 60/2003 - SC Minutes 20.01.2004- Fernando, J. reiterated that powers vested in public authorities are not absolute and unfettered;

"...Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes" (page 13)

Similarly, in ***Premachandra v Major Montague Jayawickrema and another*** [1994] 2 SLR 90 G.P.S. de Silva, C.J. held;

"There are no absolute and unfettered discretions in public Law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted." (page 105)

Further, Shirani Bandaranayake, J. (as she then was) in ***Azath Salley v Colombo Municipal Council*** S.C. (FR) Application No. 252/2007 -S.C Minutes 04.03.2009- referring to the above position, states as follows;

"It is therefore apparent that a public authority has no absolute or unfettered discretion. Referring to this position, Professor Wade (supra pgs. 354 - 355) had stated that,

***'Statutory power conferred for public purposes is conferred as it were upon trust**, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended'(emphasis added)."* (page 30)

Fernando, J. in ***Priyangani v Nanayakkara and others*** [1996] 1 SLR 399 at 404-405 reiterated the interrelationship between the Right to Equality guaranteed by Article 12 of the Constitution and Rule of Law. Furthermore, the Court held that

*"We are not concerned with contractual duties, but with the safeguards based on the **Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers**. Discretionary powers can never be treated as absolute and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred **- not at the whim and fancy of officials for political advantage or personal gain**". (emphasis added)*

In ***Bulankulama v Secretary, Ministry of Industrial Development*** **(Eppawela case)** [2000] 3 SLR 243 a case involving an imminent infringement of fundamental rights, the respondents sought to argue that the government and not this Court is the trustee of the natural resources of

the country and as long as the government acts correctly the Courts will not put itself in the shoes of the government and the Court could not *'interfere'* in the exercise of discretion of the Government in situations where the Government acts as a 'trustee'. This Court rejected the argument and Amerasinghe, J. held that under **Articles 4, 17 and 126 of the Constitution,** the Court is expressly authorised to exercise its jurisdiction where the actions / omissions of the executive, violates fundamental rights of the people and that such jurisdiction applies even in situations where the Government exercises its powers as a 'trustee'.

Amerasinghe, J. at page 253 and 257 further observes:

> *"The Constitution declares that sovereignly is in the People and is inalienable (Article 3). Being a representative democracy, the powers of the People are exercised through persons who are for the time being entrusted with certain functions"*
>
> *"The Executive does have a significant role in resource management conferred by law, yet the management of natural resources has not been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources and the Courts have the task of interpreting such legislation in giving effect to the will of the People as expressed by Parliament."*

The above dicta of this Court amply demonstrate that during the last few decades, the Public Trust Doctrine has been applied by this Court when violations of the fundamental rights of People were considered. Furthermore, in relation to powers, functions and duties which are public in nature, this Court has always had respect for the Rule of Law and specifically to the principles of openness, fairness and accountability and observed that process of making a decision should not be shrouded in secrecy and that the powers are conferred upon the Executive in the public interest and in trust for the public and these powers must be governed by reason.

In ***Vasudeva Nanayakkara v Choksy*** (**Lanka Marine Case**) [2008] 1 SLR 134 at 181 Sarath N Silva, CJ. held as follows:

"...As firmly laid down in the Determination of the Divisional Bench of Seven Judges of this Court in regard to the constitutionality of the proposed 19th Amendment to the Constitution (2002 3 SLR page 85) the principle enunciated in Articles 3 and 4 of our Constitution is that the respective organs of Government, the Legislature, the Executive, and the Judiciary are reposed power as custodians for the time being to be exercised for the people. In Bulankulame and others v Secretary, Ministry of Industrial Development (2000 3 SLR 243) this Court has observed that the resources of the State are the "resources of the People" and the Organs of the State are "guardians to whom the people have committed the care and preservation" of these resources (p.253). That, there is a confident expectation (trust) that the Executive will act in accordance with the law and accountably in the best interests of the people of Sri Lanka (p 258)".

In ***Sugathapala Mendis and another*** (**Waters Edge Case**) [2008] 2 SLR 339 Tilakawardane, J. elaborated the Public Interest Doctrine as follows;

"The principle that those charged with the upholding the Constitution- be it a police officers of the lowest rank or the President- are to do so in a way that does not "violate the Doctrine of Public Trust" by state action / inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public trust Doctrine" is based on the concept that the powers held by the organs of the government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain, favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution the Sovereignty reposes. ***Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review".***

"The Public Trust Doctrine, taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the People that they must follow this duty even when a furtherance of this trust necessarily renders inadequate an act or omission that would otherwise legally suffice." (Vide pages 352-353).

"The oral arguments and written submissions presented on behalf of the principal respondents in this case engage in precisely this abdication of responsibility, that have come to be seen as a hallmark of Sri Lanka's governmental bureaucracy. Following Bandara v Premachandra in which the Court held that ***"….the State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the judiciary must endeavour to ensure that this expectation is realized…"*** *we recognize that this duty has to be upheld not only in the name of good governance but also for sustainable economic development of the nation and all of its People, especially the economically challenged, the disadvantaged and the marginalised. In time this will empower the marginalised and disempowered members of our society, and will in due course establish a true Democratic Socialist Republic with equality for all."* (vide page 354) (emphasis added)

In ***Vasudeva Nanayakkara v K.N. Choksy and others*** (**SLIC Case**) [2009] BLR 1 at page 56 and 57 Amaratunga, J. observed as follows:

"Fundamental rights jurisdiction forms a part of the equitable jurisdiction of the Supreme Court which exercises, at the highest level, the judicial power of the people according to the Rule of Law and the fundamental rights provisions enshrined in the Constitution."

"The petitioners have filed this application in public interest alleging that the executive power of the people, delegated to the Executive by the Constitution, to exercise in good faith and according to law have been wrongfully and illegally exercised, to the prejudice of the people. The trust reposed on the executive to which the peoples' executive power has been delegated is, in the words of

Amarasinghe J in Bulankulama Case," the confident expectation (trust) that the executive will act in accordance with the law and accountability, in the best interest of the people" (2000 3 SLR 243 at 258). The ruler's trusteeship of the resources of the State which belong to the people is a part of the legal heritage of Sri Lanka dating back at least to the third century BC as pointed out by Justice Weeramantry in his separate opinion in the International Court of Justice in the Danube Case, by quoting the sermon of Arahath Mahinda to King Devanampiyatissa as recorded in the Great Chronicle-Mahawamsa."

"This concept of the public trust which curtailed the absolute power of the monarch is in perfect harmony with the doctrine of public trust developed by the Supreme Court on the basis of sovereignty of the people set out in Articles 3 and 4 of the Constitution, Article 12(1) and the principle of the Rule of law, which is the basis of our Constitution. ***The Rule of Law is the principle which keep all organs of the State within the limits of the law and the public trust doctrine operates as a check to ensure that the powers delegated to the organs of the government are held in trust and properly exercised to the benefit of the people and not to their detriment.*** *When the Executive which is the custodian of the People's Executive Power act "ultra vires" and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court."* (emphasis added)

Furthermore, in ***Sugathapala Mendis and another*** (supra) Tilakawardane, J., at page 374 elaborated that public officials must exercise executive and administrative power subject to the Rule of Law and for the long-term sustainable development of the country and for the larger benefit of the People;

"…any person who is elected to the Presidency or appointed to ministerial services [….] are so chosen because they are deemed able to embrace, uphold and set example as a follower of the Rule of Law created pursuant to the Constitution and they hold in trust the executive power of the People acquired through the Sovereignty of the People. while the exercise of Presidential power is a duty that must accord with the Rule of Law, such compliance should also come from one's own conscience and sense of integrity as owed

to its People. This means that whilst they can use their private power and their private property in an unfettered manner when granting any privileges or favours and, even in an overwhelming act of great generosity, give all their private property away, ***their public power must only be used strictly for the larger benefit of the People, the long-term sustainable development of the country and in accordance with the Rule of Law****."*

"Consequent to this framework it is to be noted for our purposes that all facets of the country - its land, economic opportunities or other assets - are to be handled and administered under the stringent limitations of the trusteeship posed by the public trust doctrine and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country," (emphasis added)

In the more recent past, in ***Wijeratne v Warnapala*** SC.FR 305/2008 (S.C. Minutes 22-09-2009), Sripavan J., (as he then was) quoting Bhawati, J. in ***S.P.Gupta v Union of India and others*** 1982AIR (SC) 149 observed;

"It has been firmly stated in several judgements of this Court that the "Rule of Law" is the basis of our Constitution [....] 'If there is one principle that runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective'"

Similarly, in ***Jayawardena v Wijayatilake*** [2001] 1 Sri LR 132**;** ***Senarath and others v Chandrika Bandaranayake Kumaratunga and others*** SCFR 503/2005 - S.C. Minutes 03.05.2007; ***Hapuarachchi and others v Commissioner of Elections and Another*** [2009] 1 SLR 1; ***Watte Gedera Wijebanda v Conservator General of Forests*** [2009] 1 SLR 337**;** and ***Environmental Foundation Ltd. v Mahaweli Authority of Sri Lanka*** [2010] 1 SLR 1, the concept of the 'Public Trust Doctrine' and the 'Rule of Law' was recognized and applied. Furthermore, this Court went onto hold, that administrative acts and decisions contrary to 'public trust' would be in excess and/or abuse of power by the Executive and therefore, violative of the

fundamental rights in general and Article 12(1) of the Constitution in particular, which guarantees equality before the law and equal protection of the law.

The above position is explicitly recognized by Fernando J, in ***Heather Mundy v Central Environmental Authority and Others*** (supra) at page 13**;**

> *"Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the "protection of the law" would include the right to notice and to be heard. Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable."*

Commenting on the unfettered discretion, this Court in ***Premalal Perera v Tissa Karaliyadda*** SC FR 891/2009 - SC Minutes 31.03.2016, categorically held, quoting many judgements of this Court, that;

> *"The said authorities have specifically rejected the notion of unfettered discretion given to those who are empowered to act in such capacity and held that* ***discretions are conferred on public functionaries in trust for the public, to be used for the good of the public,*** *and propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were entrusted". (emphasis added)*

In ***Shanmugam Sivaraja and another v OIC Terrorist Investigation Division and others,*** SC FR 15/2010, SC Minutes of 27.07.2017, Aluwihare, J. cited with approval the dicta of Wanasundera, J. in ***Jayanetti v Land Reform Commission*** (supra) and re-iterated that it was a right of the subject to challenge any act of the State from whichever organ it emanated and compel it to justify its legality.

H.N.J.Perera, CJ. in the Full Bench decision of this Court *in* ***R Sampanthan and others v Attorney-General and others,*** [SC FR 351/2018 and other applications SC minutes of 13th

December 2018] agreeing with the jurisprudence of this Court in ***Wijeyratne v Warnapala*** [SC FR 305/2008 SC minutes of 22.9.2009], ***Premachandra v Major Montegu Jayawickrema*** [1994 2 SLR 90], ***Vasudeva Nanayakkara v Choksy*** [2008 1 SLR 134], ***Sugathapala Mendis v Chandrika Kumaratunga*** [2008 2 SLR 339], ***Jayanetti v Land Reform Commission*** [1984 2 SLR 172] and ***Shanmugam Sivaraja v OIC Terrorisdt Investigation Division and others*** SC FR 15/2010, SC minutes of 27.07.2017 recognized that the jurisprudence of this Court under Article 12 of the Constitution had extended the scope of the said guarantee to encompass the protection of Rule of Law.

Thus, this Court has recognized that when different organs of the State exercise the respective powers attributed to them as the Sovereignty of the People, such organs exercise such powers on behalf of the People and therefore, a duty is cast on State organs not to use such powers arbitrarily or irrationally. This Court has through its decisions had developed the "Public Trust Doctrine" by examining use of the discretionary power vested on executive and / or administrative authorities, initially focusing on the protection of natural resources and subsequently expanded to exclude arbitrariness in decisions where public authorities exercise powers vested on the said organs, to ensure the said bodies exercise such powers to the ultimate benefit of the people.

In ***Ravindra Kariyawasam v Central Environment Authority*** **(Chunnakam case)** - SC FR 141/2015 – SC minutes of 04.04.2019, where the petitioner alleged, pollution of the groundwater making it unfit for human use, the Court held that the failure of the State agencies, *i.e.,* CEA and BOI to fulfil its statutory obligations was **'a breach of the public trust'** reposed in them and the Court held that the said agencies have violated the fundamental rights guaranteed by Article 12(1) of the Constitution, of the residents of Chunnakam as well as the Petitioner, a member of the public.

Noble Resources International Pte Limited v. Minister of Power and Renewable Energy - SC FR 394/2015 SC Minutes of 24.06.2016, is a unique case in which the Public Trust Doctrine was applied by this Court, as the events that transpired, literally and metaphorically "shocked the conscience of court". The Petitioner claimed that the decision of the Standing Cabinet Appointed Procurement Committee (SCAPC) not to award the tender for the supply of coal, to the petitioner

was unlawful and violative of petitioner's fundamental rights and the Court granted the Petitioner Leave to Proceed for the alleged violation of the petitioner's fundamental rights guaranteed in terms of **Articles 12(1) and 14(1)(g)** of the Constitution.

When the application was taken up for hearing, a preliminary objection was raised by the respondents, that the petitioner company is a company registered in Singapore and was not a registered company in Sri Lanka and has invoked the jurisdiction of this Court by itself without a local agent, representative or an Attorney-at-Law enjoining him as a petitioner. The Court nevertheless, decided to go into the merits of the case as *'some of the events that took place in the award of the tender shocked the conscience of the Court'* and the Court pronounced as follows;

> *"The Court is mindful that the fundamental rights provisions in the Constitution must be interpreted having regard to the constitutional objectives and goals and in the light of the action taken by the Governmental Authority at a given point of time.* ***As it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it in accordance with the provisions of the Constitution and the law,*** *the Court cannot close its eyes and allow the actions of the State or the Public Authority to go unchecked in its operations, in the public interest. If the Petitioner with a good case is turned away, merely because he is not sufficiently affected or the Petitioner has no "locus standi" to maintain this application, that means that* ***some Government Agency is left free to violate the law and this is not only contrary to the public interest but also violate the Rule of Law, the object of which is to protect the citizens from unlawful governmental actions.*** *It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, the Court yet dismisses the application on a preliminary objection raised by the Respondents.* ***This Court has been given power to grant relief as it may deem just and equitable****. The Court therefore decided to go into the merits of the case as some of the events that took place, in the award of the tender to the 22nd Respondent shocks the conscience of the*

Court, ***especially when the awarding of the tender involves public funds****."* (emphasis added)

Having considered the merits of the case, the Court came to the finding that the decisions made by the SCAPC was outside its jurisdiction and therefore cannot be considered as a valid decision and Sripavan, J. (as he then was) opined;

> *"The power of the State is conferred on the Members of the SCAPC and the PAB* ***to be held in trust for the benefit of the public.*** *The Supreme Court being the protector and guarantor of the fundamental rights cannot refuse to entertain an application seeking protection against infringement of such rights. The Court must regard it as its solemn duty to protect the fundamental rights jealously and vigilantly. It has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a* ***duty to protect the nation in directing it to act within the framework of the law and the Constitution****."* (emphasis added)

Though this Court dismissed this application *in limine* on the preliminary objection raised, pertaining to maintainability of the application Sripavan, J. quoted with approval the words of Md Faizal Karim J, in the case of ***SSA Bangladesh Ltd. v Engineer, Mahmudul Islam*** 9 BLC (AD)(2004), that;

> *"The judiciary has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a duty to guide the nation in shaping its destiny within the framework of the law and the Constitution. The Court of Law would always jealously guard against any abuse or misuse of power/authority by the State functionary in dealing with the State property." a*nd went on to make directions, considering the procedural flaws in the award of tender upon the basis, ***"...the award of tender involved public funds, and the solemn duty of the Court to protect the Rule of Law embodied in the Constitution in order to ensure its credibility in the faith of the people."*** (emphasis added)

Similarly, in the words of Tilakawardane, J. in her dissenting opinion in ***Vasudeva Nanayakkara v Choksy and Others*** [2009] 2 SLR 1;

"The entire fabric of the Constitution mandates that the Rule of Law be the ultimate framework of all acts carried out under the Constitution, including the acts of the executive, the legislature and the judiciary."(at page 5)

The foregoing exemplifies the bounden duty that is cast on this Court to protect the Rule of Law and jealously guard against the abuse and misuse of power and authority by the State and its functionaries in dealing with public funds.

In ***Ajith C.S. Perera v Daya Gamage*** SC FR 273/2018, SC Minutes of 18.04.2019, the petitioner complained to this Court of 'continued inaction' of the authorities to give effect to the regulations made under the Protection of Rights of Persons with Disabilities Act No 28 of 1996. The Court having been satisfied that there was no satisfactory or meaningful compliance with the said regulations held, that the rights guaranteed under Article 12 (1) of the Constitution of the petitioners and other persons with disability rights, have been violated by the State and its agencies and opined as follows;

"…that the concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution. It is a fountainhead from which these fundamental rights spring forth and array themselves in the Constitution, for the protection of all the people of the country"

It is also pertinent to observe that **Article 27(1)** of the Constitution requires the President and the Cabinet of Ministers in the governance of Sri Lanka to be guided by the Directive principles of State Policy including (a) the full realization of the fundamental rights and freedom of all persons and (b) realization by all citizens of an adequate standard of living for themselves and their families including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.

In Sri Lanka the Supreme Court recognized that when the different organs of the State exercise the respective powers attributed to them as the Sovereignty of the People such organs exercise such powers on behalf of the People. Therefore, a duty is cast on State organs not to use such powers arbitrarily or irrationally. This Court through its decisions had developed the "Public

Trust Doctrine" in examining use of discretionary power vested on executive and / or administrative authorities. Initially the Court focused on the protection of natural resources as in the Indian Supreme Court in ***M.C.Mehta v Kamal Nath*** [1997] 1 SCC 388. In the said case it was observed that:

> *"The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, air, forests and ecological fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership".*

The Supreme Court later expanded to exclude arbitrariness in decisions in instances where public authorities exercise powers vested on them and ensure that they exercise such powers to the ultimate benefit of the people. [vide ***Bandara and another v Premachandra and others*** (1994) 1 SLR 301, ***Jayawardena v Wijayatilake*** – (2001) 1 SLR 132]. It is also pertinent that this Court had extended the doctrine of Public Trust **to protect national resources from use of arbitrary power**. [vide ***Fernando v Sri Lanka Broadcasting Corporation*** (1996) 1 SLR 157, ***Mundy v Central Environmental Authority*** (SC Appeal 58/2003, SC minutes of 20.01.2004, ***Watte Gedara Wijebanda v Conservator General of Forests*** (2009) 1 SLR 337]

There is no dispute that the 'corner stone' or the *'Grundnorm'* of our Constitution is the Sovereignty of its People and this Court has time and time again held that unfettered discretion is anathema to the Rule of Law on which our Constitution is founded.

In the case of ***Premachandra v Major Montague Jayawickrema*** (supra) at page 111, this Court succinctly held *"In Sri Lanka, however it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary."*

In ***R Sampanthan and others*** (supra) having considered *curses curiae* and jurisprudence of this Court it was held that in interpreting the provisions in the Constitution, the Court should adopt an approach which enforces the Rule of Law. Furthermore, the Court held that our law does not recognize that any public authority, whether they be President or an officer of the State or organ of State, has unfettered or absolute discretion of power.

Whilst this Court in Fundamental Rights applications have always safeguarded and preserved the relationship between Democracy, Rule of Law, Public Trust and Human Dignity this Court in its Statutory Determinations too have recognised the said relationship.

In the ***Appropriation Bill of 2008***, [Decisions of the Supreme Court on Parliamentary Bills 2007-2009 Vol IX] this Court went onto hold that Parliament's power of control over public finance is exercised ***'in trust for the People'*** and therefore *'the process should be transparent and in the public domain, so that People who remain Sovereign are informed as to the manner of control exercised.'*

In ***Assistance to and Protection of Victims of Crime and Witnesses Bill*** SC SD 1-6/2014 [Decisions of the Supreme Court on Parliamentary Bills 2014 Vol XII – 3] this Court opined that "*When considering the exercise of statutory power certain fundamental principles can never be overlooked. The first is that our Constitution and System of Courts are founded on the rule of law; secondly statutory power conferred for public purposes is conferred as if it were upon trust and not absolutely*".

In the ***Inland Revenue (Amendment Bill)*** SC SD 63-64/2023, Hansard 05-09-2023 in dealing with the issue of classifications in revenue matters, this Court recognized that "*such measures would be considered as inconsistent with Article 12 of the Constitution only if they are manifestly unreasonable*" and thus recognized its jurisdiction even to examine matters relating to revenue, when such matters are based upon the principles of Public Trust.

Furthermore, this Court concluded its determination by observing as follows;

> "[…] *It was submitted that there had been corruption and mismanagement of public funds which had led to the present economic predicament. […] This Court is exercising its constitutional jurisdiction over the Bill. These are not matters which we can take into consideration in this exercise.* ***Nevertheless, we are mindful that this Court is the last bulwark to protect the Rule of Law and prevent any breach of public trust. […] In order to do so, the jurisdiction of this Court must be properly invoked in the appropriate proceedings.***" (emphasis added)

In the ***Value Added Tax (Amendment) Bill*** [SC SD 62-63/2023 Hansard of 10.11.2022] it was opined,

"*This Court shall continue to exercise its Constitutional role as the sentinel on the qui vive over executive and administrative action."* (at page 22)

When we consider the jurisprudence of this Court it is clear that the scope and content of the Right to Equality guaranteed by Article 12 of the Constitution has evolved with the passage of time. Such evolution is in accord with the progressive changes that had taken place in other jurisdictions such as in India. In its current form this Right guarantees a protection from arbitrary exercise of power and discretion by state functionaries and enhances the Rule of Law. It further requires State authorities to ensure that their conduct will not breach the trust placed on them and **make certain that public resources in their custody are protected and preserved for the benefit of the people and not to be exhausted for political or personal benefit.** Furthermore, the exercise of discretionary powers in the decision-making process, should be guided by the Directive Principles as recognized by the Constitution and callous disregard of such principles will pollute decisions with arbitrariness. Thus, Rule of Law is not only rights and equality. It's about functionality and efficiency for sustainable economic development of the nation and all of its People.

INACTION AND / OR OMMISSION TO ACT

In ***Janath S Vidanage and others v Pujith Jayasundara and others*** **(Easter Sunday case),** SC FR 163/2019 and other applications (SC minutes of 12.01.2023) a full Bench of this Court considered the Constitutional framework within which the Executive branch of the Government performs its duties and responsibilities while examining the complaint of the petitioners that the inaction of the President and other State officials led to the disastrous consequences including destruction to life and property. Having examined the statutory frame work and the common law principles governing the obligations of a Minister attached to his supervisory role over the institutions assigned to him, the Court held that the inaction on the part of the Minister as well as the State Officials, that led to the serious impact on the entire society, violated the rights guaranteed under Article 12(1) of the Constitution.

In the ***Easter Sunday Case*** (supra) this Court observed that

> *"The heads of Department and responsible officers remain liable for the infractions of not performing their duties assigned to them to safeguard the security and integrity of the nation. The Minister becomes liable when he fails in his constitutional and common law duties to have robust systems and mechanisms to protect and promote national security. It is for this reason that there has to be constant supervision and control of his officials. There must be structures and mechanisms which facilitate transparent exchange of intelligence and information. A proper mechanism to acquaint himself with intelligence and information would serve the Minister proper notice of intelligence and information and such an absence of supervisory mechanism will expose the Minister to allegations of failure of his constitutional, statutory and common law duties". (at page 89)*

This Court further proceeded to consider the relevant factors in deciding the required standard of care when the liability is attributed due to inaction or omission. Court recognised *inter alia* factors such as the magnitude of the risk, the cost and practicability of precautions, the social value of the respondent's activities and what reasonable man would have foreseen. The Court cited with approval the following dictum in ***Blyth v Birmingham Waterworks*** [(1856) 11 Exch 781]

> *"the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct human affairs would do, or doing something which a prudent and reasonable man would not do".*

PARLIAMENTARY SELECT COMMITTEE

The learned President's Counsel for the 2nd and 2A respondents submitted that the instant applications are futile and ought to be dismissed by this Court as a Parliamentary Select Committee had been appointed to investigate into the matters that are also the subject matters relating to which this Court will examine in determining these two applications. It is his contention that it is the Parliament, which has full control over public finance, is now investigating into the reasons for the economic setback through this select committee process and such select committee is empowered to submit proposals and recommendations.

In this regard it is pertinent to observe that the petitioners in these two applications invoked the jurisdiction of this Court as provided under Article 17 read with Article 126 of the Constitution. Article 118 (b) of the Constitution recognises the Supreme Court's jurisdiction to protect fundamental rights. The Supreme Court is the highest and final Superior Court of record of the Republic. Article 4(c) of the Constitution recognizes that the Parliament exercises people's judicial power through courts created and established or recognized by the Constitution or created and established by law. However, the Parliament is empowered to exercise People's judicial power, directly, in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, according to law. Therefore, there is no doubt or ambiguity as to the power of Courts to exercise judicial power of the People in regard to all matters that are recognized by law other than the specific instance excluded by Article 4(c). The Constitution which is the Supreme law of the Democratic Socialist Republic of Sri Lanka assures that independence of the judiciary as an intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka.

This Court in its Determination in **"*Industrial Disputes (Special Provisions) Bill***", SC SD 30/2022, cited with approval the following passage from Blackstone (Blackstone's Commentaries Vol. 1 at p. 269):

> *"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."*

This Court, further observed that:

> *"....except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, Parliament has only the power to provide for the creation of courts, tribunals and institutions for the exercise of the judicial power of the people. This judicial power can only be exercised by a judicial officer duly appointed under the law."*

The manner in which the Parliament could replace or abolish or amend the powers, the jurisdiction of any court other than of the Supreme Court is recognised by Article 105(2).

This Court in ***Ratnasiri Perera v Dissanayake*** [1992] 1 SLR 286 at 300 held:

> *"The Constitution now entrenches some of the jurisdictions of the Supreme Court and of the Court of Appeal, precluding an erosion of such jurisdictions by ordinary law. Other jurisdictions, however, can be taken away by ordinary law, provided of course that if they are transferred to other bodies, the officers or members thereof must be appointed in terms of Articles 114 and 170."*

Therefore, the only manner in which the Parliament could change the jurisdiction of the Supreme Court is by way of an amendment to the Constitution and any deviation is a breach of the doctrine of separation of powers. In this regard it is also pertinent to note that Standing Order 91(f) recognises the *"sub judice"* Rule in relation to proceedings in Parliament. Paragraphs 20.11 and 21.19 of Erskin May, online edition of the 25th print edition[1] provides inter alia

Para 20.11 "*The House has resolved that no matter awaiting adjudication by a court of law (including a coroner's court or a Fatal Accident Inquiry) – ie matters* sub judice *– should be brought before it. This covers both the content of Members' speeches and the subject matter of motions and questions. The resolution means that matters currently before the courts cannot be raised in a motion or amendment save where legislation is under consideration".*

Para 21.19 *"Subject to the discretion of the Chair and to the right of the House to legislate on any matter or to discuss any matters of delegated legislation, matters awaiting the adjudication of a court of law should not be brought forward in debate."*

[1] (https://erskinemay.parliament.uk/)

The applicability of this Rule to the select committees in the United Kingdom is discussed in para 38.25 which reads:

> "*The resolution of the House prescribing its practice with regard to matters that are awaiting judgment in the courts (see paras 20.11, 21.19) includes proceedings in select committees. The discretion available to the Chair should be exercised only in exceptional circumstances and, if time allows, following consultation with the Speaker. Committees have suspended inquiries in progress because a witness had been charged with criminal offences related to the subject-matter of the inquiry or have decided not to take evidence from particular witnesses in the course of an inquiry because the committee had been informed that the witnesses would also be witnesses in impending criminal or civil proceedings. The bar does not, however, operate when committees are deliberating, since they do so in private, nor when evidence is being taken in private and, since there is no restriction on the right of the House to legislate, the proceedings of a select committee on a bill need not be affected by it"*

According to the material submitted to this Court, the "Select Committee of Parliament to Investigate Causes for Financial Bankruptcy declared by the Government and to report to Parliament and submit its proposals and recommendations in this regard" had been appointed by Parliament on 19th January 2023 whereas the petitioners, invoked the jurisdiction of this Court in June 2022 and this Court having heard all parties granted leave to proceed on 7th October 2022. Therefore, by the time the select committee was appointed in Parliament, the petitioners had already invoked the jurisdiction of this Court and leave to proceed had been granted. As discussed hereinbefore, the jurisdiction vested by the Constitution on this Court under no circumstances could be curtailed or abridged by the Select Committee process of Parliament. Hence, we are of the view that the submission of the learned President's Counsel on this issue is devoid of any merit.

JURISDICTION OF THE COURT

One of the main complaints of the petitioners in these instant applications is that one or more of the respondents failed to take necessary remedial measures having come to know the adverse consequences to the economy due to the tax revisions introduced in December 2019. They contend that such inaction on the part of the State functionaries taken together with the inaction to seek assistance from the IMF in a timely manner contributed heavily to the economic collapse which caused immense hardships and damage to persons and property, including death of persons. They contend that such inaction infringed the Right to Equality guaranteed under Article 12 of the Constitution.

In our view the examination of this contention of the petitioners does not amount to an examination of the policies of the Government. In our view the jurisprudence developed with the passage of time as discussed hereinbefore requires the Court to exercise its jurisdiction vested under Article 126 of the Constitution and examine whether the executive and/or administrative authorities have acted arbitrarily and / or irrationally and / or with manifest unreasonableness and thereby breached the Public Trust and Rule of Law, in situations where the petitioners allege an infringement of the right to equality guaranteed by Article 12 of the Constitution. Therefore, we are not inclined to accept the submission that the Court lacks jurisdiction on the basis of "public policy", "economic policy" or "doctrine of political question".

In addition to the main objections raised on behalf of the respondents, that are discussed hereinbefore, regarding the maintainability of these applications, several other objections were raised, which the learned counsel argued, had made the petitions misconceived in law and should be dismissed for those reasons. This Court gave its mind to those objections and finds no merit in any of them. Accordingly, we are of the view that the petitions are valid and can be proceeded with.

RESPONDENTS AGAINST WHOM LEAVE TO PROCEED GRANTED

Gotabaya Rajapaksa - 32A respondent – assumed duties as the President on 18th November 2019, after being declared elected to the Office of the President following the resounding victory at the election held on 16th November 2019. Under Article 4(b) of the Constitution the executive power

of the People, including the defence of Sri Lanka, is exercised by the President, elected by the People. As held by this Court, it is the People's executive power that the President is exercising on behalf of the People. The President holds executive powers in trust for the People and needs to exercise such powers with due regard to rule of law. The President is the Head of the Cabinet of Ministers which is charged with the direction and control of the Government. Among the powers and functions of the President, the act of appointing the Prime Minister and other Ministers of the Cabinet of Ministers is recognised under Article 33(f) of the Constitution. On 21st November 2019, a new Government was formed by the 32A respondent. Mahinda Rajapakse – 2nd respondent - was appointed as the Prime Minister of the new Government on 21st November 2019 and the Cabinet of Ministers of the new Government was appointed on the 22nd November 2019. Cabinet portfolio of Defence in the newly formed Government was held by the 32A respondent.

P.B.Jayasundera – 38th respondent – assumed duties as the Secretary to the President on 19th November 2019 and he resigned on 22nd January 2022. The President is empowered to appoint the Secretary, as provided under Article 41 (1) of the Constitution.

Mahinda Rajapaksa – 2nd respondent - was appointed Minister of Finance, Economy and Policy Development on 21st November 2019. Scope of responsibilities attached to the Minister can be derived from the subjects and functions assigned by the President in accordance with the Constitution. Once the subjects and functions are assigned, the responsibility lies with the Minister to ensure that the relevant duties are performed and goals are achieved through the institutions that are placed under the supervision and control of the Minister. The Central Bank of Sri Lanka is one of the institutions that is placed under the supervision of the Minister of Finance. Some of the duties and functions attributed to the Minister of Finance include:

- Formulation, implementation, monitoring and evaluation of policies, programmes and projects; in relation to Public Finance, Taxation and Economic Affairs in accordance with the National Policy Plan and the subject of the departments, specified statutory institutions and laws and regulations
- Formulation of policies relating to public finance and national revenue preparation of the legal framework and operation of the other programmes

- Formulation of public finance and macro finance management policies and their operation and co-ordination
- Liaison with international development finance institutions, organizations and international financial market.
- Preparation of Annual Budget, implementation, enforcement of financial control, implementation and financial resources management.
- Implementation of National Taxation policies, strengthening the institutional structure and effective utilization of state revenue
- Formulating National Policies in order to achieve National Economic and Social Development Goals
- Supervising all specified institutions and matters relating to all subjects assigned to such institutions.

It is also pertinent to note that the Monetary Law Act No 58 of 1949 and several other fiscal statutes including Value Added Tax Act No 14 of 2002 and Inland Revenue Act No 10 of 2006 are among the statutes that are to be implemented by the Minister of Finance. (vide Gazette Extraordinary No 2153/12 dated 10 December 2019).

Examination of these duties and functions clearly show that key features in economic development and financial management are placed under the responsibility of the Minister of Finance. This responsibility requires the Minister to establish proper mechanisms of supervision and to obtain necessary data and information from the institutions that are placed under his supervision. Such flow of data and information is of utmost importance to ensure that the powers vested on him are exercised to the benefit of the people and desist from arbitrary exercise of power. Even though, the duties and functions assigned to the Minister of Finance have been revised time to time during the period relevant to these applications, core duties, institutions placed under the supervision of the Minister including the Central Bank of Sri Lanka and core statutes including Monetary Law Act and other fiscal statutes had remained under him without a change.

Basil Rajapaksa – 2A respondent – replaced the 2nd respondent and assumed duties on 08th July 2021 as the Minister of Finance. Mahinda Rajapaksa (2nd respondent) was sworn in as Minister of Economic Policies and Planning on the same day. The 2A respondent functioned as the

Minister of Finance till 04th April 2022. It is pertinent to note that the 2A respondent prior to assuming duties as the Minister of Finance in July 2021, functioned as the Chairman of the Presidential Task Force on Economic Revival and Poverty Alleviation.

Members of the Cabinet of Ministers – 03rd to the 27th respondents in SC FR 195/2022

S.R.Attygalle – 31st respondent – was appointed Secretary to the Treasury and Ministry of Finance on 19th November 2019. Ex Officio he is a member of the Monetary Board as per section 8(2) of the Monetary Law. Under Article 51(2)(b) of the Constitution the Secretary exercises supervision over the Departments and other institutions in charge of the Minister, subject to direction and control of the Minister. Being an ex officio member of the Monetary Board, his responsibility is explained in the Exter Report. Accordingly, it is observed that:

> *"The ideal which it is hoped that the proposed law will achieve is one in which there will be continuous and constructive co-operation between the Monetary Board and the Government. The principal instrument for achieving this co-operation should be the Permanent Secretary to the Ministry of Finance whose membership on the Board will ensure at all times that his Minister's views will be made known to the other members of the Board. The effectiveness of the co-operation and co-ordination between the Board and the Government will depend more upon the men occupying the key positions at particular times than upon any legal formula no matter how carefully or elaborately it might be worked out. A relationship as complex and sometimes as delicate as this one is certain to be, cannot be established full-blown by a piece of legislation. It must be the result as in other countries of years of experience and the slow growth of political conventions"* (page 13 Exter Report).

The 31st respondent resigned on 07th April 2022.

W.D.Lakshman – 30th respondent – assumed duties as Governor of the Central Bank on 24th December 2019 and resigned on 14th September 2021. Section 8(1) of the Monetary Law Act provides for the Governor of the Central Bank to be the Chairman of the Monetary Board.

Ajith Nivard Cabraal – 29th respondent – assumed duties as Governor of the Central Bank on 15th September 2021 and resigned on 04th April 2022. Prior to him assuming duties as the Governor this respondent functioned as the State Minister of Finance, Capital Markets and State Enterprise Reforms.

Samantha Kumarasinghe – 32nd respondent – was an appointed member of the Monetary Board. He functioned in this capacity from 29th June 2020 to 31st March 2022.

The Monetary Board of the Central Bank– 28th respondent – is a statutory body created under the Monetary Law Act. Section 9(1) recognizes that the Monetary Board is a body corporate with perpetual succession. Under section 5 of the Monetary Law Act, the Central Bank is established as the authority responsible for the administration and regulation of the monetary and banking system. The Central Bank is charged with the duty of regulating the supply, availability, cost and international exchange of money to secure objects including the stabilization of domestic monetary values, determining the par value of the Sri Lankan Rupee and the preservation of the par value and preservation of the stability of the exchange rate when there is no determination on the par value. Furthermore, the Central Bank is recognized as the fiscal agent, banker and financial adviser of the Government.

One of the main duties of the Central bank in the context of its duty to secure international monetary stabilization is the duty to endeavor to maintain among the assets of the Central Bank **an international reserve adequate to meet any foreseeable deficits in the international balance of payments**. Section 66(2) of the Monetary Law Act provides that

> *"In judging the adequacy of the International Reserve, the Monetary Board shall be guided by the estimates of prospective receipts and payments of foreign exchange by Sri Lanka; by the volume and maturity of the Central Bank's own liabilities in foreign currencies; and, in so far as they are known or can be estimated, by the volume and maturity of the foreign exchange assets and liabilities of the Government and of banking institutions and other persons in Sri Lanka. So long as any part of the foreign currency assets of Sri Lanka are held in currencies which are not freely convertible by the Central Bank, whether directly or indirectly, into special drawing rights or such other common*

denominator prescribed by the International Monetary Fund or into foreign currencies freely usable in international transactions, or are frozen, the Monetary Board shall also take this factor into account in judging the adequacy of the International Reserve of the Central Bank".

TAX REVISION AND DOWNGRADING BY RATING AGENCIES

In a note to the Cabinet by the 32A respondent on 26th November 2019, had recommended implementation as a matter of priority a series of measures to revise taxes. These proposals to lower taxes had been introduced to give effect to an election pledge to "restructure and introduce a simplified tax mechanism". In the note to the Cabinet, it was acknowledged that a reduction of Government revenue would take place as a result of such revisions. However, the 32A respondent had expressed the view that "potential benefit from re-engineering the tax system will eventually revive revenue". In the same note, the 32A respondent had urged the line ministries and agencies to go slow on public spending to manage fiscal imbalance. He also urged that the government expenditure incurred by semi government agencies and State Owned Enterprises (SOEs) should also be curtailed as taxes on goods and services are to be lowered. The 32A respondent in this Note to the Cabinet titled "An Economic Revival Initiative" recommended implementation of a series of measures as a matter of priority "pending parliamentary approval for amendments to the relevant tax statutes". These measures included *inter alia* bringing down the rate of VAT from 15% to 8% and to do away the 2% NBT with effect from 1st December 2019. In addition, the threshold for VAT liability was raised from 12 million per annum to 300 million per annum on the turnover. Further, tourism business was to be treated as an export and VAT would be zero rated provided 60 % of the turnover is sourced from locally. Further tax concessions were offered to the construction industry by reducing the tax liability to 14% from the existing rate of 28%. Religious institutions were removed from tax liability and further the threshold for collection of tax through PAYE was raised from all inclusive monthly income of Rs 150,000.00 to Rs 250,000/-.

The 32A respondent requested the Minister of Finance, Economy and Policy Development to take appropriate action to implement this programme. The 2nd respondent, who held the portfolio of Finance, Economy and Policy Development by his observations to the Cabinet agreed with the said proposals. It was envisaged that such tax revisions would create a conducive

environment for businesses and a positive impact on all prices. It is pertinent to note that the 38th respondent had been present on invitation at the deliberations of the Cabinet and had explained the desirable immediate impact on the economy and the well-being of the People by the implementation of the proposed measures. The Cabinet of Ministers had granted the approval to implement these proposals.

It is pertinent to observe that Article 148 of the Constitution provides that *"Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law".* However, these proposals had been implemented through an administrative mechanism by way of public notices released by the Commissioner General of Inland Revenue in early 2020 whereas the necessary legislation had been introduced only in mid 2021. It is significant to note that the Commissioner General of Inland Revenue has failed to identify the basis on which he derived authority to issue such notices but merely states that such notices were issued either on the instructions of the Ministry of Finance or as instructed by the Ministry of Finance as approved by the Cabinet of Ministers.

The income from taxes remains a significant portion of government revenue and the reduction of taxes would inevitably result in depletion of government revenue. Therefore, an important issue that arises in this regard is whether a credible mechanism was introduced parallel to the introduction of tax reductions and whether the reductions did in fact bring in the expected results. The Auditor-General observes, that the statistics does not show such a positive change in prices indices and inflation rate, as expected by these changes. The Inland Revenue Department had estimated the potential loss from tax income resulting from the proposed tax for the year 2020 amounts to 493,394 million rupees. The loss of government revenue due to the measures referred to resulted in an unmanageable budget deficit. It is to be noted that the country had been facing the phenomenon of budget deficits over a considerable period and the respondents should have been aware of this fact.

Furthermore, a major adverse consequence that resulted directly from the tax revisions was lowering of the country's credit rating by the international agencies. This remains an immediate outcome from the tax revisions introduced in late 2019. Fitch Ratings downgraded Sri Lanka from B stable to B negative on 18th December 2019. It is uncontroverted that the Fitch Rating by

27th September 2019 remained B Stable. Standard & Poor's downgraded the country rating from B stable to B negative on 14th January 2020. Fitch Ratings, directly attributed the downgrading to the sweeping tax cuts introduced in late 2019. It is recognised that such downgrading reflects the debt sustainability position of the country. This trend continued unabated, throughout the next two years (2020 and 2021) resulting in further gradual downgrading of credit rating from CCC to CC and finally reaching C. On 19th May 2022 it culminated in a "restricted default". According to the Fitch Ratings "B" represents the presence of material default with a limited margin of safety, "CCC" represents a substantial credit risk with a very low margin for safety and default is a real possibility, "CC" reflects a very high levels of credit risk and a default of some kind appears probable and "C" reflects "a default or default like process had begun, or the issuer is in standstill, or for a closed funding vehicle, payment capacity is irrevocably impaired". Ratings by two other agencies namely Moody's Investor Service and Standard & Poor's also reflect a similar pattern of downgrading. The main impact of such downgrading was the loss of access to capital markets at reasonable costs which resulted in drying up foreign exchange inflows from such sources.

When one examines the trend in downgrading by foreign rating agencies, it makes clear that remedial measures were mandatory, if the trend was to be reversed and to take control of the situation. These downgradings by multiple agencies have had a serious impact on the strength and the capacity to obtain foreign assistance and to attract foreign investment. The situation that prevailed had the obvious result in the depletion of foreign reserves deeply, affecting the capacity of importation of essentials such as fuel, gas, medicines and food. Therefore, taking remedial measures to reverse the trend of downgrading was of paramount importance. However, the reaction to these downgradings reflect the resistance to accept the errors or the mistakes and to take immediate steps to remedy the situation. The response of the Government to the downgradings had been confrontational without seeking a way out. The Ministry of Finance and the Central Bank through public statements released from September 2020 had made an attempt to criticise these downgradings and had refused to accept them. It is pertinent to note at this point that the Gross Official Reserves which stood at USD 7,780.08 million as at 31st October 2019 had decreased to USD 5,555 million by November 2020. It had further depleted to USD 2362 million in January 2022.

It is apparent that the continued inaction to reintroduce and/or to raise taxes and regain the government revenue that was lost, brought about an adverse impact on the economy which had a domino effect on the entire social fabric.

It is also important to examine these events in the context of another factor. The Government of Sri Lanka in June 2016 had entered into an agreement with the International Monetary Fund (IMF) for an Extended Fund Facility (EFF). Through this process the total funds that were made available amounts to USD 1.5 billion. In May 2019, the Executive Board of the IMF approved an extension of the arrangement by an additional year spanning up to June 2020 with rephasing of remaining disbursements. In October 2019, by a letter of intent signed by the Minister of Finance and the Governor of the Central Bank had requested the completion of the sixth review and the disbursement of the 7th instalment under the programme. Through this letter of intent, a request was also made for waivers on non-observance of certain targets. Furthermore, it was emphasised that the Government will continue to consult in advance with the Fund on adoption of new measures or revisions of the policies. On 01st November 2019, the Executive Board of the IMF completed the sixth review of economic performance under the programme and the 7th instalment of USD 164 million was released making a total of USD 1.31 billion under the arrangement. The final instalment was expected to be released on 03rd April 2020 upon the completion of the seventh review and continuous performance criteria. However, there is no material available to indicate that the Government pursued the final instalment scheduled to be disbursed in April 2020. There had been a visit to Sri Lanka by the IMF Staff during the period 29th January 2020 to 7th February 2020 to meet with the new administration and to discuss its policy agenda. Through a press release the preliminary findings of the visit were conveyed. One of the findings of the visit was that the primary deficit could widen further in 2020 due to newly implemented tax cuts and exemptions and two other factors. In view of the risks to debt sustainability and large refinancing needs it was recognised that renewed efforts to advance fiscal consolidation was essential.

In this context we will examine the submissions of the learned Counsel for the respondents. They contended that reversing tax cuts was delayed due to the adverse impact of the pandemic. It was their contention that it was impractical to have raised taxes at a time there were restricted economic activity due to the pandemic. Furthermore, they contended that no extra revenue could

have been collected even if taxes were revised. However, it is pertinent to observe that the Parliamentary authority for most of the tax revisions introduced in late December 2019 was granted by way of legislation one and half years after the tax revisions were introduced. [Value Added Tax (Amendment) Act no 9 of 2021 and Inland Revenue (Amendment) Act no 10 of 2021]. Therefore, by the time these Bills were presented in Parliament by the Executive, the adverse repercussions on the economy due to the pandemic as well as due to the tax revisions that took place in December 2019 were apparent. Yet, no steps were taken to reassess and reconsider the grave repercussions of the tax revisions on the economy. Continued efforts to move forward ignoring the adverse repercussions, in our view is both irrational and arbitrary.

We observe that no adequate steps had been taken to remedy the adverse repercussions on the deficit due to loss of revenue following the tax revisions, in a timely manner even when it was apparent that the changes failed to bring the expected positive outcomes. Such failure heavily contributed and had a domino effect on the economy which ultimately collapsed bringing in serious hardships to the entire society. The Governor of the Central Bank in his report submitted to the Minister of Finance on 15th September 2020 had drawn the attention of the Minister to the fact that the IMF raised concerns on debt sustainability during the discussions to obtain emergency financing and had proposed certain revisions in the tax regime with a view to enhance government revenue while highlighting the negative results following the changes made to collection of tax through PAYE.

It is pertinent to note, that when the tax revisions were introduced in December 2019, there had been no consultations or discussions with the officials of the Central Bank or the Monetary Board. Failure to embark on a study relating to the tax revisions and the possible adverse impact it would have on the ongoing Extended Fund Facility arrangement with the IMF, cannot be comprehended. The responsibility for the failure to complete the IMF facility that was in force from 2016 rests on the introduction of tax revisions in late 2019. The Government failed to engage in any consultation with the IMF as agreed upon through its letter of intent based on which the 7th EFF instalment was released, before introducing sweeping tax reforms.

We are of the view that the 32A respondent as the person who introduced these tax revisions as one of his election pledges and the 2nd respondent who undertook the responsibility to implement those proposals in his capacity as the Minister of Finance, Economy and Policy Development

had the responsibility to follow up and examine whether the changes made have produced the results envisaged. When the 2nd respondent relinquished duties as Minister of Finance and the 2A respondent assumed duties as the Minister of Finance on 08th July 2022, this responsibility shifted to him. We also observe that the 38th respondent who had played a major role in introducing the proposal for tax revision to the Cabinet of Ministers also had a duty to follow up to see whether the tax revisions have brought in the desired results or whether any adverse impact was caused to the economy. If they embarked on such an inquiry, they would have had the opportunity to observe the adverse consequences that had flown as a result of these changes. In our view they also had the responsibility to take remedial measures on priority basis without letting the situation aggravate. Furthermore, as observed hereinbefore, by the Governor's report submitted to the 2nd respondent (15th September 2020**)** the attention of the 2nd respondent was drawn on the grave consequences of the tax revisions and the need to bring in changes to increase government revenue.

In our view, the continued inaction and callous disregard to take remedial measures on the part of the 2nd (Mahinda Rajapaksa), 2A (Basil Rajapaksa), 32A (Gotabaya Rajapaksa) and 38th (P.B.Jayasundera) respondents is arbitrary and irrational and they had breached the public trust reposed in them by the People.

DEPLETION OF GROSS OFFICIAL RESERVES AND SEEKING ASSISTENCE FROM THE IMF

As discussed hereinbefore, the Government had entered into an Extended Fund Facility programme with the IMF in 2016 and the penultimate tranche was received in early November 2019. The last tranche was due in April 2020 after a review in December 2019. It was in October 2019 the Minister of Finance and the Governor of the Central Bank in the letter of intent signed by them stated that the Government will continue to consult in advance with the IMF, if any new measures or a change or revision of the policies are to be adopted. The Executive Board of the IMF thereafter approved the release of the penultimate tranche having satisfied with the progress made by Sri Lanka. The Governor of the Central Bank in the "Road Map 2020" delivered on 06th January 2020 had recognised "the continuation of the EFF programme with the IMF is likely to be instrumental in supporting external sector stability in the medium term". However, in December 2019, no steps had been taken to request the release of the last tranche or to engage in

negotiations and/or any consultation with the IMF after the introduction of tax revisions. No such steps had been taken even at the IMF staff visit from January 29th to 7th February, 2020.

In this background on 08th April 2020 the 38th respondent had communicated with the Managing Director of the IMF and had requested assistance in the form of Rapid Financing Instrument (RFI). In this letter the adverse impact on the economy due to the pandemic was highlighted and it was acknowledged that the "sharp decline in the economic growth, fiscal revenue and foreign exchange receipts would create a large and urgent fiscal and balance of payment needs". Furthermore, a suggestion to replace the current Extended Fund Facility arrangement with the requested Rapid Financing Instrument was also made. In the same letter it was said that Sri Lanka will be requesting additional support from other development partners, particularly Japan, the People's Republic of China, the World Bank and the Asian Development Bank.

In response to the request made by the 38th Respondent, the Director of the Asia Pacific Department of the IMF while reaffirming the commitment to support Sri Lanka had observed that the particular economic challenges may require additional time and coordination among relevant parties including other International Financing Institutions. He had further said that he and his staff would do their utmost to process the request and to follow up on the intention to replace the current Extended Fund Facility arrangement with the Rapid Finance Instrument. The Auditor General has not found any material indicating a follow up on this request by the Government. However, the 38th respondent had referred to a series of meetings and correspondence as follow up steps to the initial request. Nonetheless, this request had not brought any positive results as there was no follow up response acceptable to the IMF on their concerns as to how the key requirements including policies to continue ensuring debt sustainability, concerns on balance of payment challenges and preserving international reserves, would be fulfilled.

The Auditor General had observed that a major change had taken place to the economic policies relating to the Government's tax income set out in the letter of intent sent to the IMF in October 2019 under the hands of the Minister of Finance and the Governor of Central Bank, within a month. This is a clear instance where the sudden departure or deviation of commitments and undertakings with the international organisation resulted in consequences detrimental to the country.

It is pertinent to observe that the last tranche of the EFF that was due in April 2020 could have been secured if either the policies agreed with the IMF in obtaining the EFF in 2016 and reiterated in the October 2019 letter of intent were carried forward as agreed or if the tax revisions had been introduced in consultation with the IMF, as assured by the letter of intent. Such a scenario would not only have paved the way for the inflow of foreign exchange and enhance foreign reserves but have preserved ratings without being downgraded. This would have created an environment conducive for foreign investment and other sources of foreign funds.

The Auditor General had observed that there is no material to indicate whether any discussion and/or deliberations took place between the President, Finance Minister, Central Bank and its officials as to whether the Government is continuing with the EFF or not. It appears that there had been no decision based on a proper study on the possible repercussions of abandoning the programme. There is no indication that any discussion had taken place on any reasons as to why the continuation up to obtaining the last tranche has adverse consequences or possible ill-effects to the economy. In this background the inaction to take necessary steps to obtain the last tranche of the IMF facility which was in operation since 2016 is irrational and arbitrary. In this regard it is also pertinent to observe that since 1965 Sri Lanka had entered into agreements with the IMF to obtain funds from its Extended Fund Facility Programme in 1979, 1991, 2003 and in 2016 and the Government had drawn funds agreed in the said programmes and completed them other than in 2016. Furthermore, in 2003 funds from an Extended Fund Facility as well as from an Extended Credit Facility have been drawn fully.

On 4th August 2020, the 30th respondent by his report has drawn the attention of the 2nd respondent on multiple issues relating to the status of the economy and challenges envisaged due to many reasons. Downgrading by the rating agencies due to the growing concerns on debt sustainability, possibility of further downgrading on the basis that the economic growth and the growth of foreign currency earnings are not on par with the rising debt stock, in the event planned funding did not materialize were highlighted in the said report. Furthermore, the importance of active engagement with major multilateral and bilateral agencies was highlighted while observing that loans from such agencies are likely to follow an IMF facility. This report further predicted the depletion of foreign reserves to critical levels in 2020 due to large foreign debt service payments falling due in the period ahead and deterioration of confidence and

appetite for Sri Lanka's equity and bond markets. This report further highlighted the urgent need to secure foreign financing in two months and the possibility of triggering the automatic prepayment clauses in project loan agreements in the event of a failure to secure such financing in a timely manner.

This report had been compiled by the 30th Respondent in compliance with section 68 (1) (b) of the Monetary Law. Section 68(1)(b) reads as follows:

> **Section 68** **(1)** Whenever the Monetary Board anticipates that there may develop a deficit in the international balance of payments of such magnitude as to cause a serious decline in the international Reserve, or whenever there is an imminent threat of a serious decline in the International Reserve, or whenever the International Reserve actually falls to a level which the board considers to be a threat to the international stability of the Sri Lanka rupee, or whenever international payments or remittances are being made which in the opinion of the board constitute an actual or a potential threat to such stability or are prejudicial to the national welfare, it shall be the duty of the board ……..
>
> **(b)** To submit to the Minister in Charge of the Subject of Finance a detailed report which shall include, as a minimum, an analysis of
>
> i. The nature, causes, and magnitude of the actual or potential threat to the international stability of the Sri Lanka rupee; and
> ii. The measure which the board has already taken, and the further monetary, fiscal or administrative measures which it proposes to take or recommends for adoption by the Government.

Eight months from the initial report, on 06th April 2021, the 30th respondent has submitted another report to the 2nd respondent under section 64(3) and 68(2) of the Monetary Law. In the said report the 30th respondent had set out the challenges due to the pandemic as well as the bleak situation in the domestic economy. In the said report challenges faced by the Central Bank due to decline of official reserves were described and emphasised the need for the Government to secure adequate foreign financing on an urgent basis.

Furthermore, it is said that the Central Bank is actively working with the Government to facilitate enhancing non-debt sources of foreign exchange inflow in view of **"*the Government's stance not to approach the International Monetary Fund (IMF) for emergency financing.*"** (emphasis added). This report further provided a detailed account on the depleted foreign exchange reserves and the need to secure sufficient inflows. While recognizing positive results of facilities provided by certain agencies such as People's Bank of China, Asian Infrastructure Investment Bank, China Development Bank, Reserve Bank of India and SAARCFINANCE in foreign exchange inflows, the report in no uncertain terms emphasised that;

> *"these inflows are barely sufficient to finance the remaining debt service obligations and the likely deficit in the balance of payments in 2021. Furthermore, these facilities provide only temporary relief, as debt service payments remain large over the near to medium term. Therefore, the Government's foreign currency debt service challenge is considerable, particularly in the context of sovereign rating downgrades by all three credit rating agencies in 2020. These downgrades have reduced country's ability to access the international capital markets at a reasonable cost".*

This statutory report from the 30th respondent to the 2nd respondent dated 06th April 2021, needs to be examined along with a development that had taken place within the Monetary Board. The Monetary Board had established two Committees to monitor the external debt situation. One such committee namely External Debt Monitoring Committee (DEDMC) was led by the Deputy Governor and the other namely Monetary Board External Debt Monitoring Committee (MBEDMC) was chaired by the 32B respondent and 32C respondent has functioned as the Vice Chairman. This Committee comprised of three Deputy Governors and five other officers of the Central Bank. The MBEDMC after its first two meetings had submitted a report titled "Note on the views of the Monetary Board Level External Debt Monitoring Committee on the Need for a Close Engagement with the International Monetary Fund" to the 30th respondent on 02nd February 2021. In this report having set out the decline of foreign reserves to USD 4.8 billion by end January had predicted that the reserves will further decline to USD 4 billion by end March based on the confirmed projected inflows and outflows. It is the first time that reserves had declined below USD 5 billion after 2009. The report had further detailed the concerns raised by and the reluctance showed by different sources of foreign funding agencies to continue with any

funding facilities to Sri Lanka, in the absence of an IMF intervention. Having set out the actual situation the Committee has said *"initiating active negotiations with IMF may well be necessary to rebuild the confidence of the international investor and financial sector community on Sri Lanka".* Having expressed this view the Committee had observed a possible change of policy approaches by the IMF and commented that *"it may be possible to arrive at an agreement with the IMF to allow the new economic model that is currently being pursued by the Government to continue with little adjustment and without being subject to standard IMF conditionality and policy prescriptions".*

Having laid out all these background facts, the Committee in no uncertain terms had highlighted the need for an early engagement with the IMF. It had further said that *"the MBEDMC and DEDMC strongly agree on this requirement in order to ensure that external debt service obligations are met while maintaining adequate levels of gross official reserves and exchange rate stability, thereby preserving macroeconomic stability and financial system stability".*

The 30th respondent at the Monetary Board meeting held on 03rd February 2021 at the discussion on "The impending acute foreign exchange shortfall as reflected in the estimated steady decline in official reserves and related challenges" had informed the Board the fact that the MBEDMC has submitted a report with several suggestions. However, he had suggested considering a few other measures relating to forex inflows. Furthermore, he had requested the 31st respondent, (the Secretary to the Treasury who was an, ex-officio member of the Monetary Board) to outline the sources of foreign exchange inflows that are in the pipeline. The 31st respondent thereafter had listed out five expected sources of inflows including divesting of EPF holding in West Coast Power (Pvt) Ltd, another investment in a hotel project and facilities from China Development Bank, People's Bank of China and Asian Infrastructure Investment Bank.

The 30th respondent thereafter had suggested to review the progress in those anticipated inflows by the end of March 2021 and thereafter to consider making appropriate proposals to the Government, if necessary. However, the Deputy Governor(S) observed the difficulty to accurately estimate the volume of inflows due to the exceptional global situation and he expressed the view that negotiations for borrowing facilities should commence without delay if funds are to be received in a few months. Both the 32C respondent and Deputy Governor(N) had emphasised that it is not the quantum of funding that can be obtained from the IMF but the

restoration of the investor confidence due to an engagement with the IMF is the key factor. It was further pointed out that even inflows from many bilateral agencies are also conditional upon Sri Lanka having an engagement with the IMF. Furthermore, the 32C respondent had said that necessary measures should be taken as a matter of urgency without deferring the process to end of March. However, at these discussions the 31st respondent had remarked that ***"obtaining USD 165 million from IMF will not be the final solution"*** and had further said that ***"since the Government policy is not to go to the IMF, as officials we have to abide by it"***. He had emphasised that other means of inflows need to be considered.

These discussions that took place at the Monetary Board meeting held on 03rd February 2021 explains the position taken up by the 30th respondent in his statutory report dated 06th April 2021. It is reasonable to conclude that the 30th respondent had been influenced by the comments made by the 31st respondent that the Government's policy is not to seek the assistance of the IMF. Therefore, the 30th respondent had formulated his recommendations on the premise that there is a Government Policy not to seek assistance from the IMF. However, in this regard, it is pertinent to observe that there had been no cabinet decision by April 2021 not to seek assistance from the IMF. There is no material before this Court to conclude that such policy had been developed as the policy of the Government having considered advantages and disadvantages based on all material facts. It is the Cabinet of Ministers who is charged with the duty of direction and control of the Government.

Minutes of the meeting of the Monetary Board held on 21st April 2021 reveal that both the 30th and the 32nd respondent had expressed the view that their personal opinion as well as the policy of the Government is to move away from the IMF.

At the said meeting the 32nd respondent remarked that he personally felt that **"majority of the Central Bank officials feel that we should go to the IMF"**. The 32C respondent while noting that 170 countries have already gone to the IMF to overcome the impact of pandemic that several Central Banks that were approached by the Central Bank of Sri Lanka have indicated that Sri Lanka should negotiate with the IMF. The 32C respondent at the Monetary Board meeting held on 11th May 2021 also had reiterated the difficulty for the Central Bank to release foreign currency to commercial banks to meet their import bills. She had also remarked that the

Commercial Banks wasted USD 200 million of funds received from the China Development Bank by spending on non-essential imports such as telephones, sugar and garments.

It is in this backdrop the 30th respondent submitted the statutory report dated 30th June 2021, to the 2nd respondent.

In this report while recognising that the pandemic exacerbated the vulnerabilities and challenges to the economy, the 30th respondent recognised that the opportunities to access international financial markets were restricted due to downgrading of sovereign credit ratings. This report further provides details on further depletion of reserves. By May 2021 reserves had come down to USD 04 billion which was equivalent only to 2.7 months of imports whereas the minimum international standard is to maintain three months imports. In this report the 30th respondent reiterates that the Central Bank has been actively working with the Government to facilitate enhancing non-debt sources of foreign exchange inflows ***as the Government's stance is not to approach the International Monetary Fund***. Further, the report predicted that the reserves would deplete to USD 2.5 – 3 billion by end July 2021.This report further goes on to state that ***"by way of an advance warning, it is the duty of the Monetary Board to keep the Honourable Prime Miniter informed of debt service obligations falling due in 2022. There are Government foreign currency debt service obligations of around USD 6.6 billion….. Significant foreign exchange inflows have to be secured, to maintain reserves in 2022".***

However, on 8th July 2021, within a week of the said report the 2nd respondent had relinquished duties as Minister of Finance and the 2A respondent assumed duties as Minister of Finance.

The next report of the 30th respondent dated 26th July 2021 which is addressed to the 2A respondent who had assumed duties as the Minister of Finance by then makes reference to his earlier reports submitted to the 2nd respondent and copies of them had been annexed. In this report the 30th respondent reiterates the dire state of the economy and the challenges faced due to the pandemic. It recognises with all the guaranteed foreign exchange inflows, the gross official reserves *"are projected to remain at a critically low level of around USD 3.3 billion by end 2021".* The report predicts that the reserves will be further depleted to around USD 1.5 billion by end March 2022, *"without any further significant foreign exchange inflows in the pipeline"*. The above clearly indicated that the 2A respondent was put on notice that the reserves would deplete to around USD 1.5 billion by March 2022 [roughly about one month's imports] and there

were no foreign exchange inflows forthcoming. Thus, 2A respondent would have been alive to the precarious situation of the economy at that point of time.

This report further draws attention to the need to address the concerns raised by the rating agencies. It states *"The rating agencies have raised their concern on the ability of servicing Sri Lanka's foreign currency debt in the period ahead. Most recently, on 19 July 2021, Moody's Investor Service placed Sri Lanka's sovereign credit rating 'under review for downgrade'……It is important that the concerns of rating agencies are addressed urgently to prevent any further rating downgrades in the near future, failing which would keep international investors further away from Sri Lanka and would further reduce the possibility of accessing international capital markets. The decline in reserves below the critical levels would also prompt the friendly nations and central banks to reconsider the provision of financing that are being negotiated at present".*

In its concluding remarks *interalia* the report says: *"In the context of extremely challenging economic conditions, the Monetary Board is of the view that recent regulatory and policy measures to stabilise the external sector have helped to arrest the situation to a certain extent. However there is dire need of urgent implementation of drastic policy measures as proposed above aiming at resorting the stability of the external sector of the economy to reduce foreign exchange outflows and increase foreign exchange inflows, avoiding the sharp depletion of gross official reserves of the country and a resultant loss in confidence on the macroeconomic stability by key stakeholders including foreign lenders, potential investors, corresponding foreign banks of local banking sector. The Government may alternatively consider approaching the globally accepted lender of last resort for balance of payment needs, the International Monetary Fund (IMF).* ***The intervention of the IMF, whilst bolstering the confidence of international investors on Sri Lankan economy, may on the other hand require aggressive reforms in the fiscal sector, interest rates and the exchange rate, and even restructuring of the debt stock of the Government".***

This report, compared to the earlier reports submitted since August 2020, reflects a change of stance / strategy in relation to the need to seek assistance from the IMF. In this report, as it appears to us, the 30th respondent had recommended to the Government (2A respondent) to seek assistance from the IMF as an alternative to other possibilities. In this regard it is pertinent to

note that at a meeting of the Monetary Board held on 04th August 2021 the 32C respondent had remarked; that it will be the Monetary Board that will be summoned before a Commission of Inquiry in the event the Government or the CBSL defaults, in a backdrop where even China had reached out to IMF for assistance due to the situation caused following the COVID-19 pandemic. In response to the above remark, the 30th respondent had said that *"he is flexible on seeking IMF assistance if considered necessary and the Government also will have to be convinced if that option is to be pursued"*

However, the 2A respondent has not accepted this proposal - seeking IMF assistance - as a viable solution. The 2A respondent whilst noting the contents of the report dated 26th July 2021 has made the following observation in his letter addressed to the 30th respondent, dated 12th August 2021.

"Your report suggests to consider approaching IMF to address these challenges. It indicates that such involvement of IMF requires aggressive reforms in the fiscal sector, interest rates, exchange rate and even restructuring of debt stock of the Government. I would like the Central Bank of Sri Lanka to clearly advise me why such reforms cannot be done without resorting to IMF loan programme, for instance as Malaysia did, to manage the challenge of Asian Financial Crisis. The country may need a fresh thinking altogether as Sri Lanka has had 16 IMF programmes since 1965"

The 2A Respondent inter alia observes that *"There is also a shortage of foreign exchange in the Forex Market as has been reported by shipping lines, the business community and the media. This has resulted in a large number of containers at the Colombo port not being cleared. I have also noted that most of the cargo comprises of essential food and raw material which are essential for the smooth functioning of day-to-day life and country's economy".*

The above observation of the 2A respondent clearly demonstrates that the 2A respondent is fully aware of the critical status of the social and economic situation that prevailed by August 2021. It is pertinent to observe that the continued warnings sounded by the 30th respondent from his initial report to the 2nd respondent one year ago (04th August 2020) and repercussions predicted due to severe depletion of gross official reserves, have become the reality by this time.

The 2A respondent in the same letter had identified certain measures as necessary to be initiated by the Central Bank to *"signal market to move on to a stabilization path".* Despite the difficulties expressed by the 30th respondent in his earlier reports to continue providing foreign exchange to meet the Government's import bills, the 2A respondent has required the Central Bank to *"release of USD 250 million immediately to all Commercial Banks, since they are in need urgent foreign exchange to honour payments on account of imports under various trade instruments (DP term of payment, Sight LCs etc). This will enable all cargo currently at the ports to be cleared".* Furthermore, the 2A respondent had wanted the Central Bank to release another USD 250 million in early September 2021, to meet petroleum and LP gas financing.

The 30th respondent by his letter dated 14th September 2021, whilst acknowledging series of discussions and the close dialogue he had with the 2A respondent and officials of the Ministry of Finance, has observed that the gross official reserves had declined significantly as large external debt servicing requirements were met in the absence of adequate financial inflows. The 30th Respondent also observed that *"the recent interventions in the foreign exchange market by the Central Bank at the request of the Government has helped to ease conditions in the supply of essential imports, but could also weaken the country's external position further, if the expected inflows are further delayed".*

In relation to the 2A respondent's views on seeking assistance from the IMF, the 30th respondent while emphasising the need to implement an agenda of structural reforms to achieve economic prosperity have welcomed a reform package without the IMF, and had described it as the most preferred way forward as a country, as many other countries have graduated by implementing far-reaching economic reforms. However, having made this observation, the 30th respondent had further said that *"we are prepared to work with you, learning from past experiences of our own and other country experiences to get out of the present difficulties through required structural reforms**. Although under totally different domestic and international conditions, Sri Lanka also achieved external sector stability without an IMF intervention during early 1970s. In 2009, we obtained an IMF programme which was negotiated within the broader frame work of the Government Policy agenda of the time, Mahinda Chinthana**".*

The 30th respondent had further stated that *"While the Government with a strong commitment to long lasting structural reforms, may consider a decisive reform agenda to be implemented*

gradually, there are advantages of maintaining links with the IMF, backed by a well-structured policy. The countries which obtain financial assistance from the IMF are increasingly encouraged to implement home grown reforms. Accordingly, if Sri Lanka decides to obtain an IMF programme in 2021 as well, negotiations could be based on Government's policy framework "Vistas of Prosperity". ***The advantages that would be gained by indicating to the market that we are closely working with the IMF, even without any commitment to an IMF stabilisation programme, could boost confidence among international financial community, so that conditions for borrowing, if the need arises, could be made easy. Even a home-grown reform programme may entail significant sacrifices to be made".***

As a concluding remark, the 30th respondent *inter alia* had stated that *"some countries in the world even Sri Lanka, in some past occasions have successfully steered through crisis without the IMF support in the past. But as different country experience show, being engaged with the IMF even without an agreed programme would bring in much needed investor confidence and improve the sentiments of all other stakeholders, including multilateral and bilateral lenders and Sovereign rating agencies. This could prevent any further credit rating downgrades and may pave the way to attract foreign exchange inflows while helping to unlock the access to international markets gradually. This point is presented for the consideration of the Government".*

Ironically, the 30th respondent had resigned from the post of Governor Central Bank on the same day he sent the above report to the 2A respondent. In our view this report sent by the 30th respondent sufficiently demonstrates the advantages of seeking the assistance of the IMF in stabilising the critical condition in the economy.

In all the reports submitted by the 30th respondent to the Minister of Finance under section 68 of the Monetary Law, he had clearly set out the critical condition of the economy and the challenges to remedy the situation. The adverse consequences due to down-grades by the international agencies and the need to address their concerns were highlighted. While recognising the adverse impact the pandemic caused to the economy, they recognised the immediate need to secure foreign exchange inflows to curtail the depletion of gross official reserves and maintain the internationally accepted ratio between the gross official reserves and the foreign exchange requirement of import bills. Even though they do not contain a specific

recommendation to seek IMF assistance describing it as the only way out, they have provided material emphasising the critical condition and the advantages in seeking assistance from the IMF to mitigate the situation.

On 15th September 2021, the 29th respondent had assumed duties as Governor of the Central Bank.

The continued deterioration of the economy and the status it has reached by December 2021 is succinctly described by the 29th respondent in his statutory report to the 2A respondent submitted on 09th December 2021. The report states:

"The urgent attention of the Government is crucial to resolve the foreign currency liquidity issues faced by the state banks as well as the entire economy in order to prevent a banking and a sovereign default in the immediate future. Their continuous reliance on the Central Bank to honour payment obligations on essential imports has caused a severe stress on gross official reserves, which have already declined to a critical level at present with inadequate coverage for upcoming debt servicing or to finance essential imports".

The report further says that *"the shortage of foreign currency inflows to the government amidst the sovereign rating down grade aggravated the decline of gross official reserves. The Central Bank continued to provide foreign exchange to maturing debt obligations of the Government".* Having set out these factors and while reiterating the immediate and critical need of securing sizeable amount of foreign financing to maintain the macro-economic and financial system stability, the 29th respondent had expressed hope that the efforts the 2A respondent has currently undertaken, would bring necessary foreign financing through Government to Government collaboration, syndicated loan arrangements, credit lines for essential imports and monetisation of underutilised and non-strategic state assets. The specific details of these avenues, however, are not referred to in this report.

It is also interesting to note that the 29th respondent had expressed the view that this situation may not have arisen if envisaged inflows to the Government such as the monetisation of identified assets, including the shares of West Coast Power, East Container Terminal of the Colombo Port etc. Apart from this bare statement, this report does not further elaborate the reasons for such non-materialisation of such avenues. The critical situation in which the

economy was facing is further demonstrated by the fact that the Monetary Board at its meeting on 08th December 2021 has granted its approval to proceed with the disposal of gold on a staggered basis and had predicted the maximum amount that could be derived from disposal of gold would be USD 350-400 million.

The 29th respondent in his next report to the 2A respondent dated 31st December 2021 had drawn the attention of the 2A respondent the critical level to which Gross Official Reserves had depleted and had projected the foreign currency debt service payments for 2022 to be USD 7.3 billion which includes repayment of ISB of USD 500 million in January 2022. This report further reflects that the Net Foreign Assets of the Central Bank has deteriorated to negative levels of around Rs. 330 billion by end November 2021 mainly due to meeting the foreign currency debt service obligations of the Government and financing essential imports using the foreign exchange reserves of the Central Bank. According to this report Gross Official Reserves had depleted to USD 1.6 billion by November 2021 and recognises that such reserves were equivalent only to around one month of imports. The report claims that this amount was augmented to USD 3.1 billion by end 2021 with the activation of SWAP facility of People's Bank of China. However, he fails to disclose the conditions on which the SWAP facility was initiated and the inability to draw it unless the Gross Official Reserves would grow to the equivalent of three months of import. Even though the 29th respondent had observed the steps taken by the rating agencies which resulted in a significant loss of investor confidence, he has failed to make any recommendations to remedy this situation and win the investor confidence in order to obtain more investments to overcome the crisis situation.

Immediately after the said report, 2A respondent submitted a Cabinet Memorandum to the Cabinet of Ministers dated 03rd January2022 where he referred to the said SWAP facility as an opportunity the Government had got to strengthen the foreign reserves of the Country.

In the said Cabinet paper, the Minister, explaining the ill effects of an IMF programme had invited the Cabinet of Ministers to deliberate on a home-grown solution.

The Cabinet of Ministers after considering the said Cabinet Memorandum had decided as follows;

> ''සංදේශයේ 4 ඡේදයෙහි දක්වා ඇති කරුණු සැලකිල්ලට ගෙන දැනට ශ්‍රී ලංකාව මුහුණ දී ඇති ගැටලු සඳහා රටතුලම හඳුනා ගනු ලබන විසඳුමක් ක්‍රියාත්මක කිරීම සඳහා''

However, when considering the critical level of the Sri Lankan Economy as of 01st January 2022, with foreign reserves only to meet its import bill for only one month, a serious issue arises whether the Cabinet of Ministers were properly briefed or appraised of the critical situation of the economy in the said Cabinet paper in order to obtain objective views of the policy makers whether it is viable to resolve the economic ills by adopting a "home grown solution". Specially so when mechanics of a home grown solution were not placed before the Cabinet. It is to be noted that the Cabinet of Ministers were starved of the critical information relating to foreign reserves, a vital factor that ought to have been taken into account in deciding the viability of a home grown solution as an alternative to seeking IMF assistance. Question arises whether the Cabinet of Ministers was properly briefed of the said position in the said Cabinet Paper to obtain the decision to "identify a home-grown solution" without knowing what is the "so-called home-grown solution" that is going to bail out the Sri Lankan economy from its critical condition. It is also pertinent to observe that the Cabinet Memorandum dated 03rd January 2021 in which the 2A respondent invited the Cabinet of Ministers to deliberate on the issue whether to seek the assistance of the IMF, had not set out one of the most important factors enabling the Ministers of the Cabinet to take a well-considered decision. The Cabinet paper is silent on the critical situation in the Gross Official Reserves and the ill effects on the failure to secure inflow of foreign exchange on an urgent basis. As it was discussed herein before, the report of the 29th respondent dated 31st December 2021 clearly sets out *that "Gross Official Reserves had depleted to a critical level of USD 1.6 billion by end November 2021 which was equivalent only to around 1month imports".* In this report, the 29th respondent had proceeded to say that the reserves were augmented by USD 3.1 billion by end 2021 with the activation of the SWAP facility of the People's Republic of China.

In this regard it is also important to note that the pros and cons of adopting any measures to overcome the critical economic conditions need to be assessed in the proper context in a given situation, when a decision is to be taken on the viability of such measures. This was not a

straightforward case of assessing the suitability of seeking IMF assistance under normal circumstances but the call to seek IMF assistance was critically relevant given the unique circumstances our economy was placed in. The depleted official reserves; the need to secure foreign exchange on an urgent basis; the reluctance of the other agencies to extend support without an IMF programme were critical factors in deciding whether seeking assistance was in the best interest of the country at the relevant time.

In this backdrop was it not the duty or the responsibility of the 2A respondent to place all relevant factors referred to above before the Cabinet of Ministers when they were invited to deliberate and decide on matters that were so serious as they had a direct impact on the entire society?

In our view the 2A respondent has breached the public trust deposed in him in exercising his executive powers of the people in his capacity as the Minister of Finance in this regard by his failure to place all relevant facts with sufficient details in the Cabinet Memorandum when he invited the Cabinet of Ministers to make a choice between seeking assistance from the IMF and adopting a "home grown solution" at the given situation. As elaborated before, the following comment of the 30th respondent in his letter dated 14th September 2021 addressed to the 2A respondent reiterates this position:

> *"Although under totally different domestic and international conditions, Sri Lanka also achieved external sector stability without an IMF intervention during early 1970s"*

The report of the 29th respondent dated 27th January 2022 also sets out the critical condition in which the economy is ailing. Even though he emphasises the need to secure foreign currency inflows to avert an economic crisis, he maintains a stoic silence on the possibility of any engagement with the IMF for assistance.

The report of the 29th respondent dated 28th February 2022 describes the status of reserves and its' potential impact on the economy in the following manner: *"As the current reserve level is inadequate to meet this significant debt serving requirements, not having new foreign currency inflows into official reserves would result in a default by the Central Bank as well as the Government of Sri Lanka in the immediate future in which eventuality the economic management of the country will experience severe repercussions in the future. Such an event would be*

catastrophic, resulting in a serious loss of confidence in the Sri Lankan economy, including the rupee and it would even be developed to serious and far reaching social and political implications as well".

According to the material presented before this Court, the payment of ISB of USD 500 million took place before the February 2022 report was presented. By this time the Gross Official Reserves had come down to a critical level of USD 2.4 billion including the SWAP facility of USD 1500 million from the People's Bank of China, SWAP facility of USD 400 million from Reserve Bank of India and another SWAP facility of USD 200 million from the Bangladesh Bank.

Even though there is no reference to the restrictions imposed in the Chinese SWAP facility, in the said report, it appears that the Gross Official Reserves of Sri Lanka were only USD 300 million when the SWAP facilities referred to above are not factored in. This reserve was not sufficient to meet Sri Lanka's foreign expenditure even for one week, but this report except for the recommendation for import restrictions on non-essential goods and revision of energy prices, failed to make any recommendations to overcome the critical situation the country faced at that time, specially, in the context of there being no avenues for foreign exchange inflows.

It is surprising and hard to comprehend the reason for the 29th respondent to maintain a complete silence in all these reports on the possibility of remedying this situation by initiating a programme with the IMF. The 29th respondent has been fully aware of the critical condition in the Gross Official Reserves and the disaster the entire country would face without taking immediate steps to secure sufficient foreign funding inflows. However, he failed to make this recommendation without any justification whatsoever.

In this regard it is also pertinent to note that the Monetary Policy Committee of the Central Bank by a Board Paper titled "Review of the Monetary Policy Stance Monetary Policy Cycle No 2 – March 2022" had recommended to the Monetary Board for its consideration at its meeting on 03rd March 2022 *inter alia* to "initiate discussions with the IMF to have a credible anchor: Announce immediately to the public that the Monetary Board is prepared to propose to the Government to commence discussions with the IMF". At the Monetary Board meeting of 03rd March 2022, Director of Economic Research while summarising the contents of the aforementioned Board Paper had inter alia invited the Monetary Board to approve the

recommendations of the Monetary Policy Committee including the recommendation to initiate discussions with the IMF to have a credible anchor and to immediately make a public announcement that the Monetary Board is prepared to propose to the Government to commence discussions with the IMF. However, it is surprising and extremely difficult to comprehend the complete silence the Monetary Board maintained in regard to this recommendation. Records do not show that they at least considered this recommendation by the Monetary Policy Committee.

The learned President's Counsel who represented the 2nd and 2A respondents, whilst referring to some of the recommendations made in the reports submitted in terms of sections 64 and 68 by the Monetary Board, to the Minister, took up the position that it was the duty of the Monetary Board to advice the Minister, but the Monetary Board had failed to advice the Minister with the steps that should be followed to get over from the critical condition of the Sri Lankan economy. As already referred to, even though the few reports submitted by the 29th respondent do not explain the real situation the country was facing, the two detailed reports the 2A respondent received from the 30th respondent had placed the 2A respondent on notice of the critical condition of the Sri Lankan economy at that time. The 2A respondent had in fact responded strongly to the report submitted on 26th July 2021 by his letter dated 12th August 2021.

As already referred to above, the 30th respondent has submitted reports under Sections 64 and 68 to the 2nd respondent on 4th August 2020, 6th April 2021, and 30th June 2021 explaining the challenges faced by the Sri Lankan economy at that time. In the report, the 30th Respondent sent to the 2nd respondent on 4th August 2020, whilst explaining the sharp drop of international reserves, low level of Gross Official Reserves and urgent need to make available the foreign financing for the upcoming ISB payment, had said,

a) Most of the loans from the multilateral sources referred to above are likely to follow an IMF facility for which the IMF has indicated debt sustainability to be a significant impediment.
b) In the absence of an IMF program in the near future the options available are to seek bilateral financial assistance from friendly nations and to explore avenues of commercial borrowings.

In addition to the above 30th Respondent had further advised the 2nd Respondent,

a) The Monetary Board is of the view that the country's external sector stability remains vulnerable, necessitating corrective measures without delay.
b) Every possible initiative should be taken by all stakeholders in real, financial and fiscal sectors to prevent further depletion of the country's official reserves.

If the above recommendation of the Monetary Board is properly understood, it is clear that the Monetary Board wanted the 2nd respondent to consider the Government economic policy seriously in order to prevent further depletion of the country's official reserves.

During his submissions before this Court the 32B respondent referred to a meeting with the 2nd respondent by the Monetary Board. On a request made by the Monetary Board the said meeting was arranged on 1st July 2021 and all the members of the Monetary Board along with senior officials of the Central Bank had participated at the meeting. At the said meeting a presentation was made in Sinhala by the Central Bank and the critical condition of the Sri Lankan economy was explained. The said presentation specifically referred to an engagement with the IMF as the final resort in the following terms;

> ''එවැනි හදිසි ක්‍රියාමාර්ග ක්‍රියාත්මක නොවන්නේ නම් ජාත්‍යන්තර මට්ටමින් අවසාන ණය දෙන්නා වශයෙන් පිළිගත් ජාත්‍යන්තර මූල්‍ය අරමුදලින් සහාය ලබා ගැනීම අවශ්‍ය වනු ඇත''

According to the minutes of the said meeting Superintendent of Public Debt had explained the need for an internationally accepted anchor and the points referred to by him at the meeting was recorded under paragraph 3.7 of the said meeting as follows;

> "**3.7** Superintendent of Public Debt stated that in the recent discussions with Sovereign rating agencies they have highlighted concerns about the current situation, and there is a likelihood of such rating agencies issuing further adverse comments on the Sri Lankan economy. Rating agencies as well as foreign investors also constantly inquire about possible engagement with the International Monetary Fund (IMF) or the submission of a credible repayment plan from the Government".

On behalf of the 28th Respondent the Monetary Board, it was submitted that ***"it is the Government which has the responsibility to approach the IMF and agree on a programme, if***

any, with the IMF. The agreements must be concluded by the Government and no other. It is not possible for the Central Bank (Monetary Board) to approach the IMF if the Government is unwilling."

With regard to the above submission, it is necessary to consider the provisions in Sections 64 (1) and 68 (1) (2) of the Monetary Law.

As per the said provisions,

a) Whenever the Monetary Board anticipates economic disturbances that are likely to threaten domestic monetary stability or whenever abnormal movements in the money supply or in the price level are actually endangering such stability;
b) Whenever the Monetary Board anticipates that there may develop a deficit in the international balance of payment that cause a serious, decline in the international reserve or there is an imminent threat of such decline;

The Monetary Board has a duty to submit reports to the Minister explaining and making recommendations and the steps the Government should adopt.

As already observed in this judgement, during the period the 30th respondent was functioning as the Governor of the Central Bank and in that capacity heading the Monetary Board, several reports had been submitted explaining to the 2nd and 2A respondents the magnitude of the crisis faced by the Government of Sri Lanka.

However, when the 29th respondent was appointed the Governor, a significant difference was observed in the reports submitted to the 2A Respondent and a question arises whether the 29th respondent fulfilled his responsibilities as the Chairman of the Monetary Board in discharging the duty of the Monetary Board when submitting statutory reports to the 2A respondent.

The petitioners have produced several statements issued by the 29th respondent in his capacity as the Governor Central Bank, where he assured the public that the country is moving towards the correct path and it will recover soon.

According to the material available a decision to seek assistance from the IMF, was ultimately taken by the 32A respondent on 16th March 2022. On the 14th March 2022 the Cabinet of Ministers had decided "to authorise the Minister of Finance to take necessary action **to obtain**

technical assistance of the International Monetary Fund with a view to resolving the current situation encountered by the Sri Lankan economy" (emphasis added). The Cabinet of Ministers had taken this decision having given their mind to the note [to the Cabinet] of the 2A respondent on "Staff Report Recommendations for the 2021 Article IV Consultation of the International Monetary Fund (IMF)". The note of the 2A respondent was critical of the findings of the IMF after Article IV consultation and had observed that "some of these risks are overstated in the press release and the efforts of the authorities to address these challenges are understated". It is to be observed that the engagement with the IMF referred to in the Cabinet Decision in March 2022 was only "to obtain technical advise and the assistance of the IMF" which appears to be noncommittal and tentative as opposed to the request made by the 32A respondent in April 2022 for an appropriate fund supported programme to address the economic challenges the country was facing mainly from the balance of payment difficulties and broader macro-economic issues the country was confronted with at the time. It is to be noted the said letter was sent to the IMF with an assurance by the Government of Sri Lanka of its full commitment to achieve the objectives of such a programme. In the course of the submissions of the 32B respondent it was brought to the attention of Court that the sending of letter by 32A respondent in April 2022 was facilitated by him sequel to a one-on-one meeting he had with the 32A respondent.

Even Though, there were reports (referred to above) recommending an engagement with the IMF on an urgent basis from the two subcommittees (MBEDMC and DEDMC) and other officers of the Central Bank, the Monetary Board (28th respondent) failed to take a firm decision in this regard. The Monetary Board was fully aware of the crisis resulting from the continued depletion of Gross Official Reserves as well as the reserves of the Central Bank which reached critically low levels, yet no consensus could be reached by the members. The situation that prevailed within the Monetary Board is aptly reflected in the comments made by the 32nd respondent (Kumarasinghe) at the meeting held on 21st March 2022 and the views of the Deputy Governor (S) on the comments of the 32nd respondent. The 32nd respondent had said *"From the day I joined the Monetary Board in July 2020, for almost two years Dr Ranee Jayamaha and DG(S) have been tirelessly pushing the Monetary Board to go for an IMF programme but the majority including the past and present Governors were not willing to accept the path till the MB meeting held on 07.03.2022. However, now with the MB decisions taken on 07.03.2022, Dr Ranee*

Jayamaha and DG(S) have won the long fought battle on IMF within the MB meetings and I and the Governor(s) have been defeated".

These comments referred to above demonstrate the exact situation that prevailed within the Monetary Board. As discussed hereinbefore the 30th, and 31st respondents have continuously maintained that there was a government policy not to reach out to the IMF. However, there is no material before this Court as to the existence of any such policy prior to January 2022. The Cabinet of Ministers, however, approved the 2A respondent's proposal for a home grown solution without seeking the IMF assistance. During the course of this period, the Members of the Monetary Board were put on notice of the critical situation that prevailed in the Gross Official Reserves and the need to secure foreign exchange inflows on an urgent basis. They were also aware of the unlikelihood of receiving such inflows from other sources and further certain sources from which inflows could be obtained were insisting on an IMF anchor if they were to provide assistance. Severe hardships people underwent over this period was mainly due to the scarcity in essential items such as fuel and gas. The depletion of foreign reserves to meet the import bill was the main hurdle to secure such essentials.

The continued reluctance for a specific recommendation to the Government to seek assistance from the IMF by the majority of the members of the Monetary Board in these circumstances, in our view is a violation of public trust reposed in the Monetary Board as a collective body as well as on individual members who maintained such continued resistance despite severe depletion of Gross Official Reserves in the absence of any viable alternative to overcome this predicament. It also appears that their reluctance was not based solely on the purported policy of the Government but also due to their personal views and/or beliefs. The 32nd respondent having considered the decision of the Monetary Board to recommend to the government to seek IMF assistance as a personal defeat in a long fought battle had suggested that *"the best persons to get involved in way-forward discussions with the IMF are Dr Ranee Jayamaha and DG(S) who have the best relationships and influence with IMF".* On the following day (22nd March 2022) the said respondent had tendered his resignation from the Monetary Board. This conduct mirrors the aversion this respondent had towards reaching out to the IMF and the reluctance to consider issues objectively in the larger interest of the people who had deposed trust on him. When one accepts public office, they should have the capacity to look at issues objectively and resolve

them in the best interest of the people rather than being obsessed with their personal beliefs. Comments and the conduct of the officials of the Central Bank over this period clearly points to the direction that the need to seek assistance from IMF did exist over a period of time and any prudent person who did not act arbitrarily would have foreseen the serious repercussions in the failure to act swiftly to remedy the situation. Deputy Governor (S) in his comments says that *"the little experience I had in working with macroeconomic policy making enabled me to foresee well in advance the economic crisis that the country is experiencing at present. This is the exact reason for me to recommend and emphasize to the MB to approach IMF".* He further said *"It appears that at least at this very late stage, the Government has finally realized that there is no other option but to approach IMF. **The pain to the economy and the people of Sri Lanka would have been less if this decision was taken at least one year ago**"* (emphasis added). K.M.M.Siriwardane – Deputy Governor (S) in his note to the Monetary Board dated 04.04.2022 had listed out the board papers and submissions made to the Monetary Board since 11.11.2020 on "Macroeconomic development and foreign exchange reserves".

In this regard it is also pertinent to note that the Board Paper dated 11th November 2020 titled "Challenges in Government foreign currency debt service payments in 2021 and beyond" discusses the status of Gross Official Reserves as it stood by October 2020, the probability of the reserves dropping to critical levels in 2021, the advantages of an IMF assisted programme and the sentiments of other funding agencies on the absence of such programme. None of these matters, however, were taken up for discussion at the Monetary Board. The main reason for the non-discussion, appears to be the insistence of the 31st respondent to defer the discussion to a date after the presentation of the Budget speech in Parliament; this is despite the fact that the 32C respondent is urging paying urgent attention to the said issues.

In this regard it is also pertinent to note the conduct of the 38th respondent (Jayasundera) as revealed in the minutes of the Monetary Board meeting held on 21st April 2021. The Deputy Governor (S) has placed on record an incident that took place in the morning of that day. According to him there had been a meeting at the Presidential Secretariat chaired by the 38th respondent. This meeting was attended by the officials from the Ministry of Finance including the 31st Respondent, officials of the Central Bank including the 30th respondent, officials from the two state banks and officials from the Board of Investment. At this meeting the 38th

respondent had been critical of the officials of the Central Bank with an allegation of misleading the Monetary Board and their inability to send statutory reports required under sections 64 and 68 of the Monetary Law Act. Furthermore the 38th respondent had questioned the conduct of DG (S) at the Central Bank with insinuations that the latter is a person who tries to serve as per the needs of IMF. Two other Deputy Governors, DG(N) and DG(F) also have placed on record that at several occasions, the 38th respondent reprimands officials of the Central Bank in the presence of officials of the state banks and neither minutes of such meetings nor any official documents were shared of such meetings. The 38th respondent, however, had denied that he had caused "any intimidation" as alleged by the Central Bank officials who attended meetings chaired by him. The 30th respondent also had acknowledged that the 38th respondent was speaking to the Central Bank officials in a critical manner questioning their competencies and allegiances. Furthermore, the 30th respondent had observed that *"the interpretations given by officials of the Central Bank on matters relating to banks and market operations vary with that of market participants and Government authorities such as Dr Jayasundera".*

Learned President's Counsel for the Petitioners submitted that this conduct of the 38th respondent clearly exceeds the boundaries of the legitimate exercise of powers of the Secretary to the President. This conduct is a clear interference with the discharge of duties of public officials. In their submissions this arbitrary use of power is a breach of public trust placed on the 38th respondent.

All factors referred to above clearly establishes that the relevant state organs / officials demonstrated reluctance to reach out to the IMF in the face of the critical situation the country's economy was facing in spite of the fact there was no other viable alternative. This position, namely, the delay on the part of the Government and the Monetary Board in seeking assistance from the IMF has been commented upon by the Auditor-General as well.

It is apt to reiterate that the persons holding public office have a duty to ensure that they exercise due diligence and discharge their duties and responsibilities reasonably and rationally without acting arbitrarily. In our view, 2nd (Mahinda Rajapaksa), 2A (Basil Rajapaksa) 28th (Monetary Board), 29th (Ajith Nivard Cabraal), 30th, (W.D.Lakshman), 31st (S.R.Attygalle) and 32nd (Samantha Kumarasinghe) respondents failed to take remedial action, when the option to take such action was available, namely by not taking measures to seek assistance from the IMF in a

timely manner when they were under a duty to do so. The said inaction on the part of the said respondents, in our opinion was not only manifestly unreasonable but also irrational and arbitrary. Thus, the said respondents in our view had breached public trust reposed in them by the inaction referred to.

EXCHANGE RATE AND OUTFLOW OF FOREIGN EXCHANGE

The relevant provisions of the Monetary Law with regard to determining the par value of Sri Lanka Rupee, International Reserve and International stability of Sri Lanka Rupee reads as follows;

> Section 3. (1) The Monetary Board shall by unanimous decision, recommend to the Minister in charge of the subject of Finance that the par value of the Sri Lanka rupee be determined in terms of special drawing rights or in terms of such other common denominator as may be prescribed by the International Monetary Fund, and upon such recommendation, the Minister in charge of the subject of Finance shall, by Order published in the Gazette, determine and declare the par value of the Sri Lanka rupee in accordance with the terms specified in such recommendation:
>
> Provided, however, that if the Monetary Board is of the view that international economic conditions do not warrant the introduction or maintenance of exchange arrangements based on stable but adjustable par values, it may, by unanimous decision, recommend to the Minister in charge of the subject of Finance that no determination be made under the preceding provisions of this section or that any Order made under this section be revoked, and upon any such recommendation, the Minister in charge of the subject of Finance shall desist from making an Order under this section, or, as the case may be, revoke an Order made under this section.
>
> (2) The Monetary Board may by unanimous decision recommend to the Minister in charge of the subject of Finance the alteration of the par

value of the Sri Lanka rupee, if the Board is of the opinion that such alteration of the par value of the Sri Lanka rupee is rendered necessary in any of the following circumstances, that is to say–

(a) If the continuance of the existing par value hinders or is likely to hinder unduly, the achievement and maintenance of a high level of production, employment and real income and the full development of the productive resources of Sri Lanka, or results, or is likely to result, in a serious decline in the International Reserve of the Central Bank or in other utilizable external assets of Sri Lanka or if such decline cannot be prevented except by–

(i) a large scale increase in the external liabilities of Sri Lanka;

(ii) the persistent use of restrictions on the convertibility of the rupee into foreign currencies in settlement of current transactions; or

(iii) Undue or sustained Government assistance to one or more of the major export industries; or

(iv) Prolonged use of measures designed to restrict the volume of imports of essential commodities; or

(b) If the maintenance of the existing par value is producing, or is likely to produce, a persisting surplus in the balance of payments on current account and a monetary disequilibrium which cannot be adequately corrected by other Government or by Central Bank action authorized by this Act; or

(c) If uniform proportionate changes in the par values of currencies of its members are made by the International Monetary Fund, and upon such recommendation, the Minister in charge of the subject of Finance may, by Order published in the Gazette, amend, in

accordance with the terms specified in such recommendation, any Order made under subsection (1).

(3) Any Order made under subsection (1) or subsection (2) shall cease to have effect after a period of ten days from the date of publication thereof, unless such Order is approved by Parliament within that period:

Provided however, that if Parliament is not in session on the date of publication of the Order, the Order shall cease to have effect after a period of ten days from the date of the next meeting of Parliament, unless such Order is approved by Parliament within that period.

Section 65. In determining its international monetary policy the Monetary Board shall endeavour to maintain the par value of the Sri Lanka rupee, or where no determination of such par value has been made under section 3, maintain such exchange arrangements as are consistent with the underlying trends in the country and so relate its exchange with other currencies as to assure its free use for current international transactions.

Section 66. (1) In order to maintain the international stability of the Sri Lanka rupee and to assure the greatest possible freedom of its current international transactions, the Monetary Board shall endeavour to maintain among the assets of the Central Bank an international reserve adequate to meet any foreseeable deficits in the international balance of payments.

(2) In judging the adequacy of the International Reserve, the Monetary Board shall be guided by the estimates of prospective receipts and payments of foreign exchange by Sri Lanka; by the volume and maturity of the Central Bank's own liabilities in foreign currencies; and, in so far as they are known or can be estimated, by the volume and maturity of the foreign exchange assets and liabilities of the Government and of banking institutions and other persons in Sri Lanka. So long as any part of the foreign currency assets of Sri Lanka are held in currencies which are not freely convertible by the Central Bank, whether directly or indirectly, into

special drawing rights or such other common denominator prescribed by the International Monetary Fund or into foreign currencies freely usable in international transactions, or are frozen, the Monetary Board shall also take this factor into account in judging the adequacy of the International Reserve of the Central Bank.

Section 68. (1) Whenever the Monetary Board anticipates that there may develop a deficit in the international balance of payments of such magnitude as to cause a serious decline in the International Reserve, or whenever there is an imminent threat of a serious decline in the International Reserve, or whenever the International Reserve actually falls to a level which the board considers to be a threat to the international stability of the Sri Lanka rupee, or whenever international payments or remittances are being made which in the opinion of the board constitute an actual or a potential threat to such stability or are prejudicial to the national welfare, it shall be the duty of the board–

(a) To adopt such policies, and to cause such remedial measures to be taken, as are appropriate to the circumstances and authorized by this Act, and

(b) To submit to the Minister in charge of the subject of Finance a detailed report which shall include, as a minimum, an analysis of–

(i) The nature, causes, and magnitude of the actual or potential threat to the international stability of the Sri Lanka rupee; and

(ii) The measures which the board has already taken, and the further monetary, fiscal or administrative measures which it proposes to take or recommends for adoption by the Government.

(2) The Monetary Board shall submit further periodical reports to the Minister in charge of the subject of Finance until the threat to the international stability of the rupee has disappeared.

Section 3 (1) and (2) of the Monetary Law empower the Monetary Board, by a unanimous decision to recommend to the Minister with specified terms, to declare the par value of the Sri Lanka Rupee.

However according to the proviso to subsection (1) of section 3 of the Monetary Law, if the Monetary Board decides that the economic conditions do not warrant introducing par value, the said decision too may be communicated to the Minister.

As per the provisions in section 65 of the law it is the duty of the Monetary Board to maintain the international stability of the Sri Lanka Rupee and in order to maintain stability, there is a duty cast under Section 66 (of the said law) for the Monetary Board, to endeavour to maintain among the assets of the Central Bank an international reserve adequate to meet any foreseeable deficit in the international balance of payment.

Other than reporting and submitting periodic reports to the Minister when there is a potential threat to the international stability of Sri Lanka Rupee the Monetary Board is required under Section 68 (1) of the Monetary Law to adopt policies and remedial measures as are appropriate.

The case for the petitioners before this Court was that the Monetary Board as well as the Minister had failed to take correct decisions at the relevant time to float the rupee and thereby caused a loss to the Government.

As revealed before us, the exchange rate regime in Sri Lanka had gradually evolved from a fixed exchange regime in 1948 to an independently floating regime in 2002. However, at the time relevant to these applications Sri Lanka had a flexible exchange regime.

Export proceeds, worker remittances, tourist earnings, foreign direct investments, and foreign loans were the main sources of inflow to the country whereas import payments and loan repayments are the major outflows of foreign exchange.

One salient feature observed in our economy was the current account deficit due to the excessive outflow of foreign currency as opposed to the inflow of foreign exchange to the Country. In the

said circumstances the exchange rate is expected to be an automatic adjuster under the flexible exchange rate regime, but if the exchange rate is to be maintained at a stable rate, then a depletion of reserves would take place as foreign exchange will have to be pumped to the market to meet the demand.

As revealed before us the average exchange rate was around Rs. 185.00 per US Dollar towards the end of 2019 and was fluctuating between Rs.180.00-200.00 during 2020-2021. According to the reports published by the Central Bank, the buying rate of the US Dollar between 29.04.2021 and 06.09.2021 was between Rs. 195.0848- Rs.198.9023, and the selling rate was between Rs. 199.8700- Rs.204.8977.

As observed by the Auditor General, few members of the Monetary Board and some high-ranking Central Bank officials were not supportive of maintaining a fixed exchange rate at the cost of the foreign reserves of the country and were of the view that the exchange rate should be decided by the supply and demand for foreign exchange.

The Auditor General had observed, that the Central Bank however had made efforts to control the exchange rate using moral suasion, which was confirmed before us by several respondents.

During the period 2019 and 2021 (especially after March 2020) Sri Lankan economy experienced a drop in foreign remittances by Sri Lankan workers abroad due to the COVID-19 pandemic. There was a significant drop in Foreign Direct Investment and the inflow of foreign earnings from export markets too.

As revealed before us, it appears that although the need was to retain the meagre remittances received and creating a conducive environment to enhance the inflow, the Finance Ministry and the Central Bank however worked towards maintaining the exchange rate at around Rs 200 which mainly benefitted the importers. This is amply reflected in the letter sent by the 38th respondent to the Governor (30th respondent) requiring the Central Bank to maintain the exchange rate at Rs 185, which would have contributed towards the outflow of foreign exchange rather than boosting the inflows. In the said letter (dated 23rd March 2020), the 30th respondent had been directed to *"take immediate steps to stabilse exchange rate preferably around Rs 185/USD (commercial bank selling rate)* ***to prevent uncertainties to the business community*** *and unwarranted speculation."* The 38th respondent, having given the said direction, has stated

that the depreciation of the Sri Lanka Rupee will not help export promotion, import substitution and debt servicing. The said respondent in giving these directions stated that it was the President who directed him to take said measures referred to above.

The argument placed before us, in favour of not to depreciate the Sri Lanka Rupee was the additional fiscal burden that would result in debt servicing if the rupee was to depreciate. The Auditor General has opined, however, that it is a misconception that it would significantly increase the debt burden of the government due to the depreciation of the rupee. The comments of the Auditor General are reproduced below:

> *"Therefore, comments that the external debt burden of the government has increased significantly due to the depreciation of the rupee are misinterpretation of facts. The comments that if such depreciation of the rupee did not arise, the government could have saved billions and this money could have been used for other mega developments projects are not correct. If the exchange rate is overvalued/appreciated especially for a country like Sri Lanka, which continues to record a budget deficit and imposes significant tariffs on foreign trade, the budget deficit would further expand and this would necessitate to borrow more from domestic and external sources to finance the budget deficit."*

The Auditor General had referred to a meeting between the Governor and the licensed banks on 11th May 2021 where the banks had informed that due to the increase in imports and reluctance of exporters to convert foreign exchange, the outflow of foreign exchange remained high while inflows were low.

This matter was raised at the Monetary Board meeting held on the same day (i.e. on 11th May 2021) by the 30th respondent who chaired the meeting. He had informed the Board that the 10% conversion imposed on the exporters were insufficient and to enhance it to 25% in order to increase the liquidity situation in the forex market. Appointed member, Jayawardena (32B respondent) agreed with the said proposal but it was strongly objected to by the Secretary to the Treasury (31st respondent). The position he has taken at the said meeting was that, without ensuring the conversion of the 10 percent margin of exports, increasing the percentage of the conversion is futile. Appointed member Kumarasinghe (32nd respondent) too had agreed with the view expressed by the 31st respondent. At this stage 32B respondent whilst disagreeing with the

31st respondent had taken up the position, merely because 10% cannot be enforced, the decision to increase the margin to 25% should not be taken, is not rational. The 32B respondent has emphasised the importance of ensuring the enforcement while increasing the conversion percentage to an appropriate amount in order to improve the liquidity in the market; which was the most burning issue at that point of time.

In addition to the above discussion, the Monetary Board had made a strong plea to the 31st respondent to impose import duties on non-essential items or to agree to the Central Bank imposing LC margins on non-essential imports.

In this respect, a meeting was held at Temple Trees with the Prime Minister (2nd respondent) on 16th June 2021, to discuss the liquidity issues. The Central Bank had submitted a proposal to introduce LC margins, between 100%-150 % until 31st December 2021 as a temporary measure to resolve the liquidity crisis faced by the country. The 29th respondent as the State Minister of Finance (as he then was) had requested the Central Bank to implement the said proposal without delay.

However, even before the implementation of any decision of the Monetary Board, the 38th respondent addressing a letter to the 30th Respondent dated 21st June 2021 under the heading "Proposal to impose 150 percent deposit margin on letters of credit" had referred to the following matters:

> *"Secretary to the Treasury has brought to my notice that despite his objection the members of Monetary Board are pursuing a proposal to impose a 150 percent deposit margin on letters of credit to curtail imports to manage international reserves. [..]"*
>
> *"Furthermore, Government policy initiatives has put significant emphasis to curtail imports through the encouragement of viable import substitution production activities with food production including dairy, grains, fish and dried fish, organic fertilizer manufacturing, essential drugs and vaccines, renewable energy sources, IT and enabling services which are on the top of the list. These import substitutions are being pursued through rigorous and front loaded policy initiatives and actions. The targeted import is around USD 17,000Mn. to keep trade deficit below USD 5,000Mn.*

In this background, imposition of 150 percent deposit margin without clearly defined items being identified, may have serious repercussions on a much needed economic recovery in both domestic and in export industries and recreating employment and livelihood opportunities to the people."

Having referred to the above matter the 38th respondent had reproduced "Report on the Establishment of the Central Bank of Ceylon; Sessional paper XIV- explanatory note given to paragraph 08 in order to emphasize the importance of close working relation with the Government and had finally informed the 30th respondent in the final paragraph,

"Therefore, it is advisable that the Monetary Board refrains from the imposition of deposit margins on LC's without proper appraisal and approval of the Cabinet of Ministers."

We observe that the 38th respondent had generated the above letter neither on instructions nor on directions of the President as opposed to the letter of 23rd March 2020 referred to above. From the tenor of this letter (21st June 2021) it is apparent that the reason to generate this communication is the information conveyed to him by the 31st respondent. This Court also observes that this communication is a clear attempt by the 38th respondent to interfere with the functions of the Monetary Board / Central Bank without any authority whatsoever at a time the country was facing a major crisis due to lack of liquidity.

In this regard it is pertinent to note that at all times relevant to these applications, the Central Bank was placed as an institution coming within the purview of the Finance Minister and at no stage the portfolio of the Finance Minister was held by the President. In fact, the 38th respondent emphasises this fact in presenting his argument to counter the allegation that he interfered with the affairs of the Central Bank and/or the Monetary Board.

We further observe that the minutes of the Monetary Board meeting dated 07th July 2021 reveal that no approval to introduce LC margins as proposed by the Monetary Board had been received. The 30th respondent in his letter addressed to the 38th respondent on 13th July 2021 having described the circumstances under which the introduction of LC margins was proposed had confirmed that the said proposal was not given effect to as the Central Bank did not receive the approval of the Cabinet.

According to the reports of the Central Bank, there is a significant drop in foreign remittances from workers abroad and it came down from USD 580.9 million in January 2020 to USD 204.9 million in February 2022. However, a significant increase in the use of informal methods in transferring money such as Hawala / Undial by Sri Lankan workers abroad was observed mainly due to the high exchange rates offered in the "Gray market" compared to the exchange rate maintained by the Central Bank. Additional few rupees offered by the banks to encourage foreign remittances through the banking system showed no results.

As found out by the Auditor General, by April 2021 the Monetary Policy Committee (MPC) had observed the potential risks associated with foreign currency debt service payments and had recommended to take expeditious measures to attract financial flows through government intervention.

The Auditor General had not found in his report any meaningful decision taken by the Government to recover from this position until March 2022.

As further observed by the Auditor General under paragraph 3.1.35 of his report, the Central Bank, had maintained Sri Lanka Rupee at a static position using moral suasion for the period April 2021 to 5th September 2021 and 6th September 2021 to 7th March 2022. During this period the Central Bank had sold USD 1773.8 million and purchased USD 746.2 million from the Domestic Exchange Market making a net sale of USD 1,027.6 million. This outflow of USD had led to further depletion of the reserves.

There is also an observation by the Auditor General with regard to the interference by the 38th respondent P.B. Jayasundera in deciding the exchange rate even though he had absolutely no role to play under the Monetary Law. As observed in paragraph 3.2.1 there is reference to a discussion having taken place at the Monetary Board meeting on 21st April 2021 regarding carrying out a directive given by the 38th respondent to utilize 100 million USD out of a loan of 500 million USD received from the Chinese Development Bank. These monies were released mainly for the purpose of maintaining the rupee at the rate of Rs.192.00. The above instructions were given by the 38th respondent at a meeting where the Central Bank Officials were present at his office on 16th April 2021. They had been further instructed that in implementing the said directive, to issue to the two state banks USD 75 million each and the State Banks in turn had been instructed to sell USD 50 million at the domestic interbank Forex market at the rate of Rs.

192. Due to the above sale Sri Lanka Rupee appreciated to Rs 191.97 (on 19.04.2021) from Rs. 200 (on 12.04.2021). An appreciation by Rs. 8.03.

In this regard it is pertinent to note that on 20th April 2021, the 30th respondent in a note addressed to the 38th respondent had conveyed the observations of the Central Bank relating to the release of USD 150 million to two state banks and the appreciation of the rupee in the manner referred to above. According to these observations the sudden appreciation of the Rupee had resulted in an outflow of foreign exchange greater than the average customer foreign exchange outflows reported by the banks. Whereas outflows on 16th April 2021 remained at USD 92 million however, on 19th April 2021 it had increased to USD 137 million. They further observed that *"CBSL is of the view that it will be utmost difficult to maintain the exchange rate at around Rs 192.00 levels immediately without allowing gradual appreciation of LKR in a sustainable manner while creating sizable FX inflows to the banking system to ensure the smooth behaviour of the domestic FX market with a view to curb an undue volatility in the exchange rate".*

However, the response of the 38th respondent to these observations suggest that he disagrees with these views of the Central Bank. The 38th respondent in a note dated 27th April 2021 to the 30th respondent had observed that *"I am of the view that the release of USD 150 million to two state banks have worked well to ease the undue market scarcity. Further, infusion could have stabilized the rate since a US $ 175 Mn is expected by AIIB by this week to enhance forex cover of the two state banks"*. He further observes that *"however you seem to believe "gradualism" and "moral suasion" will stabilize the market. Since this is your subject, I do not wish to discuss this matter. However, I request a clarification as to how "gradualism" works and what and how the "moral suasion" is carried out by the CBSL to raise official reserve position of the country".* Furthermore the 38th respondent had observed that *"The management of external stability within Government Policy Framework is a responsibility of the Monetary Board and the Governor of the Central Bank of Sri Lanka".*

Even though the Monetary Board was using moral suasion in controlling the depreciation of Sri Lanka Rupee, the Board had finally observed the danger in continuing it for a longer period and in the report submitted to the Finance Minister (2A respondent) under section 64 and 68 of the Monetary Law dated 14th April 2021 had stated that;

*"**Exchange rate adjustment:** After following various types of exchange rate regimes in the world, we have moved to a flexible exchange rate regime since 2001, in which the rupee has been allowed to fluctuate according to market forces. Because of the extensive adverse side effects (on government debt, domestic price level, etc.) we have attempted over the last few months to maintain the exchange rate at around Rs. 202.00 per US dollar. To do this effectively for a long period of time, the Central Bank does not have the intervention strength in terms of reserves to be supplied to the market, and moral suasion on banks alone is unable to sustain exchange rate stability. If exchange rate stability could be maintained, it is better than continuous depreciation as it happened since late 1970s. To maintain such a policy;*

a) The policies being taken to achieve a current account balance (if not a surplus) need to indicate a gradual success and

b) A large replenishment of reserves through a significant inflow of funds is needed.

If these do not take place, then some sacrifice in the exchange rate stability objective of the Government may have to be made."

However, no progress was made in achieving the recommendations made in order to protect the official reserves until the official reserves dropped to a point that it was only sufficient for two weeks of imports. Finally, the Monetary Board floated the exchange rate with effect from 08th March 2022 and informed the public that *"greater flexibility in the exchange rate will be allowed to the markets with immediate effect. The Central Bank is also of the view that forex transactions would take place at levels which are not more than Rs. 230 per US dollar"*. The 29th respondent at a meeting of the CEOs of Licensed Commercial Banks and Licensed Specialised Banks on 9th March 2022 had stated that "certain trades may take place beyond the exchange rate stated by CBSL considering the greater flexibility that has been permitted". 32B respondent submitted that the above statement of the 29th respondent resulted in the sudden depreciation of the rupee between 225 to 364 (buying rate) and 229 to 377 (selling rate).

Within the statutory scheme of Monetary Law, the Central Bank is responsible for securing economic and price stability and mapping out the monetary policy. However, if a difference of opinion between the Minister of Finance and the Monetary Board exists as to whether the monetary policy of the Monetary Board is directed to the greatest advantage of the people, the Minister and the Board shall endeavour to reach an agreement. In the event such agreement

cannot be reached, the Minister may direct the Board to follow the policy in accordance with the opinion of the Government. In such situations the Minister should inform the Board that the Government accepts the responsibility for adoption of such policy. According to the Auditor-General there had been no such direction made by the Minister in relation to the manner in which exchange rate should be determined. He had expressed the view that until the Minister makes such a direction, the Monetary Board has the statutory power to decide on this issue. However, the Monetary Board had not taken a decision on this matter until 08th March 2022.

The situation that prevailed at the Monetary Board and surrounding circumstances is reflected in the minutes of the Monetary Board meeting held on 04th August 2021. These minutes relate to the discussions of the Monetary Board on the Board Paper titled "Performance of Foreign reserve management activities for the six months ended on 30th June 2021". At this meeting 32C respondent (Ranee Jayamaha) had said *"it is time for the Monetary Board to assess its own performance"* and had noted that by law, the Monetary Board had been given instruments to deal with situations like what prevailed at that time and had further observed that *"over the last one and half years the Monetary Board has only been debating about using these instruments".* Further elaborating on this the 32C respondent had identified the "exchange rate" as one such instrument and had said that the Monetary Board did not use it. The 32C respondent had observed that *"the exchange rate is fixed by moral suasion and it is currently at an unrealistic level with hardly any transactions taking place at that rate".* She had further stated that the Monetary Board had not used these instruments given by the statute and thereby has brought the Central Bank reserves to a negative level. At the same meeting the 30th respondent (W.D.Lakshman) had observed **that the government fears a political backlash due to the impact on the prices following an upward adjustment to the exchange rate.** The DG(S) had observed that the Monetary Board and the Government must understand and act swiftly as time is very critical. He had further said that *"these issues have been repeatedly brought to the attention of the Monetary Board by himself as well as by many departments over and over again and no tangible decisions have been taken by the Monetary Board".* The 30th respondent had said that the 2A respondent (Basil Rajapaksa) is not in favour of any adjustment to the exchange rate, but agreed to discuss the issue with the other members of the Cabinet. However, the 29th respondent in his capacity as the State Minister, was strongly against any adjustment being made to the exchange rate.

This Court observes, that the Monetary Board is empowered to intervene and take necessary measures in the face of a deficit in the international balance of payment by virtue of the provisions in the Monetary Law and is also under a duty to report to the Minister the steps so taken by virtue of Section 68 of the said Law. When we consider the material placed before us, this Court did not, however, observe any proactive measures taken by the Monetary Board to the challenges it faced either in bolstering the foreign reserves or preserving the meagre foreign reserve the country had during the period in question. Considering the sequence of events, it appears that the Monetary Board had succumbed to the dictates of officials who had no authority to intervene in the affairs of the Central Bank. We were also privy to material that disclosed that a series of discussions had been held with a view to permit the exchange rate to be determined by market forces, supply and demand of USD, but we note with dismay that no positive steps were taken to implement a 'moderate method' to protect the reserves and stem the depletion when the need to do so was felt but waited till the 11th hour to take the decision to float the Sri Lanka Rupee, by which time the reserves had dipped to such critical level and reserves were barely sufficient only for the purchases required for two weeks.

There is no material before us to draw the conclusion that the Monetary Board had acted in terms of Section 3 of the Monetary Law regarding the determination of the par value of the Sri Lanka Rupee. What can be seen from the available facts is that the Monetary Board had taken steps to maintain the Rupee value through 'moral suasion' which does not appear to have been effective in stemming the depletion of foreign reserves.

Apart from the failures referred to on the part of the Monetary Board, which is a pivotal institution in shaping the monetary policy of the country, this Court also cannot condone the conduct of the 31st and 38th respondents. The 31st respondent (S.R.Attygalle) being a top level senior public servant, as the Secretary of the Treasury having the full knowledge of the bleak situation in which the economy of the country was, yet stood in the way of the Monetary Board taking decisions which might have had a positive effect on the fiscal position. We also note with dismay the conduct of the 38th respondent (P.B.Jayasundera) who appears to have had considerable clout on the public servants. From the material placed before us it is clear that he had interfered with the functions of the Monetary Board and had prevailed upon the decision

making process of the Monetary Board. The directives he had given to the treasury officials and the Central Bank to use USD 100 million out of the USD 500 million loan received from the Chinese Bank and to maintain the par value of the Sri Lanka Rupee at Rs.192.00 as against the US Dollar and the directive on the Governor not to pursue the proposal to enhance the LC margin to 150 percent without Cabinet approval are two such instances, both of which are arbitrary and ultra vires of his powers.

In view of findings of this Court as elaborated hereinbefore, we observe that the Monetary Board (28th respondent) that has the statutory duty to take necessary initiatives regarding the par value and the exchange rate of the Sri Lanka Rupee and the power to determine international monetary policy, maintaining international stability of the Sri Lanka Rupee and to adopt necessary policies to cause remedial measures to remedy serious decline in the international reserves have failed to take meaningful measures in a timely manner. This inaction in our view breaches the public trust reposed on the 28th respondent. Furthermore, the arbitrary and irrational conduct of the 31st and 38th respondents as discussed hereinbefore had contributed to the aforementioned inaction of the 28th respondent. This conduct of the 31st and 38th respondents in our view breaches the public trust reposed in them.

CONCLUSION

When we considered these two applications, the main focus was on the economic situation of the country between November 2019 and April 2022. The reason for this focus was that the core issue the Court was invited to consider was whether the impact of the unprecedented economic crisis on the society resulted in the infringement of fundamental rights of the people and if so, whether any one or more of the respondents were responsible for such infringements due to their actions and / or inaction during this period, while holding office in executive and/or administrative branches of the Government. Many of the respondents argued that the root causes for this debacle spread well beyond this time period and therefore no responsibility could be attributed to these respondents in the manner alleged by the petitioners. They claimed that heavy borrowings of previous Governments and the mismanagement of such funds had a direct impact on the debt sustainability of the country. While we take note of this argument, in considering the responsibility of the respondents, our attention was drawn to the issue as to whether the conduct of the respondents during the relevant period directly contributed to the economic crisis.

In deciding this issue, we are of the view that the respondents ought to have known the factual situation that prevailed when they assumed public office and they should have fashioned their acts and efforts to ensure that the situation is not further aggravated but resolved. On assumption of public office, it was their duty to ensure that the existing issues were addressed and resolved in the best interest of the country and take every possible measure to avoid an aggravation to the detriment of the people.

Public trust reposed on them demands resolving of issues. Any conduct which is manifestly unreasonable, arbitrary or irrational that would lead to further aggravation of issues which are detrimental to the public, tantamount a breach of the trust bestowed on them. This is not the recognition of a 'new right' – a right to infallible decisions by the public authorities – but recognition of public officers requiring to discharge their duties to the satisfaction of their inherent core obligations, with due respect to the public trust reposed on them.

It is common ground that the country's economy deteriorated not overnight but over a period of time under consideration in the matters before us. It was evident from the material placed before us that the Gross Official Reserves and the Reserves of the Central Bank were depleted and had reached unprecedented low levels, creating a situation of which the effects were devastating on the entire citizenry without exception. The severe hardships the people had to suffer due to scarcities in essentials such as fuel, gas and medicines coupled with long hours of power shortages brought the lives of people to a standstill and the suffering the public had to undergo was undoubtedly immeasurable.

The respondents holding high public offices bestowed with powers which bear a direct impact on the lives of the people, we presume, were alive to the Directive Principles of State Policy and Fundamental Duties. They were duty bound to discharge in the manner spelt out in the directive principles in our Constitution.

"The directive principles of State policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to" per Prasanna Jayawardena, PCJ. in Ravindra Gunawaradane Kariyawasam v CEA, SC FR 141/2015 Sc minutes of 4.4.2019.

They cannot shirk their responsibilities by merely claiming that the decisions that were taken were "policy decisions" they were entitled to take. We note that Article 27 of the Constitution pledges a democratic socialist society the objectives of which include the realisation by all citizens of an adequate standard of living for themselves and their families including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities, which the public were deprived of during this unfortunate period due to mishandling of the economy when it was within the full power of the respondents to take meaningful action to prevent such a calamity. From the material placed before this Court it is as clear as can be, that the respondents had failed to act when they were not only put on notice but were fully alive to the predicament the country would face.

The respondents argued that they took all possible measures within their purview to remedy the situation. They further argued that the time period under consideration overlapped with the time period where serious challenges that resulted due to the COVID-19 pandemic that had to be overcome. As we have discussed hereinbefore, prolonged inaction due to arbitrary, irrational and/or manifestly unreasonable decisions and inadequate measures over the period under consideration had heavily contributed to disastrous consequences.

The following observations and/or comments as recorded in the minutes of the Monetary Board meeting held on 4th August 2021 shed light on the situation which prevailed at the relevant time. During the period between January and June 2021 – within a short period of six months - reserves of the Central Bank and Gross Official Reserves had decreased by 35 and 28 percent respectively. For the first time in the history of our country the net Central Bank foreign reserves recorded a negative balance of USD 78 million. As at 03rd August 2021 net Central Bank assets were negative by USD 124 million and net Gross Official Reserves remained at USD 155 million. The Deputy Governor (S) had observed that

"Government does not have foreign exchange and the Gross Official Reserves has declined to critical levels, government has no rupees either, government is depending on the CBSL for the foreign exchange as well as rupees for its domestic and foreign financing and very soon the CBSL will be required to meet the obligations of state banks and state entities such as CPC as well. Sri Lanka cannot go to the international market and borrow, foreign governments are not

lending to Sri Lanka because of the credit ratings of the country and its high default risk". The DG(N) had noted that the

"Minister himself (2A respondent) stated that it is difficult to expect any sizeable funds coming into the country at this stage".

The above quote aptly depicts the bleak picture and the disastrous state of our economy even by August 2021.

It is also pertinent to observe that in deciding the issues before us, this Court while considering each matter separately, had to consider all matters together in a holistic manner to decide the core issue, whether there was any infringement of fundamental rights. The reason being, the matters we considered are intrinsically interwoven and a focus on issues in isolation would fail to capture reality. In this regard, we are mindful of one of the arguments of the petitioners that the purported imprudent decision brought about a domino effect and led to a series of events to which we paid attention. Such an event being the tax revision introduced in December 2019, which resulted in downgrading by rating agencies, depletion of foreign reserves, losing access to international financing institutions and single digit inflation spiralling to double digits. Additionally, the continued maintenance of an artificial exchange rate and the failure to reverse tax reliefs and seek assistance from the IMF in a timely manner collectively, contributed towards the rapid deterioration of the economy. The cumulative effect of the conduct of the respondents, in our view, is what contributed to the ultimate debacle. Gross Official Reserves which stood at USD 7,642 million by end 2019 had depleted to USD 155 million by August 2021. The scarcity of foreign exchange with the Government and the Central Bank brought about severe hardships to the people.

The trust reposed in the respondents was not a higher principle or epithet unique to their offices. 'Public trust' is an inherent responsibility bestowed on all officers who exercise powers which emanate from the sovereignty of the People. Therefore, as public officers, the respondents were obliged, at all times, to act in a manner which honoured the trust reposed in them. We are of the view that by the actions, omissions, decisions and conduct hereinbefore identified to have demonstrably contributed to the economic crisis and we are of the view that the 2nd (Mahinda Rajapaksa), 2A (Basil Rajapaksa), 28th (Monetary Board), 29th (Nivard Cabraal), 30th (W.D.Lakshman), 31st (S.R.Attygalle), 32nd (Samantha Kumarasinghe), 32A (Gotabaya

Rajapaksa) and 38th (P.B.Jayasundra) respondents had violated the Public Trust reposed in them and we hold that they were in breach of the fundamental right to equal protection of the law ordained by Article 12(1) of the Constitution.

These petitioners both in applications SC FR 195/2022 and SC FR 212/2022 have invoked the fundamental rights jurisdiction of this Court in the interest of the public. We note that none of the petitioners are claiming any loss had impacted on the petitioners on an individual basis but their assertion is as a result of the conduct of the respondents the entire citizenry had to undergo hardships which could have been avoided. In the circumstances aforesaid, we are of the view that it would not be appropriate to order the respondents to pay compensation to the petitioners and as such we are not inclined to order compensation. We order however that each petitioner in both applications would be entitled to costs in sum of rupees 150,000.00 each.

Jayantha Jayasuriya, PC.
Chief Justice

Buwaneka Aluwihare, PC.
Judge of the Supreme Court

Vijith K. Malalgoda, PC.
Judge of the Supreme Court

Murdu N.B. Fernando, PC.
Judge of the Supreme Court

Priyantha Jayawardena PC, J

Both the aforementioned applications were taken up together for hearing. Accordingly, one judgment is delivered in respect of both applications. I am afraid I am not in agreement with the majority judgment.

The petitioners in both applications stated that they filed the instant applications on behalf of their own interests and on behalf of the interests of the public.

SC/FR/Application No. 195/2022

The Fundamental Rights Application No. 195/2022 was filed on the 3rd of June, 2022 and an amended application was filed on the 18th of July, 2022.

In the said application, *inter alia*, the following persons were made respondents;

(a) The 2nd, 2A, and 2B respondents are the former Cabinet Ministers charged with the subject of Finance,
(b) The 3rd to the 27th respondents are the remaining members of the Cabinet of Ministers at the time the Cabinet made the decision to reduce taxes,
(c) The 28th respondent is the Monetary Board of the Central Bank. The 29th to 31st respondents are the former Governors of the Central Bank and the Secretary to the Treasury of the Republic, who were members of the 28th respondent. The 32nd respondent is a former appointed member of the 28th respondent,
(d) The 38th respondent is the former Secretary to the President,
(e) The 32A respondent is the former President of the Republic (hereinafter referred to as the "former President"), and the Head of State, Head of Executive, the Cabinet of Ministers, and the Government at the time material to this application.

Later, two members of the Monetary board were added as the 32B and 32C respondents. However, leave was not granted against them.

Facts averred in the SC/FR/Application No. 195/2022

In the said petition, under the heading "The petitioners' application in a nutshell", the petitioners stated that a significant economic hardship was faced by the citizens of the Republic, including high levels of inflation, the non-availability of vital resources, goods, commodities and other essential items, including fuel, liquid petroleum gas, medicine and food, and the dearth of foreign currency, all of which arose consequent to the mismanagement of the economy of the Republic by the respondents to the said application.

Furthermore, the acts of the 29th to 32nd respondents in their official capacities as members of the 28th respondent, by **neglect and wilful default,** caused loss and damage to the Central Bank of Sri Lanka and consequently, to the citizens of Sri Lanka at large.

The petitioners further stated that since 2008, the various governments of the Republic have increased their reliance on foreign sources for financing the debt of the Republic. Further, between the years 2015 and 2019, 46% of the Republic's fiscal debt was financed by foreign financing means. Consequently, the exposure to foreign debt commensurately increased.

Moreover, the policy decisions taken by consecutive governments resulted in the foreign debt owed by the Republic to foreign nations being almost equivalent to the local debt when the 1st respondent was appointed as the Prime Minister of the Republic in 2019.

Further, when the former President was elected in 2019 as the President of the Republic, the fiscal debt of the Republic had risen to a proportion as high as 86.6% of the Republic's GDP. Furthermore, he was also faced with increasing foreign debt.

The petitioners stated that the former President Gotabaya Rajapaksa published an election manifesto titled "Vistas of Prosperity and Splendour", containing **several policy changes,** *inter alia,* for the purpose of providing **"emergency relief"** to people and local ventures who were suffering under the policies of the previous government. Further, he promised to deliver a **"new**

people-oriented policy on economics focused on reducing the cost of living and taxes imposed". Moreover, in the said Manifesto, the former President undertook to replace the Inland Revenue Act with a system that would achieve an economic revival of the country.

Further, after the former President assumed duties as the President of the Republic, the government reduced the taxes payable by the people of the country. Accordingly, the petitioners stated that the former President, together with the 2nd respondent, reduced the taxes for the sole purpose of delivering the election promises made. Hence, the decision to reduce taxes was purely politically motivated. Furthermore, due to the said reduction in taxation, the Republic suffered enormous and unprecedented economic damage.

The petitioners further stated that at the time the instant application was filed, the people of the Republic were facing unprecedented economic hardships, with extreme levels of inflation causing the prices of essential goods and services to increase at extreme rates. In particular, the petitioners stated that in April 2022, the price of essential goods had increased from the previous year. Thus, people are unable to buy basic commodities. Moreover, because of the high levels of inflation, a large portion of the public staged protests throughout the country.

Furthermore, the severity of the Republic's **intentional depletion of foreign currency reserves** under the watch of the 28th to the 32nd respondents, the 2nd and the 2A respondents and/or one or more of them is evident by default in servicing foreign debt.

The petitioners stated that the aforementioned circumstances, effecting the economic situation, can be attributed to the **wilful mismanagement of the economy by the 38th, 2nd, 2A, and the 29th to the 32nd respondents, who were in control of the 28th respondent** at the time material to the instant application.

Further, the petitioners stated that the 2B respondent, during his brief tenure as the Cabinet Minister of Finance of the Republic, provided in his speech a realistic and transparent overview of the state of the economy of the country on the 4th of May, 2022.

The petitioners further stated that it was only on the 25th of May, 2022 that they became aware of the acts perpetuated by the 29th to the 32nd, and 38th respondents, which caused the mismanagement of the economy of the Republic.

Moreover, the Central Bank of Sri Lanka is the apex body and authority of the Republic, responsible for the administration, supervision and regulation of the monetary, financial, and payment systems of Sri Lanka, and is charged with the duty of securing economic and price stability, as well as financial system stability, with a view to encouraging and promoting the development of productive resources belonging to the Republic. The 28th respondent is vested with the powers, duties, and functions of the Central Bank and is responsible for the management, operations, and administration of the Central Bank.

Accordingly, the 28th respondent failed and/or neglected to maintain an international reserve adequate to meet any foreseeable deficits in the international balance of payments, so as to maintain the international stability of the rupee, and thus acted in contravention of section 66 of the Monetary Law Act.

Furthermore, in January 2022, the Republic took steps to pay an International Sovereign Bond in a sum of US$ 500,000,000/-, notwithstanding the depleting foreign reserves available to the Republic.

Moreover, fixing the exchange rate to a value below Rs. 203 to the US$ caused loss and damage to the Central Bank of Sri Lanka and irreparable loss and damage to the citizens of the Republic.

The petitioners stated that, as far as the petitioners are aware, the 28th respondent has not sought to pursue any form of legal proceedings and/or disciplinary action against the 29th to 32nd respondents and/or any one or more of them, despite their contravention of the provisions of the Monetary Law Act and by wilful default and/or by misconduct causing loss and damage to the Central Bank of Sri Lanka.

The petitioners further stated that the actions and decisions of the former President, and/or the 2nd to 27th respondents, and/or the 28th to the 32nd respondents and/or the 33rd respondent and/or any one or more of them in mismanaging the economy of the Republic and failing to abide by the mandatory provisions of the Monetary Law Act have violated and/or imminently violated and/or continuously violated the Fundamental Right to equality and equal protection of the Law guaranteed to the petitioners and to the people of the Republic under Article 12(1) of the Constitution. Further, the said decisions violated the Fundamental Right to the freedom to

engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise guaranteed to the citizens of the Republic under Article 14(1)(g) of the Constitution.

In the circumstances, petitioners prayed for the following;

"

(a) *Grant Leave to Proceed with this Application;*

(b) ***Declare*** *that the Fundamental Right guaranteed to the petitioners under Article 12(1) of the Constitution is being imminently infringed and/or has been infringed and/or is continuously being infringed by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity) and/or any one or more of the Respondents;*

(c) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution is being imminently infringed and/or has been infringed and/or is continuously being infringed by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity) and/or any one or more of the Respondents;*

(d) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution is being imminently infringed and/or has been infringed and/or is continuously being infringed by the 28th, 29th, 31st and 32nd Respondent by causing the Republic to settle the International Sovereign Bond in January 2022 as evinced by P21(a);*

(e) ***Make Order*** *directing the 28th Respondent to recover and/or take steps to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by officers of the 28th Respondent and/or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents and/or any one or more of them, consequent to the decision made to set the value of the Sri Lankan Rupee at a value of and/or around Rs. 203/-, which may be uncovered by an audit prayed for hereinunder and/or otherwise;*

(f) ***Make Order*** *directing the 28th Respondent to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by officers of the 28th Respondent and/or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents and/or any one or more of them, consequent to the decision made to settle the payment referred to in P21(a), which may be uncovered by an audit prayed for hereinunder and/or otherwise;*

(g) *Grant an* ***Interim Order*** *directing the 35th to 37th Respondents to expeditiously look into the matters contained in the Application (P22) and submit its observations to Your Lordships' Court within 3 months, or such other time which Your Lordships' Court may deem reasonable;*

(h) *Grant an* ***Interim Order*** *directing the 34th respondent to conduct an audit into the affairs of the 28th Respondent, and determine the loss caused to the Central Bark of Sri Lanka by*

i. *the decision made to set the value of the Sri Lankan Rupee at a value of and/or around Rs. 203/- in a manner contrary to Section 66 of the Monetary Law Act, and further determine;*

ii. *the delay in obtaining facilities from the IMF by the Republic consequent to the decisions made by the 29th Respondent.*

(i) *Grant an* ***Interim Order*** *preventing the 29th and/or the 30th and/or the 31st and/or the 32nd Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(j) *Grant an* ***Interim Order*** *preventing the 2nd and/or the 2A and/or the 38th Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(k) *Grant an* ***Interim Order*** *directing the 28th Respondent to produce to Your Lordships Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee On Public Enterprise meeting held on 25.05.2022*

wherein it was suggested that the Republic should seek relief and/or other financial assistance from the International Monetary Fund;

(l) *Grant an **Interim Order** directing the 28th Respondent to produce to Your Lordships' Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee on Public Enterprise meeting held on 25.05.2022 wherein it is recorded that the appointed members of the 28th Respondent objected to and/ or otherwise disagreed with the artificial maintenance exchange rate of the Sri Lanka Rupee at and/or at a level below Rs. 203/-;*

(m) *Grant an **Interim Order** directing the 39th Respondent to produce to Your Lordships' Court, the minutes of the Committee on Public Enterprise meeting held on 25.05.2022;*

*(mm) Grant an **Interim Order** preventing the 2nd Respondent and/or the 2A Respondent and / or the 32A Respondent, and/ or any one or more of the 29th to the 32nd Respondents and / or the 38th Respondent from leaving the Democratic Socialist Republic of Sri Lanka without obtaining the prior permission of Your Lordships Court;*

*(mmm) Grant an **Interim Order** preventing the 32A Respondent from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships Court:*

(n) Costs;

*(o) **Such other and further relief as Your Lordships Court shall seem meet**."*

[emphasis added]

Facts averred in the SC/FR Application No. 212/2022

The SC/FR Application No. 212/2022 was made on the 17th of June, 2022. Thereafter, an amended petition was filed on the 15th of July, 2022, naming, *inter alia*, the following respondents;

a) the 1(b) respondent is the former President of Sri Lanka and was the President of the Republic at all times material to the instant application,

b) the 2nd respondent is the former Prime Minister and the former Minister of Finance, *inter alia*, from the 21st of November, 2019 to the 2nd of March, 2020, from the 9th of August, 2020 to the 8th of July, 2021,

c) the 3rd respondent was the Minister of Finance from the 28th of July, 2021 to the 3rd of April, 2022,

d) the 6th respondent was the Governor of the Central Bank from December, 2019 to September, 2021 and the Chief Executive Officer of the Central Bank and the Head of the Monetary Board of the Central Bank,

e) the 7th respondent was the Governor of the Central Bank from the 15th of September, 2021 to the 4th of April, 2022 and the Chief Executive Officer of the Central Bank and the Head of the Monetary Board of the Central Bank,

f) the 9th respondent is the Monetary Board of the Central Bank of Sri Lanka which has the power to do and perform all such acts as maybe necessary for carrying out the duties under the Monetary Law Act,

g) the 10th respondent was the Secretary to the Ministry of Finance of Sri Lanka from the 20th of November, 2019 to the 7th of April, 2022.

The petitioners in SC/FR/Application No. 212/2022 stated that the former President and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents made a series of irrational, arbitrary, patently illegal and wrongful decisions in complete dereliction of their statutory duties and fiduciary responsibility, for collateral and extraneous purposes, during the years 2019 to 2022. As a result, the petitioners

and the public were denied their right to equality, equal protection of the law, and their right to life as guaranteed by the Constitution.

The petitioners further stated that the aforesaid series of irrational, arbitrary, patently illegal, and wrongful acts on the part of the former President and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents resulted in catastrophic long-term and short-term ramifications to the economy, caused the country to default on the repayment of foreign debts for the first time in its history, and relegated Sri Lanka to declare bankruptcy.

Further, the actions and/or inaction and gross mismanagement of the economy by the former President of the Republic and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents have resulted in an unprecedented economic crisis driven by debt unsustainability.

Moreover, the International Monetary Fund (hereinafter referred to as the "IMF"), in its IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10th of February, 2022, categorised, for the first time, the sovereign debt of Sri Lanka as "unsustainable" in general and the external debt portfolio in particular. Thereafter, Sri Lanka issued a Notice of Default dated 12th of April, 2022 whereby Sri Lanka informed its creditors that all foreign debt repayments would be suspended, which included the following categories of debt;

(a) all outstanding series of bonds issued in international capital markets,
(b) certain bilateral (government to government) credit,
(c) all foreign-currency denominated loan agreements or credit facilities with commercial banks or institutional lenders, including those owned by foreign governments, and
(d) all amounts payable following a call during the said interim period upon a guarantee issued in respect of a debt of a third party.

Furthermore, on or around the 19th of May, 2022, Sri Lanka defaulted on loans that fell due and was downgraded by rating agencies as a defaulting nation.

The petitioners further stated that they invoked the Fundamental Rights jurisdiction of this court on the basis that the former President of the Republic and the 2nd, 3rd, 6th, 7th, 9th and 10th

respondents, by a series of actions commencing from 2019 and continuing to date, including acts that have necessitated the defaulting of Sovereign debt, have infringed and/or violated and continue to infringe and/or violate the Fundamental Rights of the petitioners and of all citizens of Sri Lanka.

Moreover, at the Committee on Public Enterprises (COPE) meeting held on or about the 25th of May, 2022, it transpired that the actions of the said respondents, *inter alia,* the RFI facility (Rapid Financing Instrument) of the IMF and the management of the rupee, had engendered the present crisis.

Further, the petitioners stated that the actions and/or inactions of the former President of the Republic and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents can be broadly categorised as follows;

(i) the illegal, arbitrary and unreasonable abolition, removal and/or reduction of taxes effected in the year 2019 and the consequent reduction in government revenue,

(ii) the refusal to change the aforesaid illegal, irrational and arbitrary decisions to reduce taxes despite the consequent downgrading of Sri Lanka's credit rating and the emergence of the COVID-19 Pandemic,

(iii) the failures and/or omissions to take remedial measures subsequent to rating downgrade caused, *inter alia,* by the illegal, arbitrary and unlawful actions of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents,

(iv) the refusal and failure of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents to ensure conditions were met in a manner that would permit Sri Lanka to avail itself of the sum of money agreed to be given to Sri Lanka by the IMF in terms of the Extended Fund Facility agreement as set out hereinafter,

(v) the failure to obtain available aid to combat the economic hardships faced as a consequence of COVID-19, especially in the face of a lack of government revenue,

(vi) the failure to act in terms of the Monetary Law of Sri Lanka, to maintain international reserves and the international stability of the rupee,

(vii) the failure to devalue the Sri Lankan rupee in a timely, orderly and appropriate manner, despite widespread calls and demands to do so,

(viii) the failure and/or omissions to appropriately devalue the rupee which resulted in fluctuations in worker remittances, and subsequently, the country's foreign reserves and Sri Lanka's balance of payment,

(ix) the decision to continue to service Sovereign debt without any restructuring, despite the futility and grievous prejudice in doing so,

(x) the continued refusal to seek the assistance of the IMF, despite widespread calls and demands to do so,

(xi) the subsequent admission by the former President of the Republic that the aforementioned refusal to seek the assistance of the IMF was wrong and misconceived, and

(xii) the unreasonable, arbitrary actions and / or omissions which resulted in a default of the country's foreign debt.

As such, the petitioners stated that the aforementioned respondents are directly responsible, *inter alia*, for the unsustainability of Sri Lanka's foreign debt, its default on foreign loan repayments, and the current state of the economy of Sri Lanka, and must be held accountable for the illegal, arbitrary and unreasonable acts and/or omissions that culminated in the above.

Thus, the respondents have violated the Fundamental Rights guaranteed to the citizens of Sri Lanka under Articles 12(1) and 14(1)(g) of the Constitution.

In the circumstances, the petitioners prayed for the following;

“

1. *Grant the petitioners, Leave to Proceed;*

2. ***Declare*** *that the Fundamental Rights of the Petitioners and / or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Article 12 (1), 14(1)(g) and 14A of the Constitution, have been infringed by the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, and/or their servants or their agents, and that there is a continuing violation of their said rights;*

3. ***Declare*** *that the Fundamental Rights of the Petitioners and/ or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Articles 12(1), 14(1)(g) and 14A of the Constitution are in imminent danger of infringement by the actions and/or inactions of the State including the actions/ inactions of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents;*

4. *Grant and issue the following* ***interim reliefs****/orders:*

   a) *Make Order in terms of Article 126(4) of the Constitution, and call for and examine the following record, including, but not limited to:*

      i. All records pertaining to communications and recommendations received by and / or given to the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents by the Central Bank;

      ii. All communications between the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents in respect of the decisions taken with regard to the matters impugned in this Application;

      iii. The fiscal records, all reports published and or given to the 2nd, 3rd and /or 9th respondents of and by the 9th Respondent Board under and in terms of Sections 64 and 68 of the Monetary Law Act, No. 37 of 1974;

      iv. Relevant Cabinet decisions in respect of the Ministry of Finance and the 2nd and 3rd Respondents, as well as decisions and Regulations by the 2nd and 3rd Respondents with regard to the matters impugned in this Application;

      v. A transcript of the proceedings of the Committee on Public Enterprises (COPE) held on or about 25th May 2022.

b) ***Direct*** *the appointment of a committee under the auspices of Your Lordships' Court to investigate the causes, steps taken by the aforementioned Respondents, and compile a report on the financial irregularities and mismanagement of the economy in relation to the specific instances enunciated in the present Application;*

c) *Restrain the 2nd, 3rd, 6th, 7th and 10th Respondents, from overseas travel without the prior approval of the Supreme Court, pending the investigation by the aforementioned Committee;*

5. ***Upon the submission of a report by the said Committee (appointed under the auspices of Your Lordships' Court) to direct the Hon. Attorney General or any other appropriate authorities or officers of the State to consider initiation of investigations and prosecutions against any persons (as necessary) based on the findings from the said report.***

6. ***Make such further and other just and equitable orders as Your Lordship's Court shall seem fit in the circumstances of this Application, under and in terms of Article 126(4) of the Constitution;***

7. *Grant Costs;*

8. ***Grant further and such other relief as Your Lordships Court may seem meet****."*

[emphasis added]

Main issues raised by the petitioners in both applications are as follows;

The grounds urged by the petitioners can be broadly set out as follows;

(i) the introduction of tax cuts and the failure to reverse them,

(ii) delay in seeking assistance from the IMF,

(iii) the decision by the Monetary Board not to float the rupee, and thereafter floating the same without any safeguards, and

(iv) the pay out of International Sovereign Bond of US$ 500 million on the 18th of January, 2022.

Granting of leave to proceed by the Supreme Court

After the aforementioned applications were supported in court by the counsel for the petitioners and after the hearing of the counsel for the respondents, the court made the following Orders on the 7th of October, 2022;

> *"The court is inclined to grant leave to proceed in both applications for alleged violations of Fundamental Rights guaranteed under Articles 12(1) and 14(1)(g) of the Constitution. Accordingly, leave to proceed is granted for the said violations in terms of Article 126(2) of the Constitution in both applications.*

Court made the following orders in SC/FR/195/2022:

1. *Leave to proceed is granted against 2nd, 2A, 2B, 3rd to 27th, 28th to 32nd, 32A and 38th respondents;*

2. *In view of Court's decision to grant leave to proceed against the 28th respondent board and the fact that two of former Governors of the Central Bank and two of the members who served in the 28th respondent board during the period relevant to this application have been cited as respondents in this application, Court is of the view that the remaining members of the 28th respondent board who served during the said period should also be made respondents.*

   Hence, ***petitioners*** *are directed to add Dr. Sanjeewa Jayawardane P.C and Dr. Ranee Jayamaha who are current members of the 28th respondent board, as* ***32B & 32C respondents.*** *Petitioners are further*

directed to amend the Caption accordingly and the amended caption should be filed within two weeks from today;

3. ***34th respondent - Auditor General - is directed to conduct an audit upon examining all relevant material and submit a report on the following:***
    a. ***the decision made by the 28th respondent (Monetary Board) to set the value of the Sri Lankan Rupee at or around 203/- as against the US Dollar and all matters connected to the said decision;***
    b. ***the delay in seeking facilities from the IMF by the Republic;***
    c. ***all matters relating to the settlement of International Sovereign Bond/s to the value of US$ 500 million on 18.01.2022, utilising foreign reserves;***

The said report should comprise observations, including whether any loss has been caused to the Central Bank due to one or more of the three matters referred to above. 34th respondent is further directed to submit to this court the report titled "Special Audit Report on Financial Management and Public Debt Control in Sri Lanka 2018-2022" dated 4th July 2022.

34th respondent *is further required to comply with the above directions not later than 2nd January 2023;*

4. ***28th respondent*** *- The Monetary Board of the Central Bank of Sri Lanka - is directed to produce all documents, relating to matters referred to by Dr. Sanjeewa Jayawardane P.C and Dr. Ranee Jayamaha, at the meeting of the Committee on Public Enterprise held on 25.05.2022, specifically;*
    a. *the suggestion said to have been made, that the Republic should seek relief and / or other financial assistance from the International Monetary Fund,*
    b. *objection to and/or otherwise disagreement expressed regarding the artificial maintenance of exchange rate of the Sri*

Lankan Rupee at / or at a level below 203/- as against the US Dollar.

Said documents are required to be submitted to this Court not later than 30th November 2022

5. ***Petitioners** are directed to issue notices through the Registrar of this Court on all the respondents against whom leave to proceed is granted and 32B and 32C respondents within one week of filing the further amended caption as per the direction (2) above.*

6. ***Registrar** is directed to communicate this order to the 28th and 34th respondents forthwith.*

Court makes the following orders in SC/FR/212/2022:

7. *Leave to proceed is granted against **1(b), 2nd, 3rd, 6th, 7th, 9th and 10th** respondents;*

8. ***8th respondent** - Governor of the Central Bank - is directed to produce copies of communications and recommendations given to the 1(b), 2nd, 3rd, 6th, 7th, 9th and 10th respondents by the Central Bank with regard to the matters impugned in this application during the time material to this application, not later than 30th November 2022;*

9. ***9th respondent** - The Monetary Board of the Central Bank of Sri Lanka - is directed to produce copies of all reports given to the 2nd and 3rd respondents in terms of sections 64 and 68 of the Monetary Law Act, No 37 of 1974, during the time relevant to this application, not later than 30th November 2022*

10. ***Petitioners** are directed to issue notices through the Registrar of this Court on all the respondents against whom leave to proceed is granted within one week.*

11. ***Registrar*** *is directed to communicate this order to the 8th and 9th respondents, forthwith…"*

[emphasis added]

Objections filed by the respondents

Thereafter, the 28th, 32B, 32C, 29th to 34th, 38th and 39th respondents of SC/FR Application No. 195/2022 and the 1(a), 2nd, 3rd, 6th, 7th, 9th, 10th and 11th respondents of SC/FR Application No. 212/2022 filed objections denying responsibility with regard to the allegations set out in both petitions and proceeded to justify their actions during the time material to the instant application. Further, some of the respondents raised the following objections to the maintainability of the instant applications;

(a) the Applications are misconceived in law,

(b) the subject matter of both the applications relates to policy of the government and thus, this Court has no jurisdiction to hear and determine the said applications,

(c) the reliefs sought in both the Applications are beyond the scope of the Fundamental Rights jurisdiction of this Court and contrary to the doctrine of Separation of Powers enshrined in Articles 3 and 4 of the Constitution,

(d) there is no evidence whatsoever to show that the respondents have carried out any act *ultra vires* or in violation of any law during their tenure,

(e) the petitions do not disclose any specific infringement of any particular Fundamental Right of the petitioners by any particular executive or administrative act within the meaning of the Constitution,

(f) the petitioners have not disclosed whether they are citizens of Sri Lanka in the petition and therefore, are not entitled to any relief prayed for in terms of Article 14(1)(g) of the Constitution,

(g) institutional incapacity,

(h) the doctrine of political question and judicially discoverable and manageable standards,

(i) the applications are out of time and ought to be dismissed in *limine* in terms of Article 126(2) of the Constitution,

(j) the Parliament of Sri Lanka has now appointed a Select Committee to look into the same matters that have been urged by the petitioners in both the Applications, and therefore this court has no jurisdiction to entertain the applications.

Did the respondents violate the Fundamental Rights of the petitioners by introducing tax cuts and thereafter failing to revive them?

Events Leading to the Introduction of the New Tax Policy

The 32A respondent (in SR/FR/195/22 application) and the 1(b) respondent (in SR/FR/212/22 application), the former President published an election manifesto titled "Vistas of Prosperity and Splendour", containing several policy changes, *inter alia*, for the purpose of providing "emergency relief" to the people and local ventures who were suffering under the previous government's policies. Further, he promised to deliver a "new people oriented policy on economics focused on reducing the cost of living and taxes imposed".

The said Manifesto stated;

> *"The prevailing tax system has contributed to the collapse of the domestic economy by entirely discouraging domestic entrepreneur. We would instead, introduce a tax system that would help promote production in the country.*
>
> *The current Inland Revenue Act will be replaced by a new tax law. A new taxpayer friendly simple tax system will be introduced so that it will remain active for several years without changing haphazardly and frequently."*

Thus, a new tax regime with the following would be introduced;

"

(a) *Income tax on productive enterprises will be reduced from 28 to 18 percent,*

(b) *The Economic Service Charge (ESC) and Withholding Tax (WHT) will be scrapped,*

(c) *A simple value added tax of 8 percent will be introduced replacing both the current VAT of 15 percent and the Nation Building Tax (NBT) of 2 percent,*

(d) *PAYE tax will be scrapped and personal income tax will be subject to a ceiling of 15 percent,*

(e) *A five year moratorium will be granted on taxes payable by agriculturists and small and medium enterprises,*

(f) *Various taxes that contribute to the inefficiency, irregularities, corruption and lack of transparency of the tax system will be abandoned. Instead, a special tax will be introduced for different categories of goods and services,*

(g) *Import tariff on goods competing with domestically produced substitutes will be raised,*

(h) *A simple taxation system will be introduced to cover annual vehicle registrations and charges for relevant annual services, replacing the cumbersome systems that prevails now,*

(i) *Various taxes imposed on religious institutions will be scrapped,*

(j) *A zero VAT scheme will be adopted in the case of businesses providing services to Tourist hotels and tourists, if they purchase over 60% of the food, raw materials, cloths and other consumer items locally,*

(k) *Service charges levied on telephones and Internet will be reduced by 50%,*

(l) *Special promotional schemes will be implemented to encourage foreign investments,*

(m) *A tax free package will be introduced to promote investment in identified subject areas,*

(n) *A clear and uncomplicated system of taxing will be in place with the use of internet facilities, special software and other technological services,*

(o) *Information Technology (IT) services, will be totally free from taxes (Zero Tax), considering said industry as a major force in the national manufacturing process,*

(p) *All the Sri Lankans and Foreigners, who bring foreign exchange to Sri Lanka through consultancy services are exempted from income tax."*

At the Presidential Elections held on the 16th of November, 2019, the former President was elected by the people, by a majority vote, as the President of the Republic.

On the 21st of November, 2019, the 2nd respondent was appointed as the Minister of Finance. Thereafter, the former President forwarded a note to the Cabinet of Ministers dated 26th of November, 2019 under the heading **"An Economic Revival Initiative".** It stated, *inter alia,* that the tax system of the country will be restructured as follows;

"As a matter of priority, I recommend the implementation of following measures pending parliamentary approval for amendments to the relevant tax statutes.

(i) *Replace the 15 per cent VAT and 2 per cent NBT on Goods and Services at 8 per cent with effect from 1st December, 2019.*

(ii) *VAT on banking, financial services and insurance to be maintained at 15 per cent and NBT on such services to be removed along with the proposal No. 1.*

(iii) *Tax free threshold for turnover for VAT to be raised from Rs. 1 Mn per month to Rs. 25 million per month or Rs. 300Mn per annum along with the implementation of proposal 1 to provide immediate relief particularly to small and medium businesses in all sectors in the economy.*

(iv) *Tourism business will be treated as export for zero rate provided that 60 per cent of turnover is sourced from local supplies. Tourism industry will be beneficial to local agriculture and locally made manufacturing businesses.*

(v) *Construction Industry to be placed on 14 per cent income tax instead of 28 per cent.*

(vi) *Farm income from agriculture, fishing & livestock to be made income tax free to motivate those engaged in agricultural farming including fish and livestock farming to get the maximum production from the already commenced 2019/2020 Maha season which has been blessed by favourable weather.*

(vii) *Tax imposed on religious institutions to be removed with effect from 1st December 2019.*

(viii) *Pay As You Earn (PAYE) taxes to be removed for these earnings on all inclusive monthly income of Rs. 250,000/= in place of current ceiling of Rs. 125,000/= per month for all public and private sector employees with effect from 1st January 2020.*

(ix) *Withholding Tax on interest income to be removed for those monthly interest income less than Rs. 250,000/=.*

(x) *Monthly income in excess of Rs. 250,000/- in any source of income will be liable to pay personal income tax at progressive weights of 6 per cent, 12 per cent, 18 per cent for every Rs. 250,000/= tax slabs.*

(xi) *Sri Lankans providing professional services for the receipt of foreign currency, the foreign currency earnings to be exempted from income tax with effect from 1st December 2019.*

(xii) *IT and enabling services to be made tax free from all taxes.*

(xiii) *Telecommunication Levy to be reduced by 25 per cent.*

It is possible that the proposed measures will have some reduction in revenue. However, potential benefits from re-engineering the tax system will eventually revive revenue.

As it will take some time to recoup Government revenue, it is necessary to go-slow on public spending in order to manage fiscal imbalances. I urge the line Ministries and agencies to curtail all non-essential and non-priority expenditure including those spent on vehicles, travel, building, facilities etc. The Government expenditure including those incurred by semi-Government agencies and SOEs should also decline as taxes on goods and services are to be lower.

Therefore, I request the Minister of Finance, Economy & Policy Development to take appropriate action to implement this programme."

[emphasis added]

At the Cabinet meeting held on the 27th of November, 2019, the Cabinet Paper No.19/3337/201/001 and a Note to the Cabinet dated 26th of November, 2019, by the former President on "**An Economic Revival Initiative**" were considered, along with the "*desirability of the immediate impact on the economy and the well-being of the people"* in the country. After discussion, the Cabinet of Ministers decided, *inter alia*;

"1) *to grant approval-*

(a) to implement the proposals as stated in the above Note by the President;

(b) for the implementation of the proposals to cut taxes pending Parliamentary approval;

2) to instruct the Legal Draftsman to draft amending legislation for the respective laws and legislation for new laws to implement the said proposals in the above Note;

3) to direct the Secretary, Ministry of Finance, Economy and Policy Development

(i) *to take expeditious action for the implementation of the decision,*

(ii) *to submit the draft legislation prepared by the Legal Draftsman together with the clearance of the Attorney General for the same, to the Cabinet through the Minister for consideration, and*

(iii) *to issue circular instructions to all Secretaries to Ministries and other relevant authorities, to curtail all non-essential and non-priority expenditure."*

On the 4th of December, 2019, the former Minister of Finance, the 2nd respondent, submitted a Memorandum to the Cabinet of Ministers with the heading "**National Policy Framework of the Government: A Reconstructed Country with a Future Vistas of Prosperity and Splendour".**

In the said Memorandum, it was stated that the former President *"took office as the 7th Executive President of the Republic on the 18th of November, 2019".* In his manifesto, it was stated;

> *"Gotabaya Presents to you a Reconstructed Country with a Future, Vistas of Prosperity and Splendour."*

It was further stated that "*the President's objective was to convert the above manifesto into a reality and achieve the outcome forthwith. Hence, it was imperative for all Ministries, Departments, Public Institutions, Provincial Councils and Local Authorities etc. to accept the above manifesto as the national policy framework of the government in their functions and duties and take maximum effort to make it a reality".*

Having considered the said Memorandum, the Cabinet of Ministers granted approval to accept *"A Reconstructed Country with a Future-Vistas of Prosperity and Splendour"* as the national policy framework of the government.

Thereafter, on the instructions of the Minister of Finance, the Commissioner General of Inland Revenue published notices in the newspapers informing the public of the reduction of taxes and the new taxes that were to be implemented, subject to the approval of Parliament.

It is pertinent to note that, at the time of the implementation of the said taxes, Parliament had not enacted the necessary legislation to implement the newly introduced taxes.

Thereafter, the General Election was held on the 5th of August, 2020 to elect the members of Parliament. At the said election, Sri Lanka Podujana Peramuna (SLPP) won the majority seats in

Parliament and formed a government. At the inaugural meeting of the ninth (9th) Parliament held on the 9th of August, 2020, the former President stated in his **Policy Statement**, *inter alia;*

> *"To develop the country, the right vision and plans are needed. The Policy statement, "Vistas of Prosperity and Splendour", placed before the people at the Presidential Election by me contains a national programme that was crafted during a period of nearly four years by incorporating my vision with the ideas and recommendations of national organisations such as Viyathmaga, the findings of the "Conversation with the Village" programme conducted by the Sri Lanka Podujana Peramuna, the discussions held with other political parties, and the ideas contributed by the general public.*
>
> ***In accordance with that programme, we have already taken several steps including the easing of taxes that were unduly burdening the public, introducing a high degree of transparency and efficiency to the Government administration, and curtailing unnecessary Government expenditure.***
>
> ***After we assumed office, we provided tax concessions targeting local entrepreneurs. Interest rates were brought down to encourage businesses. Competitive imports were restricted in order to protect local entrepreneurs and industrialists."***
>
> [emphasis added]

Further, such reductions were detailed by the 2nd respondent during the Budget Speech made on the 17th of November, 2020, for the year 2021. At the aforementioned Budget Speech, the 2nd respondent stated as follows;

> ***"(a) As stated in "Vistas of Prosperity and Splendour", the government simplified the tax policy with effect from January 2020 in order to better facilitate tax payers and to make the tax administration more efficient;***
>
> ***(b) I propose to maintain the VAT unchanged at 8 percent, for businesses with a turnover of more than Rs. 25 million per month engaged in the import and***

manufacture of goods or provision of services, except in the case of banking, financial and insurance sectors;

Personal Income Tax will apply on earnings from employment, rent, interest, dividends or any other source only if it exceeds Rs.250,000 per month. Withholding tax on rent, interest or dividends and the PAYE tax (Pay As You Earn) and taxes on interest have been abolished;"

Furthermore, the 2nd respondent proposed to effect further reductions in taxes in the aforementioned Budget Speech, in the following manner;

"

(a) Individuals and companies engaged in farming, including agriculture, fisheries and livestock farming will be exempted from taxes in the next 5 years. Earnings from both domestic and foreign sources by those engaged in businesses in Information Technology and enabling services and also their earnings when made while being resident or non-resident will also be exempted from income taxes,

(b) So as to promote the listing of local companies with the Colombo Stock Exchange, I propose to provide a 50 percent tax concession for the years 2021/2022 for such companies that are listed before 31 December 2021 and to maintain a corporate tax rate of 14 percent for the subsequent three years,

(c)I propose to simplify the Taxes on Capital Gains, where such taxes will be calculated based on the sale price of a property or the assessed value of a property whichever is higher. I propose to exempt the tax on dividends of foreign companies for three years if such dividends are reinvested on expansion of their businesses or in the money or stock market or in Sri Lanka International sovereign bonds,

(d) In order to promote the Colombo and Hambanthota ports as commodity trading hubs in international trading, and to encourage investments in bonded warehouses and warehouses related to offshore business I propose to exempt such investments from all taxes."

Moreover, the new government took steps to enact new legislation with retrospective effect in respect of the tax cuts introduced after the said Presidential election.

Accordingly, the approval of the Cabinet of Ministers was obtained to enact the said legislation, and the Legal Draftsman drafted the necessary Bills.

On the 12th of March, 2021, the Minister of Finance presented to the Cabinet of Ministers a Cabinet Paper No.21/0475/304/033-1 under the heading "**Implementation of New Tax Proposals**", which was considered by the Cabinet of Ministers along with Cabinet decisions dated 26th of August and 27th of November, 2019 and the certificates issued by the Attorney General inferring Article 77(1) of the Constitution with regard to the constitutionality of the draft Bills.

After discussion, the Cabinet of Ministers decided to grant approval to publish the necessary Bills in the government *Gazette*s, subject to the amendments proposed by the Attorney General, and to place them in Parliament in order to enact the necessary fiscal legislation to reduce taxes. Accordingly, the said Bills were published in the government *Gazettes* and tabled in Parliament.

It is pertinent to note that after the said Bills were tabled in Parliament, the Value Added Tax Bill and the Inland Revenue (Amendment) Bill were challenged in the Supreme Court under Article 121(1) of the Constitution. After the hearing, the Supreme Court determined that the said Bills can be passed in Parliament, subject to the amendments suggested by the court.

Paragraph 2.9.2 of the Auditor General's Report stated;

"The following matters are included in the Road map 2020 delivered by the Governor of the Central Bank, Prof. W D Lakshman on 06 January 2020.

a) *Recent tax reform initiatives constitute a much needed transformation of country's tax system towards greater simplicity. The already announced tax relief measures are expected to stimulate the economy while actively contributing to improve business confidence. Any revenue shortfall due to the changes in taxes announced recently is expected to be largely offset by action taken to eliminate unproductive current expenditures and to priorities capital expenditure.*

b) *It is expected that the fiscal consolidation path remains intact and level of public debt stock remains sustainable.*

c) *The central Bank will continue to allow greater flexibility in determining the exchange rate based on market forces and will allow the exchange rate to act as shock absorber in the envisaged monetary policy framework. Accordingly, Central Bank's intervention in the domestic foreign exchange market will be limited only to curtail any excessive volatility in the exchange rate.*

d) *The continuation of the EFF program with the IMF is likely to be instrumental in supporting external sector stability in the medium term. A sustained improvement in the external sector requires policies aimed at promoting domestic production and exports of goods and services and inflows of the non-debt creating types.*

e) *External borrowing contributes to widen the deficit in the external current account further. In addition, the increased foreign debt service payments drain the country's international reserves, which serve as a buffer for external shocks. Therefore, while fiscal consolidation efforts continue, it is important to maintain the current account deficit in the balance of payments at sustainable levels by strengthening the trade sector."*

Fiscal Policy

Fiscal policy consists of the government's income and spending, which influence economic conditions, especially macroeconomic conditions such as demand for goods and services, employment, inflation, and economic growth. Further, fiscal policy is decided by the government. During a recession, governments may lower tax rates or increase spending to encourage demand and increase economic activity. Tax cuts boost demand by increasing disposable income and by encouraging businesses to hire and invest more. In contrast, tax increases do the reverse. Thus, to combat inflation, governments raise taxes or cut government spending to stabilise the economy.

Economic activity reflects a balance between what people, businesses, and governments want to buy and what they want to sell. When the economy is weak, governments try to boost consumer and business demand by cutting interest rates or purchasing financial securities. Further, such demand is boosted by increasing spending and cutting taxes. Tax cuts increase household demand by increasing workers' take-home pay. Moreover, it can boost business demand by increasing the after-tax cash flow of business enterprises, which can be used to pay dividends, expand activity, recruit new employees, expand investments, etc.

The effect of tax cuts depends on the sensitivity of households and businesses. Further, households divide increased income between consumption and saving, and businesses choose to hire and invest more. Tax cuts are expected to free up disposable income and the circulation of money in the economy and push positive growth values in the medium and long term. Furthermore, reducing taxes improves the economy by boosting spending. Moreover, a corporate income tax cut leads to a sustained increase in Gross Domestic Product (GDP) and productivity. Tax cuts also increase funding available for businesses and may increase production and investment.

Moreover, high taxes discourage work and investment. Taxes create a "wedge" between what the employer pays and what the employee receives, so some jobs are not created. High marginal

tax rates also discourage people from working overtime or from making new investments. However, tax cuts reduce government revenue and lead to budget deficits or growth in government debt.

In his first address to the Congress on the 28th of February, 2001, George W. Bush said, *"To create economic growth and opportunity, we must put money back into the hands of the people who buy goods and create jobs."*

Do courts interfere with the fiscal policy of the government?

The petitioners alleged that the reduction of taxes by the government was a contributing factor to the economic crisis. In particular, the petitioners complained of the following three acts and/or inactions related to taxation, i.e.,

(i) arbitrary tax reductions based on the election manifesto without adequate consideration as to the consequences of such reductions,

(ii) failure to make and/or recommend timely changes to tax policy despite clear evidence as to the failure of the said policy and of the negative effects of such tax policy, and

(iii) arbitrary financial decisions without obtaining or giving effect to the advice of the Central Bank and without adequate plans or forecasts as to the result of the said decisions.

Article 148 of the Constitution reads as follows;

> **"*Parliament shall have full control over public finance.*** *No tax, rate or any other levy shall be imposed by any local authority or any other public authority except by or under the authority of a law passed by Parliament or of any existing law."*
>
> [emphasis added]

Hence, it is clear that the taxes which fall within the scope of public finance comes within the purview of Parliament. A similar view was expressed in the determination of the ***Value Added Tax (Amendment) Bill*** **(2016) S.C. (S.D.) No. 30/2016 to S.C. (S.D.) No. 33/2016,** where it was observed;

> *"Article 148 makes it mandatory that no tax, rate or any other levy shall be imposed by any local authority or any other public authority,* ***except by or under the authority of a law passed by Parliament or of any existing law.***
>
> *Accordingly, Article 152 is a special provision dealing with the manner in which a Bill affecting public revenue shall be introduced in Parliament."*
>
> [emphasis added]

The laws passed by Parliament to reduce taxes were as follows;

Date Certified by the Speaker	**Name of the Act**
31st October, **2019**	Removing of Carbon Tax **Finance Act, No. 21 of 2019**
12th October, **2020**	Removing NBT (Nation Building Tax) **NBT (Amendment) Act, No. 03 of 2020**
12th October, **2020**	Removing economic service charge **Economic Service Charge (Amendment) Act, No. 4 of 2020**

12th October, **2020** Debt Repayment Levy removed.

Finance (Amendment) Act, No. 2 of 2020

13th May, **2021** Reducing VAT (Value Added Tax) rate to 8% from 15%

Threshold for registration of Value Added Tax increased to Rs. 300 million per annum from Rs. 12 million per annum and Information Technology and enabling services exempted from Value Added Tax.

Value Added Tax (Amendment) Act, No. 9 of 2021

13th May, **2021** WHT (Withholding tax) on any payments made to any resident person removed except for:

- WHT at a rate of 14% on the amounts paid as winning from lottery, reward, betting or gambling.
- WHT at the rate of 2.5% on sale of any gem at an auction conducted by the National Gem and Jewellery Authority.
- WHT on payments made to non-resident persons.

PAYE (Pay As You Earn) tax on any employment receipts to any resident or non-resident person was removed. Accordingly, such employment receipts are subject to personal income tax rates of 6%, 12% and 18%.

Personal income tax revised to 6%, 12% and 18% from 4%, 8%, 16%, 20% and 24%.

Tax free threshold increased to 3 million per annum on any income from 1.2 million per annum from employment income

	and 500,000 from personal income. Income tax slabs increased to 3 million per annum from 600,000 per annum. Corporate income tax reduced. Standard corporate income tax rate reduced to 24% from 28%. For construction reduced to 14% from 28%. For manufacturing revised to 18% **Inland Revenue (Amendment) Act, No. 10 of 2021**
8th of April, 2022	Surcharge tax was introduced **Surcharge Tax Act, No. 14 of 2022**

Further, the Telecommunication Levy was reduced from 15% to 11.25% by a *Gazette* Notification with effect from the 1st of December, 2019. Moreover, on or about the 6th of December, 2019, concessionary rates and exemptions were granted for the importation of some items.

Thus, it is evident that the said fiscal legislation was passed in Parliament under Article 148 of the Constitution with retrospective effect.

Legislative Power of Parliament

Enacting legislation is the function of Parliament in terms of and under Chapters X and XI of the Constitution.

Article 1 of the Constitution states that Sri Lanka is a Free, **Sovereign**, Independent and Democratic Socialist Republic. Further, Article 3 states that the sovereignty is in the People and is inalienable. Article 4 states how the said sovereignty of the People is exercised and enjoyed.

Accordingly, the legislative power is exercised by Parliament and by the People at a Referendum, the executive power, including the defence of the Republic, is exercised by the President, and the judicial power is exercised by Parliament through courts, tribunals, and institutions created and established, or recognised, by the Constitution or created and established by law, except in regard to matters relating to the privileges, immunities, and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law.

A critical analysis of the Constitution shows that there is a separation of powers between the legislature, executive and the judiciary. Therefore, the aforementioned three organs act independently from each other in their own sphere. Hence, none of the said organs of the State have authority to supervise or interfere with the other organs except as permitted by law.

It is pertinent to note that while Article 118 of the Constitution deals with the general constitutional jurisdiction of the Supreme Court, Articles 120, 121 and 122 refer to the ordinary and special exercise of the constitutional jurisdiction in respect of parliamentary Bills. Further, Article 123 has conferred jurisdiction on the Supreme Court to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution. In addition to the aforementioned powers, Article 124 of the Constitution has conferred jurisdiction on the Supreme Court to determine the **legislative process** in respect of Bills.

Post legislative review and the jurisdiction of courts

Article 80(3) of the Constitution reads as follows;

> "***Where a Bill becomes law*** *upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question,* ***the validity of such Act*** *on any ground whatsoever*."
>
> [emphasis added]

Accordingly, Article 80(3) of the Constitution has ousted the jurisdiction of courts and tribunals in considering the validity of the Acts passed by Parliament once they are certified by the President of the Republic or the Speaker of Parliament.

Legislative Process

Our Constitution and the Standing Orders of Parliament provides to present two types of Bills in Parliament. Namely, Private Member's Bills and government Bills. (Only government Bills are discussed in this judgment) A government Bill is initiated by the line Ministry, and the Minister in charge of the subject presenting a Memorandum to the Cabinet of Ministers **setting out the policy and the justification to enact legislation** and seeking approval from the Cabinet of Ministers to enact the necessary legislation, and to request the Legal Draftsman to draft the Bill. If the Cabinet of Ministers consents to the enacting of the law, they will authorise the line Ministry to request the Legal Draftsman to draft the necessary legislation.

Once the Legal Draftsman prepares the Bill, it will be sent to the Attorney General to consider the constitutionality of the Bill. Thereafter, the said Minister will present the draft Bill to the Cabinet of Ministers along with the 'certificate' issued by the Attorney General in terms of Article 77(1) of the Constitution and seek the approval to publish the Bill in the government *Gazette* and to table it in Parliament.

However, the Constitution sets out certain steps that are required to be followed by the Cabinet of Ministers and also before a Bill is placed on the Order Paper in Parliament. Particularly, in respect of fiscal matters, urgent Bills and Bills that are applicable to the subjects in the 9th Schedule to the Constitution.

Further, Article 124 of the Constitution states;

> *"Save as otherwise provided in Articles 120, 121 and 122, no court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill* ***or its due compliance with the legislative process, on any ground whatsoever.****"*
>
> [emphasis added]

A careful consideration of the phrase 'its due compliance with the legislative process' in Article 124 shows that the Supreme Court has the jurisdiction to consider the legislative process applicable to Bills subject to Articles 120, 121 and 122 of the Constitution. As stated above, in terms of Article 4(a) of the Constitution, the legislative power of the People is exercised by Parliament and by the People at a Referendum. Further, another instance where people exercise legislative power is when a Bill is considered by the Supreme Court in terms of and under the aforementioned Articles in the Constitution. This was discussed in the determination in the ***Municipal Councils (Amendment) Bill, Urban Councils (Amendment) Bill, and Pradeshiya Sabha (Amendment) Bill*** **S.C. (S.D.) Nos. 25-33, 36-41, 43-52, 54, 56/ 2023.**

Thus, when the constitutional jurisdiction of the Supreme Court is invoked under Articles 120, 121 and 122 in respect of a Bill, the Supreme Court will consider not only the constitutionality of the Bill but also its due compliance with the legislative process.

Similar views were expressed in the ***Divineguma Bill*** **S.C. (S.D.) No. 04/2012 to S.C. (S.D.) No. 14/2012,** where the Supreme Court observed;

> *"... In such circumstances, we determine that the Supreme Court has the sole and exclusive jurisdiction to inquire into or pronounce upon, the Constitutionality of a Bill and* ***its procedural compliance, before such Bill is placed on the Order Paper of Parliament."***
>
> [emphasis added]

Further, the ***Water Services Reform Bill*** **S.C. (S.D.) Nos. 24 and 25/2023** considered the requirement to comply with Article 154G of the Constitution and observed;

> *"For the reasons set out above we make a determination in terms of Article 120 read with Article 123 and 154G of the Constitution that the Bill is in respect of a matter set out in the Provincial Council List and shall not become law unless it has been referred by the President to every Provincial Council as required by Article 154G(3)G of the Constitution. Since the Bill has been placed on the Order Paper of Parliament without compliance with provisions of Article 154G(3) we*

would not at this stage make a determination as to the other two grounds of challenge referred to above."

[emphasis added]

Moreover, in the ***Value Added Tax (Amendment) Bill*** **S.C. (S.D.) No. 30/2016 to S.C. (S.D.) No. 33/2016** the Supreme Court observed;

"... Thus, in the same way Article 148 had to be complied with, Article 152 too should be strictly complied with and the Court can't brush aside the words used in Article 152 as being inappropriate or surplus.

Since the due process had not been complied with in terms of Article 78 (2) and 152 of the Constitution before the Bill was introduced in Parliament, *we make a determination in terms of Articles 120 and 121 read with Article 123 and 152 of the Constitution that no determination would be made at this stage on the other grounds of challenge raised by the Petitioners."*

[emphasis added]

Further, in urgent Bills, the Supreme Court will inquire into whether there was a decision of the Cabinet of Ministers to consider the Bill as an urgent Bill.

In the ***Nominations Commission Bill*** **S.C. (S.D.) No. 1/91**, it was observed;

"A Bill titled "An Act to establish a Nominations Commission; and to provide for matters connected therewith or incidental thereto" ["the Nominations Commission Act, No. of 1990"] was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in view of the Cabinet of Minister the Bill is urgent in the national interest."

Thus, it shows that though the legislative power is vested with Parliament in terms of Article 4(a) of the Constitution and the said power begins with a Member of Parliament presenting a Bill to

Parliament, **the legislative process commences with a Minister submitting a Cabinet Memorandum to the Cabinet of Ministers setting out the policy and the justification for the need to enact legislation in respect of a particular matter.**

Further, matters of finance, initiation and administration are within the purview of the executive, while control is vested with Parliament. A similar observation was made in the ***Appropriation Bill*** **(1986) 29;**

> *"The machinery of national finance is based on the fundamental distinction between the* ***functions of initiation and administration which are vested in the Executive****, and of control which is vested in Parliament. To keep intact the principle of the financial initiate of the Executive there developed the restrictions on the power of amendment…"*
>
> [emphasis added]

Hence, I am also of the opinion that the legislative process commences not from the time a Bill is placed on the Order Paper in Parliament but from the time a Cabinet Memorandum is submitted to the Cabinet of Ministers seeking approval to commence drafting the Bill.

In the circumstances, once a Bill becomes a law upon the certification of the President or the Speaker, in terms of Article 80(3) of the Constitution, **no court or tribunal can inquire into, pronounce upon or call into question the validity of such Act or its due compliance with the legislative process** on any ground whatsoever.

Further, the scope of Article 124 of the Constitution was discussed by a full bench of the Supreme Court in ***Wijewickrema v. Attorney General*** **(1982) 2 SLR 775** where it was held;

> *"On the alleged ground that 144 members of Parliament had signed and delivered undated letters resigning their office to His Excellency the President, the plaintiff contends that "the said 144 members of Parliament were incapable of voting according to the law and the Constitution for the Fourth Amendment to the Constitution on the 4th November, 1982, and that notwithstanding the purported certification of the Speaker of the Parliament that the Fourth Amendment to the Constitution has been duly passed by a two-thirds majority of*

Parliament, the Fourth Amendment to the Constitution is not a Bill that has been duly passed by the Parliament at all and cannot therefore be submitted to the People at a Referendum.

…

…

The fundamental question involved in this action is whether Article 124 of the Constitution bars the jurisdiction of any Court to decide the constitutional issue raised by plaintiff.

In our view the plaintiff's action involves basically the question whether the Fourth Amendment to the Constitution has been validly voted upon as a Bill for the amendment of the Constitution. Our unanimous decision in this basic question is that the Court is barred by the provisions of Article 124 of the Constitution which provides:

> *"Save as otherwise provided in Article 120, 121 and 122 no Court ……shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever."*

from inquiring into or pronouncing upon the validity of the Bill for the amendment of the Constitution, referred to in the plaint."

A careful consideration of Articles 80(3) and 124 of the Constitution show that Article 80(3) is applicable to the Bills passed by Parliament, and the certificate is issued by the President of the Republic or the Speaker. On the converse, Article 124 applies to, *inter alia*, the legislative process which takes place prior to a Bill being presented to Parliament by a Member of Parliament.

In the circumstances, I am of the view that the policy decision taken by the Cabinet of Ministers to enact legislation with retrospective effect to reduce taxes cannot be challenged in courts now

as the said decision forms part of the legislative process in enacting the Acts that are under reference.

Further, though at the time of introducing the tax cuts there was no legislation in place, subsequently the legislation was enacted with retrospective effect to cover the said period. Hence, this court lacks jurisdiction to review the policy of the government to reduce taxes prior to the enactment of legislation applicable to the said period.

However, the issues with policy or its appropriateness are not matters for consideration by the judicial branch of government. In the ***Nation Building Tax (Amendment) Bill*** **S.C. (S.D.) No. 34/2016** it was observed;

> *"As Warrington L.J. in Short Vs. Poole Corp (1926) C.H. Division 60(91) stated that "**With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."***
>
> [emphasis added]

Further in the ***Fiscal Management (Responsibility) (Amendment) Bill*** **S.C. (S.D.) No. 28/2016 and S.C. (S.D.) No. 29/2016** this court observed;

> *"Thus, it becomes the policy decision of the Government to increase the Government guarantee limit from 7 percent to 10 percent. **The Court cannot strike down a policy decision taken by the Government merely because it feels another policy decision would be wiser or logical. The Courts is not expected to express its opinion as to whether at a particular situation any such policy should have been adopted or not. It is best left to the Government to decide on such matters which affects the interests of the economic progress and fiscal management of the country."***
>
> [emphasis added]

The reviewability of policy was also adverted to in the ***Special Goods and Service Tax Bill*** **S.C. (S.D.) Nos. 1-9/2022** where it was observed;

> *"Following on with the comment made by the Supreme Court in the Nation Building Tax (Amendment) Bill, [SC SD 34/2016], it is necessary for this Court to observe that* ***this Court is devoid of jurisdiction to comment on the prudence or otherwise of a particular policy formulated by the Executive and sought to be converted into legislation by the enactment of a law by Parliament. Thus, this Court will refrain from doing so, even in instances where there appears to be compelling public and national interest considerations which may warrant an adverse comment being made."***
>
> [emphasis added]

However, if an Act requires the executive to promulgate subordinate legislation and the executive fails and/or neglects to do so, courts have the power to compel the executive to promulgate the necessary subordinate legislation that are required to be made under the Act.

A careful consideration of the reduced taxes, the Note to the Cabinet dated 26th of November, 2019 under the title "An Economic Revival Initiative" shows that the sole purpose of the reduction of taxes was to resurrect the economy that was adversely affected by the Easter Sunday bombings in the year, 2019. Moreover, the said policy to reduce taxes benefited the workforce in this country, business enterprises and the public in general. Thus, it is apparent that the policy of the then government to reduce taxes was mainly a people-centric move and in line with one of the accepted economic policies of the world in addressing recession.

Does the court have jurisdiction to pronounce on the failure to enact legislation by the executive?

As stated above, the legislative process commences by a Minister submitting a Memorandum to the Cabinet of Ministers seeking approval to enact legislation. However, in terms of Article 4(a) of the Constitution, the legislative power of the people shall be exercised by the Parliament. Thus, enacting legislation fairly and squarely falls within the purview of Parliament and not within the powers of the executive.

Erskine May Parliamentary Practice (Twenty-fourth edition) at page 183 states;

> *"The authority of Parliament over all matters and persons within its jurisdiction was formally unlimited. A law might be unjust or contrary to sound principles of government; but Parliament was not controlled its discretion, and* ***when it erred, its errors could be corrected only by itself."***
>
> [emphasis added]

Hence, in view of the separation of powers enshrined in the Constitution, the courts cannot compel either the executive, the Cabinet of Ministers, or Parliament to enact legislation or to pronounce on the failure to enact legislation by any of the said organs of the State.

In any event, even if (in a hypothetical situation) the courts were to direct the executive to enact legislation, Parliament is not bound to give effect to such a direction. Hence, no purpose could be achieved by such a direction or observation issued by court. It is pertinent to note that Sri Lanka has experienced two instances where the court granted directions to Parliament and on both occasions, Parliament refused to comply with the same, citing separation of powers set out in Article 4 of the Constitution.

Further, enacting, amending or repealing laws falls within the scope of the legislature, and therefore, even the executive cannot compel Parliament to enact legislation.

Furthermore, any pronouncement by the courts with regard to the legislative procedure in respect of an Act passed by Parliament is a collateral attack on the said Act, which is excluded from the jurisdiction of court by Article 80(3) of the Constitution.

Hence, I am of the view that the respondents cannot be held responsible for the introduction of tax cuts and not enacting, repealing or amending the legislation brought to reduce taxes.

Moreover, any pronouncement of the legislative process or the failure to repeal or amend an Act by court would violate Article 80(3) of the Constitution as it would be a collateral attack on the existing Act.

In any event, it is evident from the Cabinet Memorandum dated 3rd of January, 2022 and the Note to the Cabinet dated 6th of March, 2022, the government had taken steps to introduce fiscal legislation in respect of Surcharge Tax and to increase Value Added Tax.

Was There A Delay In Seeking Assistance From The International Monetary Fund?

Events leading to the decision of the Cabinet of Ministers not to seek the assistance of the IMF

The IMF was created in the wake of World War II to manage the global regime of exchange rates and international payments. Since the collapse of fixed exchange rates in the year 1973, the fund has taken on a more active role. The IMF assists member nations in different capacities. Its most important function is the ability to provide loans to member nations in need of bailouts. Further, if a country has a deficit in its balance of payments, the IMF can step in to fill the gap. However, borrowing governments must adhere to the conditions attached to these loans by the IMF, including prescribing economic and fiscal policies.

Moreover, such conditions may cause severe hardships to the general public of the country that seeks assistance from the IMF. Hence, some countries are reluctant to seek the assistance of the IMF. Furthermore, there are instances where countries seek the assistance of the IMF as a last resort and may give up the IMF programmes without completing them due to their inability to comply with the stringent conditions imposed by the IMF. In fact, on several occasions, Sri Lanka has discontinued IMF programmes due to its inability to comply with the conditions laid down by the IMF.

The staff of the IMF visited Sri Lanka from 29th of January, 2020 to 7th of February, 2020. Afterwards, the press release issued by them on the 7th of February, 2020 stated, *inter alia*, that the economy is gradually recovering from the terrorist attacks, the recovery is supported by a solid performance of the manufacturing sector and a rebound in tourism and related services in the second half of the year, high frequency indicators continue to improve, and growth is projected to rebound to 3.7 percent in 2020 as a result of the recovery in tourism, and inflation is projected to remain at 4.5 percent in line with the Central Bank of Sri Lanka, etc.

The IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10th of February, 2022, categorised, for the first time, the sovereign debt of Sri Lanka as "unsustainable" in general and the external debt portfolio in particular.

Further, after the Executive Board of the IMF concluded the Article IV consultation with Sri Lanka on the 25th of February, 2022, it released a press release on the 2nd of March, 2022.

Policy decision of the Cabinet of Ministers in respect of seeking IMF assistance

Memorandum

It is pertinent to note that when the Central Bank and the government became aware of the financial and economic difficulties that the government had to face, particularly in repayment of local and international loans obtained by Sri Lanka, the Minister of Finance submitted a Cabinet Memorandum dated 2nd of January, 2022 under the heading **"Economy 2022 and the way forward**" to the Cabinet of Ministers and stated, *inter alia, "while the budget for 2022 has been approved, the external outlook remains a matter of concern and requires careful analysis".*

Moreover, the said Memorandum stated that the expected outflows of the country are;

- *"Total debt servicing payments in 2022, inclusive of debt stock of Sri Lanka Development Bonds and Foreign Currency Banking Units, approximately is USD 6.9 billion. Further, it includes international sovereign bonds maturing in January, amounting to USD 500 million international sovereign bonds maturing in July, amounting to USD 1,000 million.*

- *USD 1,300 million is needed in January, 2022 itself for foreign debt servicing payments with USD 3,100 million being required for foreign debt servicing payments during the first quarter of 2022.*

- *Goods imports expected to be approximately USD 22 billion."*

-

Further, expected inflows to the country during 2022 are;

"Approximately USD 32 billion is expected as total foreign currency inflows from goods and services exports. i.e.,

- *Exports of goods that are expected to reach around USD 20.7 billion, while export income from services are expected to yield USD 7 billion. Export income from apparels alone is expected to reach around USD 6.8 billion. In the case of services IT and related services are expected to yield an income of around USD 2.3 billion.*
- *Tourism is showing signs of returning to normalcy and inflows from tourism is expected to be around USD 1.8 billion. While all effort should be taken to ensure that number of tourists exceed 2 million, and it is important that new regulations, insurance schemes that discourages such influx of tourist not be pursued.*

- *During 2020, around $3,000 had pursued employment opportunities overseas while in 2021, it had been around 116,000. It is expected to increase to 300,000, broaden job opportunities, that is, by new jobs with higher salaries and focus on new job markets to increase foreign remittance to USD 7.5 billion level.*

- ***Foreign Direct Investment should increase up to USD 1 billion."***

[emphasis added]

Furthermore, in the said Cabinet Memorandum, it was stated that the short and medium-term proposals are;

"The Budget 2022 outlined clearly the state of the economy since independence, including the issues that have arisen due to foreign commercial borrowings, the highly bureaucratic and outdated systems that have been inimical not only in attracting foreign investments but also in encouraging local entrepreneurs to operate, and the impact of the non-implementation of reforms compared to peer

countries in the Asian region. It is apparent that although the short term issues could be resolved, there is a significant requirement to engage in long term strategies and reforms in all sectors that address the structural issues in the economy to create a more sustainable path.

(i) *In this context, a package which addresses the liquidity issues and provides direct support for import was discussed during my visit to India. Annual imports from India is approximately USD 3,000 million on average and includes about 70% of country's requirement of imported medicine and food items. Postponement of payments on imports from India facilitates easy financing of other imports.*

(ii) *Government has also been supported by China with the extension of a SWAP facility amounting to USD 1,500 million has had a significant impact in helping to strengthen the CBSL reserve position by the end of 2021.*

(iii) *It is required to engage with both China and Japan is negotiating a package similar to India given that 20% of the outstanding foreign debt of the government is attributable to both China and Japan. At the same time given the imports from both countries exceed the exports, i.e., the Terms of Trade with both China and Japan are not favourable to Sri Lanka, the government should engage with China and Japan to create a facility that supports trade and repayment of their debt. Such support will further enhance the liquidity position. As such, it was proposed to appoint Members of the Cabinet of Ministers to engage discussion with China and Japan to engage in discussion as noted.*

(iv) *Apart from the inflows from export of goods and services, remittances and FDI's, during 2022 if the high end real estate and lands identified by the Urban Development Authority (UDA) could be given on long term lease, another USD 1-1.5 billion could be raised.*

(v) *In this regard, a sustainable strategy will have to be implemented to address the issues emanating from the debt stock exceeding the GDP where the ISB's are*

expected to mature every year until 2029 at around USD 1,000- 1,500 million per annum. The government will work with Multilateral and Bilateral Agencies and investment Banks to exploit the green financing market to raise debt at a lower interest rate and create the space to manage the stock of debt leveraging on the interest rate differential.

(vi) *The space available to finance large infrastructure financed by debt is limited. As such, infrastructure requirements with in particular with commercial value specially in the electricity and energy sectors, the port sector requires to attract investments into such sectors. This requires the government to be in possession of such investment attracting strategies.*

(vii) *The renewable energy sector in particular has seen significant number of inquiries from top credible investors and it is regrettable that in the last 24 months only 15 MW of renewable energy had been added to the main grid. It is therefore clear that the line Ministry nor the CEB is yet in possession of a cohesive strategy to attract investments. The Budget 2020 required idle land belonging to the government and Mahaweli was to be given to the investors to engage in agriculture and other activities. It appears that this process has not been implemented as expected. Hence, the entire government machinery needs to turn around their operations to facilitate a more efficient and effective investment climate."*

Moreover, it stated;

"

(I) *To provide Public Servants with a monthly allowance of Rs. 5,000 from January. From January employees in corporates and boards will also be entitled to this. Given that there are 1,450,450 employees currently in the public sector, such payment of allowance will result in the incurring of an additional expenditure of Rs. 87 billion.*

(II) *To provide to the pensioners a monthly allowance of Rs. 5,000. Given that 666,480 pensioners are already in the system, the Government will incur an additional cost of Rs. 40 billion.*

(III) *To request the Hon. Minister of Labour to engage in discussion with the required parties to extend the aforementioned benefits to the employees in the private sector as well.*

(IV) *To provide an extra monthly allowance of Rs. 1,000 to Samurdhi beneficiaries receiving Rs. 3,500 per month. This extra allowance will also be made available to other Samurdhi beneficiaries as appropriate.*

(V) *To secure the incomes or to mitigate any loss of income that may occur due to a decline in harvest of rice farmers, the government will provide an additional Rs. 25 per kilogramme in addition to the Rs. 50 per kilogramme i.e., the guaranteed price. It is expected that such assistance to farmers will have no impact on the retail prices paid by the consumer.*

(VI) *Conduct a home gardening program to encourage growing of vegetables and fruits for self-consumption. To support such programme which includes the preparation of land, obtaining seeds, and other inputs required home gardens up to 20 perches will be provided with of Rs. 5,000 while those between 20 perches and less than 1 acre will be provided Rs. 10,000. The total cost to the government will be around Rs. 31 billion.*

(VII) *Flour Subsidy- It is decided to provide 15Kg wheat flour monthly at Rs. 80 to plantation worker families. It is further expected that such support will be provided to those plantation workers already registered with the Employees Provident Fund (EPF).*

(VIII) *The import taxes on potatoes and big onions have been reduced by Rs.30/Kg with effect from January 2022.*

(IX) *To completely exempt import of essential food and medicines taxes. These taxes will be revised only in instances where it is necessary to protect the local farmer and producer."*

Further, it stated;

> ***"interest costs, wages and salaries of public servants, and transfers to the vulnerable, including Samurdhi and pensions for the elderly, account for the recurrent expenditures, which will be difficult to curtail. As such, it would require capital expenditures to be curtailed. This would mean that to accommodate the direct costs, as noted alone, around 30% of the capital expenditure will have to be reduced. The impact of the course would be that the government's envisaged growth and development objectives will not be met."***
>
> [emphasis added]

Moreover, it stated;

> *"import of consumer goods which include food, wheat and maize, medicines, sugar, pulses, etc and fuel, coal, fertilizer accounts for almost 40% of the total imports or around USD 8 billion in a year. This would mean, that around an extra Rs. 240 billion will have to be spent on imports, which will also mean that on average, the cost of food stuff will have to increase at the minimum by 20% or so. e.g.;*
>
> - *Price of Dhal which has no tax except a Special Commodity Levy (SCL) of Rs 25 cents will see an increase in the prices to almost Rs. 350- 400 a Kilogramme from the existing Rs. 280 a Kilogramme.*
>
> - *The impact on fuel prices will be such that the cost reflective price of Diesel will mean that diesel prices will increase by around Rs.25 per litre to Rs. 146 per litre.*
>
> *The impact on the entire economy will be enormous. It is also important to take into account the fact that Sri Lanka, like many other countries, is faced with supply side disruptions, which are also likely to continue into 2022 as well. The impact of such disruptions will further push the price of staples and essentials and increase the cost of living at a faster rate than experienced now, and inflation on food items alone will remain at elevated levels.*

The direct beneficiaries of a currency depreciation will be the exporters and the overseas workers remitting foreign funds into the country. While exports of primary products such as tea in bulk form will experience an increase in their income in local currency, the bulk of the other exporters, including exporters of value-added tea, apparels will have a sizable import content, cost of which could increase with a depreciation of the currency, resulting in redactions in profit margins. Local exporters, especially those with significant import components will find that their competitiveness is somewhat compromised."

The said Cabinet Memorandum further stated;

"The impact of an increase in taxes, especially the indirect taxes such as VAT, will be instantaneous and will immediately have an impact on the cost of goods and services to the end consumer. An increase in VAT, since it is a final tax on the retail consumer, will see the retail consumers being subjected to a price increase in excess of 10%. At the same time, apart from the revision in fuel prices as noted above, electricity tariff revisions will also have to be affected. This requires the average revenue per unit of electricity to increase to Rs. 25 per unit from the existing Rs. 16 per unit. Water tariffs too will have to be revised on average by at least Rs. 10 per unit.

While it is ideal to have cost reflective prices, it should also be complemented by a mechanism to buffer the impact of such increased prices on the vulnerable in society through a direct, targeted transfer of assistance. But we have still not been able to put in place the electronic Identity card system (e-ID) that would have supported the identification of the most vulnerable and the most deserved, although it was envisaged to be there by at least December 2021. The absence of such a mechanism to enable the Government to provide assistance in a targeted manner to the most vulnerable will compromise the effectiveness of such targeted support.

It would not be incorrect to state that an IMF programme will require the country to accept conditions that will further disrupt the social fabric of the country. While it is acknowledged that an IMF programme will enable the country to access the

capital markets with better ease, it is our experience that none of the IMF programmes since the late 60's, have resulted in any lasting reforms being implemented in the country.

In fact, it would be pertinent to note that the economic challenges of today are due to two key decisions of the Yahapalana Government, which are;

- *The aggressive borrowing in the International Bond markets resulted in the country borrowing USD 12 billion dollars during 2015-2019 with USD 6.9 billion being borrowed during a 14 months period of April 2018 to May 2019. As a result, the country's foreign currency debt stock reached almost 50% of the total debt stock at the end of 2019 with the stock of ISB's at wound USD 15 billion. This has now reduced to USD 13 billion.*

- *Reduction in the price of Petrol and Diesel in 2015, without any thought to recouping the losses of Ceylon Petroleum Corporation (CPC) or the Ceylon Electricity Board (CEB) or to the possibility of an increase in global oil prices.*

- *It is noted that of the USD 12 billion so raised only around USD 2 billion had been utilized to settle ISBs, while the bulk seems to have been utilized to finance the imports, especially cars and other passenger vehicles. In fact consumption of fuel which had decreased by end 2014 has increased surpassing the previous consumption volumes, although economic growth saw a steady decline. The shortsighted decisions taken for political expediency and the failure of the Yahapalana government to aggressively implement a renewable and a clean energy strategy to use solar and wind in particular as sources of energy together with LNG, complemented by a robust mechanism to support the exporters country's has resulted in the country facing the liquidity crunch that is faced with at present."*

[emphasis added]

In the circumstances, the said Cabinet Memorandum invited the ***"Cabinet of Ministers to deliberate on the aforementioned, bearing in mind that the Government has the capacity to implement a home-grown solution to the issues that the country is faced with".***

The Cabinet of Ministers considered the said Cabinet Memorandum, the clarifications made by the Minister of Finance on the matters stated in the Memorandum, the views expressed by the Minister of Industries stating that the appropriateness of exploring the possibility of obtaining a Credit Line for the importation of essential raw materials required for industries after negotiating with the countries from where such raw materials are imported, the views expressed by the Minister of Trade stating the appropriateness of introducing a mechanism whereby Sri Lankans serving in foreign countries could remit a certain amount of foreign currency monthly to their foreign currency accounts maintained in Sri Lanka and also introducing a special loan scheme either for the construction of a house or for the purchase of other property based on the savings in the account, with a view to encouraging such account holders; and the views expressed by several other Members of the Cabinet pertaining to the course of action proposed in the Memorandum.

Decision of the Cabinet of Ministers

Thereafter, on the 3rd of January, 2022 the Cabinet of Ministers decided, *inter alia*;

"(i) to grant the concurrence of the Cabinet-

(a) *to take the necessary action in implement the proposals in the Memorandum with immediate effect;*

(b) *to take the necessary action on the short term and medium term proposals referred to in the Memorandum;*

(c) ***to implement a home grown solution for the economic issues currently encountered by Sri Lanka, taking into consideration the matters stated in the Memorandum;***

and, "*to request the Secretary to the President to take necessary action to nominate Ministers in consultation with H.E. the President, to negotiate with the relevant countries as proposed in the Memorandum".*

[emphasis added]

Accordingly, it is clear that the Cabinet of Ministers took a policy decision not to seek the assistance of the IMF but to implement a home-grown plan to address the issues that the country was facing. Similarly, as stated above, the Cabinet of Ministers took a policy decision to reduce the taxes referred to above. Thus, in terms of Article 43(1) of the Constitution, all members of the Cabinet of Ministers are collectively responsible for the said decisions and are answerable to Parliament.

Should policy decisions of the government be disturbed or interfered with unless they are found to be grossly arbitrary or irrational?

As stated above, our Constitution is based on the principle of separation of powers, though there are some overlapping Articles in the Constitution with regard to executive and legislative powers. In terms of the Constitution, the three branches of the State are: the legislature, the executive and the judiciary. Separation of powers enshrined in the Constitution was discussed in detail in the judgment delivered in ***Hadabima Authority v. Jathika Seveka Sangamaya*** **(SC Appeal 15/2013) (SC Minutes dated 26th of February, 2015).** Further, each branch of the State has the power to act in its own sphere of activity. The legislature is entrusted with the power to make laws, the executive is to make policies and implement them, and the judiciary is to apply laws, including Fundamental Rights, and interpret laws.

Therefore, making policies and executing them fall within the sphere of activities of the executive and are not within the power of the legislature or the judiciary. Moreover, other than the executive, the other two organs do not have the expertise and knowledge required to make policies. On the other hand, the executive has experts, professionals, administrators, advisors,

etc., in a given field and has the expertise to make policies after taking into consideration all aspects of a matter. Hence, the court would leave policy matters for those who are qualified to address the issues, unless the policy or action is inconsistent with the Constitution and laws, grossly arbitrary or irrational.

A similar view was expressed in ***Film Festivals & Ors. v Gaurav Ashwin Jain & Ors*. (2007) 4 SCC 737**, where the court held;

> *"The scope of judicial review of* ***governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy.*** *Nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary.* ***Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review."***
>
> [emphasis added]

Further, in ***State of Punjab & Ors. Vs Ram Lubhaya Bagga & Ors*. (1998) 4 SCC 117,** it was held;

> *".....When Government forms its policy, it is based on number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion.* ***It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits.*** *The Court would dissuade itself from entering into this realm which belongs to the executive."*
>
> [emphasis added]

Furthermore, the courts cannot express their opinion as to whether, at a particular point in time or in a particular situation, any such policy should have been introduced or not, or repealed, particularly when a policy is accepted by Parliament either at reading of the budget or in any other instances. Hence, it should be left to the discretion of the government.

A similar view was expressed in ***Delhi Science Forum v. Union of India*** **(AIR 1996 SC 1356) at 1359,** where it was held;

> "***What has been said in respect of legislations is applicable even in respect of policies which have been adopted by the Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not*** *.... Courts have their limitations - because these issues rest with the policy makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the Constitutional or statutory provision... This Court cannot review and examine as to whether said policy should have been adopted. Of course, whether there is any legal or Constitutional bar in adopting such policy can certainly be examined by the court."*
>
> [emphasis added]

Further, the power of judicial review would not extend to determining the correctness of a policy or to indulge in the exercise of finding out whether there could be more appropriate or better alternatives. As policymaking is within the domain of the executive, the courts, under the garb of judicial review, cannot usurp the jurisdiction of the decision-maker and make the decision itself. Neither can it act as an appellate authority.

Moreover, complex executive decisions in economic matters may be empirical or based on experimentation. Its validity cannot be tested on rigid principles or the application of any straitjacket formula. In such matters, even experts may seriously or doubtlessly differ. Courts cannot be expected to decide them, even with the aid of experts.

Thus, the courts do not interfere with policy matters or economic decisions, as such matters are highly technical and even experts in that field hold different opinions on the same point. Similar views were expressed in the following judgments.

In ***M/s. Prag Ice & Oil Mills and Another v. Union of India*** **(AIR 1978 SC 1296) at 1305** the Indian Supreme Court held;

> ***"We do not think that it is the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide.*** *Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts."*
>
> [emphasis added]

Moreover, in ***Shri Sitaram Sugar Company Limited v. Union of India*** **(AIR 1990 SC 1277) at 1299**, it was held;

> ***"Judicial review is not concerned with matters of economic policy.*** *The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the "feel of the experts" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness... and whether such findings are consistent with the laws of the land."*
>
> [emphasis added]

Further, in ***Sujeewa Arjune Senasinghe v. Ajith Nivard Cabraal and others*** **(SC/FR/457/2012) (SC Minutes dated 18th of September, 2014)** it was held;

> *"We must not forget that in complex economic policy matters every decision is necessarily empiric and therefore its validity cannot be tested on any rigid formula*

or strict consideration. The Court while adjudicating the constitutional validity of the decision of the Governor or Members of the Monetary Board must grant a certain measure of freedom considering the complexity of the economic activities. ***The Court cannot strike down a decision merely because it feels another policy decision would have been fairer or wiser or more scientific or logical. The Court is not expected to express its opinion as to whether at a particular point of time or in a particular situation any such decision should have been adopted or not. It is best left to the discretion of the authority concerned."***

[emphasis added]

It is pertinent to note that the aforementioned two IMF press releases did not recommend or advise the government to seek its assistance to address possible financial and economic issues.

The aforementioned IMF findings were reproduced in the Auditor General's Report furnished to court. It stated;

"2.7.6 ***IMF Staff had concluded its visit to Sri Lanka during January 29 to February 7, 2020*** *to meet with the new administration and discuss its policy agenda. The press release No. 20/42 including statements of IMF staff teams that convey preliminary findings after a visit to a country had* ***been issued on 07 February 2020.*** *Highlights of the preliminary findings of the visit are as follows.*

a) ***The economy is gradually recovering from the terrorist attacks last April. Real GDP growth is estimated at 2.6 percent in 2019.***
b) ***The recovery is supported by a solid performance of the manufacturing sector and a rebound in tourism and related services in the second half of the year.***
c) ***High frequency indicators continue to improve and growth is projected to rebound to 3.7 percent in 2020****, on the back of the recovery in tourism, and assuming that the Novel Coronavirus will have only limited negative effect on tourism arrivals and other economic activities.*

d) ***Inflation is projected to remain at around 4½ percent, in line with the Central Bank of Sri Lanka (CBSL) target***. *After a sharp import contraction in 2019, the current account deficit is expected to widen to nearly 3 percent of GDP in 2020.*

e) *Preliminary data indicate that the primary surplus target under the program supported by the Extended Fund Facility (EFF) was missed by a sizable margin in 2019 with a recorded deficit of 0.3 percent of GDP, due to weak revenue performance and expenditure overruns.*

f) ***Under current policies, as discussed with the authorities during the visit, the primary deficit could widen further to 1.9 percent of GDP in 2020, due to newly implemented tax cuts and exemptions, clearance of domestic arrears, and backloaded capital spending from 2019.***

g) ***Given risks to debt sustainability and large refinancing needs over the medium term, renewed efforts to advance fiscal consolidation will be essential for macroeconomic stability.***

h) *Measures to improve efficiency in the public administration and strengthen revenue mobilization can help reduce the high public debt, while preserving space for critical social and investment needs. Advancing relevant legislation to strengthen fiscal rules would anchor policy commitments, restore confidence, and safeguard sustainability over the medium term.*

i) *The CBSL should continue to follow a prudent and data-dependent monetary policy and stand ready to adjust rates to evolving macroeconomic conditions.*

j) ***Net International Reserves fell short of the end-December target under the EFF supported program in 2019 by about $100 million amid market pressures after the Presidential elections and announced tax cuts. However, conditions have since stabilized***. *Renewed efforts are needed to rebuild reserve buffers to safeguard resilience to shocks, under a flexible exchange rate.*

k) *Approval of the new Central Bank Law in line with international best practices is a critical step to further strengthen the independence and governance of the CBSL and support the adoption of flexible inflation targeting.*

2.7.7 The Executive Board of the International Monetary Fund (IMF) concluded the Article IV consultation with Sri Lanka on 25 February 2022. ***The press release*** *No. 22/54 in this regard had been issued on 02 March 2022. Highlights of the press release are as follows.*

a) ***Sri Lanka has been hit hard by COVID-19. On the eve of the pandemic, the country was highly vulnerable to external shocks owing to inadequate external buffers and high risks to public debt sustainability, exacerbated by the Easter Sunday terrorist attacks in 2019 and major policy changes including large tax cuts at late 2019. Real GDP contracted by 3.6 percent in 2020, due to a loss of tourism receipts and necessary lockdown measures. Sri Lanka lost access to international sovereign bond market at the onset of the pandemic.***

b) ***The authorities deployed a prompt and broad-based set of relief measures to cope with the impact of the pandemic, including macroeconomic policy stimulus, an increase in social safety net spending, and loan repayment moratoria for affected businesses. These measures were complemented by a strong vaccination drive. GDP growth is projected to have recovered to 3.6 percent in 2021, with mobility indicators largely back to their pre-pandemic levels and tourist arrivals starting to recover in late 2021.***

c) *Nonetheless, annual fiscal deficits exceeded 10 percent of GDP in 2020 and 2021, due to the pre-pandemic tax cuts, weak revenue performance in the wake of the pandemic, and expenditure measures to combat the pandemic. Limited availability of external financing for the government has resulted in a large amount of central bank direct financing of the budget. Public debt is projected to have risen from 94 percent of GDP in*

2019 to 119 percent of GDP in 2021. Large foreign exchange (FX) debt service payments by the government and a wider current account deficit have led to a significant FX shortage in the economy. The official exchange rate has been effectively pegged to the U.S. dollar since April 2021.

d) *The economic outlook is constrained by Sri Lanka's debt overhang as well as persistently large fiscal and balance-of-payments financing needs. GDP growth is projected to be negatively affected by the impact of the FX shortage and macroeconomic imbalances on economic activities and business confidence. Inflation recently accelerated to 14 percent (y/y) in January 2022 and is projected*

to remain double-digit in the coming quarters, exceeding the target band of 4–6 percent, as strong inflationary pressures have built up from both supply and demand sides sincemid- 2021. Under current policies and the authorities' commitment to preserve the tax cuts, fiscal deficit is projected to remain large over 2022–26, raising public debt further over the medium term. Due to persistent external debt service burden, international reserves would remain inadequate, despite the authorities' ongoing efforts to secure FX financing from external sources.

e) *The outlook is subject to large uncertainties with risks tilted to the downside. Unless the fiscal and balance-of-payments financing needs are met, the country could experience significant contractions in imports and private credit growth, or monetary instability in case of further central bank financing of fiscal deficits. Additional downside risks include a COVID-19 resurgence, rising commodity prices, worse-than-expected agricultural production, a potential deterioration in banks' asset quality, and extreme weather events. Upside risks include a faster than-expected tourism recovery and stronger-than-projected FDI inflows.*

f) ***Executive Directors commended the Sri Lankan authorities for the prompt policy response and successful vaccination drive, which have***

cushioned the impact of the pandemic. Despite the ongoing economic recovery, Directors noted that the country faces mounting challenges, including public debt that has risen to unsustainable levels, low international reserves, and persistently large financing needs in the coming years. Against this backdrop, they stressed the urgency of implementing a credible and coherent strategy to restore macroeconomic stability and debt sustainability, while protecting vulnerable groups and reducing poverty through strengthened, well-targeted social safety nets.

g) *Directors emphasized the need for an ambitious fiscal consolidation that is based on high-quality revenue measures. Noting Sri Lanka's low tax-to-GDP ratio, they saw scope for raising income tax and VAT rates and minimizing exemptions, complemented with revenue administration reform. Directors encouraged continued improvements to expenditure rationalization, budget formulation and execution, and the fiscal rule. They also encouraged the authorities to reform state-owned enterprises and adopt cost-recovery energy pricing.*

h) *Directors agreed that a tighter monetary policy stance is needed to contain rising inflationary pressures, while phasing out the central bank's direct financing of budget deficits. They also recommended a gradual return to a market-determined and flexible exchange rate to facilitate external adjustment and rebuild international reserves. Directors called on the authorities to gradually unwind capital flow management measures as conditions permit.*

i) ***Directors welcomed the policy actions that helped mitigate the impact of the pandemic on the financial sector. Noting financial stability risks from the public debt overhang and sovereign-bank nexus, they recommended close monitoring of underlying asset quality and identifying vulnerabilities through stress testing. Directors welcomed ongoing legislative reforms to strengthen the regulatory, supervisory, and resolution frameworks.***

j) *Directors called for renewed efforts on growth-enhancing structural reforms. They stressed the importance of increasing female labor force participation and reducing youth unemployment. Further efforts are needed to diversify the economy, phase out import restrictions, and improve the business and investment climate in general. Directors also called for a prudent management of the Colombo Port City project, and continued efforts to strengthen governance and fight corruption. They noted the country's vulnerability to climate change and welcomed efforts to increase resilience."*

[emphasis added]

Conclusion of the Auditor General

Further, the Auditor General's Report states (page 439);

"3.4 ඉහත 3.1, 3.2 සහ 3.3 හි සඳහන් කරුණු එකක් හෝ කීපයක් හේතුවෙන් ශ්‍රී ලංකා මහබැංකුවට යම් අලාභයකට හේතු වී තිබේද යන්න පිළිබඳ නිරීක්ෂණ

(අ) අධිකරණ නියෝගය ප්‍රකාරව, ප්‍රශ්නූත කරුණු එකක් හෝ ඊට වැඩි ගණනක් හේතුවෙන් ශ්‍රී ලංකා මහබැංකුවට යම් අලාභයක් සිදු වී තිබේද යන්න පිළිබඳව නිරීක්ෂණ ඉදිරිපත් කරන ලෙස සඳහන් කර තිබුණි. එසේ වුවද, මා විසින් මෙහිදී අධිකරණ නියෝගයක් පරිදි සිය විගණන කාර්යය සිදුකලද මෙවැනි සිද්ධීන් හේතුවෙන් යම් අලාභයක් සිදුවී තිබේද යන්න නිගමනය කිරීමට පහත තත්වයන් හේතුවෙන් නොහැකි වී ඇත.

i. **විෂයගත කරුණු තුනම රජයේ ප්‍රතිපත්තිමය තීරණ ලෙස බැලු බැල්මට විද්‍යාමාන වන හෙයින්** රජයේ/මහබැංකුවේ ප්‍රතිපත්තිමය තීරණ හේතුවෙන් සිදුවන යහපත් හෝ අයහපත් ලෙස විවිධාකාරයෙන් විවිධ පාර්ශව විසින් අර්ථ දැක්විය හැකි ප්‍රතිඵලයන්ගේ හිතකර හෝ අහිතකර මුල්‍ය ප්‍රති විපාක මා විසින් ගණනය කිරීම අභියෝගයට ලක් කිරීමට හැකි වීම.

ii. **විෂයගත කරුණු තුන ක්‍රියාත්මක කළ කාලය හා ඒවායේ ප්‍රතිඵලයන් අපේක්ෂා කළ හැකි කාලය තුළ එකී කරුණු තුනට අමතරව රටේ සමස්ථ ආර්ථික ක්‍රියාවලියට බලපෑම් ඇති කළ වසංගත තත්වයක් දිවයින තුළ පැවතීම හා ගෝලීය වශයෙන්ද පැවති එම වසංගත තත්වය**

සහ ඒවායේ යහපත් සහ හෝ අයහපත් ප්‍රතිඵල දේශීය ආර්ථිකයට ද බලපෑම් කිරීම හේතුවෙන් විෂයගත කරුණු තුන හේතුවෙන් පමණක්ම මහ බැංකුවට සිදුවූ මූල්‍යමය බලපෑම නිෂ්චිතව ගණනය කල නොහැකි වීම.

iii. සීමිත විදේශ සංචිත උපයෝගී කරගෙන ගත යුතු වූ ප්‍රශස්ථම තීරණය කුමක්ද යන්න මා හට හට නිර්ණය කළ නොහැකිවීම සහ විවිධ වෘත්තිමය හා සමාජීය තත්වයන් යටතේ එම තීරණය සමපාත වියයුතු යයි නිගමනය කළ නොහැකි වීම.

(ආ) කෙසේ වෙතත්, මෙම කරුණු එකක් හෝ කිහිපයක් හේතුකොටගෙන ශ්‍රී ලංකා මහබැංකුවට යම් අලාභයක් සිදු වී තිබේද යන්න සම්බන්ධ නිශ්චිත නිරීක්ෂණ මෙම වාර්තාවේ අන්තර්ගත නොවුනද ප්‍රශ්නගත එකිනෙක කරුණු සිදු වී ඇති පසුබිම සහ එම ඒකිනෙක කරුණු අනෙකුත් කරුණුවලට සෘජුව හෝ සහ වක්‍රව බලපා ඇති ආකාරය මෙම වාර්තාව පරිශීලනයේ දී නිරීක්ෂණය වනු ඇත.”

[emphasis added]

Accordingly, the Auditor General stated that he is unable to decide whether there is any loss to the Central Bank of Sri Lanka. However, though the said report stated there are delays in taking decisions by the Monetary Board and the government, it does not set out any specific violations of the law by the respondents. Hence, I am of the view that there is no expert evidence before this court to decide on the economic and fiscal issues raised in the said two applications.

Moreover, it is pertinent to note that the effects of COVID-19 were similar or more adverse to the effects that were caused during the ‘Great Depression’ economic crisis in 1929. It adversely affected our export income, which brought forex to the country. Similarly, the said pandemic reduced foreign employment opportunities and thereby adversely affected one of Sri Lanka’s main foreign earnings.

In fact, the effects of the Easter Sunday bombings and the adverse effects of COVID-19, particularly, the unexpectedly large expenditure incurred for island-wide vaccination programmes and quarantine centres, long periods of lockdowns, island-wide curfews, political uncertainty and rivalry, public protests against implementing the economic policies of the government, specifically with regard to privatisation, litigation challenging the privatisation of State entites and geopolitical issues, disturbed the implementation of the policies of the

government. Further, such matters adversely affected the income from tourism and witnessed the withdrawal of overseas and local investors from Sri Lanka. Hence, all such unexpected intervening factors immensely contributed to the economic and financial collapse in Sri Lanka.

Conclusion

In the circumstances, I am of the view that the petitioners have not established that the policy decision of the government not to go to the IMF was grossly arbitrary or irrational. On the contrary, the Auditor General's Report tendered to court, and the material filed by the respondents, particularly the aforementioned Cabinet Memoranda and the decisions of the Cabinet of Ministers, show that the government has considered the pros and cons of going to the IMF, the past experiences with the IMF, the effects of obtaining assistance from the IMF will have on the economy and the people, and thereafter taken the policy decision not to go to the IMF. Moreover, the Cabinet of Ministers and the Monetary Board of the Central Bank of Sri Lanka had taken all possible steps to address economic and fiscal matters to avert a possible crisis. Further, it is common ground that the impugned decisions are policy decisions of the government, except the decision of the Monetary Board. However, the petitioners did not establish that any of those policy decisions violated the law or were grossly arbitrary. Furthermore, as stated in the Auditor General's Report, such decisions were based on various economic theories applicable to macroeconomics. Hence, it is not possible to come to a finding in respect of the issues referred to him by the court.

Did the government take steps to manage the economy without going to the IMF?

Decisions taken by the Cabinet of Ministers under Article 43 of the Constitution to improve the fiscal and economic status of the country

The former Minister of Finance presented Cabinet Memorandum No.20/0804/204/078, on ***"Foreign Resource Mobilization 2020-2025",*** dated 13th of May, 2020, to the Cabinet of Ministers, seeking approval for the following proposals;

“

1. *The proposed external resource mobilization strategy and recommendations,*

2. *Authorize Secretary to the Treasury to appoint a Project Evaluation Committee headed by Dr Lalithasiri Gunaruwan,*

3. *Authorize Secretary Power and Energy, Chairman BOI, and Chainman CEB to ensure the implementation of construction of fourth unit of 300 MW coal power plant as an extension of the Lakvijaya Power Plant as a joint investment by a Chinese investor and Ceylon Electricity Board (CEB) as a foreign investment project under which the equity contribution of CEB is also arranged by the investing Company,*

4. *Authorize Chairman BOI and Secretary to the Ministry of Highways to finalize the investment proposal received on Construction of Elevated Expressway from Athurigiriya Interchange of Outer Circular Expressway to New Kelaniya Bridge via Rajagiriya to be done as a foreign investment project to be structured by the BOI, RDA and UDA on a BOT basis,*

5. *Authorize Secretary to the Treasury and Secretary Ministry of Highways to conduct contract negotiation on Central Expressway Section 3 and Section 4 as hundred percent foreign funded Turnkey projects with at least two local contractors' involvement in such projects and report to the Cabinet,*

6. *Any deviation from this policy framework requires prior Cabinet approval."*

Further, the background and reasonings for these proposals were stated in detail in the said Memorandum.

It was stated that "*at present about forty percent of the public investment expenditure is financed through external financing".* In this background, it was encouraged that foreign direct

investment and sustainable financial arrangements should be implemented to reduce pressure on public investment. Moreover, the need to repay foreign debt service obligations was also stressed upon.

Furthermore, the impact of the *"forced global shut down"* due to COVID-19 was referred to in the said Memorandum. It was pointed out that it resulted in a significant impact on all countries, especially countries such as Sri Lanka, which experienced a substantial dip in foreign currency inflows due to the reduction of tourism, exports, and remittances. In fact, preliminary estimates indicated a decline in both exports and remittances by almost 50 percent. It was stated that it would create significant pressure on the foreign currency reserves, which at the time stood at only around US$ 7.1 billion.

In view of the above, it was pointed out that further accumulation of foreign debt would have serious ramifications on the country's capacity to service and repay such loans, with rating agencies taking a less positive outlook on the country.

In this background, with the impact of COVID-19 and with fiscal space being limited and government revenues being almost 25-30 percent less than expected in normal situations, the increase in foreign currency debt needed to be managed prudently. The new foreign currency borrowings that the country can accommodate per annum will have to be limited to less than US$ 2.5 billion per annum, out of which US$ 1 billion for project loans, bearing in mind that if programme loans are not forthcoming in large quantities, then commercial borrowings will have to be accommodated at least for refinancing arrangements. There were almost another US$ 9 billion of loans with committed undisbursed amounts yet to be disbursed within the next 5-6 years, and the project pipeline worth US$ 8 billion must be revisited to ensure these projects are well within the priorities of the government's policy after the outbreak of COVID-19.

The said Memorandum further stated that the government should shift to a long-term maturity structure for commercial foreign loans while focusing on efficiency in resource utilisation with selected projects and programmes. Furthermore, the government would explore other liability management options as well as the cost of borrowing and incorporate reasonable grace periods. In the meantime, the government should take further steps to diversify its external debt portfolio to accommodate a sizable portion of Asian currencies and maintain an evenly distributed risk

profile. It would be prudent to invite Asian-based rating agencies to the country for a better and more balanced risk assessment.

Moreover, the public investment strategy of the country should be governed by a debt reduction investment approach with an increase in foreign investments in commercial projects. The rate of domestic savings and investment supplemented with foreign direct investment will be the most pertinent determinants to achieve sustained economic growth. Hence, it is imperative to increase domestic savings and attract higher amounts of foreign investments in commercial infrastructure development projects such as ports, airports, refineries, power generation, etc., which can generate substantial economic value addition to the nation to achieve the desired growth rate. Thus, by adopting such a strategy, the national budget has the space to accommodate non-commercial financing from multilateral and bilateral sources for economic sectors such as health, education, skill development, agriculture, rural infrastructure, etc.

Further, other topics that were discussed included foreign funding for development, the project pipeline for foreign financing for the forthcoming three years, and how financing modality could be implemented.

After discussion, the Cabinet of Ministers granted approval to those proposals and authorised the Secretary to the Cabinet of Ministers to convey the decision to the relevant authorities to carry out the necessary actions accordingly.

Furthermore, the Minister of Finance, Economic, and Policy Development chaired a meeting on the 22nd of July, 2021 to **discuss the Credit Ratings** of the country, the possible impacts of the downgrade on the credit ratings given by the rating agencies, ways of managing such impacts and how it could be addressed. The Ministers, Members of Parliament, the Central Bank of Sri Lanka, the Ministry of Finance, and other organisations, including the Presidential Task Force for Economic Revival and Poverty Alleviation, participated at the said meeting.

Moreover, at the said meeting, the Central Bank of Sri Lanka made a presentation on "Recent Development Sovereign Ratings and its Macroeconomic Challenges" and stated, *inter alia*;

"There had been 124 downgrades across the globe in 2020 and 16 downgrades in 2021.

Major factors considered for a downgrade were;

a. *Low and declining foreign exchange reserves adequacy*

b. *Limited and narrow external financing options*

c. *Extremely weak debt affordability*

d. *Unavailability of a credible and sustainable debt servicing plan in the medium term*

The following will be the immediate challenges of a downgrade;

- *Withdrawing of portfolio investment by investors*
- *Further constraining of market access*
- *Challenges to financial institutions in terms of mobilizing funds from abroad*
- *Requests to repay the existing debt obligations prematurely*
- *Spillover to other sectors including exchange rate*

For ratings to be improved, it is required to

- *Improve the fiscal outlook (through sustainable debt practices, reducing the burden on public finance from business ventures and correlating public investments with private capital or new revenue possibilities).*
- *Gradual build-up of reserves in the light of short-term obligations*
- *Near-term plan of external financing options and realizing sizable volume inflows/financing in the immediate term*
- *Adhering and effectively implementing Medium Term Debt Management Strategy (MTDS)"*

Further, at the said meeting*;*

(a) The Governor of CBSL highlighted key steps undertaken to mitigate the negative effects to the economy including;

i) *"The foreign reserves can be fortified through the SWAP agreements (USD 600 million) and SDR facility of the IMF (around USD 700-800 million)*

ii) *Foreign exposure of debt has been contained to 40 percent"*

(b) *"Steps to be taken to avoid a downgrade",*

(c) *"the impact of economic variables on the economy;*

i) *Vaccination programme will ease the pressures on the economy with the reduction of risk of the disease.*

ii) *There needs to be a detailed plan for financing the budget deficit 2022.*

iii) *Foreign debt accounts for about USD 35 billion. DG/ERD will submit a detailed list of foreign funded projects.*

iv) *The perception that the Sri Lanka is in a position to honour all its debt obligations should be upheld."*

Once again on the 17th of August, 2021, the Minister of Finance submitted a Note to the Cabinet of Ministers with the title of *"**Short Term Macro Economic Policy Initiatives"*** and requested the Cabinet of Ministers to consider it and take an appropriate decision. The said Cabinet Memorandum, *inter alia,* stated;

> *"The Governor of the Central Bank of Sri Lanka, submitting a report as required under Section 64 and 68 of the Monetary Law Act has brought to my notice some of the important economic challenges the country is currently facing, including the following;*
>
> - *Continuously increasing debt service payments due to rolling over of large external debt of the country and the increasing dependence in external debt creating sources on financing the budget deficit over the past several decades.*
> - *Vulnerabilities stemming from COVID 19 pandemic; loss of earning from tourism as well as some moderation of exports, limited foreign investment*

inflows and intensified portfolio outflows, particularly foreign investment to the government securities market.

- *Country's access to international financial markets remains restricted with the severing credit rating downgrading.*
- *Declining of gross official reserves and challenges relating to defending the Exchange Rate*

In this context, I would like to highlight that the Government is in a critical juncture since the country is confronted with the COVID 19, 3rd wave having implications on all aspects of socio economic life. The Government has devoted its attention and resources to undertake an intensified vaccination programme which envisages to vaccinate 100% of the target group by end of 2021, enabling the country to operate in the "new normal" environment."

It further stated;

"The Government has already taken steps to avoid external debt creating financing for development activities and relying on investments as well as expanding foreign earning avenues. *In this regard, the Government has taken serious measures including the following to increase Capital inflow through Foreign Direct Investment.*

1. ***Treasury is on a constant dialog with the Chinese Authorities to get them to expeditiously disburse the loan of RMB 2,000 million (USD 350 Million) from China Development Bank towards end august 2021.***
2. ***Foreign investment agreement for West Coast Power Project is been finalized. The investment agreement for West Terminal of Colombo port and the Athurugiriya Expressway have been executed to raise USD 1500 FDI over next three years.***
3. ***The Colombo Port City Economic Commission Act was enacted paving way to create an impetus of FDIs within the special Economic zone - Colombo Port City.***
4. ***Tax/Foreign Exchange Amnesty Bill and the Special Goods and Services Tax legislation are expected to take up in Parliament.***

5. ***Actions have taken to curtail non-priority public spending and costly Capital Projects.***
6. ***Several legislation including emigration and immigration laws to relax restrictions to attract foreign inflows and legislative changes to improve doing business have been lined up to place before Parliament.***
7. ***Steps have been taken to regain tourism based on bubble concept applicable for hotels above 3 stars category."***

Moreover, it will prevent speculations that have created a situation where exporters are not converting their export proceeds and importers are engaged in panic buying and selling as well as piling stocks.

Further, it stated;

> *"In this background, it was suggested that the following measures would be necessary to be initiated by the Central Bank of Sri Lanka, to signal market to move on to a stabilization path.*
>
> 1. *Release total of USD 250 Mn immediately to all Commercial Banks, enabling all cargo currently at the ports to be cleared. This should be subject to the CBSL instructing that selling rate of each Commercial Bank shall not exceed LKR 202 per USD. A further USD 250 Mn be released in early September 2021, to meet petroleum and LP gas financing.*
> 2. *Increase the present policy rate by 50 basis points to raise the prevailing Central Bank deposit rate and lending rate from 4.5% and 5.5% to 5.5% and 6% respectively.*
> 3. *Conduct open market operations aggressively to reduce its Treasury Bills holdings while allowing the maximum Treasury Bill rate to increase by 75-100 basis points.*
> 4. *Increase the interest rate on local overdraft and term loan facility of BOI Companies from domestic Banking Systems to encourage the inflow of foreign remittance and prevent interest rate arbitrage.*

5. *Impose and interest rate celling on interest payable on Forex Deposits by Commercial Banks.*
6. *Introduce letters of credit as a mandatory requirement for all imports (in place of imports being made under various trade instruments) till 31 December 2021 and impose a 2% tax on LC's other than medicine, essential food items and raw materials.*
7. *Increase the statutory reserve ratio by 2 percentage points to 4 percent and earmark such funds (approximately LKR 250 Bn) to set up a "Green Finance facility" (GFF) to lend through Commercial Banks at 4% for organic fertilizer manufacturing, renewable energy projects, forestry and organic agricultural development.*
8. *Increase the limit of inward cash declaration at customs from USD 10,000 to USD 25,000 for visiting travellers and Sri Lankan arriving the country from overseas travel.*
9. *The Ministry of Finance will request all major import companies to organize USD 15 Mn to 250 Mn medium term Credit Lines from the respective countries that they import, so that heavy import payments will not exert pressure on the FOREX market."*

Moreover, on the 23rd of November, 2021, the Minister of Finance presented to the Cabinet of Ministers a Cabinet Memorandum seeking approval to proceed with the ***"Proposed Senior Secured Revolving Credit Facility Offered by the Bank of China Limited to the Central Bank of Sri Lanka".***

The said Cabinet Memorandum, *inter alia,* stated;

"1. Bank of China Limited (BoCL) has submitted a proposal of a Senior Secured Revolving Credit facility to the Central Bank of Sri Lanka (CBSL) up to 02 billion Chinese yuan (CNY), also known as renminbi (RMB), (equivalent to USD 300 million approximately), with the possibility of increasing in the event of an over subscription depending on the syndication demand.

2. *Following multiple rounds of discussions and negotiations, BoCL agreed that the full amount (equivalent to USD 300 million approximately) can be drawn on the day the facility is available for the CBSL and maintain in a nostro account opened in BoCL Mainland China.*

   …

   …

   Hence, those funds will be considered as a part of the CBSL foreign reserves from the date of withdrawal."

As the earlier decision of the Cabinet of Ministers to sell shares to the Chinese Company did not materialise, the Minister of Finance submitted a Cabinet Memorandum dated 23rd of November, 2021 to the Cabinet of Ministers with the title ***"Investments into the West Coast Power (Private) Limited (WCPL), to reduce the cost of Electricity Generation"*** to sell shares of the said company to a company based in the United States.

Having considered the said Memorandum and the decision by the Cabinet of Ministers dated 6th of September, 2021, the Cabinet of Ministers approved the said Memorandum and authorised the Secretary to the Treasury to enter into a Share Sale and Purchase Agreement (SSPA) with New Fortress Energy Limited (NFE) with the clearance of the Attorney General.

Once again, on the 4th of December, 2021, another Cabinet Memorandum was submitted by the Minister of Finance to the Cabinet of Ministers, seeking their approval to obtain the ***"Approval of Parliament to issue an Order to extend the validity period of the Order issued under section 22 of Foreign Exchange Act No. 12 of 2017 on Restriction of Foreign Exchange Outflows".***

In the said Cabinet Memorandum, it was stated, *inter alia;*

> *"As the Order in force is to be expired on January 01, 2022, the Central Bank of Sri Lanka is of the view that regulatory measures to limit / restrict outward remittance of foreign exchange are continued to be implemented in order to minimize the potential risks in the foreign exchange market. Some of the potential risks appeared in the foreign exchange market are;*

- *Pressure on exchange rate and foreign exchange reserves emerged with negative impact on tourism and exports due to continuation of the COVID-19 pandemic.*
- *Several foreign debt payments due during the rest of the year while significant foreign debt service requirements falling due in 2022.*
- *Continuous demand for foreign exchange, arising from repayments of foreign currency debt and payments on imports of essential goods.*
- *Such risks may ultimately be transmitted to the financial system causing threats to the financial system, thereby overall economic stability as well."*

Further, it stated;

> *"Approval of the Cabinet of Ministers is sought to place the Resolution before the Parliament for its approval to make an Order in terms of section 22 (3) of the FEA to extend the validity of the Order issued under section 22 of the FEA published in the Gazette No. 2234/49 of 2nd July, 2021, for a period of six months from January 01, 2022."*

Accordingly, with the approval of the Cabinet of Ministers, the said *Gazette* was placed before Parliament for approval.

Moreover, on the 5th of December, 2021, the Minister of Finance submitted a Note to the Cabinet of Ministers titled ***"Official Visit to India"***, stating that they discussed four pillars for short and medium-term corporation in this regard;

1. *"Ensure the Food and health security it was agreed to extend a line of credit facilities for food, medicine and other essential items import from India.*
2. *Energy security package that would include a line of credit to cover import of oil from India and early modernization Trincomalee Oil tank farm*
3. *Offer of a currency Swap to help Sri Lanka address the currant balance of payment issues.*
4. *Facilitating India investments in different sectors in Sri Lanka that would contribute to growth & explained employment."*

Furthermore, as stated above, the Cabinet Paper No. 22/0009/304/002, dated 3rd of January, 2022, was presented to the Cabinet of Ministers by the Minister of Finance regarding ***"Economy 2022 and the Way Forward***" and **the Cabinet of Ministers took a policy decision not to seek the advice of the IMF.**

Once again, on the 24th of January, 2022, the Minister of Finance presented a Cabinet Memorandum titled *"**Surcharge Tax Bill**"* to the Cabinet of Ministers, seeking approval to publish the said Bill in the government *Gazette* to present it to Parliament.

> *"Budget 2022 introduced a number of proposals to strengthen the fiscal position of the country and help regain the economic activities that were affected by the COVID-19 pandemic. As such, a onetime surcharge tax of 25 percent on taxable income is proposed to be imposed on persons or companies with taxable income over Rs. 2,000 million for the year of assessment 2020/2021."*

Further, the said Memorandum stated;

> *"The approval of the Cabinet of Ministers is sought to:*
>
> (I) *Publish the Draft Surcharge Tax Bill prepared by the Legal Draftsman attached to this Memorandum as Annexure I in the Government Gazette, and*
> (II) *Submit the said Bill for the approval of Parliament."*

Moreover, after the Cabinet of Ministers approved the said Memorandum, the government took steps to enact the Surcharge Tax Act, No. 14 of 2022, which was certified by the Speaker on the 8th of April, 2022.

Furthermore, the Minister of Finance submitted to the Cabinet of Ministers, a Cabinet Memorandum dated 31st of January, 2022, titled ***"Prudent Control of Public Expenditure".***

In the said Cabinet Memorandum, it was stated;

> *"I wish to point out the need of paying close attention towards minimizing public expenditure as a country in the way most countries in the world follow for speedy results.*
>
> *I have imposed certain orders to control expenditure by budget proposals 2022, the budget circular No. 03/2021 dated 21.12.2021 issued providing guidelines to incur expenditure and Public Finance Circular 01/2020(1) dated 12.01.2022."*

Further, in said Cabinet Memorandum, it was stated;

> *"As a considerable cost has to be incurred for the implementation of the proposals made by me providing relief to minimize the economic difficulties that the public is faced with due to the above circumstances and the rising prices at present, all ministers are requested to direct their Secretaries to Ministries to thoroughly follow the below mentioned activities to restrict expenditure that have been already introduced.*

1. ***Implementing the following instructions on the public expenditure management set out in the Budget Circular No. 03/2021 dated 21.12.2021 with strict supervision.***

   i. ***Expenditure should be managed within the limits of the Appropriation Act for the year 2022 and requests for additional allocations should not be made.***

   ii. ***Reduce the fuel allowance provided to Hon. Ministers/Members of Parliament and all Government officers who are paid fuel allowance through the Consolidated Fund by 5 litres or an equivalent amount in cash per month.***

   iii. ***Prepare methods to reduce electricity cost by 10 percent***

iv. ***Suspend the construction of new office buildings except the buildings which are being constructed for a period of two years as proposed by budget proposals.***

v. ***Suspend the purchasing of vehicles for Government institutions during the year 2022.***

vi. ***Suspend the recruitment of new staff for institutions for which expenditure is incurred by the Consolidated Fund except to fill vacancies required for the wellbeing of the institution.***

vii. ***New buildings should not be obtained on rent and additional allocations will not be provided to pay rents for buildings which are obtained without provisions***

viii. ***Foreign study tours should not be organized by using local funds and officers should not be encouraged to participate in seminars/workshops etc. by using local funds unless any official/ Government participation is required on behalf of Sri Lanka.***

ix. ***Various allowances should not be paid upon internal instructions issued at ministerial or institutional level without a proper authority.***

x. ***New projects should not be commenced without allocating provisions for the settlement of bills in hand or unsettled bills regarding ongoing projects***

xi. ***State institution of the commercial nature which are not financed through the annual budget should take every possible step to cover their expenditure and provisions should not be requested from the Treasury considering the deficit of revenue. State institutions financed through the budget should manage commitments upon the limits of provisions provided to them. Action should be taken to obtain prior approval for capital expenditure without delay.***

2. *Controlling telephone expenditure through implementation of the Public Finance Circular 01/2020(1) dated 12.01.2022."*

[emphasis added]

Moreover, on the 11th of February, 2022, the Minister of Finance submitted a Note to the Cabinet of Ministers on ***"Economy 2022 and Way Forward"*** to supplement the Cabinet Memorandum dated 3rd of January, 2022. The following documents were furnished to the Cabinet of Ministers along with the said Note;

1. Foreign Currency Outflows

2. Distribution of responsibility on Foreign Currency Inflow

Once again, a Cabinet Memorandum was presented to the Cabinet of Ministers by the Minister of Finance, dated 19th of February, 2022 regarding the *"**Indian Credit Line for Importation of Essential Commodities".*** It stated, *inter alia;*

> *"The Government of India has agreed to provide its assistance import essential food commodities, medicinal drugs, fuel oils, Portland cement and industrial raw materials under an Indian Credit Line as a result of discussions had with the Indian authorities during my recent visit to India.*
>
> *Indian Credit Line*
>
> *The Government of India has agreed to grant a loan of US $1 billion under a Credit Line to import identified essential food commodities including the aforementioned food items, medicinal drugs, fuel oils, Portland cement and industrial raw materials and the Department of External Resources will negotiate with the Indian Authorities on the loan conditions to make the repayment in three 3 years.*
>
> *...*
>
> *...*
>
> *To get the approval of the Government of Sri Lanka to obtain the loan amount of US$ 1 billion from India under the Indian Credit Line towards importation of essential*

food commodities, medicinal drugs, fuel oils, Portland cement and industrial raw materials.

To finalize the loan conditions pertaining to repayment of the said loan amount of US$ one billion in 3 years with the Indian Authorities by the Department of External Resources."

Moreover, on the 28th of February, 2022, the Minister of Finance submitted a Cabinet Memorandum to the Cabinet of Ministers, seeking the ***"Withdrawal of the Bill for the Imposition of the Special Goods and Services Tax and Committee Stage Amendments to the Bill to amend Value Added Tax Act, No. 14 of 2002".*** In the said Memorandum it was stated;

"The Budgets 2021 and 2022 proposed an online-managed single Special Goods and Services Tax (SGST) in place of multiple taxes and levies imposed under several legal statutes on (i) Liquor, (ii) Cigarette, (iii) Telecommunication, (iv) Betting and Gaming and (v) Vehicles to improve the efficiency of tax collection."

Further, on the 4th of March, 2022, the Minister of Labour submitted a Cabinet Memorandum to the Cabinet of Ministers seeking approval for ***"Granting Incentives for the Promotion of Remittances from Migrant Workers".*** In the said Memorandum it was stated;

"Approximately 7 to 8 billion United State of America (US) dollars is remitted annually to this country by the foreign employment sector, which is a major sector through which Sri Lanka receives foreign exchange. At a time when Sri Lanka had faced a severe foreign exchange crisis due to setbacks in the apparel and other export sectors and the collapse of tourism due to restrictions imposed on movement and air navigation faced because of the COVID-19 global pandemic that prevailed during the last two years, the contribution made by the remittances by migrant workers towards strengthening the economy of this country to an extent was immense.

Therefore, steps have been taken to send a large number of Sri Lankan workers to foreign jobs following various strategies with the full intervention by the Sri Lanka

Bureau of Foreign Employment in collaboration with the Ministry of Labour, the Central Bank of Sri Lanka, the Ministry of Sports and Youth, the State Ministry of Foreign Employment Promotion and Market Diversification and the State Ministry of Skills Development, Vocational Education, Research and New Inventions for the purpose of promoting the foreign employment sector and thereby enhancing remittances by migrant workers.

…

…

I expect the foreign exchange remitted to this country could be increased by increasing the incentive given for each dollar from Rs.10/- at present to Rs. 38/- in order to encourage and appreciate remitting to this country the foreign exchange earned by migrant workers who shoulder the strengthening of this country's economy by shedding their sweat and hard work and ensure more economic benefits to dependents and family members of migrant workers during this coming New Year Season. In addition, I observe that some support will be given to minimize the dollar crisis which prevails in the country at present by giving this concession for remitting foreign exchange received by foreign employment agents of this country as broker charges from employers in foreign countries.

Further, this kind of processes will also enable us to minimize foreign exchange frauds that are illegally committed.

…

…

Therefore, banking all the above-mentioned facts into consideration, I wish to propose to the Cabinet of Ministers that it is suitable to increase the incentive given for remittances from the present rate of Rs. 10 per dollar to Rs. 38/- per dollar when remitting

a. *foreign exchange earned by engaging in migrant work and*
b. *foreign exchange received by foreign employment agents as broker fees from employers in oversees to this country."*

Having considered the said Memorandum, the Cabinet of Ministers approved the same.

Moreover, the Ministry of Finance, ERD – ME & SA Division on the 4th of March, 2022 presented to the Cabinet of Ministers, a Cabinet Memorandum with the title ***"USD 1000 Million Credit Line Facility Agreement between the Government of Sri Lanka and State Bank of India for Import of Essential Goods from India".***

Thereafter, on the 5th of March, 2022, the Minister of Finance submitted a Cabinet Memorandum titled ***"Importation of Essential Commodities for year 2022 under Indian Credit Facility",*** to the Cabinet of Ministers.

It stated, *inter alia;*

> *"Indian Credit Line for Importation of Essential Commodities" and the decision of the Cabinet of Ministers dated 21st February, 2022. Accordingly, the GOSL has decided to obtain a USD 1 billion loan facility from the Government of India for the importation of essential commodities for the year 2022.*
>
> *This will enable registered importers to import essential food items, essential pharmaceuticals and raw materials for local production based etc. on monthly requirement, and Government will take steps to implement a proper program to ensure the market consumer needs without shortage, even during the festive season.*
>
> *The credit facility will be beneficial in terms of meeting the external resource gap for the time being until the foreign currency inflows to the country become favorable during the recovery process.*
>
> *Accordingly, approval of the Cabinet of Ministers is sought to authorize the Secretary Ministry of Finance to sign the Credit Facility Agreement according to the format attached as Annex-1 with State Bank of India to borrow USD 1,000 million for importation of essential commodities."*

After deliberating the said Memorandum, the Cabinet of Ministers has authorised the Secretary to the Ministry of Finance to sign the said agreement.

Moreover, a Cabinet Memorandum was submitted to the Cabinet of Ministers by the Minister of Finance on the 5th of March, 2022 seeking the *"**Implementation of an Incentive Scheme based on Progress of Export".***

The said Memorandum stated;

> *"Cabinet Meeting held on 14.02.2022 regarding the Note to the Cabinet Paper No.22/0228/301/002 dated 11.02.2022 submitted by His Excellency the President under the title "2022 Economic and the way Forward" and the Cabinet Paper No. 22/0231/304/002-IV dated 11.02.2022 submitted by the Hon. Minister of Finance under the title "2022 Economic and the way Forward.*
>
> *I propose to implement an incentive scheme though Sri Lanka Export Development Board for development and promotion of exports to achieve the expected foreign exchange inflow of the Sri Lanka Export Development Board and the Department of Commerce which comes under the Ministry of Trade were also entrusted responsibilities as mentioned in Annexure I to the Cabinet Paper No. 22/0231/304/002-IV dated 11.022022."*

The said Memorandum was also approved by the Cabinet of Ministers.

Further, on the 6th of March, 2022 the Minister of Finance submitted a Note titled ***"Economy 2022 and Way Forward"*** to the Cabinet of Ministers. The said Note, *inter alia*, stated;

> ***"The impact of the COVID-19 pandemic was largely felt by all sectors of the economy and affected the lives of the people particularly during the year of 2020. However, the country is on its path to recovery with economic growth expected to be above 4 percent in 2021 with the committed aggressive vaccination drive of the Government. Exports have risen significantly considerably recording over USD 1 billion continuously since June 2021 up to February 2022. The economy is poised to take off with a growth over 5 percent in 2022.***

However, the external sector suffered due to setbacks in the tourism sector, the drop in workers' remittances and the decline in foreign direct investments. In addition, inflation as per the Colombo Consumer Price Index (CCPI) has risen 15.1 percent in February due to both supply and demand side shocks emanating from the increase in fuel and world commodity prices, supply chain disruptions and increased demand.

…

A monthly allowance of Rs. 5,000 has been granted to public servants, employees in public corporations and pensioners since January 2022. The increase in Samurdhi payments and provision of allowances to incentivize home gardening will be implemented in due course.

With regard to strengthening the external sector, the Government aims to facilitate non-debt foreign currency inflows through facilitating foreign investments, raising tourism to pre-pandemic levels, increasing workers" remittances through additional foreign employment opportunities and through promotion of exports in potential sectors such as port and shipping and boat manufacturing and establishment of pharmaceutical [Sir, this sentence seems incomplete]

Tourism sector

…

…

The following policy decisions have been taken to attract more tourists to visit the country.

- *Providing on arrival and on-line visa*
- *Extending of Initial Electronic Travel Authorization (ETA) from one month to six months for which Cabinet has granted approval.*
- *Introducing a Digital Tourism Visa (digital nomad) for a period of one year at a cost of USD 600.*

- *Initiating several global tourism promotion campaign programmes by the Ministry of Tourism targeting major markets – UK, Germany, India, China, Russia, Middle East, USA, Australia, Japan, Korea, Spain and Scandinavia (International media campaigns through BBC, CNN, Al-Jazeera and CNBC; Publication in international journals – Lonely Planet, Conde Nast traveler; wellness tourism promotion in selected European countries and Joint marketing).*
- *Conducting joint promotions by Tour Operators and Airlines for which approval of the Cabinet of Ministers has been obtained.*

…

…

Workers' Remittances

As the largest single source of foreign exchange inflow in Sri Lanka of over the past decades, workers' remittances play a vital role by contributing to offset BOP deficits, improved liquidity conditions in the domestic foreign exchange market, augment the international reserve levels and thereby improving the country's credit worthiness, poverty reduction and promotion of savings and investments.

Amidst the pandemic, workers' remittances which stood at USD 6.7 billion in 2019, increased by 5.75 percent to USD 7.1 billion in 2020. However, the number of departures for foreign employment has declined heavily 73 percent to 38,875 in 2020 from 203,075 in 2019. In 2021, although the number of departures increased to 122,263 showing signs of recovery, the workers' remittances declined by 22 percent to USD 5.5 billion in 2021 in comparison to 2020 mainly due to foreign currency being remitted via informal channels.

By facilitating foreign employment opportunities, it is expected to send over 300,000 employees for foreign employment in 2022 and 35,892 departures for foreign employment have been recorded up to mid-February. Accordingly, it is expected to earn up to USD 7.5 billion in workers' remittances in 2022.

In order to maximize the positive effects of remittances on economic growth and development, the Government is in the process of implementing the following policy initiatives in this regard.

…

…

Pharmaceutical Production

The pharmaceutical zones are established with the view of expanding the local manufacturing of pharmaceuticals and facilitating investments therein with the ultimate objective of reducing pharmaceutical imports and promote exports in the long run, while also contributing the economy through job creation.

…

…

Port and Shipping Services

Earnings from sea transport services, recorded as USD 318 Mn in 2020 from Sri Lanka Ports Authority (5LPA), South Asia Gateway Terminals (SAGT), Colombo International Container Terminals (CICT) and other maritime services, declined marginally to 315 USD Mn in 2021. Earnings from ports and shipping services expect to Increase up to USD 350 Mn in 2022.

Earnings from Ports and Shipping is further expected to increase with the following policy measures:

- *Development of East Container Terminal (ECT) second Phase expected to be completed by 2024 with*
- *12 giant cranes and 40 normal cranes. West Container Terminal (WCT)- Cabinet of Ministers has granted approval to develop the WCT with Public Private Partnership (PPP) arrangement and Agreement has been signed between SLPA, Adani Group of India and John Keels Holdings PLC.*

- *Development of Kakesanthurai Port-Feasibility study completed*
- *Trincomalee-Approval of Cabinet of Ministers has been granted and Expression of Interest (EOI) is being developed.*
- *Galle-EOS/Request for Proposals (RFPs) are called*

Non-debt creating inflows such as earnings from tourism, workers' remittances, import substitutive industries such as pharmaceuticals, earnings from sources including ports and shipping together with the details on strategic interventions to increase foreign currency inflows and to reduce foreign currency outflows aimed at improving the external sector outlook of the country, are submitted for the information of the Cabinet of Ministers.

Accordingly, the approval of the Cabinet of Ministers was sought;

- *To provide public servants with monthly allowance of Rs. 5,000/- from January.*
- *To provide to the pensioners a monthly allowance of Rs. 5,000/-.*
- *To provide extra monthly allowance of Rs. 1,000/- to Samurdhi beneficiaries.*
- *To support the programme that to conduct home gardening programme to encourage growing of vegetables and fruits for self-consumptions.*
- *Flour Subsidy – To provide 15Kg wheat flour monthly at Rs. 80 to plantation worker families.*
- *To completely exempt import of essential food and medicines taxes."*

The Cabinet of Ministers approved the said Memorandum having considered the hardships faced by the general public in this country.

Thereafter, the Minister of Finance, on the 6th of March, 2022 submitted a Note to the Cabinet of Ministers, detailing the *"**Staff Report Recommendations for the 2021 Article IV Consultation of the International Monetary Fund (IMF)".*** The said report stated;

"Usually every year, under Article IV of the IMF's Articles of Agreement, the IMF holds bilateral discussions with member countries including Sri Lanka. A staff team visits the member country, gathers economic and financial data, and discusses the

country's economic developments and policies with authorities. On return to headquarters, the staff prepares a report, which forms the basis for discussions by the Executive Board. Accordingly, the 2021 Article IV discussions with Sri Lankan authorities ***took place in Colombo during December 7-20, 2021."***

[emphasis added]

Summary of Key Recommendations as per the Press Release on the 2nd of March, 2022, by the staff of the IMF stated;

"

i. ***Urgently implementing a credible and coherent strategy to restore macroeconomic stability and debt sustainability, while protecting vulnerable groups and reducing poverty through strengthened, well-targeted social safety nets.***

ii. *Fiscal consolidation based on high-quality revenue measures through raising income tax and VAT rates, minimizing exemptions together with revenue administration reforms.*

iii. *Continuously improving expenditure rationalization, budget formulation, and execution and the fiscal rule.*

iv. *Reforming State-Owned Enterprises and adopting cost-recovery energy pricing,*

v. *Implementing a tighter monetary policy stance to contain rising inflationary pressures and phasing out Central Bank's direct financing of budget deficits.*

vi. ***Gradually returning to a market-determined and flexible exchange rate to facilitate external adjustment and rebuild international reserves.***

vii. ***Gradually unwinding capital flow management measures as conditions permit.***

viii. *Closely monitoring of underlying asset quality and identifying vulnerabilities through stress testing to mitigate financial stability risks while strengthening the regulatory, supervision and resolution frameworks.*

ix. *Renewed efforts on growth-enhancing structural reforms such as increasing female labour force participation and reducing youth unemployment.*

x. *Diversifying the economy**, phasing out import restrictions**, and improving the business and investment climate in general.*

xi. *Prudent management of the Colombo Port City project, and continued efforts to strengthen governance and fight corruption.*

xii. *Increase climate resilience."*

[emphasis added]

Further**,** the Note included the following observations made by the Minister of Finance;

> ***"The Sri Lankan economy was not in a healthy position when the COVID-19 pandemic hit the country. The economy was crippled by the Easter Sunday Attacks which adversely affected tourism and investor confidence. The improvement in business sentiments following the Presidential elections held in November 2019 and the implementation of the new policy agenda of the Government were disturbed by the pandemic and the required containment and remedial measures. The Government embarked on a reform agenda to strengthen non-debt foreign exchange inflows such as exports, remittances and foreign direct investments and to absorb a part of such inflows towards rebuilding foreign exchange reserves. Exports recorded a historic high in 2021 and surpassed over USD 1 Billion exports consecutively since June 2021 upto February 2022 with an ongoing rebound in tourism.***
>
> ***The government remains committed to ensuring medium term fiscal consolidation. Efforts are underway to recoup revenue losses observed during the pandemic,***

particularly through a one-time surcharge tax, social security contribution levy and increasing the Value Added Tax (VAT) on financial services while strengthening the tax administration in line with digitalization drive of the Government. Expenditure management has been strengthened by the introduction of quarterly commitment ceilings in the Budget 2022. Ongoing digitalization of the economy including in delivery public services is expected to support both revenue enhancement and expenditure management.

Reforms to State Owned Enterprises (SOEs) are also being carried out, albeit under difficult circumstances caused by rising energy prices and other pandemic related effects on key SOES. Revision of domestic petroleum prices in June and December 2021 helped improve the balance sheet of Ceylon Petroleum Corporation (CPC), and the Government stands ready to revise prices to reflect international market trends while minimizing the adverse effect of such revision on the economy.

A gradual reduction In the Government's external debt exposure is already observed, and the exposure to the International Sovereign Debt market is expected to decline from US$ 14.55 billion at end 2019 to US 11.55 by end 2022. Sri Lanka commits to maintaining its impeccable track record of debt servicing.

I acknowledge that the recent rise in inflation, driven mainly by food inflation (latest at 25 percent), rising petroleum prices, and supply chain disruptions, remains a major concern. The Government has taken measures to mitigate the impact of rising cost of living on the general public, while the Central Bank has tightened monetary policy to dampen demand driven pressures on inflation.

The Sri Lankan economy is going through one of the most difficult episodes in its long history, and I am confident that Sri Lanka will rebound, as it has done in the past, as the effects of the pandemic subside, aided by policies that are being put in place to strengthen its resilience and uplift the lives of our people on a sustainable

basis." (It is pertinent to note that these observations are similar to the views expressed by the IMF team in the year 2020.)

…

…

I wish to inform the Cabinet of Ministers the key recommendations made by the Executive Board of the IMF concluded the Article IV consultation with Sri Lanka on February 25, 2022 and my observations.

[emphasis added]

The Cabinet Paper No.22/0404/304/028 dated 14th of March, 2022 and the Note presented to the Cabinet of Ministers dated 6th of March, 2022 by the Minister of Finance on ***"Staff Report Recommendations for the 2021 Article IV Consultation of the International Monetary Fund (IMF)"*** were considered by the Cabinet of Ministers along with further clarifications made by the Minister of Finance. After discussion, the Cabinet of Ministers decided to authorise the Minister of Finance to take the necessary steps to obtain technical advice and the assistance of the IMF to resolve the current situation encountered by the Sri Lankan economy.

Thereafter, the Minister of Finance on the 7th of March, 2022 submitted a Cabinet Memorandum seeking the approval of the Cabinet of Ministers, for the ***"Allocation of the required budgetary provisions for fulfilment of the Energy requirement".*** It was stated, *inter alia;*

"The Covid-19 pandemic has affected not only the Sri Lankan economy but economy of the entire world which has led to a highest crude oil prices during the last ten years which severely affected the economy of the country and lead to severe fuel crises. However, the Government has taken some control measures without shifting entire burden to the general public.

…

…

Furthermore, due to the above fuel crises, the Government of Sri Lanka has made arrangement to obtain a loan facility USD 500 million through the Exim Bank of India for fuel supply."

Accordingly, the approval of Cabinet of Ministers was sought for the following;

"To obtain the covering approval for Rs. 15 billion which has been provided by General Treasury to the CPC as CEB equity infusion.

To grant the authority to the General Treasury for the allocation of Rs. 86.7 billion including Rs. 15 billion as a capital infusion to meet the financial requirements of the CEB and empower the Director General of the Department of National Budget to provide necessary additional allocation for this purpose and authority to collect through Treasury Bills issued by the Central Bank of Sri Lanka."

The said Memorandum was also approved by the Cabinet of Ministers.

Further, the Minister of Finance submitted a Note to the Cabinet of Ministers dated 10th of March, 2022, with the title *"**General Direction to Accept Bona - Fide Investment of Non-Resident Companies by Resident Companies".*** The said Note stated, *inter alia;*

"Accordingly, approval has been granted as recommended by the Monetary Board of the Central Bank of Sri Lanka, to issue a direction under Section 7 (10) of the Foreign Exchange Act No. 12 of 2017 as follows:

(a) *Grant permission on case by case basis to the request of Resident Companies to issue shares to Non-Resident investors, who have remitted funds directly to the account of such resident companies instead of remitting through the Inward Investment account of such Non-Resident Investors"*

(b) *"Grant permission to the relevant dealers to credit any income and capital proceeds of the shares to be issued by Resident Companies to Non- Resident Investors under the permission granted by the Monetary Board"*

On the 11th of March, 2022 the Minister of Finance submitted another Cabinet Memorandum to the Cabinet of Ministers to consider implementing decisions regarding ***"Managing Foreign Exchange Inflows through Banks and Registered Financial Institutions".***

The said Memorandum stated, *inter alia;*

> *"Due to Covid-19 pandemic, Sri Lanka faced a severe foreign exchange crisis due to the collapse in the tourism sector and the downturn of foreign employment sector, which is a main source of foreign exchange earnings of Sri Lanka. This foreign exchange crisis in the country further intensified with the migrant workers and exporters, in particular, resorted to using illegal money transfer methods to get a higher rupee value for foreign exchange and delaying the remittances into the country in the hope that the United State Dollar (USD) would appreciate further against the rupee.*
>
> *Taking these factors into consideration, the Central Bank of Sri Lanka has allowed the exchange rate to be determined on the market forces with effect from 07.03.2022. Since it is guaranteed to provide greater economic returns on the foreign exchange earned by migrant workers, who are committed to strengthening the economy of Sri Lanka, through this decision, there is no need to further implement the Government's incentive programme to promote migrant workers' remittances at a cost of over Rs. 20 billion per month. Also, foreign exchange earnings of exporters also have high economic benefits through determining exchange rates based on market mechanisms, they are no longer encourage to delay the remittances of foreign exchange assuming the dollar continues to appreciate or to exchange foreign earnings through risky illegal means. Therefore, there is no need to further implement the incentive scheme to bring in the foreign exchange earned by exporters.*
>
> *In view of the above, this Cabinet Memorandum is submitted to reconsider whether the following decisions taken on the Cabinet Memorandum referred in paragraphs 1.2 and above need to be implemented with the relaxation of the Foreign Exchange Policy.*

(a) to provide incentives to encourage remittances of migrant workers and brokerage fees receive to foreign employment agents as foreign currencies, and

(b) to implement an incentive scheme based on export progress to encourage short-term repatriation of foreign exchange earned by exporters."

Thereafter, the said incentive programme was discontinued with the approval of the Cabinet of Ministers.

Moreover, the Minister of Finance submitted to the Cabinet of Ministers on the 18th of March, 2022, a Cabinet Memorandum seeking *"**Approval for Promulgation of Regulation to extend the Validity Period to open Special Deposit Accounts introduced under the Foreign Exchange Act No. 12 of 2017".*** It was, *inter alia,* stated*;*

> *"Purpose of this Cabinet Memorandum is to obtain approval of the Cabinet of Ministers to promulgate Regulations to further extend the validity period of the "Special Deposit Accounts" introduced under the Foreign Exchange Act, No. 12 of 2017.*
>
> …
>
> …
>
> *Given the above, it is proposed to promulgate Regulations made under Section 7 (1) of Foreign Exchange Act, No. 12 of 2017 as described in the Annexure II, to extend the validly period for opening and maintaining of Special Deposit Accounts for another year, which will be recorded as 36 months from April 08, 2020."*

Accordingly, the approval of the Cabinet of Ministers was sought to;

"

(a) Promulgate Regulations under Section 7 (1) of Foreign Exchange Act, No. 12 of 2017

(b) Submit the Regulations for approval of Parliament"

Once again, on the 21st of March, 2022, a Cabinet Memorandum seeking approval to issue *"**Foreign Exchange Regulations to facilitate Investments in the Colombo Port City"*** was submitted to the Cabinet of Ministers by the Minister of Finance. It stated, *inter alia;*

> *"The purpose of this Cabinet Memorandum is to obtain approval of the Cabinet of Ministers to issue Regulations under the Foreign Exchange Act. No. 12 of 2017 in respect of foreign exchange transactions relating to the investments in the area of authority of the Colombo Port City Economic Commission.*
>
> *Colombo Port City Economic Commission (the Commission) and M/s CHEC Port City Colombo (Pvt.) Ltd (the Company) have made a request to the Central Bank of Sri Lanka (Central Bank) to issue Regulations and Directions under the provisions of the Foreign Exchange Act (the Act), as an interim measure until the necessary Rules and Regulations are issued/promulgated by the Commission.*
>
> *Given the above, approval of the Cabinet of Ministers is sought to:*
>
> *(a) Promulgate Regulations under Section 7(1) of the Foreign Exchange Act No. 12 of 2017, as largely set out in the Annexure I and Annexure II as described in the Paragraph No. 4 above.*
> *(b) Submit the Regulations referred in (a) above for approval of Parliament"*

Furthermore, on the 25th of March, 2022, the Minister of Finance submitted to the Cabinet of Ministers, a Cabinet Memorandum titled ***"Rapid Action Plan for Economic Revival".*** The said Memorandum, *inter alia*, stated*;*

> *"As **approved by the Cabinet of Ministers by their decision dated 21st March, 2022** and as noted under proposal 2 (1) of the Cabinet Memorandum titled "Rapid Action Plan for Economic Revival"; a Technical Committee comprising of officers from the Central Bank of Sri Lanka and the General Treasury, was appointed to engage with the International Monetary Fund (IMF) and this Committee comprises of the following members. (Annexure 01)"*

The above Memorandum was considered by the Cabinet of Ministers and approved the same.

On the 26th of March, 2022, another Cabinet Memorandum was submitted to the Cabinet of Ministers by the Minister of Finance seeking approval for the *"**Submission of the 2021 Article IV Report of the International Monetary Fund (IMF) to the Parliament".*** The said Memorandum stated, *inter alia;*

> *"Accordingly, the 2021 Article IV discussions with Sri Lankan authorities took place in Colombo during December 7-20, 2021.*
>
> *...*
>
> *...*
>
> *The key recommendations include revenue-based fiscal consolidation, restoring debt sustainability, near-term monetary policy tightening, restoring market-determined and flexible exchange rate and strengthening social safety net programmes. My observations on the commendations have already been informed to the Cabinet of Ministers through Note to the Cabinet bearing No. 22/0404/304/028 dated March 06, 2022, which has been noted by the Cabinet of Ministers as per the Cabinet Decision dated March 14, 2022.*
>
> *...*
>
> *...*
>
> *Approval of the Cabinet of Ministers is sought to submit the 2021 Article IV report prepared by the International Monetary Fund (Annexure) to the Parliament for information."*

On the 28th of March, 2022, after the discussion regarding the Cabinet Memorandum was submitted to the Cabinet of Ministers by the Minister of Finance on the 26th of March, 2022, *"it was decided to grant approval to submit the 2021 Article IV report prepared by the International Monetary Fund in respect of Sri Lanka, attached to the Memorandum, to Parliament".*

Further, the Cabinet Memorandum dated 26th of March, 2022, submitted by the Minister of Finance on ***"Expeditious Measures for Economic Revival"*** was considered by the Cabinet of Ministers.

After discussion, the Cabinet noted the measures taken by the Minister of Finance for the appointment of the Technical Committee comprising of Officials of the Central Bank of Sri Lanka and the General Treasury to arrange the programme to engage with the IMF and for the appointment of the Committee for Sustainable Management of Public Debt, as per the Cabinet decision dated 21st of March, 2022 on CP No. 22/0477/304/036. Hence, it was decided to authorise the Secretary to the Cabinet of Ministers to convey the said decision immediately to the relevant authorities for necessary action.

On the 3rd of April, 2022 the Minister of Finance submitted a Cabinet Memorandum to the Cabinet of Ministers, detailing the *"**Proposed Emergency Crisis Response Package to be funded by World Bank".*** He stated, *inter alia;*

> *"I will be having discussions with the World Bank on 11 April 2022 on strengthening social protection system in Sri Lanka and also the liquidity crisis faced by the country. I expect to provide emergency support for households affected by the pandemic situation in the country and to help them cope with the effects of the economic crisis and also for laying the ground for the strengthening of the country's social protection system for increased future resilience.*
>
> …
>
> …
>
> ***Proposed Financing Arrangement***
>
> *The total estimated financing envelope of the proposed Emergency Crisis Response Package is USS 340 million, of which;*
>
> (i) *USS 40 million would be secured through the repurposing from the existing loans and*

(ii) *US$ 300 million would be obtained as a new IBRD loan to implement the proposed, Emergency Social Safety Net Project (ESSNP).”*

In the above context, the approval of the Cabinet of Ministers was sought to;

“

1. *Make necessary arrangements to repurpose US$ 40 million from the identified ongoing Projects in the World Bank portfolio;*

2. *Initiate discussion with the World Bank to formulate and negotiate Emergency Social Safety Net Project (ESSNP) and borrow US$ 300 million from the IBRD.*

3. *Authorize Secretary, Ministry of Finance to enter into a loan agreement, once the discussions are concluded with the World Bank, to borrow USS 300 million from the 18RO to implement the proposed Emergency Social Safety Net Project (ESSNP)”*

Some of the steps that were taken by the Central Bank of Sri Lanka and the Ministry of Finance to improve the economy of the country -

The Auditor General’s Report stated thus;

“Table No. 30 - Instructions on the repatriation of worker remittances

Date	**Type of Instruction**	**Description**
22.12.2020	Operating Instructions (OIs)	Operating instructions were issued to pay Rs. 2 per dollar above the normal exchange rate for the foreign exchange remittances sent by foreign workers to banks in Sri Lanka
01.01.2021	OIs	Foreign currency earned through an employment by a Sri

		Lankan national who is working has worked abroad or Sri Lankan national who resides in Sri Lanka and earns foreign currency through rendering services in nature of employment abroad will qualify to receive an additional LKR 2.00 per US dollar with effect from 28.12.2020.
27.01.2021	OIs	All LBs are required to sell to the CBSL 10% of the Inward worker remittances which are converted to LKR, in USD with immediate effect.
17.03.2021	OI	The requirement of LBs to sell 10% of inward worker remittances to the CBSL is suspended in respect of conversion of worker remittances which have taken place from 17.03.2021 onwards.
28.05.2021	OIs	All LBs are required to sell to the CBSL 10% of the Inward worker remittances which are converted to LKR, in USD with effect from 28.05.2021 on weekly basis.
01.12.2021	OIs	MB decided to pay an additional Rs. 8 per dollar for workers' remittances from 01.12.2021 to 31.12.2021. (Total incentive Rs.10). This was extended till 31.01.2022 by OIs dated 27.12.2021. Extended until further notice by OIs dated 31.01.2022 This was discontinued with effect from 09.03.2022
27.12.2021	OIs	All LBs are required to sell to the CBSL 25% of the Inward worker remittances which are converted to LKR, in USD with effect from 27.12.2021 on weekly basis. This was continued by OIs issued on 08.03.2022.
22.03.2022	OIs	All LBs are required to sell to the CBSL 50% of the Inward worker remittances which are converted to LKR, in USD from

		week commencing from 21.03 2022-until the week ending on 29.07 2022 on weekly basis
11.04.2022	OIs	All LBs are required to sell to the CBSL 25% of the Inward worker remittances which are converted to LKR. in USD from week commencing from 11.04.2022 until the week ending on 29.07.2022 on weekly basis.

2.8.16 Instructions issued by the CBSL during the period from 18 February 2021 to 11 April 2022 in relation to repatriation, conversion and mandatory sale of export proceeds are summarised in the following table.

Table No. 31 - Instructions on the repatriation, conversion and mandatory sale of export proceeds

Date	**Type of Instruction**	**Description**
18.02.2021	Gazette No. 2215/39	Every exporter of goods shall receive the export proceeds in Sri Lanka in respect of all goods exported within 180 days from the date of shipment.
	Gazette No. 2215/39	Ever exporter of goods shall, immediately upon the receipt of such export proceeds into Sri Lanka, convert 25% from and out of the total export proceeds received in Sri Lanka into Sri Lankan Rupees through a Licensed bank (Gazette- No. 2215/39 dated 18.02.2021.

18.02.2021	OIs	All Licensed Banks are required to sell 50% of the export proceeds in various currencies purchased from exporters of goods, to CBSL in US dollars with immediate effect.
09.03.2021	Gazette No. 2218/38	Every exporter of goods shall, within fourteen (14) days upon the receipt of such export proceeds into Sri Lanka as required under Rule 3 above, convert Twenty-five per centum (25%) from and out of the total of the said exports proceeds received in Sri Lanka into Sri Lanka Rupees through a licensed bank.
17.03.2021	OIs	The requirement to sell 50% of the conversions of export proceeds received as from 17.03.2021 onwards is suspended with immediate effect
09.04.2021	Gazette No. 2222/6	Every exporter of goods shall, within thirty (30) days upon the receipt of such export proceeds into Sri Lanka as required under Rule 3 above, convert Ten per centum (10%) from and out of the total of the said exports proceeds received in Sri Lanka into Sri Lanka Rupees through a licensed bank.
28.05.2021	Gazette No. 2229/9	Every exporter of goods shall, within thirty (30) days upon the receipt of such export proceeds into Sri Lanka as required under Rule 3 above, convert not less than Twenty- five per centum (25%) from and out of the total of the said export proceeds received in Sri Lanka, into Sri Lanka Rupees, through a licensed bank.
		The Monetary Board may however determine the specific export sectors or industries or individual

		exporters, who or which may be permitted to convert less than 25% of the total of the export proceeds received in Sri Lanka, if the Monetary Board is satisfied, in its discretion, that the export goods and processes of such export sector, industry or exporter, utilize a very high percentage of imported goods that cannot be sourced domestically. Provided however, that in no instance, shall any such partial exemption that the Monetary Board may grant in its discretion, as referred to immediately above, be below ten per centum (10% of the total export proceeds"
28.05.2021	OIs	All LBS are required to sell 10% from and out of the 25% export proceeds so converted into LKR, to the CBSL on weekly basis with effect from 28.05.2021.
28.10.2021	Gazette No. 2251/42	Every exporter of pods and services who receives export proceeds in Sri Lanka, in terms of Rule 3 above, shift mandatorily convert residual of the export proceeds received in Sri Lanka, into Sri Lanka Rupees upon utilizing such proceeds only in respect of the below mentioned authorized payments, on or before the seventh (7th) day of the following month
		Previous Gazettes were repealed.
01.11.2021	OIs	All LBs are required to sell 10% of such residual of the export proceeds which are mandatorily converted into LKR to the CBSL in USD on a weekly basis with effect from 01.11.2021
27.12.2021	OIs	All LBs are required to sell 25% of such residual of the

		export proceeds which are mandatorily converted into LKR. to the CBSL in USD on a weekly basis with effect from 27.12.2021
22.03.2022	OIs	All LBs are required to sell to the CBSL 50% of the residual of export proceeds which are converted to LKR, in USD from week commencing from 21.03.2022 until the week ending on 29.07.2022 on weekly basis.
11.04.2022	OIs	All LBs are required to sell to the CBSL 25% of the residual of export proceeds which are converted to LKR, in USD from week commencing from 11.04.2022 on weekly basis.

2.8.17 Import restrictions imposed by the Minister of Finance, Economic and Policy Development during the period from 16 April 2020 to 09 March 2022 are summarised in the following table.

Gazette No and Date	**Name**	**Person Who promulgate**	**Effective Date**	**Regulations**
2171/5 2020.04.16	Imports Exports (Control) and Regulations No. 02 of 2020	Minister of Finance, Economic and Policy Development	From April 16, 2020 to July 15, 2020	Temporarily suspended importation of list of goods and to impose minimum of 30-day credit facility on importation of another list of goods.
2126/19 2020.05.22	Imports Exports (Control) Regulations No. 02 of 2020	Minister of Finance, Economic and Policy Development	2020.05.22	Extended the validity period of Extraordinary Gazette Notification No. 2171/5 by three months to introduce a list of exceptions and other regulatory and Administrative measures

2182/10 2020.06.30	Imports Exports (Control) Regulations No. 3 of 2020	Minister of Finance, Economic and Policy Development	2020.06.30	Updated the Extraordinary Gazette Notification No. 2176/19 22.05.2020.
2184/21 2020.07.16	Imports Exports (Control) Regulations No. 04 of 2020	Minister of Finance, Economic and Policy Development	2020.07.17	Repealed Imports and Exports Control Regulations No. 02 and 03. Issued updated lists of goods for temporary suspension and importing only under a mandatory credit facility provided by foreign supplier. Issued list of exemptions and other regulatory and administrative measures.
2189/4 2020.08 17	Imports Exports (Control) Regulations No. 05 of 2020	Minister of Finance	2020.08.18	Issued an unspecified validity period suspending the list of goods specified in the gazette that require import licenses.
2189/5 2020.08.17	Imports Exports (Control) Regulations No. 06 of 2020	Minister of Finance	2020.08.18	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2193/9 2020.09.15	Imports Exports (Control) Regulations No. 07 of 2020	Minister of Finance	2020.09.16	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2198/2 2020.10.19	Imports Exports (Control) Regulations No. 08 of 2020	Minister of Finance	2020.10.19	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2206/5	Imports Exports	Minister of	2020.12.15	Amended the lists of

2020.12.14	(Control) Regulations No.10 of 2020	Finance		goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2207/15 2020.12.24	Imports Exports (Control) Regulations No. 11 of 2020	Minister of Finance	2020.12.15	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2209/18 2021.01.05	Imports Exports (Control) Regulations No. 01 of 2021	Minister of Finance	2021.01.05	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2214/56 2021.02.11	Imports Exports (Control) Regulations No. 03 of 2021	Minister of Finance	2021.02.11	Amended the lists of goods those are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2222/31 2021.04.06	Imports Exports (Control) Regulations No. 04 of 2021	Minister of Finance	2021.04.07	Regulate the importation of palm oil
2224/43 2021.04.23	Imports Exports (Control) Regulations No. 05 of 2021	Minister of Finance	2021.04.23	Impose requirement of Import Control License (ICL) for mobile workshops.
2224/44 2021.04.23	Imports Exports (Control) Regulations No. 06 of 2021	Minister of Finance	2021.04.23	Temporary suspended the importation of brand-new mobile workshops.
2226/48 2021.05.06	Imports Exports (Control) Regulations No. 07 of 2021	Minister of Finance	2021.05.06	Control Importation of Chemical fertilizers, pesticides & herbicides.

2231/16 2021.06.11	Imports Exports (Control) Regulations No. 08 of 2021	Minister of Finance	2021.06.11	Imposed requirement of ICL importation of facemasks, gold ani metal
2231/17 2021.06.11	Imports Exports (Control) Regulations No. 09 of 2021	Minister of Finance	2021.06.11	Empower the recommendation to National Medicines Regulatory Authority to exports the good specified in the Schedule I including oxygen
2231/18 2021.06.11	Imports Exports (Control) Regulations No. 10 of 2021	Minister of Finance	2021.06.10	Temporary suspended the lists of goods in Schedule I that are under import restrictions as specified by Imports and Exports (Control) Regulations No. 04 of 2020.
2238/45 2021.07.31	Imports Exports (Control) Regulations No. 11 of 2021	Minister of Finance	2021.07.31	Impose requirement of ICL for mineral or chemical fertilizers.
2247/12 2021.09.29	Imports Exports (Control) Regulations No. 12 of 2021	Minister of Finance	2021.09.29	Eliminated requirement of ICL on white crystalline sugar.
2252/30 2021.11.03	Imports Exports (Control) Regulations No. 14 of 2021	Minister of Finance	2021.11.03	Removed temporary suspension importation of rice.
2256/23 2021.11.30	Imports Exports (Control) Regulations No. 15 of 2021	Minister of Finance	2021.11.30	Removed restrictions on importation of chemical fertilizers, pesticides & herbicides. Imposed requirement of ICL on radio navigational aid apparatus. Banned importation of Glyphosate

2262/17 2022.01.11	Imports Exports (Control) Regulations No. 02 of 2022	Minister of Finance	2022.01.12	Amendments to the Schedule 1 of the Special Import License Regulations, published in the Gazette Extraordinary No. 2044/40 dated 09th November 2017.
2262/18 2022.01.11	Imports Exports (Control) Regulations No. 03 of 2022	Minister of Finance	2022.01.12	Removed temporary suspension on long grain rice. Continue restrictions on fish fillet as per new Hs codes.
2270/18 2022.03.09	Imports Exports (Control) Regulations No. 05 of 2022	Minister of Finance	2022.03.10	Impose requirement of ICL on selected items.

The Auditor General's Report states;

"*2.9.8 Secretary to the President, Dr. P B Jayasundera had sent a letter on 08 April 2020 to the Managing Director of IMF, Ms.Kristalina Georgieva requesting a Rapid Financing Instrument – RFI. A summary of the content of the said letter is as follows.*

a) *The Sri Lanka economy is experiencing the devastating impact of the novel coronavirus (covid -19) pandemic.*
b) *Lower tourist arrivals due to international travel bans have reduced economic activities in hotel, restaurant, trade, transport, and other sectors, with large impact on growth, employment, and income.*
c) *The disruption in global supply chain have affected our exports and imports, reducing our foreign exchange receipts and fiscal revenues.*
d) *The slowdown in major overseas employment markets for Sri Lankan workers and disruption to remit their funds have substantially lowered our remittance inflows.*

e) *Our preliminary estimates suggests that sharp decline in our economic growth, fiscal revenues, and foreign exchange receipts would create large and urgent fiscal and balance of payment needs.*

f) *Against this background, we would like to request emergency financing from the IMF under the Rapid Financing Instrument (RFI). At this stage, we would like to replace the current Extended Fund Facility (EFF) arrangement with RFI, but we are open to your suggestion.*

g) *We are also requesting additional support from other development partners, particularly Japan, the Peoples' Republic of China, the world Bank and Asian Development Bank (ADB)."*

Moreover, the Auditor General in the Audit Report produced marked as 'Z' has evaluated the three issues on which he was directed to report to this court. In his report, he has stated that it is not possible to determine whether a loss had been caused to the Central Bank. **Further, he has not specified any violations with regard to any of the matters that were referred to him by the court**.

Therefore, I am further of the opinion that the petitioners did not establish any violations of the laws by the respondents. Hence, it is not possible to hold that the respondents have violated the Fundamental Rights of the petitioners guaranteed by the Constitution as pleaded in the two petitions. A similar view was expressed in ***Wijesinghe v. Attorney General and Others*** **(1978-79-80) 1 SLR 102 at 106** where it was held;

> ***"Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights***. *Where a transgression of the law takes place, due to some corruption, negligence or error of judgment, I do not think a person can be allowed to come under Article 126 and allege that there has been a violation of constitutional guarantees. There may also be other instances where mistakes or wrongful acts are done in the course of proceedings for which ordinarily there are built-in safe-guards or adequate procedures for obtaining relief."*
>
> [emphasis added]

Time Bar Objection

As stated above, some of the respondents pleaded that the two applications were not filed within the period of one month stipulated in Article 126(2) of the Constitution.

Article 17 of the Constitution states;

> *"Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the* ***infringement*** *or* ***imminent infringement****, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter."*
>
> [emphasis added]

Further, Article 126 (1) and (2) of the Constitution states;

> *"(1) The Supreme Court shall have sole and executive jurisdiction to hear and determine any question relating to the* ***infringement*** *or* ***imminent infringement*** *by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.*
>
> (2) *Where any person alleges that any such fundamental right or language right relating to such person* ***has been infringed*** *or* ***is about to be infringement*** *by executive or administrative action, he may himself or by an attorney-at-law on his behalf,* ***within one month thereof****,* ***in accordance with such rules or court as may be in force****, apply to the Supreme Court by way of petition in writing addressed to such Court* ***praying for relief or redress*** *in respect of such infringement. Such application my be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges."*
>
> [emphasis added]

Moreover, Supreme Court Rule 44 states:

> *"44. (1) Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126 (2) of the Constitution, for* ***relief or redress*** *in respect of an* ***infringement*** *or an* ***imminent infringement****, of any fundamental right or language right, by executive or administrative action, he shall –*
>
> (a) *set out in his petition a plain and concise statement of the facts and* ***circumstances relating to such right and the infringement or imminent infringement*** ***<u>thereof</u>****, including particulars of the executive or administrative action whereby such right has been, or is about to be, infringed; where more than one right has been, or is about to be, infringed, the* ***facts and circumstances relating to each such right and the infringement, or imminent infringement*** *thereof shall be clearly and distinctly set out. He shall, also refer to the specific provisions of the Constitution under which any such right is claimed."*
>
> [emphasis added]

A careful consideration of the two petitions show that the petitioners allege different infringements in each of those petitions, though some are identical. Further, both petitions do not specifically set out the dates on which each of the alleged infringements occurred. Thus, it is necessary to consider the averments in the two petitions to ascertain the alleged dates of the infringements in order to decide on the objection on time bar.

SC/FR Application No. 195/2022

Averments relating to alleged infringements **SC/FR Application No. 195/2022**

Paragraphs 15, 16, 22, 23, 36, 40, 45, 76 and 77 of the petition filed in the aforementioned application states;

> "*15. The Petitioners state that to upon promising to effect several tax reductions in "Vistas of Prosperity and Splendour", the Government of the Republic as*

directed by His Excellency the President caused the taxes payable by the general citizenry of the Republic to reduce.

16. Such reductions were detailed by the 2nd Respondent during the budget speech made thereby for the year 2021.

*A true copy of the **budget speech for the year 2021** made by the 2nd Respondent is annexed hereto marked as P4 and is pleaded as part and parcel hereof.*

….

…

High Levels of Inflation

*22. The Petitioners state that the citizenry of the Republic at present is facing unprecedent economic hardship, with extreme levels inflation causing the price essential goods and services to increase at extreme rates. In particular, the Petitioners state that as at **April 2022**, the price of essential goods had increased from the previous year in the following extents:*

(a) The price of Petrol had increased by 85%;

(b) The price of Diesel had increased by 69%;

(c) The price of a cylinder of Liquid Petroleum Gas had increased by 84%;

(d) The price of Turmeric had increased by 443%,

(e) The price of Bread had increased by 433%;

(f) The price of Rice had increased by 93%;

(g) The price of Dhal had increased by 171%

23. The Petitioners further state that since such article was published, the price of several and/or all of the aforementioned goods has further increased, to wit:

(b) *On the **27th of April 2022**, the price of Gas Cylinders was further increased, causing a 12.5kg cylinder of Liquid Petroleum Gas to cost Rs. 4,860/-;*

(c) *On the **19th of May 2022**, the price of a loaf of bread was increased by Rs. 30/-, to Rs. 170/*

(d) *On the **2nd of May 2022**, the Consumer Affairs Authority impose a Maximum Retail Price on certain varieties of rice, setting the maximum price at which a kilogram of "Red Nadu Rice", "Red and White Samba" and "Keen Samba" could be sold at Rs. 220/-, Rs. 230/, and Rs. 260/- respectively;*

(e) *On the **19th of April 2022**, the Ceylon Petroleum Corporation increased the price of Petrol (92 Octane) to Rs. 338 per liter*

True copies of article published in the Island Online dated 23rd May 2022. NewsFirst.lk dated 19th May 2022, NewsFirst.lk dated 3rd May 2022, and Outlook India dated 23rd May 2022 are annexed hereto marked as P6(a), P6(b), P6(c), and P6(d), respectively and are pleaded as part and parcel hereof.

...

...

*36. The Petitioners further state that the overall rate of inflation as measured by the National Consumer Price Index on a year on year basis is 33.8% in **April 2022**, which is the highest recorded in the history of the Republic, and the South Asian Region.*

37. However, the Petitioners state that since 2019, the foreign currency reserves available to the Republic were intentionally depleted by the 28th Respondent, to wit, the value of the usable Foreign Exchange reserves maintained by the Republic:

(a) As at February 2022 amounted to USD 2,300,000,000/-;
(b) As at March 2022 amounted to USD 1,930,000,000/-;
(c) As at May 2022 amounted to a sum below USD 50,000,000/-;"

....

…

40. *Furthermore, the Petitioners state that at the **COPE Committee Meeting** held on **25.05.2022**, Dr. Nandalal Weerasinghe, the Governor of the Central Bank of Sri Lanka and member of the 28th Respondent stated that the Republic does not possess any and/ or sufficient liquid foreign currency reserves to pay its foreign debts or to purchase necessary imported goods, and the assistance of the International Monetary Fund and foreign nations is required to assist the Republic in this regard (vide P20(a) and P20(b) below).*

45. *The Petitioners state that the views expressed by the Hon. 2B Respondent have further been reiterated by the officials of the International Monetary Fund (hereinafter referred to as the "IMF") who have been liaising with the Republic for the purpose of alleviating the present economic crisis faced thereby. Specifically, the Managing Director of the IMF, Mrs. Kristalina Georgieva when speaking to NDTV stated as follows:*

*"It is breaking my heart to watch the pictures of what is happening in the country that was once quite prosperous. **It is a result of mismanagement** and therefore the most important thing to be done is to put the country back on a sound microeconomic footing"*

A true copy of the article published on the Daily FT on 27.05.2022 is annexed hereto marked as P15, and is pleaded as part and parcel hereof."

….

….

INVOCATION OF THE JURISDICTION OF YOUR LORDSHIPS' COURT

76. *In the circumstances aforesaid, the Petitioners state that the actions and decision of His Excellency the President, and/or the 2nd to 27th Respondents, and/or the 28th to the 32nd Respondents and/or the 33rd Respondent (in his representative capacity) and/or any one or more of them in mismanaging the economy of the Republic in the manner morefully set out above, and failing to abide by the mandatory provisions of the Monetary Law Act has violated and /or imminently*

violates and/or continuously violates the Fundamental Right to Equality and Equal Protection of the Law guaranteed to the Petitioner and to the citizens of the Republic under Article 12(1) of the Constitution and further violates the Fundamental Right to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise guaranteed to the citizens of the Republic under Article 14(1)(g) of the Constitution, in as much as:

(a) The mismanagement of the economy of the Republic and the acts of the 2nd, 2A, 29th to 32nd Respondents, and 38th Respondents set out above have caused high levels of inflation to arise, preventing and/ or hindering the performance of lawful trade and occupation inasmuch as the citizens of the Republic may not be able to afford the essential raw materials used for such business/trade;

(b) The scarcity of essential imported items including petrol and diesel has prevented and/or hindered the ability of citizens of the Republic to attend to their business and/or trade, inasmuch as the same are prevented and/ or hindered from travelling thereto,

(c) The sharp rise in the cost of living caused by the high levels of inflation referred to above has rendered several businesses commercially unviable, and/or have caused the said businesses/trades to be rendered insolvent and/or approach insolvency,

(d) The citizens of the Republic are vulnerable to succumbing to illness and/ or are denied access to effective healthcare due and owing the inability of the Republic to import vital medicines which are used to healthcare professionals and hospitals when treating patients;

(e) The 28th, 29th, 30th, 31st and 32nd Respondents and/ or any one or more of them have failed and / or neglected to abide by the mandatory provisions contained in Section 66 of the Monetary Law Act, and have by willful default and/or by misconduct have caused loss and damage to the Central Bank of Sri Lanka and consequently to the citizens at large, by failing to maintain any exchange

arrangements as are consistent with the underlying trends in the country, by artificially causing the exchange rate of the rupee to be held at arbitrary values;

(f) The 28th, 29th, 30th, 31st and 32nd Respondents and/or any one or more of them have failed and/or neglected to abide by the mandatory provisions contained in Section 68 of the Monetary Law Act, and have by willful default and/or by misconduct have caused loss and damage to the Central Bank of Sri Lanka and consequently to the citizens at large, by settling and /or failing to prevent the settlement of the International Sovereign Bond payment due in January 2022 notwithstanding the lack of foreign exchange reserves with the 28th Respondent;

(g) The 28th Respondent has failed to take any necessary steps to recover any loss and/or damage suffered by the Central Bank of Sri Lanka consequent to the decisions made by the 29th, 30th, 31st and 32nd Respondent, and has therefore allowed any losses sustained thereby to remain;

(h) His Excellency the President, and the 1st to 27th Respondents and/or any one or more of them have acted arbitrarily in reducing the tax revenue available to the Republic by reducing the levels of taxation imposed on the citizens;

(i) The lack of essential imports, high levels of inflation, and depletion of foreign currency reserves was caused by the arbitrary and misconceived acts of the 1st to 32nd Respondents and the 38th Respondent and/or any one or more of them;

(j) His Excellency the President, and the 1st to 27th Respondents and the 38th Respondent and/or any one or more of them have taken into account irrelevant considerations and failed to take into account relevant considerations inter alia by effecting reductions in tax on the sole premise of the election promise made by His Excellency the President,

(k) His Excellency the President, and the 1st to 27th Respondents, and the 38th Respondent and/or any one or more of them are in beach of the principles of natural justice and fairness;

(l) The said the 1st to 27th Respondents and the 38th Respondent and / or any one or more of them have acted in breach of public trust and confidence reposed in them.

77. In all the aforesaid circumstances, the Petitioner states that the conduct of His Excellency the President, and the 1st to 32nd Respondents and any one or more of them are thus and otherwise ultra vires, illegal, irrational, unjustifiable, ad hoc, arbitrary and capricious. The aforesaid conduct offends the principles of natural justice, rule of law, transparency, and good governance."

Prayer to the petition in SC/FR/Application No. 195/2022

"WHEREFORE THE PETITIONERS PLEAD THAT YOUR LORDSHIPS BE PLEASED TO:

(a) *Grant Leave to Proceed with this Application;*

(b) ***Declare*** *that the Fundamental Right guaranteed to the petitioners under Article 12(1) of the Constitution* ***is being imminently infringed*** *and/or* ***has been infringed*** *and/or* ***is continuously being infringed*** *by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity) and/or any one or more of the Respondents;*

(c) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution* ***is being imminently infringed*** *and/or* ***has been infringed*** *and/or* ***is continuously being infringed*** *by the 1st to 32nd Respondents (save and except for the 2B Respondent) and/or the 33rd Respondent (in his representative capacity and/or any one or more of the Respondents;*

(d) ***Declare*** *that the Fundamental Right guaranteed to the Petitioner under Article 14(1)(g) of the Constitution* ***is being imminently infringed*** *and/or* ***has been infringed***

and/or ***is continuously being infringed*** *by the 28th, 29th, 31st and 32nd Respondent by causing the Republic to settle the International Sovereign Bond in January 2022 as evinced by P21(a);*

(e) ***Make Order*** *directing the 28th Respondent to recover and / or take steps to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by officers of the 28th Respondent and/or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents and/or any one or more of them,* ***consequent to the decision made to set the value of the Sri Lankan Rupee at a value of and / or around Rs. 203/-, which may be uncovered by an audit prayed for hereinunder and/or otherwise;***

(f) ***Make Order*** *directing the 28th Respondent to recover all losses and damages occasioned onto the Central Bank of Sri Lanka by* ***officers of the 28th Respondent and / or former officers of the Central Bank of Sri Lanka, including the 29th to the 32nd Respondents*** *and/or any one or more of them, consequent to the decision made to settle the payment referred to in P21(a), which may be uncovered by an audit prayed for hereinunder and/or otherwise;*

(g) *Grant an* ***Interim Order*** *directing, the 35th to 37th Respondents to expeditiously look into the matters contained in the Application (P22) and submit its observations to Your Lordships' Court within 3 months, or such other time which Your Lordships' Court may deem reasonable;*

(h) *Grant an* ***Interim Order*** *directing the 34th respondent to conduct an audit into the affairs of the 28th Respondent, and determine the loss caused to the Central Bark of Sri Lanka by*

i *the decision made to set the value of the Sri Lankan Rupee at a value of and/or around Rs. 203/- in a manner contrary to Section 66 of the Monetary Law Act, and further determine;*

ii *the delay in obtaining facilities from the IMF by the Republic consequent to the decisions made by the 29th Respondent."*

(i) *Grant an **Interim Order** preventing the 29th and/or the 30th and / or the 31st and / or the 32nd Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(j) *Grant an **Interim Order** preventing the 2nd and/or the 2A and / or the 38th Respondents from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships' Court;*

(k) *Grant an **Interim Order** directing the 28th Respondent to produce to Your Lordships Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee On Public Enterprise meeting held on 25.05.2022 wherein it was suggested that the Republic should seek relief and /or other financial assistance from the International Monetary Fund;*

(l) *Grant an **Interim Order** directing the 28th Respondent to produce to Your Lordships' Court the documents made reference to by Mr. Jayawardena PC and Dr. Ranee Jayamaha at the Committee On Public Enterprise meeting held on 25.05.2022 wherein it is recorded that the appointed members of the 28th Respondent objected to and/ or otherwise disagreed with the artificial maintenance exchange rate of the Sri Lanka Rupee at and/or at a level below Rs. 203/-;*

(m) *Grant an **Interim Order** directing the 39th Respondent to produce to Your Lordships' Court, the minutes of the Committee On Public Enterprise meeting held on 25.05.2022;*

*(mm) Grant an **Interim Order** preventing the 2nd Respondent and/or the 2A Respondent and / or the 32A Respondent, and/ or any one or more of the 29th to the 32nd Respondents and / or the 38th Respondent from leaving the Democratic Socialist Republic of Sri Lanka without obtaining the prior permission of Your Lordships Court;*

*(mmm) Grant an **Interim Order** preventing the 32A Respondent from alienating any assets belonging thereto which are situated in the Republic pending the hearing and determination of this application by Your Lordships Court:*

(n) *Costs;*

(o) Such other and further relief as Your Lordships Court shall seem meet."

[emphasis added]

SC/FR Application No. 212/2022

***Averments relating to the alleged infringements in* SC/FR Application No. 212/2022**

The following averments in the petition of the said application stated;

*"8. The Petitioners state that the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents **made a series of irrational, arbitrary, patently illegal, wrongful decisions, in complete dereliction of their statutory duties and fiduciary responsibility, for collateral and extraneous purposes, during the years 2019 to 2022**, which has resulted in the Petitioners and the public of Sri Lanka being denied their right to equality, equal protection of the law and their right to life as guaranteed by the Constitution of Sri Lanka.*

*9. (a) The Petitioners state that the aforesaid series of irrational, arbitrary, patently illegal, and wrongful acts on the part of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, has **resulted in catastrophic long-term and short-term ramifications to the economy**, and **caused the country to default on the repayment of foreign debts**, for the first time in its history, and has relegated Sri Lanka to a state of bankruptcy / insolvency, as will be morefully elaborated in this Application.*

....

....

10. (a)The Petitioners state that, as morefully set out in this Application, the said actions / inaction and gross mismanagement of the economy by the 1(b)

Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, have resulted in an unprecedented economic crisis driven by debt unsustainability, which has garnered the attention of the world at large

(b) The Petitioners state that the International Monetary Fund (hereinafter referred to as the "IMF") by its IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10/02/2022, categorized, for the first time the sovereign debt of Sri Lanka as "unsustainable" thereby bringing into effect a cascade of inimical repercussions to the economy of Sri Lanka in general and the external debt portfolio in particular, and thereby leading the State to issue a Notice of Default dated 12/04/2022 (P-2(a)), whereby the State of Sri Lanka informed all its creditors that all foreign debt repayment would be suspended, which debt repayments included the following categories of debt:

b. All outstanding series of bonds issued in international capital markets
c. Certain bilateral (government to government) credits
d. All foreign currency denominated loan agreements or credit facilities with commercial banks or institutional lenders, including those owned by foreign governments
e. All amounts payable following a call during the said interim period upon a guarantee issued in respect of a debt of a third party.

A true copy of the IMF Country Report No.22/91 (2021 Article IV consultation Press Release: Staff Report and Statement by the Executive Director for Sri Lanka) is annexed to the original Petition filed in this Application dated 16 June 2022, marked as "P-3" and is pleaded as part and parcel hereof.

11. The Petitioner states that thereafter, ***on or around the 19th of May 2022, Sri Lanka defaulted on loans that fell due*** *and has now been downgraded by rating agencies as a defaulting nation, as will be morefully elaborated on in this Application.*

12. The Petitioners state that the Petitioners are invoking the fundamental rights jurisdiction of Your Lordships' Court on the basis that the 1(b) Respondent and

the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents by a series of actions, commencing in 2019 and continuing to date, (as morefully set out hereinafter) including acts that have necessitated the defaulting of Sovereign debt, have infringed and/or violates and continue to infringe and/or violate the fundamental rights of the Petitioners and of all citizens of Sri Lanka, as made abundantly clear at the recent meeting of the Committee on Public Enterprises (COPE) on or about 25% May 2020, where it transpired that the actions of the said Respondents in respect of inter alia, the RFI facility (Rapid Financing Instrument) of the IME and the management of the rupee, had engendered the present crisis, as will be morefully elaborated in this Application.

...

...

13. *The Petitioners state that such actions and/or inactions of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, are broadly categorized as follows:*

    (i) ***the illegal, arbitrary and unreasonable abolition, removal and/or reduction of taxes effected in the year 2019*** *and the consequent reduction in government revenue,*

    (ii) ***the refusal to change*** *the aforesaid illegal, irrational and arbitrary decisions to reduce taxes despite the consequent downgrading of Sri Lanka's credit rating and the emergence of the COVID-19 Pandemic,*

    (iii) ***the failures and/or omissions to take remedial measures subsequent to rating downgrade caused****, inter alia, by the illegal, arbitrary and unlawful actions of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents,*

    (iv) ***the refusal and failure*** *of the 2nd, 3rd, 6th, 7th, 9th and 10th respondents to ensure conditions were met in a manner that would permit Sri Lanka to avail itself of the sum of money agreed to be given to Sri Lanka by the* ***IMF in terms of the Extended Fund Facility*** *agreement as set out hereinafter,*

(v) ***the failure to obtain available aid*** *to combat the economic hardships faced as a consequence of COVID-19, especially in the face of a lack of government revenue,*

(vi) ***the failure to act in terms of the Monetary Law of Sri Lanka****, to maintain international reserves and the international stability of the rupee,*

(vii) ***the failure to devalue the Sri Lankan rupee in a timely, orderly and appropriate manner****, despite widespread calls and demands to do so,*

(viii) ***the failure and / or omissions to appropriately devalue the rupee*** *which resulted in fluctuations in worker remittances, and subsequently, the country's foreign reserves and Sri Lanka's balance of payment,*

(ix) ***the decision to continue to service Sovereign debt without any restructuring****, despite the futility and grievous prejudice in doing so,*

(x) ***the continued refusal to seek the assistance of the IMF****, despite widespread calls and demands to do so,*

(xi) *the subsequent admission by the former President of the Republic that the aforementioned refusal to seek the assistance of the IMF was wrong and misconceived, and*

(xii) *the unreasonable, arbitrary actions and / or omissions which resulted in a default of the country's foreign debt.*

16. The Petitioners state that ***in or around November/December 2019, the Commissioner General of Inland Revenue issued a number of notices on the instructions of the 2nd Respondent which sought to reduce a number of taxes*** *[hereinafter referred to as 'tax revisions'] by inter alia:*

a. Removing/abolishing the Taxes set out by Parliament under the Nation Building Tax Act, No. 9 of 2009 as last amended by Act, No. 20 of 2019

b. *Removing/ abolishing the Taxes set out Parliament under the Economic Service Charge Act, No. 13 of 2006*

c. *Removing/Abolishing the Debt Repayment Levy*

d. *Reducing the threshold for payment for Value Added Tax from 12%- 8%*

e. *Increasing the VAT registration threshold from LKR 12,000,000 million- LKR 300,000,000*

f. *Increasing the rate of Taxable Income on Personal Income Tax from LKR 500,000 to LKR 3,000,000.00*

g. *Reducing the Top Marginal Tax Rate on Personal Income tax from 245-18%*

h. *Abolishing the mandatory withholding tax for most employees*

i. *Reducing the Standard Corporate Income Tax from 28%-24%"*

...

...

a) *"**Notice dated 18th February, 2020** issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance on the 31.2020- Implementation of proposed changes to Inland Revenue Act No. 24 of 2017*

(Pending Parliamentary Approval)

b) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Implementation of New Tax Proposals on Value Added Tax and Nation Building Tax.*

c)Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Removal of Economic Service Charge (ESC)

*d)**Notice dated 5th February 2020** issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Instruction on Withholding Tax (WHT) - (Pending formal amendment to the Inland Revenue Act 24 of 2017)*

e) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Guideline for Deduction of PAYE Tax, Period from*

01.01.2020 to 31.03.2020, (subject to formal amendment to the Inland Revenue Act, No. 24 of 2017, to be passed in Parliament).

f) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance-Change of Nation Building Tax (NBI), pending parliamentary approval for amendment to the Nation Building Tax Act, No. 9 of 2009.*

g) *Notice issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Exemption of Value Added Tax (VAT) on supply of Residential Accommodation*

h) ***Notice dated 20th of January, 2020*** *issued by the Commissioner General of Inland Revenue as instructed by the Ministry of Finance - Removal of Debt Repayment Levy (DRL) pending parliamentary approval for amendment to the Finance Act, No. 35 of 2018."*

(c) "The revenue from VAT declined from Rs. 443,877 million in 2019 to 233,786 million in 2019, which is a reduction of 47.3%."

....

...

24. "The Petitioners state that the said notices issued by the Commissioner General of Inland Revenue on the instructions of the Executive was patently illegal at the time it was made, as it sought to amend an ***Act of Parliament by administrative action,*** *and reduced the revenue of the State in a manner contrary to that set out in Article 148 of the Constitution and to thereby remove and reduce the very basic constitutional protections by which Parliament has been given full control over Public Finance."*

...

...

"The downgrading of Sri Lanka's credit ratings as a consequence of, inter alia, the tax revisions made in 2019, the refusal to change these taxes and the emergence of the Covid-19 Pandemic

39. The Petitioners state that as a result of, inter alia, the aforementioned tax revisions implemented by the 2nd Respondent, Sri Lanka began to experience a ***sharp decline in its credit ratings in the latter portion of 2019 onwards****, with its Long- Term Foreign-Currency Issuer Default Rating (IDR) stipulated by Fitch Rating (hereinafter referred to as 'Fitch') falling to 'C' in the year 2022 from B1. The Petitioners state that as repeatedly stated by Fitch, the said downgrading was due to inter alia, "Sri Lanka's worsening external liquidity position."*

A true copy of the Fitch Ratings reports for Sri Lanka dated ***25th October 2019, 2nd July 2021*** *and* ***4th January 2022*** *and the Fitch Rating Action Commentary dated* ***13th April 2022****, is annexed to the original Petition filed in this Application dated 16th June 2022 marked P-14(a), P14(b), P14 (c) and P14(d), and are pleaded as part and parcel hereof."*

....

...

54. "The Petitioner states that subsequent to a public outcry against the mishandling of the economy, the ***3rd Respondent resigned from his post as Finance Minister in April 2022****. No members of the 9th Respondent have however resigned or taken responsibility for their complicity in the actions that resulted in a serious downturn of the economy of Sri Lanka. In these circumstances the Petitioners state that it is necessary to ascertain whether the Monetary Board had fulfilled their duties in terms of section 65, 66 and 68 of the Monetary Law.*

The failure by the 3rd, 7th, 9th and 10th Respondents to devalue the Sri Lankan Rupee in a timely and appropriate manner, despite widespread calls and demands to do so."

…

…

56. "The Petitioners state that the ***rupee to USD exchange rate depreciated sharply from Rs 185 in September 2020, to approximately Rs.200 by May 2021. Since May, it***

remained relatively stable until it depreciated to approximately Rs. 256 in March 2022*."*

...

...

97. "The Petitioners state that the 1(b) Respondent, as the Head of the Executive, as well as any one or more of the Respondents abovenamed, have, most conspicuously, failed to manage the critical fiscal needs of the country, and in doing so, have grievously violated the fundamental rights of the public, as will be morefully elaborated hereinbelow."

....

...

98. "The Petitioners state that the actions and / or failures and/ or omissions on the part of the 1(b) Respondent, as well as the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, constituted grievous mismanagement of the economy, and which were a series of illegal, arbitrary and unreasonable actions and inactions, which necessitated the present decision to default on repayment of foreign loans. The Petitioners further state that in the totality of the foregoing, it is patently clear that the fundamental rights guaranteed to the citizens of Sri Lanka, under Articles 12 (1), 14(1)(g) and 14A have been violated most grievously."

Prayer to the petition in SC/FR/Application No. 212/2022

"*Wherefore the Petitioners pray that Your Lordships' Court be pleased to:*

1. *Grant the petitioners, Leave to Proceed;*

2. ***Declare*** *that the Fundamental Rights of the Petitioners and / or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Article 12 (1), 14(1)(g) and 14A of the Constitution, have been infringed by the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents, and/or their servants or their agents, and that there* ***is a continuing violation*** *of their said rights;*

3. ***Declare*** *that the Fundamental Rights of the Petitioners and/ or the citizens of Sri Lanka to Equality and Equal Protection of the Law, as guaranteed by Articles 12(1), 14(1)(g) and 14A of the Constitution are in* ***imminent danger of infringement*** *by the actions and/or* ***inactions*** *of the State including the actions/ inactions of the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents;*

4. *Grant and issue the following* ***interim reliefs/orders****:*

   a. ***Make Order*** *in terms of Article 126(4) of the Constitution, and call for and examine the following record, including, but not limited to:*

      i. *All records pertaining to communications and recommendations received by and / or given to the 2nd, 3rd, 6th, 7th, 9th and 10th Respondents by the Central Bank;*

      ii. *All communications between the 1(b) Respondent and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents in respect of the decisions taken with regard to the matters impugned in this Application;*

      iii. *The fiscal records, all reports published and or given to the 2nd, 3rd and /or 9th respondents of and by the 9th Respondent Board under and in terms of Sections 64 and 68 of the Monetary Law Act, No. 37 of 1974;*

      iv. *Relevant Cabinet decisions in respect of the Ministry of Finance and the 2nd and 3rd Respondents, as well as decisions and Regulations by the 2nd and 3rd Respondents with regard to the matters impugned in this Application;*

      v. *A transcript of the proceedings of the Committee on Public Enterprises (COPE) held on or about 25th May 2022.*

   b. ***Direct*** *the appointment of a committee under the auspices of Your Lordships' Court to investigate the causes, steps taken by the aforementioned Respondents, and compile a report on the financial irregularities and mismanagement of the economy in relation to the specific instances enunciated in the present Application;*

c. *Restrain the 2nd, 3rd, 6th, 7th and 10th Respondents, from overseas travel without the prior approval of the Supreme Court, pending the investigation by the aforementioned Committee;*

5. *Upon the submission of a report by the said Committee (appointed under the auspices of Your Lordships' Court) to direct the Hon. Attorney General or any other appropriate authorities or officers of the State to consider* ***initiation of investigations and prosecutions*** *against any persons (as necessary) based on the findings from the said report.*

6. ***Make such further and other just and equitable orders as Your Lordship's Court shall seem fit in the circumstances of this Application, under and in terms of Article 126(4) of the Constitution****;*

7. *Grant Costs;*

8. ***Grant further and such other relief as Your Lordships Court may seem meet****."*

Facts relevant to the time bar objection

As stated above, after the former President assumed duties as the President of the Republic in November 2019, the government reduced the taxes payable by the people of the country. The petitioners stated that the former President, together with the 2nd respondent, reduced the taxes for the sole purpose of delivering the election promises made. Hence, it was submitted that the decision to reduce taxes was purely politically motivated. Further, due to the said reduction in taxation, the Republic suffered enormous and unprecedented economic damage.

The petitioners further stated that at the time the instant application was filed, the people of the Republic were facing unprecedented economic hardships, with extreme levels of inflation causing the price of essential goods and services to increase at extreme rates. Thus, people were unable to buy basic commodities. Moreover, because of the high levels of inflation, a large portion of the public staged protests throughout the country.

Furthermore, the severity of the Republic's **intentional depletion of foreign currency reserves under the watch of the 28th to the 32nd respondents, the 2nd and the 2A respondents and/or**

one or more of them is evident by default in servicing foreign debt. Accordingly, the petitioners stated that the aforementioned circumstances effecting the economic situation can be attributed to the wilful mismanagement of the economy by the 38th, 2nd, 2A, and the 29th to the 32nd respondents, who were in control of the 28th respondent at the time material to the instant application.

Dates of filling the Fundamental Rights Applications

The SC/FR Application No. 195/2022 was filed in the Supreme Court on the 3rd of June, 2022 and the amended petition was filed on the 18th of July, 2022. Further, the SC/FR Application No. 212/2022 was filed in the Supreme Court on the 17th of June, 2022. Thereafter, an amended petition was filed on the 15th of July, 2022.

As stated above, the petitioners in their petitions stated that the taxes were reduced with effect from November, 2019 and the tax cuts were informed to the general public by the Commissioner General of the Inland Revenue Department by public notice in the same month. Further, the petitioners alleged that their Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution were infringed by the respondents reducing taxes when the financial status of the country was not stable.

Moreover, it was stated that as soon as the tax cuts were introduced, the rating agencies downgraded Sri Lanka on the basis that the country would not be able to honour its liabilities to the creditors. Further, at the Committee on Public Enterprises (COPE) meeting held on or about the 25th of May, 2022, it transpired that the actions of the said respondents, *inter alia,* the RFI facility (Rapid Financing Instrument) of the IMF and the management of the rupee, had led to the present crisis.

The petitioners stated that the former President and the 2nd, 3rd, 6th, 7th, 9th and 10th respondents (in SC/FR/212/2022) made a series of irrational, arbitrary, patently illegal and wrongful decisions in complete dereliction of their statutory duties and fiduciary responsibility, for collateral and extraneous purposes, during the years 2019 to 2022, which has resulted in the

petitioners and the public being denied of their right to equality, equal protection of the law, and their right to life as guaranteed by the Constitution.

Moreover, the petitioners stated that the aforementioned respondents are directly responsible, *inter alia*, for the unsustainability of Sri Lanka's foreign debt, its default on foreign loan repayments, and the current state of the economy of Sri Lanka at the time of filing the two applications, and must be held accountable for the illegal, arbitrary, and unreasonable acts and/or omissions that culminated in the above.

Further, the petitioners stated that they became aware of the real economic situation of the country only after the Finance Minister, 2nd respondent, made a statement in Parliament on the 4th of May, 2022 and when the facts were revealed at the COPE meeting on the 25th of May, 2022.

Thus, it was stated that the respondents have violated the Fundamental Rights guaranteed to the citizens of Sri Lanka under Articles 12(1) and 14(1)(g) of the Constitution.

The learned President's Counsel for the 2nd respondent and 2A respondent in SC/FR/195/22 (and 3rd respondent in SC/FR/212/2022) submitted that the 2nd respondent ceased to hold office as the Minister of Finance on the 8th of July, 2021 and the 2A respondent ceased to hold office as the Minister of Finance on the 4th of April, 2022. Thus, as the 2nd respondent and the 2A respondent resigned from their portfolios of Minister of Finance more than one month prior to the filing of the instant applications, the applications are out of time and ought to be dismissed in *limine* in terms of Article 126(2) of the Constitution. It was also submitted that, in any event, the aforesaid alleged events took place prior to one month from the date of filing the two applications in this court.

The learned Additional Solicitor General submitted the following table, which contains significant dates and events involved in the instant applications based on the petitions and the Auditor General's report furnished to court.

Date	Event
2016.06.03	Executive Board of the International Monetary Fund (IMF) approved a 36-month extended arrangement under the Extended Fund Facility with Sri Lanka for an amount equivalent to USD 1.5 Billion to support economic reform.
2019.10.31	Finance (Amendment) Act No. 21 of 2019 (abolished carbon tax)
2019.11.01	**Start of period audited by Auditor General in Z** Date on which IMF approved release of seventh and final instalment under the Extended Fund Facility approved by the IMF on 2016.06.03.
2019.11.18	1(b)/32A respondent was elected and took oaths as President of the Republic.
2019.11.20	Mahinda Rajapakse (2nd respondent) appointed as the Prime Minister and Minister of Finance.
2019.11.26	By note to Cabinet the President (1(b)/32A respondent) stated that at the recently concluded Presidential election he had promised simplification of taxes and recommended implementation of certain measure revising taxes pending Parliamentary approval.
2019.11.27	Cabinet approval granted for priority measures mentioned in note to Cabinet by President.

November-January 2019	Commissioner General of Inland Revenue issued notices to taxpayers on instructions of the 2nd respondent which sought to reduce number of taxes (tax revisions).
2020	Decline of Government revenue, as per the petitioners due to effect of tax revisions and COVID 19 pandemic.
2020.04.08	Rapid Financing Instrument requested by letter written by Secretary to the President (38th respondent in SC/FR/195/2022) to the IMF
2020.08.05	General Election
2020.10.12	**Finance (Amendment) Act No. 2 of 2020** **Nation Building Tax Amendment No. 3 of 2020** **Economic Service Charge Amendment Act No. 4 of 2020**
2021.04.09	**Speaker informs Parliament regarding Supreme Court Special Determination on the Inland Revenue (Amendment) Bill 2021.**
2021.05.13	**Value Added Tax Amendment Act No. 9 of 2021** **Inland Revenue Amendment Act No. 10 of 2021**
2021.12.10	**2A/3rd respondent states in Parliament that Sri Lanka should not seek the support of the IMF.**
May, 2021	Rupee depreciates to Rs. 200 against the dollar from Rs. 185 in September 2020.
2021.09.06	Fixing of an upper limit of the exchange rate.

2021	Gross official reserves fallen to USD 3.1 Billion from USD 5.6 Billion in 2020 and USD 7.6 Billion in 2019.
2022.02.10	**IMF stated that the sovereign debt of SL is unsustainable.**
March, 2022	**Rupee depreciates to Rs. 256 against the dollar from Rs. 200 in May 2021**
2022.03.18	End of period audited by Auditor General in Z1. Date on which former President 1(b)/32A respondent decides to officially begin talks with the IMF according to Monetary Board paper MB/DG(S)/9/30/2022.
2022.04.12	**Sri Lanka issued a Notice of Default informing all creditors that all foreign debt repayments would be suspended.**
2022.04.07	2(b)/4th respondent states in Parliament that the country should have sought IMF assistance long ago.
2022.05.19	Sri Lanka defaulted on loans that fell due.
2022.06.03	Petition filed by the petitioners (SC/FR/195/2022)
2022.06.16	Petition filed by the petitioners (SC/FR/212/2022)
2022.07.15	Amended petition of the petitioners (SC/FR/212/2022)
2022.07.18	Amended petition of the petitioners (SC/FR/195/2022)

[emphasis added]

Further, the Auditor General's report produced the names of the Ministers of Finance, Secretary to the President, Governors of the Central Bank, and Members of the Monetary Board holding office during the period applicable to the Audit Report filed in court, as Table No." 33. It stated;

Table No. 33 – Names of the Finance Ministers and officers

Name	**Position**	**Period**
Mr. Mahinda Rajapaksa	Minister of Finance	2019.11.22 to **2021.07.08**
Mr. Basil Rajapaksa	Minister of Finance	2021.07.08 to **2022.04.04**
M.U.M. Ali Sabry (PC)	Minister of Finance	2022.04.04 to 2022.05.09
Dr. P.B Jayasundara	Secretary to the President	2019.11.19 to **2022.01.14**
Mr. Gamini Sedara Senarath	Secretary to the President	2022.01.19 to 2022,07 21
Dr. Indrajit Coomaraswamy	Governor	2016.07.02 to 2019.12.20
Prof. W D Lakshman	Governor	2019.11.19 to 2022.01.14
Mr. Ajith Nivard Cabraal	Governor	2021.09.15 to **2022.04.04**
Dr. P Nandalal Weerasinghe	Governor	2022.04.08 up to now
Dr. RHS Samaratunga	Official Member- Secretary to the Ministry of Finance	2018.12.31 to 2019.11.19
Mr. S R Attygalle	Official Member- Secretary to the Ministry of Finance	2020.11.20 to **2022.04.07**
Mr.K M M Siriwardena	Official Member- Secretary to the Ministry of Finance	2022.04.08 up to now
Mrs. M Ramanathan	Appointed Member	2013.07.18 to 2019.07.17
Mr. CPR Perera	Appointed Member	2015.06.26 to 2020.01.20
Mr. A N Fonseka	Appointed Member	2016.07.27 to 2020.05.31 2022.07.27 up to now
Ms. Dushni Weerakoon	Appointed Member	2019.07.29 to 2020.05.31
Sanjeewa Jayawardena (PC)	Appointed Member	2020.02.26 up to now
Dr. Ranee Jayamaha	Appointed Member	2020.02.29 up to now
Mr. Samantha Kumarasinghe	Appointed Member	2020.02.29 to **2022.03.31**

(a) the introduction of tax cuts and the failure to reverse them

According to the Auditor General's Report filed in court, the downgrading of the sovereign credit ratings of Sri Lanka by the credit rating agencies commenced on the 18th of December, 2019 and thereafter continued to downgrade the sovereign credit rating of Sri Lanka.

In terms of Article 126(2) of the Constitution, where a person alleges that his Fundamental Rights have been infringed or are about to be infringed by an executive or administrative action, he must invoke the jurisdiction of the Supreme Court **within one month** from such infringement or such an application may be made to court within one month of the petitioner becoming aware of the act of the infringement alleged by him.

A similar view was expressed in ***Siriwardena v. Brigadier J. Rodrigo*** **(1986) 1 SLR 384 at 387** where it was held;

> *"The period of one month specified in Sub-Article (2) of Article 126 of the Constitution would ordinarily begin to run from the very date the executive or administrative act, which is said to constitute the infringement, or the imminent infringement as the case may be, of the Fundamental Right relied on, was in fact committed. Where, however, a petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case,* ***the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement*** *and was in a position to take effective steps to come before this Court …"*
>
> [emphasis added]

It is paramount to adhere to the time limit stipulated in the aforesaid Article because the more time that passes after an event occurs, the more difficult it is to ascertain the truth and come to a clear and correct decision about what did and did not happen. Moreover, documents or other essential evidence might not be available with certain parties to an application. Further, people's memories of events fade away, and therefore, the court will not be able to deliver a 'just and equitable' judgment in the case.

However, our courts have entertained applications filed after 30 days from the alleged violation if there is material to satisfy court that there was an inability to invoke the jurisdiction of the Supreme Court due to reasons beyond the control of the person invoking the jurisdiction court and it is 'just and equitable' to entertain such an application due to the facts and circumstances of

the application. This view was expressed in ***Namasivayam v. Gunawardena*** **(1989) 1 SLR 394** where the court held;

> *"The one month prescribed by Article 126(2) for making an application for relief by a person for infraction of his fundamental right applies to the case of the applicant having free access to his lawyer and to the Supreme Court. Hence, if the Petitioner was obstructed by reason of his detention from having access to his lawyer and to the Supreme Court and thus prevented from making his application within the one month of the infraction complained of his delayed application for relief under Article 126 should not be ruled out, if he made his application as soon as he was free from that constraint to make the application."*

On the contrary, it is not possible to exercise such discretion in litigation other than in a Fundamental Rights Application, as such matters are not decided on a 'just and equitable' basis.

In Fundamental Rights Applications, the court is required to consider not only the rights of the petitioner but also the rights of the respondent when making an order granting 'just and equitable' relief. This is particularly difficult if the facts are not straightforward and are interwoven with each other.

Further, when the alleged infringement was published in notice boards, newspapers, regulations, circulations, etc., the petitioners cannot plead ignorance of such publications. The sole purpose of such publications is to inform the general public of an administrative decision. Hence, the computation of time should be considered from the date of such publications.

Furthermore, there was a significant disclosure of information by the government on the state of the economy. In fact, the Parliament was informed by the Minister of Finance on the 10th of December, 2021 that Sri Lanka will not be seeking the assistance of the IMF. Moreover, section 35 of the Monetary Law Act provides for the publication of the annual report of the Central Bank within four months after the end of each financial year. Thus, this information was made available to the public.

Further, according to the petitioners, the rating agencies downgraded Sri Lanka immediately after the tax cuts were announced. Hence, according to the petitioners own showing, the alleged

infringement took place on the day that the Commissioner General of the Inland Revenue published the public notices informing the tax cuts in the years 2019 and 2020.

As stated earlier, in this judgment. the tax reductions referred to in the two petitions were implemented pursuant to a **policy decision taken by the Cabinet of Ministers**, which, in turn, has been enacted into law in terms of the Inland Revenue Act of 2021, the Value Added Tax Act of 2021, the Economic Service Charge Act of 2021 and the Nation Building Tax Act of 2021, etc., by Parliament, by virtue of the power vested in Parliament in terms of Chapters X and XVII of the Constitution. Moreover, the petitioners stated that, in this regard, it is pertinent to note that some of the Bills relating to fiscal legislation were challenged in the Supreme Court.

However, the petitioners did not challenge any of the said legislation during the legislative process, though the Inland Revenue (Amendment) Bill 2021 was challenged in the Supreme Court. Hence, they are now estopped from challenging the legislative process. In any event, anyone who sleeps over their rights is not entitled to challenge any decisions after the stipulated time period imposed by law.

(b) Delay in going to the IMF

Similarly, as evident from the Cabinet Memorandum dated 2nd of January, 2022 and the decision of the Cabinet of Ministers dated 3rd of January, 2022, it shows that the Cabinet of Ministers has taken a decision not to get the assistance of the IMF. Instead, it was decided to have a home-grown solution to the fiscal and economic issues that were faced by the country at the time. **Moreover, the said decision had been informed to the Parliament on the 10th of December, 2021 by the 2A (3rd) respondent**.

Furthermore, the IMF, in its IMF-Sri Lanka Staff Report for the 2021 Article IV Consultation dated 10th of February, 2022, stated that the sovereign debt of Sri Lanka was unsustainable. **Thereafter, on the 12th of April, 2022 the government of Sri Lanka issued an official notice informing all its creditors that all repayment of loans would be suspended** until all debts are restructured and the notice was published in local and foreign media. Thereafter, Sri Lanka defaulted on its payment of the Sovereign Bond on the 19th of May, 2022.

Hence, when the government informed the Parliament that it will not be seeking the assistance of the IMF on the 10th of December, 2022, the alleged violation had taken place on the said date.

Furthermore, according to the Auditor General's Report filed in court, the Central Bank floated the rupee on the 8th of March, 2022. The details of its effects are stated in paragraph 56 of the petition filed in SC/FR Application No. 212/2022.

Moreover, the Central Bank of Sri Lanka honoured the payment of International Sovereign Bond of US $ 500 million on the 18th of January, 2022.

A close scrutiny of the materials filed by all the parties and the Auditor General's Report filed in court relating to the said events shows that the reduction of taxes, the decision of the Monetary Board not to float the rupee, and thereafter, floating of the same, payment of International Sovereign Bonds and the delay in seeking assistance from the IMF are separate and distinct decisions. Particularly, the decision not to go to the IMF had been taken by the Cabinet of Ministers in terms of and under Article 43 of the Constitution, which was later informed to Parliament. Further, according to the Auditor General's Report, the decision to float the rupee was taken by the Monetary Board, and later, it was informed to the Cabinet of Ministers on the 11th of March, 2022 by the Minister of Finance that the decision to pay the International Sovereign Bond was taken by the government to prevent a hard default of International Sovereign Bonds and the secretary to the Ministry informed it to the Governor of the Central Bank, and the decision to reduce taxes was taken consequent to a Cabinet Memorandum submitted by the former President.

Furthermore, the dates and events referred to above in this judgment show that the said events took place long before the two Fundamental Rights Applications were filed in court.

Was there a continuing violation of the Fundamental Rights enshrined in the Constitution?

In addition to the prayer that the petitioner's Fundamental Rights were infringed by the respondents, the petitioners pleaded that there were continuing violations of their Fundamental Rights at the time the two applications were filed in court. Hence, it is necessary to ascertain -

(a) whether there was a continuing violation at the time the two applications were filed in this court,

(b) whether the alleged continuing violations ceased within one month from the filling of the two applications, or

(c) whether the alleged continuing violation ceased one month prior to filling the two applications.

Wharton's Concise Law Dictionary (Fifteenth Edition, 2009 – Reprint 2010) defines a 'Continuing wrong' as;

> *"If a duty continues from day to day, the non-performance from day to day, the non-performance of that duty from day to day is a continuing wrong."*

A continuing violation consists of multiple wrongful acts, failures to act, or taking wrongful decisions contrary to law. However, a continuing violation ceases either when the alleged violation is rectified or the alleged violation ceases or the alleged violator is no longer in a position to continue with the violation.

The '*Continuing Violation Doctrine'* may extend beyond the one-month time limitation if it can be shown that the acts complained of **are sufficiently linked to an unlawful act within the limitation period**.

The said doctrine also requires a showing of –

(1) the acts occurring within the limitations period is similar,

(2) the conduct was frequent, and

(3) the alleged conduct is continuing even at the time the jurisdiction of court is invoked.

Hence, if an aggrieved party fails to challenge the violation when and where it occurs, it is not possible to seek the benefit of the '*doctrine of continuing violation/infringement'*.

As pointed out by the learned Additional Solicitor General and the Auditor General in his Report filed in this court, some of the alleged wrongdoers named as respondents in both petitions have ceased to hold office one month prior to invoking the jurisdiction of this court under Article 126(2) of the Constitution. Thus, the said respondents were not holding any positions that can

reverse the alleged 'continuing violations'. In any event, it is the Cabinet of Ministers who are empowered to take decisions on behalf of the government in terms of and under Article 43(1) of the Constitution, other than the decision taken by the Monetary Board of Sri Lanka prior to the institution of both applications.

In the circumstances, I hold that there was no 'continuing infringement' of the alleged violations referred to in the petitions within the meaning of Article 126 of the Constitution.

Reliefs that can be granted by court in a Fundamental Rights Application

(a) Just and equitable remedy

Article 126(4) of the Constitution states;

> *"The Supreme Court* ***shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition*** *or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right."*
>
> [emphasis added]

The phrase 'just and equitable' allows the court to consider relevant factors connected with the averments in the petition and the prayer to the petition. The word 'just' denotes fairness and reasonableness, and not arbitrariness. The word 'equitable' has the meaning of 'just'. The phrase 'just and equitable' falls within the branch of civil law that is connected with fairness and justness. It ensures that the law will not impose unnecessary or unintended harsh outcomes which unfairly prejudice some of the parties in a case. Further, it provides to grant reliefs that are not strict orders of the law but comply with the principles of justice. Accordingly, as stated above, 'just and equitable' reliefs referred to in Article 126(4) of the Constitution should not apply only to the petitioners but also to the respondents.

Further, due process and the applicable law should be followed in granting 'just and equitable' reliefs. Any reliefs that have not been pleaded in the petition filed in a Fundamental Rights

Application cannot be granted as it violates the principles of natural justice, which is contrary to the *'doctrine of just and equitable remedy'*. In this regard, the court is mindful of the need to follow due process and fair play in granting relief in Fundamental Right Applications.

A similar view was expressed in ***Dayaratne v. National Savings Bank*** **(2002) 3 SLR 116 at** 132 to 133;

> *"In the alternative, the petitioners have prayed for quashing, not of all, but only the promotions of the 7th, 12th, 16th, 19th, 20th, 21st, 23rd, 25th, 27th, 40th, 41st, 42nd, and 46th respondents – on the basis that there were all junior to the petitioners.* ***While the entire process was flawed, I do not consider it just and equitable to quash the other promotions, as the petitioners have not sought that relief****. The petitioners have also asked for an order directing the 1st respondent to promote them to Grade III-II. However, the circumstances do not justify such an order."*
>
> [emphasis added]

When making a just and equitable order, the court is required to follow the principles of natural justice too. Thus, in making a just and equitable order, the court should take the following into consideration;

i. No amount of evidence can be looked into which was never put forward in the pleadings filed in court. A question which did not arise from the pleadings cannot be decided by the court.
ii. The court cannot make out a case not pleaded by the parties. The court should confine its decision to the pleadings and the prayer.
iii. The court cannot grant the relief which is not pleaded in the prayer to the petition.
iv. Parties shall not be allowed to change the scope of the application after the pleadings are completed. Particularly, at the time of hearing of an application.

Further, the object and purpose of filing pleadings in court are to ensure that litigants come to court after identifying the case put forward by the opposing party. Furthermore, it gives an indication that the orders will be made by the court at the end of the hearing.

Moreover, when there is no prayer for a particular relief, the court will not grant any reliefs that have not been prayed for, as it will lead to a miscarriage of justice. Thus, no amount of evidence will justify granting relief that has not been prayed for in the petition. Further, granting any relief that has not been prayed for would be contrary to the doctrine of 'just and equitable' enshrined in Article 126(4) of the Constitution. Similarly, if a petitioner fails to prove the alleged infringement by adducing evidence before the court, the court cannot grant any relief to the petitioner.

A careful consideration of the two petitions, particularly the specific time period applicable to the subject matter of the said applications, shows that the petitioners are focusing on a particular period where the respondents were in office, as disclosed in the Auditor General's Report filed in court. The IMF country reports and the Cabinet Memorandums filed in court show that the fiscal and economic issues that arose in the year 2022 were partly as a result of accumulated debts that have taken place for several decades. Thus, it is not 'just and equitable' to hold the respondents responsible for violations of Fundamental Rights only by considering limited materials filed in court for the period commencing from 2019. Hence, the court could have granted a 'just and equitable relief' if all the materials were available to consider the economic situation in the country prior to 2019.

(b) Prayer to the petition in a Fundamental Rights Application

As stated above, Fundamental Rights Applications fall within the realm of civil law. As held in the case of ***Dayaratne v. National Savings Bank*** *(supra),* it is settled law that the courts cannot grant reliefs not prayed for in the pleadings or in excess of what is being sought by the petitioner. The due process considerations require the judgments to conform to the pleadings filed in court and the evidence presented in court.

Further, the word **"relief"** in the phrase "to grant such **relief** or make such directions as it may deem just and equitable in the circumstances in respect of any petition…" in Article 126(4) of the Constitution refers to the word **"relief"** in the phrase "praying for **relief** or redress in respect of such infringement …" in Articles 126(1) of the Constitution.

Thus, the court cannot grant any relief that has not been prayed for in the petition filed in court.

A similar provision is found in section 40(e) of the Civil Procedure Code where it states;

"A demand of the relief which the plaintiff claims;"

Moreover, it is necessary to give reasons in the judgment for the reliefs granted by court.

Furthermore, unlike in the Indian Constitution, the Supreme Court of Sri Lanka is not conferred with the powers to supervise the implementation of its orders or judgments. Hence, it is not possible to make orders directing the parties to comply with the orders or judgments pronounced by the Supreme Court and report back to the Supreme Court. The finality of the judgments delivered by the Supreme Court was discussed in the judgment delivered in ***Jeyaraj Fernandopulle v. Premachandra de Silva*** **(1996) 1 SLR 70.** However, non-compliance with the orders or judgments of the Supreme Court would give rise to a charge of contempt of court.

Moreover, the due process considerations shall not exceed the scope of the reliefs sought in the prayer. Further, granting reliefs that have not been prayed for in the prayer violates the principles of natural justice, which requires all the parties to be given an opportunity to be heard prior to granting reliefs against a party.

Furthermore, in SC/FR Application No. 195/2022, the petitioners have prayed, *inter alia,* for *"Such other and further relief as Your Lordships Court shall seem meet"*. Further, in SC/FR Application 212/2022, the petitioners have prayed, *inter alia,* to *"Grant further and such other relief as Your Lordships Court may seem meet".*

The aforementioned prayers are similar to the prayer set out in Form No. 14 of the Civil Procedure Code, which sets out the formal parts of the plaint. It states *"and for such further or other relief as to the court shall seem meet".* However, the courts have held that the said prayer does not confer jurisdiction on the courts to grant reliefs that have not been specifically prayed for in the "prayer" to the petition or plaint filed in court.

In ***Sirinivasa Thero v. Sudassi Thero*** **63 NLR 31 at 33** it was held;

> *"Since the decree was on in respect of which, under the Code, the judgment-creditor could not ask for, and the Court had not power to issue, a writ of possession,* ***it seems to me that the Court was acting without jurisdiction in issuing such a writ****. The foundation of a writ of possession is a decree for possession, and a* ***writ of possession which is not founded on such a decree is a nullity, because in issuing it the Court acts in excess of its jurisdiction****. Where a Court make an order without jurisdiction, as in this case, it has inherent power to set it aside; and the person affected by the order is entitled ex debito justitiae to have it set aside. It is not necessary to appeal from such an order, which is a nullity: see the judgment of the Privy Council in Kofi Forfie v Seifah."*
>
> [emphasis added]

Further, in ***Surangi v. Rodrigo*** **(2003) 3 SLR 35 at 38** it was held;

> ***"No court is entitled or has jurisdiction to grant reliefs to a party which are not prayed for in the prayer to the plaint."***
>
> [emphasis added]

Moreover, in ***Pathmawathie v. Jayasekare*** **(1997) 1 SLR 248 at 250** it was held;

> *"It must always be remembered by judges that the systems of Civil Law that prevail in our country is confrontational and therefore the jurisdiction of the judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties. For example, the plaintiff presents to Court a dispute and prays for adjudication and the defendant or party from whom a relief is sought denies or opposes the claim of the plaintiff. The adjudicator or judge thereafter proceeds to determine the issues in conflict. After deciding as to who should prove what is asserted he proceeds to receive evidence viva voce and/or documentary and thereafter evaluate the evidence of facts and law and proceeds to give his finding. In that situation* ***our Civil Law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make as he pleases may be on what he thinks is right or wrong,***

moral or immoral or what should be the correct situation. The adjudicator or judge is duty bound to determine the dispute presented to his and his jurisdiction is circumscribed by that dispute and no more*."*

[emphasis added]

(c) The need to support the prayer by evidence

The petitioners in SC/FR Application No. 212/2022 pleaded, *inter alia,* as follows;

"5. Upon the submission of a report by the said Committee (appointed under the auspices of Your Lordships' Court) to direct the Hon. Attorney General or any other appropriate authorities or officers of the State to consider initiation of investigations and prosecutions against any persons (as necessary) based on the findings from the said report.

6. Make such further and other just and equitable orders as Your Lordship's Court shall seem fit in the circumstances of this Application, under and in terms of Article 126(4) of the Constitution;"

However, there is no iota of evidence to warrant institution of criminal proceedings against the respondents. Further, the said matter was not argued by the parties at the time of the hearing. Hence, the question of directing either the Attorney General or any other authority to institute criminal proceedings will not arise.

As stated above, this court cannot grant any relief other than the reliefs specifically pleaded in the prayer under Article 126(4) of the Constitution. The aforementioned prayer is too vague and not borne out by the averments in the petition.

Furthermore, as Fundamental Rights Applications fall within the realm of civil law, it is not 'just and equitable' to grant relief or make orders that are available in criminal law and the criminal procedure or other remedies available in other laws, such as in the Companies Act No. 7 of 2007, etc. Moreover, no petitioner is entitled to obtain the remedies that are available in civil law or criminal law in a Fundamental Rights Application. For instance, a party who is entitled in law to claim damages for losses from a respondent is not entitled to obtain such damages in a Fundamental Rights Application. Hence, the Supreme Court will only grant a relief which is

'just and equitable' taking into consideration the facts and circumstances of each case. Accordingly, it could not be 'just and equitable' to award a relief or interim relief that should be obtained by a civil or criminal court in a Fundamental Rights Application.

Appointment of a Select Committee to investigate the economic setback

The Parliament has appointed a Select Committee to investigate the economic setbacks and report to Parliament, and submit its proposals and recommendations in that regard. Hence, the learned President's Counsel appearing for the 2 and 2A respondents in SC/FR Application No. 195/2022 submitted that this court has no jurisdiction to entertain the two applications under consideration as Parliament is vested with full control over public finance and the said Select Committee was looking into the same issues that have been urged by the petitioners before this court.

However, in view of the findings already made in this judgment, it is not necessary to consider the aforementioned objections placed by the learned President's Counsel.

Conclusion

It is pertinent to note that;

(a) in January 2022, India pledged a total of US$2.415 billion to overcome dire financial constraints caused by external debt payments and a lack of US dollars in Sri Lanka for business. Under SAARC currency swap arrangement, India extended a $400 million and also deferred an Asian Clearing Union settlement of around $500 million. India granted a new line of credit worth $500 million for the purchase of petroleum products.

(b) in March 2022, spontaneous and organised protests by political parties and non-partisan groups over the government's mishandling of the economy were reported from several areas in the country. Several protests were staged by the opposition demanding the then administration to solve the financial crisis and to immediately resign in wake of the economic crisis.

(c) on the 17th of March, 2022, Sri Lanka received a $1 billion credit line as a lifeline from India in order to buy urgently needed essential items such as food and medicine. The

credit line was activated after India and Sri Lanka formally entered into a credit agreement during the 2A respondent's (in SC/FR/195/2022) visit to New Delhi.

(d) on the 22nd of March, 2022, the government posted soldiers at various gas and fuel filling stations to curb the tensions among people who line up in queues and to ease the fuel distribution. Power cuts were seen throughout March, 2022.

(e) on the 6th of April, 2022 the Sri Lankan Rupee plunged to a record low to become the worst performing currency in the world with US$1 trading at Rs. 355/-.

(f) on the 12th of April, 2022 the Government of Sri Lanka declared that it has taken a decision to default all of its debts in order to avoid the hard default.

(g) Fuel queues continued even till the 23rd of May, 2022.

In addition to the above, I have considered all the materials filed in court along with the Auditor General's Report and particularly, the two applications filed in court, and I am unable to agree with the said position of the petitioners that they became aware of the alleged infringement of their rights on the 4th of May, 2022, when the former Minister of Finance, the 2B respondent, made the statement in Parliament and also when the Governor of the Central Bank made the statement before COPE on the 25th of May, 2022. It is pertinent to note that on their own showing, the petitioners stated that they came to know that the reduction of taxes were implemented in November, 2019 and the alleged adverse effects took place immediately after the rating agencies downgraded Sri Lanka on the 19th of May, 2022.

Further, the country had to undergo unprecedented hardships during the years 2019 to 2022 due to a lack of essential items and the escalation of fuel and gas prices. However, the petitioners filed SC/FR Application No. 195/2022 and SC/FR Application No. 212/2022 on the 3rd of June, 2022 and 17th of June, 2022, respectively.

Article 126(2) of the Constitution states that a person should invoke the jurisdiction of the Supreme Court within one month from the date of the infringement of the Fundamental Rights.

A careful consideration of the two applications and the materials filed in court show that the alleged infringements took place on the dates specified in the aforementioned two charts furnished to court by the Auditor General and the learned Additional Solicitor General.

Moreover, as stated above, all the facts and circumstances show that the alleged infringements are not continuing infringements. On the contrary, they are specific decisions and acts, either taken or implemented by the Cabinet of Ministers or by the Monetary Board of Sri Lanka.

Furthermore, a critical analysis of the averments in both petitions shows that the petitioners did not invoke the jurisdiction of this court within one month of the alleged violations that have been pleaded in the two petitions. Hence, I am of the opinion that in light of the aforementioned overwhelming evidence with regard to the public awareness of the fiscal and economic crisis in Sri Lanka, it would not be 'just and equitable' to hold that the petitioners became aware of the said infringements within 30 days of the filing of the two applications in court or that there were continuing infringements of the Fundamental Rights of the petitioners at the time the two applications were filed in court. Hence, I hold that the parties have not invoked the jurisdiction of this court within one month of the alleged infringements as required by Article 126(2) of the Constitution.

Further, I am of the view that the petitioners have not established on a balance of probability that the respondents have infringed the Fundamental Rights of the petitioners guaranteed by Article 12(1) and 14(1) (g) of the Constitution. Hence, I dismiss the SC/FR/Application No. 195/2022 and SC/FR/Application/212/2022.

I order no costs.

Priyantha Jayawardena, PC.
Judge of the Supreme Court

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

In the matter of an Application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohamed Razik Mohamed Ramzy
No. 594/3, Polgasdeniya,
Katugastota

Acting in terms of Article 126(2) of the Constitution, the above-named petitioned the Supreme Court by his Attorney-at-Law
Musthafa Kamal Bacha Ramzeen,
No. 42, Norris Canal Road,
Colombo 10.

Petitioner

SC / FR Application No. 135/2020

Vs.

1. B.M.A.S.K. Senaratne
   Chief Inspector of Police
   Officer-in-Charge
   Computer and Forensic Training Unit,
   Criminal Investigation Department,
   Colombo 1.

2. W. Thilakaratne
   Senior Superintendent of Police
   Director,
   Criminal Investigation Department,
   Colombo 1.

2A. A.R.P.J. Alwis
Senior Superintendent of Police
Director,
Criminal Investigation Department,
Colombo 1.

2B. Kavinda Piyasekera
Senior Superintendent of Police
Director,
Criminal Investigation Department,
Colombo 1.

3. M.G.L.S. Hemachandra
Military Service Assistant of the
Defence Secretary,
Ministry of Defence,
Colombo 1.

4. Major General Kamal Gunaratne
Secretary of the Ministry of Defence,
Ministry of Defence,
Colombo 1.

5. C.D. Wickremaratne
Inspector General of Police
Sri Lanka Police Headquarters,
Colombo 1.

6. Honourable Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before:	**B.P. Aluwihare, P.C., J.** **Yasantha Kodagoda, P.C., J.** **Janak De Silva, J.**
Counsel:	Mr. Nuwan Bopage with Mr. Chathura Weththasinghe instructed by Mr. Ramzi Bacha for the Petitioner. Ms. Induni Punchihewa, State Counsel for the 1st and 3rd to 6th Respondents.
Argued on:	29th March 2023
Written Submissions:	For the Petitioner - Filed on 2nd February and 6th June, 2023. For the Respondents – Not filed.
Decided on:	14th November, 2023

Yasantha Kodagoda, P.C., J.

This judgment relates to an Application filed under Article 126(2) of the Constitution by Attorney-at-Law Musthafa Kamal Bacha Ramzeen (hereinafter referred to as "the petitioner") on behalf of one Mohamed Razik Mohamed Ramzy (hereinafter referred to as "the virtual petitioner"). The virtual petitioner had been in remand custody at the time of filing this Application. The petitioner has claimed that due to the COVID – 19 pandemic that prevailed at the time of preferring the Application, the virtual petitioner had been unable to directly move this Court and invoke the jurisdiction vested in it under and in terms of Article 126 read with Article 17 of the Constitution. Thus, he has explained why this Application was filed by him in his capacity as an Attorney-at-Law.

On 17th June 2020, when this matter was supported, the Court had granted *leave to proceed* for alleged violations of fundamental rights of the virtual petitioner guaranteed by Articles 12(1), 13(1), 13(2) and 14(1)(a) of the Constitution. The record reveals that when the Application was supported for *leave to proceed* learned counsel for the petitioner had withdrawn the three prayers of the petition seeking interim relief.

Case of the Virtual Petitioner

The virtual petitioner who is a citizen of Sri Lanka of Muslim ethnicity and Islamic religious faith, had been a public servant and had served as an Interpreter in a public sector institution. Due to a health condition, he had retired prematurely. Since December 2009, he has maintained a Facebook profile. According to "A1(i)", at the time of the incident referred to in this judgment, the virtual petitioner had 1,212 'Followers' and 3,497 'Friends'. He has been active on Facebook, and has been regularly posting his views on it regarding socio-cultural, religious and political issues. The virtual petitioner claims that he is a strong opponent of racism, religious extremism, communal violence and a believer of a peaceful society filled with tranquility and harmony among all ethnic groups. He further claims that his Facebook posts have been aimed at promoting ethnic harmony, reconciliation, equality, and justice.

On 2nd April 2020 at approximately 1.30 pm, founded upon his belief that an incorrect, vicious and unfair campaign was afoot against the Muslim community of this country, that they were responsible for spreading the Corona (COVID-19) pandemic, the virtual petitioner had using the Sinhala language, posted on Facebook the following content:

> "ශ්‍රී ලාංකික මුස්ලිම් සමාජය චින්තන යුද්ධයකට *ideological war* මුහුණ පා ඇත. රට තුළ ක්‍රියාත්මක වන ජාතිවාදී කල්ලි ඉතාමත් සූක්ෂම ආකාරයට දියත් කරනු ලබන මෙම චිනතන යුද්ධයට මුහුණ දීමට නොහැකි ආකාරයට මුස්ලිම්වරු හතරවටින්ම වටකරනු ලැබ ඇත. දියත්වන ප්‍රබල බුද්ධි ප්‍රහාරයට එරෙහිව කිසිත් කල නොහැකිව මුස්ලිම් සමාජය ඒ දෙස තුෂ්ණිම්භූතව බලා සිටී.
>
> ජාතිවාදී සතුරන් සාර්ථකව ඔවුන්ගේ අරමුණ කරා ළඟා වෙමින් සිටී. මේ ප්‍රබල බුද්ධි ප්‍රහාරය හමුවේ මුස්ලිම්වරු පරාජය වෙමින් සිටී.
>
> මුස්ලිම්වරු වහාම චින්තන ජිහාදයකට (මතවාදී අරගලය) සූදානම් විය යුතුය. එය මුලු මහත් ශ්‍රී ලාංකික පොදු සමාජය වෙනුවෙන් ඔවුන්ගේ කරමත පටවා තිබෙන ආගමික වගකීමකි. රට සහ එහි සියලු පුරවැසියන් වෙනුවෙන් පෑන සහ කී-බෝඩය අවියක් කරගනිමින් චින්තන ජිහාදයක (මතවාදී අරගලය) ට සූදානම් වීමට කාලයයි මේ. රටේ තවත් ජනකොටසක් වන මුස්ලිම්වරුන්ට එරෙහිව ගෙනයන වෛරී ප්‍රචාරණයට මුහුණ දීමට ප්‍රධාන මාධ්‍ය සහ සමාජ මාධ්‍ය ඇතුළු පවතින සෑම අවකාශයක්ම යොදාගනිමින් ගනිමින් මතවාදී අරගලයක් මගින් ජනතාවට සත්‍ය වටහාදීම පිලිබඳව මේ අවස්ථාවේ මුස්ලිම්වරු වඩාත් අවදානය යොමුකල යුතුය.
>
> නොහැක්කක් නොමැත."

[Emphasis added.]

In my view, when translated into English, the following is its meaning:

> *"The Sri Lankan Muslim community has faced an ideological war. The Muslim community has been encircled from all sides by racist groups who are operating in the country and are waging this ideological war in a subtle manner., and thus, the Muslim community is unable to face it. Unable to do anything against this intellectual assault, the Muslim community is watching it and waiting in shock. Racist enemies are gradually getting closer to their goal. In the face of this ideological war, Muslims are facing defeat. Muslims should immediately get ready for an ideological jihad (ideological struggle). On behalf of all Sri Lankans, that is a religious responsibility thrust upon the shoulders of all of them. On behalf of the country and all its citizens, this is the time to take up the pen and the keyboard as arms, and get ready for an ideological war. For the purpose of confronting the vicious campaign being carried out against the Muslims who are a group of people of this country, for the purpose of creating awareness in the people about the truth, Muslims should pay attention to the need to carry out an ideological Jihad (ideological war) by using the mainstream media, social media and all other space. Nothing is impossible."*

In response to this post, the virtual petitioner had received on his Facebook profile page a large number of replies which the petitioner has presented to this Court. Some of those responses included death threats and calls for his arrest. Consequently, on 3rd April the virtual petitioner announced through another Facebook post that he was enforcing a self-censorship and that he will not post any more content relating to politics or national problems in Sinhala language, as he does not want to endanger the lives of his children.

On 9th April 2020 at 11.04 am, the virtual petitioner has presented through electronic mail a complaint to the Inspector General of Police regarding the death threats he had received. In the said complaint, the virtual petitioner has made reference to the names of persons and websites that had made threats to him.

On 9th April 2020, the virtual petitioner was arrested by the Criminal Investigation Department (CID) and thereafter produced before the Magistrate's Court with a Report under the hand of the 1st respondent - Chief Inspector Senaratne, the OIC of the Computer Forensics Laboratory and Training Unit of the CID. The Report contained allegations that the virtual petitioner had committed offences under the Penal Code, the International Convention on Civil and Political Rights Act (hereinafter referred to as "the ICCPR Act" and the Computer Crime Act. In the light of the allegation that the virtual petitioner had committed an offence under the ICCPR Act, the learned Magistrate had placed the virtual

petitioner in remand custody. Accordingly, since 9th April, he had been detained in remand custody.

It is in this backdrop that, while the virtual petitioner was being held in remand custody, the petitioner filed this Application on behalf of the virtual petitioner. The petitioner alleged that the virtual petitioner had not committed any offence and therefore there was no justification for arresting him. The petitioner claimed that the conduct of the 1st respondent in arresting, holding in custody and having the virtual petitioner remanded, infringed the virtual petitioner's fundamental rights.

Position of the Respondents

Filing an affidavit, the 1st respondent stated that information pertaining to the virtual petitioner was first received by the CID from the Ministry of Defence. Consequently, an investigation has commenced. Investigations revealed that the statements published by the virtual petitioner on Facebook had given rise to racial and or religious hatred, which could lead to disharmony and violence. Therefore, the virtual petitioner's activities on the Facebook were kept under surveillance and steps were taken to analyze such activities. The Facebook post published by him on 2nd April 2020 propagating an 'ideological war' had given rise to 75 shares and 499 comments. This post spurred a wave of racially hostile sentiments among those who had seen the post. Investigations conducted revealed that the said post had incited feelings of anger and hostility among those who had seen it. Therefore, it was probable that such sentiments may lead to violence amongst religious groups.

Therefore, the virtual petitioner was produced before the Chief Magistrate of Colombo in MC action No. B 31673/01/20 on allegations that he had committed offences under section 120 of the Penal Code, section 6 of the Computer Crime Act and section 3(1) of the ICCPR Act. Accordingly, the virtual petitioner was placed in remand custody by the Chief Magistrate.

In the circumstances, the 1st respondent denied that he had infringed the fundamental rights of the virtual petitioner.

Submissions of learned counsel

The very essence of the submissions of learned counsel for the petitioner was that the publication of the Facebook post in issue was a clear instance of the virtual petitioner having exercised his fundamental right to freedom of speech and expression including

publication, which is guaranteed by Article 14(1)(a) of the Constitution. His position was that by arresting the virtual petitioner, holding him in custody and producing before the learned Magistrate which resulted in his being placed in remand custody without bail, the respondents had infringed the fundamental rights of the virtual petitioner. He submitted that the conduct of the respondents amounted to punishing the virtual petitioner for having exercised his fundamental rights.

The essence of the submission made by learned State Counsel who appeared for the respondents was that, by publishing the afore-stated Facebook post, the virtual petitioner had committed certain offences (and emphasized only that the virtual petitioner had committed an offence under section 3(1) of the ICCPR Act) and therefore, it was well within the legal authority and responsibility of the 1st respondent to have arrested the virtual petitioner, held him in police custody, initiated criminal proceedings in the Magistrate's Court, and move the learned Magistrate to place him in remand custody. Learned State Counsel submitted that the virtual petitioner was arrested only after a lawful investigation was conducted by the 1st respondent. She drew the attention of this Court to the fact that the original information regarding the publication of the Facebook post had been provided to the CID by the Ministry of Defence. During the course of the investigation, the CID had recorded the statement of one Shashika Pieris, whose statement justified the arrest of the virtual petitioner for having committed an offence under section 3(1) of the ICCPR Act.

In view of the positions taken up by the petitioner and the 1st respondent, as well as the submissions made by learned counsel, the adjudication of this matter would rest primarily on the finding of this Court pertaining to one particular action of the virtual petitioner. That being, the statement posted by him on the Facebook on 2nd April 2020, which has been reproduced above, verbatim. This Court must determine the following:

(i) whether the virtual petitioner exercised his fundamental right to free speech, expression including publication when he posted the afore-stated statement on Facebook, and

(ii) whether the response of the 1st respondent and the state to the publication of that post on Facebook was within the purview of restrictions that may be imposed on the exercise of the fundamental right to free speech, expression including publication and carried out in a lawful manner.

Speech and expression including publication

For the purpose of assimilating and disseminating information, views and ideas, civilized human beings regularly use spoken and written forms of language. This process is referred to as 'communication'. In most forms and manifestations of communication, there exists a dynamic and constant exchange of human interaction between those near and far. Communication mostly involves bi and multidirectional flow of information, thoughts, ideas and opinion. Some forms of speech and expression involve one-way flow of information and expression of views, and are aimed at conveying information, ideas, views, feelings and may be for the purpose of shaping public opinion. Both these forms of speech and expression are essential for living and necessary for both individual and collective realization of the true potential of life, and personal and social development. The use of speech, other forms of expression and their publication is a *sine qua non* of being born human, to a free country and is an essential prerequisite of any civilized and organized society.

Humans use communication through speech, other forms of expression and publication not only to fulfill basic and essential requirements of living. Communication involving the exercise of speech and other forms of expression and their publication is used for higher and advanced requirements of individuals and the society, such as (i) education, learning and training, (ii) professional, occupational, trade, business, financial and commercial activities, (iii) learning, practice, manifestation and propagation of religion, beliefs and other spiritual activities, (iv) socio-cultural and aesthetic activities, (v) propagation of information, vision, ideology, theory, and for engaging in advocacy, and (vi) for political activities. Particularly in contemporary society, speech and other forms of expression and their publication are essential for the meaningful and collective exercise of sovereignty and for the individual exercise of franchise. For the efficacious functioning of a representative democracy, which is the hallmark of Sri Lanka's republican representative democracy, the ability to freely and in a lawful manner exercise the fundamental right to free speech, expression including publication is a *sine qua non*. These are all key features embedded in Sri Lanka's second Republican (present) Constitution.

In addition to the use of spoken and written forms of language, for expression of thoughts, ideas, experiences and views, humans also use other forms of communication, some of which are creative, such as signs, sound, photographs, art, music, drama, cinema, video, and sculpture. Even an action such as demonstrating and picketing, making sound, wearing apparel or an accessary of a particular colour and shape or containing particular words, symbol or design, burning an effigy, and attendance or boycotting the

attendance at an event may amount to forms of expression, and are manifestations of communication. Thus, in communication, the determinant is the intention (what is sought to be achieved by the disseminator) and attendant circumstances including how it is perceived and what is understood by the intended recipients, as opposed to the form in which communication is carried out.

Communication is primarily twofold - private communication and mass communication. Mass communication involves the use of media such as books, newspapers, television and cinema.

Digital channels and platforms for free speech

In today's context, modes of communication would include digital channels and platforms which are used for both private and mass communication, and for widespread dissemination of speech and other forms of expression. Such digital forms of communication include the use of the World Wide Web – Internet, and specialized cites on the internet such as the popular platform 'Facebook' which is referred to in this judgment. Further, there are other well-known channels such as Instagram, Twitter and digital connectivity channels such as Skype, Viber, WhatsApp, Signal, and Telegram, which the companies hosting such services claim are secure channels of communication with point-to-point encryption. Collectively, they are referred to as the *social media,* the existence of which has transformed the arena of mass communication and media. These digital platforms and channels are relatively new and still going through evolution. Due to the prevalence and convenience of use, these digital channels of communication have now become part of routine daily lives of people. The impact of websites and digital social media is significant, not only because of a captivating global audience, but also because of its ability to attract the attention of people who never solicited the information contained in the message being disseminated, and happens to merely *pass-by* and then read and view the contents of the message. Drawn into and attracted to it, curiosity awakened, and finally influenced by the content, some of them understandably choose to believe the contents, accept views, and influenced thereby, conduct themselves in a particular manner.

These new digitized avenues have not only caused a revolutionary change in private and mass communication, they have created new vistas for the exercise of the fundamental right to free speech and expression including publication. Their prevalence and use have rapidly overtaken conventional channels of communication and thus have become most effective and indispensable. Therefore, such access to digital channels and platforms and

the ability of the people to use them, have now become constituent ingredients of the fundamental right to free speech and expression including publication.

However, the availability of these digital modes of communication, their ability to reach an unprecedented audience, and the convenience at which such new channels of communication could be used, have also given rise to serious concerns regarding the nature of regulation and restrictions and their enforcement that may be justifiably required for the protection of greater public and national good. Slander and defamation, contempt, unlawful intrusion into privacy, criminal or sexual intimidation, fraud, malicious spreading of false or scurrilous information and material, incitement to violence, perpetration of fraud and other criminal offences, causing ethno-social and religious hatred through the dissemination of hate speech, advocating disharmony, discrimination and hostility among communities, threats and attacks on national security and manipulative and unethical tack-ticks to influence public thinking, are some and not all the evils of abuse of modern means of digital communication.

Fundamental Right to free speech and expression including publication

Article 14 of the Constitution which has been codenamed *'the Charter of Liberty'* personifies what it means to be born human, the freedom to lawfully use the cognitive faculties of being an intellectual being as opposed to being a non-human, and in particular the ability to reap the full benefits of being a citizen of Sri Lanka. Article 14 provides for the freedom (a) of speech and expression including publication; (b) of peaceful assembly; (c) of association; (d) to form and join a trade union; (e) to manifest either by oneself or in association with others, religion or belief in worship, observance, practice and teaching in public or in private; (f) to enjoy and promote one's own culture and to use his own language; (g) to engage in any lawful occupation, profession, trade, business or enterprise; (h) of movement and of choosing his residence within Sri Lanka; and (i) to return to Sri Lanka. Thus, it would be seen that Article 14 contains rights which are so fundamental to an individual's spiritual, holistic, educational, professional or occupational, economic, and social development and well-being. Article 14 is seen as an external manifestation of the exercise of Article 10, which guarantees freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. The opportunity to exercise these fundamental rights contained in Article 14 enables the achievement of individual, social and community development, resulting in the country as a whole, developing and reaping the yields of prosperity. As Chief Justice Sharvananda has said in ***Joseph Perera alias Bruten Perera vs. The Attorney-General and***

Others[1], Article 14 contains great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country.

It is the synergy created through the fundamental rights contained in Articles 10 and 14, coupled with the fundamental rights contained in Articles 11 and 13 guaranteeing protection, security and physical freedom, and the status of equality conferred by Article 12, which cumulatively vests freedom, independence, liberty, protection and dignity in the true and comprehensive sense of those words to the People of Sri Lanka, and confers on them the opportunity and meaningfulness to collectively be the sovereigns of this Republic. Therefore, recognizing, promoting and protecting the fundamental rights guaranteed by Articles 10 to 14 are of critical importance and the solemn responsibility of the state. It is the bounden constitutional duty of the state, which has been created by the Constitution to serve the sovereign People, both collectively and through the three organs of the state. Therefore, the state shall not infringe such fundamental rights. It may however regulate and or restrict the exercise of such fundamental rights through law, to the extent and in the manner authorized by the Constitution, when doing so is necessary for the protection of wider public and national interests.

An in-depth and philosophical comprehension of the Constitution of Sri Lanka reveals that the objectives of governance and in contemporary perspectives achieving the goals of ethno-social and religious harmony, social cohesion between and within communities and between communities and the state, protection of national security and achieving rapid and sustainable economic growth and development including the millennium development goals cannot be realized, unless citizens of this country are not only permitted, but facilitated and encouraged as well, to exercise their fundamental rights guaranteed by Article 14.

Long-term suppression of the fundamental rights contained in Article 14, coupled with systematic and widespread erosion of the *rule of law* guaranteed by Article 12, supplemented by gross infringements of Articles 11 and 13 rights, augmented by the inability to meaningfully and effectively exercise the right to information recognized by Article 14A, is a recipe for the eruption of serious consequences.

Some of the consequences may be summarized as follows:

(i) individual and collective frustration;

[1] [(1992) 1 Sri L.R. 199]

(ii) unconstitutional and illegal revolt through both organized and disorganized stratagem to cause internal strife and armed conflict which may be aimed at -
(a) change of the constitutional structures of governance,
(b) change of government, and
(c) unseating of key government officials, through undemocratic and unconstitutional means, all of which often result in violence, death and destruction of property; and

(iii) stagnation and even depredation of the economy.

All of these disastrous consequences can in the long-term result in the fragmentation of the country and the destruction of the state. The ignominious outcome of systematic and widespread infringement of such fundamental rights would be the country becoming a failed state.

Suppression and infringement of fundamental rights with the short-term aim of strengthening authoritarianism, accumulation of executive power, suppression of dissent, and creating a totalitarian state, which are the antithesis to republican and democratic norms and principles of law enshrined in Sri Lanka's Constitution, will only result in long-term destruction of the very same authorities who seek to strengthen their power beyond what is permitted by the *rule of law* and those who may seek to govern without respecting alternate views, dissent and lawful means of democratic opposition.

For the right to speech and expression to be meaningful and effective, citizens must have the right to **free** speech, expression and their publication unshackled by dictatorialism, totalitarianism, authoritarianism, majoritarianism, and tyrannical oligarchism. These anti-democratic and unconstitutional forms of governance are generally associated with (a) rejection of constitutionalism and the *rule of law*, (b) disrespect for the doctrine of separation of powers and the co-equal status of the three organs of the state, (c) contempt and disregard for the independence of the judiciary, (d) disrespect for human rights, (e) intolerance of political dissent, (f) disregard for the rights of minorities and vulnerable communities and their discrimination, (g) widespread infringement of human rights and (h) arbitrary or unreasonable exercise of executive power such as overbroad and unnecessary censorship, and abusive enforcement of criminal justice measures amounting to persecution.

The importance of protecting free speech does not permeate only at national level. It is of global significance, as absence of free speech not only has domestic repercussions, but,

global effects on the well-being of human kind, stability of nation states and on international and regional peace and security, as well.

Thus, the justification for the recognition of the right to free speech and expression is not as a mere legal right, but also as an internationally recognized human right under international human rights law.

Article 19 of the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948, provides that everyone has the right to freedom of opinion and expression, and that this right includes freedom to hold opinions without interference, and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 and acceded to by Sri Lanka in 1980, provides as follows:

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

In recognition of such international human rights standards, Article 14(1)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka provides the fundamental right to freedom of speech and expression including publication.

The exercise of this fundamental right can be restricted only through constitutionally recognized limited legislative means, which may be enforced only by legal authority in the wider public and national interest.

Both the Preamble and Article 1 of the Constitution denote, that the Republic of Sri Lanka is a democracy. Democracy is the form of governance recognized by the Constitution. In out Republic, as provided in Article 3, the People are sovereign. Article 4(d) confers on the People franchise as an element of their sovereignty in addition to their fundamental rights [Article 4(e)], which are directly and individually exercised by the People. The other three elements of People's sovereignty, namely, the executive, legislative and judicial power of the People, are to be exercised in the manner provided in Articles 4(a), 4(b) and 4(c) of the Constitution. The electoral system for the exercise of franchise and thereby for election of the President, Members of Parliament, Members of Provincial Councils and Local Authorities as provided for in the Constitution and other applicable laws, enable people's sovereignty to be exercised collectively and through their elected

representatives, in a manner that would give rise to a functioning representative democracy. That would be by election of representatives of the people as head of the executive (the President), and as members of the legislature (Members of Parliament), Provincial legislatures (Members of Provincial Councils) and as members of Local Authorities, who shall serve the nation for the good of the public, in terms of the mandate they have received from the People and according to law, that the sovereignty of the People can be respected.

The efficacious functioning of these institutions according to the Constitution and other applicable laws with periodically renewed mandates from the People through the regular holding of elections in the manner prescribed by law, is essential for People's sovereignty to reign. The right to free speech, expression including publication is essential, for people to choose the manner in which they should exercise franchise, elect such representatives and confer on them mandates. That is primarily because the exercise of free speech, expression and publication is the manner in which information, principles, ideology, views and ideas may be disseminated and propagated, explained and criticized, assimilated and internalized, discussed, debated, and agreed or disagreed upon. Therefore, for the functioning of the form of governance provided for in the Constitution, the vibrant exercise of the fundamental right to free speech, expression and publication is of utmost importance. The only *caveat* being the need to exercise this fundamental right in a lawful manner which would include respecting the rights of others.

As Justice Mark Fernando has held in ***Deshapriya v. Municipal Council, Nuwaraeliya***[2], *"the right to support or criticize governments and political parties, policies and programmes is fundamental to the democratic way of life …".* As Justice Dr. A.R.B. Amerasinghe has observed in ***Channa Pieris and Others v. Attorney General and Others***[3], *"the unfettered interchange of ideas from diverse and antagonistic sources, however unorthodox or controversial, however shocking or offensive or disturbing they may be to the elected representatives of the people or to any sector of the population, however hateful to the prevailing climate of opinion, even ideas which at the time a vast majority of the people and their elected representatives believe to be false and fraught with evil consequences, must be protected and must not be abridged, if the truth is to prevail."*

Perusal of judgments of this Court during the past 50 years reveal that, a considerable number of Applications filed in Court relating to alleged instances of infringement of

[2] [(1995) 1 Sri L.R. 362]
[3] [(1994) 1 Sri L.R. 134]

Article 14(1)(a) has been connected with speech and publications containing politically sensitive content critical of the government. In this regard, the following views of Chief Justice Sharvananda in ***Joseph Perera alias Bruten Perera vs. Attorney-General and Others***[4], are of significance:

> *"… criticism of Government, however unpalatable it be, cannot be restricted or penalized unless, it is intended or has a tendency to undermine the security of the State or public order or to incite the commission of an offence. Debate on public issues should be uninhibited, robust and wide open and that may well include vehement, caustic and sometimes unpleasant sharp attacks on Government. Such debate is not calculated and does not bring Government into hatred or contempt."*

Thus, it would be seen that the infringement of the fundamental right to free speech and expression including publication has direct implications to the operation of the Constitution and to the manner in which the sovereignty of the People is to be given effect to. Therefore, as the upper guardian of the Constitution, these are additional reasons as to why this Court needs to pay special attention to the adjudication of Applications in which it is alleged that the fundamental right to free speech, expression and publication has been infringed or is attempted to be infringed. That constitutional duty in my view should be performed, by conferring on the fundamental right guaranteed by Article 14(1)(a) (which may be termed *'the facilitator of democracy'*) a pre-eminent position only second to the right to equality (which may be termed *'the custodian of the rule of law'*) guaranteed by Article 12 of the Constitution.

Free Speech, duties and responsibilities, and restrictions

As Dr. Jayampathy Wickremaratne, PC in his monumental treatise *"Fundamental Rights in Sri Lanka"*[5] has explained, *"freedom of speech and expression means the absence of restraint upon the ability of individuals or groups of individuals to communicate their ideas and experiences to others.* ***In doing so, they cannot however, compel others to pay them attention, nor are they entitled to invade other rights that are essential to human dignity.*** *Freedom of expression is one of the essential foundations of a civilized and truly democratic society. It is one of the conditions essential for the development of the human personality. …"* [Emphasis added.]

In ***Dissanayake v. University of Sri Jayawardenapura and Two Others***[6], Chief Justice Sharvananda has observed that absolute and unrestricted individual rights do not and

[4] [(1992) 1 Sri L.R. 199]
[5] 3rd Edition – 2021, p.772
[6] [(1986) 2 Sri L.R. 254] at 263

cannot exist in a modern state. Social control is needed to preserve the very liberty guaranteed. All rights are only relative and not absolute. The principle, on which the power of the State to impose restriction is based on the principle that, all individual rights of a person are held subject to such reasonable limitations and regulations as may be necessary and expedient for the protection of the general welfare of the society. Thus, it is important to note that the guarantee of freedom of speech, recognized by Article 14(1)(a) of the Constitution, does not give an absolute protection for every utterance. The exercise of the rights conferred by this Article must not result in the violation of the rights of others.

The exercise of uninhibited free speech and other forms of expression by one person can have a bearing on the rights and interests of other individuals, the wellbeing and the welfare of the society as a whole, and the security of the State. That would be particularly important in instances where the right to free speech and expression is sought to be exercised without due regard to the rights of others and duties and responsibilities towards others in society, which the law requires to be adhered to.

Therefore, while the fundamental right to free speech and expression should be protected, in wider public good, certain restrictions may have to be imposed.

Dr. Jayampathy Wickremaratne, PC[7] points out that *"a Constitution that declares fundamental rights and freedoms lays down permissible restrictions in order to maintain a balance between individual rights and freedoms on the one hand and the interests of the society on the other. While the rights and freedoms represent the claims of the individual, the permissible restrictions represent the claims of the society. … it would be useful to remind oneself that the rights which the citizens cherish deeply are fundamental – it is not the restrictions that are fundamental."*

Restrictions that are recognized and permissible with regard to the exercise of the human right to free speech are contained in international human rights instruments such as the ICCPR. Article 19(2) of the ICCPR provides as follows:

> *"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals."*

[7] ibid, at p. 129

Furthermore, Article 20 of the ICCPR provides that, *"any propaganda for war shall be prohibited by law"*, and *"any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"*.

Therefore, while the fundamental right to free speech and expression is recognized on the one hand, certain lawful restrictions that may be stipulated and imposed on the exercise of that fundamental right, can be recognized and enforced on the other hand. However, restrictions on free speech and expression should be stipulated and enforced within the framework provided for by law, and for the purpose of not mere curtailment of free speech, but for the purposes for which the Constitution stipulates that such restrictions may be imposed. Fundamentally, restrictions must be stipulated by law and enforced through lawful means, in larger public good. According to the Constitution, restrictions that may by law be imposed are contained in Articles 15(2), 15(7) and 15(8) of the Constitution.

The constitutional provisions empower restrictions to be prescribed by law –

(i) (a) in the **interests of racial and religious harmony**, or
(b) in relation to parliamentary privileges, contempt of court, defamation, and incitement to an offence,
[Article 15(2)]

(ii) (a) in the interests of national security, **public order** and the protection of public health or morality,
(b) for the purpose of securing due recognition and **respect for the rights and freedoms of others**, or
(c) for meeting the **just requirements of the general welfare of a democratic society**,
[Article 15(7)]
and

(iii) in the interests of the proper discharge of their duties and the maintenance of discipline among members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to them. [Article 15(8)]

Later in this judgment, I shall revert to the applicability of the restrictions relied upon by the respondents with regard to the exercise of free speech and its publication by the virtual petitioner.

In my opinion, for the purpose of judicial adjudication of the complaint by the petitioner that the virtual petitioner's fundamental rights were infringed by the respondents, the following questions need to be answered:

(i) *When the virtual petitioner published his Facebook post of 2nd April 2020, did he exercise his fundamental right to freedom of speech and expression including publication?*
(ii) *By the publication of the Facebook post on 2nd April 2020, did the virtual petitioner commit offences under section 120 of the Penal Code, section 3(1) of the ICCPR Act and section 6 of the Computer Crime Act?*
(iii) *Were the measures imposed by the respondents on the virtual petitioner lawful and within the scope of permissible restrictions as recognized by the Constitution?*

In search of answers to these three questions, it is necessary to revert to the Facebook post of the virtual petitioner, of 2nd April 2020.

According to the virtual petitioner, founded upon his belief that there was afoot a vicious and unfair campaign against the Muslim community that they were responsible for spreading the COVID-19 pandemic (a claim which the respondents have not assertively denied or countered, save the customary blanket denial), on 2nd April 2020, the virtual petitioner posted on Facebook, certain views. He did so, using his true identity, without in any manner seeking to disguise himself. It is not known whether the message went *viral*[8] and was therefore seen by a very large number of persons. However, according to the 1st respondent, the post had been shared by 75 Facebook users (which would may have resulted in onward transmission of the post to other users) and had generated 499 comments.

In the virtual petitioner's post of 2nd April 2020, he says that in the wake of the COVID-19 pandemic, there is an ideological war being subtly waged by racist groups against the Sri Lankan Muslim community. The Muslim community encircled by all sides is shocked by these developments, is unable to face it, and the enemies (a possible reference to the afore-stated racist groups) are on the verge of gaining victory. Muslims should respond to these attacks through the waging of an ***ideological jihad***. Muslims should confront the vicious campaign by taking-up arms, which should be in the form of using the pen and the keyboard, and respond to the attacks against the Muslim community. This should be

[8] A contemporary and new term in English language, which means fast spreading of textual and or audio-visual content over the internet and related digital media, resulting in the content reaching a large group of persons both directly and through onward forwarding by recipients.

done using the mainstream media, social media and available other space. He says that it should be for the purpose of establishing the truth.

The learned counsel for the Petitioner took pains at attempting to explain to this Court that the term *'Jihad'* does not mean *'a holy war waged by those who profess the Islamic faith against those who do not profess the Islamic faith, for the purpose of defending Islam'*. He advanced the view that it means only a 'struggle' though often according to him misunderstood to mean 'warfare' or 'terrorism'. Following persistent inquiry by Court, learned counsel for the petitioner did admit that certain manifestations of this 'struggle' may take the form of unleashing of violence. Learned State Counsel did not counter this view by presenting any alternate authoritative material or expert opinion on what a *'Jihad'* actually means. However, I shall not express any view in that regard, as doing so is unnecessary for the determination of this matter.

Be that as it may, learned counsel for the petitioner insisted that an *'ideological jihad'* does not amount to the use of any violence, inciting the perpetration of any violence or doing anything that is illegal. He submitted that it is essentially a peaceful and non-violent process, comprising of organized strategy using means of communication for the purpose of countering attacks on Islam. He further submitted that, basically, that an *'ideological jihad'* is a campaign using communication strategy. In fact, in that regard, learned State Counsel did not submit anything to the contrary. She did not expound an alternate meaning to the term *'ideological Jihad'*. The 1st respondent in his affidavit filed in this Court has not insisted that by the Facebook post, the virtual petitioner had called upon the Muslim community to engage in an armed struggle against its enemies (the allegedly racist elements referred to in the post) or engage in any violent conduct.

Material placed before this Court reveals that the Facebook post of 2nd April has generated a considerable reaction and a dialogue on Facebook. While a few have agreed with the virtual petitioner, a majority of others have not. While some have reacted to the contents of the virtual petitioner's post using strong language, others have used language which is unprintable. In the wake of adverse reactions to the virtual petitioner's post, at one stage in response to a person (using the profile name Moho Rizan, purportedly of the Muslim community) warning the virtual petitioner that he should not have used the term *'jihad'*, the virtual petitioner has clarified through another brief Facebook post that he intentionally used the term *'ideological jihad'*, and that he did not thereby mean taking a sword and attacking enemies. This response of the virtual petitioner coupled with his reference to using the "pen and the keyboard" as weapons, seems to clearly suggest that

the virtual petitioner believed in the metaphorical, prudent and legendary proverb that *'the pen is mightier than the sword'*.

On the following day (3rd April) the virtual petitioner has posted on Facebook another message, stating that his post of 2nd April referring to an *'ideological jihad'* had provoked and angered 'nationalists' and 'patriots'. He has further stated that he is continuously receiving deaths threats from them. He had reiterated that what he called for was an *'ideological struggle'* using the *'pen and the key-board'* to counter the organized anti-Muslim propaganda. He claims that upon seeing the threats leveled at him, his daughter has got shocked. Therefore, he had decided to not to post any further messages on Facebook in Sinhala language regarding political and national problems. He has also stated that, those who attack him alleging that he is a racist, should examine and tell him whether any of the Facebook posts published by him during the previous 10 years amount to racist hate speech. In fact, the examination of his previous Facebook posts in no way indicates that the virtual petitioner had engaged in spreading inflammatory rhetoric or that he possessed racist, extremist, fanatical, or radical religious ideology.

According to the 1st respondent's affidavit presented to this Court, certain 'information' relating to the virtual petitioner had been referred to the 2nd Respondent – Director of the CID by the Ministry of Defence. In the Report submitted to the Magistrate's Court when the virtual petitioner was produced before the learned Magistrate (produced by the petitioner marked "A5"), the 1st respondent has stated that this information was provided by 3rd respondent - M.G.L.S. Hemachandra, the Military Services Assistant to the Secretary to the Ministry of Defence - 4th respondent. In fact, according to this B Report, M.G.L.S. Hemachandra was the 'complainant' whose complaint to the CID dated 6th April 2020 had given rise to the commencement of the investigation against the virtual petitioner. The 1st respondent did not produce before this Court a copy of the said complaint. Further, the 3rd respondent (complainant) has not filed an affidavit in response to the Application of the petitioner. Therefore, this Court does not have any basis to take into consideration the contents of the complaint said to have been made by the 3rd respondent against the virtual petitioner.

However, the 1st respondent claims in his affidavit that the information received by the CID revealed that the 'posts' published on Facebook by the virtual petitioner gave rise to 'sentiments of racial or religious hatred' which could lead to 'disharmony and violence'.

In the afore-stated B Report, the 1st respondent has reported to the learned Magistrate that, an analysis of the Facebook postings of the virtual petitioner revealed that the virtual petitioner has in addition to the post of 2nd April, posted other content as well. The 1st respondent has reported to the learned Chief Magistrate that through these 'news items' the virtual petitioner has sought to generate 'revolutionary ideas and activities' among the Muslim community. However, the 1st respondent has not presented to this Court and the learned State Counsel did not draw our attention to any such 'news items' which the virtual petitioner is alleged to have published on Facebook. Whereas, the virtual petitioner has placed before this Court Facebook posts he published from 17th November 2019. Learned State Counsel who appeared on behalf of the respondents did not draw the attention of this Court to any of those posts and allege that either one or more of them amounted to *hate speech* and/or the publication of otherwise prohibited content. The 2nd respondent – Director of the CID, the 3rd respondent – Military Services Assistant to the Secretary to the Ministry of Defence, and the 4th respondent – Secretary to the Ministry of Defence have also not presented to this Court any affidavit or other material clarifying this aspect. Therefore, I must conclude that the 1st respondent has when reporting facts to the learned Chief Magistrate, uttered falsehood and thereby misled the learned Magistrate by portraying that the virtual petitioner had previously too incited the Muslim community to engage in the perpetration of violence.

Furthermore, in the afore-stated B – Report, the 1st respondent has reported to the learned Chief Magistrate that following the original posting of 2nd April, on 3rd April the virtual petitioner had edited the original posting. In the affidavit of the 1st respondent, he has made no reference to that allegation. Nor did the learned State Counsel in her oral submissions cite any evidence in proof of such allegation that the original Facebook post had been edited. In the circumstances, I am compelled to infer that this is yet another instance where the 1st respondent has misled the learned Magistrate.

The 1st respondent claims that the Facebook post of 2nd April stirred a wave of 'racially hostile sentiments' among Facebook users who commented on the post. In the circumstances, the 1st respondent claims to have formed the view that the '*communications (of the virtual petitioner) should be further investigated in view of the material disclosed therein*'. Accordingly, he had conducted further investigations. The 1st respondent has not explained in detail the nature of the 'further investigations' conducted by him. He has stated that he recorded the statement of one Shashika Piiris and he has produced a copy of his purported statement said to have been recorded on 9th April 2020 ("1R2"). The 1st respondent has not explained the circumstances under which he came into contact with

Shashika Piiris. According to "1R2", which is an extract of the purported statement said to have been made by Shashika Pieris to the 1st respondent on 9th April 20202 at 2.05pm, it appears that Shashika Pieris is said to be a security guard of the Civil Aviation Authority working at the Bandaranaike International Airport. He claims to be a user of the Facebook and is said to have seen the post of the virtual petitioner of 2nd April. He has explained that the virtual petitioner has called for the waging of a *Jihad* and that this term is a reference to a *'war'*. He has said that particularly in view of the events of the *'Easter Sunday terrorist attacks by Muslim terrorists'* people known to him have got very angry about the Facebook post of the virtual petitioner, and therefore were mulling to *'do something before they could commit another attack'*. In his statement, he claims that he came to the CID having told those who had got angry, that he will take necessary steps with regard to the virtual petitioner's Facebook post.

It is possibly on the strength of this statement of Shashika Pieris that the 1st respondent claims that further investigations conducted by him revealed that the post of 2nd April of the virtual petitioner had *'incited feelings of anger and hostility among those who had seen it'*. The 1st respondent does not explain the nature of any further investigations he conducted in order to have formed that opinion. The 1st respondent further claims that *'it was probable that such sentiments may lead to violence amongst religious groups'*. Thus, the statement said to have been made by Shashika Pieris is of vital importance.

In that regard, it is noted that the afore-stated B Report ("A5") which had been produced to the learned Chief Magistrate at the time the virtual petitioner was produced, makes no reference to the 1st respondent having recorded the statement of Shashika Pieris. In the affidavit of the 1st respondent, he does not explain why a reference to Shashika Pieris's statement being recorded was not included in the B Report. Thus, a doubt arises as to whether in fact the 1st respondent had recorded the purported statement of Shahsika Pieris.

In the B Report, the 1st respondent has alleged that the virtual Petitioner was arrested because he was spreading gross extremist ideology. That appears to be the subjective opinion of the 1st respondent. Neither in the said B Report nor in his affidavit has he cited instances where the virtual petitioner has spread extremist ideology.

The 1st respondent says that he 'produced the virtual petitioner before the learned Chief Magistrate' with allegations that the virtual petitioner had committed offences under section 120 of the Penal Code, section 3(1) of the ICCPR Act, and section 6 of the

Computer Crime Act. In the affidavit of the 1st respondent, he has avoided admitting that he arrested the virtual petitioner. However, in the afore-mentioned B Report, he has stated that he arrested the virtual petitioner on 9th April 2020, on suspicion that the virtual petitioner had using the Internet published information which affect reconciliation among communities (more accurately, the 1st respondent seems to be referring to cohesion among communities). The 1st respondent has reported to the Magistrate's Court that he took charge of the virtual petitioner's mobile telephone, as the said devise had been used by the virtual petitioner to access the internet.

Conclusion - Upon a consideration of the totality of the evidence and other material placed before this Court, I conclude that the very essence of the virtual petitioner's post of 2nd April, is that the ideological and communication-based campaign being allegedly carried out against the Muslim community of Sri Lanka by certain allegedly racist groups, should be countered through a similar campaign by the Muslim community through Facebook posts, other publications using the digital media, newspaper articles, and the like. Towards that objective, those countering the campaign against the Muslim community should use written forms of communication. This conclusion has been arrived at notwithstanding the virtual petitioner having used the understandably alarming term '*Jihad*'. I see nothing inflammatory or obnoxious to the law and in particular any attempt to incite the feelings of either the Muslim community or any other community or incite others to perpetrate violence, particularly because the term '*Jihad*' had been prefaced by the term '*ideological*' coupled with the weapons the virtual petitioner called upon others to use, namely the '*pen and the keyboard*'.

In arriving at this conclusion, I have also taken into consideration (a) that no evidence has been placed before this Court that the virtual petitioner had previously engaged in any violence or other illegal activity, (b) the absence of even a report prepared by an intelligence agency (though not 'evidence') that the virtual petitioner had previously been engaged in any form of terrorism including religious extremist violence or any other illegal activity, (c) the content of previous posts on Facebook of the virtual petitioner (none of which amount to inciting people to engage in any violence and in fact advocates peace), (d) the literal meaning of the contents of the Facebook post of the virtual petitioner of 2nd April, (e) the apparent doubts relating to the adequacy, integrity and lawfulness of the criminal investigation conducted by the CID and more particularly by the 1st respondent, (f) the fact that the respondents do not allege that the virtual petitioner intended to unleash violence by either the Muslim community or any other community, and (g) the submissions of learned counsel for the petitioner and the respondents.

Response of the Respondents and enforcement of criminal justice measures

I shall now consider the response of the respondents to the Facebook post of the virtual petitioner and the enforcement of criminal justice measures against him, such as (a) the arrest of the virtual petitioner on the footing that he had committed three offences, (b) holding the virtual petitioner in police custody, (c) initiation of criminal proceedings in the Magistrate's Court against the virtual petitioner, (d) objecting to the virtual petitioner being enlarged on bail and thereby causing him to be detained in remand custody.

In this regard, it is necessary to consider whether there was a lawful basis to cause the arrest of the virtual petitioner on 9th April 2020 on the footing that he had committed the offences contained in (i) section 120 of the Penal Code, (ii) section 3(1) of the ICCPR Act, and (iii) section 6 of the Computer Crime Act. I shall take each offence separately and consider whether there was a valid basis to conclude that the virtual petitioner had committed each of these offences.

However, prior to doing so, it is necessary to make the following observations. As stated earlier in this judgment, the exercise of the fundamental right to free speech, expression including publication by a citizen of this country can be restricted only on the basis of a restriction imposed by law, which is provided for in Articles 15(2), 15(7) and 15(8) of the Constitution. Article 15(8) relates to restrictions that may be imposed on members of the armed forces, etc., and hence has no relevance to this matter. The restrictions which come within the scope of Articles 15(2) and 15(7) are limited strictly for the purposes set out in those Articles. It is trite law that those restrictions must be narrowly interpreted and applied strictly for the purposes set-out in the respective Articles. The position of the respondents as advanced by the learned State Counsel is that the impugned measures of criminal justice (such as the arrest of the virtual petitioner) taken by the respondents arise out of the fact that the virtual petitioner had in the guise of exercising his fundamental right to free speech, committed certain offences, and therefore the respondents were lawfully entitled to take the measures they took. Therefore, theoretically, a question would arise whether the prohibitions which correspond to the three offences in issue come within the purview of permissible restrictions to free speech as provided in Articles 15(2) and 15(7) of the Constitution.

However, the Constitution does not provide for post-enactment judicial review of legislation. Furthermore, the Penal Code had been enacted in 1883 and thus well-before the present Constitution came into operation. Therefore, Article 16(1) would be of

relevance, which provides that all existing written and unwritten law will be valid and operative notwithstanding any inconsistency with the preceding provisions of Chapter III of the Constitution which contains fundamental rights. Though the Computer Crime Act, No. 24 of 2007 and the ICCPR Act, No. 56 of 2007 were enacted after the present Constitution came into operation, Article 80(3) of the Constitution prevents this Court from inquiring into or commenting upon or in any manner calling into question the validity of these two Acts on any ground whatsoever. Therefore, it would not be possible for this Court to examine and rule upon whether the prohibitions contained in section 120 of the Penal Code, section 3(1) of the ICCPR Act, and section 6(1) of the Computer Crime Act come within permissible restrictions under Articles 15(2) and 15(7) of the Constitution. Be that as it may, there is certainly no bar on this Court dealing with and concluding on the manner in which the prohibitions contained in section 120 of the Penal Code, section 3(1) of the ICCPR Act and section 6(1) of the Computer Crime Act were sought to be enforced by the Executive against the virtual petitioner.

Offence under section 120 of the Penal Code

In this part of the judgment, I propose to determine whether by publishing the Facebook post of 2nd April 2020, the virtual petitioner had committed the offence contained in section 120 of the Penal Code.

The offence contained in section 120 of the Penal Code named *'Exciting or attempting to excite disaffection'* is worded in the following manner:

> *"Whoever **by words, either spoken or intended to be read**, or by signs; or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or **attempts to raise discontent or disaffection amongst the People of Sri Lanka,** or **to promote feelings of ill-will and hostility between different classes of such People**, shall be punished with simple imprisonment for a term which may extend to two years."* [Emphasis added to highlight ingredients of the offence relevant to the facts of this case.]

The original section 120 of *'The Ceylon Penal Code'* contained in Ordinance No. 2 of 1883, is slightly different to the above reproduction, for the following reasons:

(i) The term *'Queen'* in the original Ordinance has been substituted by the term *'President'*.

(ii) The term *'Government established by the law in Ceylon'* in the original Ordinance has been substituted by the term *'Government of the Republic'*.

(iii) The term *'Queen's subjects'* in the original Ordinance has been substituted by the term *'People of Sri Lanka'*.

(iv) The term *'attempts'* which was not found in the original Ordinance immediately before the term *'to raise discontent or disaffection'* has been added.

The Penal Code of Ceylon[9] is a virtual carbon copy of the Indian Penal Code of 1860. It is well known that the Act drafted by the first Law Commission of India chaired by Thomas Babington Macaulay is primarily a codification of the English substantive criminal law of that era. Thus, the offence contained in section 120 of the Penal Code of this country (parallel, yet broader than section 124A which is the comparable section of the Indian Penal Code) is directly linked to the British colonial legacy of both India and this country. The offence contained in section 120 of the Penal Code is a codification of the English common law offence of 'Sedition' originating from the 16th century. The offence of sedition had been created primarily to protect the sovereign monarchy from any rhetorical advocacy aimed at creating disaffection against it and its subordinate creations including the government headed by the monarch, the administration of justice and also for the purpose of dealing with persons who may attempt to create alterations to the monarchical form of governance.

In view of the foregoing, it would be quite useful to derive a further understanding of the common law offence of Sedition. In ***Regina v. Alexander Martin Sullivan*** and ***Regina v. Richard Pigott***[10] Fitzgerald, J. has given the following very clear description of the offence of Sedition.

> *"Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are* ***calculated to*** *disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The* ***objects of sedition*** *generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which* ***have for their object*** *to excite discontent or disaffection, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder. Sedition, being inconsistent with the safety of the State, is regarded as a high misdemeanor, and, as such, punishable with fine and imprisonment; and it has been truly said that it is the duty of the Government, acting for the protection of society, to resist and extinguish it at the earliest moment. …*

[9] Ordinance No. 2 of 1883

[10] Both reported together in (1868) 11 Cox C.C. 44 at 45

Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings. …"

[Emphasis added by me to highlight the fact that embedded in the offence of sedition is a *mens rea* which most jurists refer to as ***'seditious intent'***.]

Sir James Fitzjames Stephen in ***'A Digest of the Criminal Law (Crimes and Punishments)'***[11] explains that **seditious intent** is a constituent ingredient of the offence of sedition, and explains such intention in the following manner:

*"A **seditious intention** is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects."*

This reference to the English common law offence of sedition would be incomplete unless I place on record the fact that by the enactment of the Coroners and Justice Act of 2009 (section 73 thereof), the common law offence of sedition has been abolished in the United Kingdom.

If one were to dissect the offence contained in section 120 of the Penal Code into its constituent ingredients, it would in my view appear as follows:

Whoever,

(i) ***by words, either spoken or intended to be read****, or by signs, or by visible representations, or otherwise -*

(ii) (a) excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or

(b) excites or attempts to excite hatred to or contempt of the administration of justice, or

(c) excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or

(d) ***attempts to -***

(i) *raise discontent or disaffection amongst the People of Sri Lanka, or to*

(ii) ***promote feelings of ill-will and hostility between different classes of such People****,*

shall be punished with simple imprisonment for a term which may extend to two years.

[11] 5th Edition (1894) at pages 70 – 71

It was by the 'Ordinance to amend the Ceylon Penal Code' (No. 7 of 1915), that the term '***attempts***' (printed in italics and underlined above) was added to limb '(d)' (in the above illustration of the dissection of the offence) of the original section 120 contained in the Penal Code Ordinance, No. 2 of 1883. According to the proceedings of the Legislative Council[12] recorded in the Hansard[13] on 17th March 1915 introducing the Bill, *ex-officio* member of the Council - the then Attorney-General Anton Bertram, K.C.[14] has submitted that this particular amendment to add the term *'attempts'* to section 120 of the Penal Code was being introduced to rectify *"an obvious omission in the drafting of the original clause"*. The corresponding *'Statement of Objects and Reasons'* appended to the corresponding Bill supports this proposition that the amendment was aimed at introducing *"a word necessary to complete the sense which appear to have been omitted by accident"*.[15]

Be that as it may, when one attributes the literal meaning to the term 'attempts', it is clear that by the addition of that term to section 120, the legislature has widened the scope of the 4th limb of the section, to include not only actual instances of incitement, but attempts at incitement as well. Nevertheless, the term 'attempts' highlights the need for the prosecutor to establish a seditious intention by the alleged offender, as an attempt to commit an act cannot occur, unless the offender intended to cause a corresponding outcome.

A clear exposition of the offence contained in section 120 of the Penal Code can be gathered by the following excerpt of the speech of the then Attorney-General made to the Legislative Council on 6th August 1915[16]. According to the Attorney-General, the intention of the colonial government of the day was to constitute a special tribunal to hear cases against persons accused of having committed 'sedition' under the applicable law of Ceylon (the offence contained in section 120 of the Penal Code) and under English common law**.** Attorney-General Anton Bertram, K.C. has further explained as follows:

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[12] A predecessor body of the present Parliament, which had been vested with legislative authority.

[13] My research officers were kindly given access to by the authorities of the Colombo National Museum to this volume of the Hansard.

[14] He was soon afterwards appointed the 22nd Chief Justice of Ceylon.

[15] On 24th March 1915, the amendment proposed by the Attorney-General was unanimously adopted by the Legislative Council.

[16] This was on the occasion when Attorney General Bertram moved the Legislative Council to enact an amendment to the Criminal Procedure Code (1898) by introducing section 440A. This amendment resulted in the creation of a new mode of conducting criminal trials, namely trials without a jury by three judges of the Supreme Court nomenclated ***"trials before the Supreme Court at Bar by three Judges without a jury",*** which term is commonly referred to nowadays in a truncated manner, as a *'trial-at-bar'*. This was during an era when the Supreme Court was vested with original criminal jurisdiction to try persons indicted for having committed serious offences. According to the speech of the Attorney-General, the exact purpose of introducing this new mode of trial, was to dispense with Courts Martial hearing cases against civilians under Martial law, which had been introduced on 6th June 1915 to quell the riots that had erupted on 28th May 1915.

> *"… sedition according to the principles of English law, which are embodied to a very great extent in Section 120 of our Penal Code, is of two sorts: it may be sedition against the State, or it may be what I may describe as sedition within the State. That is to say, it may be directed against the Government and the measures of Government, the authority of Government and the administration of the courts which exercise justice in the name of the Sovereign, or* ***it may be calculated or designed to stir up ill-feeling between different classes of the King's subjects****."*[17]

It would thus be seen that, the offence contained in section 120 of the Penal Code has essentially two components, which have been succinctly described by the then Attorney-General. Another noteworthy feature is the classical formulation of the manner in which the offence could be committed (the *actus reus* of the offence), that being by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise. There is no doubt that the posting of a statement on Facebook (as alleged to have been done by the virtual petitioner and admitted by him) constitute such a manner provided by section 120.

The definition of the offence also contains the causal effect of the afore-described conduct of the offender, which serves as an extension of the *actus reus*. It is that causal effect which the legislature has sought to prevent by prohibiting and criminalizing the harmful conduct. By the inclusion of the word 'attempts', the legislature has not insisted upon the stipulated result (intended by the offender) occurring. Criminal culpability and penal sanctions are attracted no sooner an attempt is made to cause the stipulated harm. The actual occurrence of harm is only a possible consequence of the offence having been committed and not an ingredient of the offence. Of the several possible causal effects contained in section 120 of the Penal Code, what is relevant to the present matter is to determine whether the virtual petitioner by his Facebook post of 2nd April, **attempted to promote feelings of ill-will and hostility between different classes of such People**, which the former Attorney-General has described as *"… calculated or designed to stir up ill-feelings between different classes …"*.[18]

The Explanation to section 120 of the Penal Code, provides as follows:

> *"It is not an offence under this section by intending to show that the President or the Government of the Republic have been misled or mistaken in measures or to point out errors of defects in the Government or any part of it, or in the administration of justice, with a view to the reformation of such alleged errors or defects, or to excite the People of Sri Lanka to attempt to procure by lawful means the alteration of any matter by law established, or* ***to point out in order to their removal matters which are producing***

[17] Hansard, Proceedings of the Legislative Council, 6th August 1915.

[18] Attorney-General Bertram ostensibly had in his mind the category of persons whom he intended to prosecute before the new tribunals of the Supreme Court he established by enacting section 440A of the Criminal Procedure Code, namely those who during the 1915 riots are alleged to have instigated or incited others to engage in violent crime against members of different ethnic communities.

or have a tendency to produce feelings of hatred or ill-will between different classes of the People of Sri Lanka." [Emphasis added.]

As per ***Abu Bakr v. The Queen***[19], the term 'classes' is a reference to groups of persons who are well-defined, stable and numerous and therefore, ethnic and religious groups would amount to 'classes' of people.

It will be observed that the offence contained in section 120 (in its present wording), serves the purpose of deterring anyone from causing the following harmful outcomes, and also enables penal sanctions to be imposed on persons who violate the several prohibitions contained in the offence:

(i) Feelings of disaffection to the President or to the Government of the Republic;
(ii) Hatred to or contempt of the administration of justice;
(iii) People of Sri Lanka procuring, otherwise than by lawful means, the alteration of any matter by law established;
(iv) Discontent or disaffection amongst the People of Sri Lanka;
(v) Feelings of ill-will and hostility between different classes of People.

In ***Sisira Kumara Wahalathanthri and Another v. Jayantha Wickramaratne and Others***[20]**,** Justice Anil Gooneratne has observed that the constitutionally guaranteed freedom of speech and expression would not be negated by section 120 of the Penal Code. Justice Gooneratne has further observed that provisions of section 120 and the explanation contained therein guarantee freedom of expression and speech, and that the explanation no doubt fortifies this position in great measure.

Though not being the *ratio* of the judgment, in ***Abu Bakr v. The Queen,*** the court had considered the evidence, and held that the court was unable to say that it was not reasonably open to the jury, upon a proper direction, to hold that the appellant **intended** to promote feelings of ill-will and hostility between different classes of the People of Sri Lanka. This observation lends support to the contention that even in terms of Sri Lankan law, 'intention' is clearly an implied constituent ingredient of the offence contained in section 120.

It must be borne in mind that notwithstanding the original purposes for which the common law offence of sedition had been created (which as I have pointed out above was primarily to protect the monarchy, the monarchical form of governance and institutions of the monarch's government), section 120 of the Penal Code must now be enforced bearing in mind that Sri Lanka is a Republic, and it is the People who are sovereign, and fundamental rights is an inalienable ingredient of such sovereignty.

[19] 54 NLR 566
[20] SC/FR Application No. 768/2009, SC Minutes of 5th November 2015

Therefore, the question that needs to be answered is, whether the virtual petitioner committed the offence contained in section 120, and in particular, whether in the absence of any evidence of any disruption of peace and tranquility having occurred, it can be alleged that by the publication of the Facebook post, that he intended to cause any of the harmful outcomes contained in section 120. Did the virtual petitioner intend by his Facebook post to either raise discontent or disaffection amongst the People of Sri Lanka or promote feelings of ill-will and hostility between different classes of such People? In my view, the virtual petitioner's intentions were clear. He wanted to encourage others of the Muslim community to resort to the use of the pen and the keyboard and counter the propaganda which he claims was being unleashed against the interests of the Muslim community that they were responsible for the spread of COVID-19. He wanted others of his own community to counter that propaganda through suitable forms of counter advocacy using written forms of language-based communication and publishing the content of such advocacy on social media such as Facebook and other digital media, in newspapers and other similar space. Basically, that counter propaganda would have been two-fold: I would assume that would be by denying the allegations being made against the Muslim community and providing scientific and empirical evidence as to the actual reasons for the spread of COVID-19.

Furthermore, as alleged by the virtual petitioner, if in fact there was an organized stratagem in place to portray the Muslim community as being responsible for the spread of the COVID-19 pandemic (a position though taken up by the petitioner, not emphatically denied or otherwise countered by the respondents), and if such campaign gathered momentum, there could easily have been feelings of hatred and ill-will by members of other communities towards the Muslim community. Therefore, the communication strategy advocated by the virtual petitioner of engaging in an *'ideological Jihad'* using the *'pen and the keyboard'* was one way in which he sought to counter the earlier mentioned campaign against the Muslim community. This is by posting the message in Sinhala, so as to captivate the attention of the Muslim community to also propagate the countering campaign in Sinhala, so that such advocacy would reach the Sinhala community. Thus, it is my view that, the virtual petitioner's Facebook post of 2nd April comes within the scope of the Explanation to section 120, as it amounts to pointing out and ensuring the removal of matters which are producing or have a tendency to produce feelings of hatred or ill-will between different classes of the People of Sri Lanka. That is an additional reason as to why the conduct of the virtual petitioner would not attract culpability under section 120.

Therefore, I must, for the reasons enumerated earlier in this judgment conclude that the virtual petitioner has not attempted to either raise discontent or disaffection amongst the People of Sri Lanka or promote feelings of ill-will and hostility between different classes of such People.

However, I must note that, particularly in the aftermath of the Easter Sunday terrorist attacks of 2019, undoubtedly and quite understandably, the non-Muslim users of the Facebook who saw the Facebook post of the virtual petitioner of 2nd April, may have been somewhat alarmed when they read the term '*Jihad*'. That term as submitted by the learned State Counsel would to an ordinary non-Muslim reader mean the waging of a *'holy war'* by those of the Islamic faith against those of all other faiths, and would be associated with unleashing of violence towards those who are not of the Islamic faith. Nevertheless, though a superficial reading of the post could have given rise to such alarm, no user of the Facebook particularly if he got alarmed, would have stopped following a mere superficial reading of the post. A word-to-word or careful reading of the post, would have clearly revealed that the virtual petitioner was advocating the launch of an *'ideological jihad'* with the use of the *'pen and the keyboard'* and not any form of perpetration of violence. He also did not incite others to unleash any form of violence. Thus, no reasonable and prudent user of the Facebook would have concluded that the virtual petitioner was attempting to incite the perpetration of violence by members of the Muslim community against members of non-Muslim communities. Therefore, it would be wholly unreasonable and incorrect to conclude that the virtual petitioner attempted to raise discontent or disaffection amongst the People of Sri Lanka, or promote feelings of ill-will and hostility between different classes of such People. Thus, the ideology of the virtual petitioner is evidently opposite to the ideology of a fanatical terrorist suicide bomber who is a radicalized, intolerant, exclusivist, and hence is committed towards the elimination of persons of all other faiths. The virtual petitioner does not fall into that dangerous category.

In view of the foregoing, I hold that, unless there is reliable and clear evidence that the impugned utterances of the alleged offender (in this instance the virtual petitioner) –

(i) were unequivocally <u>intended</u> at causing one of the outcomes contained in section 120, <u>or</u>

(ii) <u>had given rise</u> to one or more of the outcomes referred to in section 120 (in which event the intention may be reasonably inferred),

no person can be arrested or prosecuted in terms of the law for having allegedly committed the offence contained in section 120 of the Penal Code.

A careful and objective consideration is required prior to a decision being taken to arrest a person for having allegedly committed the offence contained in section 120 of the Penal Code and initiate criminal proceedings against him. This should not be understood as requiring the police to remain inactive and to await the destruction that is sought to be prevented by section 120, having to occur. It is noteworthy that section 127 of the Penal Code provides that no prosecution shall be instituted under Chapter VI of the Penal Code (containing 'offences against the state') except by or with the written authority of the Attorney-General. (Section 120 is contained within Chapter VI.) The term 'prosecution shall be instituted' is a reference to the institution of criminal proceedings either under section 136(1)(b) of the CCPA (resulting in the accused being tried in the Magistrate's

Court) or under section 393 of the CCPA (resulting in the prosecution of the accused in the High Court). Be that as it may, section 127 ensures that prior to the institution of criminal proceedings (as opposed to initiation of criminal proceedings by the filing of a report in the Magistrate's Court either under section 115 or 116 of the CCPA) the Attorney-General would consider the investigative material collected by the police and determine whether there exists a basis in law and fact to prosecute the alleged offender.

Due to the reasons stated above, I conclude that there was no basis in law or fact to take criminal justice measures on the premise that the virtual petitioner had by the publication of the Facebook post of 2nd April 2020, committed an offence under section 120 of the Penal Code.

Offence under section 3(1) of the ICCPR Act

I will now consider whether by having published the Facebook post of 2nd April 2020, the virtual petitioner had committed the offence contained in section 3(1) of the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007.

As previously stated in this judgment, the fundamental right to free speech and expression is not an absolute right, and therefore can be subjected to certain restrictions provided by law. Before I venture to comment on the position of the domestic law on this matter, a brief narration of the position of the international law would be appropriate.

Article 7 of the Universal Declaration of Human Rights (1948) provides *inter-alia* that all persons shall be entitled to equal **protection against discrimination and incitement to discrimination** in violation of the Declaration. Article 20(2) of the ICCPR (1966) stipulates that **any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence** shall be prohibited by law. Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965), requires states parties to **declare an offence punishable by law** all **dissemination of ideas based on racial superiority or hatred**, **incitement to racial discrimination**, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof. Therefore, it is evident that international law requires states to prohibit certain forms of speech and expression which have a direct impact on the rights of others and in particular certain vulnerable groups.

The long-title of the ICCPR Act provides that, it has been enacted to give effect to certain Articles in the International Covenant on Civil and Political Rights (ICCPR) relating to human rights which have not been given recognition through legislative measures, and

to provide for matters connected therewith or incidental thereto. It would be seen that section 3(1) of the ICCPR Act has been enacted to give domestic legal effect to Article 20 of the ICCPR. Articles 7 of the UDHR and Article 4(a) of the CERD, provides additional justification for the prohibition contained in the ICCPR Act.

Section 3(1) of the Act provides as follows:

> *"No person shall propagate war or **advocate** national, **racial or religious hatred** that constitutes **incitement** to discrimination, **hostility or violence**."* [Emphasis added.]

Section 3(3) of the ICCPR Act provides that a person found guilty of committing an offence under subsection (1) shall on conviction by the High Court, be punished with rigorous imprisonment for a term not exceeding ten years.

It would be seen that section 3(1) contains two prohibitions. Those being, (i) propagation of war, and (ii) advocacy which takes the form of national, racial or religious hatred which assumes the high threshold of incitement to (a) discrimination, (b) hostility, or (c) violence. In lay language, speech which violates the prohibitions contained in section 3(1) of the ICCPR Act is referred to as '*Hate Speech*'. However, it is worthwhile to note that not all forms of *hate speech* come within the purview of section 3(1). What has been prohibited is not mere advocacy which takes the form of national, racial or religious hatred or unacceptably harsh and derogatory rhetoric against groups of persons with distinct common identities, but advocacy which amounts to <u>incitement to engage in discrimination, acts of hostility and perpetration of violence</u>. That is a high threshold.

To the extent relevant to this matter, what has to be decided is whether the virtual petitioner by publishing the Facebook post of 2nd April, engaged in advocacy of racial or religious hatred which constituted incitement to discrimination, hostility or violence.

It would be pertinent to note that, according to the affidavit filed in this Court by the 1st respondent, investigations conducted by him had revealed that "*the Facebook posts of the virtual petitioner had given rise to sentiments of racial and / or religious hatred, which could lead to disharmony or violence*". Further, the 1st respondent claims that investigations into the Facebook post of 2nd April had given rise to the finding that "*the said post had incited feelings of anger and hostility among those who had seen it*". The 1st respondent claims that "*such sentiments may lead to violence amongst religious groups*". The 1st respondent has further averred that the "*the Facebook posts **shared** by Ramzy Razeek were identified to constitute speech and/or material, which fall within the ambit of section 3 of the said Act*". In

contemporary language relating to digital communication media (also referred to as 'social media') such as Facebook, 'sharing' is generally understood as a means of spreading Facebook content by posting the content posted by another user in your own Facebook profile. In this matter, no evidence has been placed before this Court that the virtual petitioner had 'shared' any material on Facebook which had been received or seen by him to others, which fall within the ambit of section 3(1) of the ICCPR Act.

According to the 1st respondent, the Human Rights Commission has published certain guidelines pertaining to the application of section 3 of the ICCPR Act. The position of the 1st respondent is that, when he took measures against the virtual petitioner, he acted in terms of these guidelines.

What the 1st respondent has referred to as 'guidelines' (produced marked "X") has in fact been captioned as a *"Legal Analysis of the scope of section 3 of the ICCPR Act, No. 56 of 2007 and Attendant Recommendations"*. Learned counsel for the petitioner did not challenge the authenticity of document marked "X".

This legal analysis is worthy of reproduction in some detail. To the extent relevant to this matter, the following are the key features of this analysis of section 3(1) of the ICCPR Act, issued by the Human Rights Commission of Sri Lanka:

(i) *Section 3 gives domestic effect to Article 20 of the International Covenant on Civil and Political Rights (ICCPR).*

(ii) *Article 20 of the ICCPR should be read in conjunction with Article 19 which recognizes the freedom of expression.*

(iii) *Article 20(2) embodies two significant elements:*
- *(a) Advocacy of national, racial or religious hatred and*
- *(b) Incitement to discrimination, hostility or violence.*

(iv) *Advocacy of national, racial or religious hatred is permissible until it constitutes incitement to discrimination, hostility or violence.*

(v) *Not all forms of incitement are prohibited under Article 20.*

(vi) *A crucial element of incitement as recognized under Article 20 is intention.*

(vii) *The offender must through his incitement to discrimination, hostility or violence intend not to merely share his opinion with others, but also compel others to commit certain actions based on his views.*

(viii) *In order to arrive at a conclusion regarding the intent, consideration must be given to the content and form of the speech in issue, the extent of advocacy and the imminence of harm which is prohibited.*

(ix) *The state has an obligation to protect individuals from incitement to discrimination, hostility or violence by third parties as well as to refrain from engaging in such acts in order to protect rights and ensure equal protection of the law for all.*

(x) *Where there is reasonable suspicion that a person is committing a section 3 offence, and public officers with the power to set the procedure under the ICCPR Act in motion fail or omit to enforce the law, such omission shall amount to state inaction which gives rise to a fundamental rights violation [Article 12(1)] as a tacit state approval of hate speech.*

I find no reason to disagree with any of these features of the analysis of section 3(1) of the ICCPR Act issued by the Human Rights Commission of Sri Lanka.

It would be seen that, while Article 14(1)(a) recognizes the fundamental right to freedom of speech and expression including publication, Article 15(2) recognizes that the exercise and operation of this fundamental right shall be subject to such restrictions as may be prescribed by law, which includes restrictions that may be prescribed in the interests of racial and religious harmony and to prevent incitement to commit an offence. Section 3(1) should be seen in the context of these restrictions. Therefore, while Article 14(1)(a) of the Constitution confers on the people the fundamental rights to free speech, section 3(1) of the ICCPR Act restricts such fundamental right to the extent of what is prohibited under that section. When the exercise of a fundamental right is restricted by law, in my view such law must be strictly interpreted (as some jurists claim, be narrowly interpreted) so as to give recognition to the exact purpose for which the Parliament enacted the restriction, and for no other reason.

The legalistic purpose for which section 3(1) of the ICCPR Act has been enacted is evident. That is to give domestic recognition and justiciability to Article 20 of the Covenant. The public interest purpose for which section 3(1) has been enacted is to be intrinsically assimilated from the content of the section, those being to protect the people of Sri Lanka and other nationals from (i) the dastardly consequences of war, and (ii) the serious and far reaching consequences to national, ethnic and religious communities (both within and outside Sri Lanka) which would include members of ethnic and religious minorities and other vulnerable communities, from possible harm emanating from the expression of hatred which assumes the manifestation of incitement to discrimination, hostility, and violence.

From a national perspective, what is sought to be protected is clear. That being harm being inflicted through discrimination, hostility and violence perpetrated on ethnic or

religious lines against members of such communities. It should not be understood as criminalizing blasphemy.

In a multi-ethnic and multi-religious society such as that of Sri Lanka, particularly given historical, socio-economic and political factors, the maintenance of peace and tranquility among communities, ensuring parity of status, affording equality to all citizens, maintaining public order, and facilitating cohesion between communities, are of utmost importance to national unity, recovery and reconciliation from conflict and tensions, and to achieve social progression and prosperity. Sovereignty of the people which is the key principle recognized by the Constitution cannot have any meaningful effect, unless these protective measures are found in society. Permitting the sowing of hatred through rhetorical advocacy which is aimed at causing incitement to discrimination, hostility and violence, would seriously erode and impinge upon sovereignty of the people and in particular vulnerable and minority communities. The impact of such *hate speech* has on the exercise of fundamental rights and franchise (which are components of sovereignty that can be exercised individually) by members of vulnerable and minority groups can be very serious and have far reaching implications. Thus, quite rightly and justifiably, incitement to discrimination, hostility and violence must be prohibited and prevented. It is against public policy to permit such forms of incitement in the guise of the exercise of the fundamental right to free speech. If any person is found to have violated that prohibition (which in terms of section 3(1) of the ICCPR Act is an offence), it is well within the authority of the Executive and a legal duty as well, to enforce the law against the offender. Such action would take the manifestation of criminal justice measures, such as the arrest of the suspect, initiation of criminal proceedings, and his subsequent prosecution. However, the adoption of such measures should be diligently and objectively carried out. Using such criminal justice measures against a person who is not culpable for having committed an offence in terms of section 3(1), would amount to infringement of that person's fundamental rights and would tantamount to persecution.

In a situation where a law enforcement officer such as a police officer or a prosecutor is to determine whether a speech or other expression of ideas made by a person amounts to the commission of an offence contained in section 3(1) of the ICCPR Act, he should in my opinion consider the following factors:

(i) Whether the content of the speech as a whole with specific reference to the impugned words, amounts to advocacy that takes the form of national, racial or religious hatred which assumes the manifestation of incitement to (a) discrimination, (b) hostility, or (c) violence;

(ii) Attendant circumstances including the context in which it was made;
(iii) Associated conduct of the person concerned, including his previous and subsequent conduct (including utterances made by him) which have a causal link to the impugned utterances.;
(iv) Relationship between the person concerned and his target group (listeners / readers). Given the relationship between the two parties (the power or the influence the person concerned yielded over the target group), was it likely that the target group would be susceptible or amenable to incitement offered by the person concerned through his rhetoric.;
(v) Overall motive and the specific intention of the person, i.e. whether the person concerned intended to incite others to engage in national racial or religious discrimination, hostility or violence;
(vi) Whether in the aftermath of the impugned speech of other expression, racial or religious discrimination, hostility or violence occurred, and if so whether there was a causal relationship between the impugned utterance and the occurrence of such racial or religious discrimination, hostility or violence;
(vii) Even if in the aftermath of the impugned speech, racial discrimination, hostility or violence did not occur, whether there was an imminent danger in the impugned utterances of the person concerned resulting such consequence.

I shall not engage in a detailed analysis of the content of the Facebook post of the virtual petitioner, as I have already done so. What remains to be done is to reiterate what I have already found, that being there was no basis to conclude that the virtual petitioner intended to cause any incitement to any form of harm to the society. What he advocated was the launching of a counter-campaign by the Muslim community against the campaign of vilification which he claims to have been launched against the Muslim community, that they were responsible for the spread of the COVID-19 pandemic. He called upon members of the Muslim community to use the *"pen and the keyboard"* and engage in an *"ideological Jihad"*. He did not advocate incitement of discrimination, hostility or violence on ethnic or social lines.

Therefore, I conclude that there was no basis in fact or law to allege that the virtual petitioner by his Facebook publication of 2nd April, violated the prohibition contained in section 3(1) of the ICCPR Act. Therefore, there was no basis to take action against the virtual petitioner on the footing that he had committed the offence contained in section 3(1) of the ICCPR Act.

Offence under section 6(1) of the Computer Crime Act –

Section 6(1) of the Computer Crime Act, No. 24 of 2007 provides as follows:

> *"Any person who **intentionally causes a computer to perform any function**, **knowing or having reason to believe** that such function will result in **danger or imminent danger** to –*
> *(a) national security;*
> *(b) the national economy; or*
> *(c) **public order**,*
> *shall be guilty of an offence and shall on conviction be punishable with imprisonment of either description for a term not exceeding five years."* [Emphasis added.]

During the hearing of this Application, learned State Counsel did not press that the virtual petitioner was responsible for having committed this offence. However, I shall briefly though, consider his culpability.

To the extent relevant to this Application, section 6(1) of the Computer Crime Act provides that whoever **intentionally causes a computer to perform any function**, **knowing or having reason to believe** that such function will result in **danger or imminent danger** to **public order**, commits an offence. First, there is no basis to conclude that the virtual petitioner when uploading his Facebook post of 2nd April 2020, knew or had reason to believe that his post would result in danger or imminent danger to public order. Second, there is no evidence that the said post endangered imminently endangered public order. Therefore, there is no basis in the allegation that the virtual petitioner committed the offence contained in section 6(1) of the Computer Crime Act.

Therefore, for the reasons stated above, I conclude that the virtual petitioner had by the publication of the Facebook post of 2nd April 2020, not committed an offence under section 6(1) of the Computer Crime Act.

Arrest of the virtual petitioner

The petitioner alleges that the arrest of the virtual petitioner was contrary to law and hence is an infringement of the virtual petitioner's fundamental right guaranteed by Article 13(1) of the Constitution.

In the petitioner's affidavit, he states that the virtual petitioner *'was arrested by the Criminal Investigation Department on 9th April 2020'*. The 1st respondent in his affidavit has not admitted that he arrested the virtual petitioner. Nor does he state who of the Criminal

Investigation Department arrested the virtual petitioner. However, "A5"[21] contains a reference to the fact that *'the suspect is being produced consequent to his being arrested on suspicion'*. Thus, I must proceed on the footing that the virtual petitioner had been arrested by the 1st respondent purportedly under section 32(1) of the Code of Criminal Procedure Act (CCPA).[22]

The 1st respondent in his affidavit has stated that *'it was subsequent to the said preliminary investigation that the petitioner was produced before the learned Chief Magistrate of Colombo in Case No. B 31673/01/20 under section 120 of the Penal Code, section 6 of the Computer Crime Act No. 24 of 2007 and section 3(1) of the ICCPR Act No. 56 of 2007'*. The afore-stated provisions of law do not provide for a suspect to be 'produced before a Magistrate'. They contain offences in respect of which the 1st respondent claims that the virtual petitioner was arrested. In the circumstances, I must proceed on the footing that the afore-stated references to the provisions under which the 1st respondent produced the virtual petitioner before the learned Chief Magistrate is erroneous, and that the virtual petitioner had in fact been produced before the learned Chief Magistrate under section 115(1) of the Code of Criminal Procedure Act. In fact, "A5" contains *inter-alia* a reference to section 115(1) of the CCPA as one of the provisions under which the report is being presented.

Section 32(1) of the CCPA to the extent relevant to the arrest of the virtual petitioner, is as follows:

> *"Any peace officer may without an order from a Magistrate and without a warrant* ***arrest any person*** *–*
> *(a)* …
> *(b) who has been concerned in any* ***cognizable offence*** *or* ***against whom a reasonable complaint has been made*** *or credible information has been received or a reasonable suspicion exists of his having been so concerned;*
> *(c)* …
> *(d)* …
> *(e)* …
> *(f)* …
> *(g)* …

[21] "A5" which has been signed by the 1st respondent and has been filed of record in Magistrate's Court Case No. B 31673/01/20, had been tendered to the Chief Magistrate when the 1st respondent produced the virtual petitioner before the learned Chief Magistrate.

[22] Section 32(1)(b) of the Code of Criminal Procedure Act is the general provision of law which authorizes a police officer to arrest without warrant, a person in relation to the commission of a cognizable offence.

(h) …
(i) … ."
[Emphasis added by me.]

It is not in dispute that the offences contained in sections 120 of the Penal Code, 3(1) of the ICCPR Act and 6(1) of the Computer Crime Act are cognizable offences, and thus fall into the category of offences in respect of which the offender may be arrested without a warrant of arrest.

When separated into its constituent ingredients, section 32(1)(b) can be depicted in the following manner:

Any peace officer may
without an order from a Magistrate and without a warrant
arrest any person
(a) who has been concerned in any cognizable offence
or
(b) against whom
(i) a reasonable complaint has been made
or
(ii) credible information has been received
or
(iii) a reasonable suspicion exists
of his having been so concerned.

Therefore, for a peace officer[23] to be authorized by law to arrest a person (suspect) for having committed a cognizable offence, one of the following should have occurred -

(i) the peace officer should have by himself formed an objective opinion that the suspect has been concerned in the commission of a cognizable offence;
(ii) the peace officer should have either directly received a complaint or must be aware that a complaint has been made against the suspect, and he should have formed the objective opinion that such complaint against the suspect (that he has been concerned in committing a cognizable offence) is reasonable;
(iii) the peace officer should have either directly received information or should be aware that information has been received against the suspect, and he should have formed the objective opinion that such information is credible and gives

[23] The term 'peace officer' would in terms of the interpretation of that term contained in section 2 of the Code of Criminal Procedure Act, includes a police officer such as the 1st respondent.

rise to the allegation that the suspect has been concerned in the commission of a cognizable office; or

(iv) the peace officer should have developed reasonable suspicion that the suspect has been concerned in the commission of a cognizable offence.

It would be seen that, a condition precedent for the arrest of a person under any one of the four situations referred to above, is the (a) commission of an **offence**, and (b) a factual and situational connection between the commission of that offence and the person being arrested. In other words, before causing the arrest of a person, the peace officer who seeks to arrest that person must be satisfied founded upon reasonable grounds that the impugned conduct constitutes an **offence** and that one of the four situational and factual connections between the commission of that offence and the person being arrested, exists. This should not be understood as insistence that the arresting officer should possess strict proof that the suspect had committed an offence. Thus, unless, it can be established that an offence recognized by the laws of Sri Lanka has been committed, the law would not permit the arrest of a person for the conduct attributed to him.

In fact, a criminal justice measure[24] in the nature of the arrest of the suspected offender can be taken, only if the impugned conduct constitutes an offence. In this regard, it is necessary to note that the entire spectrum of criminal justice measures is those that have a bearing on the liberty of the person against whom such measures are taken. Thus, both procedurally and substantively, it is necessary to take such measures strictly in accordance with the law. It is the commission of an **offence** that triggers the commencement of the range of criminal justice responses against the person responsible for the commission of such offence, including the arrest of the perpetrator of the offence.

In view of the analysis contained in this judgment, it would be seen that by posting the impugned message dated 2nd April 2020 on Facebook, the virtual petitioner did not commit an offence either under section 120 of the Penal Code, section 3(1) of the ICCPR Act or section 6(1) of the Computer Crime Act. In the circumstances, there was no lawful basis to have arrested the virtual petitioner. Therefore, I conclude that the arrest of the virtual petitioner was contrary to the procedure established by law and thus unlawful.

[24] Such criminal justice measures would include (i) arrest of the suspect, (ii) holding the arrested person in police custody, (iii) initiation of criminal proceedings against the arrested person, (iv) holding the arrested suspect in remand custody or the grant of bail to him, (v) institution of criminal proceedings against the alleged offender (accused), and his prosecution.

Article 13(1) of the Constitution provides as follows:

> *No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*

It would thus be seen that Article 13(1) contains the following two fundamental rights, they being:
(i) the arrest to be according to the procedure established by law; and
(ii) the arrested person to be informed of the reason for his arrest.
The petitioner complains of only the infringement of the first of these two fundamental rights.

As described above, for an arrest to be lawful under section 32(1)(b) of the CCPA, the arrest must be consequential to the **commission of an offence**. If an offence has not been committed, the law does not authorize a person to be arrested. As it would be seen from the above analysis, in the instant matter, the 1st respondent could not have even entertained a reasonable doubt that the virtual petitioner had committed any of the offences which he alleges. In the circumstances, the arrest of the virtual petitioner has not been carried out according to the procedure established by law, as a condition prerequisite for his arrest (namely the commission of an offence) has not been satisfied. In the circumstances, I conclude that the arrest of the virtual petitioner was contrary to procedure established by law, and thus, his fundamental right guaranteed by Article 13(1) of the Constitution had been infringed.

Police and remand custody of the virtual petitioner
As explained previously, following the arrest of the virtual petitioner on 9th April 2020, he had been produced in police custody before the learned Chief Magistrate, who had placed the suspect in remand custody. Consequently, the virtual petitioner's remand had been extended from time to time. Multiple requests made on his behalf that he be enlarged on bail had been refused by the learned Magistrate. An examination of the case record relating to B 31673/01/20 reveals that the complainant (1st respondent) had objected to the suspect being enlarged on bail.

The learned Magistrate had having called upon the 1st respondent to produced previous Facebook posts of the virtual petitioner, pointed out that in view of an allegation having been made against the suspect (virtual petitioner) that he had committed an offence under section 3(1) of the ICCPR Act, she does not have jurisdiction to grant bail and thus

has denied granted bail. Following a prolonged period of remand custody, consequent to an Application made to the High Court on behalf of the virtual petitioner (High Court Bail Application No. HCBA 224/2020), on 17th September 2020, he had been enlarged on bail.

Therefore, the period the virtual petitioner had been deprived of liberty can be divided into two segments, those being (i) the period of police custody following the arrest, and (ii) the period of remand custody. The duration of police custody at the CID seems to have been less than 24 hours, and the period of remand custody had been 5 months, 1 week and 1 day.

In ***Channa Pieris and Others v. Attorney-General and Others***[25], Justice Amerasinghe has observed that **the right not to be deprived of personal liberty except according to procedure established by law, is enshrined in Article 13(1)** of the Constitution and not in Article 13(2). Justice Amerasinghe has observed that Article 13(1) prohibits not only the taking into custody (arrest) except according to procedure established by law, but also the **keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law**. Therefore, in addition to the 'arrest' of the virtual petitioner, his subsequent police custody and the period of remand custody need to be examined from both from the perspectives of Articles 13(1) and 13(2) of the Constitution. That is with the view to determining whether the deprivation of personal liberty has been according to procedure established by law.

Police custody

Following the lawful arrest of a person, pending his production before a Magistrate, he may be held in the custody of the police. Police custody is a mechanism to keep an arrested person under arrest for the purpose of facilitating the conduct of further investigations. In terms of section 37 of the Code of Criminal Procedure Act, the period of police custody should not exceed 24 hours. The period of police custody is an extension of the status quo which emerges from the arrest of the person, and it amounts to a continuation of the deprivation of liberty arising out of the arrest. Therefore, the lawfulness of the arrested person being held in police custody is founded upon the lawfulness of the arrest. Therefore, if the arrest of a suspect has not been carried out according to the procedure prescribed by law, necessarily, holding him in the custody of the police becomes unlawful.

[25] [1994] 1 Sri L.R. 1 at 30]

As pointed out earlier, at the very core of the arrest of the virtual petitioner is an incurable flaw. That is because the virtual petitioner had been arrested, notwithstanding his not having committed an offence. Therefore, the period of police custody is also tainted with that fundamental flaw relating to the arrest of the virtual petitioner. Thus, not only is the arrest of the virtual petitioner unlawful, the subsequent period of police custody is equally unlawful. In the circumstances, I conclude that the holding of the virtual petitioner in the custody of the CID has amounted to an infringement of Article 13(1).

Remand custody

Article 13(2) of the Constitution provides as follows:

> *Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.*

In ***Channa Pieris and Others v. Attorney-General and Others***, Justice Amerasinghe has observed that the purpose of Article 13(2) is to enable a person arrested without a warrant by a non-judicial authority to be able to make representations to a judge who may apply his "judicial mind" to the circumstances before him and make a neutral determination on what course of action is appropriate in relation to his detention and further custody, which would amount to deprivation of personal liberty. Similar views have been expressed by Justice Amerasinghe in ***Farook v Raymond and others***[26].

It would be observed that, couched within Article 13(2) are two specific and inter-related fundamental rights. They are, that every person held in custody, detained or otherwise deprived of personal liberty –

(i) shall be brought before the judge of the nearest competent court **according to procedure established by law**; and

(ii) shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of an order of such judge made **in accordance with procedure established by law**.

Thus, I shall now examine whether the virtual petitioner was brought before the judge of the nearest competent court **according to procedure established by law**.

[26] [(1996) 1 Sri.LR 217]

Section 115(1) of the Code of Criminal Procedure Act[27] provides as follows:

> *Whenever an investigation under this Chapter cannot be completed within the period of twenty-four hours fixed by section 37, and there are grounds for believing that further investigation is necessary the officer in charge of the police station or the inquirer shall forthwith forward the suspect to the Magistrate having jurisdiction in the case and shall at the same time transmit to such Magistrate* ***a report of the case****, together with* ***a summary of the statements****, if any made by each of the witnesses examined in the course of such investigation relating to the case.*

It is necessary to note that filing a report in terms of section 115(1) of the Code of Criminal Procedure Act signifies an important step in the criminal justice response to the commission of an offence, namely the initiation of criminal proceedings in respect of the commission of such offence by an identified person, who is produced before a Magistrate along with the report.

It is seen that, according to section 115(1), the documentation that the law requires to be submitted include –
(i) a report of the case, and
(ii) a summary of the statements if any, recorded during the course of the investigation that has thus far been conducted.
Both the report of the case and the summary of the statements recorded are to serve a purpose which is of critical importance. It is noteworthy that there is nothing in section 115(1) that prevents both these requirements being incorporated into a single document, such as "A5", which is routinely referred to as a "B Report".[28] That being material based upon which the Magistrate having to determine whether or not the suspect being

[27] Section 115(1) of the Code of Criminal Procedure Act has been amended by section 4 of Act No. 52 of 1980.
[28] It is a matter of interest that there is nothing in the Code of Criminal Procedure Act which suggests that the report under and in terms of section 115(1) may be referred to using the nomenclature '**B Report**'. This terminology stems from Police Departmental Order "**C1**" promulgated under section 56 of the Police Ordinance, thus having the force of law. "C1" is titled '**Crime Investigation, Prosecution of offenders, Reports on accused persons, etc.**' provides for four types of forms and reports to be prepared by the police and submitted to the Magistrates Court, namely (i) Form A, (ii) **Form B**, (iii) Report under section 126 and (iv) Complaints in terms of section 148(i)(b) of the Criminal Procedure Code, Ordinance No. 15 of 1898 (old Code). **Form B** is to be used for reporting of cognizable offences in accordance with sections 121(2), 126A and 131 of the said Code. Section 126A of the old Criminal Procedure Code (introduced by Ordinance No. 31 of 1919) is comparable with section 115(1) of the present Code of Criminal Procedure Act, and relates to investigations pertaining to the commission of cognizable offences, which cannot be completed within 24 hours of the arrest of the suspect. Thus, this in my view is the root the term 'B Report' which has survived long-term usage and has got entrenched into the vocabulary of Magistrates, State Counsel and criminal defence Attorneys.

produced by the officer-in-charge of the police station should be placed in remand custody and/or enlarged on bail. Section 115(2) of the Code of Criminal Procedure Act provides that *"The Magistrate before whom a suspect is forwarded under this section,* ***if he is satisfied that it is expedient to detain the suspect*** *in custody pending further investigation, may after recording his reasons, by warrant addressed to the superintendent of any prison authorise the detention of the suspect …"*.

To enable the Magistrate to determine whether criminal proceedings against the suspect should be initiated and whether it would be expedient to detain the suspect in remand custody, the Report submitted under section 115(1) should contain one or more specific allegations that the suspect being produced has committed one or more offences, and the report along with the summary of statements must contain material based upon which the Magistrate can determine whether it is expedient to detain the suspect. If the officer in charge of the police station on whom the statutory duty is cast to submit the report along with the summary of statements is to move the Magistrate to consider placing the suspect in remand custody, he must place before the Magistrate sufficient material to substantiate the allegation contained in the report that the suspect has committed one or more offences.

Therefore, at the stage of the suspect being produced and upon a consideration of the material contained in the report and the summary of statements recorded submitted under section 115(1), the Magistrate must judicially consider the material contained in the report and the summary, and determine whether it is expedient to place the suspect in remand custody. If I am to borrow terminology used by Justice Ratwatte in ***Dayananda v. Weerasinghe and Others***,[29] the Magistrate should not be a mere 'rubber stamp' of the request of the police. He must judicially consider the request of the police in the light of the material placed before him in both the report and the summary of statements recorded. As opposed to the exercise of judicial discretion, a mere perfunctory endorsement of the Application of the police to place the suspect in remand custody, would make the ensuing order of the Magistrate placing the suspect in remand, devoid of requirements of the law, injudicious and a mockery of the justice system. This is of considerable significance, and a decision to place the suspect in remand custody amounts to deprivation of his liberty, as in terms of Article 13(2) of the Constitution, a suspect shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

[29] [(1983) 2 Sri L.R.84]

In the instant case, placing sufficient material before the learned Magistrate to substantiate the allegations against the virtual petitioner that he had committed three offences, namely offences under (i) section 120 of the Penal Code, (ii) section 3(1) of the ICCPR Act, and (iii) section 6(1) of the Computer Crime Act, is of even greater importance. That is because section 3(4) of the ICCPR Act provides that offences under sections 3(1) and 3(2) of the Act shall be cognizable and non-bailable, and that no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances. Thus, when it is alleged that the suspect has committed an offence under either section 3(1) or 3(2) of the ICCPR Act, it effectively takes away the judicial discretion otherwise conferred on the Magistrate in terms of section 115(2) to consider whether or not to place the suspect in remand custody and or whether or not to enlarge him on bail under and in terms of the Bail Act, No. 70 of 2007. Therefore, this is an additional reason as to why the officer in charge of the police station should place sufficient material in the 'B Report' to substantiate the allegation that the suspect has committed a particular offence.

A consideration of the afore-stated B Report ("A5") contains the following two deficiencies which are of significance before the eyes of the law:

(a) The Report does not contain a summary of statements recorded in the course of the investigation up to the time at which the Report was prepared. (Such summary should include the statement of the suspect.)

(b) The Report does not indicate the manner in which investigational findings (including the information contained in the statements recorded up to the point at which the Report was prepared) lend support to the allegations (those being offences alleged to have been committed by the suspect) being substantiated by investigational findings.

I have also noted that the afore-stated B Report contains the following caption:

> "*Producing to court a suspect and reporting facts pertaining to spreading of information which has the tendency of breaching harmony between ethnic communities* ***by calling for the waging of a jihadist war***".

It would thus be seen that, using the term *'jihadist war'* as opposed to *'an ideological jihad using the pen and the keyboard'*, the 1st respondent has made a conscious attempt to mislead the learned Magistrate by portraying that the virtual petitioner had called for the waging of an armed struggle. He has supplemented his attempt at misleading the learned Magistrate by not incorporating into the body of the 'Report on the case' a reference to

the fact that what the virtual petitioner had called for was an *'ideological jihad using the pen and the keyboard'*. In his Report, he has further misled the learned Magistrate by stating that the virtual petitioner had been spreading news with the view to causing in the minds of Muslims, revolutionary ideas and encouraging them to engage in such activities. The 1st respondent has also given the impression to the learned Magistrate that the virtual petitioner had attempted to hide his true identity, whereas, it is apparent that the Facebook profile of the virtual petitioner contains his correct name and it is undisputed that his profile photograph correctly depicts him.

Notwithstanding the learned Magistrate not being possessed with jurisdiction to grant bail to the virtual petitioner (in view of the allegation that he has committed an offence under section 3(1) of the ICCPR Act), an Application has been made to the learned Magistrate on his behalf, on the footing that there exists no basis in facts or in law to level an allegation that the virtual petitioner has committed such offence. By an order dated 28th May 2020, the learned Chief Magistrate has refused that Application. I have noted with a degree of relief that, pursuant to an Application seeking bail on behalf of the virtual petitioner from the High Court, following a consideration of submissions made by President's Counsel representing the virtual petitioner and Senior State Counsel representing the Honourable Attorney General, the learned Judge of the High Court making a well-considered order has, on 17th September 2020, granted bail to the virtual petitioner on the footing that there was no basis to allege that the virtual petitioner had committed an offence under section 3(1) of the ICPPR Act. It is unfortunate that by the time the order for bail was made, the virtual petitioner had spent five months and one week in remand custody.

An examination of the original case record of Magistrates Court Colombo case No. B 31673/01/20 revealed that the Honourable Attorney-General has by his letter dated 8th September 2023 informed the Director of the Criminal Investigation Department learned (with a copy to the learned Magistrate) that he does not intend to take any further action in terms of the law against the virtual petitioner. Consequently, by order dated 25th September 2023, the learned Magistrate has discharged the virtual petitioner, thus bringing an end to his ordeal of three years and five and a half months.

In view of the foregoing, I hold that the 1st respondent has at the time he produced the virtual petitioner before the learned Chief Magistrate **failed to tender to such Magistrate a Report prepared in terms of 115(1)** of the Code of Criminal Procedure Act. He has thereby infringed the fundamental right of the virtual petitioner guaranteed by Article

13(2) of the Constitution, by his failure to produce the virtual petitioner before the learned Chief Magistrate **according to procedure established by law.**

Examination of compliance with the fundamental right guaranteed by Article 13(2) *(that the suspect shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law)* would necessitate this Court to consider the lawfulness of the order made by the learned Chief Magistrate on 10th April 2020 placing the virtual petitioner in remand custody and the several subsequent orders made extending remand custody and the order made on 28th May 2020 refusing to grant bail. As such orders are judicial orders, the jurisdiction vested in this Court by Article 17 read with Article 126 of the Constitution would preclude this Court from examining whether the making of such judicial orders have amounted to an infringement of the fundamental right guaranteed by Article 13(2) of the Constitution. Thus, I shall not deal with that aspect of this case.

Observations by Court

Police officers must bear in mind the fact that arrest, initiation of criminal proceedings and causing a suspect to be placed in remand custody are by themselves criminal justice measures which have a penal character and a direct bearing on the liberty of persons. The adoption and enforcement of such measures in a manner that infringes the fundamental rights of persons can have a chilling effect on other persons too, who wish to enjoy the exercise of their inalienable fundamental rights. Therefore, such criminal justice measures must be carried out with due diligence, independently, objectively, with great caution and strictly in the manner provided by law.

Some degree of laxity can be shown by this Court, if a decision on whether or not to arrest a suspect alleged to have committed a cognizable offence had to be taken in the field at the spur of the moment, where the arresting officer was required in the circumstances of the situation to take a decision spontaneously and without any access to guidance or direction from a senior officer or legal advice. The instant case is not like that. The 1st respondent had sufficient time to consider, if necessary, to consult senior officers and to obtain legal advice from the Honourable Attorney General, and thereafter decide on whether or not to arrest the virtual petitioner.

Instead of acting as a dutiful law enforcement officer, the 1st respondent has used section 120 of the Penal Code, section 3(1) of the ICCPR Act and section 6(1) of the Computer Crime Act as weapons, and has taken action which amounts to punishment, by arresting

the virtual petitioner, holding him in police custody, and thereafter having placed him in remand custody for 5 months and 1 week.

This Court must take judicial note of the fact that the Criminal Investigation Department is an established, well-organized, structured and a specialized Department of the Sri Lanka Police, with direct access to the Department of the Attorney General. Therefore, the 1st respondent had access to multiple tiers of senior officers of the CID and to legal advisors of the state who are officers of the Department of the Attorney General.

The 1st respondent does not claim in his affidavit filed in this matter, that he acted on the instructions of his superior officers. Nor does he state that he obtained and acted on legal advice. Therefore, the 1st respondent must take primary responsibility for the infringement of the virtual petitioner's fundamental rights. The responsibility for the infringement of the fundamental rights of the virtual petitioner does not end with the 1st respondent, though it begins with his conduct of arresting the virtual petitioner.

Most unfortunately, it has now become common place for this Court to receive Applications alleging the arrest of persons without sufficient cause and in a manner that infringes their fundamental rights. Such arrests are often followed by periods of remand which are also contrary to law. A careful consideration of most such unlawful arrests reveal instances where police officers have not been permitted to exercise discretionary authority conferred on them, and been persuaded by persons in authority to act in a particular manner.

The evidence placed before this Court suggests such a situation pointing towards the direction of certain persons in authority, though due to the paucity of evidence placed by the petitioner and the position taken-up by the 1st respondent, it is not possible to arrive at an exact finding to that effect.

It is necessary for me to observe that it is the responsibility of those who yield political and administrative authority over police officers or is placed in a hierarchically superior position, to unconditionally refrain from giving case or person-specific instructions to police officers, unless they have been specifically authorized by law to give such instructions. Law enforcement officers such as police officers must have the freedom to conduct their duties independently, impartially and neutrally, and take steps and act in terms of the law, exercising their own inherent discretionary authority in a lawful manner.

Declarations and Orders of Court

(i) It is declared that the 1st respondent has infringed the fundamental rights of the virtual petitioner guaranteed by Articles 12(1), 13(1), 13(2) and 14(1)(a) of the Constitution.

(ii) The 1st respondent has when infringing the afore-stated fundamental rights of the virtual petitioner, acted under the colour of his office, as a police officer and as an officer of the Criminal Investigation Department. Thus, the 2nd respondent – Director of the Criminal Investigation Department and the state must take responsibility for the afore-stated infringement of the fundamental rights of the virtual petitioner by the 1st respondent.

The responsibility of the state arises out of the fact that the state shall be responsible for the actions of all the actions of its servants committed using the colour of their office, unless it is established that the state had taken all necessary measures to prevent the infringement in issue.

(iii) The 1st respondent shall within one month of this judgment pay a sum of Rs. 30,000/= to the virtual petitioner, using his personal funds.

(iv) The 2nd respondent shall pay a sum of Rs. 30,000/= to the virtual petitioner, using his personal funds.

(v) The state shall pay such sum of Rs. 1 million to the virtual petitioner.

(vii) The 6th Respondent shall within one month from the delivery of this judgement issue to the Inspector General of Police a summation of the principles contained in this judgment, which the latter shall issue to all police officers in the form of instructions, requiring such police officers to strictly comply with.

In view of the foregoing, this Application is allowed.

The state shall pay to the petitioner the cost incurred by him to prosecute this Application.

Judge of the Supreme Court

B.P. Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for the offence of Contempt of Court under and in terms of Article 105(3) of the Constitution of the of the Democratic Socialist Republic of Sri Lanka.

SC /Contempt No. 02/2023

Herath Mudiyanselage Vijitha Herath
No. 464/20 Pannipitiya Road,
Pelawatta, Battaramulla.

Complainant-Petitioner

Vs.

K.M. Mahinda Siriwardana
Secretary to the Treasury
Ministry of Finance
The Secretariat
Colombo 01.

Contemnor-Respondent

SC /Contempt No. 03/2023

Rathnayake Mudiyanselage Ranjith Madduma Bandara
No. 31/3, Kandawatte Terrace
Nugegoda.

Complainant-Petitioner

Vs.

K.M. Mahinda Siriwardana
Secretary to the Treasury
Ministry of Finance
The Secretariat
Colombo 01.

Contemnor-Respondent

Before	:	Jayantha Jayasuriya, PC, CJ Buwaneka Aluwihare, PC, J. Priyantha Jayawardena, PC, J. Vijith K. Malalgoda, PC, J. Murdu N.B. Fernando, PC,J.
Counsel	:	Upul Kumarapperuma with Kaneel Maddumage, Radha Kuruwitabandara & Dulini Godagamage for the Complainant-Petitioner in SC. Contempt No. 02/2023. G. Alagaratnam, PC with Suren Fernando, Sandamali Rajapaksha, Lasantha Garusinghe, Luwie Ganeshadasan, Nisala Seniya Fernando and Supuni Gunasekara for the Complainant-Petitioner in SC. Contempt No. 03/2023. Eraj de Silva with Hafeel Faris , N.K. Ashokbharan, Janaka Sundaramoorthy, Daminda Wijeratne for the Contemnor – Respondent instructed by Vidanapathirana Associates in SC. Contempt No.02/2023 & SC. Contempt No. 03/2023.
Written Submissions filed on	:	05th June 2023 on behalf of Attorney General in case Nos. SC. Contempt/02/2023 and SC. Contempt/03/2023. 07th June 2023 by the Contemnor – Respondent in Case No. SC. Contempt/ 02/2023 08th June 2023 Preliminary written submissions by the Contemnor – Respondent in Case No. SC. Contempt/ 03/2023.

21st June 2023 by Contemnor – Respondent in Case No. SC. Contempt/02/2023 and SC. Contempt/ 03/2023.

07th June 2023 by the Contemnor – Respondent in Case No. SC. Contempt/ 02/2023.

Argued on : 22.05.2023

Decided on : 14.11.2023

In both these matters K.M.Mahinda Siriwardane, Secretary to the Treasury is named as the Contemnor-Respondent (hereinafter referred to as the respondent). Furthermore, both these matters are described as applications for the offence of contempt of court under and in terms of Article 105(3) of the Constitution. While SC Contempt 02/2023 is filed by Herath Mudiyanselage Vijitha Herath, Rathnayake Mudiyanselage Ranjith Madduma Bandara has filed SC Contempt 03/2023. Both have identified themselves as complainant-petitioner in the respective applications.

These applications have been filed on the basis that the respondent willfully refused to abide by the Order of this Court dated 03 March 2023 in SC FR 69/2023 and failed to honour the aforesaid Order. Petitioners have further claimed that the respondent disregarded the aforesaid Order. They contend that the respondent had unduly interfered with the due administration of justice by his aforesaid conduct and thereby he had committed the offence of contempt of court, punishable under Article 105(3) of the Constitution.

In view of the fact that the cause of action pleaded in both these matters arise from the same conduct of the respondent and the fact that both petitioners have claimed the identical relief, they were listed together for support and all parties agreed that a single judgment can be delivered in relation to both these matters.

Both petitioners claim that the respondent was cited as the 1st respondent in SC FR 69/2023. The said application had been filed on the basis that arbitrary, wrongful, malicious, capricious, illegal, unlawful and pernicious actions and/or decisions of the respondent and/or actions or decisions of the Minister of Defence, Finance, Economic Stabilisation, National Policies, Technology, Investment Promotion, Women, Child Affairs and Social Empowerment to not provide adequate funds to the members of the Election Commission for the purpose of

conducting Local Government Elections have violated Fundamental Rights guaranteed to the petitioner of the said application and all other citizens under Article 12(1) and 14(1)(a) of the Constitution.

On 03rd March 2023, this Court having heard submissions of counsel representing all parties in the aforesaid application while granting leave to proceed, granted interim orders as prayed for in prayers (i) and (j) of the petition dated 21/02/2023.

Prayers (i) and (j) of the aforesaid petition reads as follows:

> *(i) Issue an interim order restraining and / or preventing the 01st and / or 2nd (ie Honourable Minister of Defence, Finance, Economic Stabilisation, National Policies, Technology, Investment Promotion, Women, Child Affairs and Social Empowerment represented by the Honourable Attorney-General) Respondents and their servants and agents and any other state functionary from withholding any funds allocated by the Activity Budget Estimates for the fiscal year of 2023 and / or the Budget for the year 2023 for the purpose of conducting Local Government Polls 2023 until the final determination of this application, subject to such terms, if any, as to Your Lordship's Court sees fit;*
>
> *(j) issue an interim order, restraining and / or preventing the 01st and / or 2nd (ie Honourable Minister of Defence, Finance, Economic Stabilisation, National Policies, Technology, Investment Promotion, Women, Child Affairs and Social Empowerment represented by the Honourable Attorney-General) Respondents and their servants and agents and any other state functionary from withholding any funds allocated by the Activity Budget Estimates for the fiscal year of 2023 and / or the Budget for the year 2023 for the purpose of conducting Local Government Polls 2023, from the 8th Respondent, until the final determination of this application, subject to such terms, if any, as Your Lordship's Court sees fit;*

The 8th respondents referred to in prayer (j) is the Government printer.

According to the petitioners, thereafter the 4th respondent in the aforesaid application - the Chairman of the Election Commission – by his letter dated 07th March 2023 while informing that a decision was taken to reschedule the elections for the local government authorities for 25th April 2023, requested the respondent to release a total sum of rupees one thousand and one hundred million to the election commission by 17th April 2023 in six tranches and a total sum of rupees one thousand three hundred and sixty to the police headquarters, government printer and the postal department. Subsequently, on 08th March 2023, the gazette notifications had been issued by the returning officers of respective administrative districts, declaring 25th April 2023 as the new date of elections for the local government authorities.

In response to this letter, the respondent had informed that he sought the approval of the Minister of Finance to release the funds as requested and steps would be taken to release funds no sooner such approval is granted. In the same letter the respondent had said, that the approval of the minister was sought in view of the direction of the Cabinet of Minsters dated 13th February 2023.

Thereafter, on 18th March 2023, the petitioner in Contempt 03/2023, Ranjith Madduma Bandara through an attorney-at-law had informed the respondent that steps will be initiated to charge the respondent for the offence of contempt of court as the latter is in manifest violation of the orders of the apex court and on 21st March 2023, the petitioner, initiated proceedings before this Court.

Upon receipt of these applications this Court listed them for support with notice to the Attorney-General. When these matters were taken up for support, the respondent was represented by the Counsel, even no notices were issued on him by court.

At the commencement of the hearing the learned counsel for the respondent raised preliminary objections on several grounds and moved that these applications be dismissed *in limine*. Such objections were raised on the basis that; the respondent did not have the ability to comply with the direction of the Court, there is no wilful or contumacious act of the respondent, petitioners failed to annex the charge sheet / or the draft charges, Court lacks jurisdiction, the petitioners have invoked jurisdiction for collateral purposes and the petitioners have no *locus standi*. In response to these objections, the learned counsel for the petitioners contended that none of the objections have merit and moved that they be rejected and a show cause notice be issued against the respondent.

Jurisdiction of the Court

Learned Counsel for the respondent contended that the two petitions should be dismissed *in limine* as this Court lacks jurisdiction. It was submitted that Courts do not have jurisdiction to consider any matter relating to powers of Parliament as stipulated under Article 4(c) of the Constitution. It is his contention that the matters connected to these proceedings forms part of powers of Parliament in relation to public finance and Article 4(c) excludes the judicial power of the Courts including the power to punish for contempt of court in the matters relating to public finance.

Article 4(c) of the Constitution reads as*: "the judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the people may be exercised directly by Parliament according to law;"*.

The learned counsel further contends that matters relevant to these proceedings fall within the ambit of "control of public finance" and therefore Article 148 of the Constitution precludes Court from examining this matter. It is his submission that under Article 4 (c) judicial power of the people relating to matters on powers of parliament has to be exercised by Parliament and not by Parliament through courts.

Article 148 of the Constitution reads as:

> *"Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law".*

Learned Counsel for the Petitioners submitted that the respondent's contention has no merit. While conceding that the Parliament's authority on public finance since the Parliament is vested with full control over public finance by Article 148 of the Constitution, present proceedings relate to an Order made by this Court and Court's jurisdiction as recognized under Article 105 (3) of the Constitution.

Article 105(3) reads as:

> *"The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the*

powers of such court including the power to punish for contempt itself, whether committed in the court itself or elsewhere …"

When we examine the nature of proceedings before this Court, it is clear that the petitioners are invoking jurisdiction of this court under Article 105(3) on the basis that the respondent failed to act in accordance with an order made by this Court. Jurisdiction of this court in relation to matters of Contempt of Court had been in existence over a period of time and such power is vested in court to protect the dignity and authority of the court. We do not see any merit in the submissions of the learned Counsel for the respondent on this matter. Therefore we overrule this objection.

Respondent's ability to comply with the order

The learned Counsel for the respondent submitted, that at this stage the Court should be satisfied that there is evidence available which can lead the court to conclude that an offence appears to have been committed, if the court is to issue a rule nisi for contempt of court. It is his contention that when the Court is deciding whether an offence appears to have been committed, the Court should consider four elements namely; (a). existence of an undertaking or an order, (b). knowledge of the undertaking or order, (c). ability to comply with the undertaking or the order, (d). wilful contumacious disobedience of undertaking or order.

The learned Counsel for the respondent submitted that the interim Order of the Court dated 03rd March 2023 requires the respondent (a). *not to withhold any funds allocated by the Activity Budget Estimates for the fiscal year of 2023 and / or the Budget for the year 2023 for the purpose of conducting Local Government Polls 2023 and (b). not to withhold from the 8th Respondent any funds allocated by the Activity Budget Estimates for the fiscal year of 2023 and / or the Budget for the year 2023 for the purpose of conducting Local Government Polls 2023*. The 8th Respondent in the said application was the Government Printer.

The Counsel contended that if this Court is to issue a rule nisi on the respondent, the petitioners should satisfy court that there is sufficient evidence for the Court to conclude that the respondent had the ability to comply with the said order. He contended that at no stage the respondent withheld release of funds but at all times acted according to the Constitution.

As per the material presented before this Court by the petitioners in this matter, subsequent to the aforesaid order of this Court dated 03rd March 2023, the respondent received a request of the Election Commission dated 07th March 2023 to release funds for the conduct of local

government elections. Upon receipt of this request, he sought permission from the Minister of Finance to release such funds and on the same day informed the election commission that steps would be taken to release funds no sooner he is granted permission. It is his position that he had to seek permission to release funds in view of the cabinet decisions dated 06th and 13th February 2023. It is his contention that the material available to this court reveal that the Cabinet of Ministers on 06th February 2023 and on 13th February 2023 had approved the Minister of Finance to advise the Secretary to the Treasury to release imprest only for the expenditure set out in the relevant Cabinet Memorandums until the revenue condition reaches the expected levels. Therefore, the learned counsel contends that the material available before this court is insufficient for the court to conclude that the respondent had the ability to comply with the Order of this court.

Furthermore, he submits that the respondent by his affidavit dated 13th March 2023 filed together with annexures A1, A2 and A3 in SC FR 69/2023 – the case in which the relevant Order was made - appraised the court of the request made by the election commission and the steps he took in relation to the said request. The learned Counsel contends, that the respondent by his conduct demonstrated his willingness to comply with the order and entertains no disrespect towards the Court. The learned Counsel further submitted that the Petitioners have deliberately withheld this fact in their petitions filed in this Court on 21st and 22nd March 2023 and thereby is guilty of suppression of relevant material.

Countering these submissions, the learned President's Counsel for the petitioners in SC Contempt 03/2023 contends, that the ability of the respondent to comply with the order of this court is a matter that should be examined by this Court at the main hearing. It is for the respondent to demonstrate this factor by presenting all necessary material at a full inquiry. Furthermore, they contend that the matters raised by the respondent were already considered by this Court when it made the Order on 03rd March 2023 and therefore the respondent has no right to agitate the same facts in these proceedings. In their submission that the respondent's failure to release funds to the Election Commission and other agencies to meet the expenses relating to the conduct of local government elections amounts to noncompliance with and a complete disregard of, the Order of this Court. The learned counsel for the petitioners in SC Contempt 02/2023 fully associated with the above submissions.

In considering these submissions this Court first needs to examine the nature and the scope of the relevant order. There are two parts in the order. The effect of the first part of the interim order

issued by the court as applicable to the respondent is restraining and / or preventing him from withholding any funds allocated by the Activity Budget Estimates for the fiscal year of 2023 and / or the Budget for the year 2023 for the purpose of conducting Local Government Polls 2023. The second part as applicable to the respondent is restraining and / or preventing him from withholding any funds allocated by the Activity Budget Estimates for the fiscal year of 2023 and / or the Budget for the year 2023 for the purpose of conducting Local Government Polls 2023, from the Government Printer. Therefore, the effect of these orders is, preventing the respondent from withholding funds allocated for the purpose of conducting the local government polls 2023.

Examination of all the material available to this Court reveal that the Budget Estimates of 2023 had set out Rupees 10,910 million under the heading Election Commission and the General Treasury had released a total sum of 165 million rupees between 31st January 2023 and 07th February 2023 under the General Warrant on the request of the Election Commission. The Election Commission on 07th March 2023 had requested the respondent to release a total sum of Rupees 1100 million prior to 25th April 2023 to the Election Commission and a further total sum of Rupees 1360 million to the Police Head Quarters, Printing Department and the Postal Department as election related expenditure. However, despite the interim order of this Court dated 03rd March 2023 directing the respondent **not to withhold** funds required for the Local Government Elections 2023, the responded had replied that he sought approval from the Minister of Finance and would take steps to release funds no sooner he receives the approval.

The issue before this Court is whether the respondent had breached the above mentioned Order of this Court and thereby have committed Contempt of Court. In this context, is there *prima facie* evidence that the respondent withheld funds, for this Court to issue summons and/or an order nisi against the respondent? It is pertinent to note that the Court by the Order dated 03rd March 2023 had not directed the respondent to release funds. In this background, the question arises as to whether the respondent by 07th March 2023 had the authority to release funds as requested by the Election Commission. For this Court to examine this issue, all material presented need to be considered and in that process this Court is not precluded from examining the material that had already been considered by this Court, at the time the interim Order was made. This Court independent of the relevant order of this Court, needs to be satisfied in these proceedings that the respondent had the ability to give effect to the said Order and if there had been any non-compliance or a breach of the order whether it amounted to contempt of court.

The Privy Council in **Reginald Perera v The King** 52 NLR 293 at 296 in reference to the definition of contempt of court, it was observed:

> *"...That phrase has not lacked authoritative interpretation. There must be involved some act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority " or something " calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts "*

The Court of Appeal in **Croos and Another v Dabrera** [1999] 1 SLR 205 at 209-210, observed that:

> *"The charge of contempt of court, was classically defined in the case of Regina v. Kopito, by Goodman, J. as "the scandalizing of the court, in that the words or the acts are likely to bring the court and Judges into disrepute.*
>
> *The action taken with regard to acts of contempt is based on the premises that a well-regulated laws of a civilized community cannot be sustained without sanctions being imposed for such conduct. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the Administration of Justice would be undermined and the law itself would fall into disrepute."*

The Court further observed that *"Even if contempt is not always a crime, it bears a criminal character and therefore, it must be satisfactorily proved. Lord Denning, M. R in Re Bramblewale ([1969] 3 ALL ER 1012) stated that "a contempt of court must be satisfactorily proven. To use the all time honoured phrase it must be proven beyond reasonable doubt"* (supra at 210)

In **Perkier Foods Ltd v Halo & Mr Tague** [2019] EWHC 3462 (QB) in describing the *mens rea* required to establish contempt of court cited with approval the following observation in Masri v Consolidated Contractors Ltd [2011] EWHC 1024 (Comm):

> "In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach…".

Furthermore, the court accepted that it was not necessary to show any direct intention to disobey the order. However, the court cited with approval the views of court in *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch), that:

> *"…failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order.*
>
> *Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment a contempt of court".*

In **Perkier** (supra) Justice Chamberrlain held that

> *14. "…Contempt of court, whether criminal or civil, was at common law a misdemeanour: see Dean v Dean [1987] 1 FLR 517, per Neill LJ, cited in Arlidge, Eady & Smith on Contempt (5th ed.), §12-51. That, together with the fact that its potential consequences include imprisonment and other penal sanctions, is why its elements must be proved to the criminal standard. In Sectorguard, Briggs J reasoned that a person who has no choice, because compliance with the order is impossible, does not have even the modest mens rea required for contempt. It is for the applicant to prove to the criminal standard that the respondent had the necessary mens rea. In a case where the respondent says that compliance was impossible, and there is some evidence to that effect, mens rea is in issue and it should be for the applicant to prove to the criminal standard that compliance was possible, in the sense that the respondent had a choice about what to do. That result is consistent with the general rule in criminal law.*
>
> *15. In the vast majority of cases, it will not be difficult for the applicant to prove that compliance is possible. In general, an injunction will not be granted if it would be*

impossible to comply with it. Furthermore, as the above cases show, it is not necessary to show that compliance would have been easy or convenient or inexpensive. Court orders must be complied with even if compliance is burdensome, inconvenient and expensive. What has to be proved on a committal application, in a case where the respondent has adduced evidence that compliance would be impossible (and so has discharged the evidential burden), is simply that compliance was possible….."

The Court in **Croos** (supra at 210) while describing the *mens rea* required to establish a charge of contempt of court, observed, that:

"Under Rule 31 of the Old English Rules of the Supreme Court, an act of disobedience would become an act of contempt only if it was "Willful". "Willful" was taken to mean that while, where the terms of an injunction were broken it was not necessary to show that the person was intentionally contumacious or that he intended to interfere with the administration of justice, yet where the failure or refusal to obey the order of court was casual or accidental and unintentional, it will "not be met by the full rigours of the law" ".

In **Dayawathie and Peiris v. Dr. S. D. M. Fernando and others** [1988] 2 SLR 314 Amerasinghe J cited with approval the following views of the Supreme Court of India in Debabrata Bandopoadhay v The State of West Bengal (AIR 1969 SC 189) and in *Ragunath Rai v P.Sahai (1968 S.C. 189, 193) :*

"A question whether there is contempt of court or not is a serious one. The Court is both the accuser as well as the Judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished .... Punishment under the law of contempt is called for when the lapse is deliberate and is in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged." (**Debabrata** – supra).

"Whether in a particular case contempt has been committed or not, has to be decided in the light of the circumstances of each. case. While zealously safeguarding the dignity of the Court, it is also to be borne in mind that it is of equal importance that-contempt

proceedings should not be abused and that utmost care must be taken to avoid resort to such proceedings in such cases where such action is not appropriate. Though disregard of a Court's order may itself amount to contempt even in the absence of disobedience; it would still be necessary, in my opinion, to prove in most cases, that even the disregard was wilful and not bona fide" (**Ragunath Rai** – supra).

When the legal principles as derived from these authorities are considered in the context of the facts presented by all parties before this court, firstly, it is common ground that what is ordered by this Court is for the respondent not to withhold funds. Secondly, the Appropriation Act, No.43 of 2022 had allocated to each expenditure head in accordance with the budgetary provisions for year 2023. However, on 06th February 2023, the Cabinet of Ministers had granted approval to the Minister of Finance to advise the Secretary to the Treasury to release imprest only for expenditure relating to twenty-two subjects specified in the Cabinet Memorandum on "Maintaining Essential Public Services in the Most Difficult Financial Circumstances" until the revenue condition reaches the expected level. This decision had been communicated to the respondent on the 7th February 2023 by the Secretary to the Cabinet of Ministers specifying, "action by Ministry of Finance, Economic Stabilisation and National Policies".

Cabinet of Ministers had taken this decision in the backdrop where the Cabinet of Ministers from January 2023 had considered several proposals relating to estimated expenditure as identified in the Appropriation Act, No.43 of 2022. In this regard the Cabinet of Ministers had considered matters including Payment of Government Salary Bill, Reduction of Recurrent Provisions in the Expenditure Estimates approved for the year 2023 by 05 Percent, Relief to vulnerable low-income families and Government Paddy Purchasing Programme.

It is pertinent to note that the Cabinet of Ministers is charged with the direction and control of the Government of the Republic while the Parliament is vested with full control over public finance, within the constitutional framework. In the context of the role of Parliament and the executive over the Government expenditure as envisaged in the Appropriation Act, it is pertinent to note that Section 7 of the Appropriation Act provides that:

"Where the Minister is satisfied- (a) that receipts from taxes and other sources will be less than the amounts anticipated to finance authorized expenditure; or (b) that amounts originally appropriated for a particular purpose or purposes are no longer required, he may with the approval of the Government, withdraw in whole or in part any amounts previously released for

expenditure under the authority of a warrant issued by him, from the Consolidated Fund or from any other fund or moneys, of or at the disposal of the Government, to meet any authorized expenditure and the details of all such withdrawals shall be incorporated in the Final Budget Position Report which is required to be tabled in Parliament under section 13 of the Fiscal Management (Responsibility) Act, No. 3 of 2003".

When the aforementioned cabinet decisions are considered in the context of the provisions of the Appropriation Act as described above, it appears that the direction to the respondent to confine the release of imprest to identified subjects "until the revenue conditions reaches the expected level", the respondent is legally obliged to seek the approval of the Minister of Finance to release imprest for any purpose other than the above mentioned specified subjects. The respondent having informed the Election Commission of his position had appraised the court by his affidavit dated 13th March 2023 the steps that he took in seeking the approval of the Minister and the fact that he lacks authority to materialize budgetary allocations without the approval of the Minister. The impugned conduct of the respondent therefore reflects that the respondent had taken necessary measures within his purview. In our view available evidence is insufficient to establish a prima facie case of contempt of court solely on the ground that he took this lawful step as a precursor to taking a decision on the request of the Election Commission to release funds.

In view of these findings, we are of the view that the material available does not warrant initiating contempt of court proceedings against the respondent. Both applications are devoid of any merits.

Before concluding, it is also pertinent to note that the Election Commission upon receipt of the response of the respondent dated 07th March 2023, had written to the Minister of Finance on the following day (i.e 08th March 2023) and had requested the Minister to grant approval to the respondent to release necessary funds. This demonstrates that the Election Commission had accepted the respondent's position and made the request to the Minister. In fact, the Election Commission copied the said letter to the respondent for his information. It is surprising to note that the petitioners did not disclose this fact to court for reasons best known to them and these facts were revealed from the material filed in these proceedings by the Attorney-General on 08th May 2023.

In view of these findings, we have arrived as discussed herein before, we will not proceed to examine other objections raised by the respondent.

Both applications are dismissed and make no order on costs.

Jayantha Jayasuriya, PC.

Chief Justice

Buwaneka Aluwihare, PC.

Judge of the Supreme Court

Priyantha Jayawardena, PC.

Judge of the Supreme Court

Vijith K. Malalgoda, PC.

Judge of the Supreme Court

Murdu N.B. Fernando, PC.

Judge of the Supreme Court

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

In the matter of an appeal in terms of Section 754 (1) of the Civil Procedure Code read with Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

SC (CHC) APPEAL NO. 74/2013
HC/CIVIL/412/2009/MR

Pan Asia Banking Corporation PLC
No. 450, Galle Road,
Colombo 03.
and having a branch office and/or a place of business called and known as the "Nugegoda Branch" at No.165A, High Level Road, Nugegoda.

PLAINTIFF

-Vs-

1. N. S. Gunaratne & Company (Pvt) Ltd.
   of No. 101, Nawala Road, Nugegoda.

2. Udawattage Don Nalin Srilal Gunaratne
   of No. 20/1A, Moragasmulla Road,
   Rajagiriya.

3. Roshanie Ayoma Gunaratne
   of No. 20/1A, Moragasmulla Road,
   Rajagiriya.

DEFENDANTS

AND NOW BETWEEN

1. N. S. Gunaratne & Company (Pvt) Ltd.
   of No. 101, Nawala Road, Nugegoda.

2. Udawattage Don Nalin Srilal Gunaratne

of No. 20/1A, Moragasmulla Road,
Rajagiriya.

3. Roshanie Ayoma Gunaratne
of No. 20/1A, Moragasmulla Road,
Rajagiriya.

DEFENDANT-APPELLANTS

-Vs-

Pan Asia Banking Corporation PLC
No. 450, Galle Road,
Colombo 03.
and having a branch office and/or a place of business called and known as the "Nugegoda Branch" at No.165A, High Level Road, Nugegoda.

PLAINTIFF-RESPONDENT

BEFORE : **P. PADMAN SURASENA, J.**
YASANTHA KODAGODA, PC, J. &
A. L. SHIRAN GOONERATNE, J.

COUNSEL : Rohan Sahabandu PC with Chathurika Elvitigala
and Ms. S. Senanayake for the Defendant-Appellants.

Varuna Senadhira with Irfan Batcha instructed by Eroshini de Silva for the Plaintiff-Respondent Bank.

ARGUED &
DECIDED ON: 16-11-2023.

P. PADMAN SURASENA, J.

Court heard the submissions of the learned President's Counsel for the Defendant-Appellants and the submissions of the learned Counsel for the Plaintiff-Respondent Bank and concluded the argument of this case.

The Plaintiff Bank has instituted this action in the Commercial High Court of Western Province (Holden in Colombo) against the three Defendants mentioned in the caption, to recover from them jointly and severally a sum of Rs. 5,130,648.56, together with legal interest until the completion of the payment in full.

The 1st Defendant which is a company is the principal borrower. The 2nd and 3rd Defendants are the sole Directors of the 1st Defendant Company who stood to guarantee the repayment of the said sum of money borrowed by the 1st Defendant from the Plaintiff Bank. It is a notable feature that the 2nd and 3rd Defendants are husband and wife. All three Defendants had filed a joint Answer praying for the dismissal of the Plaintiff's action.

After the conclusion of the trial, the learned Judge of the Commercial High Court by his judgment dated 28-08-2012, has held that the Plaintiff is entitled to all the relief as prayed for in the prayers to the Plaint against the Defendants and directed that the decree be entered accordingly. Being aggrieved by the said judgment pronounced by the Commercial High Court, all three Defendants lodged the instant appeal to this Court.

In the course of the hearing of this appeal before us, the Defendants did not dispute the fact that the Plaintiff Bank has credited a sum of Rs. 5,687,000.00 to the 1st Defendant's Current Account. The Statement of Accounts pertaining to the term loan relevant to the instant action has been produced in the trial marked **P 3** and the relevant entry therein has been produced marked **P 3(a)**.

In the course of the hearing, the primary argument advanced by the Defendants is that no physical transfer of cash from the Plaintiff Bank to the 1st Defendant had taken place. The Defendants also sought to argue that the documents relevant to the granting of the relevant term loan facility were blank when they signed them.

However, we observe that the Defendants had not been successful in challenging these positions in the trial. We note that the process of borrowing by the 1st Defendant had been as per the letter of offer produced in the trial marked **P 1**. We also find that the Statement of Account pertaining to the term loan (**P 3**) and the relevant entry therein [**P 3(a)**] have successfully proved in the trial the fact that the Plaintiff Bank has credited a sum of Rs. 5,687,000.00 to the 1st Defendant's Current Account.

Moreover, it could be seen that the 1st Defendant had proceeded to repay several installments subsequent to the receipt of the relevant term loan facility. This is borne out of the loan account statement produced in the trial marked **P 4**. In our view, in light of the facts and circumstances of this case, repayment of several installments is a clear proof not only of the fact that the 1st Defendant had obtained the relevant term loan facility from the Plaintiff, but also the fact that the Defendants' liability to repay the sum borrowed.

In view of the above as well as in view of the other factual circumstances in this case, we see no basis as to why the Defendants should succeed in this appeal.

Having perused the judgment of the learned Commercial High Court Judge, we observe that the learned Commercial High Court Judge has evaluated the evidence adduced by both parties, analyzed and duly considered the documents produced in the trial before coming to the correct conclusion in the case.

We have no basis to interfere with the conclusion reached by the learned Commercial High Court Judge. We proceed to dismiss this appeal but without costs.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.

I agree.

JUDGE OF THE SUPREME COURT.

Mks

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

In the matter of an Application for Leave to Appeal under Section 5 C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Rasnekgedara Jayathilaka,
Keppetipola,
Thembahena.

SC APPEAL 120/2013 **Plaintiff**
SC HCCA LA No. 195/2011

SP/HCCA/KAG/388/2007

District Court of Mawanella
Case No. 97/M

Vs.

1. H. G. Wijewardena Gunathilaka & Sons (Private) Limited,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

2. Hikkaduwa Gamage Wijewardena Gunathilake,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

3. State Mortgage and Investment Bank,
   Galle Road,
   Colombo 3.

Defendants

AND BETWEEN

1. H. G. Wijewardena Gunathilaka & Sons (Private) Limited,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

2. Hikkaduwa Gamage Wijewardena Gunathilake,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

Defendants-Appellants

Vs.

Rasnekgedara Jayathilaka,
Keppetipola,
Thembahena.

Plaintiff-Respondent

Jayasundara Mudiyanselage
Wimalawathie,
Keppetipola,
Thembahena.

Substituted-Plaintiff-Respondent

AND NOW BETWEEN

Jayasundara Mudiyanselage
Wimalawathie,
Keppetipola,
Thembahena.

Substituted-Plaintiff-Respondent-Petitioner

Vs.

1. H. G. Wijewardena Gunathilaka & Sons (Private) Limited,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

2. Hikkaduwa Gamage Wijewardena Gunathilake,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

Defendants-Appellants-Respondents

Before : **S. Thurairaja, PC, J**
A. H. M. D. Nawaz, J
K. Priyantha Fernando, J

Counsel :

Manohara De Silva, PC with
Ms. Nadeeshani Lankatilleka for
the Substituted-Plaintiff-Respondent-Appellant.

Dr. Sunil F. A. Cooray with Heshan Pietersz for the 1st and 2nd Defendants-Appellants-Respondents.

Argued on : 07.09.2023

Decided on : 16.11.2023

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Petitioner (hereinafter referred to as the appellant) in this case, was aggrieved by the judgment of the Provincial High Court of *Sabaragamuwa* holden at *Kegalle* No. SP/HCCA/KAG/388/2007 dated 27.04.2011 and preferred an appeal to this Court against the 1st and the 2nd Defendants-Appellants-Respondents (hereinafter referred to as the 1st and the 2nd respondents) praying that the judgment of the learned Judges of the Provincial High Court be set aside, that the judgment of the learned Judge of the District Court be affirmed and for further costs and relief.

Facts in brief

2. The appellant in this case has been the owner of the land in question. The appellant has mortgaged the said land to the State Mortgage Bank by Mortgage Bond No. 3025. On 31.10.1986, the appellant has entered into a hand written agreement [P-1] with the 1st and the 2nd respondents, upon which the 1st respondent agreed to pay a sum of Rs. 160,000 to the appellant, and in exchange, the appellant has agreed to transfer the said land to the 1st respondent. According to the agreement, of the agreed sum of Rs. 160, 000, a sum of Rs. 110,000 was to be paid to the State Mortgage Bank (hereinafter referred to as the bank). This sum was owed by the appellant to the bank. The remaining sum of Rs. 50,000 was to be paid to the appellant.

3. The appellant states that, the 1st and /or the 2nd respondents have paid the sum of Rs. 110,000 to the bank. However, no further sum has been paid to the bank or the appellant. Further, the respondents have also cut down several trees on the said land causing a damage amounting to Rs. 300,000 to the appellant.

4. The appellant states that, as a result of non-payment of the monies due to the bank, the bank has informed the appellant that the land would be put up for auction to recover the monies due. The appellant further states that the bank has not gone ahead with the auction. Thereafter, the appellant has paid it off and settled all the money and interests due to the bank.

5. It is the position of the respondents that, the appellant has mortgaged the said land to the bank and has obtained a loan

facility. Upon failure to pay the monies due, the bank has decided to auction the land. Thereafter, the bank had entered into a contract to sell the land to one *Gamini Neththikumara* for Rs. 100,250.

6. According to the respondents, the appellant has informed the respondents that a sum of Rs. 160,000 as previously agreed according to the first agreement [P-1] is not sufficient and demanded that a sum of Rs. 200,000 in total be paid instead. The appellant and the 2nd respondent entered into a further agreement on 19.12.1987 [P-2] according to which the respondents were to pay a sum of Rs. 200,000 in total in exchange of the land in question.

7. The respondents state that, according to the terms of the second agreement, in addition to the Rs. 110,000 which was already paid to the bank, a sum of Rs. 75,000 has been paid to the appellant and thereafter, possession of the said land has been handed over to the 2nd respondent. The 1st and the 2nd respondents state that, the possession of the said land has been handed over in 1986 and they have prescribed to the said land.

Previous proceedings

8. The appellant in this case instituted action bearing No. 97/M in the District Court of *Mawanella,* praying for a decree that the 1st and the 2nd respondents have breached the contract between the appellant and the 1st and the 2nd respondents referred to in paragraph no. 9 of the plaint, a declaration that the appellant is the owner of the premises in suit, and an order restoring the appellant in possession of the same.

9. The respondents failed to file the answer and appear on the date that was provided. Thereafter, the case was decided *exparte* on 31.07.1997. The *exparte* order was vacated in the Court of Appeal. An amended plaint was filed by the appellant in the District Court and subsequently an answer was filed by the respondents.

10. The learned District Judge by judgment dated 28.04.2006 held in favour of the appellant. At the trial, three admissions have been

recorded by the 1st and the 2nd respondents, one of which is regarding the title of the appellant to the land in suit.

11. Being aggrieved by the judgment of the learned District Judge, the respondents appealed to the Provincial High Court of *Sabaragamuwa* holden in *Kegalle*. By judgment dated 27.04.2011, the High Court held in favour of the respondents.

12. Being aggrieved by the judgment of the Provincial High Court, the appellant preferred the instant appeal to this Court. At the hearing of this appeal, leave was granted on the following questions of law.

Questions of law raised on behalf of the Plaintiff-Respondent-Petitioner.

a) Was the High Court correct in holding that the petitioner failed to prove title when the title was admitted by all parties?

b) Did the High Court err in setting aside the Judgment entered in favour of the plaintiff in the District Court on the basis that parties have admitted title to the corpus and that they had not complied with the terms of the agreement?

c) Did the High Court err in admitting and considering document A2 which was not produced at the trial and which has been tendered to Court without proper notice to parties?

Questions of law raised on behalf of the 1st and the 2nd Defendants-Appellants-Respondents.

d) Has the petitioner fully set out the title to the property in the plaint and if not, can the plaintiff rely on the admission of paragraphs 2 to 8 in the plaint to establish his alleged title?

e) In any event can the plaintiff have and maintain this action in view of the certificate of sale issued in favour of *Neththikumara* as evidenced by document marked A2?

Written submissions on behalf of the appellant.

13. The learned President's Counsel for the appellant submitted that, the appellant who filed a declaration of title case need not prove title, especially where title has been admitted. It was submitted that the appellant has title to the land and was in possession thereof. Thereafter, the appellant has entered into an informal agreement with the 1st respondent upon which the 1st respondent has entered into possession of the land. However, the respondents have failed to pay part of the consideration that was agreed upon. The appellant being unable to seek specific performance on an informal agreement which was not notarially executed, filed a case for declaration of title and ejectment.

14. It was the submission of the learned President's Counsel that, unlike in a *rei vindicatio* action where the cause of action is based on the sole ground of violation of the right of ownership, in an action for declaration of title, the appellant need not strictly prove title but sues on the right of possession and ouster. The learned President's Counsel in bringing out the distinction between the burden of proof in a *rei vindicatio* action and a case for declaration of title, relied on the case of ***Luwis Singho and Others v. Ponnamperuma [1996] 2 S.L.R. 320*** and the case of ***Pathirana v. Jayasundara [1955] 58 N.L.R. 169*** and stated that, in the instant case, where the appellant has filed action for a declaration of title and for ejectment, the appellant need not strictly prove his title.

15. The learned President's Counsel for the appellant further submitted that, in any event, the 1st and the 2nd respondents have admitted the appellant's title to the land. It was submitted that, in paragraphs 2 to 8 of the amended plaint, the appellant has set out the manner in which he became entitled to the land in question by deed No. 3024 dated 16.02.1983 and deed No. 422 dated 27.10.1978. The 1st and the 2nd respondents have admitted the same.

16. The learned President's Counsel for the appellant, by relying on the case of ***Jayasinghe v. Kiriwanegedara Tikiri Banda [1988] 2 CALR 24*** submitted that, even in a *rei vindicatio* action, if the defendant admits the title of the plaintiff, the plaintiff is absolved of the duty to prove his title. Further, in the case of

Hameed v. Weerasinghe [1989] 1 S.L.R. 217 it was held that, in a vindicatory action, it is necessary to aver and prove title, but where title is not disputed, a plaintiff may sue for ejectment. It was submitted that, in the instant case, in a circumstance where the appellant's title has been admitted by the respondents, there is no requirement for the appellant to prove title and that he is entitled to an order ejecting the respondents.

17. It was further submitted that, in accordance with the provisions of the Evidence Ordinance, facts that are admitted need not be proved. As the admission in the instant case relates to a question of fact and not law, the tile which is admitted need not be proved.

18. It was submitted that the learned Judges of the High Court have failed to consider that, in an action for declaration of title and ejectment, the plaintiff (appellant) sues on the right of possession and ouster and need not prove title.

19. The 1st and the 2nd respondents in their appeal to the High Court have produced a document marked [A-2] which is an extract from the Land Registry, which purports to indicate that the State Mortgage and Investment Bank has auctioned the land in question to one *Gamini Neththikumara*. It was the submission of the learned President's Counsel that, the High Court could not have considered the document [A-2] as it was produced for the first time in appeal by the 1st and the 2nd respondents, without proper notice to the appellant or proper application made to Court. The respondents ought to have made an application for submitting fresh evidence under section 773 of the Civil Procedure Code read with Article 139(2) of the Constitution. The Honorable Judges of the High Court have failed to consider this fact and erroneously relied on the document marked [A-2] and held that, as at the date of filing this action, the appellant in this case was not the owner of the property.

20. It was further submitted by the learned President's Counsel that, the High Court misdirected itself and has fallen to error in applying the test of accepting fresh evidence in appeal as laid down in the case of ***Ratwatte v. Bandara [1966] 70 N.L.R. 231***. In the circumstances of this case, the 1st limb of the test laid down in *Ratwatte(supra)* is not satisfied, as the document [A-2] could have been obtained by the respondents with reasonable diligence

for use at the trial, especially because the respondents were well aware of the previous volume/folio it carries forward to. The Counsel contended that, the second limb of the test laid down in the case of *Ratwatte(supra)* is also not satisfied, as the document [A-2] would not have an important influence on the result of the case as subsequently the land has been transferred to the bank and in turn the bank has retransferred to the appellant as the monies due has been paid.

Written submissions on behalf of the Respondents.

21. The learned Counsel for the respondents submitted in his written submissions that, this action cannot be categorized as a mere action for declaration of title, because the prime requisite in a declaratory action is the ouster of the appellant. In the instant case, the possession has been voluntarily handed over to the respondents.

22. The learned Counsel further submitted that, if it is a *rei vindicatio* action, even though the respondents had admitted title, if it is transpired during the evidence that the appellant had no title at the time of filing action, the action has to fail.

23. The devolution of title on the appellant as pleaded in paragraphs 2 to 8 of the said amended plaint is not disputed. If the appellant did not have title, the respondents could get no title. It was the submission of the learned Counsel that, conceding to the devolution of title on the appellant, does not preclude the respondents from showing that subsequently the appellant has parted with such title.

24. The learned Counsel further submitted that, the position of the Honorable High Court Judges and as it was submitted in the case of ***Ahamadulevve Kaddubawa v. Sanmugam [1953] 54 N.L.R. 467,*** the plaintiff in a *rei vindicatio* action must show that he had title at the time of the institution of the action. As revealed at the hearing before the High Court, as at the date of institution of this action, the owner of the said property was not the appellant but one *Chandrathilaka Gamini Neththikumara.* This has been clearly set out in the document marked [A-2] which has been produced

and received at the hearing of the appeal in terms of section 733 of the Civil Procedure Code and Article 139 (2) of the Constitution. The High Court of Civil Appeal has properly received the document marked [A-2] as fresh evidence as it touches the main issue in the case, and is of a decisive nature.

25. At the argument of this appeal, the main contentions were based on the difference in the standard of burden of proof with regard to a claim for a declaration of title and the admissibility of the document marked [A-2], and based on this document, whether the appellant had title to the land in question at the time action was filed and also on the grounds of estoppel.

26. The questions of law (a) and (b) will be answered together.

It was the position of the appellant that, where an action has been filed in respect of declaration of title, the appellant is not strictly required to prove title but sues on the right of possession and ouster. At the argument of this appeal, the distinction between a *rei vindicatio* action and a case for declaration of title in respect of the burden of proof each has to satisfy was discussed at length.

27. In the case of ***Luwis Singho and Others v. Ponnamperuma [1996] 2 S.L.R. 320*** at page 324 it was stated by *Wigneswaran J.* that,

> *"No doubt actions for declaration of title and ejectment (as is the present case) and vindicatory actions are brought for the same purpose of recovery of property. But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that ;*
>
> *(i) the Plaintiff is the owner of the land in question i.e. he has the dominium* ***and,***
>
> *(ii) that the land is in the possession of the Defendant (Voet 6:1:34)*
>
> *Thus even if an owner never had possession of a land in question it would not be a bar to a vindicatory action.*

In Punchihamy v. Arnolis[6] it was held that a purchaser who had not been placed in possession may bring a vindicatory action. Even a person who had a mere "nuda proprietas" (bare legal title) was recognized as a person entitled to file a vindicatory action. Allis Appu v. Endiris Hamy (supra).

But in an action for declaration of title and ejectment the proof that a Plaintiff had enjoyed an earlier peaceful possession of the land and that subsequently he was ousted by the Defendant would give rise to a rebuttable presumption of title in favour of the Plaintiff and thus could be classified as an action where dominium need not be proved strictly. It would appear therefore that law permits a person who has possessed peacefully but cannot establish clear title or ownership to be restored to possession and be quieted in possession. This development of the law appears to have arisen due to the need to protect de facto possession. It is different from the right of an owner recovering his possession through a vindicatory action. Our courts have always emphasized that the plaintiff who institutes a vindicatory action must prove title. (Vide Wanigaratne v. Juwanis Appuhamy.[7])

Withers, J., in Allis Appu v. Endiris Hamy (supra) when he referred to jus terttii as a defence to a rei vindicatio action, he no doubt took into consideration the fact that ownership or dominium is the essence of a vindicatory action and title being in the hands of a third party could be relevant in such cases.

But in an action for declaration of title and ejectment as in the present case, ***the Plaintiff need not sue by right of ownership but could do so by right of possession and ouster****. In fact in such cases the Plaintiff is claiming a possessory remedy rather than the relief of vindication of ownership."*

[Emphasis mine]

28. When considering the above extract, it can be observed that, it does not strictly say that a plaintiff in every action for a declaration of title need not prove title. It simply says that in an action for a declaration of title and ejectment, where a plaintiff has proved that he enjoyed previous peaceful possession and that he was later ousted by the defendant, it would give rise to a presumption of title

in favour of the plaintiff. One should be mindful that this presumption is rebuttable as well. In such an instance dominium, that is absolute ownership, need not strictly be proved.

29. It was pointed out by the Counsel for the respondents that, in the instant case, the possession has been voluntarily handed over to the respondents by the appellant and there is no ouster of the appellant. Therefore, whether a presumption of title would arise in favour of the appellant in the instant case is questionable.

30. However, in the case of ***Pathirana v. Jayasundara [1955] 58 N.L.R. 169*** which was a proceeding instituted against an overholding tenant where it was held that, a plaintiff was not entitled to amend the plaint so as to cause prejudice to the defendant's plea of prescriptive possession. In *Pathirana(supra)* it was stated that,

"... but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiffs title would be required, or else is one for a declaration (without strict proof) of title which the tenant by law precluded from denying."

31. When considering the above extract, I am in agreement with the position that, in an action for declaration of title, strict proof of title need not be established. Therefore, the appellant in the instant case need not strictly prove title as it relates to an action for declaration of title and ejectment.

32. It was the position of the learned President's Counsel for the appellant that, the 1st and the 2nd respondents have admitted the appellant's title to the land. It was his position that, in accordance with the provisions of the Evidence Ordinance, where the fact of title is admitted it need not be proved and the appellant is entitled to an order ejecting the respondents. However, the learned Counsel for the respondents contended that, merely conceding to the devolution of title on the appellant does not preclude the respondents from stating that subsequently, the appellant has parted with such title.

33. When considering the amended plaint dated 2001.02.12, paragraphs 2 to 8 of the plaint describe how the appellant became the absolute owner of the land in question. In paragraph 3 of the

answer of the 1st and 2nd respondents dated 05.09.2003 (at page 144 of the brief) the 1st and the 2nd respondents have admitted that the appellant became the sole owner of the land in question.

34. Section 58 of the Evidence Ordinance of Sri Lanka sets out that,

> *"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings;*
>
> *Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."*

35. Section 58 of the Evidence Ordinance clearly sets out that, facts that are admitted need not be proved. I am in agreement that an admission as to title does in fact qualify as a question of fact. However, I am unable to agree with the appellant's position that what has been admitted by the respondents in their answer is an admission as to title. It is my position that, what has been admitted by the respondents in their amended answer is the devolution of title on the appellant. It is pertinent to note that, admitting that the land in question was devolved on the appellant in a particular manner by particular deeds is something completely different to admitting title. An admission such as this would not hinder the respondents from stating that subsequently the appellant parted with such title.

36. As I have found that the admission in the amended answer of the respondents does not qualify as an admission as to title, the position advanced by relying on the cases of ***Jayasinghe v. Kiriwanegedara Tikiri Banda [1988] 2 CALR 24*** *and* ***Hameed v. Weerasinghe [1989] 1 SLR 217*** are futile with regard to the instant case, and therefore will not be addressed.

37. In answering the question of law (a), it is my position that, the High Court has erred in stating that the title was admitted by the parties as the respondents merely conceded to the devolution of title and not to the title itself.

38. In answering the question of law (b), the District Court judgment has not been set aside by the High Court on the basis that parties have admitted title.

39. Now I will answer the question of law (c) that has been raised on behalf of the appellant.

This question of law is in reference to the admissibility of fresh evidence in the High Court. The appellant took the position that, the High Court could not have considered the document [A-2] as it was produced for the first time in appeal by the 1st and the 2nd respondents and was also tendered to Court without proper notice to parties or proper application made to Court.

40. It was the position of the appellant that, the High Court has erred in relying on the document [A-2] as it was produced contrary to section 773 of the Code of Civil Procedure read with Article 139(2) of the Constitution and without proper notice to the appellant or proper application made to Court. Further, that the High Court has erred in applying the test of accepting fresh evidence in appeal as laid down in the case of ***Ratwatte v. Bandara [1966] 70 N.L.R. 231.*** The respondents on the other hand contended that the High Court has not acted contrary to the provisions laid down in section 773 of the Code of Civil Procedure and Article 139 of the Constitution and has correctly applied the test laid down in *Ratwatte(supra)* and properly received the document [A-2] in fresh evidence.

41. Section 773 of the Code of Civil Procedure sets out that,

> *"Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree, or order therein between and as regards the parties, or to give such direction to the Court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial "*

42. Article 139(2) of the Constitution sets out that,

> *"The Court of Appeal may further receive and admit new evidence additional to, or supplementary of, the evidence already taken in Court of First Instance touching the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require."*

43. *In the case of* ***Ratwatte v. Bandara [1966] 70 N.L.R. 231*** reference was made to the case of ***Ramasamy v. Fonseka [1958] 62 N.L.R. 90*** where *Weerasooriya J.* held that,

> *" fresh evidence would not be permitted to be adduced in appeal unless it is of a decisive nature; it must be such that, on a new trial being ordered, it would almost prove that an erroneous decision had been given."*

44. Further, reference was also made to the case of ***Ladd v. Marshall [1954] 3 All ER 745*** where *Denning L.J.* said that,

> *" In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although, it need not be decisive : third, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible."*

45. When considering the test laid down in *Ratwatte(supra)* in reference to the facts and circumstances of the instant case, it is clear that the first requirement of the test is patently not satisfied as the document marked [A-2] which is an extract from the Land Registry, which indicates that the State Mortgage and Investment Bank has auctioned the land to one *Gamini Neththikumara,* could have been obtained and produced at the trial, if reasonable diligence had been used.

46. When considering the second requirement in the test laid down in *Ratwatte(supra),* I am in agreement with the position taken by the

learned President's Counsel for the appellant. When considering the evidence of witness *Thamara Kumari* who is a clerk at the State Mortgage and Investment Bank (page 240 of the brief) in her evidence has said that, although the land in suit was auctioned, it was subsequently transferred to the bank and that the monies due has been paid to retransfer the land to the appellant. Therefore, in this light, the document [A-2] would not have had an important influence on the result of the case, as the appellant has been the owner of the property as at the date of filing this action. Therefore, the second requirement in the test laid down in *Ratwatte(supra)* is also not satisfied.

47. The general rule is that, fresh evidence is not admitted in appeal. However, in exceptional situations, it has been allowed as provided under section 773 of the Code of Civil Procedure read with Article 139(2) of the Constitution . The test in *Ratwatte(supra)* serves as a filtering mechanism to allow parties to submit fresh evidence where the test has been satisfied. This test must be strictly adhered to. If this is not followed, it would have the effect of transgressing the general rule.

48. In answering the question of law (c), as the test laid down in *Ratwatte(supra)* has not been satisfied, the document [A-2] could not have been accepted in evidence at the High Court. The learned Judges of the High Court have erred in admitting and considering the document [A-2] which was not produced at the trial.

49. Now I will answer the question of law (d) that has been raised by the respondents.

    The respondents in their amended answer dated 05.09.2003 have admitted paragraphs 2 to 8 of the plaint. It is my position that, at the time the respondents entered into the informal agreement, they have accepted the title of the appellant. They have signed the agreement and accepted possession from the appellant on the basis that the appellant has title to the land.

50. Section 116 of the Evidence Ordinance sets out that,

    "… no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given"

51. In the case of ***Ruberu and Another v. Wijesooriya [1998] 1 Sri.L.R. 58, U.DE.Z.*** it was stated that,

> *"…But whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title."*

52. The appellant has duly set out how the title was derived on him. However, as it has been elaborated in this judgment, para 2-8 of the plaint in itself will not establish that the appellant had title to the land in question at the time the action was instituted. However, by operation of section 116 of the Evidence Ordinance, the respondents are estopped from denying the title of the appellant.

53. <u>Finally, I will answer the question of law (e) that has been raised by the respondents.</u>

    According to the findings in paragraphs 39-48 of my judgment, it is my view that the document [A-2] has been wrongly admitted in the High Court.

54. For the reasons that I have elaborated in this judgment, the appellant in the instant case is entitled to a declaration of title for the land is question and an order ejecting the respondents from the land. The Judgment of the High Court is set aside. The Final determination of the District Court is affirmed. The appellant is entitled to costs in the cause.

The appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE A. H. M. D. NAWAZ.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal from the Judgment dated 3rd March 2015 of the High Court [Civil Appeal] of the Western Province (Holden in Colombo) made under and in terms of Section 5 (c) of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Daya Constructions (Private) Limited,
No. 362,
Colombo Road,
Pepiliyana,
Boralesgamuwa.

Plaintiff

SC APPEAL 64/2019
SC/HC/CALA/131/15
WP/HCCA/COL/13/2009(F)
District Court of Colombo
Case No.37756/MR

Vs.

Hovael Constructions (Private) Limited,
No. 245/55,
Old Avissawella Road,
Orugodawatta

Defendant

AND BETWEEN

Hovael Constructions (Private) Limited,
No. 245/55,

Old Avissawella Road,
Orugodawatta.

Defendant-Appellant

Daya Constructions (Private) Limited,
No. 362,
Colombo Road,
Pepiliyana,
Boralesgamuwa.

Plaintiff-Respondent

AND NOW BETWEEN

Olympus Constructions (Private) Limited,
No.445/1/2,
Colombo Road,
Pepiliyana.

Formerly knowns as;
Daya Constructions (Private) Limited,
No. 362,
Colombo Road,
Pepiliyana,
Boralesgamuwa.

Plaintiff-Respondent-Appellant

Hovael Constructions (Private) Limited,
No. 245/55,
Old Avissawella Road,
Orugodawatta.

Defendant-Appellant-Respondent

Before : **P. Padman Surasena, J**
Achala Wengappuli, J
K. Priyantha Fernando, J

Counsel :

Nihal Fernando, PC with
Rehan Dunuwile for the Plaintiff-Respondent-Appellant.

Dr. Sunil Cooray for the Defendant-Appellant-Respondent.

Argued on : 20.09.2023

Decided on : 22.11.2023

K. PRIYANTHA FERNANDO, J

1. On 15.09.2003, the company named *Olympus Constructions (Private) Limited* (formerly known as *Daya Constructions (Private) Limited*) (hereinafter referred to as the 'plaintiff') instituted an action against the company named *Hovael Constructions (Private) Limited* (hereinafter referred to as the 'defendant') in the *District Court of Colombo* praying, *inter alia*, for the recovery of an additional sum of Rs. 2,704,178.94 in respect of asphalt supplied and laid on a public road in *Negombo*.

2. After trial, the learned Additional District Judge pronounced judgment on 18.02.2009 in favour of the plaintiff. Thereafter, the respondents filed an appeal against the judgment of the learned trial Judge, upon which the learned Judges of the *High Court of Civil Appeal* of *Colombo* by their judgment dated 03.03.2015, allowed the appeal setting aside the *District Court* judgment which was entered in favour of the plaintiff.

3. Being aggrieved by the decision of the learned Judges of the Civil Appellate High Court, the plaintiff preferred the

instant appeal, whereby this Court on 20.02.2019, granted leave to appeal on the questions of law set out in paragraph 13(a), (b) and (c) of the petition dated 02.04.2015.

The said questions of law are as follows,

(a) Have the learned Judges of the High Court of Civil Appeal erred in law in failing to take cognisance of and/or appreciate the difference between a "Measure and Pay Contract" and a "Lump Sum Contract"?

(b) Have the learned Judges of the High Court of Civil Appeal erred in law in concluding that in a "Measure and Pay Contract", the Respondent was <u>not</u> contractually obliged to pay on the actual material used by the Petitioner?

(c) Have the learned Judges of the High Court of Civil Appeal erred in law in concluding that in a "Measure and Pay Contract", there is a requirement for the parties to have a further agreement to pay for the utilization for over and above the minimum requirement stated in the contract?

In addition, further leave was granted on the following question of law raised by the learned Counsel for the respondent,

"Has the Plaintiff-Respondent-Petitioner proved that extra tonnage reflected in P17 (1) to P17 (139) was used under the contract?"

Facts in Brief:

4. The plaintiff company entered into an agreement with the defendant company to lay and compact an asphalt wearing course with 50mm thickness, on a 7m wide road of approximately 5.5km long, leading from *Kurana Junction* to *Browns Beach Hotel Junction,* according to RDA specifications.

5. The defendant company, as the main contractor, has entered into an agreement with *Urban Development and Low Income Housing Project* (also referred to as the Employer), for the making of the roadway leading from *Kuruna Junction* to *Browns Beach Hotel Junction*.

6. According to the contract entered between the defendant company and the Employer, the defendant company is obliged to clear the road surface, construct drains and to raise the level of the existing road using and/or laying aggregate base course (hereinafter referred to as 'ABC') to the parameters set out by the Consultant Engineer. ABC is a mixture of small stones and quarry sand.

7. The defendant company has then entered into an agreement with the plaintiff company (who is now a sub-contractor to the Employer) to lay asphalt on top of the ABC layer laid down by the defendant company.

8. According to the contract entered between the defendant company and the plaintiff company, the plaintiff company is to lay asphalt at a thickness of 50 mm (+/-5mm). However, the plaintiff company claims that during the course of the project and particularly towards the latter part, they have discovered large undulations on the ABC layer laid by the defendant company.

9. The plaintiff company holds that the large undulations on the road surface has resulted in them laying asphalt layer

in excess of the predetermined thickness of 50 mm (+/- 5mm).

10. The plaintiff company claims that consequent to a core sample test, the average thickness of the asphalt layer laid was found to be 62.72 mm thick and therefore claims that they had been obliged to lay over and above the agreed average thickness in order to complete the works to the satisfaction of the Employer and its engineer.

11. The defendant company claims that they are only obliged to pay a sum of Rs. 6,684,385.11 to the plaintiff company for the work they have done. However, the plaintiff company claims that an additional sum of Rs. 2,704,178.94 should be paid to them by the defendant company for the extra tonnage of asphalt which they have had to use due to the large undulations on the ABC road surface prepared by the defendant company.

12. The plaintiff company claims that this contract is a 'measure and pay' contract, and for that reason the defendant company is liable to pay for the additional tonnage used by the plaintiff company.

Written Submissions on Behalf of the Plaintiff-Respondent-Appellant:

13. The learned President's Counsel for the plaintiff, drawing the attention of this Court to the evidence of the witness for the defendant company namely, *Shantha Surin Senanayake Alagiyawanna,* the Civil Engineer, submitted that the said witnesses evidence together with several documents submitted by the plaintiff, is proof to show that the actual agreement entered into between the parties is a 'measure and pay' contract and that it is not based on a theoretical figure.

14. The learned President's Counsel submitted that, a 'price per ton' was agreed upon by the defendant company for the reason that the exact quantum of asphalt to be used was unknown at the time of tender.

15. The learned President's Counsel further submitted that, if not, there was no difficulty in agreeing on a lump sum for the entire contract at the beginning itself. Therefore, takes the position that the defendant company is now liable to pay for the extra amount of asphalt used.

16. The plaintiff company tendered to this Court delivery notes marked as ['**P17 (1) to P17 (139)**'], which contains the quantities of asphalt delivered to the work site in order to substantiate the fact that extra tonnage of asphalt was being used.

17. The learned President's Counsel for the plaintiff submitted that, the plaintiff company by these delivery notes has established the actual tonnage supplied to the site. It was his contention that, the fact that the delivery notes were not proved is untenable as they have been signed by the site supervisor.

18. The learned President's Counsel further submitted that the defendant company entered into agreement with the plaintiff company to lay asphalt, approximately one month after the ABC layer had been placed by the defendant company. Subsequently, the ABC surface as a surface which consists of stones and quarry dust, is prone to deterioration due to vehicle movements and in particular rain, therefore there could be undulations on the ABC surface by the time the plaintiff was made to lay the asphalt layer.

19. The learned President's Counsel further submitted that, the plaintiff company in the interest of executing the contract to the best of its ability had informed of the

undulations to the site supervisors and the Managing Director of the defendant company namely, *Mr. Joel Selvanayagam*.

20. Furthermore, the learned President's Counsel draws the attention of this Court to the document marked [**'P10'**]. This document ['P10'] was a letter sent by the defendant company to the plaintiff company on 04.10.2002 as a response to the plaintiff company's letter dated 02.10.2002, which was marked as [**'P9'**]. The learned Counsel submitted that, as per the said letter, the director of the respondent company has categorically stated that, the plaintiff should forward core sample test results and based on the same, payment will be made to the appellant. The learned Counsel has cited the paragraph from the letter marked as [**'P10**']. What is stated in ['P10'] reads as follows:

"We will need the above information to work out the tonnage supplied, laid and compacted to make payment to you".

21. Moreover, the learned President's Counsel submitted that, the fact that core samples were taken at the request of the respondent is ex facie further proof of the fact that the contract was not a 'lump sum contract' but a 'measure and pay contract'. Therefore, puts forward the position that the defendant company having made representation and written undertaking to make payment on the actual tonnage used, cannot thereafter, refuse to pay for the asphalt by alleging that the basis of payment was some other method.

Written submissions on behalf of the Defendant-Appellant-Respondent:

22. In respect of the delivery notes marked [**'P17 (1) to P17 (139)'**], the learned Counsel for the defendant company submitted that, the defendant company has denied all the

delivery notes and made the submission that none of the delivery notes have been proven as against the defendant. Therefore, the defendant is not liable to pay for extra asphalt allegedly used as per those documents.

23. The learned Counsel further submitted that, none of the delivery notes were seen by the project engineer of the defendant company on the site, nor by anyone else on behalf of the defendant.

24. In addition to that, the learned Counsel submitted that the defendant company had admitted that the contract entered between the two parties is a 'measure and pay' contract and not a 'lump sum' contract. Further, submitted that if the plaintiff in fact has used more asphalt than was estimated originally, the plaintiff company must have proved the extra quantity.

25. The learned Counsel submitted that the plaintiff company had totally failed to prove the extra quantity by its failure to prove documents marked, ['**P17 (1) to P17 (139)**'].

26. It was contended by the learned Counsel that, the day of completion of asphalting the road was 02.10.2002, and only on that day did the plaintiff company send the letter marked ['**P9**'] informing about the large undulations for the first time and the need to increase the amount of asphalt used.

27. The learned Counsel further submitted that, the site engineer of the defendant, one *Shantha S. Senanayake Alagiyawanna,* who gave evidence for the defendant company, had been in attendance every day during the period from the commencement of the work up until the completion date. He has testified that he was never made aware at any time that any extra tonnage of asphalt was being used for any reason.

28. It was put forward by the learned Counsel that by letter dated 10.10.2002, marked as ['**P11**'], the defendant has informed the plaintiff company that, they do not agree that there were large undulations on the ABC surface and that, the ABC surface had in fact been approved by the Consultant staff prior to asphalting. The learned Counsel submitted that, through the letter marked ['**P11**'], the defendant company has further informed the plaintiff company that they should have brought such undulations to the notice of the defendants before laying the asphalt wearing course.

29. The learned Counsel draws the attention of this Court to the evidence led in this action in the *District Court* by both the plaintiff and the defendant with regards to the documents marked ['**P17 (1) to P17 (139)**']. The learned Counsel submitted that the witness for the plaintiff company itself, could not identify the signatures on the said documents.

30. It was further submitted that the delivery notes have not been acknowledged either by the witness of the defendant's company namely, *Shantha S. Senanayake Alagiyawanna* (the Civil Engineer of the defendant), nor its site engineer or any of its agents. Moreover, none of the other officers of the defendant's company had been aware of those documents. Therefore, the learned Counsel takes the position that those documents have not been proved and hence there is no proof that any such extra quantity of asphalt was used on the job.

31. It was further submitted that, no person who had allegedly weighed the asphalt laden trucks at the plaintiff's premises at *Boralesgamuwa* had been called to prove any of the delivery notes.

32. The learned Counsel hence contended that, the defendant company had correctly calculated the amount due from

the defendant to the plaintiff in terms of the contract and sent the letter marked [**'P12'**] dated 05.11.2002 with the full and final balance payment due as Rs. 684,385.11.

Answering to the Questions of Law:

33. Having heard learned Counsel for both parties at the hearing, and at the perusal of the petition, written submissions, proceedings of the trial, and documents tendered to this Court, I shall now resort to answering the questions of law before this Court and whether the defendant company is obliged to pay the sum of Rs. 2,704,178.94 to the plaintiff company.

34. I will first resort to answering the question of law raised by the learned Counsel of the defendant as to whether the plaintiff-respondent-appellant has proved that an extra tonnage was used under the contract, as reflected in the delivery notes tendered by the plaintiff.

35. It could be observed from page 287 of the brief (proceedings dated 26.07.2006) during the evidence of the witness for the plaintiff company, the Managing Director namely, *T.D.Roshan*, when questioned as to whether he was able to identify the signatures placed on the delivery notes, he answered that he could not recognize them.

    Furthermore, on page 6 of the proceedings dated 18.02.2008, during the evidence of the witness for the defendant's company, the Civil Engineer namely**,** *Shantha Surin Senanayake Alagiyawanna* was also questioned as to the signatures placed on the delivery notes. He had answered that the defendant's company had not placed such signatures. He has further stated that, if such delivery notes were to be signed at the site, he was the one who was in charge to sign such documents.

ප්‍ර: තමන් කියල තිබෙනවා පැ 17 රිසිට් පත ගැන තමන් කිව්ව මේක අත්සන් කර නැත කියලා?

පි: ආයතනයෙන් අත්සන්කර නැත. මේවා අත්සන් කර තිබෙන්නේ අපේ ආයතනයේ කෙනෙක් නොවේ. අත්සන් කරනවා නම් මම අත්සන් කරන්න ඕනේ.

36. **Section 67** of the **Evidence Ordinance No.15 of 1895**, provides,

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be his handwriting".

In the instant case, there is no evidence to show that the plaintiff had taken steps to prove as to who had signed the delivery notes. It is evident from the testimony of the witness of the plaintiff company, that the plaintiff company itself is not aware of who has signed the delivery notes. Therefore, the extra tonnage of asphalt cannot be proven, as the documents marked ['**P17 (1) to P17 (139)**'] have not been proved by the plaintiff.

37. It is provided in the explanation to **Section 154(1)** of the **Civil Procedure Code** that,

"*If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it."*

38. Further, it was held in the case of ***Cinamas Ltd. v Soundaranrajam [1998] 2 S.L.R. 16*** that, in a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the

document unless the document is forbidden by law to be received and no objections can be taken in appeal.

39. It was stated by his Lordship, Hon. Chief Justice Samarakoon, in the case of **Sri Lanka Ports Authority and Another v Jugolinija-Boal East [1981] 1 SLR 18,**

"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the cursus curiae of the original civil courts".

40. It could be seen through case law precedents that although the production of the document is objected to during the trial, if the party objects to the document fails to object to same at the closure of the case, it is evidence for all purposes.

41. However, now it is enacted law through Section 3(a)(ii) of the Civil Procedure Code (Amendment) Act No.17 of 2022 (that amends section 154 of the Civil Procedure Code) where it provides,

"3. (a) (ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence,

the court shall admit such deed or document as evidence without requiring further proof;

42. During the trial, when the delivery notes were marked through the witness of the plaintiffs company, *T.D. Roshan*, they were objected to by the defendant's company. Further, at the end of the case for the plaintiff company, when the documents were referred to in closing the plaintiff's case, the objection was confirmed by the learned Counsel for the defendant.

43. On the evidence placed before the *District Court*, it is clear that the plaintiff company has made the claim for the additional amount based on the delivery notes marked ['P17 (1) to P17 (139)']. The plaintiff company has clearly failed to prove those documents as hereinbefore mentioned. By mere producing core sample test reports before the *District Court,* the plaintiff company has failed to demonstrate that the above claimed amount is due. Plaintiff has failed to prove that they got prior approval or consent from the defendant to apply additional asphalt nor they have proved that additional asphalt was used. Therefore, this question of law raised by the defendant company is answered in the negative.

44. In answering the two questions of law under paragraph 13(a) and (b), I hold that when delivering the judgment by the learned High Court Judges dated 03.03.2015, the learned Judges were fully aware that the contract entered between the plaintiff company and the defendant company was a measure and pay contract and that, the defendant company was obliged to pay for any tonnage of asphalt used for the job. The learned High Court Judges set aside the *District Court* judgment on the basis that prior consent had not been obtained by the plaintiff to increase the thickness of the asphalt wearing course.

45. At the perusal of the documents marked ['P1 to P17'] tendered to this Court, it is evident that the two parties have initially agreed on the parameters of the length, width and thickness, and as held by the learned Judges of the High Court, the plaintiff company ought to have realized upon inspection of the road, that they needed an additional quantity of asphalt due to the large undulations on the ABC surface.

46. It is my view that the plaintiff company as a construction company, with experience in such asphalt works, should have at first instance done an inspection on the standard

of the ABC surface laid by the defendant company, in order to ascertain as to whether there are any such undulations. In the circumstances of such undulations, the plaintiff company ought to have informed the defendant company and obtained their approval or consent before initiating the project.

47. As was clearly highlighted by the learned High Court Judges, the last delivery note sent by the plaintiff company is dated 02.10.2002, and the letter marked ['P10'] informing about the need to use more asphalt due to undulations on the ABC surface is also dated 02.10.2002. As stated in the judgment of the High Court, had the plaintiff company brought this to the notice of the defendant company prior to completion of the contract and obtained their permission, there was no reason for them to write the letter ['P9']. It is therefore evident that the position taken by the plaintiff company that they have informed the defendant company of the need to use a higher quantity of asphalt is incorrect. As the learned High Court Judges clearly stated, there is no evidence in record to show that prior consent had been obtained by the plaintiff company to increase the thickness of the asphalt wearing course.

48. I must also address that, in response to the submission made by the learned President's Counsel for the plaintiff that, the plaintiff company has taken core samples at the request of the respondent. The learned Counsel for the defendant contends that, the defendant company has requested for core sample reports through letter dated 04.10.2002 marked as ['P10'], however this has not been a response to ['P9']. It is evident that the defendant company has responded to the letter marked as ['P9'] by a letter dated 10.10.2002, which is marked as ['P11'], informing the plaintiff company that they do not agree that there were large undulations on the ABC surface while giving reference to the letter dated 02.10.2002 of the plaintiff company. Therefore, it is clear that the

defendant company has never approved any extra tonnage to be used when they rejected the claim of undulations.

49. Hence, the learned High Court Judges were correct when they found that the plaintiff is not entitled to the amount claimed. Therefore, on the above premise, the questions of law under paragraphs 13(a) and (b) of the petition are answered in the negative.

50. The third question of law raised by the appellant under paragraph 13(c) of the petition is as to whether the learned Judges of the High Court erred in law in concluding that there is a requirement to have a further agreement to pay for the utilization for over and above the minimum requirement stated in the contract.

    The learned High Court Judges do not conclude that any such further agreement is required but rather holds that, there had been no understanding between the parties to pay for anything more than what was agreed upon by them, and had the plaintiff company informed of the need to increase the quantity of asphalt initially, the defendant company would have considered approval and paid.

51. The thickness of 50mm stated in the contract is the standard thickness of asphalt that the defendant company is required to lay. This thickness is agreed by both parties. As I have discussed above, where the plaintiff company was required to lay more than what was needed, they should have informed the defendant company at the outset.

52. Therefore, the question of law raised by paragraph 13(c) is also answered in the negative.

53. For the reasons stated above the Judgment of the High Court of Civil Appeal dated 03.03.2015 is affirmed.

Appeal dismissed with costs.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under and in terms of Articles 17, 126 and Chapter VI of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Sebastian Benadic
2. Aiiyasamy Sellanayagi

SC (FR) APPLICATION NO. 335/2021

3. Eugenia Nova
4. Eron Cleture Nova
5. Evan Galena Nova

All are of;
"Kanthi" Niwasa,
Nagaraya,
Lunugala.

Petitioners

Vs.

1. Kodithuwakku Arachchilage Nihal Chandrakantha,
   No. 170/04,
   Rukmalgama Road,
   Kottawa,
   Pannipitiya.
   and
   Ambalangoda Kotasa,
   Hopton,
   Lunugala.

2. Dissanayakalage Chandra Kumara,

No.26/01,
Siri Nithikarama Road,
Dalupitiya,
Kadawatha.

3. Mahambadu Ibrahim Ahmad Sajeer,
Executive Engineer (Uva Province),
Road Development Authority.

4. Gamasinghe Arachchilage Dilip Indunil Wimaladharama,
(Badulla-Chenkaladi Road Development Project Engineer),
Road Development Authority.

5. L. V. S. Weerakoon,
The Director-General,
Road Development Authority.

6. T. K. M. Galappaththi,
Provincial Director (Uva),
Road Development Authority.

7. Chandana Athuluwage,
The Chairman,
Road Development Authority.

8. Road Development Authority,

All 3rd to 8th Respondents are of;
No.216,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

9. R. W. R. Premasiri,
The Secretary,
Ministry of Highways,
"Maganeguma Mahamedura",
No. 216,
9th Floor,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

10. Johnstan Fernando,
The Minister,
Ministry of Highways,
"Maganeguma Mahamedura",
No. 216,
9th Floor,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

10(A). The Minister,
Ministry of Highways,
"Maganeguma Mahamedura",
No.216,
9th Floor,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

11. AMSK Constructions (Pvt) Ltd,
No. 1/29,
New Town Madampe,
PX 61230.

12. Ajith Rohana,
Senior Deputy Inspector General
(Crimes and Traffic Range),
Police Department of Sri Lanka,
Colombo 01.

13. Indika Hapugoda,
(Senior Superintendent of Police),
Director of Traffic Management and Road Safety,
Traffic Headquarters,
Traffic Management and Road Safety Division,
No. 03,
Mihindu Mawatha,
Colombo 12.

14. R. M. Palitha Senevirathne,
Officer in Charge,
Passara Police Station,
Passara.

15. C. D. Wickremarathne,
Inspector General of Police,
The Department of Police of
Sri Lanka,
Colombo 01.

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

Respondents

Before : **P. Padman Surasena, J**
Janak De Silva, J
K. Priyantha Fernando, J

Counsel :

Thusitha Wijekoon for the Petitioners.

Lakmali Karunanayake, DSG for the 3rd to 9th and 16th Respondents.

Harsha Fernando with Chamith Senanayake and Yohan Cooray instructed by;
Dimuthu Kuruppuarachchi for the 11th Respondent.

Argued on : 11.09.2023

Decided on : 22.11.2023

K. PRIYANTHA FERNANDO, J

1. This application stems from the bus accident, also known as the, "Passara Bus Accident", which claimed the lives of 14 passengers, while leaving 35 individuals injured. The petitioners' claim that at the time the bus accident occurred, *Benadict Medon*a and *Anthoni Saminoda*, the mother and father of the 3rd to 5th petitioners, had also been travelling in the same bus and were unfortunately found among the dead. The 3rd to 5th petitioners are the children of *Benedict Medona* and *Anthoni Saminoda.* The 1st and 2nd petitioners are the grandparents of the 3rd to 5th petitioners. The petitioners claim that the most prominent cause for the death of *Benadict Medona* and *Anthoni Saminoda* (hereinafter referred to as the "Deceased") were the "actions and/or inactions and/or omissions" on the part of the 03rd to 10th respondents (hereinafter referred to as the "Respondents") and therefore alleged that the fundamental rights of the parents of the petitioners guaranteed under Articles 11, 12(1), 12(2), 14(1)(c), 14(1)(f) and 14(1)(h) of the Constitution has been infringed by the 03rd to 10th respondents.

2. This Court granted leave to proceed under the alleged infringement of Article 12(1) of the Constitution against the 3rd to 9th respondents.

Facts in Brief:

3. On 20.03.2021, at about 6.45 a.m., the private bus bearing No. ***UP-ND 6448*** plying from *Lunugala* to *Colombo* with around 60 passengers has gone off the road and fallen into a precipice of about 250 feet near the 13th mile post on the *Lunugala-Passara* road (***A 005***).

4. The petitioners state that the road had been partially obstructed due to a boulder which had fallen onto the road due to a landslide which had occurred on

20.11.2020, which was about four months prior to the accident and as a result of which the two-lane road had been narrowed down to a single-lane, thereby no two vehicles could pass on the road at the same time.

5. According to the petitioners, a tipper truck bearing No. ***LH-9388*** had been approaching from the opposite direction towards *Lunugala* at the double bend which had caused the bus driver to swerve to the edge of the road to make room for the tipper truck. However as a result of this, the front wheel of the bus had slipped off the road causing the bus to fall down the cliff, causing the death of the parents of 3rd to 5th petitioners. The petitioners claim that the edge of the road had been eroded and was landslide prone.

6. The petitioners while admitting that it is the negligence of the bus driver which resulted in the deaths of *Benadict Medona* and *Anthoni Saminoda*, likewise submitted that if not for the inactions or omissions of the respondents, this accident would not have happened. Therefore, the petitioners claim that the respondents, who has a prime duty and/or responsibility for the maintenance of the roads and who has a duty to ensure the ultimate safety of the general public of the country are in violation of the rights guaranteed to the petitioner under Article 12(1) of the Constitution.

7. In the further written submissions tendered to this Court by the petitioners, the learned Counsel asserts section 9 of the **Road Development Authority Act No.73 of 1981**, which provides the powers, duties and functions of the RDA to show how the RDA has a duty to ensure the safety of the public.

8. Additionally, the learned Counsel submitted the preamble to the **National Thoroughfares Act No. 40 of 2008** to further illustrate the responsibility owed by the RDA and submitted that in light of the preamble, it is clear that the intention of the legislature is to provide a

legal framework to facilitate the maintenance and administration of the road network of the country.

9. The learned Counsel for the petitioners further submitted that according to section 3 of the **National Thoroughfares Act,** the RDA has exclusive power of implementation and administration of the provisions of the Act. Moreover, the learned Counsel for the petitioners submitted that according to section 5 of the said Act, the 3rd, 5th and 6th respondents are to be responsible for the implementation and administration of the provisions of the said Act.

10. Furthermore, the petitioners also claim that despite having known that the boulder was obstructing the road, the respondents had failed to take steps to clear the road for a duration of four months and therefore they are thoroughly responsible for the death of the deceased.

11. The petitioners claim that the respondents have neither erected a safety fence along the eroded edge of the road, nor have placed any warning signs and/or barriers to warn the road users of the boulder and to alert passengers of the road to be more vigilant.

12. In the further written submissions tendered to this Court, the learned Counsel for the petitioners draws attention of the Court to the cases of ***Jayanetti v The Land Reform Commission and Others [1984] 2 SLR 172, Azath Salley v Colombo Municipal Council and Others [2009] 1 SLR 365, Everad Anthony Payoe and Others v Hatton Dickoya Urban Council & Others SC FR 654/09 S.C Minute 23.06.2017,*** and the case of ***Gamlakshage Sunil Seneviratne v Shelton Gunasekara & Others SC FR Application No. 476/2012 S.C.Minute 13.07.2015*** to explain as to how the facts of this case could satisfy to invoke a fundamental rights action.

13. In response to these submissions by the petitioner, the 7th respondent (Chairman of the Road Development Authority) in his affidavit claims that the section of the road where the accident occurred had been handed over to the contractor named AMSK Constructions (Pvt) Ltd (the 11th respondent) which is evident from the letter marked ['**R1**'], for widening and development under the OFID Funded Project on 31.01.2017 and submits that according to their contractual obligations, the construction company was obligated to look after the overall safety and maintenance of the road.

14. The 7th respondent claims that from September 2020 up until February 2021, there had been severe monsoons in that area, which had resulted in landslides around 45 locations along the same road and admits that on 20.11.2020 a large volume of rocks had fallen onto the site of the accident causing a boulder, soil and debris to block the road. The 7th respondent further claims that, once the Road Development Authority (hereinafter referred to as the "RDA") had been informed about the land slips by the contractor, they had advised the contractor to take immediate action to clear the location. The contractor had started clearing the road once they were advised by the RDA. Although they had been able to clear the debris and the soil to make the road passable, they had been unable to remove the boulder.

15. In furtherance to that, the 7th respondent explains that although advised to remove the boulder immediately, the contractors were not able to remove it as it had been precariously balanced on vulnerable rock surface and due to the rainy weather conditions prevailing in that area. He further states that if removed at that instance, it would have resulted in further more landslides, and would have endangered the houses atop the rock surface. It was submitted on behalf of the 7th respondent

that, it was dangerous to remove the boulder by using normal explosives. Therefore, they had several meetings with the experts and finally decided to do a chemical blasting where the risk is minimal.

16. In addition to that, the 7th respondent claims that some of the other slips that had occurred during that time as mentioned above were worse in terms of volume and damage caused to the road when compared to the landslide which had occurred at the site of the accident and therefore, they had to first attend into clearing those areas of the road that were largely affected.

17. In furtherance to that, the 7th respondent claims that the RDA consultant and the officers of RDA have had conducted regular site inspections and several meetings had also been held with the contractors regarding the site and the safety measures which could be taken by the contractors.

18. In answering to the petitioner's claim, the 7th respondent deposed that the contractors have taken the necessary precautions to warn the public. In his affidavit he claims that the contractors have placed yellow tape and poles had also been fixed with illuminating stickers. The 7th respondent further deposed that apart from that, the contractors have also placed "drive slow" road signs at the double bend area. The 7th respondent further submits that iron poles have been erected along the right side of the road, however, the poles were removed by unknown people several times and the contractor had to continuously replace the same. Complaints had been made by the contractors regarding the same to the *Passara Police Station.*

19. The petitioners have submitted that just two to three days after the accident, the RDA has removed the boulder which had fallen on the road and erected a safety fence along the right edge of the road and pleads the

question as to why the respondents could not have done this earlier.

20. In response, the 7th respondent submits that, as mentioned before, they were unable to remove the rock due to safety reasons and due to the prevailing weather conditions in the area. On 19.03.2021, the day before the accident the contractor had commenced drilling the rock for the purpose of chemical blasting which was to happen on the next date (i.e. 20.03.2021). Therefore, the 7th respondent deposed that since the process had already started, the 11th respondent has completed it by a controlled blasting method as instructed by the National Building Research Organization (NBRO).

21. The 7th respondent further submitted that, the driver of the bus, as a person who would be taking the same route daily ought to have been familiar with the terrain and about the fallen rock. The 7th respondent deposed that the RDA had acted according to the law and discharged their duties and has not done anything to erode the public trust as was claimed by the petitioner.

22. In this instance, the learned Counsel for the respondents further contends that the facts of this case does not create a basis for the invocation of the fundamental rights jurisdiction and that this is a matter that should be determined in a trial in the District Court.

Alleged Violation of Article 12(1):

23. Having heard all parties at the hearing, and at the perusal of the petition, objections, and written submissions of parties, I shall now examine as to whether the 3rd to 9th respondents are in violation of Article 12(1) of the Constitution.

24. At the hearing of the case, this Court had the opportunity to watch the video recording submitted by the learned Counsel for the petitioner marked as **['X13(A) to X22(A)']** in open Court. It was seen that the driver of the ill-fated bus, drove the bus at a very high speed on the slope and went out of control upon seeing the tipper truck and swerved towards the precipice. In the event the driver had been more cautious, careful and driving at a controllable speed, he would have been able to stop the bus upon seeing the tipper truck and would have safely passed the boulder without any accident. The bus driver being a person who drives daily on the same route would have been familiar about the road and the boulder.

25. In addition to that, the tipper truck driver also had a responsibility to have stopped his vehicle before the boulder and make way for the oncoming bus as he could have reasonably foreseen that it would be dangerous for both vehicles to pass alongside the boulder at the same time as there was only one operative lane in the road due to the boulder.

26. Nevertheless, in this instance, as mentioned above, it needs to be considered whether there was any action, inaction or omission on the part of the 03rd to 09th respondents as alleged by the petitioners.

27. **Article 12(1)** of the **Constitution** provides;

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

28. Article 12(1) incorporates two distinct principles; the negative concept and the positive concept. His Lordship, Justice Janak De Silva in the case of ***D. S. Fernando v***

Hon. Laxman Kiriella and Others SC/FR/360/2016 S.C. Minute 10.08.2023 stated that;

"…The negative concept is that all individuals are equal before the law and that no one should be treated differently. The positive concept is that all individuals are entitled to equal protection of the law, which requires them to be treated equally in similar circumstances. The negative concept requires the application of the law to everyone. No one is entitled to be treated differently, except where the law recognizes a specific exemption to its application…Any act which contravenes the law will violate the rule of law embedded in Article 12(1)".

29. The RDA being a public authority who carries out administrative actions, is deemed to provide equal protection to individuals and in the event that they are found to have infringed a fundamental right of an individual by way of an administrative action, the individual is able to invoke jurisdiction against the RDA under Article 17 of the Constitution. This is also evident from the case authorities provided by the learned Counsel for the petitioners as mentioned in paragraph 12 above.

30. **Section 101** of the **Evidence Ordinance No.15 of 1895** provides;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

It is for the petitioners to prove that the actions and/or inactions of the respondents violated their rights enshrined under Article 12(1) of the Constitution.

31. As submitted by the learned counsel for the petitioners the publication present on the RDA website, where it provided;

"…it is the responsibility of the RDA to maintain the road network to a reasonable standard so that there would be uninterrupted public transport available to them".

The RDA owes a duty to maintain the roads and to remove any hazards that would obstruct or cause harm to the public who uses the road. This is also evident through the preamble to the National Thorougfares Act No. 40 of 2008 and the Road Development Authority Act No. 73 of 1981 as provided by the learned Counsel for the petitioners.

32. As was stated in the Supreme Court of Canada in the case of **Housen v Nikolaisen [2002] 2 S.C.R. 235,** a municipality has a duty to keep a roadway in a reasonable state of repair so that the users of the roadway, exercising ordinary care may travel upon it safely. The municipality owes a duty of care to the ordinary driver, not the negligent driver.

33. In this situation, the petitioners allege that the respondents had done nothing to remove the boulder for a period of four months, but had been able to remove it just few days after the accident. Prima facie, this would show that the RDA had breached their duty owed to the public and has not acted with due care and diligence and therefore could be made liable for having knowledge of the possible hazards that could arise due to the fallen rock, and yet not clearing the road.

34. However, when considering the facts and circumstances of this case, it could be seen that the RDA has since the

day of the landslides, taken steps to clear the roads with more than 40 landslides. This is evident from the fact that they have initially cleared the soil and debris that had covered the road and also from the fact that they have had several meetings with the 11th respondent contractors and have conducted several inspections as to how they could remove the boulder which was large in volume and which had been lying in a vulnerable position.

35. The explanation provided by the RDA as to why they were unable to remove the boulder at the very instance of the landslide; the fact that a normal blasting of the boulder would have been very risky and if they have removed it during the monsoon season it would have caused a potential threat to the houses that were atop the hill, shows that they have looked into this matter with caution, taking into consideration all the other situations which could arise.

36. It could be seen that although the RDA had not been able to remove the boulder earlier, they had initiated measures to do chemical blasting. Moreover, they had taken necessary precautions to warn the public as submitted by the respondents. This is evident from the fact that they have placed 'drive slow' warning signs at the double-bend, they have also erected poles with illuminating stickers and yellow tape, which can be seen in the photographs marked as **['R9 to R12']** and the video recordings marked as **['X13(A) to X22(A)']**.

37. In addition to that, as submitted by the learned Counsel for the respondents, despite warning signs being present or not, the bus driver as someone using the same route daily, ought to have been aware of the boulder which had been present there for the past four months.

Declaration:

38. Therefore, for the foregoing reasons and pertaining to the circumstances of the present case, I hold that the respondents are not in violation of Article 12(1) of the Constitution.

Application dismissed without costs.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA.

I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal to the Supreme Court in terms of Articles 128 and 154(p) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 9 of the High Court of the Province (Special Provisions) Act No.19 of 1990.

SC APPEAL NO.118/2010

High Court of Badulla No. 26/2007 (Appeal)

Magistrate Court Badulla Case No. 9245.

The Officer in Charge,
Crimes Investigation Division,
Police Station,
Badulla.

Complainant

Vs

1. Thangavelu Chandran.
   No. 22/180/2,
   Mahathenna Division,
   Sarniya Estate,
   Kandegedara.

2. Kande Naidalage Sumith.
   "Nimal Sevana",
   Nilmalpotha,
   Kandegedara.

3. Jayaweera Mudiyanselage
   Gunathilaka.
   No.232/2,
   Badulla Road,
   Bandarawela.

Accused

AND

Jayaweera Mudiyanselage Gunathilaka.

No.232/2,

Badulla Road,

Bandarawela.

3rd ACCUSED-APPELLANT

vs.

1. The Officer in Charge,
   Crimes Investigation Division,
   Police Station,
   Badulla.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Jayaweera Mudiyanselage Gunathilaka.

No.232/2,

Badulla Road,

Bandarawela.

3rd ACCUSED-APPELLANT-APPELLANT

vs.

1. The Officer in Charge,
   Crimes Investigation Division,
   Police Station,
   Badulla.

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

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE: **S. THURAIRAJA, PC, J;**

A.H.M.D. NAWAZ, J &

ACHALA WENGAPPULI, J.

COUNSEL: Anil Silva, PC with Amaan Bandara for the 3rd Accused-Appellant-Appellant.

Ms. Lakmali Karunanayake DSG for the Complainant-Respondents-Respondents.

WRITTEN SUBMISSIONS: 3rd Accused-Appellant-Appellant on 21st December 2010.

Complainant-Respondents-Respondents on 30th April 2013 and 28th July 2016.

ARGUED ON: 16th May 2023.

DECIDED ON: 23rd November 2023.

S. THURAIRAJA, PC, J.

The 3rd Accused-Appellant-Appellant (hereinafter referred to as the "Appellant") preferred this appeal against the judgment of the High Court of Badulla (hereinafter referred to as the "High Court") dated 15th July 2010. The matter was taken up for Argument on 16th May 2023, and the Counsel for the Appellant submitted that he will be confining this appeal to two questions of law stated as follows:

(i) Whether the evidence of witnesses was led contrary to Section 192 of the Criminal Procedure Act No.15 of 1979?

(ii) Whether all Accused were acquitted on Counts No. 2, 3 and 4, and can the Appellant be convicted on Count No.1, namely under Section 140 of the Penal Code?

I find it pertinent to set out the material facts of the case prior to addressing the question of law before us.

The 3rd Accused-Appellant-Appellant (hereinafter referred to as the "Appellant") and two others were charged in the Magistrates Court of Badulla on four counts, namely,

1. At Mahathanna Division, Kandegedara within the jurisdiction of this court on 23rd December 1999 you being a member of an unlawful assembly with the common intention of causing unjust harm or other criminal act to Marimuttu Tirruppan of No. 13/1, Mhathenna Division, Sarniya Estate, Kandegedara committed an offence punishable under Section 140 of the Penal Code.
2. In the same transaction you with some other people being members of the unlawful assembly described in charge 1 to carry out the common intention or intentions of the said unlawful assembly did

cause hurt by assaulting with hands, stones and sticks and thereby committed an offence punishable under Section 146 of the Penal Code.

3. In the same transaction you did commit robbery of the properties worth Rs. 92700/- belonging to Marimuttu Tirupathy and thereby committed an offence punishable under Section 382 read with Section 146 of the Penal Code.
4. In the same transaction you with the common intention of causing unjust harm or loss to the properties of Marimuttu Thirupathy and knowing the same will happen did pelt stones to the house of Marimuttu Thirupathy and thereby committed mischief to the properties of the said house worth Rs. 500/- an offence punishable under Section 140 read with Section 146 of the Penal Code.

The 1st and 2nd Accused and the Appellant pleaded not guilty, and the case proceeded to trial. On 18th September 2002, the prosecution concluded the evidence in chief of prosecution witness No. 1 Marimuttu Murugayya. In giving evidence the witness stated that, on 23rd December 1999 the 1st and 2nd Accused and the Appellant arrived at his house with several others and attacked his house with clubs; that he ran outside and hid in the vegetable plot and watched the activities of the mob; that he identified the 1st and 2nd Accused and the Appellant as they were previously known to him; that after the crowd left he went inside the house and realised that some jewellery and few household items were missing; and that he informed the police that night itself and the police arrived and commenced investigations. On this day of the trial, the 1st and 2nd Accused and the Appellant were present and represented and moved for a date to cross-examine the witness. As a result, Court re-fixed the matter for cross-examination and further trial was on 22nd January 2003.

When this case was called on 22nd January 2003 for trial, only the 1st Accused was present in court, and the 2nd Accused and the Appellant were absent, and as such,

warrants were issued on them, and their sureties were noticed. The matter was re-fixed for trial on 2nd December 2003 and then again on 24th February 2004. However, on 24th February 2004, the 2nd Accused and the Appellant were absent again, and warrants were re-issued.

On 27th February 2004, the Appellant appeared in court and got the warrant recalled. However, as the 2nd Accused was absent, the matter was fixed for steps under Section 192 of the Code of Criminal Procedure Act on 13th July 2004. On 13th July 2004, the 1st Accused and Appellant appeared in Court and were represented. The police had led evidence under Section 192(1) of the Criminal Procedure Code and had informed the court that the 2nd Accused was not found in his village, and the same was confirmed by the Gramasevaka of the said village. After this evidence was led, the court permitted evidence to be led in the absence of the 2nd Accused, and the matter was fixed for trial on 9th December 2004.

On 9th December 2004, only the 1st Accused was present before the Court, and the Appellant was absent. Court observed that although the Appellant was present before the Court on 27th February 2004, he had been absent on 22nd January 2003, 24th February 2004 and 9th of December 2004. Therefore, the learned Magistrate issued a warrant on the Appellant and his sureties were noticed of the same. The matter was re-fixed to be tried on 21st April 2005, and on that date, too, only the 1st Accused had appeared, and the Appellant had neither been present nor represented. Therefore, the learned Magistrate had decided to proceed against the Appellant *in absentia* as provided under S.192(1) of the Code of Criminal Procedure Act.

After making this observation, the Learned Magistrate had called witness No. 1, and he had been cross-examined by the counsel for the 1st Accused. On the same day, witness No. 2 had given evidence, and he had identified the 2nd Accused as a person who came and mobbed Marimuttu's house. The trial had been concluded on this day with the evidence of witness No. 9, who was a police officer. The case was then fixed for judgment on 23rd June 2005. On 23rd June 2005, the case was re-fixed for judgment

on 02nd September 2005. On 02nd September 2005, only the 1st Accused was present and the matter was re-fixed for judgment on 18th November 2005. However, as the Presidential Election was held on 18th November 2005, the case was not called on the said day and was called again on 25th November 2005 and fixed for judgment on 10th February 2006. The matter was called against on 10th February 2006, and the judgment was pronounced: the 1st and 2nd Accused and the Appellant were convicted for all 4 counts. On this day also, the 2nd Accused and Appellant were absent and unrepresented. The matter was called again on 10th March 2006 and on 21st April 2006 for sentencing, but still, the 2nd Accused and the Appellant were absent and unrepresented on all of these days. Since the 2nd Accused and the Appellant were absent court issued warrants on them. After these days, this matter was called on several days, namely, 25th April 2006, 30th May 2006, 25th July 2006, 30th July 2006, 11th August 2006, 15th August 2006 and 12th September 2006, but no application was made on behalf of the Appellant.

On 26th September 2006, the 1st and 2nd Accused and the Appellant were present in court, and an application was made under Section 192 (2) of the Code of Criminal Procedure Act. The counsel informed Court that the Appellant came to Court on 18th November 2005 and as the case was not taken up due to the Presidential Election being held, he had no notice of the next date of this case. He had stated that on 29th November 2005, the case had been taken up for trial in the absence of his client.

Having heard this application, the learned Judge had fixed the matter for order on the said application and for sentencing on 28th November 2006. On this day, the 1st and 2nd Accused and the Appellant were present in Court, and the matter was re-fixed for sentencing on 30th January 2007. The 1st and 2nd Accused and the Appellant were absent on 30th January 2007, and the learned Magistrate, who had been specially appointed by the Judicial Services Commission to sentence the 1st and 2nd Accused and the Appellant, had observed their absence, and had proceeded to convict all three Accused on each count in the following manner. For the first count, imposed a

sentence of 6 months Rigorous imprisonment with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment. For the second count, imposed a sentence of 6 months Rigorous imprisonment with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment. For the third count, imposed a sentence of 24 months Rigorous imprisonment for each accused with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment. In addition to the above, directed to pay a compensation of Rs. 100,000/- to the victim by each Accused and in default of the said payment, 6 months Rigorous Imprisonment. For the fourth count, imposed a sentence of 6 months Rigorous imprisonment with a fine of Rs. 1500/- and in default of the said payment, 6 months Rigorous Imprisonment.

Being aggrieved by the said conviction and sentence, the Appellant appealed to the Provincial High Court of the Uva Province holden at Badulla. The Learned High Court Judge, having considered the said appeal, delivered her judgment on 15th July 2010. The High Court judgment set aside the convictions and sentence imposed on the Appellant on charges 2, 3 and 4 but affirmed the conviction and sentence imposed on Count 1 and suspended the term of imprisonment imposed on Count 1 for five years. Subject to this variation, the appeal of the Appellant was dismissed.

Being aggrieved by the said judgment of the Learned High Court Judge, the Appellant filed a Leave to Appeal application, and this Court granted Leave to Appeal on 16th September 2010. As mentioned above, the first question of law is as follows: whether the evidence of witnesses was led contrary to Section 192 of the Criminal Procedure Act. Section 192(1) of the Code of Criminal Procedure Act No.15 of 1979 reads as follows:

"Section 192 (1) Where the accused-

(a) is absconding or has left the island; or

(b) is unable to attend or remain in court by reason of illness and either had consented to the commencement or continuance

of the trial in his absence of such trial may commence and proceed or continue in his absence without prejudice to him; or

*(c) by reason of his conduct in court is obstructing or impeding the progress of the trial, the Magistrate may, **if satisfied** of these facts, commence and proceed with the trial in the absence of the accused."*

(Emphasis added)

In the present case, the Appellant was present at the initial stage in Court when the trial proceeded against him but was absent during the latter stages of the trial. Therefore, the relevant part of the provision is Section 192 (1)(a) of the Code of Criminal Procedure Act. This Section only requires the learned Magistrate to be satisfied with the situation and it does not specify the course of action that must be adopted by the Magistrate to satisfy himself. This Section has given the discretion to the Magistrate to proceed with the trial if he is satisfied that the accused is absconding. As discussed earlier, in the present case, the Appellant was present at the time of the trial commenced on 18th September 2002. After the evidence in chief of PW1 concluded, the Counsel for the Appellant had moved for a date for cross-examination and based on this application Court re-fixed the matter for cross-examination on 22nd January 2003. However, on this date and on several subsequent dates, namely 2nd December 2003, 24th February 2004 and 9th December 2004, the Appellant was absent and unrepresented. On 21st April 2005, the learned Magistrate had proceeded on the basis that the Appellant was knowingly absconding and observed (page 124 of the appeal brief) as follows;

"3 වන විත්තිකරු අද දින අධිකරණය මග හැර විභාගයට පෙනී සිටීමෙන් වැලකී ඇත. ඔහු මීට පෙරද අවස්ථාවන් කීපයකදී විටින් විට අධිකරණය මග හැර ඇත. අවසන් විභාග දිනය වන අද දින 3වන විත්තනිකරු නොපැමිණීමෙන් ඔහු මෙම නඩු විභාගයට පෙනී සිටීමෙන් වැලකී මෙම අධිකරණය මගහැර තිබෙන බවට

මම සැහීමකට පත්වෙමි. එබැවින් අපරාධ නඩු විධාන සංග්‍රහ පනතේ 192(1) විධිවිධාන පරිදි ඔහු නොමැතිවද ඔහුට විරුද්ධව සාක්ෂි ඉදිරිපත් කිරීමට පැමිණිල්ලට අවසර දෙමි. මෙම නඩුව මෙම අධිකරණයේ පවතින ඉතා පැරණි නඩුවකි. මෙම නඩුව 1999 වරෂයේ පවරා ඇති නඩුවක්ද වේ. "

An approximate translation would read as follows;

"The 3rd Accused has avoided appearing in court today. He has missed Court on several occasions before. I have observed that the 3rd Accused has avoided the Court by not appearing today too, which is the last day of hearing. Therefore, I allow the prosecution to adduce evidence against him without him as per the provisions of 192(1) of the Code of Criminal Procedure Act. This case is a very old case in this court. This case is also a case assigned in 1999."

Section 192 is there to proceed in the absence of an accused, and it empowers the Magistrate to continue the trial in the absence of an accused. If the Magistrate is satisfied that the accused is absconding, Section 192, as discussed earlier, empowers the Magistrate to commence and proceed with the trial in the absence of the accused. The learned Counsel for the Appellant submits that, there was no inquiry was held under Section 192(1) of the Code of Criminal Procedure Act therefore, in terms of the law, the learned Magistrate had caused a fundamental error by this. I am of the view that although an inquiry was not held under Section 192(1) of the Code of Criminal Procedure Act, a determination was made under the said section. There were sufficient reasons for the Learned Magistrate to satisfy himself that the Appellant was absconding from the Court Proceedings for a considerable period of time. Further, as I observed, the Appellant was present before the learned Magistrate on 6th April 2001, and from 17th July 2001, he was absent in several instances and not represented by an Attorney-at-Law. Section 192(1) procedure is applicable to those suspects/accused who did not have prior knowledge about the next dates and/or steps of the Court

proceedings. I am of the view that due to the abovementioned facts, the Appellant possessed prior knowledge of the next dates and/or steps of the Court proceedings. Further, as he was occasionally present before the Court, the Appellant is not entitled to claim any relief under section 192 of the Code of Criminal Procedure Act.

The second question of law in this matter is, whether all Accused were acquitted on Count No. 2, 3 and 4 and can the Appellant be convicted on Count No.1, namely under Section 140 of the Penal Code. The learned High Court Judge, in her judgment, stated that there was no evidence to prove charges 3 and 4 with regard to the Appellant. The learned High Court Judge also stated that the second charge was defective. On those grounds, the learned High Court Judge has acquitted the Appellant on charges 2, 3 and 4. The only charge which was affirmed was the first charge, which was a charge of unlawful assembly. Section 138 of the Penal Code defines unlawful assembly while the substantive offence of being a member of an unlawful assembly is constituted by Section 139, the punishment for this offence is prescribed by Section 140.

As it was submitted in the present case, the learned High Court Judge has set aside the conviction of the 3rd and 4th counts of the Appellant, mainly based on the statement of evidence of the two main eyewitnesses namely Marimuttu Murugayya (P.W.1) and Muththusamy Sundaram (P.W.2) that, the Appellant arrived at the scene of the crime but have failed to clearly describe the individual acts they committed. But, witness Marimuththu Murugayya (P.W.1) in his evidence clearly stated that a mob had attacked the house and he was able to identify only three accused out of the others, and among them the Appellant (Gunathilake) was there, stated as follows;

> *"සුමින් සහ ගුණතිලක මහත්තයා බැහැලා ආවා.... තව කට්ටියක් කලු පාට පට්ටලින් මුහුණ බැඳලා සිටියා. 4,5 දෙනෙක් මගේ ගෙදරට ගොඩ වුනා. ඊට පස්සේ මම දොර වහගත්තා. මම දොර ඇරියේ නැහැ, ඔවුන් දොරට තට්ටු කරලා පොලු වලින් ගැහුවා. ඊට පස්සේ පිටිපස්සෙන් ආවා. ජනේලය ඔක්කොම කැඩුවා. කට්ටිය ඉස්සරහ ඉඳලා කෑ ගැහුවා. දොර කැඩුවා කියලා.... මගේ නිවසට*

පහර දුන්න පුද්ගලයින් අද අධිකරණයේ ඉන්නවා. පළවෙනියට ඉන්නේ චන්දරේ, දෙවෙනියට ඉන්නේ සුමිත්, ඒ දෙන්නා ඇතුළට ආවා. තුන් වෙනියට ඉන්නේ ගුණතිලක."

An approximate translation would read as follows;

"Mr. Sumit and Mr. Gunathilaka came down…. Others had their faces tied with black bands. 4,5 people boarded my house. Then I closed the door. I didn't open the door. They knocked on the door and beat with sticks. Then came from behind. All the windows were broken. The group shouted from the front. That the door was broken... The people who attacked my house are in court today. Chandare is the first one, Sumith is the second one, they both came inside. The third is Gunathilake."

Unlawful assembly is a legal term to describe a group of people, five or more, with the common object of deliberate disturbance of the peace. All the members of an unlawful assembly are liable to acts of any member in furtherance of a common object. In terms of Section 138 and Section 140 of the Penal Code, the prosecution has to prove the presence of a common object. The concept of common object may apply to two or more persons, and by definition, an unlawful assembly should have been formed for one or more of the six purposes enumerated in section 138. One can define a "common object" as the shared intention entertained by each of the members of an unlawful assembly, and the existence of this intention is sufficient for the purpose of section 146. Further, in the context of a common object, it is sufficient that each accused person joined the unlawful assembly with knowledge of its character and objects, even though no further act was done by some of them. Furthermore, the offence envisaged by section 146 is one committed in the prosecution of the common object of the assembly, or such as the members of that assembly knew to be likely to be committed in the prosecution of the common object of the assembly.

With the above understandings, I am of the view that Section 140 of the Penal Code only requires the presence of a common object. Hence, for the above reasons, I answer the first and second questions of law negatively.

Decision

After careful consideration of the submissions made, facts and circumstances of the instant case as discussed above, there is no basis to interfere with the decision of the learned Provincial High Court Judge of the Uva Province holden at Badulla. I hereby dismiss this Appeal, by answering the first and second questions of law negatively. I affirm the judgment of the Provincial High Court of the Uva Province holden at Badulla dated 15th July 2010.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J
I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to appeal made under Section 5 (1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

Standard Credit Lanka Limited carrying on its business at No. 277, Union Place, Colombo 02 and registered at No. 97, Hyde Park Corner, Colombo 02 (formerly Ceylinco Investment and Realty Limited).

S.C. (CHC) Appeal No. 72/2013 **Plaintiff**

H.C. (Civil) Case No. CHC/244/07/MR

Vs.

1. Harankaha Arachchige Menaka Jayasankha No. 49/6, Makola South, Makola.

2. Dewasinghe Hewage Kulawathi Minipura No. 49/6, Makola South, Makola.

Defendants

AND NOW BETWEEN

1. Harankaha Arachchige Menaka Jayasankha No. 49/6, Makola South, Makola.

2. Dewasinghe Hewage Kulawathi Minipura No. 49/6, Makola South, Makola.

Defendants – Appellants

Vs.

Standard Credit Lanka Limited carrying on its business at No. 277, Union Place, Colombo 02 and registered at No. 97, Hyde Park Corner, Colombo 02 (formerly Ceylinco Investment and Realty Limited).

Plaintiff – Respondent

Before: **Jayantha Jayasuriya P.C., C.J.**

Janak De Silva, J.

Achala Wengappuli, J.

Counsel:

Thilak Wijesinghe with Gayanthika Menike Goonesinghe for the Defendants-Appellants

Wasantha Fernando with Chamathka Suriarachchi, Shaloshi Fernando and Kavindya Dharmarathnam for the Plaintiff-Respondent

Written Submissions:

Defendant-Appellants on 24.01.2022

Plaintiff-Respondent on 24.01.2022

Argued on: 14.12.2021

Decided on: 23.11.2023

Janak De Silva, J.

The Plaintiff-Respondent ("Respondent") instituted this action against the Defendants-Appellants ("Appellants") to recover a sum of Rs. 12,433,028/= and interest thereon. Admittedly, on 17.01.2006, a sum of Rs. 3,000,000/= was lent by the Respondent to the Appellants as a housing loan. The property more fully described in the schedule to the plaint was mortgaged by Mortgage Bond No. 486 as security.

At the trial, the Appellants admitted the due execution of Mortgage Bond No. 486 and the receipt of a sum of Rs. 3 million in accordance with the said Mortgage Bond.

On behalf of the Respondent, the Chief Financial Officer gave evidence and marked documents X1 to X10 as evidence. None of them were marked subject to proof. They included the statement of accounts (X9), letters of demand (X7 and X8), and the reply of the Appellants (X10) to the letter of demand (X8).

On behalf of the Appellants, only the 1st Appellant gave evidence.

The only defenses raised by the Appellants at the trial were that the contents of the Mortgage Bond were not explained prior to signing and that the statement of account was incorrect.

The learned Judge of the Provincial High Court of the Western Province holden in Colombo (Commercial High Court) rejected these contentions and entered judgment as prayed for in the plaint.

In this appeal, the Appellants seek to assail the judgment of the learned Commercial High Court Judge on the following three grounds:

(1) The amount of Rs. 12,433,028/= sought to be recovered by the Respondent is not recoverable in terms of Section 192 of the Civil Procedure Code and the law of contracts;
(2) Awarding interest on Rs. 12,420,504/= is contrary to section 192 of the Civil Procedure Code; and,
(3) Interest granted is contrary to Section 5 of the Introduction of Law of England Ordinance, No. 5 of 1852 ("Civil Law Ordinance").

According to the Appellant, in the statement of account marked (X9), the amount claimed by the Respondent includes:

(1) Defaulted instalments (as at 24.11.2006 after deduction of Rs. 158,000/= payment made by the Appellants)	-	Rs. 313,101.00
(2) Default charges (interest on defaulted instalments)	-	Rs. 12,524.00
(3) Future Rentals (from 24.11.2006 to December 2026)	-	Rs. 12,107,403.00
Total	-	Rs. 12,432,028.00

The Appellants contend that in terms of the law, the said amount of Rs. 12,432,028/= includes:

(a) Balance principal sum;

(b) Interest accrued on the principal sum prior to the institution of the action;

(c) Interest on the defaulted installments (compound interest); and,

(d) Future interest since 24.11.2006 to January 2026.

It should be noted that there is no record of the Respondent being awarded future interest until January 2026. The statement of accounts (X9) claims that the total outstanding balance in respect of the loan agreement as at 25.11.2006 is Rs. 12,489,072.36, with an additional interest rate of 4% per month from 25.11.2006 on the balance of rentals receivable until payment is made in full.

In terms of the second schedule to Mortgage Bond No. 486 (X4), the Appellants agreed to pay the principal sum of Rs. 3,000,000/= with 21% interest thereon in equated monthly instalments of Rs. 52,413/= in 240 months. Hence, a sum of Rs. 12,579,120/= (Rs. 52,413/= x 240) should have been paid over 20 years by the Appellants if they were to fully perform their obligations in terms of the agreement.

The statement of account (X9) shows that the sum of Rs. 12,489,072.36 claimed by the Respondent has been arrived at after deducting payments made amounting to Rs. 158,616/= from Rs. 12,579,120/= (Rs. 12,420,504/=) plus a few other charges. Therefore, it is clear that the Respondent claimed only what it was entitled to in terms of the agreement between the parties and the interest thereon from the date of the action to the date of the judgment and to the full payment thereof.

The question to be determined is whether the sum claimed can be granted in accordance with Section 192 of the Civil Procedure Code. According to the Appellants, the Court cannot grant compound interest under Section 192(1) of the Civil Procedure Code.

Hence, I propose to address this contention after examining the provisions in Section 192 (1), which reads:

> *"When the action is for a sum of money due to the plaintiff, the court may, in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement at the rate of twelve per centum per annum to be paid on the principal sum adjudged from the date of the action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the court thinks fit."*

These provisions specify the period and at what rate interest on money may be calculated. It deals with three distinct periods.

Firstly, it deals with interest prior to the institution of the action. Interest can be charged on the principal sum for any period prior to the commencement of the action at the rate agreed upon by the parties.

Secondly, interest can be charged on the principal sum to be paid from the date of the action until the date of the decree.

Thirdly, interest can be ordered on the aggregate sum so judged, from the date of the decree to the date of payment or such earlier date as the Court thinks fit.

I need not examine the rate at which interest may be ordered since the contention of the Appellants is on the type of interest that can be ordered and not the rate at which it can be done.

Compound interest (*anatocismus*) is the interest that is calculated based on the principal and any accumulated interest. On the question of compound interest, it appears that at one time the law was disconcerting.

Let me begin the analysis by considering the position in Roman law and Roman-Dutch law.

In Roman Law, interest was due either by agreement or by rule of law. The promise of interest usually requires *stipulatio*, a contract in the form of verbal question and answer.

Lee [*The Elements of Roman Law*, 4th ed. (Sweet & Maxwell, Reprint 2007), page 291] states that "*[b]efore Justinian the law forbade the parties to agree in advance that the loan should bear compound interest. Justinian (very absurdly) forbade it as regards accrued interest as well; that is to say, the parties were not allowed to convert accrued interest into an interest-bearing loan by a new agreement*".

Grotius [*The Introduction to Dutch Jurisprudence*, Translated by Charles Herbert (London: John Van Voorst and another, 1844), page 326] states that "*it is for good reasons forbidden to heap up and add the unpaid interest to the capital, and again stipulate for a profit thereon (Anatocismus); because parties who do not look into consequences are thereby effectually ruined.*"

Van Der Linden [*Institutes of the Laws of Holland*, Translated by J. Henry (London, 1828), page 219] states "*that interest upon interest is not allowed, nor to be turned into principal, so as to increase the original debt*".

It is evident that compound interest was not permitted under both Roman law and Roman-Dutch law.

It appears that at first, it was thought that this principle was part of our law.

Walter Pereira in *Institutes of the Laws of Ceylon* [Vol. II (H.C. Cottle – acting Government Printer, 1901), page 547] states that "*compound interest, that is interest upon interest, is not allowed [Vand. D.C. 57] even though expressly stipulated for [Pulle v. Tamby Cando, Ram. Rep. 1872-1876, 189. See Cens. For. 1.4.4.27]*".

This principle was adopted in ***Mudiyanse v. Vanderpoorten*** **[23 N.L.R. 342]** and ***Obeyesekere v. Fonseka*** **[36 N.L.R. 334]**, an authority relied on by the Appellants, where it was held that Roman-Dutch law does not allow compound interest even though expressly stipulated for.

Nevertheless, in ***Abeydeera v. Ramanathan Chettiar*** **[38 N.L.R. 389]**, it was held that in Ceylon (as it was then) compound interest may be recovered where the party charged has agreed to pay it. In ***Marikar v. Supramaniam Chettiar*** **(44 N.L.R. 409)** the majority held that compound interest is recoverable under the law of Ceylon, although the question of such a charge may be considered on the reopening of a transaction in terms of the Money Lending Ordinance. Section 5 of the Civil Law Ordinance was believed by the majority to have abolished the Roman-Dutch law rule against compound interest.

Weeramantry in *The Law of Contracts* [Vol. 2, (Lawman (India) (Pvt.) Ltd., 1969 reprint in 1999), page 925] clarified this position and stated:

> *"The Roman Law prohibited compound interest so also the Roman Dutch Law did not allow compound interest even though expressly stipulated for, but the Roman-Dutch law prohibition against compound interest is no longer in force in South Africa or in Ceylon."*

The Court of Appeal in ***Kiran Atapattu v. Pan Asia Bank Ltd.*** **[(2005) 2 Sri.L.R. 276]** adopted this position.

On the basis of the above authorities and the reasoning therein, I am of the opinion that compound interest is not prohibited in Sri Lanka. Moreover, there is nothing in Section 192 of the Civil Procedure Code which contradicts this position.

I reject the Appellants' argument that compound interest cannot be claimed by the Respondent.

Nonetheless, it is important to consider the provisions in Section 5 of the Introduction of Law of England Ordinance, No. 5 of 1852 ("Civil Law Ordinance") which states that the amount recoverable on account of interest shall in no case exceed the principal amount.

It is interesting to note that although this rule is embodied in an enactment made by the British, it formed part of Roman-Dutch law.

Van Der Linden [supra.] states that "*the amount of interest may not exceed the principal*".

Lee [supra.] states that "*in the classical period arrears of interest, might not be recovered in any action in excess of the capital. Justinian enacted that the capital might not in any circumstances yield in interest a sum greater than itself. This meant that when the capital had doubled it ceased to bear interest*".

It appears that due to the genesis of the rule in the Roman-Dutch law, at some point, the rule was refused to be applied in Ceylon (as it was then) on equitable considerations.

In ***Sedembranader v. Sangerapulle*** **(Ram. Rep. 1843-1855, 19)**, decided in 1845 before the Civil Law Ordinance was enacted in Ceylon (as it then was), Oliphant C.J. commented that the rule is unknown to the English law and refused to apply the rule as there was no equity in it.

It is possible that the rule was incorporated into the Civil Law Ordinance to overcome the apprehension of the English judges in enforcing it as part of Roman-Dutch law. It is thus clear that Section 5 of the Civil Law Ordinance is in fact based on the principle in the Roman-Dutch Law inasmuch such principle was not known to English law.

It has been confirmed in ***Lucia Perera v. Albert Fernando*** **(1 C.L.W. 107**) that the rule in Section 5 of the Civil Law Ordinance is a restatement of the Roman-Dutch law rule.

Walter Pereira in *Laws of Ceylon* [supra.] states that where interest is paid from time to time there is no limit to the amount which may be recovered as interest. The amount already paid may exceed the principal. Still, the creditor is entitled to recover a sum equal to the principal as interest.

It appears that Pereira was of the view that if interest is paid periodically, there is no limit to the amount that can be recovered as interest. He relies on two authorities, ***Coomarevelo v. Sittarapuwalpillai*** **(4 S.C.C. 28) and** ***Sidenberenada v. Sangarapulle*** **(sic) [supra.]** for this proposition. Let me examine them to test the validity of this proposition.

In ***Sinnathamby Cumaraveley and another v. Muttutamby Sitterapuvalpulley*** **[(1881) 4 S.C.C. 28]** the headnote states that the plaintiff was entitled to recover in this action his principal and all arrears of interest then due *up to the amount of the principal*. The principal sum borrowed in that case was rupees 5,000. Cayley C.J. states [ibid., page 29] that "*the plaintiff cannot recover more than 5,000 rupees*". The only principle sought to be made is that there is nothing preventing the obligee of a bond from recovering at any time arrears of interest equal to the principal, however much interest he may have previously received.

In ***Sedembranader v. Sangerapulle*** **[supra.]**, the Court considered the rule as part of the Roman-Dutch law and not in the context of Section 5 of the Civil Law Ordinance. It is clear that the learned judge was under a misapprehension about the ambit of the rule

for he says the application of the rule means that one who has lent say £100 at ten percent for ten years, and who has regularly been paid £10 a year as interest, would not be entitled to demand his £100 at the end of the tenth year, because he had been paid that sum in the shape of interest.

I am of the view that the above decisions do not support the proposition made by Pereira [supra] that where interest is paid from time to time there is no limit to the amount which may be recovered as interest.

However, there appears to be support for a narrower version of Pereira's proposition in the case of ***Talpe Gamagey Don Carolis De Silva Appuhami v. Baffamagey Don Theodoris*** **[(1882-1883) S.C.C. 16]** where Clarence A.C.J. held:

> "*… running interest stops when the amount in arrear reaches the amount of the principal, but that if a part-payment of interest be then made, interest may then run on till the amount of the principal be again reached: and this is in accordance with the Roman-Dutch Law or practice as described by Voet, who says (xxii, i. 19) "Non iniquum ex nostris moribus visum fuit, durare obligationem usurariam, donec sors restituta fuerit, etiamsi triplicatoe vel quadruplicatoe sortis supercent quantitatem, si modo particiulatim soluatoe sint."*

According to Roman-Dutch law, running interest stops when the amount in arrears reaches the principal. However, if part-payment of interest is made thereafter, interest may then run until the principal amount is reached again. In ***Talpe Gamagey Don Carolis De Silva Appuhami v. Baffamagey Don Theodoris*** **[ibid.]** Clarence A.C.J. held that this was indeed the practice in the country.

How does section 5 of the Civil Law Ordinance affect that position in Roman-Dutch law? Is that part of the Roman-Dutch law still valid in Sri Lanka after Section 5 was enacted? I need not address that question here as there is no evidence in this case that the amount

of interest to be paid by the Appellants to the Respondent reached the principal amount. It is a matter to be considered in appropriate proceedings when the issue arises.

The ambit of Section 5 of the Civil Law Ordinance was considered in ***Fernando and Another v. Sillappen & Others*** **[5 C.W.R. 301]** which was decided in 1918, where Bertram C.J. explained the meaning of the words *"the amount recoverable on account of interest"*. He did so after interpreting Section 192 of the Civil Procedure Code to provide for the adjustment of three sums, firstly, the principal sum, secondly, the interest on the principal sum up to the date of action, and in the third place, a supplementary sum in respect of interest from the date of action brought to the date of judgment.

In so far as the interest is concerned, Section 192 of the Civil Procedure Code allows the Court to award interest on the principal sum at the rate agreed between parties firstly, for any period prior to the institution of the action, and secondly, from the date of action to the date of the decree. Furthermore, the Court is competent to grant interest on the total amount decided upon from the date of the decree to the date of payment.

Bertram C.J. [ibid., page 303] took the view that the words *"the amount recoverable on account of interest"* in Section 5 of the Civil Law Ordinance did not apply to the aggregate amount made up of the two sums of "interest", i.e., firstly, the interest due up to the date of action brought, and secondly, the interest due from the date of action brought to the date of judgment.

In other words, the prohibition in Section 5 of the Civil Law Ordinance applies only to the amount of interest due on the principal sum as at the date of the institution of the action.

This prohibition does not apply to the power vested in Court in terms of Section 192 of the Civil Procedure Code to award interest on the principal sum according to the rate

agreed between parties from the date of action to the date of decree and on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date determined by Court.

Bertram C.J. [ibid.] held that Section 192 of the Civil Procedure Code intended to give the creditor a certain additional statutory right to interest in addition to the limit of interest which he was allowed by the common law. The principle of this additional statutory right is that the creditor's rights ought not to be prejudiced by the length of the resistance offered to his claim by the debtor.

In ***Lucia Perera v. Albert Fernando*** **[supra.]** decided in 1931, it was held that Section 192 of the Civil Procedure Code does not in anyway repeal the provision in Section 3 (present Section 5) of the Civil Law Ordinance and that it must be read subject to that. The decision in ***Fernando and Another v. Sillappen & Others*** **[supra.]** was not discussed.

Weeramantry in *The Law of Contracts* [supra., page 932] states:

> *"Section 192 of the Civil Procedure Code does, however confer on creditors an additional right in this sense, that interest may be claimed for the period between the plaint and judgment even in cases where the interest claimed in the plaint already equals the amount of the principal. The date of plaint is thus the time at which the line is drawn in calculating the limit of interest allowed under the Civil Law Ordinance, the underlying principle being that the creditors rights ought not be prejudiced by the length of resistance offered in Court by the debtor."*

In my view, this proposition has much merit given that the Civil Procedure Code was enacted in 1889 whereas the Civil Law Ordinance was enacted in 1852.

Moreover, this assertion is of greater significance in the current context where laws delays have had a negative impact on the administration of justice. To apply the principle in Section 5 of the Civil Law Ordinance to the additional right conferred on creditors

terms in Section 192 of the Civil Procedure Code will embolden the debtors to prolong litigation with the assistance of canny legal advice. The creditor may, at the end of a prolonged litigation, be left with a worthless paper decree.

In ***Nimalaratne Perera v. Peoples Bank*** **[(2005) 2 Sri.L.R. 67]** it was held that the limitation placed by Section 5 of the Civil Law Ordinance on the amount recoverable as interest has no application to interest recoverable relating to a banking transaction. The Respondent is not a bank. The transaction in question is not a banking transaction. Hence, we are not called upon to test the validity of the *ratio* in ***Nimalaratne Perera v. Peoples Bank*** **[ibid.]**.

It is pertinent to note that the rule in Section 5 of the Civil Law Ordinance has been referenced in some recent legislation by the legislature. On one occasion it is repeated, and on another occasion an exception has been made.

Section 5 of the Money Lending Ordinance No. 2 of 1918 as amended, states that in taking account under Section 2 therein, the court shall observe the rule that no interest shall at any time be recoverable to an amount in excess of the sum then due as principal.

In terms of Section 21 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended, notwithstanding anything to the contrary in that Act or any other law, "*an institution*" may recover as interest "*in an action instituted under this Act*", a sum of money in excess of the sum of money calculated as principal, in such action. (emphasis added)

However, the Respondent does not benefit from this exception as this action has not been instituted under that Act.

For all the foregoing reasons, I hold that the rule in Section 5 of the Civil Law Ordinance is part of our law. It prevents the recovery on account of interest a sum exceeding the principal as at the date of the institution of the action even where interest has been paid

from time to time provided that the interest so paid has not reached the principal sum. However, the rule in Section 5 of the Civil Law Ordinance does not apply to the interest that the Court can order in terms of Section 192 of the Civil Procedure Code on the principal sum and interest thereon from the date of the action to the date of the decree and on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date determined by Court.

The learned Commercial High Court Judge awarded the Respondent a sum of Rs. 12,433,028/= and interest of 21% per annum on a sum of Rs. 12,420,540/= from 25.11.2006 to the date of payment. This is contrary to the rule set out in Section 5 of the Civil Law Ordinance.

Accordingly, I am of the view that the Respondent is only entitled to the following relief:

(1) The balance of the principal sum of Rs. 2,841,384/= (Rs. 3,000,000/= less payment received as at termination Rs. 158,616/=);
(2) Interest on Rs. 3,000,000/= at the rate of 21% per annum agreed between the parties from 07.01.2006 (the date of the Mortgage Bond No. 486) up to 24.07.2007 (the date of institution of this action). If the total amount of interest exceeds Rs. 3,000,000/=, the Respondent is only entitled to Rs. 3,000,000/= in view of Section 5 of the Civil Law Ordinance;
(3) From the date of institution of this action to the date of the decree, the Respondent is entitled, in terms of Section 192 of the Civil Procedure Code, to interest on the principal sum of Rs. 3,000,000/= at the agreed rate of 21% per annum;
(4) For the aggregate amount, namely the interest recoverable under item (2) and (3) above, an interest at the rate of 13% from the date of judgment till the date on which the entire amount is paid.

The rule in Section 5 of the Civil Law Ordinance will not apply to items (3) and (4).

The above calculation is based on the statement of accounts marked X9 which was not challenged during the evidence of the 1st Appellant.

For the foregoing reasons, the judgment of the learned Commercial High Court Judge is varied to the extent set out above. The learned Judge of the Commercial High Court is directed to enter a decree accordingly.

Appeal partly allowed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya P.C., Chief Justice

I agree.

CHIEF JUSTICE

Achala Wengappuli, J.

I agree.

JUDGE OF THE SUPREME COURT

DECEMBER

2023

JUDGMENTS

DECEMBER INDEX

1.	SC/CHC/APPEAL/68/2014	4465
2.	SC/APPEAL/201/2017	4480
3.	SC/APPEAL/210/2017	4496
4.	SC/APPEAL/62/2020	4517
5.	SC/FR/298/2021	4537
6.	SC/FR/107/2011	4554

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

Anthony Surendra,

No. 251/42B,

Kirula Road,

Colombo 05.

SC CHC/APPEAL 68/2014

PLAINTIFF

Commercial HC- No.29/2008/IP

vs.

1. Sri Lankan Airlines,

No.22, East Tower,

World Trade Center,

Echelon Square,

Colombo 01.

2. Sri Lanka Rupavahini Corporation,

P.O. Box 2204,

Independence Square,

Colombo 07.

DEFENDANTS

AND

In an application under Section 87(3) of the Civil Procedure Code.

Anthony Surendra,

No. 251/42B,

Kirula Road,

Colombo 05.

PLAINTIFF-PETITIONER

vs.

1. Sri Lankan Airlines,

No.22, East Tower,

World Trade Center,

Echelon Square,

Colombo 01.

2. Sri Lanka Rupavahini Corporation,

P.O. Box 2204,

Independence Square,

Colombo 07.

DEFENDANT-RESPONDENTS

AND NOW

In the matter of an application under Section 5(1) of the High Court of the Provinces (Special Provisions) Act

No.10 of 1996 read together with Section 6 thereof and Section 88(2) read together with Section 754(1) read together with Section 755(3) and 758 of the Civil Procedure Code.

Sri Lanka Rupavahini Corporation,

P.O. Box 2204,

Independence Square,

Colombo 07.

2ND DEFENDANT-RESPONDENT-APPELLANT

vs.

1. Anthony Surendra,

   No. 251/42B,

   Kirula Road,

   Colombo 05.

PLAINTIFF-PETITIONER-RESPONDENT

2. Sri Lankan Airlines,

   No.22, East Tower,

   World Trade Center,

   Echelon Square,

   Colombo 01.

DEFENDANT-RESPONDENTS

BEFORE : JAYANTHA JAYASURIYA, PC, CJ
S. THURAIRAJ, PC, J
MAHINDA SAMAYAWARDHENA, J

COUNSEL : Palitha Kumarasinghe, PC with Viraj Bandaranayake instructed by Mrs. N. Wijekoon for the 2nd- Defendant- Respondent- Appellant.
Chandaka Jayasundere, PC with Rehan Almeida instructed by Gayan Salwathura for the Plaintiff-Petitioner-Respondent.
Minoli Jinadasa instructed by M/S Pieris and Pieris for the 1st Defendant-Respondent- Respondent.

WRITTEN SUBMISSIONS: 2nd Defendant-Respondent-Appellant on 6th January 2021.
Plaintiff- Petitioner-Respondent on 6th February 2023.

ARGUED ON : 30th January 2023

DECIDED ON : 1st December 2023

S. THURAIRAJA, PC, J.

The Plaintiff-Respondent-Respondent, namely Anthony Surendra (hereinafter sometimes referred to as the "Plaintiff") instituted this action at the Commercial High Court against the 1st Defendant-Respondent-Respondent (hereinafter sometimes referred to as the "1st Defendant") and the 2nd Defendant-Respondent-Appellant (hereinafter sometimes referred to as "2nd Defendant") claiming compensation for the alleged infringement of the Copyrights of the Plaintiff in and over the songs "Nana nanane" and "Rajakale Hittapu" which were being exploited without his authorization in contravention of the Plaintiff's economic rights and moral rights in and over the

music and the lyrics over the aforementioned songs. Thereby, Plaintiff sought relief in the form of *inter alia* an order for a sum of Rs. 10 million on account of loss suffered by the Plaintiff for several acts of infringement by the Defendants, and, an order to deliver to the Plaintiff all material that infringes the said rights that is in possession of the Defendant. The matter was set for trial, and upon settling the issues, the Plaintiff sought permission to file evidence by way of an Affidavit. The 2nd Defendant states that upon the Plaintiff filing his evidence by way of Affidavit, the matter was fixed for further hearing, and after two days of hearing which concluded on 18th October 2011, the matter was re-fixed for 16th January 2012, on which date the Plaintiff was to be cross-examined. However, on 16th January 2012, the Plaintiff failed to appear before the court at 9.30 A.M., at which time the proceedings had commenced. The Court waited for a period of time at the request of the Attorneys-at-Law, and the case was taken up again at 10:15 A.M., at which time the Plaintiff was still absent. The Court thereafter proceeded to dismiss the Action by reason of the Plaintiff not being present at the trial.

Despite this, Plaintiff, who arrived at 10:45 A.M. of the same day as the aforementioned proceedings, states that the delay was caused not as a result of his default but due to an unusual traffic congestion in the area surrounding the Plaintiff's residence caused as a result of the ceremonial opening of the Narahenpita Police Station on the same day. Thereafter, the Plaintiff proceeded to tender the petition and affidavit seeking the permission of the Commercial High Court to set aside the order dismissing the action of the Plaintiff in accordance with section 87(3) of the Civil Procedure Code.

The Learned Commercial High Court Judge delivered his Order permitting the Application of the Plaintiff and held *inter alia* that; (a) the Plaintiff was interested in the case as he filed papers to set aside the dismissal order on the same day, (b) the Plaintiff had not admitted that he was negligent, (c) the Plaintiff informed the Attorney-at-Law of his delay in attending the Court at around 10.15-10.30 A.M., (d) the delay of the Plaintiff in attending the Court was beyond his control, (e) no objections were raised by the 2nd Defendant under section 145 of the Civil Procedure Code, and (f) time was

given to the Defendant on 18th October 2011 till 16th January 2012 and as such section 145 of the Civil Procedure Code does not apply in the instant case.

Being aggrieved by this order, the 2nd Defendant has now made an appeal to this Court on the grounds that the Learned High Court Judge had no power to set aside the order dismissing the action of the Plaintiff as the instant was a default within the ambit of section 145 of the Civil Procedure Code, and even if it was within the ambit of section 87(3) of the Civil Procedure Code, the Plaintiff had failed to establish reasonable grounds for his non-appearance, thereby the application of the Plaintiff should not be permitted.

In light of the facts and circumstances of the instant case, the evidence on behalf of the Plaintiff was led through three witnesses; namely the Plaintiff, one Karagapalliya Guruge Dayananda and one Kaluthara Patabendige Patrick. Firstly, the evidence of the Plaintiff was led wherein the Plaintiff affirmed the matters as follows.

On the date fixed for trial, the Plaintiff was delayed in being present in Court at the time at which the matter was called. Nonetheless, the Plaintiff arrived in Court at 10.45 A.M. despite having attempted to arrive by 9.00 A.M. due to the fact that a halt in traffic flow down the lane in which the Plaintiff lived had occurred due to the new Narahenpita Police Station being ceremoniously opened on that specific date.

Furthermore, the vehicles of the Department of Labour were parked down the Plaintiff's Lane and in addition, two banks were also situated on the said lane. From time to time, the main road was closed due to the opening of the new building of the Narahenpita Police Station, and there was a continuous inflow of vehicles into the Plaintiff's Lane. As a result, the Plaintiff stated that although he was able to leave his house in his vehicle, the vehicle was later jammed by the traffic congestion that had occurred in the lane. Therefore, the Plaintiff stated that he was unable to attend Court at the specified time due to no fault of his own. Furthermore, on this day, due to the traffic congestion, the Plaintiff had failed to hear his mobile phone and therefore missed the calls from his instructing Attorney. The Plaintiff was unable to leave his vehicle in the middle of

the road and journey on foot and/or resort to alternate means of transportation. Furthermore, the vehicle could not be parked on either side of the road due to the fact that several vehicles had already been parked therein. The Plaintiff stated to Court that, on previous occasions, his appearances at Court were punctual, having left his residence at the same time as he did on 16th January 2012. His contention was that the delay was not his fault and instead beyond his control.

The evidence of one Karagapalliya Guruge Udayananda (a three-wheeler driver who operates from a three-wheeler stand opposite the Narahenpita Police Station) and one Kalutara Patabandige Patrick Anesley Peiris (a resident of a road which leads to Kirula Road) was led thereafter. These witnesses corroborated the evidence of the Plaintiff, and in particular, stated that on 16th January 2012, the new building housing the Narahenpita Police Station was being ceremoniously opened, and a major congestion of traffic occurred between 8.00 A.M. and 10.30 A.M. While the Narahenpita police station has two gates, on that specific date, it was only the gate alongside Kirula Road that was in use. The said Kirula Road is an ordinary by-road where, in the event two vehicles are parked, it would be difficult to manoeuvre another. On the said date, senior police officials and VIPs had parked their vehicles on Kirula Road, which made it impossible for the residents and users, including the said Udayananda, to move their vehicles. A photo showing the road was marked 2D3 (at page 368 of the appeal brief). All witnesses claim that on the said date, the police did not allow the residents to move their vehicles out or in that morning.

The 2nd Defendant led evidence of Police Inspector Weerasinghelage Wasantha Jayaratne. The witness confirmed the fact that the ceremonial opening of the Narahenpita Police Station took place on 16th January 2012 and that a number of distinguished invitees were present, including Mr. Dinesh Gunawardene, Mr. Geethanjan Gunawardene, Mr. Gotabaya Rajapakse and the Inspector General of Police. There was no road closure during the time at which VIPs were travelling towards the ceremony, but, from time to time, roads were indeed closed, coinciding with the arrival

of VIPs. Further, he stated that the vehicles of the VIPs were parked in the car park of the police station while the other vehicles of Police dignitaries were parked alongside the wall of the Department of Labour situated on Kirula Road. During the time at which the ceremony took place, the police took steps to ensure that the vehicles of the individuals participating in the ceremony were given parking in and around the area and that the vehicles that were usually parked in those areas were not allowed to park there during such time. The traffic flow on Kirula Road was stopped by the police from time to time, although he stated that he was not personally aware of the state of traffic between 8.30 A.M. and 9.00 A.M. on the top of the road on which the Plaintiff resides (Vide- at page 416 of appeal brief). Furthermore, the witness stated that it is only when there is a special traffic plan in operation that the police take steps to notify the public of the same and on this occasion, there was no such traffic plan in place. Therefore, no such information was conveyed to the public. In this regard, the movement of VIPs and road closures, as stated by the witness, took place during normal traffic conditions, which are admittedly already heavily congested at that specific time of day (Vide- at page 417 of appeal brief). The witness also admitted that in the event that a vehicle is within the lane on which the Plaintiff resides, there was no alternative way to exit the road other than the singular access towards Kirula Road.

Sections 87 and 145 of Civil Procedure Code

In this case, the Plaintiff, relying on section 87(3) of the Civil Procedure Code, submitted that the order of dismissal can be set aside. But the 2nd Defendant submitted to Court in his written submissions to consider his application under Section 145 of the Civil Procedure Code.

The learned High Court Judge explained this situation at pages 10 and 11 of his judgement which reads as follows.

"සිවිල් නඩු විධාන සංග්‍රහයේ 87 වගන්තියට අනුකූලව අයදුම්පත ඉදිරිපත් කර නැති බවට විරෝධතාවක්ද 2 වන විත්තිකාර වගඋත්තරකරු විරෝධතා පෙත්සමේදී ගෙන ඇතත්, ප්‍රමාණවත් ලෙස පෙත්සම්, දිවුරුම් පෙත්සම් මගින් අදාළ ඉල්ලීම කර ඇත. ඒ අනුව එකී විරෝධය හුදු තාක්ෂණික විරෝධයක් පමණි.

ලිඛිත දේශන වලදී 2 විත්තිකාර වගඋත්තරකරු වෙනුවෙන් සිවිල් නඩු විධාන සංග්‍රහයේ 87 වගන්තිය යටතේ ඉල්ලීමක් කළ නොහැකි බවත් අදාළ වන්නේ සිවිල් නඩු විධාන සංග්‍රහයේ 145 වගන්තිය බවත් ඒ අනුව වලංගු ඉල්ලීමක් නැති බවටත්, කළ යුතුව තිබුණේ සෘජු ඇපෑලක් ඉදිරිපත් කිරීම බවත් තර්ක කර ඇත. මෙය නම විරෝධතාවයන් දී නොනැගූ ලිඛිත දේශණයේ දී පමණක් අනෙක් පාර්ශවයට පිළිතුරු දීමට හැකියාවක් නොමැති වන ලෙස ගොඩ නගන තර්කයකි. විරෝධතාවයේදී 2 වන විත්තිකරු වෙනුවෙන් ගෙන ඇති ඉල්ලීම 87 වගන්තියට අනුකූලව ඉදිරිපත් කර නැති බවකි."

An approximate translation of the above paragraph is produced below:

"Although the 2nd defendant-respondent has also raised an objection that the application has not been submitted in accordance with Section 87 of the Code of Civil Procedure, the relevant request has been made through petitions and affidavits. Accordingly, that objection is only a technical objection.

In the written submissions, it has been argued that no request can be made under Section 87 of the Civil Procedure Code and Section 145 of the Civil Procedure Code is applicable therefore, there is no valid request, and a direct appeal should have been made. This is an argument that is built only in the written submissions so that the other party is not able to answer without raising their objections. The plea taken on behalf of the 2nd Defendant in the objection is that

the application of the Plaintiff has not been submitted in accordance with Section 87."

Chapter XII of the Civil Procedure Code deals with matters relating to consequences and cures of default of appearance and pleadings of the parties to actions. While section 84 deals with default of appearance of the defendant, section 87 deals with non-appearance of the plaintiff. Both above-mentioned sections deal with appearance and non-appearance of the parties. Default of appearance of the defendant may occur on the summons returnable day and the answer due date. Default of appearance of the plaintiff may occur on the replication due date. Further, either party can be in default, in instances where a date was granted for a step but failed to take such step, where there is failure to file list of witnesses and documents and where either party is not ready with evidence at the trial stage and at the partly heard trial stage. The provisions of the Civil Procedure Code, relating to the consequences of default of appearance, does not contemplate orders made thereunder to be final and conclusive in the first instance itself. In every instance, an opportunity is afforded to a party in default to cure his default. It is only upon failure to cure such default; an order is made absolute and final.

Non-appearance of the plaintiff and reinstatement of the case is set out in section 87 of the Code. Section 87(3) of the Code enables a Court, upon application by a plaintiff within a reasonable time from the date of dismissal, to set aside its order of dismissal for want of appearance of a plaintiff, where it is *satisfied* that there were reasonable grounds for the non-appearance of the plaintiff. The burden of alleging and proving the existence of facts, on the basis of which a court may decide that there is good cause for absence, rests on the absent party who seeks reinstatement of the case. Section 87(3) of the Civil Procedure Code provides as follows:

*"The plaintiff may apply within a **reasonable time** from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the*

*defendant shall be given notice, the court is **satisfied** that there were **reasonable grounds** for the non-appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made."*

(*Emphasis added*)

Chapter XVIII of the Civil Procedure Code dealt with the adjournments, which contained sections 143-145, which reads as follows.

143. (1) The court may, if sufficient cause be shown at any stage of the action, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the action:

Provided however, that no adjournment in excess of Six weeks may be granted except in exceptional circumstances, and for reasons to be recorded.

(2) In all such cases the court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the action shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing to be necessary for reasons to be recorded and signed by the Judge.

144. If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the court may proceed to dispose

of the action in one of the modes directed in that behalf by Chapter XII, or make such other order as it thinks fit.

145. If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith.''

The word 'adjournment' generally means the appointment of another day for the continuation of that which has already commenced in contradistinction to postponement, which means the putting off of that which was appointed to be done on a specified day for a later day. As per section 143, when the hearing of evidence has begun, the hearing must be continued from day to day, until all the witnesses in attendance have been examined, unless the Court finds any adjournment necessary for reasons to be recorded and signed by the Judge. Under section 143 of the Code, adjournment is entirely discretionary, and under section 145 of the Code, if a party to whom time has been granted fails to produce his evidence or to bring his witnesses or to do any other act necessary for the further progress of the case, for which time has been allowed, the Court has power notwithstanding such default, to decide the action forthwith. Section 144 of the Civil Procedure Code provides for instances of non-appearance of a party on the adjourned day.

It appears as per section 145 that when a court grants time to a party to the case to produce certain evidence at the hearing, and the said party has failed to do so, the court must proceed to hear the other evidence as may be tendered on behalf of the party in default and decide the action forthwith.

However, on the day in question, namely 16th January 2012, this case was listed for cross-examination of the Plaintiff, and the date was granted based on the request made by the Defendants. The Court granted time for the Defendants on 18th October 2011 for the cross-examination upon the request made by the Defendants. Section

145 deals with the failure of such parties to whom such time has been granted and empowers the judge to exercise his discretion as to whether or not the case should proceed and be decided notwithstanding such failure. in the instant case the learned High Court judge has duly applied his mind and exercised and his discretion and deemed it appropriate to afford an opportunity for the Plaintiff to cure his default. In my view the Defendants have not given sufficient reasons as to why this Court should interfere with the findings of the learned High Court Judge. Therefore, I am inclined to agree with the view taken by the learned High Court Judge to consider this matter under section 87 of the Civil Procedure Code and in giving an order in terms of section 87(3) of the Civil Procedure Code.

In order to succeed in the application in question, the Plaintiff had to prove that there were reasonable grounds for the non-appearance on the part of the plaintiff.

In **Rev. Sumanatissa vs Harry [2009 (1) SLR 31]** it was held that,

> *"On an analysis of section 87 (3) of the Code the limiting factors would be that the application to restore should be made within a reasonable time and the plaintiff should satisfy Court that there were* ***reasonable grounds*** *for non-appearance. The legislature in its wisdom had not set a rigid deadline as to what period of time should construe* ***within a reasonable time****. This is a clear indication that in interpreting Section 87 (3) Court must use the yardstick of a* ***subjective test*** *rather than a less flexible objective test in determining what is reasonable."*
>
> (*Emphasis added*)

Section 87(3) states that the application should be made within a reasonable time and on reasonable grounds, and this section enables a Court to decide the application based on a subjective test. The burden of proving the existence of facts, on the basis of which a court may decide that there is a good cause for absence, rests on the absent party who seeks reinstatement of the case. Considering the evidence led before the

High Court, it was undisputed that on the date in question, the opening ceremony of the Narahenpita Police Station took place. From the strength of the evidence of the Plaintiff, it is proven that on the date in question, a considerable amount of traffic congestion was present in the Plaintiff's Lane, and the reason for such congestion was the fact that an unforeseen number of vehicles had been directed into the Plaintiff's lane. The position of the Plaintiff was corroborated, by other independent evidence produced before the Court.

As it was revealed, during the opening ceremony of the police station, no traffic plan was in place. However, evidence was given by Police Inspector Weerasinghelage Wasantha Jayaratne to the effect that he did not personally know the situation in the Plaintiff's Lane as this officer was not on duty at that point. Although certain dignitaries' vehicles were parked within the premises of the police station, certain other dignitaries' vehicles (particularly the high-ranking police official's vehicles) had to be parked outside of the police station. As a result, the vehicles that were normally parked at this location had to find alternative areas to park. The witness was unable to account for where these vehicles had found parking. Therefore, it can be considered that vehicles that normally park in other areas surrounding the Plaintiff's Road, had parked down the road instead, leading to a heightened congestion of vehicles. As such, the Plaintiff's reasons for being unable to be present before Court at the designated time could be accepted on a balance of probabilities.

Decision

For the aforementioned reasons, considering all facts and circumstances of this instant case, I hold that the Plaintiff does in fact have reasonable grounds for his non-appearance at the Commercial High Court on 16th January 2012. Having perused the aforementioned evidence, it can be understood that there was, in fact, an unusual level of traffic congestion, which resulted in the Plaintiff arriving at the Commercial High Court on 16th January 2012 well after the time of trial. Yet, the most compelling point

on behalf of the Plaintiff in my view is that an application was filed on the same day for an appeal to set aside the order dismissing his application, which indicates that it was due to a misfortune beyond his control that he was not able to arrive on time and that he did yet maintain an interest in this action. Therefore, the view taken by the learned High Court Judge to consider this matter under section 87 of the Civil Procedure Code and in giving an order in terms of section 87(3) of the Civil Procedure Code setting aside the dismissal of the action of the Plaintiff is acceptable. The Appeal of the 2nd Defendant is hereby dismissed with taxed Costs.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ

I agree.

CHIEF JUSTICE

MAHINDA SAMAYAWARDHENA, J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal in terms of Article 154(P)of the Constitution read with Section 31 D D of the Industrial Disputes Act (as amended) and Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 od 1990

S.C. Appeal: 201/2017
SC/(Spl.) L A / 89 /2017
HC/AMP/LT/APP/432/2016
LT No. 44/610/2012

W.P.R.P. Devanagala
No: 26/135,
Kumudugama,
Dadayamtalawa

APPLICANT

-VS-

Sarvodaya Economic Enterprises
Development Services (Guarantee) Ltd
(SEEDS)
No. 45, Rawatawatte Road,
Moratuwa

RESPONDENT

AND

W.P.R.P. Devanagala
No: 26/135,
Kumudugama,
Dadayamtalawa

APPLICANT – APPELLANT

-VS-

Sarvodaya Economic Enterprises
Development Services (Guarantee) Ltd
(SEEDS)
No. 45, Rawatawatte Road,
Moratuwa

RESPONDENT – RESPONDENT

AND NOW BETWEEN

Sarvodaya Economic Enterprises
Development Services (Guarantee) Ltd
(SEEDS)
No. 45, Rawatawatte Road,
Moratuwa

RESPONDENT-RESPONDENT - APPELLANT

-VS-

W.P.R.P. Devanagala
No: 26/135,
Kumudugama,
Dadayamtalawa

APPLICANT-APPELLANT-RESPONDENT

BEFORE: P. PADMAN SURASENA, J
K.K. WICKREMASINGHE, J
MAHINDA SAMAYAWARDHENA, J

COUNSEL: Malik Hannan for the Respondent- Respondent – Appellant instructed by R.A.N.C. Gunatilake
V. Puvitharan PC with Subhani Kalugamage and Anuja Rasanayakham for the Appellant-Appellant-Respondent

WRITTEN SUBMISSIONS: By Respondent-Respondent-Appellant on 04.12.2017 and 13.01.2022
By Applicant-Appellant-Respondent on 14.05.2018

ARGUED ON: 01.11.2021

DECIDED ON: 05.12.2023

K. KUMUDINI WICKREMASINGHE, J

This is an appeal from the judgement of the High Court of the Eastern Province (holden in Ampara) dated 08.03.2017. The crux of this matter centers around the questions of law based on which leave to appeal was granted, which are;

- Did the Honourable Judge of the Provincial High Court of the Eastern Province (holden in Ampara) err in law in varying the Labour Tribunal Order by awarding 04 years arrears of salary amounting to Rupees Seven Hundred and Twenty-Four Thousand Eight Hundred and Sixteen (Rs. 724,816,00) as well as Rupees Two Million (Rs. 2,000,000.00) as compensation?

- Did the Honourable Judge of the Provincial High Court of the Eastern Province (holden in Ampara) err in law in awarding 04 years arrears of salary as well a compensation when the Applicant-Appellant-Respondent has not placed any substantial evidence with regard to actual financial loss caused to the Appellant-Appellant-Respondent as a result of termination of his service by the Respondent-Respondent-Appellant?

Prior to addressing these questions of law, I will briefly set out the factual background of the case as follows:

The Applicant-Appellant-Respondent was employed at Sarvodya Economic Enterprises Development Services (Guarantee) LTD (SEEDS)- the Respondent-Respondent-Appellant, as a Divisional Project Manager. At the time of the alleged incident and when he was interdicted, he was the Deputy District Manager of the organisation and had served the Appellant- institution for more than 12 years. On the recommendation of the societies and the field officers, the

SEEDS granted loans to four borrowers for a number of purposes. When the repayment of the loan was defaulted, it was discovered that either there were no persons as such or the borrowers mentioned in the application did not receive any loans from SEEDS. According to the Appellant, the field officers had committed fraud on the institution.

The Respondent-Employee was charged with the following

1. Issuing loans to 4 applicants without inspection and qualification of such applicants
2. Bad Supervision
3. For Financial loss to the institution as a result of not taking steps to recover the dues and non-payment of dues following the loan to the borrowers.

After an Inquiry, the Respondent-Employee's services were terminated on 17.01.2012. The Applicant-Appellant-Respondent instituted a Labour Tribunal proceedings against the Respondent-Respondent-Appellant on the 16th of July 2012 for terminating his services by letter dated 17.01.2012 and prayed for reinstatement in the same position, arrears of salary including all statutory allowances and compensation of Rs. 2,000,000/- and any other relief as Court deems meet.

The Appellant filed an answer dated 20th August 2012 denying the position taken up by the Respondent and stated *inter alia* that the Respondent's services were terminated after holding a domestic inquiry relating to the charges against the Respondent and thus the termination of the Respondent's service is based on equitable and just reasons and therefore the Respondent's application should be dismissed.

The Learned President of the Labour Tribunal delivered his Order on the 05.01.2016 and held that the Appellant has failed to produce substantial evidence to substantiate the termination of the Respondent's service but since the Appellant has lost confidence in the Respondent, in lieu of reinstatement a sum of Rupees One Hundred and Eighty-One Thousand Two Hundred (Rs. 181,200.00/-) was awarded as compensation.

The Appellant-Institution did not appeal against the said Order or the findings of the Learned President of the Labour Tribunal. But being aggrieved by the said Order, the Respondent made an appeal against the said Order to the Provincial High Court of the Eastern Province bearing Case No.

HC/AMP/LT/APP/432/2016 stating the Learned President of Labour Tribunal failed to grant compensation and underestimated back wages due to the Respondent.

On the 8th of March 2017 the Learned High Court Judge delivered his Order in the said Appeal and varied the Order of the Learned President of the Labour Tribunal by awarding 4 years arrears of salary amounting to Rupees Seven Hundred and Twenty-Four Thousand Eight Hundred and Sixteen (Rs. 724,816/-) and a further sum of Rupees Two Million (Rs. 2,000,000/-) as compensation for wrongful termination of the Respondent's service. Accordingly, a sum of Rupees Two Million Seven Hundred and Twenty-Four Thousand Eight Hundred and Sixteen (Rs. 2,724,816/-) was awarded to the Respondent.

Appellant's Position

The Appellant stated that the Learned High Court Judge erred in law and in facts holding inter alia;

a) That the 3 charges made against the Respondent are based on one particular issue and if the said issue cannot be proved, the charges cannot be maintained.
b) That the finding by the Learned President of the Labour Tribunal, that the Respondent was guilty to the 2nd charge as he admitted to the same, is unjust and unreasonable as the Respondent has pleaded not guilty to the same at the domestic inquiry.
c) That since the evidence revealed that one person responsible for the said incident is still in employment, itself is a fact which proves that the Respondent was not guilty of the same as to terminate his services.

The Appellant further states that the matter in issue is the misappropriation of loans by 3rd parties which were fraudulently obtained as a result of Respondent's approval of the said loans without properly assessing the details of the borrowers. This caused financial loss to the Appellant.

According to the evidence of the Appellant's witness, Sisira Wijesinghe Bandara, Manager Recoveries, the alleged loan misappropriation occurred due to the Respondent as he failed to assess the qualifications of the borrowers and follow the guidelines and circulars relevant to loan approval.

Furthermore, the Respondent admitted to the loan misappropriation while denying any responsibility for it. In addition, the Respondent stated unambiguously in his examination in chief that the domestic inquiry was

conducted in accordance with the law. The Respondent admitted that he was guilty of the second charge, that his inability to assess the eligibility of loan borrowers resulted in the funds being misappropriated by third parties, causing the Appellant significant loss.

The Appellant draws the court's attention to the evidence of the Appellant's witness, who clearly stated that the six officers who placed their signatures in approving the loans are no longer in service. Therefore, it is the position of the Appellant that the High Court judge's findings that one person who placed his signature in approving the loans still being in service while the Respondent's services were terminated had proved mala fide on the part of the Appellant is unjust and unreasonable.

Moreover, the Respondent has not presented any evidence to show that he has been victimised in any way. Thus, the High Court's finding that there was no previous charge against the Respondent is also incorrect, as the Respondent revealed in his examination-in-chief that he was warned for improper asset assessment on one occasion and suspended for one month at half salary.

In light of the above, the Appellant claims that the Learned High Court Judge's determination that what the Respondent has done is just authorising loans without examining the borrowers' income is erroneous. The Appellant therefore claims that the award of compensation granting back wages is erroneous.

The Appellant also claims that the Respondent has failed to present any evidence of actual financial loss incurred by him as a result of the Appellant's termination of his services. It is well established that the employee must prove actual financial loss he suffered as a result of the employer's termination of his employment. If the employee fails to provide proof in this regard, the Labour Tribunal cannot award compensation even if it is proven that the termination of the employee's services was unjust and unreasonable.

The Appellant claims that the Learned High Court Judge's decision goes against the weight of the evidence presented in the case and that he failed to appreciate the just and equitable nature of the order of the learned President of the Labour Tribunal

Respondent’s Position

The Respondent asserts that the termination of his services was not warranted since the decision to issue loans to the beneficiaries was determined by a

committee based on recommendations made by the society of which the beneficiary is a member and by the field officials of SEEDS.

The aforementioned committee does not identify the beneficiaries. The committee bases its conclusions on the suitability of the beneficiaries only on the documentation given upon verification.

According to the Respondent, the evidence shows that the SEEDS filing officials forged or fraudulently submitted the documents to the committee for approval. When approving the loans to the beneficiaries, neither the Applicant-Employee nor the committee could have detected the fraud.

The Respondent claims that the Learned High Court Judge appropriately examined the matter and awarded arrears of salary of Rs. 724,816 for wrongful termination over a four-year period. The Applicant-Employee who worked for the Respondent-Institution was wrongfully terminated, preventing him from working for any other institution. He could have obtained a better job if he hadn't been terminated. That opportunity was taken from him due to his wrongful termination, for which he must be adequately compensated.

Analysis

The Respondent Company conducted a disciplinary inquiry for financial loss to the institution as a result of not taking steps to recover the dues and non-payment of dues following the loan to the borrowers.

During the cross examination of the Respondent in the Labour Tribunal, when questioned on the 2nd charge, the Respondent admitted guilt on the said charge.

However the Learned High Court Judge delivered his Order by varying the Order of the Learned President of the Labour Tribunal by awarding 4 years arrears of salary amounting to Rupees Seven Hundred and Twenty-Four Thousand Eight Hundred and Sixteen (Rs. 724,816/-) and a further sum of Rupees Two Million (Rs. 2,000,000/-) as compensation for wrongful termination of the Respondent's service. Accordingly, a sum of Rupees Two Million Seven Hundred and Twenty-Four Thousand Eight Hundred and Sixteen (Rs. 2,724,816/-) was awarded to the Respondent.

The most important question that must be answered in this instant case is whether the Respondent whose service was terminated is entitled to

compensation and back wages especially when he had admitted guilt to the 2nd charge.

Given that the Respondent admitted guilt to the second charge during the trial it is critical to assess whether the Appellant had lost confidence in the Respondent. If termination of the Respondent was justified and the Appellant had lost confidence in the Respondent, can the Respondent claim for both compensation and back wages?

This critical importance of loss of confidence was highlighted in the case of **Democratic Workers' Congress v De Mel and Wanigasekera [CGG 12432 of 19th May 1961 at para 24]** where it was held that;

"The contractual relationship as between employer and employee so far as it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of any incident which adversely affects that confidence, the very foundation on which that contractual relationship is built should necessarily collapse ... Once this link in the chain of the contractual relationship ... snaps, it would be illogical or unreasonable to bind one party to fulfil his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter."

Loss of confidence occurs when an employer loses trust in an employee as a result of specific events, such that the employer no longer feels it appropriate to continue employing such individuals within the organisation.

S. R. De Silva in his book, **The Legal Framework of Industrial Relations in Ceylon [(1973) at page 553]** has stated as follows:

"Loss of confidence may justify a termination or, in a case where a termination is held to be unjustified, may be an argument against the award of reinstatement. Though theoretically there is no restriction as to the class of employee in respect of 15 whom termination of employment may be effected on the ground of loss of confidence, it usually applies in respect of employees who hold positions of trust and confidence such as accountants, cashiers and watchers or who perform a certain degree of responsible work. The type of conduct that can reasonably be said to lead to loss of confidence by an employer in an employee is generally that which involves bribery and corruption, collection of unauthorized commissions, revealing confidential information, having an interest in a rival business, dissuading clients and customers, transferring business orders to

competitors, conniving actively or passively at thefts, defalcations and fraud, sabotage and undermining discipline or loyalty…" [emphasis added]

In '**The Law of Dismissal' [(2018) at page 123], S.R. De Silva** has stated further that:

"Loss of confidence is not confined to conduct involving dishonesty. Thus, for instance, loss of confidence in an employee for making disparaging remarks concerning a senior planter to junior planters has been held to be justified [The Ceylon Mercantile Union v. Geo Steuart & Co. Ltd. CGG 14773 of 3 November, 1967]. In another case, the Court of Appeal, in concluding that the termination was justified, held that there was reasonable suspicion of the employee's complicity in the theft and that, although insufficient to bring home a charge of theft, it was sufficient to establish negligence having regard to his position as a security guard [Ceylon Cold Stores Ltd. v. Gunapala – CA/398/1980 – CAM 06.08.1982]."

In the case of **Peiris v Celltel Lanka Limited [SC Appeal No. 30/2009; SC Minutes of 11th March 2011 at pages 8-9]** the issue of loss of confidence in a non-banking environment was addressed. The Appellant in this case was an Assistant Manager, a position characterized by the court as "of responsibility which demands integrity, competency, reliability and independence." It was held by Tilakawardane, J that

"… There was without a doubt an expectation by the Respondent that the Appellant was to act with the utmost integrity and honesty, arguably even more so than that required of an employee without such autonomy. Once the Appellant fell short of this expectation it is perfectly reasonable, by any reasonable standard, that the Respondent would cease to continue to repose any confidence in the Appellant.

Loss of confidence arises when the employer suspects the honesty and loyalty of the employee. It is often a subjective feeling or individual reaction to an objective set of facts and motivation. It should not be a disguise to cover up the employer's inability to establish charges in a disciplinary inquiry but must be actually based on a bona fide suspicion against the employee making it impossible or risky to the organization to continue to keep him in service. The employer-employee relationship is based on trust and confidence both in the integrity of the employee as well as his ability or capacity. Loss of confidence however, is not fully subjective and must be based on established grounds of misconduct which the law regards as sufficient" [emphasis added].

"... In cases of employment which demand a high level of responsibility and autonomy, a lapse in integrity is the precise sort of moral turpitude that can result in a particularly devastating structural and managerial breakdown simply because of the reliance and expectation placed in the hands of such positions, and as such is the sort of transgressive behaviour for which termination of services can be justified." [emphasis added]

The following two excerpts from the judgment **Peoples' Bank Vs Lanka Banku Sevaka Sangamaya [SC Appeal 106/2012 decided on 09-06-2015]** of His Lordship Justice Sisira J. de Abrew would show how this Court looked at the above issue of Loss of Confidence and Misconduct in the workplace.

"I now advert to these matters. It is correct to say that acts of misconduct committed by him are private transactions between him and third parties and that he had not caused any monetary loss to the Appellant Bank. As I pointed out earlier the cheques issued by him have been dishonored by the bank on the grounds that there were no sufficient funds in his account and that the cheques were issued after the account had been closed. These acts clearly demonstrate that he was dishonest when he issued the cheques. When an employee of the Appellant Bank committed the above-mentioned dishonest acts, they will affect the reputation of the bank and such acts would undoubtedly erode the confidence of the people that they have towards the bank. Needless to say, that the existence of a bank depends on public confidence. When employees of the Appellant Bank behave in this manner, it will affect the reputation of the Bank and therefore the Bank must take disciplinary actions against such employees. In my view such persons cannot function in Banks. When compensation is awarded to the employees who committed the above acts of misconduct, such a decision can be construed as an encouragement to commit further acts of misconduct. ....."

In the case **M Sithamparanathan Vs. People's Bank [1986] (1) SLR 411** it was held that *"..... It is needless to emphasize that the utmost confidence is expected of any officer employed in a Bank. Not only has he to transact business with the public but also he has to deal with money belonging to customers in the safe custody of the Bank. As such he owes a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank. Integrity and confidence thus are indispensable and where an officer has forfeited such confidence and has been shown up as being involved in any*

fraudulent or questionable transaction, both public interest and the interest of the bank demand that he should be removed from such confidence. ...."

In this instant case, a Deputy District Manager is expected to work with diligence and confidence while issuing loans to applicants. The manager owes a duty both to the Company and the customers who borrow such loans.

In the case of **National Savings Bank Vs. Ceylon Bank Employees' Union [1982] (2) SLR 629** it was held that *".... The public have a right to expect a high standard of honesty in persons employed in a bank and bank authorities have a right to insist that their employees should observe a high standard of honesty. This is an implied condition of service in a bank. Conduct on the part of a bankman which tends to undermine public confidence amounts to misconduct. Whether the misconduct relates to the discharge of his duties in the bank or not, if it reflects on the bankman's honesty, it renders him unfit to serve in a bank and justifies the dismissal..."*

D L K Peiris Vs Celltell Lanka Ltd [SC Appeal 30/2009, decided on 24-11-2010] held that **"***The Appellant was an Assistant Manager, Credit Collections (outstation), a position of responsibility which demands integrity, competency, reliability and independence. Given the nature of the Appellant's services which was to independently handle the Respondent's work in the outstation districts, there was without a doubt an expectation by the Respondent that the Appellant was to act with the utmost integrity and honesty, arguably even more so than that required of an employee without such autonomy.*

Once the Appellant fell short of this expectation it is perfectly reasonable, by any reasonable standard, that the Respondent would cease to continue to repose any confidence in the Appellant. Loss of confidence arises when the employer suspects the honesty and loyalty of the employee. It is often a subjective feeling or individual reaction to an objective set of facts and motivation. It should not be a disguise to cover up the employer's inability to establish charges in a disciplinary inquiry but must be actually based on a bona fide suspicion against the employee making it impossible or risky to the organization to continue to keep him in service. The employer-employee relationship is based on trust and confidence both in the integrity of the employee as well as his ability or capacity. Loss of confidence however, is not fully subjective and must be based on established grounds of misconduct which the law regards as sufficient. The concept of loss of confidence has been well expressed in the following terms:

"the contractual relationship as between employer and employee so far as it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of any incident which adversely affects that confidence the very foundation on which that contractual relationship is built should necessarily collapse…. Once this link in the chain of the contractual relationship…. snaps it would be illogical or unreasonable to bind one party to fulfill his obligations towards the other. Otherwise, it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter." (vide Democratic Workers' Congress vs De Mel and Wanigasekera ….)"

We could also look into a broader approach of the concept of loss of confidence by leaning into the concept of trust. Wanasundera, J in **Kosgolle Gedara Greeta Shirani Wanigasinghe v Hector Kobbekaduwa Agrarian Research and Training Institute [SC Appeal No. 73/2014; SC Minutes of 2nd September 2015],** stated that;

"The Appellant argued that she did not hold a fiduciary position in the Respondent Institution and therefore the final charge in the charge sheet regarding "loss of confidence" does not apply to her. I see this concept in a different way. All the workers in any institution work for the employer. The employer has employed each and every person having allocated some part of the work of the employer. Let it be the Chief Executive Officer, let it be a clerk or a peon or even a sanitation labourer, they are employed under the employer. The employer trusts that they will do their part of the work properly. The employer thus has trust on them. The CEO is a very highly trusted person. The officers are also trusted with may be a little lesser degree than the CEO. The minor employee also is trusted, may be even to a lesser degree than the officer. No employee is distrusted. Without trust, an employer cannot and will not employ any person. The employee knows that he is trusted not to be negligent in his work, not to be indisciplined, not to be fraudulent, not to work without due care for co-workers etc. They are tied to the employer with the bond of trust. I am of the view that each and every employee is holding a fiduciary position in relation to the employer. The employee cannot break his trust and work at his or her free will and leisure" [emphasis added].

Further Obeyesekere, J stated in the case of **The Associated Newspapers of Ceylon Limited V M.S.P. Nanayakkara [SC Appeal No: 223/2016] decided on 06th December 2022** *"I am of the view that an employee is expected at all times to serve his employer: (a) with honesty and integrity;*

(b) in a manner that does not breach the trust that has been placed in him/her;
(c) in a manner that fosters the confidence that the employer has in him/her.

While the above would undoubtedly include a requirement that all matters that may give rise to a conflict of interest or any matter that may give rise to the employer losing confidence in the employee be reported to the employer forthwith, failure to act as set out above may result in the employer losing confidence in the employee."

Having laid down the legal context of loss of confidence and misconduct in the workplace, I shall now consider whether the Appellant has in fact lost confidence in the Respondent and therefore whether the Respondent can actually claim for compensation and back wages when in fact he admitted guilt to the 2nd charge.

It goes without saying that the position of a Deputy District Manager is a position of high responsibility and hence requires such a person who holds such a designation to work with diligence and consistency. It also should be noted that having worked for over 12 years, a reasonable person would expect a high standard of working and awareness in the Organisation. Therefore, it is fair to assume that the Respondent was aware of the dealings of the company. We should further notice that the Respondent should have known to carefully and not negligently control the issuance of loans to consumers.

It makes no difference whether the Respondent acted dishonestly in this situation. What matters is whether he acted negligently, causing the Appellant to lose confidence in the Respondent. He has acted negligently by not adequately supervising the granting of loans, which has led to the Appellant losing confidence in the Respondent. After working for a long period, an employer will place a certain amount of faith and trust in their staff.

This therefore raises the question of whether the Respondent can claim for compensation and back wages after;

1) losing faith in the Respondent
2) the Respondent admitted guilt to the 2nd charge

Taking into account the facts and circumstances unique to this case, I am of the view that the Respondent's failure to carefully supervise the issuance of loans is a serious breach of discipline that goes to the heart of the employer-employee

relationship and is sufficient to state that the Appellant has lost trust and confidence in the Respondent.

The decision of the Appellant to terminate the service of the Respondent is amply supported by the facts and circumstances of the present case. The aforementioned facts are sufficient for the Appellant to no longer have confidence in the Respondent. The Company would not be able to function with Employees on its staff who are unwilling to strictly abide by the regulations set forth by the Company to protect the trust placed in them by customers.

Since it is now established that the Appellant has lost confidence in the Respondent, I answer the first question of law in the affirmative.

Even though the Labour Tribunal in the case of **People's Bank v Lanka Banku Sevaka Sangamaya [SC Appeal No. 209/2012; SC Minutes of 16th November 2015 at pages 18-19]:** granted compensation having held that the termination was justified in appeal, Sisira De Abrew, J set aside the order for compensation on the basis that, *"When compensation is awarded to the employees who committed the above acts of misconduct, such a decision can be construed as an encouragement to commit further acts of misconduct."*.

In **David Michael Joachim v Aitken Spence Travels Limited [SC Appeal No. 9/2010; SC minutes of 11th February 2021],** Kodagoda, J held that while an employee whose termination of services is lawful and justified cannot as of right claim compensation,

"The power conferred by law on the labour tribunal requires the President of the tribunal to make a just and equitable order, and he is not precluded by law from making an order for the payment of compensation to the applicant, if the circumstances justify the making of such an order …

The ordering of compensation to the applicant should be considered favourably, if attendant circumstances justifies the making of an order for compensation, and particularly when termination of services though determined by the tribunal to have been both lawful and justifiable, was not occasioned due to any wrongdoing/misconduct committed by the applicant. (employee).

In situations where termination of services was due to misconduct by the applicant/workman and such termination is held by the tribunal to have been just and equitable, an order for compensation would be just and equitable, only if there are special or exceptional circumstances, that warrant the making of such an order for payment of compensation."

In the present case, the Appellant Company had sufficient grounds to lose confidence and hence terminate the Respondent's employment. Hence, I conclude that the Respondent in this instance does not have any claim to compensation or back wages from the Appellant Company especially after having acted negligently and admitting guilt to the 2nd charge.

Accordingly, due to the reasons stated above, the two questions of law on which leave has been granted is answered in the affirmative , the Judgement of the High Court is set aside and the order of the Labour Tribunal is restored.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.
I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL No. 210/2017

S.C. Special Leave to Appeal No. 7/15

High Court Monaragala Appeal No. 14/2013 and 15/2013

Magistrate Court Bibile Case No. 14007

Officer In Charge
Police Station,
Bibile.

COMPLAINANT

-Vs-

1. Sanjaya Samantha Bandara Nanayakkara
   Kawdella,
   Bibile.

2. Alawatthage Chularathne Anura De Silva
   Batticaloa Road,
   Ambagolla Junction,
   Bibile.

ACCUSED

AND THEN BETWEEN

1. Sanjaya Samantha Bandara Nanayakkara
   Kawdella,
   Bibile.

1ST ACCUSED-APPELLANT

2. Alawatthage Chularathne Anura De Silva
   Batticaloa Road,
   Ambagolla Junction,
   Bibile.

2ND ACCUSED-APPELLANT

-Vs-

1. Officer In Charge
   Police Station,
   Bibile.
   COMPLAINANT-RESPONDENT

2. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.
   RESPONDENT

AND NOW BETWEEN

Alawatthage Chularathne Anura De Silva
Batticaloa Road,
Ambagolla Junction,
Bibile.
2ND ACCUSED-APPELLANT-APPELLANT

-Vs-

1. Officer In Charge
   Police Station,
   Bibile.
   COMPLAINANT-RESPONDENT-RESPONDENT

2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
   RESPONDENT-RESPONDENT

BEFORE : **P. PADMAN SURASENA, J.**
A. H. M. D. NAWAZ, J. &
K. PRIYANTHA FERNANDO, J.

COUNSEL : Asoka Fernando for the 2nd Accused-Appellant-Appellant instructed by Ms. A.R.R. Siriwardena.
Azard Navavi SDSG for the Complainant-Respondent-Respondent and the Respondent-Respondent.

ARGUED &

DECIDED ON: 13-12-2023.

P. PADMAN SURASENA, J.

Court heard the submissions of the learned Counsel for the 2nd Accused-Appellant-Appellant, the submissions of the learned Senior Deputy Solicitor General who appeared for both the Complainant-Respondent-Respondent and the Respondent-Respondent, and then concluded the argument of this case.

The 2nd Accused-Appellant-Appellant (hereinafter referred to as the Accused-Appellant) stood charged along with another (1st Accused) before the Magistrate's Court of Bibile under three counts. The 1st count is for an offence punishable under Section 344 read with Section 32 of the Penal Code; the 2nd count is for an offence punishable under Section 186 read with Section 32 of the Penal Code; the 3rd count is for an offence punishable under Section 314 read with Section 32 of the Penal Code. As the learned Magistrate had decided not to proceed with the 2nd count, the trial had proceeded only on the 1st and 3rd counts. After the trial, the learned Magistrate had convicted both Accused on the 1st count in the Charge Sheet, which is for using criminal force against Police Constable 1759 Nissanka of Bibile Police in order to prevent or deter the said Police Constable from discharging his duty as a public servant, an offence punishable under Section 344 read with Section 32 of the Penal Code. The learned Magistrate has acquitted both Accused from the 3rd count which is under Section 314 of the Penal Code.

Being aggrieved by the said conviction, both the Accused had then appealed to the Provincial High Court. The Provincial High Court, by its judgement dated 26-11-2014, had affirmed the conviction and the sentence imposed on both Accused, and affirmed the judgement dated 17-06-2013 pronounced by the learned Magistrate of Bibile.

Being aggrieved by the judgement of the Provincial High Court, the 2nd Accused has filed the instant appeal. Although, the 2nd Accused in the Special Leave to Appeal Petition filed before this Court had sought for Special Leave to Appeal in respect of several questions of law covering the factual matrices of the case, we note that this Court by its order dated 31-10-2017, had granted Special Leave to Appeal only on the following question of law.

> *"Whether the Hon. High Court Judge erred in law for his inability to consider that, the learned Magistrate disregarded the failure of the prosecution to prove Count 1*

of the charges framed against the accused for its inability to establish that the Virtual Complainant engaged in his official duties at the time of the incident?"

Therefore, it would suffice for us to consider the above question of law in this appeal.

The facts of the case show clearly that the 2nd Accused had assaulted/used criminal force on the Police Constable Nissanka who had just come out of the Police Station and walked towards the Bus Stand in Bibile Town.

The main contention of the learned Counsel for the 2nd Accused is that the said Police Constable was not on duty when he was subjected to the relevant assault. It was his argument that due to that fact, it was wrong for the Magistrate's Court as well as the Provincial High Court to have convicted the Accused-Appellant-Appellant. Section 344 of the Penal Code under which the 2nd Accused stands convicted is as follows:

"whoever assault or uses a criminal force to any person, being a public servant in the execution of his duty, as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

Therefore, the primary question is whether the Police Constable Nissanka could be considered to have been discharging his duty at the time he was assaulted just outside the Police Station. First and foremost, it could be pertinent to refer to Section 56 of the Police Ordinance which is as follows:

"Every police officer shall for all purposes in this Ordinance contained be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka."

It shall be his duty-

(a) To use his best endeavours and ability to prevent all crimes, offences and public nuisances;

(b) To preserve the peace;

(c) To apprehend disorderly and suspicious characters;

(d) To detect and bring offenders to justice;

(e) To collect and communicate intelligence affecting the public peace;

(f) Promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority.

The literal and plain meaning of the above section is clear enough for us to hold that every Police Officer must be considered to be always on duty. Be that as it may, even on the consideration of the facts of this case, we can see clearly that the Police Constable Nissanka was on standby duty in the Police Station on the relevant date. This is obvious because the incident relevant to this case had occurred on the day immediately after the date of the Presidential Election 2010. Furthermore, it is not disputed that the Police Constable Nissanka had come out of the Police Station with permission obtained from his superiors.

On the other hand, the relevant date of offence being the day immediately after the Presidential Election 2010, we cannot turn a blind eye to the fact that the law had prohibited any gathering on the streets on such days. It is also not disputed that the group of persons to which the 2nd Accused had belonged at the time of committing this offence was celebrating the election victory in the town with cheering etc. It was at that moment that the Police Constable Nissanka observing that those persons were committing an offence and observing that there was a likelihood of a breach of peace in the area, had taken a prompt action to warn that group of persons with a view of dispersing them. It was at that time that the 2nd Accused had resisted the duty of the said Police Constable and used criminal force on him. We observe that it was under such circumstances that the 2nd Accused now takes up the position that the Police Constable Nissanka was not on duty at that moment. We are unable to agree with that submission.

Learned Senior Deputy Solicitor General cited the case of **Albert V. Lavin**.[1] In that case, *Lavin,* a Police Constable at the relevant time, off duty and in plain clothes, was at the head of a queue of a bus stop. He had intervened when another person had attempted to jump the queue at that bus stop. The Magistrate had concluded that there were reasonable grounds for Lavin to believe that there existed a likelihood of a breach of peace which was imminent at the time, which had warranted his intervention. The House of Lords had unanimously agreed with that conclusion.

[1] 1981 (3) ALL ER 878

Thus, in addition to the presence of the afore-stated statutory provision in our country namely, Section 56 of the Police Ordinance, *Lavin's case* also supports the sustainability of the judgements of both the Magistrate's Court as well as the Provincial High Court.

For the foregoing reasons, we proceed to answer the question of law in respect of which this Court has granted Special Leave to Appeal, in the negative. We observe that the learned Magistrate had considered evidence in relation to all the ingredients of the offence and had come to the correct conclusion. We also observe that the whole trial had been conducted before the Magistrate who pronounced the judgement. Therefore, the learned Magistrate who pronounced the judgement had ample opportunity to evaluate the evidence of the Witnesses taking into consideration, the demeanour and deportment of those Witnesses. Perusal of the judgement of the learned High Court Judge also reveals that the learned High Court Judge had also considered all necessary aspects of the case before he decided to dismiss the appeal. Thus, in those circumstances we have no basis to interfere with the findings of the Trial Judge as well as the conclusions reached by the learned High Court Judge.

For the above reasons, we decide to affirm the judgement dated 17-06-2013 and also the judgement dated 26-11-2014 of the learned High Court Judge and affirm the conviction and the sentence imposed on the 2nd Accused. Hence this Appeal should stand dismissed.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

I agree,

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO J.

I agree,

JUDGE OF THE SUPREME COURT

Mks

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

In the matter of an application for Special Leave to Appeal to the Supreme Court in terms of Articles 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC APPEAL NO.16/2020

SC SPL LA No. 68/2017

Court of Appeal No. CA 122/2010

High Court of Nuwara-Eliya: 11/09.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

VS

Jayasinghe Mudiyanselage Roshan Bandaranayaka,

144/B, School Lane,

Kumbalagamuwa,

Walapone.

ACCUSED

AND

Jayasinghe Mudiyanselage Roshan Bandaranayaka,

144/B, School Lane,

Kumbalagamuwa,

Walapone.

ACCUSED-APPELLANT

VS.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Jayasinghe Mudiyanselage Roshan Bandaranayaka,

144/B, School Lane,

Kumbalagamuwa,

Walapone.

ACCUSED-APPELLANT -APPELLANT

VS.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE : **S. THURAIRAJA, PC, J;, J;**
YASANTHA KODAGODA, PC, J &
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Dimuthu Senarath Bandara instructed by Savithri Fernando for the Accused-Appellant-Appellant.
R. Abeysooriya, PC, ASG for the Complainant-Respondent-Respondent.

WRITTEN SUBMISSIONS: Accused-Appellant-Appellant on 9th November 2010.
Complainant-Respondent-Respondent on 9th November 2023.

ARGUED ON : 20th September 2023.

DECIDED ON : 13th December 2023.

S. THURAIRAJA, PC, J.

The Accused-Appellant-Appellant preferred this appeal against the judgment of the Court of dated 17th February 2017 and the special leave was granted on 13th February 2020 on the questions of law set out in paragraphs 12(i), 12(iv) and 12(vii) of the Petition dated 29th March 2017. On the argument day, the Counsel for the Appellant and learned Additional Solicitor General submitted that they would confine their submissions to questions of law no. (i) and (vii) of paragraph 12 of the Petition stated as follows.

> *12(i) Did the learned Trial Judge err in law by failure to consider that the items of circumstantial evidence placed before him were not sufficient to prove the prosecution's case against the appellant beyond reasonable doubt?*

12 (vii) Did their Lordships of the Court of Appeal err in law in holding that the Trial Judge was correct in disbelieving and rejecting the dock statement in the light of the prosecution evidence?

I find it pertinent to set out the material facts of the case prior to addressing the question of law before us.

The Accused-Appellant-Appellant (hereinafter referred to as the "Appellant") to the present appeal, Jayasinghe Mudiyanselage Roshan Bandaranayake, was indicted before the High Court of Nuwara Eliya (hereinafter referred to as the "High Court") by the Honourable Attorney General on the charge of committing the murder of Wakwella Liyana Arachchige Neela Malani Wakwella on or about 27th February 2005 an offence punishable under Section 296 of the Penal Code.

The said Appellant opted to be tried before the High Court without a jury. After the conclusion of the prosecution case, the Appellant chose to make a dock statement and closed his case. The learned High Court Judge convicted the Appellant on the indictment and sentenced him to death. Being dissatisfied with the said conviction and sentence, the Appellant had preferred an appeal to the Court of Appeal and raised the following grounds of appeal.

(i) The items of circumstantial evidence are not sufficient to prove the prosecution's case against the Appellant beyond reasonable doubt.

(ii) *The rejection of dock statement is wrongful and the learned High Court Judge has failed to correctly apply principles governing the evaluation of a dock statement.*

After the conclusion of the arguments, the learned Judges of the Court of Appeal delivered the judgment on 17th February 2017, dismissing the Appeal and affirming the conviction and sentence of the learned High Court Judge. Being aggrieved by the said judgment of the Court of Appeal, the Appellant had preferred the present appeal before the Supreme Court.

As per the submitted facts of the case, the deceased Neela Malani Wakwella was the legally married wife of the Appellant, and according to the evidence of the mother of the Appellant, Kumarihamy (PW2), who was called as a prosecution witness at the High Court trial, the deceased and the Appellant lived in a house in close proximity to the house of Kumarihamy. The Police had commenced the investigation into the sudden death of the deceased Neela Malani Wakwella as a case of suicide by strangulation, but later, her husband (the Appellant) was arrested as the suspect for committing murder of the said deceased.

The entirety of the prosecution's case is based on circumstantial evidence placed before the High Court; therefore, it is important to conduct a proper evaluation of the said circumstantial evidence in order to address the first question of law submitted in this present case. During the trial before the High Court, the prosecution had relied on the evidence of the witnesses namely Godella Waththa Arachchilage Ranjith Dharmasiri (PW 1), Jayasinghe Mudiyanselage Kumarihamy (PW 2), Weerasinghe Mudiyanselage Podi Appuhamy (PW 6), Doctor Ashoka Bandara Senevirathne Consultant Judicial Medical Officer Kandy (PW 16), Retired Inspector of Police Marabedde Rathnayake Tiyunis Gunathilake (PW 9) and Widyarathne Ganithayalage Wasantha Kumari Premaratne (PW 8).

According to the evidence of Kumarihamy (PW 2), who is the mother of the Appellant, the deceased was living alone with the Appellant, on the day the incident occurred. As narrated by PW 2, at around 8.30 pm on the day of the incident, the Appellant had visited her on his way to the paddy field to borrow a torch from her. She further testified that upon hearing the cries of the Appellant around 11.30 pm following his return from the paddy field, she had hastily made her way to the Appellant's house to inquire. At this juncture, PW1 had seen a piece of wire hooked onto the beam of the house and another piece of wire that encircled the deceased's neck. She further testified that she held the deceased by her legs, and when she attempted to bring her down, the wire

from which the deceased was hanging was broken. During this time, the Appellant was outside the house crying for help from the neighbours.

According to the evidence of witness Dharmasiri (PW 1- the Grama Seva Niladhari), he had gone to the house of the deceased on the day in question around midnight on information received from a neighbour. PW 1 found the Appellant seated on a mat outside the house, and discovered the deceased collapsed near a chair, with one of her legs still propped on the said chair. He also observed a piece of wire tied to the roof. He was informed that the deceased had committed suicide by hanging herself. He then had taken steps to the Police about the death by telephone.

The above descriptions of the scene were confirmed by the evidence of the Inspector of Police Gunathilake, who was attached to Walapane Police Station. According to his evidence, the information with regard to the suicide of Wakwella Liyana Arachchige Neela Malani Wakwella was received by the police station around 2.40 A.M. from the Grama Niladhari Dharmasiri, and he had gone to the scene of crime around 3.10 A.M. with a team of police officers consisting of PC 40442, PC 15890, RPC 37718 and the Inquirer into Sudden Deaths (hereinafter sometimes referred to as the "ISP") of the area. Whilst confirming the position of the dead body with the Grama Niladhari, this witness had further observed a piece of wire near the body of the deceased in addition to the wire hanging from the roof. This witness had further observed a wallet with several letters kept on a cabinet closer to the body. Since the witness had observed some significance with the said wallet, he had inspected it and found 27 well-packed love letters written by one Kumari to the Appellant, Roshan Bandaranayake. He had taken the said letters into his custody, and the said letters were identified at the trial before the High Court. According to the witness, the wallet was empty save for the letters.

Even though he had arrived at the scene with the ISP, he felt suspicious of the nature of the wires and the letters found inside the wallet. Thereby, he requested the inquirer to refer the matter to a Magisterial Inquiry.

The prosecution had relied on the evidence of Wasantha Kumari Premarathne (PW 8) to explain the 27 love letters found in close proximity to the dead body of the deceased. According to the evidence of Wasantha Kumari, she had an affair with the Appellant, Roshan Bandaranayake, in or about 2003 and admitted to writing letters to him. PW 8 had identified the letters produced before the court by the prosecution. However, according to this witness, she was unaware of the fact that the Appellant was a married person when she engaged in the affair. When the wife of the accused (the deceased in this case) visited her along with her mother to confront the witness, on her father's advice PW 8 worshipped the deceased to apologise and express her regret, promising to end the affair with the Appellant. According to the witness, since then, she has never written or maintained any relationship with the Appellant, and the letters she received from the Appellant were burnt by her.

As it was submitted, the most important evidence of the prosecution was the evidence of the Consultant Judicial Medical Officer A.B. Seneviratne (PW 16), who held the post-mortem inquiry of the deceased Neela Malani Wakwella. At the post-mortem, Dr. Senevirathne stated that a total of 21 wounds were discovered on the body of the deceased, and there were multiple abrasions on both sides of the neck of the deceased. The Judicial Medical Officer (hereinafter referred to as 'the JMO'), in giving evidence at the trial, confirmed that the death was caused by manual strangulation.

ප්‍ර: ගෙලෙහි තිබූ බාහිර තුවාල සම්බන්ධයෙන් අභ්‍යන්තර තුවාල සම්බන්ධයෙන් නිරීක්ෂණය කළේ මොනවාද?

උ: ගෙලෙහි ඉදිරිපිට ඇති මාංශපේශි වලට ඇති වූ රුධිර වහනය නිසා ඇති වූ තුවාලය. ඉදිරිපස ඇති මාංශපේශි වල ඉහළ භාගයේ මෙම තැළීම් දක්නට ලැබුණා. එමෙන්ම රුධිර ගැලීම් වටා වැඩිපුර දක්නට ලැබුණා. ගෙලෙහි දකුණු පැත්තේ එමෙන්ම ඉදිරිපස ගැඹුරින් පිහිටා තිබූ මාංශපේශි වල තැළීම් හේතුකොට ගෙන තැලීම් තුවාල තිබුණා. තයිරොයිඩ් වල වම් පැත්තේ ඉහලට නෙරා ඇති කොටස බිඳී තිබුණා.

ප්‍ර: ඒ ආකාරයෙන් තුවාළ සිදුවිය හැක්කේ කවර ආකාරයෙන්ද?

උ: ස්වාමීනී, 1-9 දක්වා මා සඳහන් කර තිබෙනවා, ගෙලෙහි වම් පැත්තේ සහ දකුණු පැත්තේ යටි හනුවේ කෝණයට පහළින් පිහිටා තිබූ සීරීම් තුවාළ සම්බන්ධයෙන්. ඊට

අමතරව ඊට යටින් ඇති මාංශ පේශි වල තැලීම් සහ උගුරු දණ්ඩෙහි වම් පස බග්නයක් මා සඳහන් කළා. ඒ ආකාරයට තුවාළ සිදු වී තිබුණේ ගෙල හිර කිරීමෙන්ය.

ප්‍ර: ඔබතුමාගේ පශ්චාත් මරණ පරීක්ෂණ වාර්තාවේ මරණයට හේතුව ලෙස හඳුනාගෙන ඇත්තේ මොකක්ද?

උ: අතින් ගෙල සිර කිරීමක්.

In his evidence, the JMO categorically rejected the contention that this death was a suicide.

ප්‍ර: මෙය එල්ලීමෙන් සිදුකර ගනු ලැබූ සිය දිවි නසා ගැනීමක් ලෙස ඔබට සාක්ෂි හමු උනා ද?

උ: නැත.

ප්‍ර: ඔබතුමාගේ ඒ මතයට පදනම් වූ හේතුවක් තිබෙනවාද?

උ: එසේය.

ප්‍ර: ඒ මොකක්ද?

උ: මා ඉහතින් සඳහන් කළ ආකාරයට ඇයගේ ගෙලෙහි සීරීම් තුවාල දක්නට ලැබුණා. ඉදිරිපස සිට පැත්තට වන්නට. ගෙලෙහි වම් පැත්තට වන්නට සීරීම් තුවාල වැඩි ප%මාණයක් දක්නට ලැබුණා. එමෙන්ම මෙම සීරීම් තුවාල විශාල ප%මාණයේ සීරීම් තුවාල නෙමෙයි. 1 වන තුවාලය සෙන්ටි මීටර් 3.52 යි. අනෙක් හැම එකක්ම කුඩා සීරීම් තුවාල. සමහර ඒවා සිරස් අතට සහ සිරසට ආනතව පිහිටා තිබුණා. එමෙන්ම එම සීරීම් තුවාල වලට පිටින් ඇති මාංශ පේශි කැපීමක් දක්නට ලැබුණා. උගුරු දණ්ඩේ හග්නයක් දක්නට ලැබුනා. එවැනි සීරීම් තුවාල ගෙල වැළලා ගෙන මිය යන අයගේ දක්නට ලැබෙන්නේ නැහැ.

During cross-examination, the JMO stated that,

ප්‍ර: මම නැවත වරක් යෝජනා කරනවා. ඇයම ගෙල වැළලා ගෙන මෙම මරණය සිදු වුණේ කියලා?

උ: නමුත් ගෙල වැළලා ගැනීමේදී දක්නට ලැබෙන ලක්ෂණ කිසිවක් මෙම මෘත ශරීරයේ දක්නට ලැබුණේ නැහැ.

Further, the JMO specifically rejected all suggestions to the effect that the wounds discovered on deceased's body were self-inflicted as a result of sudden change of mind subsequent to the deceased's decision to hang herself. In cross-examination,

ප්‍ර: මේ සීරීම් තුවාල ගෙල ලා ගන්න කොට ඇති වෙන්නේ නැද්ද දගලන අවස්ථාවේදි ඇය විසින්ම මේ සීරීම් තුවාල කර ගන්න හැකියාවක් නැද්ද ගෙල ලා ගෙන මැරෙන්න හදන අවස්ථාවක්.

උ: ගෙල වැල ලා ගන්න අවස්ථාවක මරණය ඉතා ඉක්මනින් සිදු වෙනවා. බොහෝ අවස්ථාවල ඒ පුද්ගලයා අවසන් වශයෙන් ඔහුගේ තීරණය වෙනස් කලහොත් ඔහුටම බැරි වෙනවා ඔහුගේ ජීවිතය බේර ගන්න. එවැනි අවස්ථාවක ඕනී නම් තොණ්ඩුව දා ගන්න අවස්ථාවේදී ඇති වෙන්න පුලුවන්. මේ තරම් විශාල තැලීම් තුවාල ඇති වෙන්නේ නැහැ. මේ සීරීම් තුවාල විසිරී ඇති ආකාරයට සිරස් අතට සහ සිරසට ආනතව.

ප්‍ර: එල්ලිලා පහතට ඇදෙන අවස්ථාවක සීරීම් තුවාල ඇති වීමට හැකියාවක් නැද්ද?

උ: මේ ආකාරයට ඇති වෙන්නේ නැහැ.

Further, he specifically rejected all the suggestions to the effect that the wounds discovered on the body were caused due to falling as a result of the breaking of wires.

ප්‍ර: එම තැනැත්තිය, මිය ගිය තැනැත්තිය බිමට වැටුණා නම් වෛද්‍යතුමා කියන සීරීම් තුවාල ඇති විය හැකියි නේද ?

උ: නැත.

ප්‍ර: උඩකින් බිමට වැටෙන කොට මේ දණහිසට තුවාල සිදු වන්නේ නැද්ද?

උ: විය හැකියි, නමුත් මා නිරීක්ෂණය කළේ මියගිය අයෙකුගේ සිරුරේ තියෙන තුවාල නෙමෙයි. අංක 10 වශයෙන් මම පැහැදිලිව ලකුණක් කළා.

ප්‍ර: මෙය මියගිය තැනැත්තිය උඩක සිට බිමට වැටීමෙන් සිදු විය හැකිද?

උ: පුද්ගලයෙක් ඉහල තැනක සිට පහලට වැටුනාම සීරීම් තුවාල ඇති වෙන්න පුළුවන්. ඊට වැඩිය තැලීම් තුවාල වැඩියි. වැළ මිට, වළලුක දණහිසේ තුවාලවල එවැනි තැලීම් දක්නට ලැබුණේ නැහැ. කලවයේ පමණක් තැලීම් තුවාල මා සඳහන් කරලා තියෙනවා. එය හරස් අතට පිහිටා තිබූ තැලීම් තුවාලයක්.

Moreover, the JMO, giving evidence at the trial, refuted the contention that one of the marks found across the neck of the deceased was a mark caused while the deceased was alive.

ප්‍ර: ඔබතුමා සඳහන් කළා අංක 10 තුවාලය සම්බන්ධයෙන්?

උ: බෙල්ල ප%දේශයේ පිහිටලා තිබුණ ලකුණක් වශයෙන් නිරීක්ෂණය කලේ.

ප්‍ර: එය කවර ආකාරයෙන් ඇති විය හැකි තුවාලයක්ද?

උ: මෙය බෙල්ල මැද හරස් අතට පිහිටලා තිබුණා. නමුත් මෙහි එලෙස ජීවත්ව ඉන්න කෙනෙකුට ගෙල තොණ්ඩුවකින් සිර කිරීමේදී ඇති වන අභ්‍යන්තර තැළුම් තුවාල දක්නට ලැබුණේ නැහැ. ඒ නිසා මට මෙම ලකුණ ජීවත්ව ඉන්න අවස්ථාවේදී මෙම තැනැත්තිය ජීවත්ව සිටින අවස්ථාවක යෙදූ බලයක් හේතු කොට ගෙන ඇති වූ ලකුණක් ලෙස සඳහන් කරන්න බැහැ.

Further, the JMO confirmed the possibility of the above-mentioned mark being caused by the wire found at the place of the incident and marked as a production in Court. Therefore, it is submitted that the wound no.10 found on the body (15cm horizontal mark across the front middle of the neck) of the deceased supports the proposition that the Appellant attempted to hang the body using the wire subsequent to the commission of murder in order to stage it as a case of suicide. In addition, the JMO giving evidence confirmed that there was evidence of a struggle, evidence of the deceased's mouth being covered shut, and evidence of a blow to the head.

ප්‍ර: ප්‍රතිරෝධය පෑම සම්බන්ධයෙන්?

උ: මැය කෙසඟ සිරුරක් තිබුණු තැනැත්තියක්. එවැනි තැනැත්තියක් ඒ තරම් ප්‍රතිරෝධය පෑමේ බලය අඩුයි. එනමුත් ඇය දගලා ඇති බවට ලකුණු යොදා තිබෙනවා. 11 සිට 21 දක්වා ඇති තුවාළ පිහිටලා තිබුණේ ඉහළ බාහුවේ සහ පහළ බාහුවේ නෙරා ඇති වැල මිට, දණහිස, වළලු කර ආශ්‍රිතව. එවැනි අවස්ථාවක ඇය යම්කිසි ආකාරයෙන් දැගලීමක් කර ඇති බවක් පැහැදිලිව පේනවා. එමෙන්ම අංක 2 සහ 3 තුවාල මුඛය ආශ්‍රිතව ඇති තැල්මක්. එය මුඛය වැසීමට පාවිච්චි කලා. ඊට අමතරව අංක 1 තුවාලය හිසට යම්කිසි විදිහකින් පහරක් වැදුණු තුවාලයක්.

I am of the view that in the light of the above evidence by the JMO, the contention raised by the Appellant to the effect that the death was a case of suicide becomes negatory. Further, the contention submitted by the Appellant to the effect that the wounds were the result of a fall or an attempt to reverse the decision to commit suicide also becomes nugatory on the above evidence. Furthermore, considering the number of wounds on the body of the deceased and their nature as explained by the JMO, together with the evidence that shows the effect of a struggle, the deceased's mouth being covered, and a blow to the deceased's head, the irresistible inference one can draw is that this is a clear case of murder. As it was submitted in the evidence of the JMO, the 15 cm mark found on the front-middle portion of the neck of the deceased, which, in his opinion, is a mark created by an act subsequent to the death of the victim or a post-mortem injury, supports the contention that the Appellant attempted to stage an act of suicide after committing the murder.

In this case, as per page 349 of the appeal brief, it is very clearly indicated in the post-mortem report that the signs of hypostasis were visible on the posterior part of the body. However, according to the evidence of PW1, upon her arrival, the body position was face down on the floor.

ප්‍ර: මළ සිරුර තමා දැක්කද?

උ: එහෙමයි.

ප්‍ර: මළ සිරුර කොහොමද තිබුණේ?

උ: පුටුව උඩ කකුලක් තිබුණා. මුහුණ වැහෙන පරිදි වැටී තිබුණා.

As per the evidence of PW1, if the body was face down on the floor, it is impossible to have evidence of hypostasis (post mortem lividity- is the result of sedimenting of the blood in a cadaver due to gravity. It commences as soon as the circulation ceases. This appears and apparent after 30-60 minutes after death) on the posterior part of the body. Therefore, it is very clear from this evidence that the body was shifted after the death occurred. It is also clear that the body was lying somewhere else face up for a considerable period of time before it was shifted to the position in which it was found.

As it was discussed above, the prosecution heavily relied on the circumstantial evidence in establishing the prosecution's case, which can be summarized as follows. In **Sigera vs Attorney General (2011 1 SLR page 201)** the Court held that,

> *"In order to base a conviction on circumstantial evidence, the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable hypotheses of his innocence. In order to justify an inference of guilt from the circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. (Vide. King Vs Abeywickrama, King Vs Appuhamy, as held in Podisingho Vs King, that in the case of circumstantial evidence it is the duty of the trial judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. In Don Sunny Vs Attorney General, it was held that proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence and that if an inference can be drawn which is consistent with the innocence of the accused the accused cannot be convicted."*

In this case, based on the evidence of the JMO, the following was established: the cause of death was due to manual strangulation and not suicide; the external injuries found on the body were compatible with injuries inflicted when resisting manual strangulation; there were no internal injuries found corresponding to the mark found on the neck; and that it was a post-mortem injury. Even though the scene of the crime was arranged to display that the deceased had a fall after she hanged herself, the injuries on her body were not compatible with a fall but instead with resistance to manual strangulation, and the scene of the crime did not match a version of events where the deceased fell after hanging herself due to the fact that her leg was still

propped on a chair. According to the evidence of Kumarihamy (the mother of the Appellant) only the Appellant and the deceased lived in their house. The 27 letters inside the wallet found in close proximity to the body of the deceased were undisturbed and well-packed when recovered by the Police. The recovered letters referred to an affair between the Appellant and witness Kumari, which, according to PW 8, ended two years ago, and consequently, there is no purpose for the appearance of these letters on the scene of a crime unless the person who placed them at the scene of crime wanted to introduce them in order to mislead the investigation.

For the reasons set out above, we see no merit in the first ground of appeal raised by the learned Counsel for the Appellant.

As the final ground of appeal, it was argued by the learned Counsel for the Appellant that the rejection of the dock statement is wrongful and the learned High Court Judge has failed to correctly apply principles governing the evaluation of a dock statement. As discussed above, the Appellant, when explained his rights at the conclusion of the prosecution case, opted to make a dock statement. In his dock statement, the Appellant took up the position that when he returned home from the paddy field at around 11.30 P.M., he found the deceased collapsed near a small chair. He speaks of making an attempt to lift her and, at that time, observed a rope around her neck. At that stage, having been frightened, he called for his mother. No other evidence was placed on behalf of the Appellant before the High Court, and the defence's case was limited to the dock statement.

It is appropriate at this stage to consider the approach adopted by the learned High Court Judge in light of Supreme Court's decisions. In **Queen V. Kularatne 71 NLR 529 at page 531,** it was held that: -

> *"When an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had*

deliberately refrained from giving sworn testimony. But the jury must also be directed that

(a) if they believe the unsworn statement it must be acted upon,

(b) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and

(c) that it should not be used against another accused.''

As observed by me, the learned High Court Judge was mindful of the medical evidence led at the trial and appropriately gave due consideration to the dock statement in his judgment (at pages 14-17) before rejecting it. In view of the above, it is abundantly clear that the learned High Court Judge had adopted the correct approach in evaluating the dock statement. Therefore, I see no merit in this argument.

Further, same and identical questions of law were raised in his appeal by the Appellant before the Court of Appeal too. The learned Judges of the Court of Appeal dismissed the Appellant's appeal on 17th February 2017. I perused the judgment of the Court of Appeal and I am of the view that the learned Judges of the Court of Appeal comprehensively analysed both grounds of appeal, submissions made by the parties and had come to a correct conclusion by dismissing the Appellant's appeal.

Decision

After careful consideration of the submissions made, facts and circumstances of the instant case as discussed above, there is no basis to interfere with the decision of the learned High Court Judge of Nuwara Eliya and the learned Judges of the Court of Appeal. I hereby dismiss this Appeal, by answering the first and second questions of law negatively. I affirm the conviction and the sentence given by the learned High

Court Judge of Nuwara Eliya dated 02nd November 2010 and the judgment of the learned of the Court of Appeal dated 17th February 2017.

Appeal Dismissed.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution

M.D.S.A. Perera,
No. 59, Pahala Kosgama,
Kosgama.

Petitioner

SC /FR/ Application No. 62/2020

Vs,

1. Dharmasena Dissanayake,
Chairman,
Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

1A. Jagath Balapatabendi
Chairman,

2. Prof. Hussain Ismail,
Member,

2A. Indrani Sugathadasa,
Member,

3. Dr. Prathap Ramanujam,
Member,

3A. V. Shivagnanasothy,
Member,

4. V. Jegarasasingam,
Member,

4A. Dr. T.R.C. Ruberu,
Member,

5. S. Ranugge,
Member,

5A. Ahamod Lebbe Mohamed Saleem,
Member,

6. D. Laksiri Mendis,
Member,

6A. Leelasena Liyanagama,
Member,

7. Sarath Jayathilaka,
Member,

7A. Dian Gomes,
Member,

8. Sudarma Karunarathna,
Member,

8A. Dilith Jayaweera,
Member,

9. G.S.A. De Silva P.C.,
Member,

9A. W.H. Piyadasa,
Member,

The 2nd to 9th Respondents all of;

Public Service Commission,
No. 122/9, Rajamalwatta Road,
Battaramulla.

10. M.A.B. Daya Senarath,
Secretary,
Public Service Commission,
No. 122/9, Rajamalwatta Road,
Battaramulla.

11. S. Hettiarachchi,
Secretary to the Ministry of Public Administration, Home of Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

11A. J.J. Rathnasiri,
Secretary to the Ministry of Public Administration, Home of Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

11B. M.P.K. Mayadunne,
Secretary to the Ministry of Public Administration, Home of Affairs, Provincial Councils and Local Government,
Independence Square, Colombo 07.

12. Jagath D. Dias,
Director General,
Department of Pensions,
Maligawatta, Colombo 10.

13. W.D. Jayasinghe,
Secretary General,
National Procurement Commission,
No. 145, Main Street, Battaramulla.

14. Mayuri Perera,
Director Administration,
National Procurement Commission,
No. 145, Main Street, Battaramulla.

15. C.P.U. Hettiarachchi,
Senior Assistant Secretary,
(Internal Administration)
Ministry of Public Administration, Home of Affairs, Provincial Councils and Local Government,
Independent Square, Colombo 07.

16. T. Murugeson,
Additional Secretary,
Public Service Commission,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC,**
Justice K. Kumudini Wickremasinghe,
Justice Mahinda Samayawardhena,

Counsel: Shantha Jayawardena with Hiranya Damunupola for the Petitioner
Sureka Almeda, SC, for the Respondents

Argued on: 12. 07.2023
Judgment on: 14.12.2023

Vijith K. Malalgoda PC J

The Petitioner M.D.S.A Perera of No. 59 Pahala Kosgama, Kosgama who was serving as a Grade I Accountant in the Sri Lanka Accountants Service, had complained of an illegally initiated disciplinary inquiry commenced a few days prior to his retirement upon completion of 60 years, which made him to retire under Section 12 of the Minutes on Pension violating his Fundamental Right to equality guaranteed under Article 12 (1) of the Constitution.

This Court granted leave to proceed on the alleged violation of Article 12 (1) on 24th November 2021. As revealed before us, the Petitioner was served with a charge sheet by the Public Service Commission at the time of his retirement and another charge sheet was also issued to him subsequently.

1st Charge sheet against the Petitioner

The Petitioner was a resident of Kosgama, close to the Salawa Army Camp where the armory of the said camp exploded causing damage to the residents of the area. The Petitioner's house and personal vehicle were damaged due to the said explosion but the Petitioner was not happy with the compensation awarded to him. Whilst making inquiries, he got to know that the compensation paid to certain individuals is disproportionate to the damage caused and made a complaint to the Divisional Secretary informing his dissatisfaction. In the meantime, a Right to Information (hereinafter referred to as RTI) application was made to the office of the Cabinet of Ministers requesting copies of Cabinet Memorandums and Decisions in respect of the assessment and granting relief to Salawa victims. Once he received three Cabinet decisions as per the above request, he made several requests under the Right to Information Act to several authorities including;

1. The request made to information officer of the Ministry of Disaster Management dated 14.07.2017
2. The request made to Divisional Secretariat Seethawaka dated 28.08.2017
3. The request made to the Department of Valuation dated 30.08.2017
4. Appeal dated 21.09.2017 made to RTI Commission.

At the time the Petitioner made the above RTI applications, he was working as the Chief Accountant at the Ministry of Rural Economic Development, and in some of the Applications made, he placed his official stamp on the request application.

Whilst the above process was in progress, the Petitioner was informed of a complaint made by one Sudath Pushpakumara to the Secretary to the Ministry of Public Administration by letter dated 14.03.2018 against the Petitioner, and a preliminary investigation was held and a statement was recorded from the Petitioner.

The Petitioner has annexed marked P-15 a copy of the preliminary investigation report and brought to our attention to the following two passages one from the observations and the other from the recommendations of the inquiry officer.

> "එම්. ඩී. එම්. ඒ. පෙරේරා මහතා ආපදා කළමනාකරණ අමාත්‍යාංශයේ හා සීතාවක ප්‍රාදේශීය ලේකම් කාර්යාලයේ තොරතුරු නිලධාරී වෙතින් තොරතුරු ඉල්ලා යොමු කරන ලද ලිපි සඳහා සිය නිලනාමය හා මුද්‍රාව භාවිතා කර ඇති බව තහවුරු වුවද රාජ්‍ය සේවයේ නියුතු මාණ්ඩලික නිලධාරියකු වෙත නිකුත් කෙරෙන නිල මුද්‍රාව භාවිතා කල යුතු ආකාරය හෝ භාවිතයට අදාල සීමාවන් පිළිබඳව ආයතන සංග්‍රහයේ විධිවිධාන යටතේ හෝ රාජ්‍ය පරිපාලන චක්‍රලේඛ විධිවිධාන යටතේ සඳහන් නොවන හෙයින් ඔහු වරදක් සිදුකර නොමැති බව තහවුරු වන බව."

> "එම්. ඩී. එම්. ඒ. පෙරේරා මහතාට තොරතුරු පනත යටතේ සිය පෞද්ගලික අවශ්‍යතා සඳහා තොරතුරු ලබා ගැනීම හෝ යම් පාර්ශවයක් සම්බන්ධව පෞද්ගලික පැමිණිලි කිරීම සඳහා යන කාරණය සඳහා සිය රාජකාරී තනතුර හා නිල මුද්‍රාව භාවිත කිරීමෙන් වැලකී සිටින ලෙස අවවාද කිරීමට කටයුතු කිරීම."

Even though the said "preliminary investigation report" had only recommended, that the Petitioner be warned not to use his official seal for any personal purpose, no such warning was issued to the Petitioner by the disciplinary authority but, he received a letter dated 04.11.2019 from the 15th Respondent calling for explanation to the charge sheet dated 21.10.2019 issued

by the 10th Respondent. The said charge sheet which is produced marked P-17 contained two charges and the count one refers to the charge of misusing his official stamp.

As submitted by the Petitioner, by letter dated 13.12.2019 his explanation was forwarded to the Ministry of Public Administration.

2nd Charge sheet against the Petitioner

The Petitioner had been appointed to the National Procurement Commission on an acting basis to the Post of Director (Procurement Investigation) by letter dated 07.11.2018 and while he was functioning in the above capacity it was revealed by the Audit Report dated 30.05.2019 published by National Audit Office, that there were financial irregularities pertaining to the official vehicle used by the 13th Respondent in violation of Public Administration Circulars 05 of 2016 and 14 of 2008.

The Petitioner brought this matter to the notice of the Chairman and the Members of the Commission and also forwarded letters dated 15.07.2019 to the Commission to Investigate Allegations of Bribery or Corruption and Secretary to the Public Service Commission complaining about the said irregularity.

By letter dated 03.09.2019, the Petitioner was transferred from the post of Director (Procurement Investigation) to the Ministry of Public Administration, Disaster Management and Livestock Development. The said decision to transfer the Petitioner was challenged by the Petitioner by way of a Fundamental Rights Application before the Supreme Court bearing No. 379/2019 but the Proceeding in the said matter was terminated since the Petitioner was granted a substantive position as the Chief Internal Auditor in the Ministry of Plantation Industries and Export Agriculture.

In the meantime, the Petitioner was served with a notice requesting him to be present at the National Procurement Commission on 31.10.2019 to record a statement with regard to an investigation conducted against him. The Petitioner made a statement to the investigating officer as requested and the Petitioner was served with a charge sheet dated 06.02.2020 by the 10th Respondent. The said charge sheet contained charges with regard to his conduct in making a complaint against the 13th and the 14th Respondents to the Commission to Investigate Allegations of Bribery or Corruption.

However prior to the second charge sheet dated 06.02.2020 being served on the Petitioner, by letter dated 23.01.2020 the Public Service Commission had informed the 11th Respondent that the explanation given by the Petitioner to the charge sheet dated 21.10.2019 is not acceptable to the Public Service Commission and therefore the Commission had decided to hold a formal disciplinary inquiry against the Petitioner and pending the said inquiry the Commission had decided to send the Petitioner on retirement from 07.02.2020 when he completed 60 years under the provisions of Section 12 of the Pension Minute.

It is the said decision of the Public Service Commission that is challenged before this Court under paragraphs 'e' and 'h' to the prayer of the petition along with several other reliefs to declare null and void the decisions by the Public Service Commission to hold formal inquires against the Petitioner.

It was also submitted on behalf of the Petitioner before this Court that, when the Public Service Commission had called for his explanation with regard to the charge sheet dated 21.10.2019, the charges were referred to the Secretary of Public Administration, for his observation and the Secretary of Public Administrtion having referred the charges to the Secretary to the Ministry of Mahaweli, Agriculture, Irrigation and Rural Development, the Ministry under which the

Petitioner was serving at that time, had forwarded the observations of the Secretary to the Ministry of Mahaweli, Agriculture, Irrigation, and Rural Development where Petitioner had been recommended to be discharged. However, the said recommendation was rejected by the Public Service Commission. (P-38 or P-39)

Whilst submitting the above, the Petitioner who was a Senior Accountant in the Government Accountants Service had made an allegation which is personal in nature, against the 1st Respondent, namely Dharmasena Dissanayake, Chairman of Public Service Commission, of his involvement in deciding to hold a preliminary inquiry as well as a formal inquiry when the relevant authorities had recommended otherwise. It was alleged that the 1st Respondent in his capacity as the Chairman of Public Service Commission and previously as the Secretary to the Ministry of Public Administration had developed an animosity towards the Petitioner who was the Secretary to the Government Accountants Association who had made him the Respondent in several litigations before the Supreme Court. (P-4 or P-5)

Whilst resisting any relief being granted to the Petitioner, the incumbent Chairman of the Public Service Commission had submitted the following before this Court,

a) At the time the Petitioner reached his age of retirement, i.e., 60 years, the disciplinary action against him was pending on a complaint said to have been made against him by one W.V.D. Sudath Pushpakumara of No. 64/2B, Balika Vidyalaya Mawatha, Pahala Kosgama, Kosgama of misusing official powers and state property.
b) In the said circumstances, the Petitioner was sent on retirement under Section 12 of the Minutes on Pension
c) The Petition referred to above was received against the Petitioner in March 2018 and on a directive made by the Public Service Commission, the Secretary to the

Ministry of Public Administration appointed a two-member panel to conduct a preliminary investigation into the complaint

During the investigation, it was revealed that on 04.08.2016 when the officers of the Assistant Government Agents office Seethawaka were making preparations to pay compensation to the victims who suffered losses to their houses, the office had received a complaint from one M.D.S.A. Perera who had introduced himself as the Chief Accountant to the Ministry of Rural Development and also Deputy Director at Anti-Corruption Secretariat, complaining that, the relevant authorities have recommended Rs. 853,000 for the damages caused to the house of one W.D. Sudath Pushpakumara in excess of the real damage caused to him but the compensation recommended to the others, whose houses were damaged more than the house of Pushpakumara, were less than the amount recommended to Pushpakumara. The Petitioner had further requested to stop any payment until the matter is fully investigated.

The officials at the Assistant Government Agents office had taken note of the said complaint and the payment was re-considered through the Government valuer.

In addition to the above complaint the Petitioner made, he had submitted several RTI requests to various government institutions. The Petitioner identifying himself as the Chief Accountant Rural Development Ministry had submitted an RTI application on 14.07.2017 to the Ministry of Disaster Management requesting the details of;

a) As per Cabinet paper 23/2016, lists of 1794 beneficiaries who received compensation of less than one million each, 112 beneficiaries who received compensation over one million each, and the list of recipients who were recommended to receive compensation for damaged house hold items

b) As per Cabinet paper 18/2016, list of 2031 beneficiaries who received compensation ranging between 100,000/- and 1,000,000/-

c) As per Cabinet paper 14/2016, list of beneficiaries who were recommended to receive up to Rs. 10,000/- for the loss caused to them as self-employed people of the area including three-wheeler owners, shop owners, etc.

As some of the information he requested was considered confidential, several letters were exchanged between several government institutions including a letter written by the Secretary to the Ministry of Disaster Management to the Secretary of the Ministry of Rural Development Ministry inquiring whether the information called by its Accountant is required for an official purpose. This letter was replied to by the Additional Secretary to the Ministry of Rural Development informing that the requested information was not required for any official purpose. In the meantime, the Petitioner too had written another letter to the Ministry of Disaster Management requesting the registered number of his request, and in the said letter he had placed his official seal below his signature.

By letter dated 24.07.2017, the Petitioner had submitted a similar RTI request from the Seethawaka Pradeshiya Saba requesting information almost similar to his request made to the Ministry of Disaster Management with specific reference to the amounts they paid to each party with a full list under each category. In the request he made, he had placed the official rubber stamp below his signature. This request too was considered confidential and several letters were exchanged between several government agencies.

Making another RTI request from the Government Valuation Department by letter dated 30.08.2017 requesting the details of the valuations the Department made with regard to

damage caused to houses, household equipment, and vehicles during the explosion that took place on 25.06.206 at the Army Camp Salawa-Kosgama.

However, the Petitioner was not successful in obtaining the said request either. The Petitioner was informed by the Valuation Department that there are matters pending before the Human Rights Commission and the Supreme Court on the matter referred to in the request and therefore refused to issue the information requested by him.

As against the orders made by the authorities refusing to issue the RTI requests made by the Petitioner, he submitted an appeal to the Right to Information Commission. It was further observed in the investigation report that the information requested by the Petitioner did not appear to be personal in nature but was general in nature and that was the main reason for the authorities to refuse the requests made by the Petitioner. It was further revealed that the Petitioner in addition to identifying his designation in the applications he made, had also placed his official stamp in those requests. The fact that the Petitioner was using his official status and the official stamp was quarried from him by the Additional Secretary to the Ministry of Rural Development, the Ministry Under which the Petitioner was working at that time by letter dated 30.01.2018. By letter dated 04.04.2018, the same officer had informed the Petitioner that there was material to establish him using his official status and official stamp for private matters. By letter dated 06.12.2018, the same officer had warned the Petitioner to refrain from using his official designation and the official stamp when obtaining information for private matters.

Whilst referring to the above information with regard to the report the inquiring officers submitted to the Public Service Commission, the incumbent Chairman of the Public Service Commission has taken up the position that, the purpose for requesting the Secretary to the

Ministry of Public Administration to hold an inquiry was to ascertain whether the Petitioner had committed any misconduct, by misusing the official powers and government property.

With regard to the recommendation submitted by the inquiry officer, it was submitted that the Public Service Commission is not bound to act on those recommendations, but the Commission after considering the conduct of the Petitioner which was revealed from the inquiry report had decided to commence a formal inquiry against the Petitioner and therefore directed the Secretary to the Ministry of Public Administration to submit draft charges. On receipt of the draft charges the Public Service Commission by charge sheet dated 21.10.2019 (R-5) called for an explanation from the Petitioner and also requested the Secretary to the Ministry of Public Administration, Disaster Management and Livestock Development to submit their observations and recommendations to the above charge sheet.

The Public Service Commission has once again considered the explanation provided by the Petitioner and the observations of the Secretary to the Ministry of Public Administration, Disaster Management and Livestock Development, and was of the view that the Petitioner should face a formal Disciplinary Inquiry in terms of Section 15.9 of Chapter XLVIII of the Establishment Code. The above decision was reached by the Commission by order dated 23.01.2020 with a consequential decision to retire the Petitioner under Section 12 of the Minutes of Pension with effect from 02.07.2020.

The Formal Disciplinary Inquiry had proceeded against the Petitioner and the findings of the said inquiry to exonerate the Petitioner were submitted to the Public Service Commission but the Commission has considered the recommendations, the circumstances, and the nature of the allegations leveled against the Petitioner in the charge sheet, had found the Petitioner guilty of both charges and recommended to the Secretary to Ministry of Public Administration

Provincial Council and Local Government to deduct 2% from his commuted pension as a punishment in terms of section 36.7.of Chapter XLVIII of the Establishment Code.

The Petitioner who was aggrieved by the said disciplinary order; had appealed to the Administrative Appeals Tribunal and the Petitioner was exonerated from all charges by the said tribunal by order dated 10.11.2022 and the said order had been given effect to by the Public Service Commission.

As already observed by me, there were recommendations by the investigating officer who conducted the preliminary investigation, the Secretary to the Ministry of Mahaweli, Agriculture, Irrigation and Rural Development, and the Inquiry officer who conducted the Formal Inquiry to discharge the Petitioner but the Public Service Commission had overruled the said recommendation and proceeded with the inquiry and found the Petitioner guilty of the two charges framed against him; until he was exonerated by the Administrative Appeals Tribunal.

Since a Complaint had been received against the Petitioner by the Public Service Commission, the Commission had directed the Secretary of Public Administration, Disaster Management to hold the preliminary investigation under the delegated powers identified in paragraphs 6:1 and 6:2 of the Establishment Code. (Chapter XLVIII)

Provisions in paragraphs 6:3, 13:1, and 13:12 of the Establishment Code refer to the provisions that need to be followed after a preliminary investigation carried out under paragraphs 6.1 and 6.2 of the Establishment Code as follows;

> 6:3 If a *prima-facie* case is disclosed against the officer by the preliminary investigation held in terms of sub-section 6:2 above, the relevant Disciplinary Authority should prepare a charge sheet and duly issue it to the officer. However, in the case of an officer in the Combined Services, the Head of the

Department in which the officer works should forward, without delay, the draft charge sheet and other documents to the Director of Combined Services.

13:1 A preliminary investigation is that which is conducted by a Disciplinary Authority or Head of Institution or other Appropriate Authority or by an officer or a Committee of Officers duly authorized by the above authorities to find facts as are necessary to ascertain the truth of suspicion or information that an act of misconduct has been committed by an officer or several officers and to find out and report whether there are, *prima-facie,* sufficient material and evidence to prefer charges and take disciplinary action against the officer or officers under suspicion. The primary task of an officer or a Committee of Officers conducting a preliminary investigation is the recording of statements of relevant persons, examination of documents and records, obtaining of originals or certified copies thereof, physical verification of state-owned assets in the charge of the officer or officers subject to the investigation, examination of relevant premises, taking over of all articles and documents which are considered necessary and making their observations and recommendations on matters found out by them regarding the act of misconduct committed.

13:12 After the completion of the preliminary investigation, the officer conducting the investigation should forward the report of the preliminary investigation together with the statements obtained from relevant parties, documents, etc. taken into his custody and his observations and recommendations to the appropriate authority. The officer conducting the preliminary investigation should also prepare a draft charge sheet as per Appendix 5 of this Code and forward it to the

relevant authority in the event that sufficient material is disclosed that calls for disciplinary action against the suspect officer or officers.

As per the provisions referred above, a responsibility is cast upon the investigating officer or the panel to submit observations and recommendations with the report to the disciplinary authority and to submit a draft charge sheet in the event sufficient material is disclosed against the suspect officer. However, the Establishment Code is silent in a situation where the disciplinary authority cannot agree with the recommendation of the inquiry officer.

In the case *of* **Prof. Desmond Mallikarachci Vs. University of Peradeniya and Others** SC Appeal 120/2010 SC minutes dated 25.04.2019 the purpose of a preliminary inquiry was identified as follows;

> *"The purpose of a preliminary inquiry under the Government Establishments Code as set out in paragraph 13.1, Chapter XLVIII is "to find facts as are necessary to ascertain the truth of a suspicion or information that an act of misconduct has been committed by an officer or several officers, and to find out and report whether there are, prima-facie, sufficient material and evidence to prefer charges and take disciplinary action against the officer or officers under suspicion."*

In the case of **T.G.J.L. Amarasinghe Vs. Dr. N.C.D. Ariyarathne and others** SC FR 15/2017 SC minutes dated 02.09.2019 Prasanne Jayawardena J observes the instance where the disciplinary authority could issue a charge sheet as follows;

> *"In view of this fact, the scheme of the Establishments Code is that when a Disciplinary Authority is considering whether disciplinary action should be taken against a public officer, he should first ensure a 'preliminary investigation' is held to ascertain whether*

there is a prima-facie case which justifies taking disciplinary action against that public officer.

Thereafter, a Charge Sheet is to be issued only if that preliminary investigation discloses a prima facie case against the public officer. Needless to say, this is a safeguard put in place to ensure that disciplinary action against a public officer is commenced only where it is justified."

As submitted by the 1st Respondent, in the absence of a draft charge sheet, the commission had directed the Secretary to the Ministry of Public Administration, Disaster Management and Livestock Development to submit the draft charge sheet to the commission in order to call for an explanation from the Petitioner. However, the relevant provisions of the Establishment Code do not provide the Secretary to the line ministry to draft a charge sheet but it is the duty of the investigating officer to submit the draft charge sheet along with his recommendation if the preliminary investigation discloses an offence committed by the public servant who was under investigation.

As revealed before us, the Public Service Commission had thereafter issued the charge sheet to the Petitioner calling for his explanation and acted on the advance copy of the explanation the commission received directly from the Petitioner without waiting for the proper documentation to come from the relevant ministry and acting under the provisions of paragraph 15:9 of Chapter XLVIII of the Establishment Code, decided to hold a formal disciplinary inquiry against the Petitioner. However, it is revealed from the material placed before this Court, that the formal documents received by the Public Service Commission contained a recommendation from the Secretary to the Ministry of Mahaweli, Agriculture, Irrigation and Rural Development recommending the discharge of the Petitioner. The decision to hold the Formal Disciplinary

Inquiry was communicated by letter dated 23.01.2020 by the Public Service Commission and it was further decided to retire the Petitioner under Section 12 of the Minutes on Pension with effect from 07.02.2020. The above conduct of the Public Service Commission, especially with regard to its decision to act on the advance copy of the explanation given by the Petitioner and to communicate its decision to hold the formal disciplinary inquiry reveals the interest the Public Service Commission had shown to commence a formal inquiry against the Petitioner before he reaches the retiring age on 07th February 2020.

The principle that there is no unfettered power in taking executive and/or administrative decisions, is recognized in the case of **Marie Indira Fernandopulle and Another Vs. E.L. Senanayake, Minister of Land and Agriculture** 79 NLR 115 at page 120 as follows;

> *"Are the courts obliged to turn a deaf ear merely because some statutory officer is able to proclaim "I alone decide," "When I open my mouth let no dog bark?" If that be the position when rights of the subject are involved, then the court would have abdicated its powers necessary to safeguard the rights of the individual."*

With regard to the allegation leveled against the 1st Respondent, Chairman Public Service Commission that he was biased against the Petitioner, and had taken a personal interest in penalizing him ignoring the recommendations to exonerate the Petitioner, I am not inclined to accept the said position taken up by the Petitioner for the following reason,

i. The Petitioner had failed to submit any concrete material to establish his complaint except for him being one of the Petitioners in two cases filed against several public officials, including the 1st Respondent.

ii. When the decision to overrule the recommendation by the Formal Inquiry and convict him on the two charges against him the Chairman of the Public Service

Commission had been charged and the said decision had been taken by the incumbent chairman of the Public Service Commission.

It is also observed by this Court that, when the Petitioner was charge-sheeted by charge sheet dated 06.02.2020 for the second time with regard to his conduct at the National Procurement Commission, the Public Service Commission has considered the explanation submitted by the Petitioner, appointed an inquiry officer to conduct a Formal Disciplinary Inquiry but, decided to reject the conclusion of the inquiry officer when the inquiry officer had found him guilty of the charge sheet and decided that the charges have not been proven against the Petitioner and exonerated the Petitioner from the two charges leveled against him through the disciplinary order dated 30.08.2022.

It is also observed from the material placed before this Court that the second charge sheet based on the complainant made by the National Procurement Commission was also issued to the Petitioner on 06.02.2020, a day prior to his date of retirement, but the formal inquiry based on the said charge sheet was commenced on 24.07.2020 several months after his retirement and therefore the above decision had not influenced the decision to retire the Petitioner under Section 12 of the Minutes on Pension.

The Complaint before this Court was made by the Petitioner at a time he was sent on retirement under Section 12 of the Minutes on Pension and the Petitioner had prayed several reliefs with regard to the two disciplinary inquiries pending against him. As already referred to in this Judgment, the Petitioner had been exonerated from the 1st charge sheet by the order of the Administrative Appeal Tribunal and was exonerated from the 2nd charge sheet by the order dated 30.08.2022 of the Public Service Commission. When considering the material already discussed in this Judgment, especially with regard to the conduct of the Public Service

Commission in sending the Petitioner on retirement under Section 12 of the Minutes on Pension, I am of the view that the Petitioner was successful in establishing the violation of his Fundamental Rights for the equal protection of law guaranteed under Article 12 (1) of the Constitution.

In the said circumstances, this Court holds that the 1st to 10th Respondents have acted in violation of the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution.

We direct the state to pay as costs for litigation, a sum of Rupees 50,000/-

Application allowed with costs for litigation.

Judge of the Supreme Court

Justice K. Kumudini Wickremasinghe,

I agree,

Judge of the Supreme Court

Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court

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

SC FR 298/2021

In the matter of an application made in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Keliduwa Madduama Liyanage Janaka Priya,

"Shanthi", Galagama North,

Nakulugamuwa, Beliaththa.

Petitioner

Vs,

1. Mr. C.D. Wickramaratne,
   Inspector General of Police,
   Police Headquarters, Colombo 01.

2. Hon Mohan Priyadarshana De Silva,
   Member of Parliament,
   Near the Railway Station Dodanduwa (80250).

3. Hon. Rear Admiral Dr. Sarath Weerasekara,
   Minister of Public Security,
   4th Floor, "Suhurupaya", Battaramulla.

3A. Hon. Tiran Alles,
   Minister of Public Security,
   4th Floor, "Suhurupaya", Battaramulla.

4. Major General (Retired) Jagath Alwis,
   Secretary to the Ministry of Public Secretary,
   14th Floor, "Suhurupaya", Battaramulla.

4A. Mr. S. Hettiarachchi,
   Secretary to the Ministry of Public Security,
   14th Floor, "Suhurupaya", Battaramulla.

5. Hon. Justice Jagath Balapatabendi,
   Chairman, Public Service Commission.

6. Mrs. Indrani Sugathadasa,
   Member, Public Service Commission.

7. Mr. Sundaram Arumainayagam,
   Member, Public Service Commission.

8. Dr. T.R.C. Ruberu,
   Member, Public Service Commission.

9. Mr. Ahamod Lebbe Mohomed Saleem,
   Member, Public Service Commission.

10. Mr. Leedasena Liyanagama,
    Member, Public Service Commission.

11. Mr. Dian Gomes,
    Member, Public Service Commission.

12. Mr. Dilith Jayaweera,
    Member, Public Service Commission.

13. Mr. W.H. Piyadasa,
    Member, Public Service Commission.

14. Mr. M.A.B. Daya Senarath,
    Member, Public Service Commission.

    The 05th to 14th Respondents are at;

    Public Service Commission,
    No. 1200/9, Rajamalwatta Road, Battaramulla.

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

Respondents

Before: **Justice Vijith K. Malalgoda PC**
Justice Mahinda Samayawardhena
Justice Arjuna Obeyesekere

Counsel: Darshana Kuruppu with Buddhika Thilakarathna, Sudarsha de Silva, and Sahan Weerasinghe for the Petitioner,

Ms. Ganga Wakishta Arachchi, DSG, for the 1st,3rd, 4A, 5th, to 14th and 15th Respondents

Argued on: 16. 06.2023

Decided on: 14.12.2023

Vijith K. Malalgoda PC J

Petitioner to the instant application Chief Inspector of Police Keliduwa Madduma Liyanage Janaka Priya who was the Officer-in-Charge of Police Station Thelikada in Elpitiya Police Division had come before this Court alleging the violation of his fundamental right guaranteed under Article 12 (1) of the Constitution by transferring him with immediate effect from Thelikada Police Station to Tangalle Police Division for normal duties on the ground of exigencies of service, without following the proper procedure in transferring an Officer-in-Charge of a Police Station.

This Court on 25.07.2022 granted leave to proceed for the alleged violation of Article 12 (1) of the Constitution and at the time the matter was supported before this Court, the learned DSG who represented the Respondents informed the Court that the Respondents will be raising a preliminary objection for the maintainability of the application since the application had been filed out of time.

As revealed before us the Petitioner who joined the Sri Lanka Police Department on 09.03.1993 as a Reserve Sub Inspector was absorbed into the Police Regular Service as a Sub Inspector of Police with effect from 24.02.2006 and was promoted to the rank of Inspector of Police with effect from 25.09.2007. He was subsequently promoted to the rank of Chief Inspector of Police with effect from 01.01.2020. When the Petitioner was holding the rank of the Inspector of Police, on 03.06.2015 he was appointed as the Officer in Charge of the Police Station Uva Paranagama in the Bandarawela Police Division and was transferred to Thelikada Police Station in the Elpitiya Police Division on 15.03.2019.

Objection of Time Bar

The instant application was filed at the registry on the 30th September 2021 alleging that the Petitioner was subject to discriminatory and/or unreasonable and/or arbitrary transfer with immediate effect, communicated to him by Telephone Massage. (TTM 115, CTTM 133 dated 09.08.2021)

As per the provisions in Article 126 (2) of the Constitution any person who alleged that his fundamental right had been violated by executive or administrative action, may apply within one month thereof to the Supreme Court.

The strict application of the above provision required the Petitioner to come before this Court within one month from 09.08.2021.

However, whilst explaining his delay in invoking the fundamental rights jurisdiction before the Supreme Court, the Petitioner had submitted that he could not file the instant application any earlier than he did due to the Island-wide quarantine curfew imposed on 20th August 2021 and therefore the Petitioner did not have the access to his lawyer in order to obtain legal advice.

It is common ground that the country was under a lockdown period due to the COVID-19 pandemic which prevented the public from engaging in day-to-day activities. The Supreme on two occasions issued Temporary Rules under Article 136 of the Constitution to grant relief to litigants who faced difficulties due to the lockdown imposed in the Country. The first set of Rules namely Supreme Court (Temporary Provisions) Rules 2020 were published in the Government Gazette Extraordinary No 2174/4 dated 6th May 2020 covering a period between 16th March 2020 to 18th May 2020.

A similar rule was published in the Government Gazette Extraordinary No. 2211/56 dated 21st January 2021 covering the period 24th October 2020 to 31st January 2021.

However, the rules promulgated above were only applicable to the timeline (of sixty days) identified in rule 7 of the Supreme Court Rules 1990.

Since the rule referred to above had a limited application, a piece of legislation was introduced to address the difficulties faced by the litigants who faced the same difficulty with regard to cases that

were not covered by the rules promulgated by the Supreme Court under Article 136 of the Constitution.

An Act titled Corona Vires Decease 2019 (COVID-19) (Temporary Provisions) Act No. 17 of 2021 was introduced with effect from 1st March 2020 for a period of two years and the purpose of introducing the said legislation was identified in the long title to the said Act as follows;

> "AN ACT TO MAKE TEMPORARY PROVISIONS IN RELATION TO SITUATIONS WHERE PERSONS WERE UNABLE TO PERFORM CERTAIN ACTIONS REQUIRED BY LAW TO BE PERFORMED WITHIN THE PRESCRIBED TIME PERIODS DUE TO COVID - 19 CIRCUMSTANCES; TO ASSIGN ALTERNATIVE COURTS WHERE A COURT CANNOT FUNCTION DUE TO COVID - 19 CIRCUMSTANCES; TO CONDUCT COURT PROCEEDINGS USING REMOTE COMMUNICATION TECHNOLOGY TO FACILITATE THE CONTROL OF CORONA VIRUS DISEASE 2019 (COVID - 19); AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO."

Section 2 (1) of the said Act has identified the areas that will be covered by the Act as follows;

2. (1) Where any court, tribunal, or any other authority established by or under any law is satisfied that, a person was prevented from-

    a) Instituting or filing any action, application, appeal, or other legal proceeding, as the case may be, within the period prescribed by law for such purpose; or
    b) Performing any act which is required by law to be done or performed within a prescribed time period,

    due to any COID-19 circumstance, it shall be competent for such court, tribunal, or any other authority established by or under any law to allow, admit or entertain an action, application, appeal, other proceedings, or act, referred to in paragraph (a) or (b), notwithstanding the lapse of the time period prescribed by law for such purpose and subject to the provisions of section 9, the period within which such person was subject to such COVID -19 circumstance shall be excluded in calculating the said prescribed time period.

However, as per the provisions in section 2 (2), the relief granted under subsection (1) shall not apply to similar reliefs granted by rules promulgated by the Supreme Court under Article 136 including the rules referred to above.

In the said circumstances it is clear that the provision in the Corona Vires Decease 2019 (COVID-19) (Temporary Provisions) Act No 17 of 2021 is applicable to an application filed before this Court under Article 126 (2).

Under Section 6 of the said Act the burden of proof that the inability to comply with the prescribed time periods for the purpose of Section 2 is due to any COVID-19 circumstance, shall be on the party making the application for relief under such Section and in Section 8 "COVID-19 circumstance" is interpreted as,

a) COVID-19
b) Any other circumstance arising out of or consequential to the circumstances referred to in paragraph (a)

Section 5 restricts the relief period granted under Section 2 to a period not exceeding twelve months.

The Petitioner when invoking the jurisdiction of this Court had explained the delay in coming before this Court as the imposition of Island wide quarantine curfew imposed on 20th August 2021. When the Respondents raised a time bar objection among the objections filed before this Court, the Petitioner had filed papers to establish his position by way of counter objections, and according to the counter objections, the Petitioner logged his out entry on 11.08.2021 and thereafter from 14.08.2021-03.09.2021 underwent home quarantine for a period of 21 days as he was identified as a person exposed to a COVID-19 patient. He has also produced marked X1 the quarantine certificate issued by the Public Health Inspector countersigned by the MOH Beliatta.

The Petitioner has also produced press releases issued by the President's Office extending the quarantine curfew until 13th September, 21st September, and finally until 1st of October. The Petitioner had invoked the jurisdiction of this Court on 30th September one day prior to the lifting of the quarantine curfew.

In the case of ***Gamaethige V. Siriwardana (1998) 1 Sri LR 384 at 402,*** *Mark Fernando J* considering the time bar objection had observed the following;

> *"While the time limit is mandatory, in exceptional cases, on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or, delay on the part of the Petitioner, this Court has a discretion to entertain an application made out of time."*

When considering the material submitted by the Petitioner in the determination of the preliminary objections raised on behalf of the Respondents, I am satisfied with the explanation provided by the Petitioner in explaining the delay and therefore overrule the preliminary objection.

Whilst the Petitioner was serving as the Officer in Charge of the Police Station Thelikada, on 01.01.2020 was promoted to the rank of Chief Inspector of Police. As the Officer in Charge of Police Station Thelikada, the Petitioner along with his subordinate officers conducted several raids and apprehended several suspects for their involvement in unregulated sand mining and Timber Trafficking which were carried out in the Thelikada Police area at a large scale with the blessings of some local politicians for a long period of time.

Even though the Petitioner had taken up the above position and submitted that, due to his impartial conduct in carrying out raids and apprehending suspects, he was not popular among the Criminals and their "Masters" and created enemies who decided to get rid of him from Thelikada Police Station, but failed to submit material to justify his position before this Court. When explaining the above the Petitioner has taken up the position that, his sudden transfer from Thelikada Police Station has prevented him from obtaining the necessary material to place before the Supreme Court.

As further submitted by the Petitioner, while he was serving as Officer in Charge of Police Station Thelikada, he got to know that, an anonymous Petition had been received by his superior officers and an inquiry was conducted on the directives of the 1st Respondent, by a team of Police Officers headed by an Assistant Superintendent of Police of the Special Investigations Unit, and a statement was recorded from the Petitioner.

The Petitioner had reliable information that he was exonerated from the charges leveled against him in the anonymous petition, by the Special Investigations Unit, but to his surprise, he received a Police Message dated 09.08.2021 (TTM 155 and CTTM 139) informing him that he had been transferred to Tangalle Police Division for normal duties on the ground of exigencies of service. (P-4) Somewhere around March 2021 (five months prior to his transfer) the Petition received a letter through post by an anonymous sender said to have been signed by the 2nd Respondent who is a State Minister and a Member of Parliament from the Galle District requesting the 3rd Respondent to appoint one S.M.C.L. Silva an Inspector of Police who was serving at that time at Elpitiya Police Station to the Post of Officer in Charge of Police Station Thelikada, even though there was no vacancy for the above post at that time (a copy of the letter dated 28.03.2021 was produced marked P-3)

On behalf of the Petitioner, it was argued that the transfer order he was served based on exigencies of service, was a cover-up to transfer him out of Thelikada Police Station and to appoint a close associate of the Political leadership as OIC Thelikada Police Station. The Petitioner who was a Chief Inspector of Police and an Officer in Charge of a Station was transferred for normal duties (not to an Officer in Charge Position) was not a transfer on exigencies of service but in fact a demotion for him. At the time the Petitioner came before this Court, the Petitioner was attached to Kataragama Police Station for normal duties by Senior Superintendent of Police Tangalle.

On behalf of the Petitioner, it was further argued that as per the Government Gazette (Extra-ordinary) No 2202/24 dated 20th November 2020, the powers of the Public Service Commission to appoint and transfer the Officer in Charge of Police Stations had been delegated to the Inspector General of Police, and the Inspector General of Police is expected to appoint and transfer the Officer in Charge of Police Stations as per the scheme approved by the Public Service Commission.

However, in the absence of a scheme approved by the Public Service Commission, the transfer of Officer in Charge of Police Stations was to be implemented in terms of the provisions set out in rules 218-223 of the Procedural Rules of the Public Service Commission.

As observed by us clause 196 of the Procedural Rules identified the methods of transfer of Public Officer as follows;

> 196. Transfers are four-fold as indicated below,
>
> i. Transfers done annually
> ii. Transfers done on exigencies of service
> iii. Transfers done on disciplinary grounds
> iv. Mutual transfers on requests made by officers

Clauses 218 onwards up to clause 221 provided for the transfers made on exigencies of service as follows;

> 218. A Public Officer may be transferred on exigencies of service by the Appointing Authority for any one of the following reasons.
>
> i. Where the service of an officer is no longer needed at his present Station

ii. Where an officer is needed for service in another station or that particular officer himself is needed

iii. Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable

219. Before a Public Officer is transferred on exigencies of service, the Authority with Delegated Power shall personally satisfy himself that the need has actually arisen as specified in Section 218 above and that the transfer cannot be deferred till the next annual transfers.

220. Depending on the nature of the need for services that has arisen, the Appointing Authority may transfer an officer at short notice.

221. The Appointing Authority shall record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service. The Appointing Authority shall convey the reasons to the officer concerned.

In the transfer order that was communicated to the Petitioner by TTM-155 and CTTM-139, it is stated that,

"මහජන ආරක්ෂක අමාත්‍යාංශයේ ලේකම්ගේ 2021.08.06 දිනැති අංක 02/08/OIC/02/2021 දරණ ලිපියේ සඳහන් අනුමැතිය පරිදි පහත සඳහන් ස්ථාන මාරු කිරීම සේවයේ අවශ්‍යතාවය මත වහාම ක්‍රියාත්මක වන පරිදි නියෝග කරමි.

01. ප්‍ර.පොා.ප. කේ.එම්.එල්. ජනකප්‍රිය — තෙලිකඩ පොලිස් ස්ථානාධිපති තනතුරේ සිට සාමාන්‍ය රාජකාරි සඳහා තංගල්ල කොට්ඨාශය වෙත

From the material placed before this court by the Petitioner, it is revealed that,

a) The Petitioner was promoted to the rank of Chief Inspector with effect from 01.01.2020

b) There were no pending disciplinary matters except for the investigation carried out by the Special Investigation Unit regarding an anonymous Petition received against the Petitioner

On behalf of the Respondents, the 1st Respondent Inspector General of Police had filed objections by way of an affidavit, and in the said affidavit, the 1st Respondent had taken up the position that,

a) The transfer of the Petitioner was made in accordance with the law, having duly considered the facts and circumstances that prevailed at Thelikada Police area which is supported by several reports received by him including, an intelligence report which produced marked 1R1, report by the Superintendent of Police Elpitiya marked 1R2, Report of the Deputy Inspector General of Police Galle marked 1R3 and the Report of the Senior Deputy Inspector General of Southern Province marked 1R4.

b) The investigation carried out by the Special Investigation Unit was based only on one anonymous petition received against the Petitioner but in the reports referred to above, several allegations were leveled against the Petitioner mainly based on the intelligence report received against him.

c) The transfer of the Petitioner was not motivated due to the influence of the political leadership of the area and in fact, after the transfer of the Petitioner from Thelikada Police Station, Chief Inspector of Police Weerakonda Arachchige Shihan Dilanka was appointed as the Officer in Charge of Thelikada Police Station with effect from 27.08.2021 and IP S.M.C.L. Silva has only acted as Officer in Charge of Thelikada Police Station for a brief period of two weeks until the post was filled permanently.

As observed by this Court, the 1st Respondent when justifying his decision to transfer the Petitioner, had heavily relied on the four Reports produced marked 1R1-1R4, but as further observed by this Court, no steps were taken against the Petitioner with regard to the allegations referred to in those reports.

In 1R1, the Report of the Intelligence Unit Galle dated 20.09.2020, there is a reference to making false entries with regard to the use of the official vehicle assigned to the Police Station with the help of the Police Driver Sanjeewa, misusing the money allocated for fuel, having a close relationship with the people who involved in illegal sand mining, Neglecting duties by not visiting the Police Station, associating a set of favourite officers and with the help of one retired sergeant, collecting money from people involved in illegal activities.

It appears that the above allegations are very serious in nature, which can be leveled against an Officer in Charge of a Police Station, and therefore there is a duty cast upon the Respondents to place before the Court the steps that were taken against the Petitioner with regard to the allegation in 1R1. In

addition to the above, in the Report produced marked 1R2 prepared by the Superintendent of Police Elpitiya dated 06.09.2020 addressed to DIG Galle, there is a reference to the arrest of some suspects for operating a brothel and for possession of 3170 mg. of Heroin in the Police area of Thelikada on information received by the Senior DIG Southern Province through an informant, by a police party led by IP Thuduwage of Elpitiya District Crime Detective Unit and had taken up the position that the above detection would establish that the Petitioners had failed in his duties as OIC Thelikada. In addition to the above, there is a reference to an illicit affair of the Petitioner with a WPC and an investigation carried out by ASP II – Elpitiya with regard to a petition received against the Petitioner.

1R3 and 1R4 are two Reports one by the Deputy Inspector General of Police Galle addressed to the Senior Deputy Inspector General of Police Southern Province and the other by the Senior Deputy Inspector General of Police Southern Province addressed to the Inspector General of Police. 1R3 was received by the Senior Deputy Inspector General of Police on 07.10.2020 and 1R4 was received by the Inspector General of Police on 15.10.2020. Both reports were based on 1R1 and 1R2, produced by their subordinate officers but the allegation of having an illicit affair with a WPC was explained in detail in those two reports.

However, in both reports referred to above, i.e., 1R3 and 1R4 prepared by the Deputy Inspector General of Police Galle and the Senior Deputy Inspector General of Police Southern Province there is no reference to any disciplinary step taken against or pending against the Petitioner. As revealed before this Court during the argument, the authors of 1R3 and 1R4 had not even directed to record a statement and/or call for his explanation from the Petitioner with regard to the allegations leveled against him in those reports. Even though there is a reference to an investigation carried out by Assistant Superintendent of Police II Elpitiya with regard to a petition, no such material was placed before this Court to establish the allegations against the Petitioner.

As observed by this Court the 1st Respondent who received 1R4 on 15th October 2020, on 25th July 2021, nine months after the receipt of 1R4, based on the allegations against the Petitioner found in 1R4, had recommended to the Secretary to the Ministry of Public Security, Law and Order to transfer the Petitioner to Tangalle Division for normal duties. (1R6)

In the said recommendation, 1st Respondent had first requested to cancel his previous recommendation dated 18.06.2021 to transfer the Officer in Charge Rathgama Police Station to Anuradhapura Division for normal duties and to transfer OIC Achchuweli to Rathgama Police Station,

and had referred to the conduct of the Petitioner as revealed in the reports he received in October 2020 including the allegation of an illicit affair with WPC …… (කා.පො.සැ. සමඟ ප්‍රසිද්ධියේ අනියම් සම්බන්ධතාවයක් පවත්වන බවත්….) and recommend to transfer him out of Thelikada Police Station to Tangalle Division for normal duties and to replace him with OIC Achchuweli.

Acting on the said recommendation the 4th Respondent, Secretary to the Ministry of Public Security, Law and Order had transferred the Petitioner as recommended but no order was made to implement the second recommendation to replace him with OIC Achchuweli but made an order to direct the Senior Deputy Inspector General of the area to appoint a suitable officer to cover up duties (1R7) and the said directive was communicated to the relevant officer by the 1st Respondent by TTM155. (1R8)

It is on this directive only the Petitioner was transferred to Tangalle Division with immediate effect and on an acting basis he was replaced by Inspector of Police S.M.C.L. Silva.

As against the transfer order, the Petitioner appealed to the Public Service Commission, and as submitted by the Petitioner as well as the 1st Respondent, the said appeal was rejected by the Public Service Commission (1R12).

The observations forwarded to the 4th Respondent by the 1st Respondent and the observations of the 4th Respondent sent to the Public Service Commission with regard to the said appeal were produced before this Court by the 1st Respondent marked 1R9 and 1R10 respectively and the reason for his transfer was explained in those observations as follows;

1R9 “නිලධාරියා සම්බන්ධයෙන් බස්නාහිර පළාත භාර ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරයා සහ බුද්ධි අංශ විසින් පහත කරුණු වාර්තා කර තිබීම හේතුවෙන් ඔබගේ අනුමැතිය පරිදි 2021.08.09 තෙලිකඩ පොලිස් ස්ථානාධිපති තනතුරින් ඉවත් කර ස්ථාන මාරු කර ඇත.

ජ්‍යෙෂ්ඨ නියෝජ්‍ය පොලිස්පතිවරයාගේ වාර්තාවේ සඳහන් කරුණු සැකවින්;

- කා.පො.සැ..... නිලධාරිනිය සමඟ ප්‍රසිද්ධියේම අනියම් සම්බන්ධතාවයක් පවත්වන බවත් පො.කා.රි. ..... නිලධාරියාගේ සහය ඇතිව ලැගුම්හල් සඳහා මෙම නිලධාරිනිය ගෙන යාමට කටයුතු කරන බව
- 2021.08.14 දින නිලධාරිනිය ස්ථානයට පැමිණ විවේකය වාර්තා කර නොමැති බවත් ස්ථානාධිපතිවරයා විසින් දෛනික තොරතුරු පොත රැගෙන ගොස් උක්ත කාන්තා පොලිස් සැරයන් වරිය ලෙසට පෙනී සිට ස්ථානාධිපතිගේ අත් අකුරින් ඒදින පැය 22.00 ට විවේකය වාර්තා කර අසත්‍ය සටහන් යොදා ඇති බව

- මේ සම්බන්ධයෙන් පොලිස් විශේෂ විමර්ශන ඒකකය මඟින් විමර්ශනයක් ආරම්භකර ඇති බව"

1R10 "4 ඒ අනුව අයහපත් වාර්තා සලකා තෙලිකඩ හිටපු පොලිස් ස්ථානාධිපති ස්ථාන මාරු කිරීම සිදුකර ඇති බව දන්වමින් අවශ්‍ය කටයුතු සඳහා කාරුණිකව ඉදිරිපත් කරමි."

Even though no disciplinary action was commenced or recommended by the 1st Respondent except for the investigation carried out by the Special Investigations Unit on the directives of the 1st Respondent on one anonymous petition received against the Petitioner, the 1st Respondent had maintained the position that the transfer of the Petitioner was recommended under Clause 218 (iii) of the procedural rules of the Public Service Commission.

The objections filed before this Court by the 1st Respondent were challenged by the Petitioner and in the counter objections filed, the Petitioner had relied on four documents marked X-1 to X-4. The documents produced X-3 and X-4 refer to the investigation carried out by the Special Investigation Unit with regard to the petitioner and X-3 is a letter dated 20.05.2021 bearing No. PHQ/ED/05/07/522-2021 addressed to the Director Special Investigation Unit by the 1st Respondent and the said letter refers to the following;

> "That, the 1st Respondent by letter dated 07.09.2020 bearing No. Staff/03/IGP/OUT/05/4632/2020 advised the Director Special Investigation Unit to conduct an inquiry into an anonymous petition received by him regarding allegations of acts of misconduct of the Petitioner
>
> That, the said investigation had been conducted by the said unit, and the final report was forwarded to the 1st Respondent on 22.04.2021 bearing No. D/SIU/OW/533/2021. The Report and the entire investigation file had been forwarded to Director Disciplinary and conduct and report had been called by him.
>
> That, according to the report received from the Director, of Disciplinary and Conduct the allegations made against the Petitioner were not proved. However, it was recommended that WPC.... had been found guilty of dereliction of duty, for failing to enter her off duty, on 14.08.2020 in the daily information book, and enter the same on 15.08.2020 below the entry made by the Officer in Charge of Night Duty."

and Directed the Director of the Special Investigation Unit to communicate the disciplinary recommendation with regard to WPC ..... and to report the progress.

In response to the above direction, the Director Special Investigation Unit sent X-4 dated 01.06.2021 to the Senior Superintendent of Police Elpitiya directing him to take disciplinary action against WPC. …. Police Station Thelikada and to report.

As observed by this Court, the 1st Respondent is silent on these two letters. Even during the arguments before us, X-3 and X-4 were never rejected or challenged on behalf of the 1st Respondent. It is observed that the said letters are neither copied to the Petitioners nor sent to the personal file of the Petitioner. They are internal communications in the Police Department and the Petitioner has failed to explain to this Court, how he received these documents. However, in the absence of any challenge to X3 and X4 on behalf of the 1st Respondent, this Court will only take into consideration that by May 2021 a decision has been taken

a) To exonerate the Petitioner of the allegation leveled against him in the petition that was investigated by the Special Investigation Unit

b) To charge sheet WPC…. for her conduct with regard to the allegation of leaving the Police Station without making an official entry in the relevant register.

However as already referred to by me in this judgment the 1st Respondent's recommendation to transfer the Petitioner was mainly based on the allegation with regard to his alleged involvement with the WPC …., in the recommendation sent to the Secretary to the Ministry of Public Security Law and Order on 25th July 2021 approximately two months after a decision was taken that the material is insufficient to establish charges against the Petitioner.

When the Petitioner appealed to the Public Service Commission against his transfer order, the 1st Respondent submitted his observation (1R9) dated 10th January 2022 mainly on three issues

a) That the petitioner was having an illicit affair openly with WPC ….
b) That on 14.08.2020 WPC …. had left the Police Station without reporting her off duty and the Petitioner had made a false out entry in his handwriting to help the WPC

c) That there is an inquiry pending against the petitioner with regard to the above incident by the Special Investigations Unit, when in fact the inquiry is concluded and the decision had already being communicated by that time.

When making his recommendation to transfer the Petitioner out of Thelikada Police Station (1R-6), the 1st Respondent failed to ascertain the correct position with regard to the inquiry pending against the Petitioner and totally depended on the reports he received from the Senior Deputy Inspector General of Police Southern Province eight months before.

It is also observed by this Court that there was an attempt to oust the Petitioner from Thelikada Police Station by the Higher Ranks of the Southern Police Division to please the political leadership, and when transfer order was received to replace Officer in Charge Thelikada with a suitable officer to act, Inspector of Police SMCL Silva who was recommended to the above post (P-3) by the 2nd Respondent was appointed to act as the Officer in Charge of Thelikada Police Station.

In the case of ***Range Bandara Vs. General Anuruddha Ratwatte and another (1997) 3 Sri LR 360*** *Mark Fernando J* having observed the following;

> "The 2nd Respondent stated that it was a continuation of the end-of-the-year transfer from 1995 and that 68 officers were transferred at the same time. Although he did not make any reference to the 'exigencies of service,' the 1st Respondent claim that the 2nd Respondent had told him it was on account of the exigencies of service……."
>
> As for alleged complaints after October 1994, since the 2nd Respondent did not refer to any reports relating to such complaints, it is quite unsafe to act on the 2nd Respondent's bare assertion that he was 'made aware' of complaints, particularly <u>because these were not disclosed to the Petitioner so that he could have been heard in his defence</u>……
>
> But there is a more serious objection to allowing that material to be tendered. Not having given the Petitioner even an inkling that his transfer was on account of such complaints, and had pretended that the transfer was a normal annual transfer-with 68 other transfers-can the 2nd Respondent now be allowed to say that it was on disciplinary grounds, 'so that proper inquiries could be conducted', in respect of the complaints against him? All the complaints referred to in the October 1994 reports were not proceeded with, either

because they were withdrawn or because there was insufficient evidence. Even if there were subsequent complaints (i.e., between October 1994 and December 1995) why was no action taken in 1995? ....."

had held that;

"In my view, the summary transfer of the Petitioner to a distant place was unreasonable, on the material available to the 2nd Respondent, and it was also a misuse of discretion to withhold from him, the true reason for the transfer because it deprived him of the opportunity to rebut it. I hold that the 2nd Respondent's decision to transfer the Petitioner was arbitrary, capricious, and unreasonable, and in violation of the Petitioner's fundamental right, under Article 12 (1)." (Emphasis added)

The petitioner was transferred from Thelikada Police Station on, the ground of exigencies of service, but the 1st Respondent was silent on the relevant provision of Clause 218 of the Procedural Rule he acted upon when making the recommendation.

As already observed in this order, the 1st Respondent when making his recommendation had heavily relied on the alleged illicit affair of the Petitioner but also referred to the misuse of the official vehicle and fuel allocated to the Police Station and having a close relationship with criminals of the area but in the absence of any pending investigation or inquiry based on these allegations the Petitioner is totally unaware of the reasons for his transfer except the fact that he is being transferred on exigencies of service.

Clause 218 refers to three different criteria a transfer could be implemented on exigencies of service. The Petitioner who faced the transfer on exigencies of service was deprived of properly defending himself without knowing the real reason for his transfer, when compared to a transfer made on disciplinary grounds, where the officer is well aware of the reason for his transfer. The person who is transferred on exigencies of service should have been informed of the reasons behind his transfer. If the Petitioner was informed of the reasons for his transfer he could have properly defended himself before the Public Service Commission when he submitted the appeal and the 1st Respondent would not have been able to mislead the Public Service Commission.

The allegation that the 2nd Respondent was involved in the transfer of the Petitioner was not established before this Court except for the fact that he wanted a particular officer to be appointed

as the Officer in Charge of Thelikada Police Station. The material that was placed against the 4th Respondent that he had arbitrarily and/or unreasonably approved an *adhoc* transfer of the Petitioner was not established since the 4th Respondent was acting on the recommendations of the 1st Respondent but the 4th Respondent was reluctant to implement the full recommendation made by the 1st Respondent.

When considering the material already discussed in this judgment it is clear that the conduct of the 1st Respondent in recommending the transfer of the Petitioner on exigency of service is in violation of the fundamental rights of the Petitioner guaranteed under Article 12(1) of the Constitution. The Petitioner was not successful in establishing any violation of his fundamental rights by the other Respondents.

For the reasons given in this judgment, I hold that the 1st Respondent has violated the Fundamental Rights of the Petitioner guaranteed under Article 12(1) of the Constitution by transferring the Petitioner from Thelikada Police Station.

Since the Petitioner is presently serving as an Officer in Charge of a Police Station, this court will not make any order to have him back at Thelikada Police Station.

Application allowed.

Judge of the Supreme Court

Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court

Justice Arjuna Obeyesekere,

I agree,

Judge of the Supreme Court

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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No.107/2011

Weheragedara Ranjith Sumangala,

No. 137/2, Beliaththawila,

Kindelpitiya, Millewa.

PETITIONER

vs.

Bandara, Police Officer,

Police Station, Mirihana.

1nd RESPONDENT

Inspector Bhathiya Jayasinghe,

Officer-in-Charge – Emergency Unit,

Police Station, Mirihana.

2nd RESPONDENT

Egodawele, Chief Inspector,

Head Quarters' Inspector,

Police Station, Mirihana.

3rd RESPONDENT

Ajith Wanasundara,

No. 255, Malagala, Padukka.

4th RESPONDENT

M.W.D. Tennakone,

Superintendent of Police,

Nugegoda Division,

Office of the Superintendent of Police,

Nugegoda.

5th RESPONDENT

Mahinda Balasuriya,

Inspector General of Police,

Police Headquarters,

Colombo 01.

6th RESPONDENT

Hon. Attorney General,

Attorney General's Department,

Hulftsdorp,

Colombo 12.

7th RESPONDENT

BEFORE : S. THURAIRAJA, PC, J

KUMUDINI WICKREMASINGHE, J

K. PRIYANTHA FERNANDO, J

COUNSEL:

Viran Corea with Sarita de Fonseka and Thilini Vidanagamage for the Petitioner.

Sandamal Rajapakshe with Laknath Seneviratne for the 1st, 2nd, and 4th Respondents.

Nalin Ladduwahetti, PC with Kavithri Ubeysekara instructed by Ms. Lilanthi De Silva for the 3rd Respondent.

Induni Punchihewa, SC for the 5th, 6th and 7th Respondents.

WRITTEN SUBMISSIONS:

Written submissions on behalf of the Petitioner on 21st March 2012.

Written submissions on behalf of the 1st, 2nd, and 4th Respondents on 19th November 2013.

Written submissions of the Attorney-General on 26th September 2023.

ARGUED ON : 27th September 2023

DECIDED ON : 14th December 2023

S. THURAIRAJA, PC, J.

The Petitioner, namely Weheragedara Ranjith Sumangala (hereinafter sometimes referred to as "the Petitioner"), filed this application on 28th March 2011 against the 1st to 6th Respondents (hereinafter sometimes jointly referred to as "Respondents") seeking relief in respect of the alleged infringement of his fundamental rights guaranteed by and under the Constitution of the Democratic Socialist Republic of Sri Lanka. Accordingly, on 26th April 2011, when the case was called for support, State Counsel representing the Respondents pleaded for time to be granted in order to expeditiously obtain instructions regarding the injuries purportedly sustained by the Petitioner. Thereafter, as the Respondents have not filed limited objections, on 30th May 2011, the Court granted leave to proceed for the alleged violation of Articles 11,

12(1), 13(1) and 13(2) of the Constitution in the manner and circumstances hereinafter described.

FACTUAL MATRIX

As stated by the 1st, 2nd, and 4th Respondents in their Statement of Objections dated 6th December 2011, the facts and circumstances of the instant case take place in the course of an investigation under the direction and instructions of the 5th Respondent, founded on a complaint by an unknown party concerning several thefts which occurred in the Moragahahena-Padduka area during the period preceding the events of this case. As stated by the Respondents, the Petitioner was arrested on 17th December 2010 on the 'reasonable suspicion' that he was part of a thieving gang connected to these thefts. However, upon the perusal of the evidence presented to this Court by both parties, there appear to be several inconsistencies with the Respondent's narration of the incidents of this case, which I will address in the course of this judgment. Thus, for the sake of clarity, I will first consider in brief the facts as narrated by both the Petitioner and the Respondent separately as stated in the Petition and Statement of Objections, respectively.

Facts as stated by the Petitioner

The Petitioner, who was at one time a soldier in the Sri Lankan Army, was discharged from military service on or about 7th September 2009, and at the time of this application was employed as a tinsmith and earned his living by doing motor vehicle repair work. On or about 15th December 2010 at around 9:15 a.m. the Petitioner was walking towards the 'garment junction' in Madagala to get into a three-wheeler of a friend named Chandana who was taking him to work at a house in Kahawala. At the said junction, the Petitioner noticed a motorcycle with the 4th Respondent and another. The Petitioner states that it was only after he was arrested in the manner elucidated hereinafter that he came to realise this other person with the 4th Respondent to be a police officer. The Petitioner got into the said three-wheeler and

proceeded towards Kahawala. A few minutes into the journey the Petitioner realized that they were being surrounded on all 4 sides by motor bicycles and the three-wheeler was forced to stop. The 1st Respondent together with another police officer forced themselves into the back seat of the three-wheeler on either side of the Petitioner. The 1st Respondent and the other police officer forcefully took custody of the Petitioner's mobile phone, threatening the Petitioner saying "දගලන්න එපා, මරණවා [Don't struggle, will kill you]".

The Petitioner was then taken to the Dambara Cemetery and was questioned by the Respondents about one Chinthaka. The Petitioner stated that he did not know anything of this person apart from the fact that he owned cattle and a bakery. Upon giving this response, the Respondents started kicking the Petitioner's thighs several times till he was numb. Thereafter, 1st Respondent made a phone call to another, and the Petitioner heard him say "සර්, අල්ල ගත්තා [Sir, we caught]". Thereafter, as per the instructions of this 'sir' over the phone, the Respondents removed the Petitioner's t-shirt and blindfolded him with it.

About 15 minutes later, the Petitioner, still blindfolded, was dragged and put into a van with his hands cuffed at the back, at which time there were several other Police officers present. The 2nd Respondent questioned the Petitioner whether he had retained his gun from the military, to which the Petitioner answered in the negative. The 2nd Respondent had threatened the Petitioner that he would bury the Petitioner alive in the cemetery, causing the Petitioner to fear for his life.

Thereafter the 2nd Respondent had asked the 1st Respondent to put Chillie powder into two shopping bags and to tie it over the Petitioner's head so as to compel him to breathe in the Chillie powder. While the Petitioner was caused to choke and suffocate by being compelled to inhale the Chillie powder, the Police officers had watched the Petitioner and had only removed it when it seemed as though the Petitioner was about to die. Once again, the Petitioner was questioned regarding the weapon and the Petitioner had answered in the negative just as he had done before. The entire process

of torture by Chillie powder was continued repeatedly while the other Police officers were striking the Petitioner's cheeks until he was bleeding out of his mouth and continued to beat him with what the Petitioner described as "three-wheeler belts".

The Petitioner states that during this process of torture, the 2nd Respondent further questioned the Petitioner about several other robberies he was purported to have been involved in, with a specific focus on the robbery said to have occurred at the house of the 4th Respondent whose house the Petitioner had overheard people say had been broken into a few days ago. When the Petitioner said he knew nothing about it, the entire process of torture continued. The Petitioner states that the torment came to a point that he could not bear it anymore, and, in fear for his life, he falsely admitted to robbing the said house of the 4th Respondent. In an attempt to be relieved of the torture, the Petitioner had fabricated a false incident, that, a person named Chaminda went into the house of the 4th Respondent while the Petitioner kept a lookout, and another named Nimal was also involved. The Petitioner also falsely admitted that he was given Rs.50,000 for having assisted in the robbery and that he did not know about the balance of monies stolen.

Thereafter, the beating stopped, and the 1st and 2nd Respondents along with the other Police Officers went to have a meal at the "Hasthigiriya Hotel" in Meepe taking the Petitioner in the van along with them. The Petitioner was not given any food to eat. The Petitioner was thereafter blindfolded and handcuffed, and taken to a place to shower, and thereafter to a place which the Petitioner later learnt was the Mirihana Police Station. The Petitioner was further questioned at the Police station by the 1st and 2nd Respondents with the aim of getting an admission from the Petitioner as to the robberies, to which he had previously admitted having succumbed to the torment caused by the Respondents. This time, however, the Petitioner was informed that he had 15 cases of Robbery against him in Padukka and was questioned further regarding this. Having answered in the negative, the Petitioner was once again subject to torture by way of Chillie powder as described above and additionally, two officers were

standing on his thighs and jumping until his legs were numb while continuing the questioning. Unable to bear the pain and agony, the Petitioner had once again succumbed to the pressure and had made various admissions, including that he had broken into the co-operative store, removed the rubber from a lorry, stolen some gold jewellery, broken into his brother-in-law's house and stolen the television, VCD player and cassette player.

The Petitioner states that once all the admissions were written down by the 1st and 2nd Respondents, the beatings ceased for a while. Thereafter, since the Petitioner had indicated that he could show the purportedly stolen goods in his house, he was put into a van and brought back to his house around 6:00 a.m. on or about 16th December 2010 by the 1st, 2nd, and 4th Respondents and about four other Police Officers. The 2nd Respondent thereafter went into the house and asked the Petitioner's wife whether the television and the pendant worn by the Petitioner's child were stolen. The Petitioner's wife responded that the said television had been purchased from Singer Sri Lanka on an easy-pay scheme and showed the receipts. The 2nd Respondent further inquired as to the whereabouts of the stolen gold jewellery, to which the Petitioner responded that it was buried near the plantain trees. However, upon searching the place the 1st and 2nd Respondents discovered that there were no such goods. The 2nd Respondent asked the Petitioner as to why he had lied, to which the Petitioner responded that he had no option but to lie because he was afraid, which resulted in the 2nd Respondent and another Police Officer beating the Petitioner mercilessly, subjecting him to such degrading treatment in front of the Petitioner's wife and two children of ages 09 and 02 years respectively, traumatising his wife and children so much so that his eldest daughter fainted upon witnessing her father mistreated in such a manner.

The Petitioner states that one Police Officer began assaulting his legs and back with a pole handed over by the 4th Respondent until the pole broke. The Petitioner was then dragged into the kitchen and questioned again about the purported stolen goods.

Since there were no such goods, the Petitioner was mercilessly assaulted over and over again with another "පොල්ලක්" [club] until that, too, broke. The Petitioner states that thereafter the said Police Officers began trampling his face since he had fallen on the ground. The Petitioner states that at one point his wife and two children were taken to one of the rooms and were not permitted to come out, to prevent them from shouting, while the 1st and 2nd Respondents and other Police Officers continued to assault the Petitioner.

Immediately thereafter, the Petitioner was taken in the van again to the Mirihana Police Station. The Petitioner was taken to the top floor of the said Mirihana Police Station, handcuffed and asked to sit on the floor beside the chair. The Petitioner then saw that Chandana, the driver of the three-wheeler, was permitted to make a statement and to leave thereafter. The Petitioner was thereafter taken to what appeared to be 'the torture chambers' of the Mirihana Police Station, where he was assaulted mercilessly. The Petitioner states that one of the Police Officers assaulted the Petitioner's thighs with a pole till he was numb and fell. Thereafter a Police Officer began assaulting him with a 'three-wheeler belt' and then he was hung on a beam upside down with his legs and kept suspended for a while. Eventually, when he was taken down, he was forced to have a bath. The Petitioner states that thereafter he was taken upstairs again and questioned by the 1st and 2nd Respondents as to details of the aforementioned Nimal and Chaminda and one Jayasena also known to the Petitioner. Then one of the Police Officers said that they, too, had been brought and that the Petitioner would see them in the morning. The Petitioner states that on or about 17th December 2010, he was taken to a place within the Mirihana Police Station, where the said Nimal, Chaminda and Jayasena were. It was apparent that they too had been subjected to torture. The Petitioner was questioned again about their involvement in the purported robbery of the 4th Respondent's house, and he answered in the affirmative as he could not endure being tortured anymore. However, the torture continued and all of them were beaten mercilessly. The Petitioner states that thereafter he was taken upstairs, and one hand and leg were cuffed together onto one leg of a table, as on several other occasions.

The Petitioner further states that even though the Petitioner had explained to the Consultant Judicial Medical Officer that he had been cuffed to a table, it had been erroneously recorded as him having been cuffed to a bed, as demonstrated in the Medico-Legal Report.

The Petitioner states that on or about 18th December 2010, he was taken down to the said 'torture chambers' again where he saw the said Nimal suspended on a beam with his hands. Then again, the Petitioner was questioned as to whether he was saying the truth and the Petitioner at that point, said that he was compelled to fabricate it previously, only because he was powerless to escape the torture and merely to gain relief from the pain. Thereafter, on the same day, i.e., on or about 18th December 2010, the Petitioner was hung by his hands and suspended on a beam, while the said Nimal was taken down. During this time the Petitioner was questioned repeatedly regarding all alleged cases and as he denied his involvement, the torture persisted. In a while, the 1st and 2nd Respondents placed a chair on which the Petitioner was ordered to stand and yet again answer the questions posed at him with the sole purpose of manipulating him to secure an admission. However, the moment it was denied the chair was pulled away, causing the Petitioner to remain suspended by his hands. The Petitioner was left suspended in this manner for a while, causing him to suffer immense pain. The Petitioner states that eventually, when he could not bear it anymore, he admitted only to the robbery of the Co-operative Store and removing the rubber from the lorry and he also said that only Nimal, Chaminda and he were involved and that Jayasena was not. The Petitioner states that thereafter, the 2nd Respondent ordered that he (and others) be taken down, made to bathe, given Panadol and eventually given some food. The Petitioner states that even though he had been initially arrested on or about 15th December 2010, until such time (on or about 18th December 2010) he had not been given even a morsel of food. The Petitioner states that even then, the torture did not stop as they were taken upstairs and all of them except for Jayasena were beaten mercilessly with three-wheeler 'belts'. In fact, the Petitioner claims that he was beaten with a 'three-wheeler belt' by the 2" Respondent about 25-30

times until he was in unbearably excruciating pain. Thereafter, Nimal and Chaminda were questioned as to what was stolen and where the goods were. Subsequently, Nimal's wife brought an oven claiming that it was one of the 'stolen goods' and thereafter eventually the beatings ceased and they were handcuffed.

The Petitioner states that he came to know that his wife, on coming to learn that he was detained at the said Mirihana Police Station, had on several occasions come to the Police Station, but was refused access on every such instance. In fact, on one such occasion, when the Petitioner's wife was desperately searching for the Petitioner, she was informed by one of the female Police Officers at the Mirihana Police Station that the Petitioner was there but that she had been instructed not to grant access to him. The Petitioner further states that on or about 19th December 2010, all of them were confined to a cell and at around 6:40 p.m., were taken to the residence of the Acting Magistrate of Awissawella to obtain a detention order for 48 hours under the pretext of having to conduct further investigations. Accordingly, the detention was extended, and the suspects were to be produced in Court at 9:00 a.m. on 21st December 2010. The Petitioner however further states that the 2nd Respondent obtained such detention order by stating that the Petitioner and others had been arrested only on 18th December 2010.

The Petitioner further states that when the said Acting Magistrate questioned the Petitioner as to whether any injuries were inflicted while in custody, the Petitioner had said there had not been such. The Petitioner states that the reasoning for answering in this manner despite all the torture he had undergone over the past days was due to the fact that he feared for his life, being fully aware of the consequences he was likely to face and what further suffering he would be made to endure by the Police while being detained if he had informed the learned Acting Magistrate of the treatment meted out to him by the Respondents. The Petitioner further states that in the circumstances, the learned Acting Magistrate too, without any examination of the Petitioner, recorded that there were no injuries, as borne out by the said record.

The Petitioner states that he (and others) was not produced before the Court on 21st December 2010, in contravention of the said detention order.

Therefore, the learned Magistrate, on 22nd December 2010 declared that such detention was unlawful and ordered the Registrar of Court to call for a report from the Deputy Inspector General - Nugegoda on the matter. The Petitioner states that later that evening, they were produced before the learned Magistrate at which point, he informed the learned Magistrate about the torture endured. Consequently, the Petitioner was enlarged on personal bail of Rs. 50,000.00 and the learned Magistrate ordered that he (and others) be given necessary medical attention and that the case record be placed in the safe.

The Petitioner states that after his release, on or about 25th December 2010 the Petitioner was admitted to the Matale Hospital as it was not safe for him to remain at his residence. Thereafter, on or about 27th December 2010, he was examined by the Consultant Judicial Medical Officer, Matale who concluded that the nature and pattern of the injuries sustained by the Petitioner were consistent with the history given by him and he was further referred to a Neurologist and a Physiologist for further examination.

The Petitioner states that he made a complaint to the Human Rights Commission on or about 6th January 2011 concerning the aforesaid conduct and actions of the said Respondents and/or other persons set out in this application involving torture, inhuman and degrading treatment of the Petitioner and the infringement of the Petitioner's fundamental rights as guaranteed under the Constitution. However, on or about 10th March 2011 when the matter was taken up for Inquiry, the said 2nd Respondent was not represented and therefore the Inquiry has been postponed indefinitely.

The Petitioner states that on or about 28th January 2011 the Petitioner (as well as the said Nimal, Chaminda and Jayasena) received notice to be present in the Horana Magistrate's Court in respect of certain charge(s) against him. On such occasion, the Petitioner was once again unlawfully remanded and refused bail purportedly on the

basis that there was a probability that he would continue to commit such offences if released on bail, even though the Petitioner had never had charges against him except the purported charges as elucidated above.

The learned Magistrate further ordered the Officer-in-Charge of the Moragahahena Police Station to submit a report on the purported stolen goods. However, as demonstrated by such report dated 11th February 2011, none of the charges against the Petitioner could be sustained and the Petitioner was consequently released on bail.

Facts as stated by the 1st, 2nd and 4th Respondents

The 1st, 2nd, and 4th Respondents by their Joint Statement of Objections, in denying all the averments of the Petition, stated that they were conducting investigations on the instructions and directions of the 5th Respondent, acting on an anonymous public complaint as to several thefts in the area, and that Petitioner and the 3 others were suspected to be involved in these thefts as a gang. Respondents are of the position that the arrest and taking into custody of the Petitioner and the subsequent detention were during these investigations as per the instructions given by the 5th Respondent. The Respondents also deny that the Petitioner was arrested on 15th December 2010 and state that he was arrested on 17th December 2010 with minimum force used only because there was resistance on the part of the Petitioner. The Respondents further hold the position that no injury or torture was caused to the Petitioner in the course of the custody, which allegedly was from 17th to 22nd December 2010.

Facts as stated by the 3rd Respondent

In summarizing the Affidavit by the 3rd Respondent denying the averments of the Petition, while the 3rd Respondent does affirm that he is the Head Quarters Inspector of the Mirihana Police area, and that he is unaware as to the other building referred to by the Petitioner where the torture had taken place. He also claims to be unaware of the other circumstances of the instant application. While being generally unaware of the torturous conduct which transpired according to the Petitioner, he affirms that no

such torture or injury was caused to the Petitioner by the Respondents, and thus states that he cannot be held responsible for any of the aforementioned conduct.

Written Submissions on behalf of the 7th Respondents

The 7th Respondent makes an identical narration to that of the 1st, 2nd, and 4th Respondents, and goes a step further in the Written Submissions filed on their behalf to state that the Petitioner was arrested and investigated under and in accordance with the provisions of the *Code of Criminal Procedure (Special Provisions) Act, No. 15 of 2005*, and have rightly obtained an order from the Magistrate to extend the period of investigation accordingly, and thereby the Respondents are not in violation of the fundamental rights guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution. At this instance, I wish to reiterate the fact that the events of the instant case occurred within the period beginning from 15th December 2010 until 22nd December 2010.

Affidavit of the 5th Respondent dated 05th October 2023

I wish to place on record that there was no Statement of Objections, nor any Written Submissions filed by and on behalf of the 5th Respondent up until 26th September 2023, on which date the 5th Respondent had tendered an Affidavit, which did not challenge much of the averments in the Petition dated 28th March 2011 nor the Counter Affidavit of the Petitioner. The said Affidavit only makes reference to the fact that the Respondents had sought permission from the learned Magistrate to further detain the Petitioner and several other suspects for the purposes of further investigations into a complaint made with regard to several incidents of thefts. The 5th Respondent states that permission was sought and granted pursuant to section 2 of the *Code of Criminal Procedure (Special Provisions) Act, No.2 of 2013*.

ANALYSIS

I wish to first place on record that the subject matter and the issues surrounding the instant case do not concern the guilt of the Petitioner with regard to the criminal

allegations levelled against him. The instant case concerns only and is limited to considering whether there has been a violation of the Petitioner's fundamental rights guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution, by the Respondents for the manner in which they conducted themselves towards the Petitioner.

Even the reconvicted criminals of the most notorious kind are entitled to their fundamental rights. No number of allegations or even past convictions can abrogate or limit one's fundamental rights except as permitted by the Constitution under Article 15. The presumption of innocence as enshrined within Article 13(5) of the Constitution, being a cornerstone of the due process of law, must at all times be upheld by investigating officers with the utmost conviction.

As such, needless to say, the allegations against the Petitioner, of which the Respondents invited this Court's attention, matter only insofar as to determine whether there is a reasonable suspicion or reasonable complaint against the Petitioner in considering Article 13(1). Such allegations matter nought in respect of all other fundamental rights—especially Article 11, for torture, inhuman and degrading treatment are absolutely abominable in law under all circumstances.

Article 13(1): Arrest

Article 13(1) of the Constitution provides as follows:

> *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*

This Article insists upon two fundamental requirements in making an arrest. Firstly, it provides in no uncertain terms that an arrest may only be made "according to procedure established by law". Secondly, it further requires that a person be given reasons for his arrest. Section 23(1) of the *Code of Criminal Procedure Act, No. 15 of 1979* once again insists upon this Constitutionally recognized requirement of giving reasons for the arrest.

Police officers are required to act strictly within the parameters of law in effecting arrests. Here, the words 'according to procedure established by law' means, of course, according to the procedure set out in any specific written law established for the purposes of regulating the manner in which an arrest can be made, and, primarily with regard to the instant case, the *Code of Criminal Procedure Act, No. 15 of 1979*.

Before deciding whether there had been an illegal arrest, it is necessary to determine whether there had, in fact, been an arrest.

It is well established in our law by cases such as ***Namasivayam v. Gunawardena*** **[1989] 1 Sri LR 394** and ***Piyasiri v. Fernando, ASP*** **[1988] 1 Sri LR 173,** that an arrest can take place even without physical confinement. In the instant case, this question does not trouble us as the Respondents themselves have not denied arresting the Petitioner. The position held by the 1st, 2nd and 4th Respondents was that they had arrested and detained the Petitioner according to the provisions of the law using minimum force. [Paras 5 and 6 of the Statement of Objections of 1st, 2nd, and 4th Respondents dated 6th December 2011].

The procedure with regard to arresting a person without a warrant is set out in Chapter IV B (Sections 32-43) of the *Code of Criminal Procedure Act, No. 15 of 1979*. Section 32 therein states as follows:

(1) "Any peace officer may without an order from a Magistrate and without a warrant arrest any person -

(a) who in his presence commits any breach of the peace;

(b) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;

(c) having in his possession without lawful excuse (the burden of proving which excuse shall He on such person) any implement of house-breaking;

(d) who has been proclaimed as an offender;

(e) *in whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing;*

(f) *who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody;*

(g) *reasonably suspected of being a deserter from the Sri Lanka Army, Navy or Air Force;*

(h) *found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence;*

(i) *who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any act committed at any place out of Sri Lanka, which if committed in Sri Lanka would have been punishable as an offence and for which he is under any law for: the time being in force relating to extradition or to fugitive persons or otherwise liable to be apprehended or detained in custody in Sri Lanka."*

The Respondents insisted that there had been a reasonable complaint made and reasonable suspicion against the Petitioner, placing reliance upon the letter dated 10th October 2010, written by the villagers to the office of Deputy Inspector General, but bearing the name of the 5th Respondent, Deshabandu Tennakoon as the recipient—who was, in fact, a Superintendent of Police at the time material, as per his own admission by his Affidavit dated 05th October 2023 at paragraphs 1 and 5.

As held in ***Walahahangunawewa Dhammarathana Thero v. Sanjeewa Mahanama*** **SC FR 313/09, SC Minutes of 03.07.2013 at p. 89,**

"In order to arrest a person under this subsection [subsection (1) of section 32] there should be a reasonable complaint, credible information or a reasonable suspicion. <u>Mere fact of receiving a complaint or information does not permit a</u>

peace officer to arrest a person. Police Officer upon receipt of a complaint or information is required to commence investigations and ascertain whether the complaint is a reasonable complaint, the information is credible or the suspicion is reasonable before proceeding to arrest a person." (Emphasis added)

In ***Channa Pieris v. Attorney-General*** **[1994] 1 Sri LR 1 at p. 46,** His Lordship Amerasinghe J states as follows,

"A reasonable suspicion may be based either upon matters within the officer's knowledge or upon credible information furnished to him, or upon a combination of both sources. He may inform himself either by personal investigation or by adopting information supplied to him or by doing both, as the third respondent suggests he did in the matters before us, and as it was the case in Ragunathan v. Thuraisingham [SC Application 158/88 - SC Minutes of 23.08.89] A suspicion does not become "reasonable" merely because the source of the information is creditworthy. If he is activated by an unreliable informant, the officer making the arrest should, as a matter of prudence, act with greater circumspection than if the information had come from a creditworthy source. However, eventually the question is whether in the circumstances, including the reliability of the sources of information, the person making the arrest could, as a reasonable man, have suspected that the persons were concerned in or committing or had committed the offence in question"

It was held by Kulatunga J in ***Gamlath v. Neville Silva and Others*** **[1991] 2 Sri LR 267 at p. 274,** citing ***Muttusamy v. Kannangara*** **52 NLR 324 at 327** that,

"[A] suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officer's own knowledge or on the state-ments made by other persons in a way which justify him giving them credit"

Having referred to some of the aforementioned authorities, Aluwihare J in ***Ganeshan Samson Roy v. M.M. Janaka Marasinghe and Others*** **S.C (F/R) 405/2018, SC Minutes of 20.09.2023 at p. 11** opined as follows:

> *"Police officers cannot mechanically make an arrest upon a mere complaint received, without forming the opinion that the allegation is credible. Thus, a police officer is required to make necessary investigations, unless the facts are obvious, to verify whether the complaint is credible or whether the information provided is reliable. An arrest upon a general or vague suspicion would lead to significantly abridging the personal liberties guaranteed to a person by the Constitution…"*

However, if we were to stretch this logic irrationally, that could prove counterproductive and pernicious towards the legitimate goals of the criminal justice system. In this regard, Amerasinghe J in ***Channa Pieris v. Attorney-General*** **[1994] 1 Sri LR 1 at p. 46** further explicated as follows:

> *…the officer is not required to have reasonable grounds to believe. As Dias J. pointed out in Buhary v. Jayaratne [(1947) 48 NLR 224] "believe" is much stronger than "suspect" and involves the necessity of showing that a reasonable man must have felt convinced in his mind of the fact in which he believed. (See per Seneviratne J. in Withanachchi v. Cyril Herath and others [SC 144-45/86 - SC Minutes 01.07.88]. However the officer making an arrest cannot act on a suspicion founded on* ***mere*** *conjecture or* ***vague*** *surmise. His information must give rise to a* ***reasonable*** *suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature but of a positive and definite character providing reasonable ground for suspecting that the person arrested was concerned in the commission of an offence."*

It is to be noted that the aforementioned letter dated 10th October 2010 addressed by name to the 5th Respondent marked 'Rx(1)' is an anonymous letter. It is signed by the "aggrieved villagers/neighbours". As such, the credibility of the information contained

therein is most certainly questionable. The officers must in such instances be prudent to conduct an investigation so as to confirm such information before acting on the same. However, the Respondents have failed to produce sufficient evidence to satisfy this Court that they had conducted an appropriate investigation prior to instigating the arrest of the Petitioner.

It was most certainly reasonable for then Superintendent of Police, T.M.W.D. Tennakoon, to direct an investigation with regards to the complaint so received, as it is the duty of a police officer to duly respond to such complaints, even when they are anonymous. However, once such an order or direction is made by a senior police officer, as I shall discuss in detail later on, they are duty-bound to ensure that such directions are properly carried out, with due regard to the procedure established by law.

It appears in the instant case that the Respondents have failed to sufficiently investigate the anonymous complaint made. I do not wish to state, by any means, that police officers should refrain from acting on anonymous complaints, but rather that an officer must take some steps to confirm the legitimacy of such complaints. While wide powers are vested with police officers to carry out their investigations, when it comes to any act which may impinge upon the individual liberties of a person, officers must observe utmost caution. The officers in question could have, at the least, interviewed some persons living in the area and recorded their statements so as to verify the veracity of the allegations levelled against the Petitioner and several others by the anonymous letter and the unnamed informant. However, no evidence has been produced before this Court by the Respondents to establish that such actions have been taken. Therefore, in my view, it cannot be said that the Respondents have acted upon a *reasonable* complaint or upon *reasonable* suspicion as required by section 32 of the *Code of Criminal Procedure Act, No. 15 of 1979*.

Informing the Reasons for Arrest

Apart from Article 13(1) itself, section 23(1) of the *Code of Criminal Procedure Act, No. 15 of 1979*. Section 23(1) provides as follows:

> *"In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.*

As Sharvananda J, as His Lordship was then, stated in ***Mariadas Raj v. Attorney-General*** **FRD(2) 397 at pp. 402-404,**

> *"The law is solicitous for the freedom of the individual and has therefore enacted that the person who is arrested is entitled to know the reason for his arrest and has elevated this right into a fundamental right with the attendant sanctions for its breach… Article 13(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding the personal liberty in all legal systems where the Rule of Law prevails… The purpose of this rule is to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the mind of the arresting official and disabuse his mind of the suspicion which actuated the arrest."*

I unreservedly echo this astute observation of His Lordship. As apparent from the rationale so set out, the requirement of informing the reasons for one's arrest also marks a vital step in the investigation process. Even where an officer arrests the correct person, who is subsequently convicted by a court of law, if such person is not informed of the reason for his arrest at the time of arrest, that amounts to a violation of Article 13(1) of the Constitution, without prejudice to such conviction. Misidentifications are common enough that it is vital for law enforcement authorities to afford any person being arrested an opportunity to explain themselves.

In the instant case, as stated by the 1st, 2nd and 4th Respondents in their joint Statement of Objections dated 06th December 2011, the Petitioner and 3 others were arrested by the 2nd Respondent [para 6] while the Respondents were on police patrol, pursuant to the investigation which commenced under the order and instructions of the 5th Respondent [para 4].

As relayed by the Petitioner, the 1st and 2nd Respondents, while the three-wheeler was in motion, forced themselves into the same three-wheeler in which the Petitioner was travelling compelling the driver to take them to the cemetery, where the first acts of torture were recorded and was continuously questioned and compelled to admit to having committed or been associated with the several thefts in the area, particularly the theft of the house of the 4th Respondent. The law requires police officers to inform a person being arrested of the reason for the arrest with such precision so as to enable the arrestee to offer an explanation. There is no indication of such reasons being provided to the Petitioner as the three-wheel driver was compelled to drive towards the cemetery.

For the aforementioned reasons, the Court finds that there has been a violation of the Petitioner's fundamental rights as guaranteed under Article 13(1).

13(2): Subsequent Detention and Production Before Magistrate

To address the question as to whether the Petitioner has been produced before a Magistrate within the legally prescribed time period, it is vital to determine the exact time of arrest. The version of events submitted by the Petitioner and the Respondents greatly differed in this regard.

Irregularities as to the date of arrest

The Petitioner states in his Petition that he was taken to the Dambara Cemetery where the chain of torturous acts began, as narrated by the Petition dated 15th December 2010. However, all Respondents, particularly the 1st, 2nd and 4th Respondents by their Statement of Objections and Written Submissions and the 5th Respondent by his

Affidavit dated 05th October 2023, strongly held the position that the arrest was in fact made on 17th December 2010. The only evidence presented by the Respondents to substantiate this position is the copies of the "හදිසි ඇමතුම් අංශයේ දෛනිකව පවත්වාගෙන යනු ලබන හදිසි ඇමතුම් තොරතුරු පොත" submitted as part and parcel of the Statement of Objections, marked 'Rx(2)'.

However, I wish to place on record that, having perused the said true copies of the purported 'Information Book' submitted by the 1st, 2nd and 4th Respondents marked 'Rx(2)', it is observable that the arrest of the Petitioner was, in fact, recorded to have been made on 18th December 2010, and not on 17th December 2010 as claimed in the Statement of Objections of the Respondents. This in itself is sufficient to construe that there are irregularities in the Respondent's narration of the facts and circumstances of the instant case, significantly weakening their position.

Per contra, the Petitioner relied on the affidavits of several other persons to substantiate his position, which provided this Court with a broader picture of what had transpired.

Accordingly, reproduced below [*verbatim* for accuracy] are several of the averments in the Affidavit of the Patrick Aarachchige Nimal Perera (hereinafter referred to as "Nimal Perera"), produced marked 'P12', annexed to the Counter Affidavit of the Petitioner, which concern the factual matrix of the instant case, along with an approximate translation of each averment. Nimal Perera was another who was subjected to torture along with the Petitioner during the period in question and was a party previously known to the Petitioner.

> "3. 2010. 12.15 වන දින රාත්‍රී 9.00-10.00 පමණ මගේ ජංගම දුරකථනයට රංජිත් සුමංගල යන අයගේ දුරකථනයෙන් ඇමතුමක් ලැබුණා. කතා කළ අය පවසා සිටියේ මට ටිකක් වැඩිවෙලා රබර් වත්තේ වැටිලා ඉන්නවා. පොඩ්ඩක් වරෙන් මාව ගෙදරට දාන්න යනුවෙනි. නමුත් ඒ කටහඬ රංජිත්ගේ නොවන බව මා හඳුනා ගත් බවත්, ඒ නිසා මම ත්‍රීවිල් පාර්ක් එකේ ඉන්න මගේ යාළුවන්ට කෝල් කරලා ඒ බව දැනුම් දුන් බවත් ප්‍රකාශකර සිටිමි.

[3. I state that on 2010.12.15 around 9:00-10:00 p.m. I received a phone call from one Ranjith Sumangala, stating that he had a little too much to drink and had fallen down in the Rubber estate. I was asked to come and take him home. However, I noticed that the voice was not that of the said Ranjith, and therefore I called my friends at the three-wheel park informed them of this.]

4. එවිට ඔවුන් කිව්වේ, අපි දැන් පොලිසියට ඇවිල්ලා ඉන්නේ, රංජිතුයි චන්දනයි නෑ ඒ ගැන පැමිණිලි කරන්න. පොඩ්ඩක් ඉන්න අපි රබර් වත්තට එන්නම්, කවුද ඉන්නේ කියලා බලන්න කිව්වා. ඊට පස්සෙ මමත් ත්‍රිවිල් පාර්ක් එකේ යාළුවෝත් රබර් වත්තට ගිය බවත්, කවුරුත් හිටිගේ නැති බවත්, පසුව මම ගෙදර ගොස් නිදා ගත් බවත් ප්‍රකාශකර සිටිමි.

[4. I state, thereafter what they said was that they were at the police station at that point, Ranjith and Chandana were missing, and have come to file a complaint about it. I was told to wait for a while and that they would come to the rubber estate to see who is there. After that, I went to the rubber estate with my friends of Three-wheel Park, and no one was there, and after that I went home and slept.]"

Upon Nimal Perera informing his friends at the three-wheel park, the same informed Nimal Perera that they were down at the Police station to file a complaint, as the said Ranjith and one Chandana were missing—Chandana being the driver of the three-wheel which the Petitioner had travelled in the same morning. The friends at the three-wheel park informed Nimal Perera that they would come to Rubber Estate in a short while. When they had arrived at the Rubber estate, there was no one to be found. Nimal Perera had gone home afterwards.

Varusha Hannedige Suwinitha Kumari (hereinafter referred to as "Suwinitha Kumari"), the wife of the Petitioner, in her Affidavit dated 25th March 2011, produced marked 'P3', annexed to the Petition of the Petitioner, states as follows:

"3. 2010. 12. 15 වන දින මාගේ ස්වාමිපුරුෂයා වැඩට යන බව පවසා උදේ නිවසින් පිටව ගිය බව ප්‍රකාශකර සිටිමි.

[3. I state that on 15.12.2010 my husband left the house in the morning saying that he was going to work.]

4. එදින රාත්‍රී 9.00 ට පමණ ස්වාමිපුරුෂයාගේ මිතුරෙකු දුරකථනයෙන් කතාකර, ස්වාමිපුරුෂයා ගෙදර ආවාද කියා විමසා සිටියා. මා නැහැ කිව්වා. පසුව මා සෑම තැනම ස්වාමිපුරුෂයා පිළිබඳව සෝදිසි කළ බවත්. නමුත් ඔහු පිළිබඳ තොරතුරක් දැනගැනීමට නොහැකි වූ බවත් ප්‍රකාශකර සිටිමි.

[4. I state that on the same day at about 9:00 p.m., a friend of my husband called over the phone questioning if my husband had come home after work that day. I said no. Thereafter I went everywhere to inquire regarding my husband's whereabouts but was not able to find anything.]

5. නැවත එදින රාත්‍රී 11.00 පමණ චන්දන යන අයගේ මල්ලී ඇතුළු තිදෙනෙකු අපගේ නිවසට පැමිණියා. රංජිත් ආවාද කියා විමසා සිටියා. චන්දන යන අයද නිවසට පැමිණියේ නැති බව ඔවුන් පවසා සිටි බවත්, මාගේ ස්වාමිපුරුෂයා වැඩට ගොස් ඇත්තේ චන්දන නමැති අයගේ ත්‍රීරෝද රථයෙන් බවත් ප්‍රකාශකර සිටිමි.

[5. I state that on the same day at around 11.00 p.m. 3 others including the younger brother of one Chandana came to our house. They asked whether Ranjith had come home. Also mentioned that said Chandana too had not come home. I also state that my husband had gone to work that morning in said Chandana's three-wheeler.]

6. **2010. 12. 16 වන දින උදේ 6.00 පමණ** ගෙදර කවුද කියා කතා කරනවා ඇසී, මා බලන විට පිරිසක් දෙරකඩ සිටියා. පොලිස් නිල ඇඳුමින් තිදෙනෙකු පමණ සිටි අතර, සිවිල් ඇඳුමින් තවත් සිවි දෙනෙකු පමණ සිටියා. එම පිරිස සමග අසල්වාසී අයෙකු වන අජිත් වනසුන්දර නමැති අයත් සිටි බවත් ප්‍රකාශ කර සිටිමි.

[6. I state that on 16.12.2010 at 6.00 a.m. having heard someone calling asking 'who is home'. I found a group of people at our doorstep when checked. In police uniform there were around three and in civil clothing there were around four. With that group a neighbour named Ajith Wanasundara was also there.]

7. **ඒ අතර. මාගේ ස්වාමිපුරුෂයාද සිටි අතර**, ඔහුගේ අත් පිටුපසට කර අත්වලට මාංචු දමා තිබුණි. අඳුනා ගන්න බැරි තරමට ඔහුගේ මුහුණ ඉදිමී තිබුණි. කෙළින් සිටගැනීමට නොහැකි තත්වයේ ඔහු සිටි බවත්, හරිහැටි සිහි කල්පනාව නොතිබුණු බවත් ප්‍රකාශකර සිටිමි.

[7. I state that my husband was also present among them. His hands were handcuffed behind his back. His face was swollen to the point of being unrecognizable. He was unable to stand straight and did not seem to be fully conscious.]"

[Approximate translation and emphasis added]

Furthermore, Devanarayanage Rathna Deshapriya (hereinafter referred to as "Rathna Deshapriya"), the employer of the Petitioner, under whom the Petitioner was employed at the time material, in his Affidavit dated 04th March 2011, produced marked 'P1' annexed to the Petition of the Petitioner, states as follows:

"5. රංජිත් ටිංකරින් වැඩ පුරුදු වීමට මා සමග එක්වුයේ 2004 වසරේදී පමණය. එතැන් පටන්, ඔහු මා සමග එක්ව අඛණ්ඩව වැඩ කරන බවත් ප්‍රකාශ කර සිටිමි.

[5. Ranjith initially joined to train under me as a tinsmith in 2004, and from then onwards he continued to be consistently employed under me.]

6. 2010. 12. 14 දිනදී, ඔහු මා සමග වැඩ කරනු ලැබුවේ කහවල, ගොරොක්ගොඩ නිවසක කැරවෑන් වෑන් රථයක ටිංකරින් වැඩ කළ බවත්, ඔහුට දෛනික වැටුපක් ලබාදුන් බවත් ප්‍රකාශ කර සිටිමි.

[6. I state that on 14.12.2010, Ranjith did some work with me on a caravan at a house in Kahawala, Gorokgoda, and was paid daily wages.]

7. 2010. 12. 15 වන දින රංජිත් වැඩට ඒමට පරක්කු වූ බවත්, ඒ අවස්ථාවේ ඔහුට මා දුරකථනයෙන් කතා කළ බවත්. එවිට ඔහු පවසා සිටියේ පරක්කු වුණා, ඊළඟ බස්එකේ හරි ඉක්මණින් එන බව පවසා සිටි බව ප්‍රකාශ කර සිටිමි.

[7. I state that on 15.12.2010, Ranjith got late to work, and at that instance, I called him on the phone and he stated that he got late and assured me that he would try to arrive at work as soon as possible at least in the next bus.]

8. 2010. 12. 15 වන දින රාත්‍රියේ චන්දන යන අයගේ මල්ලී මට දුරකථනයෙන් කතා කර, රංජිත් හා ඔහුගේ සොහොයුරා පැමිණ ඇති බවත් නමුත් රෑ වනතුරු ගෙදර පැමිණ නැති බවත්, මංජුල එගොල්ලන්ව කොහේ හරි යැව්වද කියා මගෙන් විමසා සිටි බවත් ඒ අවස්ථාවේ මා ඔහුට අද රංජිත් වැඩට ආවේ නැති බව ඔහුට කියූ බව ප්‍රකාශ කර සිටිමි.

[8. I state that on the night of 2010.12.15 the younger brother of one Chandana spoke to me over the phone, stating that though Ranjith and his brother had come from there, they had not returned home till late, and asked me whether Manjula had sent them somewhere. At that point, I told him that Ranjith didn't come to work today.]

9. පසුව මා හා අනෙකුත් මිතුරන් රංජිත් හා චන්දන ගැන සෙවූ බවත්, පාදුක්ක පොලිසියටද ගොස් මොවුන් ගැන සොයා බැලූ බවත් නමුත් තොරතුරක් දැනගන්නට නොලැබුණු බවත් පසුව, මිරිහාන පොලිසිය විසින් රංජිත්වත් චන්දනවත් අත්අඩංගුවට ගෙන ඇති බව චන්දනගේ මල්ලිගෙන් දැනගන්නට ලැබුණු බවත් ප්‍රකාශකර සිටිමි

[9. I state that thereafter some of my other friends and I went on a search for Ranjith and Chandana, and even went to the Padukka Police Station but were unable to find any information. Later, we got to know from the brother of the said Chandana that Ranjith and Chandana had been arrested by the Mirihana Police.]

10. 2010.12.16 වන දින උදේ මා රංජිත්ගේ නිවසට පැමිණි බවත්, එදින උදේ 6.00 විතර රංජිත්ව ගෙදරට ගෙනවිත් නැවත පොලිසිය රැගෙන ගිය බව ඔහුගේ බිරිඳගෙන් දැනගන්නට ලැබුණු බව ප්‍රකාශකර සිටිමි.

[10. I state that on 16.12.2010, I visited Ranjith's house, and I got to know from his Wife that around 6.00 a.m. Ranjith was brought to the house and taken away again by the Police.]"

The Petitioner had also mentioned at his medical examination by the Judicial Medical Officer on 27th December 2010, that he was taken into custody on 15th December 2010, and was subjected to torture since then. The Judicial Medical Officer concludes in his report that the injuries are consistent with this history narrated by the Petitioner.

Therefore, having considered the totality of the above evidence presented by both Parties, the affidavits of the Petitioner which corroborate the fact that the Petitioner was taken in by the Police on 15th December 2010, and the irregularities in the ''"හඳිසි ඇමතුම් අංශයේ දෙදෙනිකව පවත්වාගෙන යනු ලබන හදිසි ඇමතුම් තොරතුරු පොත"' excerpts submitted by the 1st, 2nd and 4th Respondents, it can be concluded that the Petitioner was, in fact, taken into custody by the Police on 15th December 2010, and was thus in police custody up until 22nd December 2010, on which date he was presented before the Avissawella Magistrate.

Code of Criminal Procedure, Act Nos. 15 of 2005 and 42 of 2007

In this regard, it is also necessary to duly appraise the position taken by the Respondents in defence.

Article 13(2) states that *"[e]very Person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived or personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."*

Sections 36, 37 and 38 of the *Code of Criminal Procedure Act, No. 15 of 1979* deal with the detention of persons arrested without a warrant.

Section 36 states that,

> *"A peace officer making an arrest without warrant shall **without unnecessary delay** and subject to the provisions herein contained as to bail **take or send the person arrested before a Magistrate** having jurisdiction in the case."*
>
> *[Emphasis added]*

Section 37 provides that,

> *"Any peace officer **shall not detain in custody or otherwise confine** a person arrested without a warrant **for a longer period than under all the circumstances of the case is reasonable**, and such **period shall not exceed twenty-four hours** exclusive of the time necessary for the journey from the place of arrest to the Magistrate."*
>
> *[Emphasis added]*

The core issue of law which arises in the instant case is what was raised in the Written Submissions of the Attorney-General on behalf of the 5th, 6th and 7th Respondents, and by the 5th Respondent in his Affidavit tendered on 27th September 2023.

The position thus held by Respondents is that the act of arresting the Petitioner was done pursuant to the *Code of Criminal Procedure Act, No. 15 of 2005*, particularly section 2 which provides as follows:

> *"Notwithstanding anything contained in the Code of Criminal Procedure Act, No. 15 of 1979 other than the provisions of section 43(A) of that Act, any peace officer shall not detain in custody or otherwise confine a person **arrested without a warrant** for a longer period than under all the circumstances of the case is reasonable, and **such period shall not exceed twenty - four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate**:*

Provided that where the arrest is in relation to an offence as is specified in the Schedule to this Act, such period of detention in police custody may, on production before him of the person arrested and on a certificate filed by a police officer not below the rank of the Assistant Superintendent of Police submitted prior to the expiration of the said period of twenty - four hours, to the effect that it is necessary to detain such person for the purpose of further investigations, ***be extended upon an order made in that behalf by the Magistrate for a further period not exceeding twenty - four hours, so however that the aggregate period of detention shall not exceed forty-eight hours."***

[Emphasis added]

As mentioned previously, the Respondents state that the Petitioner was arrested in the course of a purported investigation into the thefts in the Moragahahena-Padukka area, and such investigations were under the order and instructions of the 5th Respondent, and accordingly, the Respondents contend that the Petitioner was taken into custody in compliance with the abovementioned provisions.

Before considering whether the above provisions have been complied with, I wish to place on record that the *Code of Criminal Procedure Act, No. 15 of 2005* which came into effect from 31st May 2005, by virtue of section 7 provides for the time frame within which the Act would be effective as follows.

"The provisions of this Act shall be in operation for ***a period of two years from the date of its coming into operation****."*

[Emphasis added]

Thus, the *Code of Criminal Procedure Act, No. 15 of 2005* remained valid only until 31st May 2007, unless further extended by any preceding written law or Gazette Extraordinary under the Order of the Minister of Justice. Accordingly, the duration was further extended by another two years by the *Code of Criminal Procedure (Amendment) Act, No. 42 of 2007* which came into effect on 09th October 2007, by virtue of section 7(1) read along with section 8 of the said Act, as provided below.

*"7. (1) The provisions of this Act shall be in operation for **a period of two years** commencing from the thirty-first day of May, 2007.*

8. Any act or thing done for which enabling provision is made under this Act, during the period commencing on the thirty-first day of May, 2007 and ending on the date of the coming into operation of this Act, shall be deemed to have been done validly."

[Emphasis added]

Thus, the *Code of Criminal Procedure (Amendment) Act, No. 42 of 2007* was to remain valid only until 31st May 2009, unless further extended by any preceding written law or Gazette Extraordinary under the Order of the then Minister of Justice. Thereafter, it was not renewed nor extended up until the events of the instant case transpired which was on 15th December 2010. During this period, there was no such Act in operation which would validate the acts done during 15th-22nd December.

The next extension was done by **Gazette Extraordinary No. 1708/5 - 30th May 2011**, which further extended the duration of application of the *Code of Criminal Procedure (Amendment) Act, No. 42 of 2007* to a further period of two years, commencing from 31st May 2011. Thereafter, the *Code of Criminal Procedure (Special Provisions) Act, No. 02 of 2013* came into effect from 06th February 2013, which provided for an amended provision under section 2, as follows.

"Notwithstanding anything contained in the Code of Criminal Procedure Act, No. 15 of 1979 other than the provisions of section 43 A of that Act, any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the presence of the Magistrate:

Provided that, where the arrest is in relation to an offence as is specified in the Schedule to this Act, such period of detention in police custody may, on production before him of the person arrested and on a certificate filed by a police officer not below the rank of the Assistant Superintendent of Police submitted prior to the expiration of the said period of twenty-four hours, to the effect that it is necessary to detain such person for the purpose of further investigations, ***be extended upon an Order made in that behalf by the Magistrate for a further period not exceeding twenty-four hours, so however that the aggregate period of detention shall not exceed forty-eight hours****:*

Provided further, that any person arrested and ***detained for a further period*** *shall be* ***afforded an opportunity to consult an Attorney-at-Law of his choice and to communicate with any relative or friend of his choice*** *during the period of such detention."*

[Emphasis added]

However, the law as it stands today under the *Code of Criminal Procedure (Special Provisions) Act No. 02 of 2013*, section 8 provides as follows.

"8. Where during the period commencing on May 31, 2009 and ending on the date of the coming into operation of this Act, any power, duty or function was exercised, performed or discharged by any person to whom such power, duty or function was assigned by or under Criminal Procedure (Special Provisions) Act, No. 42 of 2007, such power, duty or function which was so exercised, performed or discharged, shall, notwithstanding that the provisions of the said Criminal Procedure (Special Provisions) Act, No. 42 of 2007 was not in operation during the that period, be deemed to have been validly exercised, performed or discharged, as if the said Act was in operation during such period:"

The effect of the above provision is to retrospectively give effect to any acts between 31st May 2009 to 6th February 2013, despite there not being any express written law to extend the time duration at the time in suit in the instant case. The 5th Respondent by

his Affidavit tendered on 27th September 2023, relies on the aforementioned provisions to justify the detention of the Petitioner from 15th to 22nd December 2010, or, as was fabricated by the Respondents, from 17th to 22nd December 2010. This Court accepts that the Respondents have relied upon the correct legal provisions, but they have failed in its application in the instant case. Regardless of whichever date the arrest was made on, by virtue of section 2, no person can be detained in the custody of the police without being presented before the Magistrate for a time duration exceeding 24 hours.

In the instant case, the first time in which the Petitioner and the 3 others tortured and kept in custody were presented before the Acting Magistrate was on 19th December 2010 which was well over the 24-hour time limit. It was thereafter that a further extension was granted by the Acting Magistrate, to another 48 hours, during which period the Petitioner was not allowed to consult an Attorney, nor was he allowed to communicate with his wife and friends who had arrived at the Mirihana Police station but were denied access to him. This is a clear violation of the procedure set out above.

As such, it is palpably clear that the Petitioner has not been produced before the Magistrate as required by law. Therefore, I find that the Petitioner's fundamental rights under Article 13(2) of the Constitution have also been violated by the conduct of the Respondents.

Article 11: Torture, Inhuman and Degrading Treatment

Article 11 of the Constitution provides that,

> *"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and Article 3 of the European Convention on Human Rights similarly prohibit torture and cruel, inhuman or degrading treatment or punishment in virtually identical terms.

Amerasinghe J, in ***W.M.K. De Silva V. Chairman, Ceylon Fertilizer Corporation*** **(1989) 2 SLR 393 at p. 405,** explains the ambit of Article 11 of the Constitution as follows:

> *"In my view Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as 'the victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach of a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third per son ought to do or refrain from doing, as the case may be."*

This is in line with Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which Sri L is a State Party since 1994. Accordingly, Article 1 provides for the definition of Torture as follows:

> *"…torture means any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as* ***obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed,*** *intimidating or coercing him or a third person, or any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person*

acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

[Emphasis added]

Atukorale J, in ***Amal Sudath Silva v. Kodituwakku Inspector of Police and Others* (1987) 2 SLR 119 at p. 126**, observing the universality of this right, states,

"Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torture some, cruel or inhuman treatment on another. ***It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee.*** *Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its, fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion".*

[emphasis added]

As has clearly been set out by His Lordship, this right is one which applies universally, without restrictions, to all persons, from saints to the most notorious. Article 11 encapsulates one of the most basic elements of human dignity, the principle which underpins all fundamental rights. As there can never be a justification for torture, this Court is only troubled with deciding whether the Petitioner has been subjected to such

treatment which can be construed as torture, cruel, inhuman or degrading as contemplated in Article 11 by the Respondents.

In making these decisions, the evidence presented by the Petitioner must be considered in light of other corroborative evidence—primarily the medical reports assessing the physical and mental well-being of the Petitioner after the incident in question.

To summarize what has been provided in the factual matrix above, the Petitioner provides within the averments of the Petition dated 28th March 2011 a detailed description of the physical harm caused by the 1st, 2nd and 4th Respondents, primarily having hit him on several occasions with 'three-wheeler belts', handcuffed and tied to beams, suffocating him, beaten him physically, and having tied a bag of chilli powder over the Petitioner's head and compelling him to inhale it.

In his Medico-Legal Report of the Petitioner, Dr. Ajith Jayasena, Judicial Medical Officer, of the District General Hospital, Matale, makes note under Section 2.1 of the said Report of the Injuries identified having examined the Petitioner on 27th December 2010 which was a few days after the incident in question. Accordingly, the JMO makes note of several healing abrasions along the back of the Petitioner's neck and chest, and across his arms, and of several resolving contusions on the Petitioner's arm, back of his chest and abdomen. The report concludes that the injuries identified are consistent with the medical history as narrated by the Petitioner, and special attention was drawn to the injuries noted under section 2.1 No. 11 and 13 which are consistent with the Petitioner being suspended with a ligature at wrist joint. This medical report most certainly corroborates the averments as to the torturous acts committed against the Petitioner.

Furthermore, the said report concludes that the injuries identified in the medical examination are clearly consistent with the history given by the Petitioner. The Petitioner has further been diagnosed as suffering from Post Traumatic Stress Disorder with depressive features, having left ulnar claw with both ulnar and median nerve

damage, suffering from injury to spinal nerves and has restricted movement of the neck and also the possibility of left-side mild ulnar nerve lesion without gross axonal degeneration and neuropraxia, all of which clearly indicate the gravity of the injuries suffered by the Petitioner at the hands of the said Respondents as complained of through this application.

Once again, I wish to place emphasis on the Affidavit of Nimal Perera, marked "P12", annexed to the Counter Affidavit of the Petitioner, which also establishes the torture endured by the Petitioner and other 3 detainees in the hands of the 1st, 2nd, 4th and 5th Respondents. Nimal Perera was taken in by the Police on 16th December 2010. The said affidavit states as follows:

> "15. පසුදා උදේ එනම් 2010. 12. 17 වන දින උදේ එම ගොඩනැගිල්ලේ පිටුපස තිබෙන පරණ ගොඩනැගිල්ලකට මාව ගෙන ගියා. එක ඇතුලේ ග්‍රවුන්ඩ් එකක් තිබුණා. ග්‍රවුන්ඩ් එක වටේ කොන්ක්‍රීට් කාමර තිබුණා. පොලිස් නිලධාරීන් 6-7 ක් විතර හිටියා. **ජනේලෙයි උළුවස්සයි අතරින් පරාලයක් දෙලා බැඳලා නිරුවත් කර මාව එල්ලුවා.** මගේ මල්ලි, රංජිත් හා නිශාන්ත එතැන හිටියා. එතන රබර් හෝස් එකක්. ත්‍රීවිල් රබර් පටියක්. පොල්ලක් ද තිබුණු බවත් ප්‍රකාශකර සිටිමි.
>
> *[15. I state that the next morning, that is, on the morning of 17.12.2010, I was taken to an old building located behind the said building. Inside of the said buiiing, there was a ground. There were concrete rooms around the ground. There were about 6-7 police officers.* ***They strung a rafter between the windows and the door and stripped me naked and suspended me****. My younger brother, Ranjith and Nishantha were there. There was a rubber hose, a three-wheel rubber band and also a stick.]*
>
> 16. භාතිය ජයසිංහ නිලධාරියා මට කිව්වා, වේලාසනින් කියන්නේ. ගූටි කන්නෙ නැතුව කේස් 21 තියෙනවා භාර ගනින් කියලා. මම කිව්වා මම මුකුත් දන්නෙ නෑ කියලා. එවිට එහි සිටි අනෙක් නිලධාරීන් 6 දෙනාම වරින් වර ත්‍රීවිල් රබර් පටියෙන් පහර දුන්නා. පහර දෙන ගමන් කිව්වා, දැන් බාර ගනින් කියලා. මම කිව්වා රංජිත් කීව්වා

නම් එයා ගිහින් ඇති. මම දන්නෙ නෑ කියලා. එවිට භාතිය ජයසිංහ, ගුටි නොකා ඇත්ත කියපං කියලා පවසා සිටි බව ප්‍රකාශ කර සිටිමි.

[16. I state that the officer namely, Bhathiya Jayasinghe told me, I am telling you this earlier, there are 21 cases, admit them without getting beaten. I said I don't know anything. Then the other 6 officers who were there, thrashed me with a three-wheel rubber band. While thrashing, they kept asking to admit. I said that if Ranjith had told them anything, he must have gone and that I don't know. Then Officer namely, Bhathiya Jayasinghe asked to tell the truth without getting beaten]

17. ඊට පස්සෙ රංජිත්වත් එතන්ට ගෙනාවා. දැන් මෙයාගෙන් අහපන් කියලා මට කිව්වා. මම රංජිත්ගෙන් ඇහුවා ඇයි බොරු කියන්නෙ කියලා. මෙයා ගිහින් ඇති සර් මම දන්නෙනෑ මෙයාගෙන්ම අහගන්න කියලා මම කිව්වා. පසුව රංජිත්වත් නිරුවත් කර, මාව බිමට බස්සවා රංජිත්ව එල්ලුව බව ප්‍රකාශකර සිටිමි.

[17. I state that Ranjith was also brought there. They told me to ask him then. I asked Ranjith why he was lying. I said, "Sir, I don't know, if he has gone, ask him". Later, Ranjith was also stripped naked and I was taken down while Ranjith was suspended.]

18. මගේ කකුල්දෙක බැඳලා ඔලුව පහතට දමලා එතන තිබුණු වතුර පොන්ඩ් එකට ඔබමින් හුස්ම ගන්න බැරුව දඟලන විට ගොඩට ගත්තා. නැවතත් එසේ කළා. මේ ආකාරයට අපි හතර දෙනාවම වරින්වර දැමීම බවත්, සවස 4.00 පමණ වන තුරු මේ ආකාරයෙන් අපට නොයෙක් වධහිංසා කළ බවත් ප්‍රකාශකර සිටිමි.

[18. I state that, my legs were tied; my head was sunk and I was pressed into the pond of water and taken out when I was struggling to breathe. The same was repeated. I state that the 4 of us were repeatedly sunk into the water in turn in this way and we were subjected to various forms of torture in this manner until around 4:00 in the evening.]

19. මිරිස් කුඩුයි. පෙට්‍රල් හා ෂොපින් බෑග් ගෙනාවා. ෂොපින් බෑග් වලට පෙට්‍රල් දෙලා මුණට ඇල්ලුවා හතර දෙනාටම ඒ විදිහට කළා. පසුව හතර දෙනාවම නිරුවත් කොට, ලිංගේන්ද්‍රි වලට මිරිස්කුඩු දමා. හතර දෙනාටම මාරුවෙන් මාරුවට ලිංගික අපයෝජනයට ලක්කළ බවත් ප්‍රකාශ කර සිටිමි.

[19. I state that chilli powder, Petrol and shopping bags were brought. Petrol was poured into the shopping bags and was held to all 4 of our faces. Then all four were stripped naked and our genitals were covered with Chillie Powder. All four were sexually abused in turn in this manner.]

20. ඊට පසුව මාව නැවතත් එල්ලා බණ්ඩාර නමැති පොලිස් නිලධාරියාත් තවත් සුදු මහත උස වයසින් අවු: 25 ක් 30 ක් පමණ වන නිලධාරීයෙකු කැමරා ෆෝන් දෙකකින් වීඩියෝ කළා, බණ්ඩාර නමැති නිලධාරියා ඔහුගේ ගර්ල් ෆ්‍රෙන්ඩිට් එම වීඩියෝ බැලීමට යැවූ බවත්. එවිට ඇය දුරකථනයෙන් අනේ පව් මොනවද ඔය කරන වැඩ කියලා කිව්ව බවත්එවිට ඔහු මොකක්ද පව් කියලා විමසා සිටි බවත් ප්‍රකාශ කර සිටිමි.

[20. I state that, thereafter, I was suspended again and the police officer namely, Bandara, and another well-built officer who had a fair complexion and was about 25 to 30 years old took videos with two camera phones. I state that the officer namely, Bandara sent such videos to his girlfriend. Upon seeing the videos, she said on the phone, "What a pity, what are you doing?" and then he responded by asking what was pity.]

21. ඊට පසු මාව නැවතත් බිමට දමා හතර දෙනාටම ව්‍යායාම කරන්න කිව්වා. වටේ දුවන්න කිව්වා. දුවලා නාන්න කිව්වා. මම කිව්වා මට නම් බෑ මාව මැරෙයි කියලා. එවිට ඔහු කිව්වා. උඹ නෑවේ නැත්නං උඹව නාවනවා කියලා. පසුව අපිව වතුර ටැංකිය ළඟට අරගෙන ගිහිල්ලා අපිට නාන්න කිව්වා. අපි අමාරුවෙන් නෑවා රංජිත්ගේ අතින් වතුර උස්සන්න බෑ කියලා කිව්ව බවත්, පසුව ඔහුව අපි නෑව්ව බවත්, නැවතත් ගුවුන්ඩ් එක ළඟට ගෙනල්ලා අපිට ඇඳුම් වේලගන්න කිව්ව බවත් ප්‍රකාශකර සිටිමි.

[21. I state that, after that, I was taken down and all four were asked to exercise and run around naked. Thereafter, we were asked to take a bath. I said that I couldn't, and it would kill me. Then he said. " If you don't bathe, we will forcefully

bathe you". Then they took us to the water tank and asked us to take a bath. we bathed with much difficulty. I do state that Ranjith told him that he could not lift the water from his hands, then we bathed him and they brought us back to the ground and ordered us to dry our clothes.

22. ඇඳුම් වේලාගත්තට පසු නැවතත් අර බිල්ඩිමට රැගෙන ගිහින් මාංචු දැලා මේසවල් යට වාඩිකර තැබුවා. **එදා දවසේ අපට කන්න බොන්න කිසිම දෙයක් දුන්නේ නැහැ.** පැනඩෝල් පෙත්ත ගානේ විතරක් දුන්නා. එදා රෑත් අපි මේස යටට වෙලා හිටියා. එසේ සිටින විට උසස් නිලධාරියෙකු අපි සිටි තැනට ආවා. ඔහු එම නිලධාරීන්ගෙන් මොවුන් කවිද කියා විමසා සිටියාඑවිට එම නිලධාරීන් කිව්වා සර් මේ අර සාජන් මේජර්ගේ කේස් එකේ එවුන්. මෙතන හරක් හොරෙකුත් ඉන්නවා කියා කිව්ව බවත් ප්‍රකාශකර සිටිමි.

[22. I state that, after drying the clothes, we were taken back to the previously said building. Thereafter, we were handcuffed and they made us sit under the tables. We were not given anything to eat or drink that day. Each received a panadol tablet. We stayed under the table that night too. While we were there, a higher-ranked police officer came to the place where we were. He asked those officers who we were, and then those officers said, " Sir, these are the fellows of the Sergeant Major's case. There is a cattle thief too among them.".]

23. **එවිට එම නිලධාරියා අපිව නිරුවත් කොට එකා පිටුපස එකා තියා. ත්‍රීවිල් රබර් පටියකින් අපි හතරදෙනාටම ඇඟපුරාවටම පහරදුන්නා** එසේ පහරදෙන ගමන් සිද්ධාලේප අපේ ලිංගේන්ද්‍රයවල ගාගන්නා ලෙස අණ කළා. අපි අපහසුවෙන් ගාගත්තා. පසුව ඒ විට ඔහු නැවත නැවතත් පහර දුන් බවත් ප්‍රකාශ කර සිටිමි. දැවිල්ලත් සමග වේදනාවෙන් සිටින.

[23. I state that, then the said higher-ranked officer stripped us naked and kept us in order. All four of us were beaten around the entire body with a three-wheel rubber band and while being beaten, we were ordered to rub Siddhalepa on our genitals. We applied it with difficulty. He repeatedly thrashed us when we were in pain with smarting.]

24. ඒ අවස්ථාවේ ඔහුට දුරකථන ඇමතුමක් ආවාඔහු කිව්වා මුන්ට ඇඳගන්න දෙන්න එපා. පැය 2ක් විතර මෙහෙම තියන්න. මම ආයෙත් එනවා කියා ඔහු ගියා. පසුව එහි සිටි නිලධාරියෙකු කිව්වා. එයා වෙනඳ මිනිස්සුන්ට ගහන කෙනෙක් නෙමෙයි. ඒත් උඹලගේ කරුමෙට තමයි. එයත් උඹලට ගැහුවේ කියලා කිව්වා. **එම නිලධාරියා පොලිස් අධිකාරී දේශබන්ධු තෙන්නකෝන් නිලධාරියා** බව පසුව මම දැනගත් බවත් ප්‍රකාශකර සිටිමි.

[24. I state that, at that moment, he received a phone call. He ordered the other police officers not to let us dress, and to keep us in this manner for about 2 hours, stating that he would be back again. Then an officer who was there said that he was not the type of officer who usually hits people, but he too thrashed us due to our ill fate. I came to know later that the said police officer was Superintendent of Police Deshabandhu Tennakoon.]

25. ඊට පසුදින එනම්. **2010. 12. 18 වන දින උදේ නැවතත් අපි එක එක්කෙනාව කලින් දින වධහිංසා කළ තැනට ගෙන ගොස් පෙර දින පහරදුන් ආකාරයටම පහරදුන්නා.** සැරින් සැරේට පහරදෙමින් එම නිලධාරීන් බිම ගෙනවිත් බිබී දෙන්නා දෙන්නා මාරු වෙවී අපට පහර දී නැවතත් රාත්‍රියේ තැබූ ගොඩනැගිල්ලට ගෙනවිත් මේසවලට තබා මාංචු දැම්ම බව ප්‍රකාශකර සිටිමි.

[25. I state that, on the day after that i.e., on the morning of the 18th of December 2010, we were taken again to the place where we were tortured previously and beaten the same way as the previous day. The officers brought drinks after hitting us again and again and they beat us in turns and brought us back to the building where we were kept at night and placed us on the tables and handcuffed us.]

26. පසුදින එනම් **2010.12.19 වන දින උදේ අපව රඳවා තිබුණු ගොඩනැගිල්ලේ පිටුපස බැල්කනිය වෙත ගෙන ගොස් එදින සවස්වන තුරු එහි රඳවා තබා යකඩ පොල්ලකින් බණ්ඩාර, දිසානායක ඇතුළු නිලධාරීන් 6 දෙනෙකු පමණ අපිට වරින් වර පහරදුන්නා.** පහරදෙන ගමන් **මූණට මිරිස්කුඩු දැම්මා**. එසේ කරමින් වනසුන්දරගේ ගෙදර මංකොල්ලකාපු සල්ලි කෝ කියලා ඇහුවා. අපි කිව්වා අපි මංකොල්ල කෑවේ නෑ කියලා. නෑ කියන කියන පාරට අපිට නැවතත් පහරදුන්නා. එතන අවිවේ අපි 4 දෙනාවම වාඩි කරලා තිබ්බා. සවස 5.00 වන තුරුම අපව එසේ තිබ්බා. එදින එම

ගොඩනැගිල්ලට උසස් නිලධාරියෙකු පැමිණෙන බව එතන හිටපු පොලිස් නිලධාරීන්ගේ කතා බහෙන් අපි දැනගත්තා. ඔහුට පෙනෙන එක වැළැක්වීම සඳහා එහි රඳවා තැබූ බව ප්‍රකාශකර සිටිමි.

[26. On the following day, December 19, 2010, in the morning, we were escorted to the rear balcony of the building where we were being held and detained there until the evening and six officers including Bandara and Dissanayake repeatedly attacked with an iron rod. While there were attacking, they also threw chilli powder at our faces. While they were doing so, they asked where is the money that was looted from the house of Wanasundara. We said that we didn't loot. At all the times we said 'no', they repeatedly assaulted us. They made us all sit down under the hot sun until evening 5.00. We learned from the conversation of the police officers there that a senior official was coming to that building that day. We were kept in this secure location so as to prevent the higher ranked official from seeing it.]

27. එදින සවස උසාවි යන්න ලෑස්ති වෙන්න කිව්වා. හැන්දෑවේ 7.00 පමණ අවිස්සාවේල්ල අධිකරණයේ වැඩබලන මහේස්ත්‍රාත්වරයාගේ පුවක්පිටියේ තිබෙන නිවසට අපව රැගෙන ගිය බවත් ප්‍රකාශකර සිටිමි.

[27. I state that he ordered me to get ready to go to the courts that evening. I do state that around 7.00 in the evening we were taken to the house of the Acting Magistrate of Avissawella Court in Puwakpitiya.]"

Affidavit of Thilakarathna Aarachchige Chaminda Nishan (hereinafter referred to as "Chaminda Nishan"), marked "P10", annexed to the Counter Affidavit of the Petitioner corroborates the version of the Petitioner as follows:

"3. 2010. 12. 15 වන දින රාත්‍රී 9.30-10.00 පමණ, අප නිවසේ සිටියදී "චමින්ද දෙර අරින්න" කියා කවිදේ කතා කළා. මගේ බිරිඳ දෙර ඇයා. එවිට නිල ඇඳුම් ඇඳගත් පොලිස් නිලධාරියෙකු හා සිවිල් ඇඳුම් ඇඳගත් දෙදෙනෙකු නිවස ඇතුළට පැමිණි බවත් ප්‍රකාශ කර සිටිමි.

[3. I state that on 15.12.2010 around 9.30-10 p.m., when we were at home, someone called saying "Chaminda, open the door". My wife opened the door. At that point, a police officer in uniform and two others in civilian clothing came inside]

4. නිල ඇඳුමෙන් සිටි නිලධාරියා, "චමින්ද කෝ" කියා ඇහුවා. මම මොකද සර් කියලා ඇහුවා. එවිට, "අපිට ගෙනියන්න ඕනා ඕනා" කිව්වා. මට ෂර්ට් එකක් දාගෙන එන ලෙස කිව්ව බවත්, පසුව මා ෂර්ට් එකක් දමාගෙන පැමිණි බවත් ප්‍රකාශ කර සිටිමි.

[4. I state that, the officer in uniform asked "where is Chaminda". When I asked why, sir, he said "we need to take him" and asked me to put on a shirt and come, thereafter I put on shirt and went.]

5. මාව මිදුලට ගෙන යන විට තවත් සිවිල් ඇඳුමින් සිටි තිදෙනෙකු නිවස පිටුපස සිට පැමිණි බවත්, කොහේටද ගෙනියන්නේ කියා මගේ බිරිඳ විමසුව ද කිසිවක් නොකී බවත්, පසුව මාවත් රැගෙන පාරට ගිය බවත් ප්‍රකාශ කර සිටිමි.

[5. I state that when I was being taken to the garden three more persons in civilian clothing came from behind the house and, even when my wife asked where I am being taken, they kept silent and thereafter took me to the road.]

6. පසුව සිවිල් ඇඳුමින් සිටි නිලධාරීන් දෙදෙනෙකු මා ඇඳගෙන සිටි ෂර්ට් එක ගලවා මගේ ඇස් බැන්ද. ටික දුරක් ගෙන ගොස් මාව වාහනයකට දැම්මා. පසුව මගෙන් ඇහුවා, රංජිත්ව අඳුනනවාද කියලා. මම ඔව් කියූ බවත්, එවිට එම නිලධාරියා "එහෙනම් යං, රංජිත් අපි ළඟ ඉන්නවා" කියා පවසා සිටි බවත් ප්‍රකාශකර සිටිමි...

[6. I state that, thereafter the two officers in civilian clothing took off the shirt I was wearing and blindfolded me with it. They put me in a vehicle after taking me some distance. Thereafter asked me if I knew Ranjith. I said yes, and then that officer said "In that case lets go, we have Ranjith"]

8. පසුව මාව එක්කගෙන ගොස් වාහනයෙන් බස්සවා මගේ ඇස් බැඳ තිබූ ෂර්ට් එක ගැලෙව්වා. එවිට මා සිටියේ මිරිහාන පොලිසියේ බවත්, ඒ අවස්ථාවේ, රංජිත්

සුමංගලවත්, අප ප්‍රදේශයේ ජයසේන නමැති අයවත් රැගෙන ඇවිත් ඇති බව මා දුටු බවත් ප්‍රකාශ කර සිටිමි...

[8. Thereafter, they took me and removed the blindfolded shirt after getting me off the vehicle. I state that, at that point, I saw that I was at Mirihana Police, and that Ranjith Sumangala and one Jayasena in our area were also there brought in.]

...

11. එවිට එම නිලධාරීන් දෙන්නා, රංජිත් එක්ක කරපු දේවල් කියපං කියමින් අතේ තිබුණු ත්‍රීවිල් බෙල්ට් වලින් මට පහරදුන් බවත්, මා කිසිවක් නොදන්නා බව පවසා සිටි බවත්, පසුව නැවතත් මා කලින් සිටි කාමරයට ගිහින් දැමූ බවත් ප්‍රකාශ කර සිටිමි...

[I state that, then those two officers beat me with three-wheel belts which they had taken with them, commanding me to tell them what I did with Ranjith. I said that I knew nothing and I was dragged into the room where I was previously kept.]

14. මා කලින් සිටි කාමරයට මාව දැමූ බවත්, එදින රාත්‍රී 10.00 පමණ මාව දිසානායක නමැති නිලධාරයා වෙනත් කාමරයකට ගෙනගිය බවත්, බණ්ඩාර නමැති නිලධාරියා ජයසේනව රැගෙන ආ බවත්, පසුව මගෙන් හා ජයසේනගෙන් රංජිත් චක්ක කරපු දේවල් කියපං කියමින් ප්‍රශ්න කළ බවත්, අප කිසිවක් නොදන්නා බව පවසා සිටි විට, අපට වධ හිංසා කරමින් ප්‍රශ්න කළ බවත් ප්‍රකාශ කර සිටිමි.

[14. I state that I was kept in the room I was in before and around 10:00 p.m. of that night, officer namely, Dissanayake brought me to another room, the officer namely, Bandara brought Jayasena, and then Jayasena and I were questioned by asking what we did with Ranjith, when we said that we did not know anything, they tortured and interrogated us.]

15. 2010. 12. 17, 18 හා 19 වන දින වල ද අප 4 දෙනාව ඉහත ආකාරයට පොලිස් අත්අඩංගුවේ තබාගෙන වධහිංසා කළ බවත්, 2010. 12. 19 වන දින හැන්දෑවේ අවිස්සාවේල්ල අධිකරණයේ මහේස්ත්‍රාත්වරයා වෙත ඉදිරිපත් කර නැවතත් රැගෙන ආ බවත්, අපව රඳවා තබා ගැනීමට පැය 48 ක රැඳවුම් නියෝගයක් ලබාගෙන තිබූ බවත් ප්‍රකාශ කර සිටිමි.

[15. I do state that on the 17th, 18th and 19th of December, 2010, the 4 of us were kept in police custody and tortured in the above manner, and on the evening of the 19.12.2010, we were brought before the Magistrate of Avissawella Court and we were detained for 48 hours. I do also state that a detention order had been obtained to detain us.]

16. 2010. 12. 19 වන දින සිට නැවතත් 2010. 12. 22 වන දින සවස් වන තෙක් අපව මිරිහාන පොලිසියේ රඳවා තබාගත් බවත්, අපව රඳවාගත් කාලය තුළදී බණ්ඩාර, දසනායක, භාතිය ජයසිංහ හා තෙන්නකෝන් ඇතුළු නිලධාරීන් 7 දෙනෙකු පමණ වධහිංසා කළ බවත් ප්‍රකාශ කර සිටිමි.

[I do state that, from 19. 12. 2010 until the evening of 22. 12. 2010, we were detained at the Mirihana police station, and during the time we were detained, we were tortured by nearly 7 officers including Bandara, Dasanayake, Bhathia Jayasinghe, and Thennakoon]"

Furthermore, the Petition of the Petitioner states that he was taken back to his house at one point during his detention looking for the goods he was alleged to have stolen. At this point, he further states that he was beaten in front of his family mercilessly, so much so that it caused his eldest daughter to faint, out of sheer agony, unable to witness her father being treated in such a cruel manner.

The affidavit of Petitioner's wife, Suwinitha Kumari, produced marked 'P3' attached to the Petition of the Petitioner states, in this regard, as follows:

"7. ඒ අතර. මාගේ ස්වාමිපුරුෂයාද සිටි අතර, ඔහුගේ අත් පිටුපසට කර අත්වලට මාංචු දමා තිබුණි. **අඳුනා ගන්න බැරි තරමට ඔහුගේ මුහුණ ඉදිමී** තිබුණි. **කෙළින් සිටගැනීමට නොහැකි තත්වයේ ඔහු සිටි බවත්, හරිහැටි සිහි කල්පනාව නොතිබුණු බවත්** ප්‍රකාශ කර සිටිමි.

[7. *I state that my husband was also there among others. His hands were handcuffed behind his back. His face was swollen to the point of being*

unrecognizable. He was unable to stand straight and did not seem to be fully conscious.]

…

10. ඒ අවස්ථාවේ මා ඒවායේ රිසිටි පෙන්වා සිටියා. එවිට එතැන සිටි කෙනෙකු **මිදුලේ තිබුණු දරට ගෙනා පොල්ලක් ගෙන ස්වාමිපුරුෂයාගේ කකුල්වලට හා පිටට පහරදුන් බවත්. එම පොල්ල කැඩෙන තුරු ඔහුට පහරදුන් බවත් ප්‍රකාශකර සිටිමි**.

[10. I showed the receipts for having obtained the TV and the "panchayudha". Thereafter, they found a stick brought in for firewood in the garden and used it to beat my husband's legs and spine until the stick broke]

11. පසුව ස්වාමිපුරුෂයාව කුස්සියට ඇදගෙන ගියා. එතැනදී හොරකම් කරපු බඩු විමසා සොයා ගැනීමට කිසිවක නොතිබුණු හෙයින්, **කුස්සියේ දෙරට දැන පොල්ල අරගෙන** එම නිලධාරීන් යම් යම් දේවල් කියන ලෙස බලපෑම් කරමින් ස්වාමිපුරුෂයාට **පහරදුන් බවත්, එම පොල්ල කැඩුණාට පසුව බිම වැටී සිටි සැමියාගේ මුහුණ ද පෑගූ බවත්** ප්‍රකාශකර සිටිමි.

[11. Thereafter, they dragged my husband into the kitchen to look for the alleged stolen goods, and since they couldn't find anything, they took a wooden bar used for the kitchen door and beat my husband commanding him to answer them. After the wooden bar broke, they trampled my husband's face who fell down at that moment]

12. ඒ අවස්ථාවේ මා හා දරුවන් දෙන්නා කෑගැසූ බවත්, **ස්වාමිපුරුෂයාට පහර දෙනවා දැක. ලොකු දුව සිහි නැතින වැටුණු බවත්**. අප කෑ ගසන එක වළක්වන්න අප තිදෙනාව කාමරයකට දමා. ඒ දෙර ළඟ දෙන්නෙක් මුරට සිටි බවත්. එවිට මට ස්වාමිපුරුෂයා කෑගසන ශබ්දය පමණක් ඇසුණු බවත් ප්‍රකාශ කර සිටිමි.

[12. At this moment, I and my children started screaming seeing the manner in which my husband was being beaten, and my eldest daughter fainted at the sight of her tortured father. To prevent us from further screaming, they locked us three

in a room, they had placed two persons to stand outside guarding the entrance. We could only thereafter hear the shouts of my husband.]

…

14. ස්වාමිපුරුෂයාව ඇදගෙන යන අවස්ථාවේ **කැඩුණු දෙර පොල්ලේ ඉතිරි කෑල්ලෙන් ස්වාමිපුරුෂයාට නැවතත් ගහගෙන ගහගෙන ගියා**. එසේ පහර දෙමින් ඔහුව ඇදගෙන ගියා. මා හා දරුවන් දෙදෙනා පස්සෙන් යන විට, අපිට එන්න එපා කියා පන්නා දැමූ බවත්. අපි බියෙන් නැවත හැරී නිවසට ගිය බවත් ප්‍රකාශකර සිටිමි.

[14. I state that, as my husband was being dragged away, He was beaten again with the remaining piece of the broken doorpost. He was beaten and dragged. When I and the two children followed, we were chased away and told not to come, so we turned back and went home in fear.]

…

21. 2010. 12. 21 වන දින අවිස්සාවේල්ල උසාවියට ගෙනගිය බවත් ඒ අවස්ථාවේ මාගේ ස්වාමිපුරුෂයා සමග අත්අඩංගුවේ සිටි අයගේ ඥාතීන් මට දැනුම් දුන්නා උසාවි ගෙනියන බව. ඒ නිසා මා අවිස්සාවේල්ල උසාවියට ගියා. නමුත් සවස 2.00 වන තෙක් ස්වාමිපුරුෂයාව අධිකරණයට ගෙනාවේ නැති බවත්. එබැවින් නැවත අප මිරිහාන පොලිසියට ගිය බවත්. ඒ අවස්ථාවේ ස්වාමිපුරුෂයා කූඩුව තුළ සිටි බවත් ප්‍රකාශකර සිටිමි.

[21. I state that I come to know that my husband was brought to the Avissawella Court on or about 21. 12. 2010 through the relatives of those who were in custody with my husband at that time. Therefore, I went to the Avissawella Court. Yet, the husband was not brought to the court until 2.00 p.m. which made us go to the Mirihana police again. I also state that the husband was in the cells at that time.]

22. ස්වාමිපුරුෂයාට **ඉතා අමානුෂික ලෙස පහරදී තිබුණු** බවත්. ඔහුගේ **මුහුණ. අත් පා රතු වී තිබුණි. නැගිට ගැනීමටවත් නොහැකිව සිටියා. වධ දහ අටම දුන්නා යැයි මා සමඟ ඔහු පවසා සිටි බවත්** ප්‍රකාශකර සිටිමි."

[I state that the husband was brutally beaten. His face & limbs were swollen red. He couldn't even stand up. He told me that he had been harassed in every possible way.]

[Emphasis added]

However high the threshold of proving torture may be, the Respondents in the instant case have unfortunately cleared it with much ease. The instant case is a glowing testimony as to the almost prophetic prudence of Sir Fitzjames Stephen in making admissions made to a police officer inadmissible when drawing the Indian Evidence Act—which we went on to adopt in our own Evidence Ordinance.

In view of the aforementioned, it is clear that the 1st, 2nd, 4th and 5th Respondents have all been directly associated with the torturing of the Petitioner. What the Petitioner has had to endure, without a shred of doubt, amounts to torture as contemplated under Article 11 of the Constitution. Furthermore, the narration of the incidents of torture by Nimal Perera as noted above is consistent with the narration as provided by the Petitioner. Thus, this Court concludes that the 1st, 2nd, 3rd, 4th and 5th Respondents have violated the fundamental rights of the Petitioner as enshrined under Article 11 of the Constitution.

Violation of Article 12(1) of the Constitution

Article 12(1) of the Constitution provides that "[a]ll persons are equal before the law and are entitled to the equal protection of the law."

Article 12(1) of the Constitution serves as an umbrella provision which governs the fundamental right to equality, against class discrimination of persons, and to uphold equality in the application of law. Within Article 12(1) of the Constitution is enshrined the doctrine of Rule of Law, thereby affording equal protection before the law to all persons. Above all, Article 12(1) of the Constitution further embraces the all-important

notion of human dignity, the golden thread running through the fabric of fundamental rights.

Article 12(1) of the Constitution stands an absolute bar against arbitrariness for it imposes a duty on all public officials regardless of their rank to uphold the law and only exercise the powers as have been vested upon them by law, thus establishing the supremacy of law above all other considerations. Public Officials—which most certainly includes police officers—cannot adopt a practice of selective application of laws, nor can there be arbitrary decisions, assuming the role of judge, jury and executioner.

In the instant case, the Respondents are of the position the arrests and detention were made under the direction and instructions of the 5th Respondents during an investigation regarding several thefts in the area acting on a complaint made by an unknown party to the 5th Respondent. In the Written Submissions of the Attorney General dated 26th September 2023 and the Affidavit of the 5th Respondent dated 05th October 2023, it was contended that the arrests and detention were lawful under section 2 of the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013. The Respondents further contended the arrests to be in accordance with the procedures set out by law and that minimum force was used on the Petitioner during the arrests.

The question here is by no means the amount of force used at the time of effecting the arrest. As has been discussed above, the Petitioner was arrested and detained without a warrant and held and tortured in custody for more than 24 hours. There is an absolute and non-derogable prohibition against torture in all circumstances, even during times of armed conflict or states of emergency, for it is a sign of absolute lawlessness.

The arrestees, including the Petitioner, were only presented before the Magistrate to extend the period of custody for the purposes of the so-called investigations on 19th

December 2010, by which date 4 days had already passed. This, as established, is absolutely obnoxious to the 'special provisions' the Respondents themselves relied on.

Persons in detention, regardless of the charges or accusations against them, are entitled to the fullest protection of their human dignity and physical integrity. State institutions and those who serve the State are sternly reminded of their obligation to ensure that persons in detention are treated not only within the bounds of legality but with an uncompromising adherence to the principles of humanity. This stance is not only a legal mandate, but also a relentless moral imperative.

The manner in which the 1st, 2nd and 5th Respondents, being officers of the law, have conducted themselves, in concert with the 4th Respondent, is a stark betrayal of the Rule of Law. They have acted in a manner entirely repugnant to the virtues of a democratic republic.

In these circumstances, I have no qualm holding the treatment the Petitioner had undergone to be a gross violation of his fundamental rights recognised under Article 12(1) of the Constitution.

CONCLUSION OF THE COURT

Considering the inconsistencies in the Respondents' version of events and the fact that the Petitioner's version of events is corroborated by the Medical Report issued by the Judicial Medical Officer of the District General Hospital of Matale as well as the affidavits of those who were detained and tortured with him, this Court is left with no other option but to reject the position of the Respondents *in toto* and accept the Petitioner's version of events as true.

The Petitioner's fundamental rights under Articles 11, 12(1), 13(1) and 13(2) have been blatantly violated by the 1st, 2nd, 4th and 5th Respondents. The kind of conduct on display, judged even by the lowest of standards, amounts to a magnificent failure of all that the Rule of Law stands for.

This Court has time and time again made pronouncements setting out guiding principles as to how law enforcement officers must act. But all such attempts continue to fall on deaf ears. Violations of the kind we have observed in this case are, unfortunately, all too common. These are by no means isolated one-off events but are symptoms of longstanding institutional failures. When the Evidence Ordinance was first enacted in 1895, police officers were deemed too unreliable to make confessions made before them admissible. Lamentably, after well over a dozen decades, nought has changed.

In the words of Aluwihare J., as expressed in ***Mohammed Rashid Fathima Sharmila v. K.W.G. Nishantha*** **SC. FR Application, No. 398/2008, SCM of 03rd February 2023,** the matters are disturbing, to say the least. His Lordship further expressed concerns therein vis-à-vis the *modus operandi* of Sri Lanka Police:

> *"…Sri Lanka Police established in 1806, has a history of over two centuries and one would expect it to develop into a body that comprises of professional law enforcement personnel. I am at a loss to understand, in the present day and time as to why such an established law enforcement entity is incapable of affording due protection to a citizen who is in their custody. Unfortunately, it is not rare to hear instances of suspects dying in the hands of the police. It only highlights the utterly unprofessional approach to duty by the personnel who man it and as a consequence, people are increasingly losing trust in the police. It had lost the credibility it ought to enjoy as a law enforcement agency. The incident relevant to this application had taken place in 2008, however, this court observes that instances of death of suspects in police custody are continuing to happen, even today. It appears that the hierarchy of the administration had paid scant attention to arrest this trend which does not augur well for the law enforcement and the rule of law."*

Having expressed these worries, his Lordship directed the Inspector General of Police to formulate, issue and implement guidelines to the police elaborating as to how the standards may be improved.

Years prior to these observations, in ***Landage Ishara Anjali (Minor) v. Waruni Bogahawatte,*** **SC (FR) Application No. 677/2012, SCM of 12.06.2019** Aluwihare J. has similarly raised concerns with regards to the growing number of incidents of abuse of power. There, too, the Inspector General of Police was directed to issue guidelines regarding the same. In addition to such direction, his Lordship has further postulated guiding principles to be included in any such guidelines to be issued.

Following the directions of His Lordship in ***Mohammed Rashid Fathima Sharmila v. K.W.G. Nishantha (supra),*** the Inspector General of Police has issued IGP Circular 2747/2023 dated 25th March 2023. While this circular has specifically referred to this case, I cannot help but notice that it has not sufficiently encompassed the guiding principles Aluwihare J. postulated in ***Landage Ishara Anjali (Minor) v. Waruni Bogahawatte (supra).*** In particular, the elements concerning human dignity, non-discrimination, proportionality and rights of children.

As such, we direct the National Police Commission and the relevant authorities to give due recognition to these principles in formulating any future guidelines. Moreover, we direct the National Police Commission to see to it that these guidelines—including Circular 2747/2023 and the principles I have noted it to have omitted—are properly implemented and are integrated into the training of police officers.

LIABILITY OF THE RESPONDENTS

The 3rd Respondent, Madiwaka Adikari Mudiyanselage Egodawele Wallauwe Senerath Adikari Egodawele, the Head Quarters Inspector, Mirihana Police Station, at the time material to this case, by his Affidavit dated 5th October 2011, averred that the conduct in question did not take place under his direct supervision. In view of the facts disclosed therein, the Counsel appearing for the Petitioner informed this Court on 11th

October 2017 that he does not intend to pursue any relief against the 3rd Respondent. Considering this, I make no pronouncements against the 3rd Respondent [Journal Entry dated 11.10.2017].

1st and 2nd Respondents

It is clear from the foregoing discussion that the 1st, 2nd and 4th Respondents have played a central role in the fundamental rights violations in the instant case. Upon perusal of the facts and circumstances of the instant case, it is apparent that most of the torture was in fact carried out by the 1st and 2nd Respondents, and it was they who had abducted the Petitioner on 15th December 2010 and took the Petitioner to the Cemetery.

The Petition of the Petitioner explains, in great detail, the role played by the 1st, 2nd and 4th Respondents in the violations in question. The Petition of the Petitioner very clearly claims the 1st and 2nd Respondents to have been instrumental in the arrest and the subsequent prolonged torture of the Petitioner.

Corroborating the same, the Affidavit of Chaminda Nishan, produced marked 'P10' attached to the Counter Affidavit of the Petitioner, specifically mentions officers Bandara (1st Respondent) and Bhathiya Jayasinghe (2nd Respondent) to have tortured the arrestees by various means.

Further corroborating, the Affidavit of Nimal Perera, produced marked 'P12' attached to the Counter Affidavit of the Petitioner, explicates how the officers Bandara and Bhathiya Jayasinghe tortured them in numerous despicably imaginative ways.

The Petition of the Petitioner also avers that he was tortured at his own home in front of his family, to such a grave extent that his elder daughter fainted at the sight of it. Affidavit of the Petitioner's wife dated 25th March 2011, produced marked 'P2' attached to the Petition, corroborates the acts of torture that took place at the Petitioner's home.

The 1st and 2nd Respondents themselves have not rejected their involvement in effecting the arrest, but rather argue the arrest to have been carried out according to the procedure established by law. All that they have produced in support are the documents marked 'Rx(1)', 'Rx(2)' and 'Rx(2)'. Said documents are titled "නුගේගොඩ හඳිසි ඇමතුම් අංශයේ දෙනිකව පවත්වාගෙන යනු ලබන හඳිසි ඇමතුම් තොරතුරු පොතෙන් උපුටා ගන්නා ලද සත්‍ය පිටපතකි." I am not able to provide a proper translation of the same as this purported "හඳිසි ඇමතුම් අංශයේ දෙනිකව පවත්වාගෙන යනු ලබන හඳිසි ඇමතුම් තොරතුරු පොත" is not an Information Book that is generally in use. Given the incongruities found between the aforementioned documents and the Respondents' own averments, this Court cannot attribute any probative value to the same. As such, the 1st and 2nd Respondents are no doubt liable for the violations of Articles 13(1) and 13(2) morefully dealt with earlier in the judgement.

In response to these clear and grave allegations set out in the aforementioned averments with regards to Articles 11 and 12, the 1st and 2nd Respondents, in their joint Objections with the 4th Respondent dated 06th December 2011 and their Written Submissions dated 19th November 2013, have merely offered a simple denial of the contents therein.

However, the Medico-Legal Report of the Petitioner issued by the Consultant Judicial Medical Officer of the District General Hospital, Matale strongly corroborates the version of events set out before this Court by the Petitioner. The history given by the Petitioner to the Judicial Medical Officer reflects what he has averred before this Court and the Judicial Medical Officer concludes and opines the history so given to be consistent with the 16 different injuries recorded in the Medico Legal Report.

The position of the 1st, 2nd [and the 4th Respondent, as the 1st, 2nd and 4th Respondents have filed joint Objections and Written Submissions] with regards to the Medico-Legal Report is to simply claim the injuries therein to be non-corroborative of the history recorded.

Such a simple and feeble denial cannot, by any means, displace an expert opinion. As such I have no qualm holding the 1st and 2nd Respondents liable for the violation of Petitioner's fundamental rights under Articles 11, 12(1), 13(1) and 13(2).

4th Respondent

With regards to the 4th Respondent, Petition of the Petitioner as well as the aforementioned Affidavits marked 'P2' [at para 6], 'P10' [at para 13] and 'P12' [at para 13] confirm the participation of the 4th Respondent in the conduct in question. In this regard, it is pertinent to note that the 4th Respondent is not a police officer, and moreover, he had not denied the contents of the aforementioned affidavits.

However, in the joint Written Submissions dated 06th December 2011, it was contended that his actions do not amount to executive and administrative action on account of the fact that he is not a public officer. At the very outset, I wish to note that this contention has no bearing on this Court's jurisdiction, as several other public officers are involved in the violations in question. Furthermore, as held in ***Faiz v. Attorney-General and Others*** **[1995] 1 Sri L.R. 372**, whether an act is executive and/or administrative is not conclusively dependent upon the colour of the actor's office. In appropriate cases, even the acts of a private individual may amount to executive and administrative action.

In ***Faiz v. Attorney-General (Supra)*** **at p. 383**, His Lordship Mark Fernando J held as follows:

> *"Article 126, speaks of an infringement by executive of administrative action; it does not impose a further requirement this action must be by an executive officer. It follows at the act of a private individual would render him liable, if in the circumstances that act is "executive or administrative". The act of a private individual would be executive if such act is done with the authority of the executive such authority; transforms an otherwise purely private act into executive or administrative action; such authority may be express, or implied from prior or*

concurrent acts manifesting approval, instigation, connivance, acquiescence, participation and the like (including inaction in circumstances where there is a duty to act); and from subsequent acts which manifest ratification or adoption. While I use concepts and terminology of the law relating to agency, and vicarious liability in delict, in my view responsibility under Article 126 would extend to all situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility. The executive, and the executive officers from whom such authority flows would all be responsible for the infringement. Conversely, when an infringement by an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby. In any event this Court would have power under Article 126(4) to make orders and directions against such an individual in order to afford relief to the victim."

[Emphasis added]

The aforementioned was cited with approval by His Lordship Aluwihare J in ***Ganeshan Samson Roy v. M.M. Janaka Marasinghe and Others*** **S.C (F/R) 405/2018, SC Minutes of 20.09.2023 at p. 21.** The 6th Respondent of the ***Samson Roy Case*** was a private citizen, whose false complaint instigated an arbitrary arrest. The said 6th Respondent was directed to pay compensation to the Petitioner in view of his involvement in the violation of fundamental rights.

Hence, I do not see any jurisdictional impediment on account of the 4th Respondent's civilian status at the time material. As the 4th Respondent has interestingly opted to file joint Objections and Written Submissions with the 1st and 2nd Respondents, his contentions, too, suffer the same infirmities, which I have adverted to above. In view of this, I find the 4th Respondent liable for the violation of Petitioner's fundamental

rights under Articles 11, 12(1), 13(1) and 13(2) for the same reasons as the 1st and 2nd Respondents.

5th Respondent

With regards to the 5th Respondent, it is clear from paragraphs 22, 23, 24 and 25 of the aforementioned Affidavit of Nimal Perera dated 08th June 2011, produced marked 'P12', he, then a Superintendent of Police, has paid a visit to the place where the Petitioner and several others were detained on 17th December 2010. The affidavit further states that the 5th Respondent himself beat the Petitioner with a 'three-wheel rubber band' after stripping him naked and ordering him to rub Siddhalepa on his genitalia. The 5th Respondent is specifically referred to therein by his name and rank, as it was then.

The Counter Affidavit of the Petitioner along with the aforementioned affidavits marked 'P10', 'P11' and 'P12', was filed before this Court on 02nd March 2012. Written Submissions of the 1st, 2nd and 4th Respondents was filed on 19th November 2013, almost 20 months later. Even at that point, nothing was filed on behalf of the 5th Respondent.

In the interest of justice, on 19th May 2020, the Court directed the Registrar to serve notices on the 3rd and 5th Respondents informing them of the next date of hearing. The notice sent to the 5th Respondent was not returned. Written submissions of the Attorney-General on behalf of the 5th and 6th Respondents was filed on 26th September 2023.

As can be seen, the Respondents of the instant case were afforded ample opportunities to plead their cases before this Court. Upon direction by the Court, the 5th Respondent, too, filed Affidavit dated 05th October 2023. The said Affidavit only related to the *Code of Criminal Procedure (Special Provisions) Acts*. The 5th Respondent, represented by the Attorney-General, has not at any point during the proceedings rejected or objected to the allegations against him hereinbefore set out.

Therefore, I find the 5th Respondent to have tortured the Petitioner in violation of his fundamental rights guaranteed under Article 11 of the Constitution. For this very reason, and by the very fact, I find the 5th Respondent to have further violated the Petitioner's rights under Article 12(1) of the Constitution.

It is also revealed by the Minute on the document marked 'Rx(1)', the 1st, 2nd and 4th Respondents' Statement of Objections and the excerpts from the "හදිසි ඇමතුම් අංශයේ දෛනිකව පවත්වාගෙන යනු ලබන හදිසි ඇමතුම් තොරතුරු පොත" annexed thereto marked 'Rx(2)' that the 5th Respondent himself ordered the investigation and that he has had intimate knowledge of the investigation.

With regards to the violation of Articles 13(1) and 13(2) of the Constitution, from the aforementioned facts, it is clear that the 5th Respondent had knowledge of the Petitioner's detention on account of his visit on 17th December 2010 for a brief session of torture. The 5th Respondent had received the anonymous complaint describing the involvement of the Petitioner and 3 others by name only 5 days before the arrest, and, when the 5th Respondent arrived at the torture chamber on 17th December 2010, he had inquired from another Police Officer "මොවුන් කවිද [who are they]", to which the other Police Officer replied "සර් මේ අර සාජන් මේජර්ගේ කේස් එකේ එවුන් [Sir, this is the parties involved in that Sargent Major's case]". Such a loose reference to a matter alludes to the fact that not only did the 5th Respondent have knowledge of the arrest of the Petitioner and the 3 others, but that he was kept updated on the events that transpired after the arrest on 15th December 2010. As such, it appears that the Petitioner was kept detained without producing before a Magistrate within the legally stipulated time frame with full knowledge of the 5th Respondent. Therefore, I hold the 5th Respondent, too, to have violated the fundamental rights of the Petitioner enshrined under Articles 13(1) and 13(2) of the Constitution.

While findings of fundamental rights violations are ample, the wrongdoers—especially the big fish in the pond—are seldom held duly accountable. Senior officers, under whose authority and direction their subordinates may act, have a special duty to ensure

that they do not abuse such authority or go beyond such direction. Senior officers cannot merely give orders and thereafter sleep on this duty. They are to closely scrutinize the conduct of their subordinates. The stars that adorn their uniforms are not ornaments of power, but rather, reminders of the immense responsibility that comes with their authority.

Gross neglect of this duty would render them complicit in the actions of their unruly subordinates. The concept of commission by omission is well recognized in our constitutional jurisprudence by cases such as the ***Easter Sunday Cases,* SC/FR/163/2019, SC Minutes of 12th January 2023**.

I am of the view that supervising officers are to be directly held liable for the conduct of their subordinates in appropriate instances, even in the absence of direct participation. Supervising officers can be held liable where there is affirmatory participation or participatory presence on the part of such supervising officers; or, where they have, directly or indirectly, implemented or enabled unconstitutional policies by turning a blind eye towards unconstitutional practices directly under their authority.

What is revealed to us in the instant case, apparent from what I have cited above from the affidavits, is a pattern of grave derelictions, which has persisted for a considerable period of time. Where such a pattern is observable, what other inference are we to draw than, either the wrongdoings have taken place with the blessings of the direct supervisors or that such supervisors have slept on the wheel? In either case, such supervisors are directly complicit in the actions so enabled.

From the circumstances established in the instant case, it is clear that the 5th Respondent has enabled, through his actions as well as inaction, the conduct of the 1st, 2nd and 4th Respondents, making him directly liable for the fundamental rights violations hereinbefore established. No material has been produced before this Court by the 5th Respondent so as to distance himself from such violations.

Therefore, I hold the 5th Respondent to have violated the fundamental rights of the Petitioner guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

ORDERS OF THE COURT

Although relief is granted principally against the State in fundamental rights jurisdiction, in appropriate cases, *cursus curiae* with regards to awarding compensation has been to direct culpable officers to personally make amends. This appears to me a fit case to make such orders.

In cases of this nature, where the violations are grave, while the State must absolutely take responsibility, I do not see it sufficient to merely impose the liability on the State. I do not see it just and equitable to impose upon the taxpayer the burden of compensating for the transgressions of errant officials. Having borne the burden of their earnings over the years, must the taxpayer compensate for their misdeeds as well?

Furthermore, the amount of compensation awarded must sufficiently reflect the gravity of the offences as well as the audacity of the offenders. Especially where violations of Article 11 are to be found, it is necessary to award compensation in such amounts adequate to deter such degenerates.

Therefore, we direct the National Police Commission and other relevant authorities to take appropriate disciplinary action against the officers we have found to be responsible.

The Respondents are ordered to pay compensation to the Petitioner in the following manner:

1. The State is ordered to pay as compensation a sum of Rs. 100,000/- (Rupees Hundred Thousand) out of the funds allocated to the Police Department, given the institutional issues observed;
2. The 1st Respondent is ordered to pay as compensation a sum of Rs. 500,000/- (Rupees Five-Hundred Thousand);

3. The 2nd Respondent is ordered to pay as compensation a sum of Rs. 500,000/- (Rupees Five-Hundred Thousand); and
4. The 4th Respondent is ordered to pay as compensation a sum of Rs. 500,000/- (Rupees Five-Hundred Thousand).
5. The 5th Respondent is ordered to pay as compensation a sum of Rs. 500,000/- (Rupees Five-Hundred Thousand).

The 1st,2nd,4th and 5th Respondents are to pay the aforementioned sums, within six months from the date of judgement, out of their personal funds.

Application allowed.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J

I agree

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J

I agree

JUDGE OF THE SUPREME COURT

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